Nos. 14-14061-AA
14-14066-AA

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JAMES DOMER BRENNER, *et al.*, *Appellees,* *v.* SEC'Y, FLA. DEP'T OF HEALTH, *et al.*, *Appellants.*	SLOAN GRIMSLEY, *et al.*, *Appellees,* *v.* SEC'Y, FLA. DEP'T OF HEALTH AND SEC'Y, FLA. DEP'T OF MGMT. SERVS., *et al.*, *Appellants.*

Appeal from the United States District Court
for the Northern District of Florida
Civil Case No. 4:14-cv-00107-RH-CAS (Judge Robert L. Hinkle)

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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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

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, pursuant to Eleventh Circuit Rule 26.1-1, certify that the following persons and entities have an interest in the outcome of this case and/or appeal:

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v.	*v.*
SEC'Y, FLA. DEP'T OF HEALTH, *et al.*,	SEC'Y, FLA. DEP'T OF HEALTH AND SEC'Y, FLA. DEP'T OF MGMT. SERVS., *et al.*,
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STATEMENT OF THE ISSUE

Whether the Fourteenth Amendment to the United States Constitution requires the State of Florida to license or recognize same-sex marriage.

IDENTITY AND INTEREST OF *AMICI*[1]

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 marriage between a man and a woman 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 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

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[1] No party's counsel authored the brief in whole or in part, and no one other than the *amici curiae*, their members, or their counsel contributed money that was intended to fund preparing or submitting the brief. Because not all parties consented to the filing of this brief it is submitted with a Motion for Leave to File.

with the devastating effects of out-of-wedlock births, failed marriages, and the general decline of the venerable m 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*, 572 U.S. ___, 134 S. Ct. 1623, 1637 (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 People of Florida did not violate the United States Constitution by acting to preserve the traditional definition of marriage. Individual statements of interest are found in the attached Addendum.

SUMMARY OF ARGUMENT

Advocates striving to redefine marriage routinely argue that those who defend marriage between a man and a woman are motivated by "anti-gay animus," in the form of unthinking ignorance or actual hostility. Such aspersions 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, 107 S. Ct. 2254, 2265 (1987), indeed as being truly "sacred." *Griswold v. Connecticut*, 381 U.S. 479, 486, 85 S. Ct. 1678, 1682 (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.*,

573 U.S. ___, 134 S. Ct. 2751, 2785 (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 sustained 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 people 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, 45, 5 S. Ct. 747, 764 (1885), and not from animosity toward anyone.

In this brief we demonstrate that Article I, § 27 of the Florida Constitution, and related provisions of Florida Statutes, should not be overturned based on the spurious charge that religious organizations and voters 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 the Florida Marriage Amendment by no stretch undermines its constitutionality.

ARGUMENT

I. The Florida Marriage Amendment Should Not Be Invalidated or Subjected to Closer Judicial Scrutiny Based on False Accusations of Animus.

The district court declared the Florida Marriage Amendment unconstitutional, reasoning that it "stems entirely, or almost entirely, from moral disapproval of the practice" and that Supreme Court precedents have "rejected moral disapproval of same-sex orientation as a legitimate basis for a law." *Brenner v. Scott*, 999 F.Supp.2d 1278, 1289, 1290 (N.D. Fla. 2014). In reaching that conclusion the district court did not address plaintiffs' argument that reserving marriage for man-woman couples expresses illicit animus toward homosexuals. *See* Pls' Mot. Prelim. Injunct., *Brenner v. Scott*, 4:14cv138-RH/CAS, at 30 n.35 (Apr. 25, 2014). We address animus here in anticipation that plaintiffs will reiterate their accusation of animus on appeal.

We emphatically deny that religious organizations and voters support marriage between a man and a woman out of animus. Our

U.S. 356, 367, 121 S. Ct. 955, 964 (2001). "Although such biases may often accompany irrational (and therefore unconstitutional) discrimination, *their presence alone does not a constitutional violation make*." *Id.* (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 DeBoer*, 2014 WL 5748990, at *15 (animus "do[es] not turn on reading the minds of [lawmakers] ... [but] on asking whether anything but prejudice to the affected class could explain the law.").

B. Neither *Windsor* Nor *Romer* Justifies This Court in Construing the Florida Marriage Amendment 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, 2692 (2013) (quoting *Romer*, 517 U.S. at 633, 116 S. Ct. at 1628). 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 Florida'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, Florida 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, 95 S. Ct. 553, 559

(1975)). *Windsor* thus denies any basis for inquiring into alleged animus here because State marriage laws like Florida's reflect "exactly what every State has been doing for hundreds of years: defining marriage as they see it." *DeBoer*, 2014 WL 5748990, at *19.

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." *Windsor*, 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, 93 S. Ct. 1278, 1297 (1973).

Romer likewise offers no support for inquiring into allegations that the Florida Marriage Amendment is based on animus. There too, the Court said, the challenged discrimination was "unusual"—indeed "unprecedented." *Romer*, 517 U.S. at 633, 116 S. Ct. at 1628. Animus

faiths teach love and respect for all people. The understanding of marriage as a faithful union of man and woman predates by centuries the demand for same-sex marriage,[2] and our support for it has nothing to do with disrespect or antipathy toward any group.

Our support for man-woman marriage stands on the affirmative belief that such unions complement our human natures as male and female, promote responsible procreation, and provide 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, 63 S. Ct. 207, 215 (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, 8 S. Ct. 723, 726 (1888). Attributing religious support for traditional marriage to ignorance, hostility or bigotry ignores numerous rational "reasons ... to promote the institution of marriage

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[2] *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").

beyond mere moral disapproval of an excluded group." *Lawrence v. Texas*, 539 U.S. 558, 585, 123 S. Ct. 2472, 2488 (2003)(O'Connor, J., concurring). Those reasons are informed by history, right reason, experience, common sense, and social science. Many courts have found those reasons persuasive. *See, e.g.*, *DeBoer v. Snyder*, Nos. 14–1341, 3057, 3464, 5291, 5297, 5818, 2014 WL 5748990, at *26-27 (6th Cir. Nov. 6, 2014); *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 867-68 (8th Cir. 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.[3] 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

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

for procreation that is unique to such a union—there can be no marriage.[4] 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 society can "know to treat a couple as married and not as single."[5] Homosexuality is far from central to Evangelical teachings on marriage.

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[4] *See id.* at ¶¶ 371-72.

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

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."[6] 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."[7] Here again, homosexuality is remote from teachings about marriage and family.

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[6] 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.

[7] 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.

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 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 founded on anti-homosexual animus misrepresents 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 cavalierly dismissed by the district court, which rejected every one of the state's defenses of Florida marriage law as "insufficient," even labelling as "pretext" the state's argument that marriage is essentially a male-female institution intended to provide a stable family setting for

children born as a result of sexual relations between a man and a woman. *Brenner*, 999 F.Supp.2d at 1289. But Florida's understanding of marriage as an essentially procreative institution is entirely valid, and its interests in maintaining the normative and practical connections between marriage and the bearing and rearing of children are compelling.

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 unusual insight into the deeply personal, painful, and often fraught circumstances surrounding the breakdown of marriages and the cost of child-rearing out of wedlock. That vast experience deserves this Court's consideration and respect, no less than some 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). sMarriage 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."[8]

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."[9] 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,

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[8] 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).

[9] 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.

rearing children, and inculcating in them the [values] required for politically liberal citizenship."[10]

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 v. Robles*, 7 N.Y.3d 338, 855 N.E.2d 1, 7 (2006); *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 confirms the importance of fathers for successful child-rearing.[11] "The burden of social science evidence supports the idea that gender-differentiated parenting is important for human development and that the contribution of fathers to childrearing is unique and irreplaceable."[12]

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[10] 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.

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

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

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."[13] 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.[14]

The connections between such social pathologies and family structure are anything but impersonal statistics to us. We know from experience 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 behavior. We have ministered to those

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[13] MOORE, *supra* note 9, at 6.

[14] *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.

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

It takes a mother and a father to create a child. Children need their mothers *and* fathers. And society needs mothers *and* fathers to rear their children. That is why society needs the institution of male-female marriage and why Florida 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."[15] 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

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

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."[16]

A gender-neutral definition of marriage changes its message and function by celebrating adult relationships rather than protecting children.[17] That shift 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

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

[17] *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.").

power of law in American society."[18] Sober reflection suggests that transforming marriage into a relationship primarily directed at affirming the life choices of adults 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 the Marriage Institution Against Judicial Redefinition.

The Florida Marriage Amendment resembles dozens of State provisions reaffirming the man-woman definition of marriage through direct democracy—"a constitutionally respected vehicle for change and resistance to change." *DeBoer*, 2014 WL 5748990, at *15. "[Florida] voters acted in concert and statewide to seek consensus and adopt a policy on a difficult subject." *Schuette*, 134 S. Ct. at 1637. They amended their constitution not out of animus, but to guard against the risk that "the courts would seize control over an issue that people of good faith care deeply about." *DeBoer*, 2014 WL 5748990, at *15. Like laws banning assisted suicide, traditional marriage, "[t]hough deeply rooted ... [has] in recent years been reexamined and, generally,

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

reaffirmed." *Washington v. Glucksberg*, 521 U.S. 702, 716, 117 S. Ct. 2258, 2265 (1997).

II. The Florida Amendment Reserving Marriage for a Man and a Woman Is Not an Invalid Expression of Animus.

None of these reasons behind our support for traditional marriage is rooted in hostility or animus. Each satisfies 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, 88 S. Ct. 1673, 88 S. Ct. 1673, 1682 (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, 116 S. Ct. 1620, 1627 (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

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) (internal quotation omitted). Unlike the broad and novel provision struck down in *Romer*, the Florida Marriage Amendment "codified a long-existing, widely held social norm already reflected in state law," placing that norm in the Florida constitution was not "unusual," and resisting the redefinition of marriage did not by itself "convey the kind of malice or unthinking prejudice the Constitution prohibits." *DeBoer*, 2014 WL 5748990, at *13-14.

The Florida Marriage Amendment is "free from impermissible animus," in short, because it merely "formalized a definition that every State had employed for almost all of American history, and it did so in a province the States had always dominated." *Bishop v. Smith*, 760 F.3d 1070, 1109 (10th Cir. 2014) (Holmes, J., concurring).

C. This Court Should Reject Arguments Invoking Animus as a Justification for Nullifying the Florida Marriage Amendment.

Subjecting the Florida amendment 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 Florida 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*, 134 S. Ct. at 2785 (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."). This "fearsome quality of animus jurisprudence," *Bishop*, 760 F.3d at 1103 (Holmes, J., concurring), would unfairly stigmatize millions of Americans who believe that marriage between a man and a woman both reflects divine law and is best for society. *Cf. Burwell*, 134 S. Ct. at 2785 (Kennedy, J., concurring). Because "the law can be a teacher," *Garrett*, 531 U.S. at 375, 121 S. Ct. at 968 (Kennedy, J., concurring), baseless but frequent comparisons between opposition to same-sex marriage and racism[19] would condemn those who believe in

[19] *See* William N. Eskridge, Jr., *The History of Same-Sex Marriage*, 79

traditional marriage as social and political outcasts.[20] As the Sixth Circuit recently held, "[i]t is no less unfair to paint the proponents of the [traditional marriage] measures as a monolithic group of hate-mongers than it is to paint the opponents as a monolithic group trying to undo American families." *DeBoer*, 2014 WL 5748990, at *15.[21]

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, 108 S. Ct. 1910, 1914 (1988). Because sexual

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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.").

[20] *See* GIRGIS, ET AL., *supra* note 16, 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.").

[21] 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*, 134 S. Ct. at 1635 (rejecting an interpretation of the Equal Protection Clause under which "[r]acial division would be validated, not discouraged"); *Town of Greece*, 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).

orientation does not characterize a suspect class and same-sex marriage 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, 93 S. Ct. at 1300. Applying a different standard here, based on alleged animus when Florida law is not unusual, would distort the well-settled equal protection framework.

Third, denying the Florida Marriage Amendment the presumption of validity owed under rational basis review would deprive Florida 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*, 134 S. Ct. at 1636 (internal quotations omitted). Silencing those democratic voices to appease spurious charges of animus would undo the choice of "[Florida] voters [who] exercised their privilege to enact laws as a basic exercise of their democratic power." *Id.* 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.[22]

III. The Florida Marriage Amendment Is Not Invalid Because It Was Influenced by Religious and Moral Viewpoints.

In this last section we address the Establishment Clause claim asserted by the Brenner plaintiffs, *see* 999 F.Supp.2d at 1284—that the Florida Marriage Amendment was unconstitutionally "enacted for the purpose of establishing a definition of marriage based upon religious beliefs of the majority." First Amended Verified Complaint, *Brenner v. Scott*, No. 4:14-cv-00107-RH-CAS, at 15 (Mar. 15, 2014). 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 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,

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[22] 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.

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 in the great questions of the day. Their support for laws preserving the 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

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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, 83 S. Ct. 1560, 1566 (1963). That is why 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 held special importance for 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).

or its adherents from any aspect of public life." *McDaniel v. Paty*, 435 U.S. 618, 640-41, 98 S. Ct. 1322, 1336 (1978) (Brennan, J., concurring in the judgment) (citations omitted); *see also Walz v. Tax Comm'n*, 397 U.S. 664, 670, 90 S. Ct. 1409, 1412 (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 redefining marriage and ignorant or hateful when they do not. *See Larson v. Valente*, 456 U.S. 228, 244, 102 S. Ct. 1673, 1683 (1982).

Voiding the Florida Marriage Amendment because of its support by religious voters or organizations 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, 113 S. Ct. 2217, 2228 (1993) (citations omitted). 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, 68 S. Ct. 461,

465 (1948); *see also Bd. Educ. Westside Cnty. Schs. v. Mergens*, 496 U.S. 226, 248, 110 S. Ct. 2356, 2371 (1990)

("[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 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*, 134 S. Ct. at 2785 (Kennedy, J., concurring) (emphasis added).

Overturning the Florida Marriage Amendment because of the religious or moral views that influenced its enactment would strip Florida voters of their "fundamental right," *Schuette*, 134 S. Ct. at 1637, as free and equal citizens in our democracy to deliberate and decide a sensitive 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, 47 S. Ct. 641, 648 (1927) (Brandeis, J., concurring) (footnote omitted). Voters of every opinion 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, 100 S. Ct. 2671, 2689 (1980); *McGowan v. Maryland*, 366 U.S. 420, 422, 81 S. Ct. 1101, 1113-14 (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, 98 S. Ct. at 1336 (Brennan, J., concurring in the judgment).

Concern about democratic self-government was central to the Sixth Circuit's recent decision to affirm the constitutionality of Michigan's Marriage Amendment—a provision substantially identical to the Florida provision challenged here. *See DeBoer*, 2014 WL 5748990, at *2. Writing for the court, Judge Sutton stressed "respect for democratic control over this traditional area of state expertise" and "[f]aith in democracy with respect to issues that the Constitution has

not committed to the courts." *Id.* at *13, *23. In particular, Judge Sutton drew on the Supreme Court's Michigan affirmative action decision in *Schuette*, noting that its reasoning "applies with equal vigor" to the issue of same-sex marriage. *Id.* at *14. In *Schuette* Justice Kennedy saw "serious First Amendment implications" in removing the question of affirmative action in university admissions "from the realm of public discussion, dialogue, and debate." *Schuette*, 134 S. Ct. at 1637. In addition, he reasoned that overturning the Michigan 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.*; *see also id.* at 1649 (Breyer, J., concurring in the judgment) ("the Constitution foresees the ballot box, not the courts, as the normal instrument for resolving differences and debates about the merits of [affirmative action] programs"). An imprudent exercise of judicial power would have the same result here.

As *DeBoer* and *Schuette* suggest, nullifying the Florida Marriage Amendment because of the religious or moral views expressed by lawmakers who proposed it or voters who adopted it would abridge the

fundamental right of citizens and their elected representatives to participate authentically in the processes of self-government *as believers*. 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, 90 S. Ct. 1153, 1162 (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, 85 S. Ct. 348, 357 (1964) (collecting decisions upholding federal laws where "Congress was legislating against moral wrongs").

The First Amendment grants religious belief and practice special protection, not special burdens. It 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 great matters of public controversy 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 constitutional rights. The Florida Marriage

Amendment 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.[27]

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. The Florida Marriage Amendment and related laws should therefore be upheld, allowing the democratic conversation about marriage to continue.

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[27] Apart from their constitutional rights, religious believers are morally entitled 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).

DATED this 21st day of November, 2014.

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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 6,950 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief also complies with the requirements of Fed. R. App. P. 32(a)(6) and Eleventh Circuit Rule 32 because it has been prepared in a proportionally-spaced typeface using Microsoft Office Word 2010 in 14-Point Century style.

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CERTIFICATE OF SERVICE

I hereby certify that on November 21, 2014, I filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit through the CM/ECF system; an original paper copy of the brief and six additional copies have been sent to the Court via Federal Express. Participating counsel in this case are registered CM/ECF users who will be served by the appellate CM/ECF system:

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INDIVIDUAL 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 represents more than 45,000 local churches from 40 different denominations and serves a constituency of millions.

The Church of Jesus Christ of Latter-day Saints ("LDS Church") is a Christian denomination with 15 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 nearly 15.8 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 6,200 member congregations and 2.3 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.