No. 14-1341

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

APRIL DEBOER; JANE ROWSE, INDIVIDUALLY AND AS PARENTS AND NEXT FRIEND OF N.D.-R, R.D.-R AND J.D.-R, MINORS

Plaintiffs-Appellees,

v.

RICHARD SNYDER, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF MICHIGAN; BILL SCHUETTE, IN HIS OFFICIAL CAPACITY AS MICHIGAN ATTORNEY GENERAL,

Defendants-Appellants.

On Appeal from the United States District Court for the Eastern District of Michigan, No. 12-cv-10285 (Hon. Bernard A. Friedman)

BRIEF OF THE COALITION OF BLACK PASTORS FROM DETROIT, OUTSTATE MICHIGAN, AND OHIO AS AMICI CURIAE SUPPORTING DEFENDANTS-APPELLANTS

THOMAS MORE LAW CENTER
RICHARD THOMPSON, ESQ.
ERIN ELIZABETH MERSINO, ESQ.
P.O. BOX 393
ANN ARBOR, MI 48106
(734)827-2001

WILLIAM R. WAGNER
JOHN S. KANE
300 SOUTH CAPITOL
LANSING, MICHIGAN 48933

DATED: MAY 14, 2014

CORPORATE DISCLOSURE STATEMENT

Amici Curiae have not issued shares to the public, and no *Amicus* has any parent company, subsidiary, or affiliate that has issued shared to the public. Thus, no publicly held company owns 10 percent or more of stock of any *Amicus*.

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INTEREST OF *AMICI CURIAE*

Amici are comprised of 110 Black Pastors, Churches, and supporting institutions and groups from Detroit, Michigan, Outstate Michigan, and Ohio. A complete list of *amici*, with their qualifications and institutional affiliations for identification purposes, is included in the Addendum to this Brief. *Amici* devote their lives to America's time-honored family values, morality, and the Christian faith. *Amici* pastors represent the interests of an additional over 200 pastors and are leaders of churches throughout Michigan and Ohio. *Amici* head their pastoral communities, preach, and spread the good news of God's love.

As pastors, *amici* are considered to be shepherds who guide their church communities and their local body of believers in accordance with the Bible, which defines both the role and responsibilities of the pastor and the role and responsibilities of the members of their church community. *Amici* believe that the Bible defines what constitutes sound doctrine, not the culture, gender, or personality. *Amici* bear the responsibility to oppose unsound doctrines and to oppose practices that are harmful to the following of God's teachings as outlined in the Bible. Therefore, *Amici* support the vote of 2.7 million citizens of Michigan who cast their vote and enacted the Michigan Marriage Amendment to secure the sanctity of the traditional family, as it is defined by God in the Bible.

The undersigned *Amici* have a strong interest in seeing the district court's unwarranted decision reversed. *Amici* must oppose any idea, law, rule or suggestion that is contrary to the teachings of the Bible. Hence, when a solitary judge strikes down a law and endangers the inviolability of marriage and the family, the pastor has the preeminent responsibility of standing against such a decision and leading the community to do so as well.

Amici Curiae file this Brief with the consent of all parties.

STATEMENT OF COMPLIANCE WITH FED. R. APP. P. 29 (c)(5)

No party's counsel authored this Brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the Brief; and no person other than *Amici Curiae*, their members, or their counsel contributed money that was intended to fund the preparation or submission of the Brief.

ARGUMENT

The Michigan Marriage Amendment (hereinafter "MMA") does not serve a discriminatory purpose. Rather, it states:

> To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose.

Mich. Const. Art. I, § 25. The MMA denies no one the right to marry. Every man in the State of Michigan is allowed to marry. Every woman in the State of

Michigan is allowed to marry. The MMA simply codifies our long-standing definition of marriage, and it is the right of our state's voters to do so. *United States v. Windsor*, 133 S. Ct. 2675, 2691 (2013) (stating that "regulation of domestic relations" is "an area that has long been regarded as a virtually exclusive province of the States.") (*quoting Sosna v. Iowa*, 419 U.S. 393, 404 (1975)).

As Christian pastors, *amici* know that all human beings have inherent value because God created every person in His image. Thus, it is *amici*'s position that the government should never classify or discriminate against another human being, based upon who they are. *Amici* do not, therefore, condone discriminatory actions toward any person and hold no animus toward anyone.

A person's sexuality and sexual preferences, however, are *not* their state of being, or even an immutable aspect of who they are, as race is. The truth of the matter is that it is merely activity in which they engage. And for *amici*, truth matters. The state has no responsibility to promote any person's sexual proclivities, whether heterosexual, homosexual, or otherwise—and certainly is not required to accept that one's sexual conduct preference is the same as an immutable characteristic like race. Government may not regulate people based on who they are, but it may regulate their conduct, including sexual conduct.

This brief addresses two of the fundamental flaws in the lower court's opinion. First, the lower court misapplied the reasoning behind the landmark case

of *Loving v. Virginia* in rejecting the government's argument that the State can define marriage truthfully. Second, the lower court committed reversible error by incorrectly applying rational basis review.

I. *LOVING v. VIRGINIA* DOES NOT PROHIBIT STATES FROM ENACTING RATIONAL LAWS THAT PREVENT MARRIAGE REDEFINITION

The Equal Protection Clause holds special significance for Black Americans. The text of the Fourteenth Amendment guarantees that "no state shall ... deny to any person within its jurisdiction equal protection of the laws," and this text must be viewed in the context of its history. U.S. Const., amend. XIV, § 1. When the Equal Protection Clause became law in 1868, many Black Americans were recently emancipated slaves. Four years later in 1872, the Supreme Court suggested that white supremacist discrimination was "the evil [the Civil War Amendments] were designed to remedy," *Slaughter-House Cases*, 83 U.S. 36, 72 (1873) ("We do not say that no one else but the negro can share in [their] protection, but ... in any fair and just construction of any section or phrase of these [Civil War] amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy."); *Strauder v. West Virginia*, 100 U.S. 303, 306 (1880) ("the colored race for whose protection the [Fourteenth] Amendment was primarily designed"). It then took nearly a century after the end of the Civil War for the Supreme Court to

enforce a modicum of what we now know as substantive equality. *Brown v. Board. of Educ.*, 347 U.S. 483 (1954).

Comparing the dilemmas of same-sex couples to the centuries of discrimination faced by Black Americans is a distortion of our country's cultural and legal history. The disgraces and unspeakable privations in our nation's history pertaining to the civil rights of Black Americans are unmatched. No other class of individuals, including individuals who are same-sex attracted, have ever been enslaved, or lawfully viewed not as human, but as property. *See*, *e.g.*, Stacy Swimp, *LGBT Comparison of Marriage Redefinition to Historical Black Civil Rights Struggles is Dishonest and Manufactured*, (March 7, 2014), (http://stacyswimp.net/2014/03/07/lgbt-comparison-of-marriage-redefinition-to-historical-Black-civil-rights-struggles-is-dishonest-and-manufactured). Same-sex attracted individuals have never lawfully been forced to attend different schools, walk on separate public sidewalks, sit at the back of the bus, drink out of separate drinking fountains, denied their right to assemble, or denied their voting rights. *Id*. The legal history of these disparate classifications, *i.e.*, immutable racial discrimination and same-sex attraction, is incongruent. Yet, courts have mistakenly drawn upon this incongruence as the basis for what it is now deeming "marriage equality."

The Hawaii Supreme Court first ruled that a state's failure to agree with "same-sex" marriage violated the state's Equal Rights Amendment. *Baehr v. Lewin*, 74 Haw. 530 (Haw. 1993). This marked the first time a court used the Supreme Court's decision in *Loving v. Virginia*, 388 U.S. 1 (1967), to blur the line of a suspect class (race) and a non-suspect class (sexual preference) in Equal Protection Clause analysis.

To understand why this analysis is incorrect, it is essential to understand the holding in *Loving v. Virginia*—that a state's statutory scheme to prevent marriage on the basis of racial classifications violated the Equal Protection Clause. *Id*. at 11. The plaintiffs in *Loving* were two Virginia residents, a black woman and a white man. *Id*. at 3. The plaintiffs legally married in Washington, D.C. and returned to Virginia. *Id*. The state of Virginia, however, considered interracial marriage a criminal offense. *Id*. The plaintiffs were charged and pleaded guilty to violating the state's ban on interracial marriage, and were sentenced to a year in jail, a sentence suspended for a period of twenty-five (25) years if the plaintiffs left the state. *Id*. In a landmark decision, the Supreme Court struck down Virginia's ban on interracial marriage on both equal protection and due process grounds. In doing so, the Supreme Court held,

> At the very least, the Equal Protection Clause demands that *racial classifications . . . be subjected to the "most rigid scrutiny,"* . . . and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent

> of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate. . . . There is patently no legitimate overriding purpose independent of invidious discrimination which justifies this classification. . . . We have consistently denied the constitutionality of measures which restrict the rights of citizens on account of race.

Id. at 10-12 (emphasis added).

Loving was clearly a case about *racial discrimination.* The *Baehr* court improperly expanded *Loving* by plucking from its dicta that: "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free [people]." *Baehr*, 74 Haw. at 562-63 (quoting *Loving*, 388 U.S. at 12). However, this statement is followed in *Loving* by the critical qualification that this fundamental freedom is not to be denied "on so unsupportable a basis as [] racial classifications," which the *Baehr* court failed to acknowledge. *Loving*, 388 U.S. at 12.

The Supreme Court in *Loving* never contemplated, much less addressed, "same-sex marriage." However, in *Baehr*, the court assumed, without reasoned explanation, that because *racial* discrimination is morally wrong and unconstitutional, that it necessarily follows that a state cannot recognize the historical, moral, and Biblical value that marriage should be between a man and a woman. *Baehr*, 74 Haw. at 572. As the *Baehr* dissent correctly pointed out, "*Loving* is simply not authority for the plurality's proposition that the civil right to

marriage must be accorded to same sex couples." *Id.* at 588 (Heen, J., dissenting). There are critical differences between race and sexual preference classifications.

Race is a suspect class, and racial discrimination triggers strict scrutiny review. In order for a law to survive strict scrutiny under the Equal Protection Clause, the state interest involved must be more than important—it must be *compelling*. *Loving*, 388 U.S. at 11. And the law itself must be *necessary* in order to achieve the objective. *Id*. If any less discriminatory means of achieving the goal exists, the law will fall. *Id*. As a practical matter, it is rare for a law to survive strict scrutiny review.

In contrast, and as the lower court in the instant case correctly held, one's sexual preference does not involve a suspect class and merits rational basis review. *DeBoer v. Synder*, Case No. 2: 12-cv-10285, 2014 U.S. Dist. LEXIS 37274, *6, 32-33 (E.D. Mich. Mar. 21, 2014). Rational basis review, asks whether "there is some rational relationship between disparity of treatment and some legitimate governmental purpose." *Central State Univ. v. American Assoc. of University Professors*, 526 U.S. 124, 128 (1999), *citing Heller v. Doe*, 509 U.S. 312, 319-321 (1993). Although the lower court claimed to follow rational basis review, it misapplied this test to overturn the MMA. [1]

[1] Additionally, the lower court should not have even touched, much less overthrown, the MMA because it simply did not need to adjudicate Michigan's Constitution. The MMA did not cause these plaintiffs any harm. If they were

The lower court opined that "*Loving* has profound implications for this litigation." *Deboer*, 2014 U.S. Dist. LEXIS 37274 at *48. The court was right in the sense that *Loving* affirmed the fundamental constitutional right of a *man and woman to marry* because "[m]arriage [between a man and a woman] is . . . fundamental to our very existence and survival." *Skinner v. State of Oklahoma*, 316 U.S. 535, 541, (1942) (pertaining to the importance of procreation); *Maynard v. Hill*, 125 U.S. 190 (1888) (signifying "the relation of husband and wife, deriving both its rights and duties from a source higher than any contract of which the parties are capable."). *Loving* emphasized the importance of traditional marriage to all Americans. It did not pave the way for the destruction of that vital institution. So-called "marriage equality" rests on the false premise that all individuals should be allowed to "marry" (actually, to redefine "marriage" to fit their desires) because the right to marry is the fundamental right of all. But *Loving* and its progeny do not hold that if prohibited conduct is defined by reference to a proclivity, then that prohibition violates the Equal Protection Clause. *See* S. Girgis, R.P. George, & R.T. Anderson, What is Marriage? 34 Harv. J. L & Pub.

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caused any harm (which *amici* contest), it is by section 24 of the Michigan Adoption Code, Mich. Comp. Laws § 710.24, and possibly certain other statutes that deny them the benefits they seek. To the extent those statutes could be amended to permit them to receive the benefits they seek, there is no reason to strike the MMA. If they cannot be amended and they violate the Constitution somehow (which *amici* contest), then they should be stricken, not the MMA. *See* What is Marriage, *supra* at 281 (observing that any pertinent need for benefits can be accommodated by statute, rather than by redefining "marriage").

Pol'y, 245, 249 (2011) (hereafter, "What is Marriage") ("antimiscegegenation was about whom to allow to marry, not what marriage was essentially about; and sex, unlike race, is rationally related to the latter question"). The "marriage equality" slogan is also self-defeating, because it is a standard-less standard that renders "marriage" equally meaningless for all. *See id.* at 269-75 (discussing that the logic of Plaintiffs' position demands "equal marriage rights" for bigamists, polygamists, and virtually any other arrangement individuals might want to create).

Although the lower court cited *Loving* for the proposition that states cannot discriminate in violation of the Equal Protection Clause, all states routinely require certain qualifications to obtain a marriage license and disallow certain individuals who do not meet those qualifications. States discriminate against first cousins, for example, by not allowing them to marry. MCLS § 551.3 (1996). States discriminate against bigamists, polygamists, and polyamorists in the licensing of marriage, and it is within the states' right to do so. *See, e.g.*, Barbara Bradley Hagerty, *Some Muslims in U.S. Quietly Engage in Polygamy*, National Public Radio: *All Things Considered*, May 27, 2008 (discussing that polygamy is illegal in all fifty states); *Lesbian 'throple' proves Scalia right on slippery slopes*, Washington Times Editorial, Apr. 25, 2104, http://www.washingtontimes.com/news/2014/apr/25/editorial-throuple-in-paradise/ (lesbian threesome claim to have married). Under the lower court's reasoning such restrictions would no longer be

valid. The lower court discarded the limits on marriage that have always existed under Michigan law and, acting as a super-legislature, replaced the traditional and rational definition of marriage with one that has no discernible limits.

It is clearly within a state's right to define marriage between a man and a woman when that licensing restriction passes rational basis review. The Court should review the MMA and the issue of "same-sex marriage," not under an unspoken or implicit heightened review, but as any other law that does not involve a suspect class. *Loving* does not require a higher standard, but it does counsel a different outcome: protection of Michigan citizens' fundamental right of marriage. The fact that American media or other factions erroneously characterize the traditional meaning of "marriage" as being on par with the civil rights deprivations of Black Americans does not make it so. The law treats racial classifications as wholly distinct from sexual preference classifications. And here, such different classifications necessarily yield different outcomes.

II. THE LOWER COURT COMMITTED REVERSIBLE ERROR BY FAILING TO APPLY RATIONAL BASIS REVIEW

The lower court committed reversible error by placing the burden of proof on the state to establish a legitimate government interest. Although the lower court cited the correct constitutional standard applicable in this case, it thereafter failed to properly apply that burden.

It is not the State's burden, on rational-basis review, to justify the State's traditional definition of marriage. The Supreme Court has unequivocally held that "the burden is on the one attacking the legislative arrangement to negate every conceivable basis which might support it, whether or not the basis has a foundation in the record." *Heller*, 509 U.S. at 320-21 (citations and quotations omitted). A law is constitutional even if it is "based on rational speculation unsupported by evidence or empirical data." *Id.* at 320. Courts simply do not have "a license . . . to judge the wisdom, fairness, or logic of legislative choices." *Id.* (citations and quotations omitted). As the Supreme Court elsewhere noted: "The inequality produced, in order to encounter the challenge of the Constitution, must be 'actually and palpably unreasonable and arbitrary.'" *Radice v. People of the State of New York*, 264 U.S. 292, 296 (1924) (citations and quotations omitted).

In matters involving a non-suspect classification, the Supreme Court permits both under- and over-inclusiveness in the drafting of such laws. All the state is required to show is that the definition rationally advances a legitimate state interest. *See, e.g., Johnson v. Robison*, 415 U.S. 361, 385 (1947). "The government has no obligation to produce evidence to support the rationality of its . . . [imposed] classifications and may rely entirely on rational speculation unsupported by any evidence or empirical data." *Hadix v. Johnson*, 230 F.3d 840, 843 (6th Cir. 2000).

Because the current definition of marriage rationally advances Michigan's interests, *e.g.*, promoting procreation and effective parenting,[2] the lower court should have rejected the Plaintiffs' Equal Protection claim as a matter of law. The lower court, however, decided that the MMA does not "proscribe conduct in a manner that is rationally related to any conceivable legitimate governmental purpose." *Deboer*, 2014 U.S. Dist. LEXIS 37274 at *7. To reach this iconoclastic conclusion, the lower court paid lip service to the governing rule, but then turned traditional rational basis review on its head. *Id*. at *34-45.

The lower court first offered a series of rationalizations to bolster the inadequacies and limitations of Plaintiffs' expert testimony and to attack the testimony of Defendants' experts. But in the end, the lower court concluded that because the *State* failed to demonstrate a measurable difference in some child-rearing "outcomes" that the lower court deemed critical, the 2.7 million people of Michigan who enacted the MMA were irrational for not endorsing homosexual conduct as a matter of public policy.

[2] Indeed, long ago, in *Maynard v. Hill*, 125 U.S. 190, 205 (1888), the Court characterized marriage as "the most important relation in life," and as "the foundation of the family and of society, *without which there would be neither civilization nor progress*," *id*. at 211. In *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), the Court recognized that the right "to marry, establish a home and bring up children" is a central part of the liberty protected by the Constitution.

i. Providing an Optimal Environment for Raising Children is Rational.

Some truths are self-evident. Among them are that men and women are different. In fact, it is clear from our very existence that men are made for women, and women for men. None of us would be here but for that truth. Another self-evident truth is that it is best for children to be raised by their parents whenever possible. There have been many theories to the contrary throughout history, but they have all proven vacuous at best. Public policy that recognizes and acts on these truths is not unfairly discriminatory. In fact, the only way to have sound public policy is to build on such truths.

In deciding to radically redefine "marriage," the lower court rejected these truths. It held that Michigan voters were *irrational* in affirming a notion upon which our nation was founded and has flourished for over two hundred years: that the natural family is the optimal environment in which children should be raised. *Deboer*, 2014 U.S. Dist. LEXIS 37274 at *35-40. The lower court rejected the convictions of 2.7 million Michigan voters and relied on the testimony of several individuals it deemed experts on the issue, who claim there is "no difference" between heterosexual and homosexual couples raising children. *Id*. at *13, 23, 27, 29, 30, 37. Remarkably, the lower court found all the "experts" supporting the proposition to be "highly" or "fully" credible, and it found all who testified against

Plaintiffs' "no difference" theory to have no credibility at all. *See id*. at *13, 23, 27, 29, 30, 35-40.

One reason the lower court failed to provide an adequate basis for its conclusion that this testimony supported the lower court's conclusion of "no difference," is that it never satisfactorily established which criteria were relevant to its inquiry—*i.e.*, which differences matter, and why. The lower court seems to have relied primarily on the testimony of Mr. Brodzinsky in determining that: "What matters is the 'quality of parenting that's being offered' to the child." *Id*. at *8. And the court adopted Mr. Brodzinsky's definition of parental quality. *See id*. at *8, 35. The lower court failed to articulate the "scientific basis" for why certain qualities the "experts" chose and purported to measure are the qualities we as a people must adopt and endorse. What are the so-called experts' qualifications to make moral decisions about what makes for good parenting or addresses the concerns a parent has for his child? The evidence that these social scientists actually measured *those* crucial factors—or are in any way qualified to even identify, much less measure, those factors are nowhere in the record.[3]

[3] These experts largely purported to measure one or more facets of children's school performance, which the court then equated to "healthy development," *id*. at *28, 29, 37; and even that parameter was hardly conclusive in supporting the court's "no difference" thesis, *id*. at *37. There is no scientific basis for the conclusion that a child's well being is properly determined by checking whether he or she has dropped out of school or been held back a grade at some point. It is a

These simply are not "scientific" matters. Materialistic science cannot measure the non-material. It cannot define or select morality, values, or the necessary components of a successful family, much less measure these factors. It is an injustice and exhibits a gross misreading of the Constitution to install such self-styled "social" experts as the moral compass of the population. Further, these studies fail to demonstrate that the people of Michigan's concept of family and marriage is irrational. Given the fundamental flaws in the lower court's premises and reasoning, its findings are unreliable.

The lower court also cited "Rosenfeld's study that children raised by same-sex couples progress at almost the same rate through school as children raised by heterosexual couples." *Id*. at *10. Leaving aside the fact that progress through school is hardly a conclusive measure for an optimal child-rearing environment,[4] this obviously does not "refute" the premise that heterosexual couples make better parents. *See, e.g.*, G.W. Dent, Jr., Straight is Better: Why Law and Society May Justly Prefer Heterosexuality, 15 Tex. Rev. L. & Pol. 359, 371-406 (2011).

Next the court touted Brodzinsky's opinion that "parental gender plays a limited role, if any, in producing well-adjusted children." *Deboer*, 2014 U.S. Dist.

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reasonable factor to consider among many others, but not a factor that can "scientifically" be weighed.

[4] When it found it convenient to advance its argument, the court actually admitted that "[o]ptimal academic outcomes for children cannot logically dictate which groups may marry." *Id*. at *39.

LEXIS 37274 at *36. This raises the obvious question of which parent is it that children can supposedly do without—the mother or the father? Curiously, the court and its experts failed to elucidate this particular point.

Obviously, scientific observations of human biology, human history, and our own experience, common sense and reason tell us that children come exclusively from opposite sex unions, and children benefit from being raised by their biological parents whenever possible. *See, e.g.* Straight Is Better, *supra* at 376, 378, 380-81; What is Marriage, *supra* at 258; M. Gallagher, (How) Does Marriage Protect Child Well-Being, in The Meaning of Marriage (R.P. George & J.B. Elshtain, eds.) (Scepter Publishers, Inc., 2010) at 197-212 (*see especially* 208-12 regarding gender roles).

These are but a few of the flaws with the lower court's "debate-ending" scientific foray. There is no real question these "experts" have failed to prove that *amici* and the majority of Michigan's electorate, like the Founders of this Nation, are irrational for promoting the traditional family structure and defending its definition from destructive innovations like the one the lower court unjustly seeks to impose. When the Eight Circuit Court of Appeals decided a case practically identical to this, it recognized the correct legal principles:

> The State argues that the many laws defining marriage as the union of one man and one woman and extending a variety of benefits to married couples are rationally related to the government interest in "steering procreation into marriage." By affording legal recognition

> and a basket of rights and benefits to married heterosexual couples, such laws "encourage procreation to take place within the socially recognized unit that is best situated for raising children." The State and its supporting amici cite a host of judicial decisions and secondary authorities recognizing and upholding this rationale. The argument is based in part on the traditional notion that two committed heterosexuals are the optimal partnership for raising children, which modern-day homosexual parents understandably decry. But it is also based on a "responsible procreation" theory that justifies conferring the inducements of marital recognition and benefits on opposite-sex couples, who can otherwise produce children by accident, but not on same-sex couples, who cannot. *See Hernandez v. Robles* [New York, 2006]; *Morrison v. Sadler*, [Indiana, 2005]. Whatever our personal views regarding this political and sociological debate, we cannot conclude that the State's justification "lacks a rational relationship to legitimate state interests." *Romer*, 517 U.S. at 632.

Citizens for Equal Protection v. Bruning, 455 F.3d 859 (8th Cir. 2006). Under the applicable rational basis review, it is enough for the state to promote natural families merely because natural families provide *some* benefit to the healthy development of our children. *See, e.g.*, *Hadix*, 230 F.3d at 843.

The lower court also criticized various aspects of the MMA, arguing that if the state desires to promote an optimal environment in which its children may be raised, it cannot do so unless it does so with extraordinary empirical precision. *Deboer*, 2014 U.S. Dist. LEXIS 37274 at *39-40 (*e.g.*, applying strict logic of Michigan marriage licensing, only wealthy suburban Asians should be allowed to marry). In doing so, the lower court essentially applied the "least restrictive means" component of the *strict scrutiny* test. The lower court in *Bruning* made the same error. And the Court of Appeals in that case cogently corrected this error:

> The district court rejected the State's justification as being "at once too broad and too narrow." *Citizens for Equal Protection*, 368 F. Supp. 2d at 1002. But under rational-basis review, "Even if the classification . . . is to some extent both underinclusive and overinclusive, and hence the line drawn . . . imperfect, it is nevertheless the rule that . . . perfection is by no means required." *Vance v. Bradley*, 440 U.S. 93, 108 (1979). Legislatures are permitted to use generalizations so long as "the question is at least debatable." *Heller*, 509 U.S. at 326 (quotation omitted). The package of government benefits and restrictions that accompany the institution of formal marriage serve a variety of other purposes. The legislature -- or the people through the initiative process -- may rationally choose not to expand in wholesale fashion the groups entitled to those benefits. "We accept such imperfection because it is in turn rationally related to the secondary objective of legislative convenience." *Vance*, 440 U.S. at 109.

Bruning, 455 F.3d at 868. In essence, Michigan is entitled to promote what has proven to be the healthiest social structure for the rearing of children and propagation of society, and it is not required to simultaneously promote less healthy alternatives.

ii. Proceeding With Caution is Rational.

The lower court rejected the State's interest in not promoting homosexual couples by redefining marriage because the State is not yet convinced by any credible evidence that this would serve the public interest.[5] *Deboer*, 2014 U.S. Dist. LEXIS 37274 at *40-42. The lower court asserted that although it is

[5] There is ample evidence that the lower court was clearly premature in declaring that the scientific aspect of the debate is over. *See, e.g.* Straight is Better, *supra*, at 376-82; W. Duncan, Marriage on Trial, 12 J. Gender Race & Just. 493, 498-502 (2009); What is Marriage, *supra*, at 270, 278; J. Satinover, Homosexuality and the Politics of Truth 31-36, 49-70 (Baker Books, 1996).

sometimes prudent to delay implementation of radical social experiments, a state cannot do so when there is a deprivation of constitutional rights. *Id*.

In addition to being yet another manifestation of the lower court's misplaced "least restrictive means" test, this reasoning is tautological. The question is whether there is a violation of constitutional rights. The lower court cannot assume a violation in order to negate our State's interest in avoiding the irreversible social disruption such a redefinition would cause, when that very interest indicates the lack of such a violation under the rational basis standard.

Moreover, the lower court ignores *amici's* constitutional right to natural marriage. In the numerous Supreme Court cases defending the "fundamental right" of marriage, the Supreme Court refers exclusively to the right of the only true marriage that there is: one man and one woman. *See, e.g.*, *Maynard*, 125 U.S. at 205; *Meyer*, 262 U.S. at 399. To redefine that institution to include whatever people prefer at a given moment is to destroy that institution. The lower court cites no authority to destroy our fundamental right to marriage by defining it out of existence.

iii. Traditional Morality Is Rational.

It is true that the MMA upholds the traditional, moral meaning of "marriage." But it is not true that the people of the State of Michigan have thus unfairly discriminated against individuals engaging in homosexual conduct. In the

MMA, Michigan's citizens merely codified the meaning of the term "marriage" that has always existed in this state and this nation.

When the lower court said it was rejecting morality as a basis for Michigan's codification of its traditional marriage rule, it was not being entirely forthright. *Deboer*, 2014 U.S. Dist. LEXIS 37274 at *44 ("tradition and morality are not rational bases for the MMA"). What it actually did was to supplant the tried and true morality of the Judeo-Christian tradition upon which our country was founded with the trendy, relativist morality of political correctness.[6] It rejected our Founders' judgment—which we have inherited and which we share—and just replaced it with its own.[7]

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[6] Like any lawgiver, the lower court cannot avoid the application of morality. *See, e.g.*, Senator Barack Obama, Keynote Address to Sojourners at the 'Call to Renewal' Conference (June 28, 2006) ("Our law is by definition a codification of morality, much of it grounded in Judeo-Christian tradition."). Unlike a good lawgiver, however, the lower court was not forthright in exposing and explaining the morality it employed. If it believes we are endowed by our Creator with certain inalienable rights, then let the court explicitly argue that the Creator endowed us with the right to "marry" a person of the same sex. If the lower court believes we are not so endowed, but make up our own rights, it should also explain why it gets to make them up.

[7] *See, e.g.*, What is Marriage, *supra*, at 286 ("there is no truly neutral marriage policy"); Straight Is Better, *supra* at 363-64 ("Sensible scholars acknowledge that moral neutrality is not only undesirable but impossible."). Robert Reilly more fully explains this disingenuous displacement of morality and tradition:

> The legal protection of heterosexual relations between a husband and wife involves a public judgment on the nature and purpose of sex. That judgment teaches that the proper exercise of sex is within the marital bond because both the procreative and unitive purposes of sex are best

Amici understand better than many that "tradition" alone cannot justify a law, no matter how hoary its pedigree. But *amici* do not argue the MMA should remain unmolested by the federal judiciary merely because it upholds long-standing tradition. Contrary to the lower court's facile analysis, mere "tradition" is not the reason the MMA is rational. The *reason*s for the tradition are the reason the MMA is rational, because the reasons for the tradition are entirely rational. *See, e.g.*, *Bruning*, *supra*, at 632 (promotion of traditional family structure as sound social foundation is rational); What is Marriage, *supra*, at 248-259 (discussing fundamental nature of marriage as a public good and revisionists' failure to justify replacing it with their relativist surrogate); M. Gallagher, Why Marriage Matters: The Case for Normal Marriage, available at http://marriagedebate.com/pdf/Senate

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> fulfilled within it. The family alone is capable of providing the necessary stability for the profound relationship that sexual union both symbolizes and cements and for the welfare of the children who issue from it.
>
> The legitimization of homosexual relations changes that judgment and the teaching that emanates from it. What is disguised under the rubric of legal neutrality toward an individual's choice of sexual behavior—"equality and freedom for everyone"—is, in fact, a demotion of marriage from something seen as good in itself and for society to just one of the available sexual alternatives. In other words, this neutrality is not at all neutral; it teaches and promotes indifference, where once there was an endorsement.

Reilly, Robert R., Making Gay Okay: How Rationalizing Homosexual Behavior is Changing Everything, 13 (Ignatius Press, 2014).

Sept42003.pdf (discussing research demonstrating benefits of traditional family structure); Straight is Better, *supra* at 359, 371-75 (the biological family is universally recognized as a unique social unit worthy of special encouragement and protection).

The lower court's theory that the people of Michigan have always been "actually and palpably unreasonable and arbitrary" in defining marriage as the union of one man and one woman is an insult and is itself palpably unreasonable and arbitrary. *See Radice*, 264 U.S. at 294. The people of the State of Michigan have not violated the United States Constitution by merely codifying the traditional definition of "marriage." If anything, it is the lower court that has arguably violated an oath to uphold the Constitution by re-writing it in direct defiance of the very rules that it admits govern the exercise of its limited authority.

There is no surer way to destroy an institution like marriage than to destroy its meaning.[8] If "marriage" means whatever one judge wants it to mean, it means nothing. If it has no fixed meaning, it is merely a vessel for a judge's will. It is

[8] Destroying marriage by destroying its meaning is the admitted goal of many "same-sex marriage" advocates. *See* , *e.g.*, What is Marriage, *supra*, at 277-78 (citing numerous gay activists and supporters who openly advocate the destruction of traditional concepts of marriage and family); Why Marriage Matters, *supra*; Gay Marriage is a Lie: Destruction of Marriage, Masha Gessen (http://www.youtube.com/watch?v=n9M0xcs2Vw4, last visited May 12, 2014) (In the words of gay activist Masha Gessen …, "Gay marriage is a lie . . . Fighting for gay marriage generally involves lying about what we're going to do with marriage when we get there. It's a no-brainer that the institution of marriage should not exist.").

used as a subterfuge for judicial legislation. And as Montesquieu observed: "There is no greater tyranny than that which is perpetrated under the shield of law and in the name of justice." Charles de Montesquieu, Montesquieu's Considerations on the Causes of the Grandeur and Decadence of the Romans, 279 (Jehu Baker trans., Tiberius 1882).

iv. Federalism Related Concerns

The lower court correctly observed that states' rights to regulate the family are subject to federal constitutional limitations. *Deboer*, 2014 U.S. Dist. LEXIS 37274 at *44-51. But as the Supreme Court held in *F.C.C. v. Beach Communics.*, 508 U.S. 307, 320(1993),"[t]he assumptions underlying [a law's] rationales may be erroneous, but the very fact that they are 'arguable' is sufficient, on rational-basis review, to 'immunize' the [law] from constitutional challenge." Under the Tenth Amendment that argument is one to be conducted in the various States. It has been properly conducted in Michigan.

The lower court admitted that we could amend our Constitution in this way as long as we do so on a "fairly debatable" basis.[9] But the lower court has held that only it can define what is fairly debatable, and that this issue is not. It

[9] *Radice*, 264 U.S. at 294 ("Where the constitutional validity of a statute depends upon the existence of facts, courts must be cautious about reaching a conclusion respecting them contrary to that reached by the Legislature; and if the question of what the facts establish be a fairly debatable one, it is not permissible for the judge to set up his opinion in respect of it against the opinion of the lawmaker.").

basically used a "have a debate, but I'll always win" standard. Justice Black evaluated such conduct in his *In re Winship* Dissent: "When this Court assumes for itself the power to declare any law—state or federal—unconstitutional because it offends [a] majority[] [of the court's] own views of what is fundamental and decent in our society, our Nation ceases to be governed according to the 'law of the land' and instead becomes one governed ultimately by the 'law of the judges.'" *In re Winship*, 397 U.S. 358, 387 (1970) (Black, J., dissenting).

This court should not follow the lower court in ignoring the fact that it is the Plaintiffs who seek to change our definition of marriage; and they seek to do it not by consulting the will of the people, but by asking a few unelected federal officials to over-rule the longstanding will of the people. As Justice Black observed, "[t]he people, through their elected representatives, may of course be wrong in making … determinations [of fairness], but the right of self-government that our Constitution preserves is just as important as any of the specific individual freedoms preserved in the Bill of Rights." *Id*. at 385. Thus, it is important to recognize that *amici* and the other 2.7 million Michigan voters who cherish the institution of marriage and the traditional family that the Supreme Court has often acknowledged as foundational for our nation also have important constitutional rights at stake in this debate.

Plaintiffs currently have a right to marry that is equal to any other adult in Michigan. Under the guise of constitutional liberty and equal protection, the lower court unilaterally destroyed the institution of marriage long recognized by the people of the state of Michigan, and replaced it with its own standard-less and unsustainable version. As the only other Federal Court of Appeals to adjudicate this issue correctly observed:

> In the nearly one hundred and fifty years since the Fourteenth Amendment was adopted, to our knowledge no Justice of the Supreme Court has suggested that a state statute or constitutional provision codifying the traditional definition of marriage violates the Equal Protection Clause or any other provision of the United States Constitution. Indeed, in *Baker v. Nelson*, 409 U.S. 810(1972), when faced with a Fourteenth Amendment challenge to a decision by the Supreme Court of Minnesota denying a marriage license to a same-sex couple, the United States Supreme Court dismissed "for want of a substantial federal question."

Bruning, 455 F.3d at 870. The lower court clearly overstepped its authority usurping the people of Michigan's right to retain the traditional meaning of marriage.

CONCLUSION

For the reasons stated above, *Amici* respectfully request that this Court reverse the judgment of the district court.

Respectfully submitted,

THOMAS MORE LAW CENTER

By: /s/ Erin Mersino

Erin Mersino, Esq.

/s/ William R. Wagner[10]
William R. Wagner, Esq.

/s/ John S. Kane
John S. Kane, Esq.

Counsel of Record

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7), the foregoing Brief is proportionally spaced, has a typeface of 14 points Times New Roman, and contains 7,000 words or less, excluding those sections identified in Fed. R. App. P. 32(a)(7)(B)(iii).

THOMAS MORE LAW CENTER

/s/ Erin Mersino
Erin Mersino (P70886)

[10] Although Messers. Wagner and Kane are professors of law employed by the Thomas M. Cooley Law School, they are not representing the School or its views in any capacity in this case, but are appearing strictly as private attorneys on an "of counsel" basis with the Thomas More Law Center.

CERTIFICATE OF SERVICE

I hereby certify that on May 14, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that all of the participants in this case are registered CM/ECF users.

THOMAS MORE LAW CENTER

/s/ Erin Mersino
Erin Mersino (P70886)

ADDENDUM

List of *Amici* with Qualifications and Institutional Affiliations

Minister Stacy Swimp
Revive Alive Missional Ministry
Flint, Michigan

Bishop Ira Combs, Jr., D.D.
Greater Bible Way Temple
Jackson, Michigan

Apostle Lennell Caldwell
First Baptist World Changers International Ministries
Detroit, Michigan

Pastor Stacey Foster
Life Changers
Detroit, Michigan

Rev. Dr. Randolph Thomas
Greater Bethlehem MBC
Detroit, Michigan

Rev. Dr. James Crowder
St. Galilee Missionary Baptist Church
Detroit, Michigan

Gina Johnsen, Director
Michigan Capitol House of Prayer
Lansing, Michigan

Pastor Leonard Jackson
Bethel Community
Detroit, Michigan

Apostle Ellis L. Smith
Jubilee Christian Center
Detroit, Michigan

Pastor Dr. Rader Johnson, Elder
Greater Bibleway Temple of Apostolic Faith
Bay City, Michigan

Pastor Dr. Phillip Johnson
Greater Bibleway Temple of Apostolic Faith
Bay City, Michigan

Rev. Terry J. Mack
Greater Bethlehem MBC
Detroit, Michigan

Pastor Cedric Robinson
Judah Tabernacle
Melvindale, Michigan

Pastor John Groves
West Wayne Free Will Baptist
Wayne, Michigan

Bishop James A. Williams, Jr.
Spirit & Truth Christian Ministries
Detroit, Michigan

Cal Garcia
Auburn Hills Christian Center
Auburn Hills, Michigan

Pastor Ray Anderson
House of Help Ministries
Detroit, Michigan

Rev. Daniel Moore
Flowery Mount Baptist Church
Detroit, Michigan

Rev. James O'Rear
Greater New Hope Missionary Baptist Church
New Haven, Michigan

Rev. John H. Grice, Jr.
Calvary Missionary Baptist Church
Mount Clemens, Michigan

Pastor Donald Potocki
Briarwood Baptist Church
Ann Arbor, Michigan

Pastor Charlie Knighten
Pilgrim Travelers Missionary Baptist Church
Inkster, Michigan

Pastor Charles Johnson III
Anderson Memorial COGIC
Detroit, Michigan

Pastor David McGowan
First Free Will Baptist
Pontiac, Michigan

Dr. Timothy A. Williams
Pastor New Beginnings Cathedral
Detroit, Michigan

Rev. Harold Ewin
Rouge Free Will Baptist
Wyandotte, Michigan

Pastor Lionel Oakes
Kingdom Citizens Worship
Detroit, Michigan

Pastor Dr. Curtis C. Williams
Aijalon Baptist Church and
Owner of Trinity Chapel Funeral Home
Detroit, Michigan

Pastor Daryl Ounanain
Mt. Lebanon Strathmoor Church
Detroit, Michigan

Pastor Steve Gallegos
Auburn Hills Christian Center
Auburn Hills, Michigan

Apostle Damon Davis
Kingdom Fire Ministries International
Romulus, Michigan

Pastor Audry Turner
Nehemiah Baptist Church
Detroit, Michigan

Pastor Steven Staten
Unity Temple Church
Detroit, Michigan

Pastor Gary D. Hooks
Fountain of Life & Praise Church
Detroit, Michigan

Dr. Gregory Tukes
True Church Ministries
Detroit, Michigan

Rev. William Revely
Holy Hope Heritage Church
Detroit, Michigan

Rev. Travis Lilly
Faith Free Will Baptist Church
Ray Township, Michigan

Rev. Ron Meadows
Faith Free Will Baptist Church
Ray Township, Michigan

Pastor Fred and Jamie McGlone
New Covenant Christian Church
Lansing, Michigan

Rev. James Atkins
Williams Chapel MBC
Detroit, Michigan

Leonard Mungo, Elder
Annapolis Park Church of Christ
Westland, Michigan

Pastor Darrell Moore
New Life COGIC
Roseville, Michigan

Pastor Danny L. Slater
Rouge Free Will Baptist Church
Wyandotte, Michigan

Brian Wright
First Free Will Baptist of Ypsilanti
Ypsilanti, Michigan

Rev. Walker Harris
Belleville Freewill Baptist Church
Belleville, Michigan

Rev. Willie Pitts
Greater King Solomon Church
Detroit, Michigan

Paul and Carolyn Bersche
Paul Bersche Ministries
Farmington, Michigan

Richard Crisco
Rochester First Assembly
Rochester, Michigan

Charles Baughman
Rouge Free Will Baptist Master's Men
Wyandotte, Michigan

Edward Lee Rakes
Rouge Free Will Baptist Youth
Wyandotte, Michigan

Eugene Smith
Greater King Solomon Church
Detroit, Michigan

CL & Verna Johnston
Ignited International Ministries Church
Detroit, Michigan

Pastor Damon Moseley
Bethel Temple Baptist Church
Detroit, Michigan

Pastor Lernard Thomas
Fellowship Churches
Detroit, Michigan

Apostle Diane Chappelle
Apostle at Visions of Hope Fellowship Worldwide
Detroit, Michigan

Apostle Dr. Hattie Archer
Transforming Lives Ministries
Southfield, Michigan

Pastor Datron Davis
Regeneration Church
Detroit, Michigan

Pastor Maurice Hardwick
Solomons Temple
Detroit, Michigan

Cleveland Right to Life
Cleveland, Ohio

Dr. Monica Miller
President of Citizens for a Pro-Life Society
Livonia, Michigan

Jacqui Fetsko
Executive Director of Lake County Right to Life
Mentor, Ohio

Cathy Ann Braun
State Coordinator, National Day of Prayer
Lansing, Michigan

Pastor Reuben and Dawn Garcia
True Life Covenant
Clio, Michigan

Linda Harvey, President
Mission America
Columbus, OH

Dr. Kent Spann
Spann Ministries
Grove City, Ohio

Arthur E. Norris
Promotional Director
Michigan State Association of Free Will Baptists
Grand Blanc, Michigan

Mike Albertone
Our Lady of Mount Carmel
Wickliffe, Ohio

Paula M. Long
St. Cyprian Church
Perry, Ohio

Rev. Calvin Brown
Trinity Free Will Baptist Church
Ypsilanti, Michigan

Rev. Todd R. Gould
The Evangelical Free Church of Cass City
Cass City, Michigan 48726

Elder, Lutullus S. Penton Jr.
and Yvonne Penton,
Directors of Black Americans for Life
Flint, Michigan

Pastor George Johnson, Jr.
North Warren Free Will Baptist
Warren, Michigan

Pastor Mark Tackett
Heritage Free Will Baptist
Taylor, Michigan

Denver & Marsha Sallee
HELP Pro-Life Apostolate
Middlefield, Ohio

Donna Anderson
St. Cyprian Church
Perry, Ohio

Pastor Rex Evans
First Free Will Baptist Church Of Ypsilanti
Ypsilanti, Michigan

Pastor Rodney J. McTaggart
Bread of Life Harvest Church
Saginaw, Michigan

Pastor Ernest M. Ruemenapp
Family Heritage Baptist Church
Harrisville, Michigan

Jessie Still, Senior Leader
Spirit of Christ Church
Haslett, Michigan

Rev. Paul Hancock III and
Rev. Rebecca Hancock
Dearborn Assembly of God Church
Dearborn, Michigan

Joseph A. Wenturine, Senior Pastor
Harvest Christian Church
Marine City, Michigan

Pastor Wendy Waterson
Sanctuary Gate Church
Saint Johns, Michigan

Steve Lockwood
Minister-Owosso Church of Christ
Owosso, Michigan

Brenda Battle Jordan
Former Director of Black Americans for Life and Board Member of
Flint Right to Life
Flint, Michigan

Ken Jordan
Board Member of Flint Right to Life
Flint, Michigan

Pastor Walter S. Moss
New Beginnings Foursquare Gospel Church
Canton, Ohio

Kenneth A. Themm
Board Member & Sunday School Leader at Durand Church of the Nazarene
Under the Direction of Pastor Dr. Michael McCarty
Durand, Michigan

Pastor Steven Staten
Unity Temple Apostolic Church
Detroit, Michigan

Pastor Wallace F. Reames III
LifeLine Victory Center
Vassar, Michigan

Rev. Edward Watts
Gateway HOPE Center
Burton, Michigan

Rev. David K. Woodby
Redeemer Lutheran Church
Owosso, Michigan

Senior Pastor Randolph O'Dell
The Crossing Church
Farmington, Michigan

James Muffett, President of Citizens for Traditional Values
Amy Hawkins, Executive Director of Citizens for Traditional Values
Citizens for Traditional Values
Lansing, Michigan

Dr. Michael Ross, President
Defending Our Father's House
Troy, Michigan

Dr. Mary Ruth Montgomery
Ecclesia International Ministries, Inc.
Warren, Michigan

Bishop Gary Harper
Greater Grace Temple (O.G. Hayes Memorial)
Taylor, Michigan

Elder DeShawn Wilkins
Immanuel Outreach Cathedral
Detroit, Michigan

Suffragan Bishop Luke McClendon
Christ Temple Church
Westland, Michigan

Suffragan Bishop Donald Bradley
Bethlehem Temple Apostolic Faith Church
Clinton Township, Michigan

Pastor Kimberly Brown
Zion Cathedral of Praise
Port Huron, Michigan

Elder Keith Spiller
Pentecostal Church of Jesus Christ
East Pointe, Michigan

Elder Grady Coleman
Greater Love Pentecostal Church
Ypsilanti, Michigan

Pastor Clara Simon
Abundance of Life Apostolic Faith Church
Ypsilanti, Michigan

Suffragan Bishop Harry Grayson
Messias Temple Church
Ypsilanti, Michigan

Pastor James Manns
Greater Bibleway Temple
Pontiac, Michigan

District Elder Philip Thompson
Bethlehem Temple Church
Flint, Michigan

Pastor Melvin Davis
Greater Emmanuel Temple
Flint, Michigan

Jay McNally, Director
Citizen's Alliance for Life & Liberty
Ypsilanti, Michigan

Pastor Eric Moore
The Culture of Honor
Detroit, Michigan

Apostle Laurita Bledsoe
God's Anointed
Detroit, Michigan

Rev. Dr. Roland Caldwell
Burnette Inspirational Ministeries
Detroit, Michigan

Pastor Carol D. Caldwell
First Baptist World Changers International Ministries
Detroit, Michigan

Rev. Cheryl Clark
For Our Children
Detroit, Michigan

Pastor Lawrence Glass
Baptist Pastors of Detroit & its Vicinity
Detroit, Michigan

Minister Dennis Gover
Joshua Temple C.O.G.I.C.
Detroit, Michigan

Associate Pastor Kelvin Lott
Rochester First Assembly
Rochester, Michigan

Senior Pastor John M. Lucas
Bethel Church of the Apostolic Faith
Detroit, Michigan

Dr. Ernest Maddox
Dr. Ernest Maddox Ministries
Oak Park, Michigan

Pastor Don Magee
Lakes Baptist Church
Walled Lake, Michigan

Pastor Lee A. Williams
Merciful Ministries International
Romulus, Michigan