2014

Brief of Scholars of the Constitutional Rights of Children Susannah W. Pollvogt, Catherine E. Smith, and Tanya Washington as Amici Curiae in Support of Plaintiffs-Appellants and Reversal: *Robicheaux v. Caldwell*

Catherine E. Smith

Tanya Washington

Susannah W. Pollvogt

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14-31037

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JONATHAN P. ROBICHEAUX; DEREK PENTON; NADINE BLANCHARD and COURTNEY BLANCHARD, *Plaintiffs-Appellants,*

v.

JAMES. D. CALDWELL, in his official capacity as the Louisiana Attorney General, also known as Buddy Caldwell, *Defendant-Appellee.*

JONATHAN P. ROBICHEAUX; DEREK PENTON; NADINE BLANCHARD; COURTNEY BLANCHARD; ROBERT WELLES; and GARTH BEAUREGARD, *Plaintiffs-Appellants,*

v.

DEVIN GEORGE, in his official capacity as the State Registrar and Center Director at Louisiana Department of Health and Hospitals; TIM BARFIELD, in his official capacity as the Louisiana Secretary of Revenue; KATHY KLIEBERT, in her official capacity as the Louisiana Secretary of Health and Hospitals, *Defendants-Appellees.*

FORUM FOR EQUALITY LOUISIANA, INCORPORATED; JACQUELINE M. BRETTNER; M. LAUREN BRETTNER; NICHOLAS J. VAN SICKELS; ANDREW S. BOND; HENRY LAMBERT; R. CAREY BOND; L. HAVARD SCOTT, III; and SERGIO MARCH PRIETO, *Plaintiffs-Appellants,*

v.

TIM BARFIELD, in his official capacity as Secretary of the Louisiana Department of Revenue; DEVIN GEORGE, in his official capacity as Louisiana State Registrar, *Defendants-Appellees.*

Appeal From The United States District Court For The Eastern District Of Louisiana, Nos. 2:13-cv-5090, 2:14-cv-97, 2:14-cv-327

BRIEF OF SCHOLARS OF THE CONSTITUTIONAL RIGHTS OF CHILDREN SUSANNAH W. POLLVOGT, CATHERINE E. SMITH, AND TANYA WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

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JONATHAN P. ROBICHEAUX; DEREK PENTON; NADINE BLANCHARD and COURTNEY BLANCHARD, *Plaintiffs-Appellants,*

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Pursuant to Fifth Circuit Local Rule 28.2.1(b), undersigned counsel for Amicus Curiae certifies that the following persons and entities 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.

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4. Courtney Blanchard

5. Robert Welles

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Defendants-Appellees

25. James D. Caldwell, in his official capacity as the Louisiana Attorney General

26. Devin George, in his official capacity as the State Registrar and Center Director as Louisiana Department of Health and Hospitals

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Respectfully submitted,

/s/ Deborah Pearce .

SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

Per Fifth Circuit Rule 29.2, *Amici* state that they are unaware of any additional parties with an interest in the amicus brief.

Respectfully submitted,

/s/ Deborah Pearce .

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INTEREST OF *AMICI CURIAE*[1]

Amici are scholars and professors of family law and the law of equal protection. *Amici* submit this brief to respond directly to arguments advanced by the State of Louisiana that its laws prohibiting same-sex marriage[2] are justified because they advance child welfare. Specifically, the State asserts that its laws advance child welfare by promoting Louisiana's interest in: (1) linking children with their biological parents to prevent the social stigma associated with being "illegitimate" and (2) establishing the child as a member of an intact family

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[1] *Amici* file this brief pursuant to Joint Consent by All Parties to the Filing of Briefs of *Amicus Curiae,* No 14-31037 (Oct. 7, 2014). Further, pursuant to F. R. App. P. 29(c)(5), *amici* state that no party's counsel authored this brief in whole or in part; no part or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than *amici curiae* and its counsel—contributed money that was intended to fund preparing or submitting the brief.

[2] Louisiana law defines marriage as the union of one man and one woman:

> Marriage in the state of Louisiana shall consist only of the union of one man and one woman. No official or court of the state of Louisiana shall construe this constitution or any state law to require that marriage or the legal incidents thereof be conferred upon any member of any union other than the union of one man and one woman. A legal status identical to or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized. No official or court of the state of Louisiana shall recognize any marriage contracted in any other jurisdiction which is not the union of one man and one woman.

La. Const. art. 12, § 15. Louisiana law also contains a non-recognition provision:

> A purported marriage between persons of the same sex violates a strong public policy of the state of Louisiana and such a marriage contracted in another state shall not be recognized in this state for any purpose, including the assertion of any right or claim as a result of the purported marriage.

La. Civ. Code art. 3520(B).

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resulting from the marriage of the mother and alleged father. These purported justifications express and enforce a bare preference for the children of opposite-sex couples as the only children entitled to the type of permanency, stability, security and so-called "ideal" parenting arrangements that the laws allegedly encourage. However, this justification obscures the laws' real function, which is to draw invidious distinctions between families headed by opposite-sex parents and families headed by same-sex parents, and, by implication, between the children in these families.

Amici's scholarship demonstrates that Louisiana's marriage laws are categorically impermissible under this Court's equal protection jurisprudence because they punish children based on realities beyond their control.

SUMMARY OF THE ARGUMENT

Marriage, according to the district court, is good for children.[3] But, per the district court's decision, the benefits of marriage—legal, economic, social and psychic—are available only to *some* children, namely, the children of opposite-sex couples.[4] For reasons not explained by the district court, the children of same-sex

[3] *Robicheaux, et al., v. Caldwell, et al.*, No. 13-5090 (E.D. La. Sept. 3 2014), slip op. at 15 (agreeing with State's argument that there is an interest in "linking children to an intact family").

[4] Even more narrowly, the district court opinion holds that it is only children with a biological connection to their parents that deserve this stability, *id.*, a line of reasoning that is inherently denigrating to children in families formed through adoption.

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couples are not entitled to these benefits, despite the fact that they surely need these benefits as much any other of children.

Louisiana's marriage laws and the district court decision upholding them represent bare discrimination between two similarly situated groups of children. This discrimination is justified based on concerns entirely out of the child's control—moral disapproval of same-sex relationships, a bare preference for families headed by opposite-sex couples, an attempt to incentivize opposite-sex couples to enter into the institution of marriage, and/or an attempt to establish paternity where it might be questioned.

None of these concerns relates to the child's need for the legal and social protections of marriage. Such discrimination is patently impermissible per unequivocal Supreme Court precedent.[5] Specifically, the Supreme Court has recognized that "children can neither affect their parents' conduct nor their own status,"[6] such that laws punishing children based on the decisions and conduct of adults are inherently "illogical and unjust."[7]

[5] *See Plyler v. Doe*, 457 U.S. 202, 219-20 (1982) (striking down state law denying public education to children of undocumented immigrants); *Weber v. Aetna Cas. & Surety*, 406 U.S. 164, 175 (1972) (striking down state law denying workers' compensation proceeds to non-marital children); *Levy v. Louisiana*, 391 U.S. 68, 72 (1968) (striking down state law denying wrongful death benefits to non-marital children).

[6] *Plyler*, 457 U.S. at 219-20.

[7] *Weber*, 406 U.S. at 175.

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This brief establishes two, irrefutable propositions. First: Supreme Court precedent forbids the punishment of children to incentivize adult behavior. Second, Louisiana's marriage laws punish the children of same-sex couples in precisely this impermissible manner.

ARGUMENT AND AUTHORITIES

If the State contends that marriage confers benefits upon children brought within the institution, then the State necessarily concedes that excluding an entire class of children from those benefits imposes a harm upon the excluded children.

As detailed below, Louisiana's laws discriminate between children based on whether their parents are of the opposite or same sex. The children in the former class are entitled to the myriad benefits conferred upon children by marriage, including an automatic legal relationship to both parents, while children in the latter class are denied these same benefits.

Thus, some children are denied a legal relationship to their parents so that others may have that legal bond. The exclusion of children of same-sex parents from the benefits of marriage is unjust for a number or reasons, including that it denies children the ability to create a legal relationship to their non-biological (or non-legal) parent. This barrier to a legal relationship has the potential to deny children of same-sex parents access to a host of state benefits through their non-biological (or non-legal) parent. Children of same-sex couples in Louisiana can be

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denied their non-biological parent's workers' compensation benefits, state health insurance, social security benefits, and civil service benefits, to name a few.[8] These benefits flow to children of opposite-sex married parents as a matter of course. There is no way in which this deprivation of rights to one group is needed to advance the rights of the other. This is bare preferential treatment of the type the Equal Protection Clause does not permit.

I. SUPREME COURT PRECEDENT UNEQUIVOCALLY ESTABLISHES THAT STATES MAY NOT PUNISH CHILDREN BECAUSE OF THEIR PARENTS' RELATIONSHIP OR IN AN EFFORT TO CONTROL OR INCENTIVIZE ADULT BEHAVIOR

The Supreme Court's equal protection jurisprudence has expressed a consistent, special concern for discrimination against children.[9] Why? Because discrimination against children always necessarily implicates two of the Equal Protection Clause's core values: promoting a society in which one's success or

[8] *See* Catherine Smith, *Equal Protection for Children of Same-Sex Parents*, 90 WASH. U. L. REV. 1589, 1603-07 (2013); Sam Castic, *The Irrationality of a Rational Basis: Denying Benefits to the Children of Same-Sex Couples*, 3 MOD. AM. 3, 4-6 (2007); Jennifer L. Rosato, *Children of Same-Sex Parents Deserve the Security Blanket of the Parentage Presumption*, 44 FAM. CT. REV. 74, 75-76 (2006).

[9] *See Pickett v. Brown*, 462 U.S. 1, 7 (1983) (noting explicitly a "special concern" for illegitimate children); *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1, 111 (1973) (Marshall, J., dissenting) (stating that the Court has a "special interest" in education because it is the "principal instrument in awakening the child" to cultural values, preparing children for professional training, and helping children adjust to the environment. (quoting *Brown*, 347 U.S. at 493)).

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failure is the result of individual merit,[10] and discouraging the creation of permanent class or caste distinctions.[11] Where laws function to place children in a distinct, disadvantaged class based on the conduct of their parents, both principles are violated. Louisiana's laws do precisely this.

A. A State May Not Punish Children Because of The Nature of Their Parents' Relationship

The Supreme Court has consistently expressed special concern with discrimination against children—in particular protecting their right to self-determination and to flourish fully in society, without being hampered by legal, economic and social barriers imposed by virtue of the circumstances of their birth.[12] This concern is perhaps most strongly expressed in the Court's treatment of non-marital children.

The United States has a long history of discrimination against children born to unmarried parents.[13] Because of society's moral condemnation of their parents'

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[10] *See Plyler*, 457 U.S. at 222. *See also* Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887, 926 (2012) (identifying meritocracy as core equal protection value).

[11] *See Plyler*, 457 U.S. at 234 (Blackmun, J., concurring). *See also* Pollvogt at 926 (discussing goal of Equal Protection Clause to eliminate laws that tend to create social castes).

[12] *See Weber*, 406 U.S. at 175 (stating that condemning a child for the actions of his parents is "illogical and unjust"); *Levy*, 391 U.S. at 72 (holding that it is invidious to discriminate against illegitimate children for the actions of adults over which the children have no control).

[13] 1 WILLIAM BLACKSTONE, COMMENTARIES *447 ("rights [of a non-marital child] are very few, being only such as he can acquire; for he can inherit nothing, being looked

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conduct, they were denied legal and social benefits to which marital children were entitled. They could not inherit property; further, they were not entitled to financial parental support, wrongful death recovery, workers' compensation, social security, and other government benefits.[14]

In the early 1940s, criticism of the treatment of non-marital children began to take root and became a part of the political and legal debates of the civil rights movement.[15] In 1968, Professor Harry Krause and civil rights lawyer Norman Dorsen advanced child-centered arguments in *Levy v. Louisiana*, the first equal protection challenge on behalf of non-marital children.[16]

Louise Levy, an unmarried African American mother with five young children, died from the medical malpractice of a state hospital.[17] Thelma Levy, Louise' sister, sued Louisiana on behalf of the Levy children, who were prohibited

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upon as the son of nobody."); Gareth W. Cook, *Bastards*, 47 TEX. L. REV. 326, 327 n.11 (1969). *See Levy*, 391 U.S. at 70 ("We start from the premise that illegitimate children are not 'nonpersons.' They are humans, live, and have their being. They are clearly 'persons' within the meaning of the Equal Protection Clause of the Fourteenth Amendment.).

[14] *See* Solangel Maldonado, *Illegitimate Harm: Law, Stigma and Discrimination Against Non-marital Children*, 63 FLA. L. REV. 345, 346-47 (2011).

[15] Martha Davis, *Male Coverture: Law and the Illegitimate Family*, 56 RUTGERS L. REV. 73, 90 (2003).

[16] Brief of Appellee, *Levy v. Louisiana*, 391 U.S. 68 (1968) No. 508, 1968 WL 112826; *see also*, Smith, *Equal Protection for Children of Same-Sex Parents*, 90 WASH. U. L. REV. 1589 (2013).

[17] John C. Gray and David Rudovsky, *The Court Acknowledges the Illegitimate: Levy v. Louisiana and Glona v. American Guarantee & Liability Insurance Co.*, 118 U. PA. L. REV. 1, 2-3 (1969).

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from a "right to recover" because they were born outside of marriage.[18] The Louisiana Court of Appeals affirmed the trial court's dismissal of the children's claim on the grounds that they were not "legitimate," insofar as "morals and general welfare . . . discourage[] bringing children into the world out of wedlock."[19]

In a groundbreaking legal victory for children, the Supreme Court reversed. The Court, citing *Brown v. Board of Education*, explained its departure from its normal practice of deferring to legislative decisions: "[W]e have been extremely sensitive when it comes to basic civil rights and have not hesitated to strike down an invidious classification even though it had history and tradition on its side."[20] The Court determined Louisiana's actions represented invidious discrimination because the child's status as "illegitimate" was unrelated to the injury to the mother.[21]

Four years after *Levy* was decided, in *Weber v. Aetna Casualty & Surety Co.*,[22] the Supreme Court struck down yet another Louisiana law that penalized children based on moral disdain for the parents' conduct. In that case, a father,

[18] *Id.* at 3.

[19] *Id.* (quoting *Levy v. Louisiana*, 192 So. 2d 193, 195 (La. Ct. App. 1967)). The Louisiana Supreme Court denied certiorari because it found the Court of Appeals made no error of law.

[20] *Levy*, 391 U.S. at 71.

[21] *Levy*, 391 U.S. at 72; *see also* Plyler, 457 U.S. at 216.

[22] 406 U.S. 164 (1972).

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Henry Clyde Stokes, had died of work-related injuries. At the time of his death, he lived with Willie Mae Weber.[23] Stokes and Weber were not married, but had five children.[24] One of the children was born to Stokes and Weber, while four others had been born to Stokes and his lawful wife, Adlay Jones, who had previously been committed to a mental hospital.[25] Weber and Stokes' second child was born shortly after Stokes' death.[26]

The four marital children filed a workers' compensation claim for their father's death, while Willie Mae Weber sought compensation benefits on behalf of the non-marital children.[27] Louisiana law awarded workers' compensation proceeds to a deceased worker's children born of his marriage, while the children born outside the marriage were denied those same proceeds.[28]

Once again, the Supreme Court reversed the Louisiana Supreme Court's decision, which had upheld the discriminatory law. The Court articulated a principle that is now well-established: treating children born outside of marriage differently than those born inside it is impermissible discrimination.[29] The Court explained that marital and non-marital children were identically situated with

[23] *Id.* at 165.
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.* at 165–66.
[28] *Id.* at 175-76.
[29] *Id.* at 169.

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respect to their interest in these benefits: "An unacknowledged illegitimate child may suffer as much from the loss of a parent as a child born within wedlock or an illegitimate later acknowledged."[30]

Weber, the most well-known and cited non-marital status case, reiterated that a state may not express its moral objection of parental conduct by withholding government benefits from the child. To do so places the child at a legal, economic and social disadvantage for conduct over which the child has no control. In *Weber*, the Supreme Court conceded that the state's interest "in protecting 'legitimate family relationships'" was weighty.[31] The Court acknowledged that, "the regulation and protection of the family unit have indeed been a venerable state concern."[32] Importantly, the Court did not "question the importance of that interest" but did question "how the challenged statute will promote it."[33] The Court ultimately concluded that "[t]he state interest in family relationships is not served by the statute"[34] explaining, "[t]he inferior classification of unacknowledged illegitimates bears, in this instance, no relationship to those recognized purposes of recovery which workmen's compensation statutes commendably serve."[35]

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[30] *Id.*

[31] *Id.* at 173.

[32] *Id.*

[33] *Id.*

[34] *Id.* at 175.

[35] *Id.*

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In other words, while promoting marriage and childbirth within marriage may be a valid state interest in the abstract, the Court rejected the contention that this interest was advanced by excluding a group of children who have an identical interest in the benefits at issue, simply because that group of children is disfavored.

B. A State May Not Punish Children in an Effort to Control or Incentivize Adult Behavior

The Supreme Court has also expressed special concern about unfair discrimination against children in other contexts. Specifically, *Weber's* moral and jurisprudential clarity about discrimination against children was echoed years later in *Plyler v. Doe*.[36] At issue in *Plyler* was a state law that sought to deny public education to the children of undocumented immigrants. In deciding the case, the Court relied heavily on the factual findings of the district court to the effect that (1) the law did nothing to improve the quality of education in the state and (2) it instead tended to "permanently lock[] the children of undocumented immigrants into the lowest socio-economic class."[37]

The Court highlighted the core purpose of the Equal Protection Clause: "to work nothing less than the abolition of all caste-based and invidious class-based legislation."[38] To be sure, not all laws that distinguish between groups fall under

[36] 457 U.S. 202 (1982).

[37] *Id.* at 208.

[38] *Id.* at 213.

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this prohibition. But laws that determine the legal, economic and social status of children, based on the circumstances of their birth, surely do. As the Court explained in *Plyler*, "[l]egislation imposing special disabilities upon groups disfavored *by virtue of circumstances beyond their control* suggests the kind of 'class or caste' treatment that the Fourteenth Amendment was designed to abolish."[39]

The Court went on to emphasize that, even though it was arguably permissible to disapprove of the presence of undocumented immigrants in the United States, this concern did not justify "imposing disabilities on the minor *children* of illegal immigrants."[40] In support of its holding, the Court announced,

> Even if the state found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice."[41] Thus, discrimination against children is unjust in part because it contravenes "one of the goals of the Equal Protection Clause . . . [which is] the abolition of governmental barriers to advancement on the basis of individual merit.[42]

Taken as a whole, the Supreme Court's precedent dealing with the equal protection rights of children makes clear that states may not deprive children of important rights and benefits to express moral disapproval of adult relationships

[39] *Id.* at 216 n.14 (emphasis added).

[40] *Id.* at 219-20.

[41] *Id.*

[42] *Id.* at 222.

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and conduct, or in an attempt to incentivize adult conduct. By denying legal relationships and protections to the children of same-sex parents in a misguided and unrelated effort to establish a legal fiction of paternity in cases of opposite-sex parents, Louisiana's laws engage in precisely this type of unjustified discrimination.

II. LOUISIANA'S MARRIAGE BANS FAIL AS A MATTER OF LAW BECAUSE THEY HARM CHILDREN IN AN EFFORT TO REGULATE ADULT RELATIONSHIPS AND CONDUCT

As the district court acknowledged, "The Equal Protection Clause . . . essentially directs that all persons similarly situated be treated alike."[43] And yet Louisiana's laws prohibiting same-sex marriages and refusing to recognize valid same-sex marriages from other jurisdictions patently violate this most fundamental understanding of the equal protection guarantee. The children of same-sex couples are *identically situated* to the children of opposite-sex couples, in terms of their need for and entitlement to the types of family-supporting governmental rights and benefits conferred by the institution of marriage. Yet Louisiana's marriage laws impose permanent class distinctions between these two groups of children by penalizing children in same-sex families merely because their parents are of the same sex.

[43] *Robicheaux, et al., v. Caldwell, et al.,* No. 13-5090 (E.D. La. Sept. 3 2014), slip op. at 6 (quoting *Stoneburner v. Sec'y of the Army*, 152 F.3d 485, 491 (5th Cir. 1998) (citing *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985)).

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A. Numerous Courts Have Already Concluded that Bans Against Same-Sex Marriage Harm Children

Numerous courts, including the United States Supreme Court, have already concluded that marriage bans harm children in ways both tangible and intangible.

First and foremost, the United States Supreme Court acknowledged this inescapable truth in deciding *United States v. Windsor*:

> The differentiation [between same-sex and opposite-sex couples] humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.[44]

The Court further noted the financial impact of marriage bans on children:

> DOMA also brings financial harm to children of same-sex couples. It raises the cost of health care for families by taxing health benefits provided by employers to their workers' same-sex spouses. And it denies or reduces benefits allowed to families upon the loss of a spouse and parent, benefits that are an integral part of family security.[45]

In addition to these tangible harms, the Court determined that marriage bans tell the world that the children of same-sex couples are considered inferior: "DOMA instructs all federal officials, and indeed all persons with whom

[44] 133 S. Ct. 2675, 2694 (2013).

[45] *Id.* at 2695 (citations omitted).

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same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others."[46]

Following in Windsor's wake, the overwhelming majority of post-*Windsor* courts deciding the constitutionality of state marriage bans have concluded that, if a state purports to have the goal of promoting the well-being of children, banning same-sex marriage thwarts rather than advances that goal. As one federal district court poignantly described:

> Of course the welfare of our children is a legitimate state interest. However, limiting marriage to opposite sex couples fails to further this interest. . . .[N]eedlessly stigmatizing and humiliating children who are being raised by the loving couples targeted by Virginia's Marriage Laws betrays that interest . . . . The "for the children rationale" rests upon an unconstitutional, hurtful and unfounded presumption that same-sex couples cannot be good parents. . . . The state's compelling interests in protecting and supporting our children are not furthered by a prohibition against same-sex marriage.[47]

Another federal court similarly found that marriage bans inevitably undermine rather than promote the interests of children:

> [T]he State fails to demonstrate any rational link between its prohibition of same-sex marriage and its goal of having more children raised in the family structure the State wishes to promote. . . [T]he State's prohibition of same-sex marriage detracts from the State's goal of promoting optimal environments for children. The State does not contest the Plaintiff's assertion that roughly 3,000 children are currently being raised by same-sex couples in Utah. These children are also worthy of the State's protection, yet Amendment 3 harms

[46] *Id.* at 2695-96.

[47] *Bostic v. Rainey*, 970 F.Supp.2d 456, 478 (E.D. Va. 2014).

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> them for the same reasons that the Supreme Court found that DOMA harmed the children of same-sex couples.[48]

Thousands of children are being raised by committed same-sex couples, and by excluding their parents from marriage, states like Louisiana place these children in legal and social jeopardy:

> Defendant's discriminatory conduct most directly affects the children of same-sex couples, subjecting these children to harms spared the children of opposite-sex married parents. Ohio refuses to give legal recognition to both parents of these children, based on the State's disapproval of their same-sex relationships. . . . The children in

[48] *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1212 (D. Utah 2014). *See also Baskin v. Bogan*, 766 F.3d 648, 664 (7th Cir. 2014) ("If marriage is better for children who are being brought up by their biological parents, it must be better for children who are being brought up by their adoptive parents."); *De Leon v. Perry* 975 F.Supp.2d 632, 653 (W.D. Tex. 2014) ("There is no doubt that the welfare of children is a legitimate state interest; however, limiting marriage to opposite-sex couples fails to further this interest. . . . Instead, Section 32 causes needless stigmatization and humiliation for children being raised by the loving same-sex couples being targeted . . .. Defendants have not provided any evidentiary support for their assertion that denying marriage to same-sex couples positively affects childrearing. Accordingly, this Court agrees with other district courts that have recently reviewed this issue and concludes that there is no rational connection between Defendants' assertion and the legitimate interest of successful childrearing."); *Latta v. Otter*, No. 14-35420, 2014 WL 4977682, at *11 ("Defendants' essential contention is that bans on same-sex marriage promote the welfare of children, by encouraging good parenting in stable opposite-sex families. . . . Defendants have presented no evidence of any such effect."); *Bostic v. Schafer*, 760 F.3d 352, 384 (4th Cir. 2014) ("Because the Proponents' arguments are based on overbroad generalizations about same-sex parents, and because there is no link between banning same-sex marriage and promoting optimal childrearing, this aim cannot support the Virginia Marriage Laws."); *Bourke v. Beshear*, No. 3:13-CV-750-H, 2014 WL 556729, at *8 (W.D. Ky. Feb. 12, 2014) ("The Court fails to see how having a family could conceivably harm children . . . [a]nd no one has offered evidence that same-sex couples would be any less capable of raising children. . . .").

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> Plaintiffs' and other same-sex married couples' families cannot be denied the right to two legal parents . . . without a sufficient justification. No such justification exists.[49]

B. Louisiana's Arguments Defending Harmful Discrimination Against Children Are Not Supported By Law Or Logic

Louisiana cannot claim that marriage is good for some children while at the same time excluding children similarly situated from marital benefits.[50] Indeed, the rationale behind Louisiana's marriage laws suffers from the same flawed reasoning used to justify discrimination against non-marital children in the cases discussed above. Louisiana's laws categorically exclude an entire class of children from family-supporting benefits and protections out of a misguided and unconstitutional effort to prefer some families over others.

The State of Louisiana argues that it has a legitimate interest in linking children with their biological parents. Indeed, the State contends that Louisiana's principal purpose for regulating marriage is to protect children by linking them to

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[49] *Henry v. Himes*, No. 1:14-cv-129, slip op. (S.D. Ohio, April 14, 2014) at *15. *See also Latta v. Otter*, No. 14-35420 ("Idaho's Marriage Laws fail to advance the State's interest because they withhold legal, financial, and social benefits from the very group they purportedly protect—children. . . . Failing to shield Idaho's children in any rational way, Idaho's Marriage Laws fall on the sword they wield against same-sex couples and their families."

[50] For a thorough consideration of arguments that underwrite challenges to marriage bans and non-recognition laws because of their impairment of the filial relationship between a child and her non-biological parent *see* Tanya Washington, *In Windsor's Wake: Section 2's Defense of Marriage at the Expense of Children,* 48 IND. L. REV. 1 (2014); Tanya Washington, *What About the Children?: Child-Centered Challenges to Same-Sex Marriage Bans*, 12 WHITTIER J. CHILD & FAM. ADVOC. 1 (2012).

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their biological mother and father. The State ties the institution of marriage to a public policy of establishing paternity and thereby preventing illegitimacy, noting that Louisiana courts have zealously guarded and enforced the presumption of paternity to achieve the fundamental ends of preservation of the family unit and to avoid of the stigma of illegitimacy.

Thus, the State seeks to protect some children from the "stigma of illegitimacy," but in the same moment, it forces other children (the children of same-sex couples) into this very status by denying their parents the right to marry. *Amici* do not agree that being born outside of the institution of marriage is or should be stigmatizing, but if the State itself considers this so, then how can it justify affirmatively imposing this precise harm on an entire class of "innocent children"?

Louisiana repeatedly and confusingly conflates two arguments in support of excluding children of same-sex parents from the rights and benefits of marriage—the primacy of a child-parent biological connection and avoiding the stigma of illegitimacy. *Amici* will take each argument in turn.

The State argues that its principal purpose for regulating marriage is to protect children by linking them to their biological mother and father." The State's key support for this argument is Louisiana's marital presumption rule, which provides that the "husband of the mother is presumed to be the father of a child

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born during the marriage or within three hundred days from the date of termination of the marriage."[51]

The flaw in the State's argument is that there is no legal or factual basis to support the notion that the marital presumption rule is rooted in "linking children with biological parents." The State cites no case to support this view and, in fact, the marital presumption has been upheld in circumstances where it was impossible for the father to have a biological connection to the child.[52] Further, Louisiana actually provides for a non-rebuttable presumption of paternity for the husband who consents to assisted conception of the mother.[53] The marital presumption is a legal fiction designed to ensure that a child has a legal relationship to two parents, not to reflect or enforce biological connections. Under this logic, the State should want to enhance all means of creating legal connections between children and their parents. Including families headed by same-sex couples would only enhance this goal, not thwart it.

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[51] La. Civ. Code art. 185.

[52] *See Cook v. Perron* See, 427 So.2d 499 (La. Ct. App. 1983) (marital father precluded from disavowal despite the fact that the woman he subsequently married was pregnant when he met her); *Tannehill v. Tannehill*, 261 So.2d 619 (La. 1972) (marital father precluded from disavowal of paternity even though he was sterile due to a childhood disease); *Smith v. Cole*, 553 So.2d 847 (La. 1989) (denying biological father disavowal of paternity and recognizing both the non-biological marital father and non-marital biological father as both have legal responsibility to the child).

[53] La. Civ. Code art. 188 ("The husband of the mother may not disavow a child born to his wife as a result of an assisted conception to which he consented.").

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If the overarching policy concern of the State of Louisiana is providing stability and a legal safety net for children, its marriage bans have the opposite effect. As the district court in Michigan noted in invalidating that state's marriage bans, such laws "destabilize[] children raised by same-sex couples in the event the sole legal parent dies or becomes incapacitated."[54] This is precisely the sort of legal and social jeopardy the State claims it wants to avoid with its presumption of paternity. It cannot be the case that stability and a legal relationship to parents is important for some children, but not for others. The State cannot exclude an entire class of children in reliance on the primacy of biology, when, in fact, it allows and endorses legal parent-child relationships between non-biological opposite-sex parents and children through the marital presumption rule, as well as through adoption and the legal recognition of stepparents.[55] Children of same-sex couples (and their parents), just as deserving of the benefits of marriage and legal parentage, are denied each of these legal avenues.

The State's second argument is that the institution of marriage's purpose is to ensure paternity to prevent illegitimacy, which also fails.

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[54] *DeBoer v. Snyder*, 973 F.Supp.2d 757, 763 (E.D. Mich. 2014).

[55] Louisiana is one of the few states to allow "dual paternity," that recognizes the legal relationships of both the marital and biological father to ensure that the child obtains support. *See Department of Social Services v. Howard*, 898 So.2d 443, 444 (La. Ct. App. 2004); *Smith v. Cole*, 553 So.2d 847 (La. 1989).

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The reality is that Louisiana excludes "innocent" children of same-sex couples from the "Civil Code's web of child-protective presumptions" because the State morally disagrees with same-sex relationships, or, at a minimum, prefers opposite-sex relationships. While the State may seek to protect marital children of opposite-sex couples from the "stigma of illegitimacy," it cannot do so by trampling on the constitutional rights and interests of other children without running afoul of well-established equal protection law.

Significantly, Louisiana is all too familiar with the precedent established by *Levy* and *Weber*, yet makes no reference to these cases in its argument that it must exclude children of same-sex couples from marriage to protect children of opposite sex couples from the social stigma of illegitimacy. The state cannot use moral judgment—whether to encourage marriage of opposite sex couples as it did in the non-marital cases or to deny marriage to same-sex couples as it seeks to do here—to deny children economic security and emotional tranquility in their family.

CONCLUSION

For the foregoing reasons, *Amici Curiae* urge this court to reverse the decision of the district court.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2014, I electronically filed this Brief of *Amici Curiae* with the Clerk of Court by using the CM/ECF system, which will send a notice of electronic filing and copy to all counsel of record, including, but not limited to, counsel for the defendant-appellee parties:

1. James D. Caldwell, in his official capacity as the Louisiana Attorney General

2. Devin George, in his official capacity as the State Registrar and Center Director as Louisiana Department of Health and Hospitals

3. Tim Barfield, in his official capacity as the Louisiana Secretary of Revenue

4. Kathy Kliebert, in her official capacity as the Louisiana Secretary of Health and Hospitals

I further certify that the foregoing document meets the required privacy redactions; is an exact copy of the paper document to be produced; and, has been scanned and is virus free.

/s/ Deborah Pearce .

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Pursuant to FIFTH CIR. R. 32.3, undersigned counsel certifies this brief complies with the type-volume limitations of FIFTH CIR. R. 32.3.

1. EXCLUSIVE OF THE EXEMPTED PORTIONS OF FED.R.APP.P. 32(a)(7)(B)(iii), THE BRIEF CONTAINS 5,357 WORDS.

2. THE BRIEF HAS BEEN PREPARED IN PROPORTIONALLY SPACED TYPEFACE USING WORD PERFECT 12.0 FOR WINDOWS IN TIMES NEW ROMAN TYPEFACE AND 14 POINT FONT SIZE.

3. UNDERSIGNED COUNSEL IS ALSO PROVIDING AN ELECTRONIC VERSION OF THE BRIEF TO THE COURT AND OPPOSING COUNSEL.

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/s/ Deborah Pearce .

United States Court of Appeals

FIFTH CIRCUIT
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October 28, 2014

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No. 14-31037 Jonathan Robicheaux, et al v. James Caldwell, et al
USDC No. 2:13-CV-5090
USDC No. 2:14-CV-327
USDC No. 2:14-CV-97

Dear Ms. Pearce,

The following pertains to your brief electronically filed on October 24, 2014.

You must submit the **seven (7)** paper copies of your brief required by 5TH CIR. R. 31.1 within five (5) days of the date of this notice pursuant to 5th Cir. ECF Filing Standard E.1.

Sincerely,

LYLE W. CAYCE, Clerk

Sabrina B. Short

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