No. 13-4178

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DEREK KITCHEN, individually, et al., Plaintiffs-Appellees, v. GARY R. HERBERT, in his official capacity as Governor of Utah, et al., Defendants-Appellants, and SHERRIE SWENSEN, in her official capacity as Clerk of Salt Lake County, Defendant.	(Appeal from the United States District Court for the District of Utah, Civil Case No. 2:13-CV-00217-RJS)

BRIEF OF AMICUS CURIAE THE SUTHERLAND INSTITUTE IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, the undersigned states that the *amicus* is not a corporation that issues stock or has a parent corporation that issues stock.

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INTEREST OF AMICUS CURIAE[1]

Amicus is a public policy and education organization working to influence Utah law and policy based on a core set of governing principles including recognizing the family as the fundamental unit of society. To this end, the Institute advocates measures that allow Utah to preserve a distinctive public policy reflecting the value its citizens place on the family—the unique and uniquely beneficial union of a husband and wife, a mother and father, whose relationship protects their children. The Institute also works to counteract pressures on the state to reflexively adopt laws of other states that do not reflect the unique and vibrant family-centered culture of the state of Utah.

ARGUMENT

In oral argument before the court below, Plaintiffs' attorney painted a lurid picture of the motivation behind Utah's marriage law:

> That's what it's about. They visualize sexual conduct and they want it stopped. It's simple. Read their papers. It's all about that. . . . They're based on prejudice and bias that is religiously grounded in this state. And it is no one's right to impose a majority's religious view on the rest of the citizens in a state, which is exactly what's happening here. Transcript at 103.

[1] No party's counsel authored the brief in whole or in part, and no one other than the amicus curiae, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief. This brief is filed with consent of all parties; thus no motion for leave to file is required. *See* Fed. R. App. P. 29(a).

The conclusion of the court below was significantly less colorful but still far from complimentary: "the imposition of inequality was not merely the law's effect, but its goal." Kitchen v. Herbert, No.2:13-cv-00217 (2013), slip op. at 39. The court also charged the state with making arguments in favor of the amendment that "are almost identical" to arguments made "in support of Virginia's law prohibiting interracial marriage." *Id*. at 51.

Amicus respectfully suggests that these characterizations are not only overstated and grossly unfair but, more importantly, fundamentally misapprehend the nature of the State's interest in marriage and lead to a fatally flawed analysis of the constitutionality of Utah's laws regarding marriage.

I. The District Court's Analysis of the State's Interests in Marriage Rests on Assumptions Fundamentally at Odds with a System of Ordered Liberty.

The court below said Utah's marriage amendment "bears no rational relationship to any legitimate state interests and therefore fails rational basis review." *Id*. at 41. To reach this conclusion, the court created reductionist interests it then attributed to the State—increasing "the number of opposite-sex couples choosing to marry each other," affecting "the choices of couples to have or raise children," and preserving tradition for its own sake. *Id*. at 44-45, 48. The court could then assert that failing to meet these *post hoc* goals made the marriage amendment and statutory recognition of marriage as the union of a husband and a wife irrational.

The court's fundamental mistake in this analysis arises from inattention to a very basic fact: the State, in recognizing marriage, does not write on a blank slate. Specifically, when Utah's legislature proposed and the people of the State ratified section 29 of article I of the Utah Constitution, they were not creating a new legal arrangement to accomplish novel purposes, either nefarious or humane.

A. Marriage and Family Are Pre-Political Institutions.

As Professor Richard Garnett has noted, "The law no more 'creates' the family than the Rule Against Perpetuities 'creates' dirt." Richard W. Garnett, *Taking Pierce Seriously: The Family, Religious Education, and Harm to Children* 76 NOTRE DAME L. REV. 109, 114 n.29 (2000). Another academic commentator explains:

> [T]he facts are these: (a) prior to the thirteenth century, when the Church finally managed to take control of it, marriage was an entirely social practice; (b) marriage only became a sacrament in 1439; and (c) the Catholic Church only began requiring the attendance of a priest for a valid marriage in 1563, after the Reformation. The state came to marriage even later than did the Church. Indeed, it was not until 1753, with the passage of Lord Hardwicke's Marriage Act, that the British state became a significant player in the joining together of men and women as husbands and wives. F.C. DeCoste, *Courting Leviathan: Limited Government and Social Freedom in* Reference re Same-Sex Marriage 42 ALBERTA L. REV. 1099, 1112-13 (2005) (citations omitted).

The Utah Supreme Court has explained: "The rights inherent in family relationships—husband-wife, parent-child, and sibling—are the most obvious examples of rights retained by the people. They are 'natural,' 'intrinsic,' or 'prior'

in the sense that our Constitutions presuppose them, as they presuppose the right to own and dispose of property." *In re J.P.*, 648 P.2d 1364, 1373 (Utah 1982).

In fact, "the family—based on a union, more or less durable, but socially approved, of two individuals of opposite sexes who establish a household and bear and raise children—appears to be a practically universal phenomenon, present in every type of society." CLAUDE LEVI-STRAUSS, THE VIEW FROM AFAR 40-41 (1985). As a group of family scholars explained:

> Marriage exists in virtually every known human society. Exactly what family forms existed in prehistoric society is not known, and the shape of human marriage varies considerably in different cultural contexts. But at least since the beginning of recorded history, in all the flourishing varieties of human cultures documented by anthropologists, marriage has been a universal human institution. As a virtually universal human idea, marriage is about regulating the reproduction of children, families, and society. While marriage systems differ (and not every person or class within a society marries), marriage across societies is a publicly acknowledged and supported sexual union which creates kinship obligations and sharing of resources between men, women, and the children that their sexual union may produce. WILLIAM J. DOHERTY, ET AL., WHY MARRIAGE MATTERS: 21 CONCLUSIONS FROM THE SOCIAL SCIENCES 8-9 (Institute for American Values 2002).

The New York Court of Appeals recognized: "Until a few decades ago, it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex." *Hernandez v. Robles*, 855 N.E.2d 1, 8 (N.Y. 2006).

This universal understanding derives from the realities of human nature, particularly the reality of sex difference and the facts that (1) every child who is born

has a mother and father and (2) only the sexual relationship of a man and a woman can result in a child without the participation of a third party. As one state jurist has noted: "The binary character of marriage exists first because there are two sexes." *Andersen v. King County*, 138 P.3d 963, 1002 (Wash. 2006) (Johnson, J., concurring).

It hardly needs to be said that this has been true notwithstanding that people in all of these times and cultures understood that some married couples would be unable to have children.

B. Marriage and Family Are Essential to Ordered Liberty.

Given that marriage and family are pre-political and not mere instruments of state policy, they are fundamental to a system of ordered liberty. Such a system is one in which "every person [does not] make his own standards on matters of conduct in which society as a whole has important interests" (*Wisconsin v. Yoder*, 406 U.S. 205, 216 (1972)) but rather "the claims of social peace and order on the one side and of personal liberty on the other" are harmonized in accordance with constitutional principles of limited government. *Illinois v. Allen*, 397 U.S. 337, 348 (1970) (Brennan, J., concurring). The family is an integral part of this system because it allows for "social constraint and the shaping of individual moral character through local intermediate institutions" (Barry Alan Shain, *American Community* in COMMUNITY AND TRADITION 39, 41 (George W. Carey & Bruce Frohnen, eds.,

1998)) rather than through micromanagement by a remote centralized state. The common good is served and broad personal freedom secured when the shaping of individual character is performed by mediating institutions whose authority is independent of, rather than derived from, the state. The family thus "serve[s] as the context in which millions of Americans pluralistically contract to organize their lives independently of central political authority." George Steven Swan, *The Political Economy of American Family Policy, 1945-85* 12 POPULATION AND DEVELOPMENT REVIEW 739, 752 (December 1986).

Since every human being enters the world as the result of a relationship (however tenuous in some cases) of a man and a woman, the institution of marriage is particularly crucial in forming the initial context for the shaping of individual character. It promises to link those whose relationship creates the child to one another and to the children they create. When this is successful, that child will have all of the advantages of consistent interaction with his or her parents or at least a mother and father when biological parents cannot or will not care for that child (which is one way, in addition to an example of faithfulness, that married couples who cannot bear children still serve the institution's child-centered purpose). As J. David Velleman nicely explains:

> Some truths are so homely as to embarrass the philosopher who ventures to speak them. First comes love, then comes marriage, and then the proverbial baby carriage. Well, it's not such a ridiculous way of doing things, is it? The baby in that carriage has an inborn nature that

> joins together the nature of two adults. If those two adults are joined by love into a stable relationship—call it marriage—then they will be naturally prepared to care for it with sympathetic understanding, and to show it how to recognize and reconcile some of the qualities within itself. A child naturally comes to feel at home with itself and at home in the world by growing up in its own family. J. David Velleman, *Family History* 34 PHILOSOPHICAL PAPERS 357, 370-371 (November 2005).

All of this is not to say the state has no role to play in regards to marriage and the family. The state can, and ought to, provide a legal structure for the family to be recognized and it can protect the integrity of that structure. Dean Bruce C. Hafen explained: "the contribution of family life to the conditions that develop and sustain long-term personal fulfillment and autonomy depends . . . upon maintaining the family as a legally defined and structurally significant entity." Bruce C. Hafen, *The Family as Entity* 22 U.C. DAVIS LAW REVIEW 865, 867 (1989).

C. The Decision of the Court Below Rested on the Assumption that Marriage is Merely an Instrument of State Policy.

In contrast to this understanding of marriage as linked to our system of ordered liberty, the court below implied that marriage was nothing but an instrument of social engineering. For instance, as noted above, the court characterized the "goal" of Utah's marriage amendment as "imposition of inequality" as if legislators had gathered in a brainstorming session to determine how to harm the chances of same-sex couples, and came up with a thing called marriage to which these couples could be intentionally excluded. This is of a piece with the court's general understanding

of marriage. Its description is "a public commitment to form an exclusive relationship and create a family with a partner with whom the person shares an intimate and sustaining emotional bond." Kitchen v. Herbert, No.2:13-cv-00217 (2013), slip op. at 28. What is striking is the thinness of the conception—marriage is a mere private agreement, but one that is necessarily "public." In the context of a case premised on the claim that the failure of the government to give plaintiffs a marriage license is a constitutional violation, it is clear that this public requirement means that marriage is a government endorsement of a private agreement. This retooled institution is an instrument of state policy, this time with the goal of promoting "a person's dignity and autonomy." *Id*. at 23.

When the court turns to analyzing its characterization of the state's interests in marriage, the court's understanding of marriage as an instrument of state purposes is evident. For instance, the court faults the state for "present[ing] no evidence that the number of opposite-sex couples choosing to marry each other is likely to be affected in any way by the ability of same-sex couples to marry." *Id*. at 44. The court also speaks of the state as "prohibiting same-sex couples from marrying" though there is manifestly no state statute that punishes same-sex couples for participating in religious or other wedding ceremonies. *Id*. at 43. The court speaks of the state offering "incentives" for marriage and the law's "effect on the choices of couples to have or raise children." *Id*. at 45. In one passage, the court suggests the state cannot

have a benign or beneficial interest in marriage because the states that have recently redefined marriage to include same-sex couples have not seen "any decrease in opposite-sex marriage rates, any increase in divorce rates, or any increase in the number of nonmarital births."[2]

In each instance, the court's understanding of marriage suggests that it is a government program with social engineering ends ("incentivizing" childbirth or increasing statistics), analogous to a tax break for home ownership or an initiative to get more computers in the public schools. In fact, the Supreme Court has rejected marriage statutes that really did have social engineering purposes, as both reprehensible (using marriage to send a message about racial superiority) and laudable (using marriage as a child support collection program). *See Loving v. Virginia*, 388 U.S. 1 (1967); *Zablocki v. Redhail*, 434 U.S. 374 (1978).

These conceptions of the state's role vis-à-vis marriage are in direct opposition to the system of ordered liberty previously described, which takes marriage as a pre-existing institution to which the state gives recognition because experience demonstrates that the institution provides powerful social benefits that cannot be provided through a government program.

[2] The probative value of such an assertion is highly suspect given that only one state has had same-sex marriage for ten years so any significant longitudinal data is still forthcoming.

II. Utah's Laws Regarding Marriage and Family Cannot Be Understood as an Attempt to Exclude any Targeted Group.

None of the foregoing suggests the state's treatment of marriage cannot serve socially valuable ends. The state can clearly conclude that the experience of millennia suggests that it will matter whether its laws (1) recognize the institution of marriage as having a larger social purpose related to promoting the welfare of children or (2) create a vehicle for bestowing government approbation on private relationship for purposes of sending a message about the worth of alternate family arrangements.

The court below assumed the former but, as we have seen, this is at odds with the understanding of marriage consistent with a system of ordered liberty. The Supreme Court has said that "[t]he child is not the mere creature of the state." *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925). Marriage, too, is not the mere creature of the state. The state's recognition of marriage cannot plausibly be attributed to a desire to be either inclusive or exclusive of alternative family forms. As New York's appellate division has noted, marriage is "not primarily about adult needs for official recognition and support." *Hernandez v. Robles*, 805 N.Y.S.2d 354, 360 (N.Y. App. 2005). Rather, it is about "the well-being of children and society." *Id*.

As the state's brief notes, Utah's family law consistently couples recognition of marriage with a recognition of the needs of children to a relationship with a mother and father. Opening Brief at 14. There is no similar legal expression of a policy to

recognize marriage in order to facilitate expressive individualism or relationship egalitarianism. In retaining an understanding of marriage that predates the state of Utah, it hardly seems likely the state was trying to make a statement about sexual orientation when, as the Supreme Court has noted, "according to some scholars the concept of the homosexual as a distinct category of person did not emerge until the late 19th century. " *Lawrence v. Texas*, 539 U.S. 558, 568 (2003). At any rate, while state laws may not deny the dignity of individuals, the constitution does not require states affirmatively to try to bestow dignity on individuals if, indeed, it could do so. *Cf. DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 195 (1989) (Due Process Clause "is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security.").

In fact, the language of the Utah marriage amendment makes clear that it is intended to address only the "legal effect" of relationships. Utah Const., art. 1, sec. 29. A statute passed during the same session as the legislature sent this amendment to the voters specifies that nothing in the state's marriage recognition policy "impairs any contract or other rights, benefits, or duties that are enforceable independently of this section." Utah Code §30-1-4.1. Utah law clearly makes a distinction between wide latitude for private ordering of relationships and formal legal recognition of the marriage institution. This is an entirely appropriate approach to differing circumstances. "There is a basic difference between direct state interference with a

protected activity and state encouragement of an alternative activity consonant with legislative policy. Constitutional concerns are greatest when the State attempts to impose its will by force of law; the State's power to encourage actions deemed to be in the public interest is necessarily far broader." *Maher v. Roe*, 432 U.S. 464, 475-476 (1977); *see also Rust v. Sullivan*, 500 U.S. 173, 193 (1991). Utah's laws promote marriage while allowing for maximum tolerance of private relationships.

It is clear that Utah's marriage laws are not aimed to effect "exclusion" as the court below suggested. They are meant to recognize and encourage participation in a pre-existing social institution, not to exclude anyone from the protection of the law. Since "[u]ntil a few decades ago, it was an accepted truth for almost everyone who has ever lived in any society, in which marriage existed, that there could be marriages only between participants of different sex" (*Hernandez v. Robles*, 7 N.Y.3d 338, 361 (2006)), these laws that merely retain longstanding understandings stretching back millennia could hardly have been meant to exclude an unimaginable eventuality.

III. The District Court's Failure to Understand the State's Interests in Marriage Does Not Make Those Interests Irrational.

In trying to preserve a pre-existing understanding of marriage, Utah's marriage laws sought to preserve the social goods marriage has produced across time and cultures—the goods that help explain the remarkable universality of the institution. The court below found incomprehensible ("irrational") the state's interest

in promoting the common good by preserving marriage. It found the state was asserting that "tradition alone" was the state's concern in enacting its marriage laws. In support of its conclusion, the court pointed to *Heller v. Doe*, 509 U.S. 312 (1993) for the proposition that, "[a]ncient lineage of a legal concept does not give it immunity from attack for lacking a rational basis." *Id*. at 326. This is an unobjectionable point since no one would argue that the longevity of a practice, in itself, settles the question of its constitutionality. The court should have included the next sentence from *Heller*, however: "That the law has long treated the classes as distinct, however, suggests that there is commonsense distinction between" those the law in that case affected. *Id*. In other words, a longstanding practice is not unassailable but ought to be given some deference if it reflects lessons of experience.

The relevance of this observation to the question of marriage is obvious. While "[t]he 'family tradition' . . . has been such an obvious presupposition of our culture that it has not been well articulated, let alone explained or justified" (Bruce C. Hafen, *Puberty, Privacy and Protection: The Risks of Children's "Rights"* 63 ABA J. 1383 (Oct. 1977)), we can still discern the important interests it has promoted and that explain its longevity. Though the government does not create marriage, states like Utah can surely recognize the "commonsense" benefits marriage provides to a society in which it is preserved and promoted. As noted above, marriage over time and across cultures has "regulat[ed] the reproduction of children, families, and

society. . . . [and] creates kinship obligations and sharing of resources between men, women, and the children that their sexual union may produce." WILLIAM J. DOHERTY, ET AL., WHY MARRIAGE MATTERS: 21 CONCLUSIONS FROM THE SOCIAL SCIENCES 8-9 (Institute for American Values 2002).

A number of federal and state cases have recognized that state marriage laws are constitutionally valid because they ensure these benefits to society. The Eighth Circuit has noted that Nebraska's marriage amendment was justified by the purpose of "encourag[ing] heterosexual couples to bear and raise children in committed marriage relationships." *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 868 (8th Cir. 2006). The New York Court of Appeals said New York "could find that an important function of marriage is to create more stability and permanence in the relationships that cause children to be born." *Hernandez v. Robles*, 7 N.Y.3d 338, 350 (N.Y. 2006). Maryland's highest court said: "marriage enjoys its fundamental status due, in large part, to its link to procreation. This 'inextricable link' between marriage and procreation reasonably could support the definition of marriage as between a man and a woman only, because it is that relationship that is capable of producing biological offspring of both members (advances in reproductive technologies notwithstanding)." *Conaway v. Deane*, 932 A.2d 571, 630-631 (Md. 2007) (citations omitted). Washington's Supreme Court similarly held that "limiting marriage to opposite-sex couples furthers the State's interests in procreation and

encouraging families with a mother and father and children biologically related to both." *Andersen v. King County*, 138 P.3d 963, 985 (Wash. 2006). In a case involving a separate legal matter, adoption, the Eleventh Circuit endorsed a Massachusetts' judge's statement that "the Legislature could rationally conclude that a family environment with married opposite-sex parents remains the optimal social structure in which to bear children." *Lofton v. Secretary of Department of Children & Family*, 385 F.3d 804, 825 n. 26 (11th Cir. 2004) (quoting *Goodridge v. Department of Public Health*, 798 N.E.2d 941, 999 (2003) (Cordy, J., dissenting).

The state can also reasonably assume that some or all of the functions that have demonstrably been served by recognition of marriage from time immemorial would be at risk if marriage is redefined to become government endorsement of private agreements. For instance, when Maine's legislature enacted a new definition of marriage as the union of any two people, it also struck out the official purpose statement in the previous marriage law. 2009 Maine LD1020. The deleted provision read:

> The union of one man and one woman joined in traditional monogamous marriage is of inestimable value to society; the State has a compelling interest to nurture and promote the unique institution of traditional monogamous marriage in the support of harmonious families and the physical and mental health of children; and that the State has the compelling interest in promoting the moral values inherent in traditional monogamous marriage. 19-A Maine Rev. Stat. §650.

It's clear that one change that will come as a result of redefining marriage is diluting or eliminating its former child-centered nature.

The redefinition could also more directly work to separate a child from at least one of her parents. For instance, a trial court in New Jersey concluded that "a child born within the context of a marriage with two female spouses" was the child of the mother and the mother's female partner. *In re Parentage of Robinson*, 890 A.2d 1036, 1042 (N.J. Super. 2005). A Massachusetts court granted joint legal custody to a child's mother and the mother's former same-sex spouse, even though the state's paternity presumption for artificial insemination referred to "husbands." *Della Corte v. Ramirez*, 961 N.E.2d 601, 603 (Mass. App. Ct. 2012). Citing the state's same-sex marriage case, an Iowa court held: "As parents, a mother's wife is identical to a mother's husband in every common and ordinary sense except for biology." *Buntemeyer v. Iowa Dep't of Pub. Health*, No. CV 9041, slip op. at 15 (Iowa Super 2012). Another Iowa case held the state constitution required the state's paternity presumption to apply to a female spouse of a child's mother because of the same-sex marriage of the two. *Gartner v. Iowa Dep't of Pub. Health*, 830 N.W.2d 335 (Iowa 2013).

Thus, same-sex marriage becomes a means of separating children, by operation of law, from at least one of their parents, not as a result of the parent's

unfitness or inability to care for the child but in order to facilitate the adult arrangement of the other parent.

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A panel of the Eleventh Circuit has warned: "Hunting expeditions that seek trophy game in the fundamental-rights forest must heed the maxim 'look before you shoot.' Such excursions, if embarked upon recklessly, endanger the very ecosystem in which such liberties thrive — our republican democracy." *Williams v. Attorney General of Alabama*, 378 F.3d 1232, 1250 (11th Cir. 2004). In deciding that the constitution mandates a hitherto unknown right to have marriage redefined to mean the government endorsement of private intimate arrangements, the decision of the court below threatens the "ecosystem" of ordered liberty with its irreplaceable component of recognition of the pre-existing institution of marriage linked to the protection of children. This is a mistake this court ought wisely to avoid.

CONCLUSION

For the foregoing reasons, *amicus* respectfully requests this court to reverse the decision of the court below.

Dated: February 10, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

Certificate of Compliance with Type-Volume Limitation,
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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,297 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Date: February 10, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on February 10, 2014, I electronically filed the foregoing using the court's CM/ECF system, which will send notification of such filing to the following:

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s/ William C. Duncan