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

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MARILYN RAE BASKIN, *et al.*,

Plaintiffs-Appellees,

v.

PENNY BOGAN, in her official capacity as Boone County Clerk, *et al.*,

Defendants-Appellants.

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

Brief of *Amici Curiae* United States Conference of Catholic Bishops; National Association of Evangelicals; The Church of Jesus Christ of Latter-day Saints; The Ethics & Religious Liberty Commission of the Southern Baptist Convention; and The Lutheran Church—Missouri Synod In Support of Defendants-Appellants and Supporting Reversal

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1(a), a signed corporate disclosure statement in the form provided by the Court is separately filed on behalf of all *amici curiae*. In addition, the undersigned states that none of the religious organizations joining this brief issues stock or has a parent corporation that issues stock.

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IDENTITY AND INTEREST OF *AMICI*

The voices of millions of Americans are represented in the broad cross-section of faith communities that join in this brief. Our theological perspectives, though often differing, converge on a critical point: that the traditional husband-wife definition of marriage is vital to the welfare of children, families, and society. Faith communities like ours are among the essential pillars of this Nation's marriage culture. With our teachings, rituals, traditions, and ministries, we sustain and nourish both individual marriages and a culture that makes enduring marriages possible. We have the deepest interest in strengthening the time-honored institution of husband-wife marriage both because of our religious beliefs and because of the profound benefits it provides children, families, and society. Our practical experience in this area is unequaled. In millions of ministry settings each day we see the benefits that married mother-father parenting brings to children. And we deal daily with the devastating effects of out-of-wedlock births, failed marriages, and the general decline of the venerable husband-wife marriage institution.

We therefore seek to be heard in the democratic and judicial forums where the fate of that foundational institution will be decided. We urge this Court to allow the marriage debate to be resolved through the democratic process, where the views of all citizens can be accounted for. Contrary to arguments by some advocates of same-sex marriage, people of faith and their religious organizations, no less than any others, have "a fundamental right . . . to speak and debate and learn and then,

as a matter of political will, to act through a lawful electoral process." *Schuette v. Coalition to Defend Affirmative Action*, No. 12-682, 2014 WL 1577512, at *15 (U.S. Apr. 22, 2014) (plurality op.) (Kennedy, J.). That "fundamental right" applies as much to the issue of same-sex marriage as to the issue of affirmative action. *See id.*

This brief is submitted out of a shared conviction that the State of Indiana did not violate the United States Constitution by acting to preserve the husband-wife definition of marriage. Individual statements of interest are found in the attached Addendum.

INTRODUCTION

Advocates of same-sex marriage routinely argue that those who oppose redefining marriage are motivated by "anti-gay animus," either in the form of unthinking ignorance or actual hostility. Such aspersions, which take various forms, are often cast at people and institutions of faith.

The accusation is false and offensive. It is intended to suppress rational dialogue and democratic conversation, to win by insult and intimidation rather than by persuasion based on reason, experience, and fact. In truth, we support the husband-wife definition of marriage because we believe it is right and good for children, families, and society. Our respective faith traditions teach us that truth. But so do reason, long experience, and social fact.

We are among the "many religions [that] recognize marriage as having spiritual significance," *Turner v. Safley*, 482 U.S. 78, 96 (1987), indeed as being truly "sacred." *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965). Our commitment

to traditional marriage reflects an undeniable "belie[f] in a divine creator and a divine law," *Burwell v. Hobby Lobby Stores, Inc.*, Nos. 13-354, 13-356, 2014 WL 2921709, at *28 (U.S. June 30, 2014) (Kennedy, J., concurring), and "must be understood by precepts far beyond the authority of government to alter or define." *Town of Greece v. Galloway*, 572 U.S. ___, 134 S. Ct. 1811, 1827 (2014) (plurality op.) (Kennedy, J.). Our respective religious doctrines hold that marriage between a man and a woman is sanctioned by God as the right and best setting for bearing and raising children. We believe that children, families, society, and our Nation thrive best when husband-wife marriage is upheld and strengthened as a cherished, primary social institution. The lives of millions of Americans are ordered around the family and derive meaning and stability from that institution. We make no apologies for these sincerely held religious beliefs.

But the value we place on husband-wife marriage is also influenced by rational judgments about human nature and the needs of individuals and society (especially children) and by our collective experience counseling and serving millions of followers over countless years. For these reasons, too, we are convinced that traditional marriage is indispensable to the common good and our republican form of government.

As our faith communities seek to sustain and transmit the virtues of husband-wife marriage and family life, our teachings and rituals seldom focus on sexual orientation or homosexuality. Our support for the historic meaning of marriage arises from an affirmative vision "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," *Murphy v. Ramsey*, 114 U.S. 15, 44 (1885), and not from animosity toward anyone.

In this brief we demonstrate that Indiana Code § 31-11-1-1 should not be overturned based on the spurious charge that religious organizations support such laws out of animus. Our faith communities bear no ill will toward same-sex couples, but rather have marriage-affirming religious beliefs that merge with both practical experience and sociological fact to convince us that retaining the husband-wife marriage definition is essential. We further demonstrate that under Supreme Court jurisprudence the notion of "animus" holds limited relevance—and none here. Finally, we refute the suggestion that the Establishment Clause limits the fundamental right of persons and institutions of faith to participate fully in the democratic process. The fact that religious believers support Indiana's marriage laws by no stretch undermines their constitutional validity.

ARGUMENT

I. Indiana's Marriage Statute Should Not Be Invalidated or Subjected to Closer Judicial Scrutiny Based on False Accusations of Animus.

The district court declared § 31-11-1-1 unconstitutional in part because the State's refusal to recognize same-sex marriages performed out of state was "motivated by animus, thus violating the Equal Protection Clause." *Baskin v. Bogan*, Nos. 1:14–cv–00355–RLY–TAB, 1:14–cv–00404–RLY–TAB, 1:14–cv–00406–RLY–MJD, 2014 WL 2884868, at *14 (S.D. Ind. June 28, 2014). Plaintiffs have leveled the more general accusation that Indiana's marriage statute betrays an

"animus-driven motive—to fence lesbian and gay Indiana residents and their children out of marriage." Mem. Supp. Pls.' Mot. Summ. J. at 32, *Baskin v. Bogan*, No. 1:14-cv-00355-RLY-TAB (S.D. Ind. Apr. 3, 2014).

We emphatically deny that religious support for marriage between a man and a woman is founded on prejudice or ignorance. Our faiths teach love and respect for all people. The understanding of marriage as a faithful union of man and woman predates by centuries the controversy over same-sex marriage,[1] and our support for it has nothing to do with disrespect or antipathy toward any group.

Our support for traditional marriage stands on the affirmative belief that husband-wife marriage complements our human natures as male and female, promotes responsible procreation, and provides the best environment for children. These beliefs are echoed in numerous Supreme Court decisions holding that husband-wife marriage—"an institution more basic in our civilization than any other," *Williams v. North Carolina*, 317 U.S. 287, 303 (1942)—is "the most important relation in life" and "ha[s] more to do with the morals and civilization of a people than any other institution." *Maynard v. Hill*, 125 U.S. 190, 205 (1888).

Reducing religious support for traditional marriage to ignorance, hostility or bigotry ignores numerous rational "reasons … to promote the institution of marriage beyond mere moral disapproval of an excluded group." *Lawrence v. Texas*, 539 U.S. 558, 585 (2003) (O'Connor, J., concurring). Those reasons are

[1] *See, e.g.*, JOHN WITTE JR., FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION 17 (2d ed. 2012) (describing heterosexual monogamy as an idea "inherited from ancient Greece and Rome").

informed by history, right reason, experience, common sense, and social science. Many courts have found those reasons persuasive. *See, e.g.*, *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 867-68 (8th Cir. 2006); *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006).

A. We Defend Traditional Marriage Out of Fidelity to Religious Beliefs That Include But Transcend Teachings About Human Sexuality, Not Out of Animus.

Let us first dispel the myth that hostility lies at the root of religious support for husband-wife marriage. Jesus expressed no disapproval or hostility when he taught, "Have you not read that he who made them from the beginning made them male and female, and said, 'For this reason a man shall leave his father and mother and be joined to his wife, and the two shall become one flesh?'" *Matthew* 19:4-5 (RSV). Nor were the ancient Jewish scriptural texts that Jesus referenced based on animosity toward anyone. *See Genesis* 1:27, 2:23 (RSV).

Faith communities and religious organizations like *amici* have long histories of upholding traditional marriage for reasons that have nothing to do with homosexuality. Indeed, their support precedes by centuries the very idea of same-sex marriage. Many of this Nation's prominent faith traditions have rich religious narratives that extol the personal, familial, and social virtues of traditional marriage while barely mentioning homosexuality.

The Catholic Tradition. With a tradition stretching back two millennia, the Catholic Church recognizes marriage as a permanent, faithful, and fruitful

covenant between a man and a woman that is indispensable to the common good.[2] Marriage has its origin, not in the will of any particular people, religion, or state, but rather, in the nature of the human person, created by God as male and female. When joined in marriage, a man and woman uniquely complement one another spiritually, emotionally, psychologically, and physically. This makes it possible for them to unite in a one-flesh union capable of participating in God's creative action through the generation of new human life. Without this unitive complementarity—and the corresponding capacity for procreation that is unique to such a union—there can be no marriage.[3] These fundamental Catholic teachings about marriage do not mention and have nothing to do with same-sex attraction.

The Evangelical Protestant Tradition. For five centuries the various denominational voices of Protestantism have taught marriage from a biblical view focused on uniting a man and woman in a divinely sanctioned companionship for the procreation and rearing of children and the benefit of society. One representative Bible commentary teaches: "Marriage . . . was established by God at creation, when God created the first human beings as 'male and female' (Gen. 1:27) and then said to them, 'Be fruitful and multiply and fill the earth' (Gen. 1:28). . . . Marriage begins with a commitment before God and other people to be husband and wife for life," with "[s]ome kind of public commitment" being important so that

[2] *See* CATECHISM OF THE CATHOLIC CHURCH ¶ 1601 (2d ed. 1994).

[3] *See id.* at ¶¶ 371-72.

society can "know to treat a couple as married and not as single."[4] Homosexuality is far from central to Evangelical teachings on marriage.

The Latter-day Saint (Mormon) Tradition. Marriage is fundamental to the doctrine of The Church of Jesus Christ of Latter-day Saints. A formal doctrinal proclamation on marriage declares that "[m]arriage between a man and a woman is ordained of God," that "[c]hildren are entitled to birth within the bonds of matrimony, and to be reared by a father and a mother who honor marital vows with complete fidelity," and that "[h]usband and wife have a solemn responsibility to love and care for each other and for their children."[5] Strong families based on husband-wife marriage "serve as the fundamental institution for transmitting to future generations the moral strengths, traditions, and values that sustain civilization."[6] Here again, homosexuality is remote from teachings about marriage and family.

* * *

In sum, our religious understandings of marriage are rooted in beliefs about God's will concerning men, women, children, and society, rather than in the narrower issue of homosexuality. Religious teachings may address homosexual conduct and other departures from the marriage norm, but such issues are a secondary and small part of religious discourse on marriage. Indeed, it is only the

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[4] ESV STUDY BIBLE 2543-44 (2008).

[5] THE FIRST PRESIDENCY AND COUNCIL OF THE TWELVE APOSTLES OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, THE FAMILY: A PROCLAMATION TO THE WORLD (Sept. 23, 1995), *available at* http://www.lds.org/topics/family-proclamation.

[6] The Church of Jesus Christ of Latter-day Saints, Newsroom, *The Divine Institution of Marriage* (Aug. 13, 2008), http://newsroom.lds.org/ldsnewsroom/eng/commentary/the-divine-institution-of-marriage.

recent same-sex marriage movement that has made it more common for religious organizations to include discussions of homosexuality in their teachings on marriage. The contention that religious support for husband-wife marriage is rooted in anti-homosexual animus rests on a false portrayal of our beliefs.

B. We Also Defend Traditional Marriage to Protect Vital Interests in the Welfare of Children, Families, and Society.

Until the same-sex marriage controversy erupted, it was commonly accepted that children thrive best when reared by their mother and father. That truth, confirmed by millennia of human experience, was improperly cast aside by the district court when it concluded that Indiana's marriage laws fail rational basis review. *See Baskin*, 2014 WL 2884868, at *13.

Under that generous standard, "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *FCC v. Beach Commc'ns*, 508 U.S. 307, 315 (1993) (citations omitted). Moreover, "[n]othing in the Constitution requires [Indiana] to accept as truth the most advanced and sophisticated [scientific] opinion." *Alberts v. California*, 354 U.S. 475, 501 (1957) (Harlan, J., concurring in the result). The Fourteenth Amendment poses no limitation on State lawmaking "simply because there is no conclusive evidence or empirical data." *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 63 (1973). And, of course, States may protect values "spiritual as well as physical, aesthetic as well as monetary." *Berman v. Parker*, 348 U.S. 26, 33 (1954). Well-founded judgments that society needs husband-wife marriage and the security it gives children furnish a "reasonably conceivable state of facts that could

provide a rational basis" for distinguishing between opposite-sex and same-sex couples. *Beach Commc'ns*, 508 U.S. at 313.

1. Procreation and Child-Rearing Ideally Occur Within a Stable Marriage Between a Man and a Woman.

Counseling millions of people over countless years gives us a unique perspective on the deeply personal, painful, and often fraught circumstances surrounding the breakdown of marriages and the costs of child-rearing out of wedlock. That vast experience deserves this Court's consideration and respect, no less than the recent sociological studies and positions that have dominated the debate. Our experience affirms the benefits of husband-wife marriage for the protection of children and the good of society.

a. Sex between men and women presents a social challenge. "[A]n orderly society requires some mechanism for coping with the fact that sexual intercourse commonly results in pregnancy and childbirth." *Morrison v. Sadler*, 821 N.E.2d 15, 25-26 (Ind. Ct. App. 2005) (internal quotation marks and citation omitted). Marriage provides "the important legal and normative link between heterosexual intercourse and procreation on the one hand and family responsibilities on the other. The partners in a marriage are expected to engage in exclusive sexual relations, with children the probable result and paternity presumed." *Id.* at 26 (internal quotation marks and citation omitted). Husband-

wife marriage thus "protects child well-being . . . by increasing the likelihood that the child's own mother and father will stay together in a harmonious household."[7]

b. Our own experience, as well as social science, teaches that "family structure matters for children, and the family structure that helps children the most is a family headed by two biological parents in a low-conflict marriage."[8] Indeed, "[a] family headed by two married parents who are the biological mother and father of their children is the optimal arrangement for maintaining a socially stable fertility rate, rearing children, and inculcating in them the [values] required for politically liberal citizenship."[9]

Innate differences between men and women mean 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." *Hernandez*, 855 N.E.2d at 7; *see also Lofton v. Sec'y of Dep't of Children and Family Servs.*, 358 F.3d 804, 819 (11th Cir. 2004) ("[C]hildren benefit from the presence of both a father and mother in the home."). Mothers are critical for child development, of course, but research also demonstrates that fathers' contributions to child-rearing are equally important.[10] "The burden of social science evidence supports the idea that gender-differentiated parenting is important for

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[7] Maggie Gallagher, *(How) Will Gay Marriage Weaken Marriage As a Social Institution: A Reply to Andrew Koppelman*, 2 U. ST. THOMAS L.J. 33, 50-51 (2004).

[8] KRISTIN ANDERSON MOORE ET AL., CHILD TRENDS, MARRIAGE FROM A CHILD'S PERSPECTIVE: HOW DOES FAMILY STRUCTURE AFFECT CHILDREN AND WHAT CAN WE DO ABOUT IT? 1-2 (June 2002), http://www.childtrends.org/files/MarriageRB602.pdf.

[9] Matthew B. O'Brien, *Why Liberal Neutrality Prohibits Same-Sex Marriage: Rawls, Political Liberalism, and the Family*, 2012 BRIT. J. AM. LEG. STUD. 411, 414.

[10] *See, e.g.*, W. BRADFORD WILCOX ET AL., WHY MARRIAGE MATTERS (2d ed. 2005).

human development and that the contribution of fathers to childrearing is unique and irreplaceable."[11]

2. Limiting Marriage to Male-Female Couples Furthers Powerful State Interests.

a. Children reared in family structures other than the stable husband-wife home with both biological parents "face higher risks of poor outcomes than do children in intact families headed by two biological parents."[12] Such disadvantaged children bear a higher risk of experiencing poverty, suicide, mental illness, physical illness, infant mortality, lower educational achievement, juvenile delinquency, adult criminality, unwed teen parenthood, lower life expectancy, and reduced intimacy with parents.[13]

The connections between such social pathologies and family structure are anything but impersonal statistics to us. We know all too well the personal tragedies associated with unwed parenting and family breakdown. We have seen boys, bereft of their fathers or any proper male role model, acting out in violence, joining gangs, and engaging in other destructive social and sexual behavior. We have ministered to those boys in prisons where too many are consigned to live out their ruined lives. We have cared for and wept with victims left in their destructive

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[11] DAVID POPENOE, LIFE WITHOUT FATHER: COMPELLING NEW EVIDENCE THAT FATHERHOOD & MARRIAGE ARE INDISPENSABLE FOR THE GOOD OF CHILDREN & SOCIETY 146 (1996).

[12] MOORE, *supra* note 10, at 6.

[13] *See generally* Brief Amici Curiae of James Q. Wilson et al., Legal and Family Scholars In Support of Appellees at 41-43, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999), *available at* http://www.courts.ca.gov/documents/Legal_Family_Scholars_Amicus_Brief.pdf.

wake. And we have seen young girls, deprived of the love and affection of a father, fall into self-destructive behavior that too often results in pregnancy and out-of-wedlock birth—thereby cruelly repeating the cycle.

Only male-female relationships can create children. Children need their mothers *and* fathers. And society needs mothers *and* fathers to raise their children. That is why society needs the institution of male-female marriage and why Indiana is right to specially protect and support it.

b. When it comes to marriage, the law is a teacher. "[L]aw is not just an ingenious collection of devices to avoid or adjust disputes and to advance this or that interest, but also a way that society makes sense of things."[14] By reserving marriage for the relationship between a man and a woman, the law encourages socially optimal behavior through an institution that supports and confirms the People's deep cultural understanding—and the sociological truth—that stable mother-father marital unions are best for children. "Recognizing same-sex relationships as marriages would legally abolish that ideal. No civil institution would reinforce the notion that men and women typically have different strengths as parents; that boys and girls tend to benefit from fathers and mothers in different ways."[15]

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[14] MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW: AMERICAN FAILURES, EUROPEAN CHALLENGES 7-8 (1987).

[15] SHERIF GIRGIS, RYAN T. ANDERSON, & ROBERT P. GEORGE, WHAT IS MARRIAGE? 58 (2012).

A gender-neutral definition of marriage changes its message and function by redirecting it to serve the interests of adults.[16] That change would harness the law for the self-interest of those in power (adults). "One may see these kinds of social consequences of legal change as good, or as questionable, or as both. But to argue that these kinds of cultural effects of law do not exist, and need not be taken into account when contemplating major changes in family law, is to demonstrate a fundamental lack of intellectual seriousness about the power of law in American society."[17] And we are convinced that transforming marriage into a relationship primarily directed at adults and their life choices will deepen the devastating effects America has suffered over the last half-century with the devaluing of marriage as a child-centered institution.

C. We Support Laws Protecting Traditional Marriage to Safeguard the Marriage Institution Against Judicial Redefinition.

Indiana's marriage statute is among the dozens of State provisions reaffirming the man-woman definition of marriage based on democratic "reflection and choice."[18] Indiana lawmakers added the historic definition of marriage to their state law, not out of animus toward any group, but as a security against the potential modification of Indiana law by State courts. *See Kitchen v. Herbert*, No. 13-4178, 2014 WL 2868044, at *1 (10th Cir. June 28, 2014) (noting that Utah

[16] *See, e.g.*, Ralph Wedgwood, *The Fundamental Argument for Same-Sex Marriage*, 7 J. POL. PHIL. 225, 225 (1999) ("The basic rationale for marriage lies in its serving certain legitimate and important interests of married couples.").

[17] INSTITUTE FOR AMERICAN VALUES, MARRIAGE AND THE LAW: A STATEMENT OF PRINCIPLES 26 (2006).

[18] THE FEDERALIST NO. 1, at 3 (Jacob E. Cooke ed., 1961) (Alexander Hamilton).

lawmakers and voters adopted similar provisions defining marriage "because they felt threatened by state-court opinions allowing same-sex marriage"). Like laws banning assisted suicide, traditional marriage, "[t]hough deeply rooted … [has] in recent years been reexamined and, generally, reaffirmed." *Wash. v. Glucksberg*, 521 U.S. 702, 716 (1997).

II. Indiana's Laws Reserving Marriage for a Man and a Woman Are Not Invalid Expressions of Animus.

None of these reasons behind our support for traditional marriage is rooted in hostility or animus. Each is sufficiently rational and legitimate to satisfy the Constitution. But we also want to underscore that allegations of animus play a sharply limited role in equal protection analysis.

A. Allegations of Animus Are Relevant *Only* When a Law Can Be Explained Solely By Animus with No Legitimate Purpose.

Judicial inquiry into animus is an exception to the rule that a law will not be declared unconstitutional "on the basis of an alleged illicit legislative motive." *United States v. O'Brien*, 391 U.S. 367, 383 (1968). Inquiring into animus to decide an equal protection claim serves the limited reason of "ensur[ing] that classifications are not drawn *for the purpose of* disadvantaging the group burdened by the law." *Romer v. Evans*, 517 U.S. 620, 633 (1996) (emphasis added). Merely showing that a challenged law suggests "'negative attitudes'" or "'fear'" toward a group is insufficient to strike it down. *Bd. Trustees Univ. Ala. v. Garrett*, 531 U.S. 356, 367 (2001). "Although such biases may often accompany irrational (and therefore unconstitutional) discrimination, *their presence alone does not a*

constitutional violation make." *Id.* (emphasis added). Instead, it must be shown "that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part '*because of*,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (emphasis added). Only proof of hostility toward the affected group, unmixed with *any* legitimate purpose for the challenged classification, justifies striking down a law for impermissible animus. *See Bishop v. Smith*, Nos. 14-5003 & 14-5006, 2014 WL 3537847, at *23 n.5 (10th Cir. July 18, 2014) (Holmes, J., concurring).

B. Neither *Windsor* Nor *Romer* Justifies This Court in Construing Indiana's Marriage Statute As An Expression of Impermissible Animus.

These limits on the animus inquiry characterized the Supreme Court's approach in *Windsor* and *Romer*. *Windsor* struck down section 3 of the Defense of Marriage Act ("DOMA") as a "'discrimination[ ] of an unusual character'" requiring "careful consideration." *United States v. Windsor*, 570 U.S. ___, 133 S. Ct. 2675, 2693 (2013) (quoting *Romer*, 517 U.S. at 633). Only after concluding that Congress's definition of marriage was "unusual"—a "federal intrusion" on the States' "historic and essential authority to define the marital relation"—did the Court delve into "the design, purpose, and effect of DOMA" to determine whether the law was "motived by an improper animus or purpose." *Id.* at 2692-93. Its purpose, the Court found, was to "impose restrictions and disabilities" on rights granted by those States that had chosen to recognize same-sex marriage. *Id.* at 2692.

Unlike DOMA, State laws like Indiana's that reaffirm the historic definition of marriage cannot be described as classifications of an "unusual character": they are the historical and present norm. *Windsor* freely acknowledged that "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" and "[t]he limitation of lawful marriage to heterosexual couples … for centuries had been deemed both necessary and fundamental." *Id.* at 2689. Also unlike DOMA, Indiana laws reaffirming the ancient understanding of marriage are perfectly normal because State laws regulating marriage *are* the norm—as the *Windsor* Court spent pages emphasizing. *See id.* at 2693 (describing authority over the marital relation as "'a virtually exclusive province of the States'") (quoting *Sosna v. Iowa*, 419 U.S. 393, 404 (1975)). *Windsor* thus denies any basis for inquiring into alleged animus here because State marriage laws like Indiana's are not unusual in content or in the source of their authority.

Windsor did not create an independent right to same-sex marriage; it invalidated DOMA as a "federal intrusion" on the States' "historic and essential authority to define the marital relation." 133 S. Ct. at 2692. *Windsor* nowhere suggests that state laws memorializing the historical definition of marriage are invalid, much less announces a national right to same-sex marriage under the rubric of equal protection. In fact, the limited inquiry into animus has never produced a new constitutional right, given the Court's injunction against "creat[ing] substantive constitutional rights in the name of guaranteeing equal protection of

the laws." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33 (1973). *Romer* likewise offers no support for inquiring into allegations that Indiana's marriage definition is based on animus. There too, the Court said, the challenged discrimination was "unusual"—indeed "unprecedented." *Romer*, 517 U.S. at 633. Animus fatally undermined the Colorado provision because "'all that the government c[ould] come up with in defense of the law is that the people who are hurt by it happen to be irrationally hated or irrationally feared.'" *Cook v. Gates*, 528 F.3d 42, 61 (1st Cir. 2008) (quoting *Milner v. Apfel*, 148 F.3d 812, 817 (7th Cir. 1998)). Unlike the broad and novel provision struck down in *Romer*, Indiana's marriage law "only made explicit a tacit rule that until recently had been universal and unquestioned for the entirety of our legal history as a country: that same-sex unions cannot be sanctioned as marriages by the State." *Bishop*, 2014 WL 3537847, at *27 (Holmes, J., concurring).

Indiana's statute excluding same-sex marriage is "free from impermissible animus," in short, because it "does not sweep broadly—it excludes gays and lesbians from the single institution of marriage—and it cannot sensibly be depicted as 'unusual' where the State was simply exercising its age-old police power to define marriage in the way that it, along with every other State, always had." *Id.* at *30.

C. This Court Should Reject Arguments Invoking Animus as a Justification for Nullifying State Marriage Laws.

Subjecting Indiana's marriage statute to heightened scrutiny based on Plaintiffs' unfounded allegations of animus—a finding nowhere authorized by

Supreme Court precedent when a challenged classification is not "unusual"—would have serious consequences.

First, such an approach would brand Indiana voters as irrational or bigoted. Maligning their deeply held convictions would "demean[ ]" them, with "the resulting injury and indignity" of having their personal convictions condemned by a court and used as the basis for overturning laws they personally approved. *Windsor*, 133 S. Ct. at 2694, 2692; *see also Burwell v. Hobby Lobby Stores, Inc.*, Nos. 13-354, 13-356, 2014 WL 2921709, at *28 (U.S. June 30, 2014) (Kennedy, J., concurring) (citation omitted) ("free exercise [of religion] is essential in preserving [citizens'] own dignity and in striving for a self-definition shaped by their religious precepts.").

Second, such a decision would seriously distort the established framework for deciding equal protection claims, which assigns "different levels of scrutiny to different types of classifications." *Clark v. Jeter*, 486 U.S. 456, 461 (1988). Because sexual orientation does not characterize a suspect class and marrying a person of the same sex is not a fundamental right, "[a] century of Supreme Court adjudication under the Equal Protection Clause affirmatively supports the application of the traditional standard of review, which requires only that [State laws defining marriage] be shown to bear some rational relationship to legitimate state purposes." *Rodriguez*, 411 U.S. at 40. Applying a different standard here, based on alleged animus when Indiana's law is not "unusual," would distort the well-settled equal protection framework.

Third, denying Indiana's marriage laws the presumption of validity owed under rational basis review would deprive Indiana voters of the benefits of federalism. For "[i]n the federal system States 'respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times.'" *Schuette*, 2014 WL 1577512, at *15 (internal quotations omitted). Silencing those democratic voices on spurious charges of animus would undo the choice of "[Indiana] lawmakers [who] exercised their privilege to enact laws as a basic exercise of their democratic power." *Id.*

In the marriage context, this disenfranchisement would fall especially hard on faith communities, which by religious mission and tradition shoulder much of the burden of sustaining a vibrant marriage culture and supporting families and individuals when marriages fail. By declaring Indiana's marriage statute unconstitutional, their strongly held values would no longer be reflected in the law—indeed, those values would be labeled illegitimate.[19] The implications of such a declaration would seriously harm religious organizations and people of faith, given frequent comparisons between opposition to same-sex marriage and racism.[20] Because "the law can be a teacher," *Garrett*, 531 U.S. at 375 (Kennedy, J., concurring), a judicial decision declaring traditional marriage unconstitutional

[19] Striking down State marriage laws for animus also would be unjustly one-sided. Laws protecting traditional marriage no more imply animus toward same-sex couples than laws redefining marriage imply animus toward people of faith.

[20] *See* William N. Eskridge, Jr., *The History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1507 (1993) ("Just as white supremacy is the ideology that undergirds excluding different-race couples from the institution of marriage, homophobia is the ideology that undergirds excluding same-sex couples from that same institution.").

would indefensibly condemn those who believe in traditional marriage as social and political outcasts.[21] Indefensible results like these can be avoided only by following Justice Kennedy's admonition—that "courts may not disempower the voters [or their elected representatives] from choosing which path to follow." *Schuette*, 2014 WL 1577512, at *14.[22]

III. Indiana's Marriage Statute Is Not Invalid Because It Was Informed by Religious and Moral Viewpoints.

We finally address the all-too-common argument that Indiana's marriage law is invalid because it reflects the religious or moral views of legislators who approved it. *See DeBoer v. Snyder*, 973 F.Supp.2d 757, 773 (E.D. Mich. 2014) (holding that a similar provision of Michigan law offended constitutional principles "prevent[ing] the state from mandating adherence to an established religion . . . or 'enforcing private moral or religious beliefs without an accompanying secular purpose.'") (internal quotation and citations omitted). That argument is so thoroughly flawed that a prominent advocate for same-sex marriage criticized it as "outside the space for legitimate disagreement." Roy T. Englert, Jr., *Unsustainable Arguments Won't*

[21] *See* GIRGIS, ET AL., *supra* note 17, at 9 ("If civil marriage is redefined, believing what virtually every human society once believed about marriage—that it is a male-female union—will be seen increasingly as a malicious prejudice, to be driven to the margins of culture.").

[22] Eschewing a constitutional interpretation that would deepen tensions over sexual orientation is consistent with the Supreme Court's recent decisions in the sensitive areas of race and religion. *See Schuette*, 2014 WL 1577512, at *14 (rejecting an interpretation of the Equal Protection Clause under which "[r]acial division would be validated, not discouraged"); *Town of*, 134 S. Ct. at 1819 ("A test that would sweep away what has so long been settled would create new controversy and begin anew the very divisions along religious lines that the Establishment Clause seeks to prevent.") (citation omitted).

Advance Case for Marriage Equality, Nat'l L.J., Apr. 21, 2014, at 35. It's easy to see why.

History provides the baseline for what practices the Establishment Clause prohibits, *see Town of Greece*, 134 S. Ct. at 1819, and American history brims with evidence that religion has contributed to the Nation's formative developments—from the founding[23] to the abolition of slavery,[24] the fight for women's suffrage,[25] and the civil rights movement.[26] Religious organizations and people of faith have always participated actively in the great moral and political questions of the day. Their support for laws preserving the traditional institution of marriage is consistent with that familiar pattern of religion in American public life.

The Establishment Clause offers no excuse for departing from that pattern. It "may not be used as a sword to justify repression of religion or its adherents from any aspect of public life." *McDaniel v. Paty*, 435 U.S. 618, 640-41 (1978) (Brennan, J., concurring in the judgment) (citations omitted); *see also Walz v. Tax Comm'n*,

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[23] "[T]he Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him." *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 212 (1963). Accordingly, they amended the Constitution to secure religious liberty as America's first freedom. *See* U.S. CONST. amend. 1.

[24] Lincoln's presidential speeches were "suffused with" biblical references that inspired and sustained the fight to end slavery. WILLIAM LEE MILLER, LINCOLN'S VIRTUES 50 (2002).

[25] Susan B. Anthony argued that women's suffrage would bring moral and religious issues "into the political arena" because such issues were of special importance to women. Letter from Susan B. Anthony to Dr. George E. Vincent (Aug. 1904), *in* 3 IDA HUSTED HARPER, LIFE AND WORKS OF SUSAN B. ANTHONY, at 1294 (1908).

[26] Martin Luther King's best-known speeches and writings relied on biblical language and imagery. *See, e.g.*, Martin Luther King, I Have a Dream (1963), *in* I HAVE A DREAM: WRITINGS AND SPEECHES THAT CHANGED THE WORLD, at 105-06 (James Melvin Washington ed., 1992).

397 U.S. 664, 670 (1970) (right to engage in "vigorous advocacy of legal or constitutional positions" belongs to "churches, as much as secular bodies and private citizens"). Certainly, courts have no warrant for pronouncing the religious beliefs of voters legitimate when they approve of same-sex marriage and ignorant or hateful when they oppose it. *See Larson v. Valente*, 456 U.S. 228, 244 (1982).

Voiding Indiana's marriage statute because of its support by religious voters or organizations would would operate as a forbidden "religious gerrymander," indirectly "regulat[ing] … [political participation] because it is undertaken for religious reasons." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) (citations omitted). Such open hostility toward religion is "at war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion." *Illinois ex rel. McCollum v. Bd. Educ. Sch. Dist.*, 333 U.S. 203, 211-12 (1948); *see also Bd. Ed. Westside Cnty Schs. v. Mergens*, 496 U.S. 226 (1990) at 248 ("[The Constitution] does not license government to treat religion and those who teach or practice it ... as subversive of American ideals and therefore subject to unique disabilities.") (internal quotation marks omitted). Justice Kennedy has recently reminded us that "[i]n our constitutional tradition, freedom means that all persons have the right to believe or strive to believe in a divine creator and a divine law…. Free exercise in this sense … means, too, the right to express those beliefs and to establish one's religious (or non-religious) self-definition *in the political, civic, and economic life of our larger community*." *Burwell*, 2014 WL 2921709, at *28 (Kennedy, J., concurring) (emphasis added).

Overturning Indiana's marriage statute because of the religious or moral views that informed its enactment would indirectly strip Indiana voters of their "fundamental right," *Schuette*, 2014 WL 1577512, at *15, as free and equal citizens in our democracy to deliberate and decide a basic question—namely, the nature of marriage—that profoundly affects their common lives together. "Those who won our independence believed that … freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth" and that "public discussion is a political duty, and that this should be a fundamental principle of the American government." *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (footnote omitted). Voters of every opinion—and their elected representatives—may freely support laws reflecting their own moral judgments about what is best for society. *See Harris v. McRae*, 448 U.S. 297, 319-20 (1980); *McGowan v. Maryland*, 366 U.S. 420, 422 (1961). And "no less than members of any other group, [religious Americans must] enjoy the full measure of protection afforded speech, association, and political activity generally." *McDaniel*, 435 U.S. at 641 (Brennan, J., concurring in the judgment).

Similar principles guided the Supreme Court in its recent *Schuette* decision. There the Court declined to take "a difficult question from the reach of the voters," who had approved a constitutional amendment banning the use of affirmative action in college admissions. *Schuette*, 2014 WL 1577512, at *16. Justice Kennedy perceived "serious First Amendment implications" in "remov[ing] that question "from the realm of public discussion, dialogue, and debate." *Id.* He concluded that

overturning the Michigan affirmative action amendment would place "an unprecedented restriction on the exercise of a fundamental right … to speak and debate and learn and then, as a matter of political will, to act through a lawful electoral process." *Id.* at *15.

Schuette applies with equal force here. Nullifying Indiana's marriage statute because of the religious or moral views expressed by lawmakers who proposed or adopted it would abridge the fundamental right of citizens and their elected representatives to participate authentically in the processes of self-government *as believers*. If pursued consistently, a policy of voiding laws when they reflect controversial religious or moral judgments would mean the end of representative government as we know it. For "[c]onflicting claims of morality … are raised by opponents and proponents of almost every [legislative] measure." *Dandridge v. Williams*, 397 U.S. 471, 487 (1970). From criminal laws, to business and labor regulations, environmental legislation, military spending, and universal health care—law and public policy are constantly based on notions of morality. *See, e.g.*, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 257 (1964) (collecting decisions upholding federal laws where "Congress was legislating against moral wrongs"). Perhaps this is why President Obama recognized that "to say that men and women should not inject their 'personal morality' into public policy debates is a practical absurdity."[27]

[27] Barack Obama, Call to Renewal Keynote Address (June 28, 2006), *available at* http://www.nytimes.com/2006/06/28/us/politics/2006obamaspeech.html?pagewanted=all&_r=0.

Religious liberty warrants special protection, not special burdens. The Constitution secures for every American the rights to rely on and to freely express their religious beliefs and other convictions when debating and making decisions about important matters of public policy like same-sex marriage. Subjecting a law to greater judicial scrutiny because of the support it received from religious organizations and people of faith would indefensibly burden the exercise of those essential democratic rights. Indiana's marriage statute must be judged based on settled rules of law—not on a more demanding standard born of suspicion toward religion, religious believers, or their values.[28]

CONCLUSION

Marriage, understood as the union of one man and one woman, remains a vital and foundational institution of civil society. The government's interests in continuing to encourage and support husband-wife marriage are not only legitimate but compelling. And religious institutions and persons who support husband-wife marriage do so not based on illicit animosity but on constitutionally protected religious *and* rational judgments about what is best for society. Indiana's marriage statute should therefore be upheld, allowing the democratic conversation about marriage to continue.

DATED this 22nd day of July, 2014.

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[28] In addition to their constitutional rights, religious believers possess moral rights to express themselves on public issues in religious terms and to give or withhold their consent to coercive measures based on their religious convictions alone. *See* CHRISTOPHER J. EBERLE, RELIGIOUS CONVICTION IN LIBERAL POLITICS 333 (2002); ROBERT AUDI & NICHOLAS WOLTERSTORFF, RELIGION IN THE PUBLIC SQUARE 94 (1997).

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 29(b) because it contains 6,926 words, excluding the parts of the brief exempted by Fed. R. App. P. 32 (a)(7)(B)(iii).

This brief complies with the requirements of Fed. R. App. P. 32 (a)(6) and Circuit Rule 32(b) because it has been prepared in a proportionally-spaced typeface using Microsoft Office Word 2010 in 12-Point Century style in the body of the brief and 11-point Century style in the footnotes.

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CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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STATEMENTS OF INTEREST OF THE *AMICI*

The United States Conference of Catholic Bishops ("USCCB" or "Conference") is a nonprofit corporation, the members of which are the Catholic Bishops in the United States. The USCCB advocates and promotes the pastoral teaching of the U.S. Catholic Bishops in such diverse areas of the nation's life as the free expression of ideas, fair employment and equal opportunity for the underprivileged, protection of the rights of parents and children, the sanctity of life, and the nature of marriage. Values of particular importance to the Conference include the promotion and defense of marriage, the protection of the First Amendment rights of religious organizations and their adherents, and the proper development of the nation's jurisprudence on these issues.

The National Association of Evangelicals ("NAE") is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It serves 41 member denominations, as well as numerous evangelical associations, missions, nonprofits, colleges, seminaries, and independent churches. NAE serves as the collective voice of evangelical churches, as well as other church-related and independent religious ministries.

The Church of Jesus Christ of Latter-day Saints ("LDS Church") is a Christian denomination with over 14 million members worldwide. Marriage and the family are central to the LDS Church and its members. The LDS Church teaches that marriage between a man and a woman is ordained of God, that the traditional family is the foundation of society, and that marriage and family supply

the crucial relationships through which parents and children acquire private and public virtue. Out of support for these fundamental beliefs, the LDS Church appears in this case to defend the traditional, husband-wife definition of marriage.

The Ethics and Religious Liberty Commission (ERLC) is the moral concerns and public policy entity of the Southern Baptist Convention (SBC), the nation's largest Protestant denomination, with over 46,000 churches and 16 million members. The ERLC is charged by the SBC with addressing public policy affecting such issues as marriage and family, the sanctity of human life, ethics, and religious liberty. Marriage is a crucial social institution. As such, we seek to strengthen and protect it for the benefit of all.

The Lutheran Church-Missouri Synod is the second largest Lutheran denomination in North America, with approximately 6,150 member congregations which, in turn, have approximately 2.4 million baptized members. The Synod believes that marriage is a sacred union of one man and one woman, *Genesis* 2:24-25, and that God gave marriage as a picture of the relationship between Christ and His bride the Church, *Ephesians* 5:32. As a Christian body in this country, the Synod believes it has the duty and responsibility to speak publicly in support of traditional marriage and to protect marriage as a divinely created relationship between one man and one woman.