NO. 14-50196

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CLEOPATRA DELEON; NICOLE DIMETMAN; VICTOR HOLMES; MARK PHARISS,

Plaintiffs-Appellees,

v.

RICK PERRY, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF TEXAS; GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS TEXAS ATTORNEY GENERAL; DAVID LAKEY, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE DEPARTMENT OF STATE HEALTH SERVICES,

Defendants-Appellants.

On Appeal from the United States District Court
For the Western District of Texas
No. 5:13-cv-00982-OLG (Orlando L. Garcia, J)

AMICUS CURIAE BRIEF OF THE TEXAS CONSERVATIVE COALITION IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL OF THE DISTRICT COURT

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 28.2.1, the undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

APPELLANTS:

Rick Perry, in his official capacity as Governor of the State of Texas.
Greg Abbott, in his official capacity as Texas Attorney General.
David Lakey, in his official capacity as Commissioner of the Texas Department of State Health Services.

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Amicus Curiae the Texas Conservative Coalition is a tax-exempt, non-profit corporation. Pursuant to Fed. R. App. P. 26.1, it has no parent corporation, no subsidiaries, and no publicly held corporation that owns 10 percent or more of its stock.

As a legislative caucus, the Texas Conservative Coalition maintains an ongoing non-financial interest in the outcome of this case. Texas Conservative Coalition membership consents to the filing of this Brief, and includes the following:

Brian Birdwell, Texas Senate

Donna Campbell, Texas Senate

Bob Deuell, Texas Senate

Craig Estes, Texas Senate

Troy Fraser, Texas Senate

Kelly Hancock, Texas Senate

Robert Nichols, Texas Senate

Dan Patrick, Texas Senate

Ken Paxton, Texas Senate

Charles Schwertner, Texas Senate

Larry Taylor, Texas Senate

Charles "Doc" Anderson, Texas House of Representatives

Trent Ashby, Texas House of Representatives

Cecil Bell, Jr., Texas House of Representatives

Dwayne Bohac, Texas House of Representatives

Dennis Bonnen, Texas House of Representatives

Greg Bonnen, Texas House of Representatives

Angie Chen Button, Texas House of Representatives

Tom Craddick, Texas House of Representatives

Brandon Creighton, Texas House of Representatives

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/s/ Russell H. Withers
Russell H. Withers
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STATEMENT OF CONSENT OF ALL PARTIES TO FILE THIS BRIEF AND COMPLIANCE WITH FED. R. APP. 29

This Brief is filed with the consent of all parties. No party's counsel authored this Brief in whole or in part. No party or party's counsel contributed money intended to fund preparing or submitting the Brief, and no person other than Amicus Curiae, its members, or its counsel contributed money that was intended to fund the preparing or submitting the Brief.

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Texas Conservative Coalition

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INTEREST OF THE AMICUS CURIAE

The Texas Conservative Coalition (TCC) is a legislative caucus, formed in 1985 in order to shape public policy by promoting the organization's foundational principles of limited government, individual liberty, free enterprise, and traditional values. After almost thirty years, TCC is recognized as one of the largest and most influential caucuses in the Texas Legislature. TCC is a 501(c)(4) non-profit organization that relies on the support of sponsors and dues paid by caucus members. Its board of directors is comprised of members of the Texas Legislature.

TCC membership supported the Texas legislature's action to add provisions in the Texas Family Code restricting same-sex marriage. TCC also supported the adoption of Art. I, Section 32 to the Texas Constitution which defines marriage solely as a union of one man and one woman, and which was approved by a 76 percent favorable vote of the electorate.

As a legislative caucus comprised of public servants who are answerable to a Texas constituency that overwhelmingly supported the same-sex marriage restriction, TCC maintains an ongoing interest in the outcome of this case.

SUMMARY OF THE ARGUMENT

Two provisions of the Texas Family Code and one section of the Texas Constitution combine to restrict same-sex marriage in the State of Texas by defining marriage as a union between one man and one woman. The Texas Conservative Coalition argues that the district court erred in several respects when it held those laws unconstitutional under the Fourteenth Amendment to the United States Constitution, and it now presents three main arguments.

First, the district court based its decision primarily on *United States v. Windsor*, which struck down the federal prohibition on same-sex marriage in the Defense of Marriage Act. However, the district court ignored the central rationale upon which *Windsor* was decided—state authority to define and regulate marriage and domestic relations. The court did not consider the distinction between the federal law struck down in *Windsor*, and the state law at issue in this case. TCC argues, however, that Texas's marriage laws are consistent with *Windsor*, and constitutional.

Secondly, the district court erred in recognizing same-sex marriage as a fundamental right. The Supreme Court has not recognized and does not recognize same-sex marriage as a fundamental right. When social policy does not invoke a fundamental right or target a suspect class, then regulations challenged under the

Fourteenth Amendment invoke only rational basis review. Accordingly, due process challenges to Texas's marriage laws invoke only rational basis review, not strict scrutiny.

Finally, Texas's marriage laws survive rational basis review. Under rational basis, Texas's marriage laws need only be rationally related to a legitimate governmental interest, and there are a variety of justifications for Texas's laws which fall into that category. Furthermore, Texas's marriage laws continue to satisfy rational basis review when analyzed under the animus-based approach invoked by reference to *Romer* and *Lawrence*.

The Texas Conservative Coalition urges the United States Court of Appeals for the Fifth Circuit to reverse the district court's decision and declare Texas's marriage laws constitutional.

ARGUMENT

Article I, Section 32 of the Texas Constitution, Section 2.001 of the Texas Family Code, and Section 6.204 of the Texas Family Code (referred to hereinafter as "Texas's marriage laws") combine to restrict marriage in Texas to unions between one man and one woman. Plaintiffs in this case filed a motion for a preliminary injunction, arguing that Texas's marriage laws are unconstitutional under the Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution. ROA.1995. On February 26, 2014, the United

States District Court for the Western District of Texas issued an order granting Plaintiffs' motion in a ruling that declared Texas's marriage laws unconstitutional in accordance with Plaintiffs' constitutional claims. ROA.2041. TCC argues that the district court erred in several respects and should be reversed by the Court of Appeals for the Fifth Circuit.

I. The Supreme Court's ruling in *Windsor* does not require invalidation of Texas's marriage laws, and it suggests their constitutionality.

Turning to binding precedent from the United States Supreme Court, the district court relied on *Windsor*, in which the Court struck down Section 3 of the federal Defense of Marriage Act (DOMA), though it should be noted that the Court in that case did not consider Section 2 of DOMA, which reserves the right to define marriage to the states. *United States v. Windsor*, 133 S. Ct. 2675, 2682 (2013). The district court recognized its responsibility to "apply the Supreme Court's decision in *Windsor* and decide whether a state can do what the federal government cannot" do: prohibit state recognition of same-sex marriage. ROA.1996.

Ultimately concluding that Texas's marriage laws conflict with the United States Constitution's guarantees of equal protection and due process, the district court reached its conclusion by ignoring the central rationale behind the Supreme Court's ruling in *Windsor*—the States' exclusive authority to regulate marriage and domestic relations.

A. The importance of federalism and the authority of States to regulate the institution of marriage and domestic relations are central to the holding in *Windsor*.

A proper reading of *Windsor* recognizes not only that Section 3 of DOMA was struck down as unconstitutional, but also that the States' authority to regulate marriage without federal intrusion played a central role in the decision. *See Windsor*, 133 S. Ct. at 2689-93.

States have a long history of regulating marriage. *Id.* Subject to the rights protected under the Constitution, "'regulation of domestic relations' is 'an area that has long been regarded as a virtually exclusive province of the States.'" *Id.* at 2691 (quoting *Sosna v. Iowa*, 419 U.S. 393, 404 (1975)). Indeed:

> Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders. The marriage relation creates problems of large social importance. Protection of offspring, property interests, and the enforcement of marital responsibilities are but a few of commanding problems in the field of domestic relations with which the state must deal.

Williams v. North Carolina, 317 U.S. 287, 298 (1942). In short, the Constitution delegates "no authority to the Government of the United States on the subject of marriage and divorce." *Haddock v. Haddock*, 201 U.S. 562, 575 (1906). The majority in *Windsor* recognized the importance of state authority in this realm, explaining that "[c]onsistent with this allocation of authority [to the States], the Federal Government, through our history, has *deferred to state-law policy*

decisions with respect to domestic relations." *Windsor*, 133 S. Ct. at 2691 (emphasis added).

The federal DOMA statute was a departure from the historical constitutional balance between state authority to regulate marriage and federal intervention. Central to Justice Kennedy's majority opinion in *Windsor* was the fact that "DOMA, because of its reach and extent, departs from this history and tradition of reliance on state law to define marriage." *Id.* at 2692. Thus, it was "unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance." *Id.* Justice Kennedy's opinion suggests that the disruption of federalism and our system of divided government, *alone*, provided sufficient grounds to strike the federal law down as unconstitutional. *Id.*

Chief Justice John Roberts, though dissenting from the majority, agreed that "[t]he dominant theme of the majority opinion is that the Federal Government's intrusion into an area 'central to domestic relations law applicable to its residents and citizens' is sufficiently 'unusual' to set off alarm bells. I think the majority goes off course . . . but it *is undeniable that its judgment is based on federalism*." *Id.* at 2697 (Roberts, C.J., dissenting) (emphasis added) (internal citations omitted). The Chief Justice went on to point out that the central reasoning behind the majority's decision to strike down the federal DOMA law—"the State's power in

defining the marital relation"—will remain relevant as it "will come into play . . . in future cases about the constitutionality of *state* marriage definitions. So too will the concerns for state diversity and sovereignty that weigh against DOMA's constitutionality in this case." *Id.* at 2688. (Roberts, C.J., dissenting) (emphasis added). Justice Alito, in his dissent, echoed the Chief Justice's concern:

> To the extent that the Court takes the position that the question of same-sex marriage should be resolved primarily at the state level, I wholeheartedly agree. I hope that the Court will ultimately permit the people of each State to decide this question for themselves. Unless the Court is willing to allow this to occur, the *whiffs of federalism* in today's opinion of the Court will soon be scattered to the wind.

Id. at 2720 (Alito, J., dissenting) (emphasis added).

The case now before the Fifth Circuit is one of the "future cases" predicted by the Chief Justice in which courts must decide whether or not to distinguish between the *federal* prohibition of same-sex marriage struck down in *Windsor* and a similar restriction at the *state* level. Given the importance placed on state autonomy in the regulation of marital affairs by the majority in *Windsor*, the Fifth Circuit should "take the [Supreme] Court at its word and distinguish away." *Id.* at 2709 (Scalia, J., dissenting) (discussing the Chief Justice's view that "lower federal courts and state courts can distinguish [*Windsor*] when the issue before them is state denial of marital status to same-sex couples—or even that [the Supreme Court] could *theoretically* do so.").

B. Texas's marriage laws are constitutionally consistent with *Windsor*.

In line with the central reasoning in *Windsor*, Texas's marriage laws should be upheld as valid regulations of domestic relations. These regulations remain the "exclusive province" of the States, and the federal government "has deferred to state-law policy decisions" on these matters since the founding. *See Id.* at 2691-92.

In granting Plaintiffs' motion for preliminary injunction, the district court relied primarily on *Windsor*, yet it made only brief, dismissive reference to state authority in domestic relations. *See* ROA.1996 ("Regulation of marriage has traditionally been the province of the states and remains so today."). In contrast, the majority opinion in *Windsor* devoted "seven pages to describing how long and well established that power is[.]" *Windsor*, 133 S. Ct. at 2605 (Scalia, J., dissenting). *Windsor* is binding precedent, and the district court made no effort to explain why state authority in *this* case is any less important than it was to the United States Supreme Court in *that* one. It avoided the argument—and its obligation to follow *Windsor's* reasoning—altogether. At a minimum, if the Fifth Circuit affirms the district court's ruling, it should address this issue in detail. TCC argues, however, that the district court's decision is so disregards *Windsor's* reliance on state authority that the district court's decision should be reversed.

II. Plaintiffs' Equal Protection and Due Process claims demand only rational basis review.

In determining whether or not Plaintiffs were likely to prevail on the merits of their case, the district court analyzed the likelihood that their Fourteenth Amendment equal protection and due process claims would succeed. ROA.2012. Applying rational basis and strict scrutiny, respectively, to Plaintiffs' claims, the court found that Plaintiffs were likely to succeed on both grounds. *See* ROA.2018, 2025, 2032, 2034-36. TCC argues that Texas's marriage laws must survive only rational basis review because homosexuals are not a suspect class and the right to same-sex marriage is not fundamental.

A. Homosexuals are not a suspect class under the Equal Protection Clause.

Under the Fourteenth Amendment to the United States Constitution, no state may deny any person within its jurisdiction equal protection of the laws. *See* U.S. CONST. amend. XIV, § 1. The Equal Protection Clause of the Fourteenth Amendment "is essentially a direction that all persons similarly situated should be treated alike." *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985).

Depending on the classification used in a law being challenged under the Equal Protection Clause, laws are analyzed under one of three tiers of review: strict scrutiny, intermediate scrutiny, or rational basis review. *Clark v. Jeter*, 486 U.S.

456, 461 (1988). Strict scrutiny has only been applied to equal protection challenges based on classifications of race, alienage, or national origin. *See Cleburne,* 473 U.S. at 440. Intermediate scrutiny has only been used to review laws in which the classifications are based on sex or illegitimacy. *See, e.g., Clark v. Jeter*, 486 U.S. 456, 461 (1988). All other classifications are not considered to be suspect and receive only rational basis review, under which "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *See Cleburne,* 473 U.S. at 440.

Because homosexuals are not a classification based on race, alienage, national origin, sex, or illegitimacy, they are not recognized under equal protection doctrine as a suspect class, and their equal protection claims require only rational basis review. Though the district court came to a legal conclusion via rational basis review that TCC argues was incorrect, rational basis *was* the appropriate standard for Plaintiffs' equal protection claims, and the district court was correct to apply it. *See* ROA.2013.

B. Same-sex marriage is not a fundamental right under the Due Process clause.

The district court addressed two arguments presented by Plaintiffs under the Due Process Clause of the Fourteenth Amendment, but its analysis placed great importance on the status of marriage as a fundamental right which necessarily invokes strict scrutiny review. ROA.2025-26, 2028-30. TCC argues that the

district court erred in expanding the fundamental right of *marriage* to include *same-sex marriage*, and that strict scrutiny was inappropriate. Indeed, strict scrutiny has never been applied by the Supreme Court in cases of discrimination based on sexual preference. *See, e.g.*, *Romer v. Evans* 517 U.S. 620 (1996); *Lawrence v. Texas*, 539 U.S. 558 (2003). Moreover, same-sex marriage as a fundamental right was rejected when the Supreme Court summarily dismissed *Baker v. Nelson* for want of a federal question.[1] *Baker v. Nelson*, 409 U.S. 810 (1972); *Baker v. Nelson*, 191 N.W.2d 185, 186-87 (Minn. 1971) (en banc).

Under the doctrine of "substantive-due-process," only fundamental rights that are "objectively, deeply rooted in this Nation's history and tradition" qualify for scrutiny other than rational basis review. *See Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). Marriage is most certainly one of those fundamental rights. *Loving v. Virginia*, 388 U.S. 1, 12 (1967). Same-sex marriage, however, can hardly be called a deeply rooted tradition as no state permitted same-sex marriage until 2003, and that decision was the product of the state judiciary, not the democratic process. *See Goodridge v. Department of Public Health*, 798 N.E.2d 941 (2003) (holding by the Massachusetts Supreme Court that prohibitions on same-sex marriage violate the State Constitution).

[1] TCC has chosen not to discuss *Baker* in depth because TCC takes the position that same-sex marriage is not a fundamental right, even without *Baker* as precedent for lower courts to follow. While it does take the position that *Baker* is binding on lower courts, TCC expects that case and surrounding issues to be fully argued in other briefs.

Windsor also reveals that the Supreme Court does not view same-sex marriage as being "deeply rooted in this Nation's history and tradition" and, thus, non-fundamental. Indeed, Justice Kennedy's opinion considered it "fair to conclude that, until recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage." *Windsor*, 133 S. Ct. at 2689; *See also id.* at 2709 (Scalia, J., dissenting) (DOMA "did no more than codify an aspect of marriage that had been unquestioned in our society for most of its existence—indeed, had been unquestioned in virtually all societies for virtually all of human history."). If there was ever an opportunity for the Supreme Court to declare same-sex marriage a fundamental right, *Windsor* was that occasion, and the Court did not do so.

As its primary authority in recognizing a fundamental right to same-sex marriage, the district court reasoned that same-sex marriage restrictions are "analogous" to the kind of race-based marriage restrictions struck down by the United States Supreme Court in *Loving v. Virginia*. ROA.2029 ("the [*Loving*] Court held that individuals could not be restricted from exercising their 'existing' right to marry on account of their chosen partner."). The laws challenged in *Loving*, however, were "a comprehensive statutory scheme aimed at prohibiting and punishing interracial marriages." *Loving*, 388 U.S. at 4.

The kind of abhorrent racial discrimination struck down in *Loving* is not present in the case at hand. *Loving* is a case that never contemplated "subsets" of marriage as the district court claims it did. *See* ROA.2029. It was open racial discrimination as it related to the *existing* fundamental right to marry, understood as marriage between one man and one woman. *Loving*, 388 U.S. at 2 (describing plaintiffs as "Mildred Jeter, a Negro woman, and Richard Loving, a white man."). Indeed, all Supreme Court cases to date dealing with the fundamental right to marry involve opposite-sex couples. *See, e.g., Zablocki v. Redhail*, 434 U.S. 374 (1978); *Turner v. Safley*, 482 U.S. 78 (1987).

The district court broadened the definition of the "existing right to marry" as one that includes the right of people to "select the partners of their choosing" for marriage, without regard to sex. ROA.2029. Not only is that a distortion of *Loving* and other fundamental marriage rights cases, but it problematically opens the definition of marriage to a variety of unions that society has deemed unacceptable and does not include under the umbrella of the fundamental right to marry. If the right to select "partners of their choosing" is the criterion used to invoke marriage as a fundamental right, then marriage restrictions on age, polygamy, and consanguinity are also ripe for challenge. Of course, courts have upheld restrictions based on age and consanguinity. *See, e.g., Cleveland v. United States*, 329 U.S. 14, 16, 20 (1946) (holding that prosecutions for bigamy under the

Mann Act are valid). *See also Windsor*, 133 S. Ct. at 2691-92 (Scalia, J., dissenting) (citing examples of how age and consanguinity restrictions vary in different jurisdictions).

The fundamental right to marry has never been understood to be all-encompassing. Therefore, Texas's marriage laws invoke non-fundamental rights and must be analyzed for constitutionality under rational basis review.

III. Texas's marriage laws survive rational basis review.

Because Texas's marriage laws do not restrict a fundamental right and do not single out a suspect class, they are subject to rational basis review. In contrast to the district court's findings, Texas's marriage laws satisfy rational basis, and are constitutional.

Under rational basis review, a law or regulation must bear a rational relationship to a legitimate governmental purpose. *Romer*, 517 U.S. at 631. However, rational basis review begins with a strong presumption of validity and the burden is placed upon the challenging party to negate "any conceivable basis which might support it." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 314-15 (1993). Furthermore, "[i]t is a familiar principle of constitutional law that [The United States Supreme Court] will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *United States v. O'Brien*, 391 U.S. 367, 383 (1968). Though laws "born of animosity toward the

class of persons affected" may not survive rational basis review, as was the case in *Romer*, 517 U.S. at 634.

The district court concluded that Texas's marriage laws are unconstitutional under the Equal Protection and Due Process clauses of the Fourteenth Amendment because the laws "deny Plaintiffs access to the institution of marriage and its numerous rights, privileges, and responsibilities for the sole reason that Plaintiffs wish to be married to a person of the same sex." ROA.2041. The court opined that "[w]ithout a rational relation to a legitimate governmental purpose, state-imposed inequality can find no refuge in our United States Constitution." ROA.2041.

The district court's analysis of Texas's marriage laws under rational basis review was inadequate in several respects. First and foremost, it is well established that states have a legitimate interest in marriage and domestic relations, and Texas's marriage laws are rationally related to those interests. Equally important is that Texas's marriage laws were not "born of animosity" or a desire to harm homosexuals, but rather out of a desire to elevate and place great importance on the institution of marriage as it has been understood by countless cultures for thousands of years. *See Windsor*, 133 S. Ct. at 2689 ("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.").

A. Texas has a legitimate interest in the regulation of marriage and domestic relations.

States have a legitimate interest in the regulation of marriage and domestic relations. Indeed, "[e]ach state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders." *Williams v. North Carolina*, 317 U.S. 287, 298 (1942). "Protection of offspring, property interests, and the enforcement of marital responsibilities" are all included in the State's interest in regulating domestic relations. *Id.* The *Windsor* Court recognized that "[t]he States' interest in defining and regulating the marital relation, subject to constitutional guarantees, stems from the understanding that marriage is more than a routine classification for purposes of certain statutory benefits." *Windsor*, 133 S. Ct. at 2692.

More specifically, the state interest in regulation of marriage and domestic relations necessarily includes an interest in same-sex marriage. The majority opinion in *Windsor* even leaves room for prohibitions on same-sex marriage as long as they are enacted for reasons other than imposing inequality. *Id.* at 2694 (suggesting that if the "principal purpose" of a same-sex marriage law is for "other reasons like governmental efficiency," then it may not be unconstitutional).

In addition, the district court in this very case conceded that "[t]here is no doubt that the welfare of children is a legitimate state interest." ROA.2019. The district court also appeared to accept the premise that the State has a legitimate interest in encouraging procreation. ROA.2022 ("rather than serving *the interest of encouraging stable environments for procreation*, Section 32 hinders the creation of such environments.") (emphasis added).

With recognition by the district court in this case and the United States Supreme Court of broad interests of the state in the regulation of marriage and domestic relations, as well as narrow interests under the umbrella of marriage and domestic relations, Texas's marriage laws need only be rationally related to those interests.

B. Texas's marriage laws are rationally related to its interest in marriage and domestic relations.

Under rational basis review, a law affecting the non-fundamental rights of a non-suspect class is "constitutionally valid if 'there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decision maker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.'" *Armour v. City of Indianapolis, Ind.*, 132 S. Ct. 2073, 2080 (2012) (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992)). The Supreme Court has ruled that policy reasons are plausible if "there is any

reasonably conceivable state of facts that could provide a rational basis for the classification." *Beach Communications, Inc.*, 508 U.S. at 313. Furthermore, when the law being challenged is presumed constitutional, the "burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." *Heller v. Doe*, 509 U.S. 312, 320, (1993) (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, *364* (1973)).

The district court ran afoul of deferential rational basis review as the State offered numerous plausible policy reasons for Texas's marriage laws. The legislative history behind those laws shows that those policy reasons were considered to be true by state legislators and voters. Many of those reasons were cited by the district court, which chose to dismiss them as implausible. Moreover, the district court certainly did not consider "any reasonably conceivable," *Beach Communications, Inc.*, 508 U.S. at 313, set of facts or attempt to negate "every conceivable basis which might support," *Heller*, 509 U.S. at 320, Texas's marriage laws, as was its constitutional duty.

When the Texas Legislature added Section 6.204 to the Texas Family Code, supporters made many arguments in favor of passage. For example, the State, quoting supporters of the laws, argued that protecting marriage between one man and one woman "gives women and children the surest protection against poverty and abuse," and "provides for healthy psychological development of children[.]"

ROA.2000 (quoting HOUSE RESEARCH ORG., FOCUS REPORT, MAJOR ISSUES OF THE 78TH LEG., REG. SESS., No. 78–12, at 83 (Tex. Aug. 6, 2003)). Whatever the merits of this belief happen to be—and TCC believes it to have a great deal of merit—it provides adequate foundation for constitutionality. There is a wide range of literature supporting this view, particularly with regard to child development, making it plausible and, thus, rational for legislators to believe. *See, e.g.*, Wendy D. Manning & Kathleen A. Lamb, *Adolescent Well-Being in Cohabitating, Married, & Single-Parent Families*, 65 J. Marriage & Fam. 876, 890 (2003) ("The advantage of marriage appears to exist primarily when the child is the biological offspring of both parents.").

The legislative history of Texas's constitutional amendment defining marriage reveals a rationale similar to the statute, which was also dismissed by the district court. Specifically, supporters of the amendment in the Legislature argued that:

> [T]raditional marriage consisting of one man and a woman is the basis for a healthy, successful, stable environment for children. It is the surest way for a family to enjoy good health, avoid poverty, and contribute to their community. The sanctity of marriage is fundamental to the strength of Texas's families, and the state should ensure that no court decision undermine this fundamental value.

ROA.2001 (quoting HOUSE RESEARCH ORG., H.J.R. 6 BILL ANALYSIS, 79TH LEG., REG. SESS., at 34 (Tex. Apr. 25, 2005)). Again, the view held by supporters of Texas's marriage laws need not be the best option for advancing the State's

interest; it need only be plausible, s*ee Armour*, 132 S.Ct. at 2080. There is ample literature supporting the belief that families led by one man and one woman provide the most stable environment for children to support that plausibility. *See, e.g.*, David Popenoe, *Life Without Father: Compelling New Evidence that Fatherhood and Marriage are Indispensible for the Good of Children & Society*, 146 (1996) ("[T]he burden of social science evidence supports the idea that gender-differentiated parenting is important for human development[.]"); Michael E. Lamb, *Fathers: Forgotten Contributors to Child Development*, 18 Human Dev. 245, 246 (1975) ("[b]oth mothers and fathers play crucial and qualitatively different roles in the socialization of the child."); *see also* Mark Regnerus, *How Different Are the Adult Children of Parents Who Have Same-Sex Relationships? Findings from the New Family Structures Study*, 41 Soc. Sci. Research 752, 763 (2012) (concluding that a biological mother and father provide optimal child outcomes).

Another ground cited by supporters of Texas's marriage laws and subsequently dismissed by the district court is that recognition of same-sex marriage "could lead to the recognition of bigamy, incest, pedophilia, and group marriage[.]" ROA.2000 (quoting HOUSE RESEARCH ORG., DAILY FLOOR REPORT, 78TH LEG., REG. SESS., at 27–29 (Tex. Apr. 29, 2003)). As already discussed in this brief, restrictions on marriage relating to these moral considerations remain

valid. *See Windsor*, 133 S. Ct. at 2691-92. Thus, the goal of actively trying to prevent those practices from becoming valid is entirely rational public policy.

None of this is to say that recognition of pedophilia or other morally reprehensible actions being recognized as valid is actually a logical next step that would follow recognition of same-sex marriages. Rather, it supports the fact that legislators and Texas voters enacted Texas's marriage laws with the intention of supporting marriage arrangements that they believe support valid goals related to those concerns. Thus, the laws are entirely rational and constitutional.

C. Texas's marriage laws were not enacted out of animus or for the purpose of making anyone unequal under the law.

The district court cited *Romer* for the proposition that "Supreme Court precedent prohibits states from passing legislation born out of animosity against homosexuals." ROA.2041. While true that the Supreme Court has invalidated laws for which "no legitimate purpose overcomes the purpose and effect to disparage and injure," *Windsor*, 133 S. Ct. at 2696, it is quite a leap to suggest that a majority of Texas legislators and voters passed Texas's marriage laws out of animus towards homosexuals. Instead of accepting any of the valid rationales offered by the State or that exist independently of the State's arguments, the district court decided to paint the law's supporters with what Chief Justice Roberts

calls "the brush of bigotry." *Windsor*, 133 S. Ct. at 2696 (Roberts, C.J., dissenting).

The primary sources for the animus-based approach to rational basis review are *Romer v. Evans*, 517 U.S. 620 (1996), and *Lawrence v. Texas*, 539 U.S. 558 (2003), yet the facts of both *Romer* and *Lawrence* are so dissimilar to the facts surrounding Texas's marriage laws that they are hardly analogous, and should not apply here.

In *Romer*, for instance, the State of Colorado adopted a constitutional amendment that specifically singled out homosexuals and declared that "no protected status based on homosexual, lesbian or bisexual orientation" be given by any branch of state or local government in Colorado. *Romer*, 517 U.S at 624. In ruling the amendment unconstitutional, the Court explained that by "making a general announcement that gays and lesbians shall not have any particular protections from the law," the State "inflicts on them immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it." *Id.* Thus, the law lacked a rational relationship to a legitimate state interest. *Id.*

Lawrence, 539 U.S. 558, is also commonly referenced by courts using the animus-based approach to rational basis review in cases of discrimination based on sexual preference. In *Lawrence*, the statute at issue made it a crime to engage in

"[d]eviate sexual intercourse with another individual of the same sex." *Id.* at 563. There, the Court concluded that "[t]he State cannot demean [homosexuals] or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government." *Id.* at 578.

Texas's marriage laws are quite unlike the laws challenged in *Romer* and *Lawrence*. *See* TEX. CONST. art I, § 32(b); TEX. FAM. CODE ANN. § 2.001; TEX. FAM. CODE ANN. § 6.204. While the laws restrict same-sex marriage, they do so not by declaring that homosexuals cannot marry, but by defining marriage as it will be recognized by the State. The laws apply equally to everyone. They were not enacted to "disparage and injure," *Windsor*, 133 S. Ct. at 2696, anyone. Nor were they enacted out of "animosity against homosexuals." *Romer*, 517 U.S. at 634. To the contrary, the laws were enacted with a desire to elevate the state's legal recognition of marriage to a level that society has celebrated throughout history. Legislative history of Texas's constitutional amendment on same-sex marriage is instructive:

> This proposed constitutional amendment would ensure that the legal status of marriage was conferred only on unions involving a man and a woman. Including additional language about the status of unmarried couples could nullify living wills, powers of attorney, and other legal agreements reached by couples who were not married. The limited working of this constitutional amendment would preserve future flexibility in allowing other types of legal arrangements short of marriage or civil unions in the future . . . *The amendment would not*

> *discriminate against individuals but merely would permit the voters of Texas to decide the scope of marriage in the state*.

HOUSE RESEARCH ORG., H.J.R. 6 BILL ANALYSIS, 79TH LEG., REG. SESS. (Tex. Apr. 25, 2005) (emphasis added). This rationale shows not only that there was an active attempt to enact the law in a non-discriminatory manner, but also that contractual and other legal arrangements outside of marriage or civil unions would still be valid after the law was enacted.

Floor debate records also support the notion that Texas's marriage laws were enacted with non-discriminatory intentions. Senator Todd Staples, author of the resolution proposing the constitutional amendment that was eventually passed, offered his rational for its adoption:

> I'm personally bringing this legislation because I believe that we should protect the institution of marriage as it is defined in law today. That we should *hold that up higher than any other relationships*. I believe that there's a distinction between intimate association and the right for government to recognize or subsidize any other form of relationship. And I think that is a distinction there. And I think the institution of marriage, as it is defined in law today, should be protected.

SENATE JOURNAL, H.J.R. 6 ON SECOND READING, 79TH LEG., REG. SESS. (May 21, 2005) (emphasis added). Holding marriage up "higher than other relationships" is not the same thing as discriminating out of animosity or bare desire to harm. It is a desire to define, clarify, and celebrate marriage, rather than exclude anyone from it. Texas legislators and voters acted on the former rationale, not the latter.

CONCLUSION

Regulation of morality and societal norms has always been an acceptable, permissible, and constitutional role of state government, and state governments' police powers over marriage and domestic relations are broad. These truths were accepted by the Supreme Court and relied upon heavily when it struck down the federal same-sex prohibition in *Windsor*. It is impossible to read *Windsor* without recognizing that state authority in marital relations was central to the holding in that decision. TCC argues that the district court erred in its interpretation of *Windsor* as a general declaration that same-sex marriage prohibitions are unconstitutional. To the contrary, *Windsor* leaves plenty of room for the constitutionality of state-level prohibitions on same-sex marriage.

Additionally, state same-sex marriage restrictions do not invoke a level of scrutiny higher than rational basis because they do not implicate a fundamental right and because homosexuals are not a suspect classification. Under rational basis review, Texas's marriage laws are justified under a variety of legitimate state interests which are rationally related to those laws, and thus, are constitutional. This remains true even under the animus-based version of rational basis review set out in *Romer* and *Lawrence*.

TCC urges the United States Court of Appeals for the Fifth Circuit to reverse the district court's ruling that Texas's marriage laws are unconstitutional.

Respectfully submitted this 4th day of August, 2014,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

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CERTIFICATE OF SERVICE

I hereby certify that on August 4, 2014, I electronically filed the attached Amicus Curiae Brief in the case of De Leon, et al., v. Perry, et al, No. 14-50196, with the clerk of this court by using the CM/ECF system. I further certify that all counsel of record are registered CM/ECF users and have been served using that system.

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