

12-2335(L)

12-2435 (Con)

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

EDITH SCHLAIN WINDSOR, *Plaintiff-Appellee*,

v.

UNITED STATES OF AMERICA, *Defendant-Appellant*,

and

BIPARTISAN LEGAL ADVISORY GROUP OF THE U.S. HOUSE OF
REPRESENTATIVES, *Intervenor-Defendant-Appellant*.

Appeal from the United States District Court for the Southern District
of New York, Civil Action No. 1:10-cv-08435 (Honorable Barbara S. Jones)

**BRIEF OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION, THE
AMERICAN ACADEMY OF PEDIATRICS, THE AMERICAN
PSYCHIATRIC ASSOCIATION, THE AMERICAN PSYCHOANALYTIC
ASSOCIATION, THE NATIONAL ASSOCIATION OF SOCIAL
WORKERS AND ITS NEW YORK CITY AND STATE CHAPTERS, AND
THE NEW YORK STATE PSYCHOLOGICAL ASSOCIATION AS *AMICI
CURIAE* IN SUPPORT OF PLAINTIFF-APPELLEE AND IN SUPPORT OF
AFFIRMANCE**

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INTEREST OF *AMICI CURIAE*¹

The American Psychological Association, the world's largest professional association of psychologists, is a scientific and educational organization dedicated to increasing and disseminating psychological knowledge. The Association has adopted multiple research-based policy statements supporting the rights of gay and lesbian people including a 2011 policy statement supporting full marriage equality and calling on the federal government "to extend full recognition to legally married same-sex couples, and to accord them all of the rights, benefits, and responsibilities that it provides to legally married different-sex couples." Am. Psychol. Ass'n, *Resolution on Marriage Equality For Same-Sex Couples* (2011), available at <http://www.apa.org/about/governance/council/policy/same-sex.pdf>.

The American Academy of Pediatrics (AAP) is the largest professional association of pediatricians in the world, with over 62,000 members. Through education, research, advocacy, and the provision of expert advice, AAP seeks the optimal physical, mental, and social health and well-being for infants, children, adolescents, and young adults.

The American Psychiatric Association is the Nation's largest organization of physicians specializing in psychiatry. It joins this brief for the reasons expressed

¹ No party's counsel authored this brief in whole or in part, and no party or a party's counsel nor any other person other than the *Amici* contributed money that was intended to fund preparing or submitting the brief.

in its 2005 position statement, *Support of Legal Recognition of Same-Sex Civil Marriage*, available at <http://www.psych.org/Departments/EDU/Library/APAOfficialDocumentsandRelated/PositionStatements/200502.aspx> (“In the interest of maintaining and promoting mental health, the American Psychiatric Association supports the legal recognition of same-sex marriage with all rights, benefits, and responsibilities conferred by civil marriage, and opposes restrictions to those same rights, benefits, and responsibilities.”).

The American Psychoanalytic Association is the oldest and largest national psychoanalytic membership organization, with more than 3,500 members and associates. It believes that marriage is a basic human right and that same gender couples should be able to share equally in the rights and responsibilities of civil marriage.

The National Association of Social Workers (NASW) is the largest association of professional social workers in the world with nearly 145,000 members. NASW develops policy statements on issues of importance to the social work profession and, consistent with those statements, NASW and its New York State and New York City Chapters (also *Amici* herein) support full social and legal acceptance of lesbian, gay, and bisexual people.

With more than 2500 members, the New York State Psychological Association seeks to advance the science and practice of psychology as a means of

promoting human welfare by supporting excellence in education, training, research, advocacy, and service.

All parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY

The floor debate on the Defense of Marriage Act (“DOMA”) evidences a generalized congressional disapproval of homosexuality. 142 Cong. Rec. H7444 (daily ed. July 11, 1996) (statement of Rep. Coburn); 142 Cong. Rec. H7486 (daily ed. July 12, 1996) (statement of Rep. Buyer); *Id.* at H7494 (statement of Rep. Smith) (“‘immoral,’ ‘depraved,’ ‘unnatural,’ ‘based on perversion,’ and ‘an attack upon God’s principles.’”). Other statements at the debate reflect a belief that permitting homosexuals to marry would harm the institution of marriage and be inimical to the welfare of children of same sex couples. For example, one Representative said that it is a “fundamental, unavoidable fact of our human nature” that heterosexual marriage is “the ideal structure within which” to raise children. *Defense of Marriage Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 104th Cong. 1 (1996) (statement of Rep. Canary, Chairman, H. Subcomm. on the Constitution). Another said that heterosexual marriage is “uniquely capable of * * * nurturing children.” *Id.* at 1-2. Another said that the bill will deter “erosion of the family and the erosion of marriage because marriage is the bond that keeps the family together.” *Id.* at 33

(statement of Rep. Sensenbrenner, Member, H. Comm. on the Judiciary). And yet another, quoting the Declaration of Independence, said that the bill reflects “truths that are self-evident.” *Id.* at 36 (statement of Rep. Inglis, Member, H. Subcomm. on the Constitution).

In fact, however, the claim that legal recognition of marriage for same–sex couples undermines the institution of marriage and harms their children is inconsistent with the scientific evidence. That evidence supports the conclusion that homosexuality is a normal expression of human sexuality that is not chosen; that gay and lesbian people form stable, committed relationships that are equivalent to heterosexual relationships in essential respects; and that same-sex couples are no less fit than heterosexual parents to raise children and their children are no less psychologically healthy and well-adjusted than children of opposite sex parents.

The body of research presented below strongly supports the conclusion that discrimination by the federal government between married same-sex couples and married opposite-sex couples in awarding benefits unfairly stigmatizes same-sex couples. The research also contravenes the stereotype-based rationales that were advanced to support passage of DOMA and that the Equal Protection component of the Due Process Clause was designed to prohibit.

ARGUMENT

I. The Scientific Evidence Presented In This Brief.

Representing the leading associations of psychological, psychiatric, medical, and social work professionals, *Amici* have sought in this brief to present an accurate and responsible summary of the current state of scientific and professional knowledge concerning sexual orientation and the family relevant to this case. The brief relies on the best empirical research available.

Every study cited herein has been critically evaluated to assess its methodology, including the reliability and validity of the measures and tests it employed, and the quality of its data-collection procedures and statistical analyses. The adequacy of each study's sample was also evaluated and deemed appropriate by accepted scientific standards. Some of these studies may contain qualifications or suggestions for further research, but that is consistent with the scientific method and does not impeach the studies' conclusions.

Most of the studies and literature reviews cited herein have been peer-reviewed and published in reputable academic journals. Other academic books, book chapters, and technical reports, which typically are not subject to the same peer-review standards as journal articles, are included because they report research employing rigorous methods, are authored by well-established researchers, and accurately reflect professional consensus about the current state of knowledge.

The sole criteria applied in including the scientific literature cited herein are those relevant to scientific validity.

II. Homosexuality Is A Normal Expression of Human Sexuality, Is Generally Not Chosen, And Is Highly Resistant To Change.

Sexual orientation refers to an enduring disposition to experience sexual, affectional, and/or romantic attractions to one or both sexes. It also encompasses an individual's sense of personal and social identity based on those attractions, on behaviors expressing those attractions, and on membership in a community of others who share those attractions and behaviors.² Although sexual orientation ranges along a continuum from exclusively heterosexual to exclusively homosexual, it is usually discussed in three categories: *heterosexual* (having sexual and romantic attraction primarily or exclusively to members of the other sex), *homosexual* (having sexual and romantic attraction primarily or exclusively to members of one's own sex), and *bisexual* (having a significant degree of sexual and romantic attraction to both sexes).

Homosexuality was declassified as a mental disorder by the American Psychiatric Association in 1973 as the result of research that found no scientific support for the classification. In 1974, the American Psychological Association

² See A.R. D'Augelli, *Sexual Orientation*, in 7 Am. Psychol. Ass'n, Encyclopedia of Psychology 260 (A.E. Kazdin ed., 2000); G.M. Herek, *Homosexuality*, in 2 The Corsini Encyclopedia of Psychology 774-76 (I.B. Weiner & W.E. Craighead eds., 4th ed. 2010).

adopted policy reflecting the same conclusion. For decades, then, the consensus of mental health professionals and researchers has been that homosexuality and bisexuality are normal expressions of human sexuality and pose no inherent obstacle to leading a happy, healthy, and productive life, and that gay and lesbian people function well in the full array of social institutions and interpersonal relationships.³

Current scientific and professional understanding is that the core feelings that form the basis for adult sexual orientation typically emerge between middle childhood and early adolescence, without any necessary prior sexual experience.⁴ Most gay men and lesbian women do not experience their sexual orientation as the result of a voluntary choice. In a U.S. national probability sample of 662 self-identified lesbian, gay, and bisexual adults, 88% of gay men and 68% of lesbian

³ See, e.g., Am. Psychiatric Ass'n, Position Statement: *Homosexuality and Civil Rights* (1973), in 131 Am. J. Psychiatry 497 (1974); Am. Psychol. Ass'n, *Minutes of the Annual Meeting of the Council of Representatives*, 30 Am. Psychologist 620, 633 (1975).

⁴ See R.C. Savin-Williams, “. . . And Then I Became Gay”: Young Men’s Stories 1-19 (1998); G. Remafedi et al., *Demography of Sexual Orientation in Adolescents*, 89 Pediatrics 714 (1992); R.C. Savin-Williams & L.M. Diamond, *Sexual Identity Trajectories Among Sexual-Minority Youths: Gender Comparisons*, 29 Archives of Sexual Behavior 607 (2000).

women reported no choice at all about their sexual orientation, while 7% of gay men and 15% of lesbian women reported only a small amount of choice.⁵

Research and the clinical experience of *Amici's* members also indicate that sexual orientation is highly resistant to change. Nonetheless, several groups and individuals have offered clinical interventions—sometimes called “conversion” therapies—that purport to change sexual orientation from homosexual to heterosexual. No scientifically adequate research has shown that such interventions are effective or safe, and an American Psychological Association review of the scientific literature concluded that sexual orientation change efforts are unlikely to succeed and indeed can be harmful.⁶ All major national mental health organizations have adopted policy statements cautioning the profession and the public about treatments that purport to change sexual orientation.⁷

⁵ G. Herek et al., *Demographic, Psychological, and Social Characteristics of Self-Identified Lesbian, Gay, and Bisexual Adults in a US Probability Sample*, 7 *Sexuality Res. & Soc. Policy* 176 (2010). See also G. Herek et al., *Internalized Stigma Among Sexual Minority Adults: Insights From a Social Psychological Perspective*, 56 *J. Counseling Psychol.* 32 (2009).

⁶ Am. Psychol. Ass'n, *Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation* (2009); see also Am. Psychol. Ass'n, *Resolution on Appropriate Affirmative Responses to Sexual Orientation Distress and Change Efforts* (2009), both available at <http://www.apa.org/pi/lgbt/resources/sexual-orientation.aspx>.

⁷ See Am. Psychol. Ass'n, *Resolution*, *supra* note 6; Am. Psychiatric Ass'n, *Position Statement: Psychiatric Treatment and Sexual Orientation* (1998), available at <http://www.psych.org/Departments/EDU/Library/APAOfficialDocumentsandRelated/PositionStatements/199820.aspx>; Am. Ass'n for Marriage

III. Sexual Orientation and Relationships.

Like heterosexuals, gay and lesbian people want to form stable, long-lasting relationships,⁸ and many of them do: numerous studies of gay and lesbian people show that the vast majority of participants have been in a committed relationship at some point in their lives, that large proportions are currently in such a relationship (40-70% of gay men and 45-80% of lesbian women), and that many of those

& Fam. Therapy; *Reparative/Conversion Therapy* (2009), available at http://www.aamft.org/iMIS15/AAMFT/MFT_Resources/Content/Resources/Position_On_Couples.aspx; Am. Med. Ass'n, Policy H-160.991, *Health Care Needs of the Homosexual Population*, available at <http://www.ama-assn.org/ama/pub/about-ama/our-people/member-groups-sections/glbt-advisory-committee/ama-policy-regarding-sexual-orientation.page>; Nat'l Ass'n of Soc. Workers, Position Statement: "*Reparative*" and "*Conversion*" Therapies for Lesbians and Gay Men (2000), available at <http://www.naswdc.org/diversity/lgb/reparative.asp>; Am. Psychoanalytic Ass'n, Position Statement: *Attempts to Change Sexual Orientation, Gender Identity, or Gender Expression* (2012), available at http://www.apsa.org/about_apsaa/position_statements/attempts_to_change_sexual_orientation.aspx; B.L. Frankowski, *Sexual Orientation and Adolescents*, 113 *Pediatrics* 1827 (2004).

⁸ In a 2005 U.S. national probability sample of 662 self-identified lesbian, gay, and bisexual adults, of those not currently in a relationship, 34% of the gay men and 46% of the lesbian women said that they would like to marry someday and, of those who were currently in a relationship, 78% of the gay men and 87% of the lesbian women said they would marry their partner if it was legal. Herek et al., *Demographic*, *supra* note 5. See also Henry J. Kaiser Fam. Found., *Inside-OUT: A Report on the Experiences of Lesbians, Gays and Bisexuals in America and the Public's Views on Issues and Policies Related to Sexual Orientation* 31 (2001), available at <http://www.kff.org/kaiserpolls/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=13875>; A.R. D'Augelli et al., *Lesbian and Gay Youth's Aspirations for Marriage and Raising Children*, 1 *J. LGBT Issues in Counseling* 77 (2007).

couples have been together 10 or more years.⁹ Recent surveys based on probability samples support these findings.¹⁰ Data from the 2010 US Census shows that same-sex couples headed more than 600,000 US households and more than 45,000 in New York, including more than 10,000 married couples in New York and more than 130,000 married couples in the United States.¹¹

Empirical research demonstrates that the psychological and social aspects of committed relationships between same-sex partners closely resemble those of heterosexual partnerships. Like heterosexual couples, same-sex couples form deep emotional attachments and commitments. Heterosexual and same-sex couples alike face similar issues concerning intimacy, love, equity, loyalty, and stability,

⁹ See L.A. Peplau & A.W. Fingerhut, *The Close Relationships of Lesbians and Gay Men*, 58 Ann. Rev. Psychol. 405 (2007) ; L.A. Peplau & N. Ghavami, *Gay, Lesbian, and Bisexual Relationships*, in Encyclopedia of Human Relationships (H.T. Reis & S. Sprecher eds., 2009); P.M. Nardi, *Friends, Lovers, and Families: The Impact of AIDS on Gay and Lesbian Relationships*, in *In Changing Times: Gay Men and Lesbians Encounter HIV/AIDS* 55, 71-72 (Tables 3.1, 3.2) (M.P. Levine et al. eds., 1997).

¹⁰ Herek et al., *Demographic*, *supra* note 5; T.C. Mills et al., *Health-Related Characteristics of Men Who Have Sex with Men: A Comparison of Those Living in "Gay Ghettos" with Those Living Elsewhere*, 91 Am. J. Pub. Health 980, 982 (Table 1) (2001); S.D. Cochran et al., *Prevalence of Mental Disorders, Psychological Distress, and Mental Services Use Among Lesbian, Gay, and Bisexual Adults in the United States*, 71 J. Consulting & Clinical Psychol. 53, 56 (2003); Henry J. Kaiser Fam. Found., *supra* note 8.

¹¹ Same-Sex Unmarried Partner or Spouse Households by Sex of Householder by Presence of Own Children: 2010 Census and 2010 American Community Survey, *available at* <http://www.census.gov/hhes/samesex/files/supp-table-AFF.xls>.

and they go through similar processes to address those issues.¹² Empirical research also shows that gay and lesbian couples have levels of relationship satisfaction similar to or higher than those of heterosexual couples.¹³

IV. The Children of Same Sex Couples.

A. Many Same-Sex Couples Are Raising Children.

Although data are not available to indicate the exact number of lesbian and gay parents in the United States, the 2010 Census reported 111,033 households headed by same-sex couples with their own children under 18 years, 63% (69,839) unmarried and 37% (41,194) married. Among the more than 45,000 New York household heads who reported cohabiting with a same-sex partner, 8,025 had their own children under 18 living at home, 58% (4,649) unmarried and 42% (3,376)

¹² L.A. Kurdek, *Change in Relationship Quality for Partners from Lesbian, Gay Male, and Heterosexual Couples*, 22 J. Fam. Psychol. 701 (2008); L.A. Kurdek, *Are Gay and Lesbian Cohabiting Couples Really Different from Heterosexual Married Couples?*, 66 J. Marriage & Fam. 880 (2004); G.I. Roisman et al., *Adult Romantic Relationships as Contexts for Human Development: A Multimethod Comparison of Same-Sex Couples with Opposite-Sex Dating, Engaged, and Married Dyads*, 44 Developmental Psychol. 91 (2008); see generally L.A. Kurdek, *What Do We Know About Gay and Lesbian Couples?*, 14 Current Directions in Psychol. Sci. 251 (2005); Peplau & Fingerhut, *supra* note 9; Peplau & Ghavami, *supra* note 9.

¹³ K.F. Balsam et al., *Three-Year Follow-Up of Same-Sex Couples Who Had Civil Unions in Vermont, Same-Sex Couples Not in Civil Unions, and Heterosexual Married Couples*, 44 Developmental Psychol. 102 (2008); Kurdek, *Change in Relationship Quality*, *supra* note 12; L.A. Peplau & K.P. Beals, *The Family Lives of Lesbians and Gay Men*, in Handbook of Family Communication 233, 236 (A.L. Vangelisti ed., 2004).

married.¹⁴ Researchers estimate the number of lesbian or gay parents to be substantially higher than the Census figures.¹⁵

B. The Factors That Affect the Adjustment of Children Are Not Dependent on Parental Gender Or Sexual Orientation.

Hundreds of studies over the past 30 years have led to a consensus on the factors that are associated with healthy adjustment among children and adolescents. The three most important are (1) the qualities of parent-child relationships, (2) the qualities of relationships among significant adults (*e.g.*, parents) in child or adolescent lives, and (3) available economic and other resources. There is no empirical support for the notion that the presence of both male and female role models in the home promotes adjustment among children or adolescents.¹⁶

¹⁴ 2010 Census and 2010 American Community Survey, *supra* note 10.

¹⁵ See C.J. Patterson & L.V. Friel, *Sexual Orientation and Fertility, in* Infertility in the Modern World: Present and Future Prospects 238 (G.R. Bentley & N.G. Mascie-Taylor eds., 2000); E.C. Perrin & Comm. on Psychosocial Aspects of Child & Fam. Health, *Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 *Pediatrics* 341 (2002). The Census form does not ask about sexual orientation but includes information that may allow the Census Bureau to deduce that same- sex partners live in a household.

¹⁶ S. Golombok, *Parenting: What Really Counts?* (2002); C.J. Patterson, & P.D. Hastings, *Socialization in the Context of Family Diversity, in* Handbook of Socialization: Theory and Research 328-51 (J.E. Grusec & P.D. Hastings eds., 2007); J. Stacey & T.J. Biblarz, *(How) Does the Sexual Orientation of Parents Matter?*, 66 *Am. Soc. Rev.* 159 (2001).

The term “adjustment” refers to characteristics that allow children and adolescents to function well in their daily lives. Youngsters who are well-adjusted have sufficient social skills to get along with peers as well as with adults, to function well in school and in the workplace, and to establish meaningful intimate relationships. In contrast, maladjustment is reflected in behavior problems such as aggression or other deficient social skills that impair the ability to form and/or maintain positive relationships with others.¹⁷

On the basis of many years of research, mental health professionals have reached a consensus that, when parent-child and parent-adolescent relationships are characterized by warmth, love and affection, emotional commitment, reliability, and consistency, as well as by appropriate guidance and limit-setting, children and adolescents are likely to show more positive adjustment. Children whose parents provide loving guidance in the context of secure home environments are more likely to flourish – and this is just as true for children of same-sex parents.¹⁸

Research also shows that the quality of relationships among significant adults in a child’s life is associated with adjustment. When relationships between

¹⁷ Golombok, *supra* note 16; M.E. Lamb & C. Lewis, *The Role of Parent-Child Relationships in Child Development*, in *Developmental Science: An Advanced Textbook* 429-68 (M.H. Bornstein & M.E. Lamb eds., 5th ed. 2005); Patterson & Hastings, *supra* note 16.

¹⁸ Lamb & Lewis, *supra* note 17; Patterson & Hastings, *supra* note 16.

parents are characterized by love, warmth, cooperation, security, and mutual support, children are more likely to show positive adjustment. In contrast, when parental relationships are conflict-ridden and acrimonious, the adjustment is likely to be less favorable. These correlations are just as true for children of same-sex couples as for children of opposite-sex couples.¹⁹

Finally, researchers acknowledge the association between child adjustment and access to economic and other resources. Children with access to sufficient economic resources are likely to live in safer neighborhoods, breathe cleaner air, and eat more nutritious food. They are also more likely to have opportunities to participate in positive after-school activities and hence to have access to social and emotional resources from teammates, coaches, youth leaders, and others. These children are more likely to show positive adjustment, and this is just as true for children of same-sex couples as it is for children of opposite-sex couples.²⁰

¹⁹ The Family Context of Parenting in Children's Adaptation to Elementary School (P.A. Cowan, C.P. Cowan, J.C. Ablow, V.K. Johnson & J.R. Measelle eds., 2005); E.M. Cummings, M.C. Goeke-Morey & L.M. Papp, *Children's Responses to Everyday Marital Conflict Tactics in the Home*, 74 *Child Dev.* 1918 (2003); E.M. Cummings, M.C. Goeke-Morey & L.M. Papp, *Everyday Marital Conflict and Child Aggression*, 32 *J. Abnormal Child Psychol.* 191 (2004); Golombok, *supra* note 16.

²⁰ Neighborhood Poverty: Context and Consequences for Children (J. Brooks-Gunn, G.J. Duncan & J.L. Aber eds., 1997); Consequences of Growing Up Poor (G.J. Duncan & J. Brooks-Gunn eds., 1997); Patterson & Hastings, *supra* note 16.

In short, the very same factors that are linked to positive development of children with heterosexual parents are also linked to positive development of children with lesbian and gay parents.²¹

C. There Is No Scientific Basis for Concluding That Gay and Lesbian Parents Are Any Less Fit or Capable Than Heterosexual Parents, or That Their Children Are Any Less Psychologically Healthy and Well Adjusted.

Assertions that heterosexual couples are better parents than same-sex couples, or that the children of lesbian or gay parents fare worse than children of heterosexual parents, have no support in the credible scientific research literature.²²

²¹ See R.W. Chan, B. Raboy & C.J. Patterson, *Psychosocial Adjustment Among Children Conceived Via Donor Insemination By Lesbian and Heterosexual Mothers*, 69 *Child Dev.* 443 (1998); C.J. Patterson, *Lesbian and Gay Parents and Their Children: A Social Science Perspective*, in *Contemporary Perspectives on Lesbian, Gay, and Bisexual Identities*, Nebraska Symposium on Motivation 141 (D.A. Hope ed., 2009); Stacey & Biblarz, *supra* note 16; C.J. Telingator & C.J. Patterson, *Children and Adolescents of Lesbian and Gay Parents*, 47 *J. Am. Acad. of Child & Adolescent Psychiatry* 1364 (2008); J.L. Wainright et al., *Psychosocial Adjustment, School Outcomes, and Romantic Relationships of Adolescents With Same-Sex Parents*, 75 *Child Dev.* 1886 (2009).

²² The research literature on gay, lesbian, and bisexual parents includes dozens of empirical studies. They vary in the quality of their samples, research design, measurement methods, and data analysis techniques, but are impressively consistent in their failure to identify deficits in parenting abilities or in the development of children raised in a lesbian or gay household. Their findings are summarized in reviews of empirical literature published in respected, peer-reviewed journals and academic books and empirical studies. See, e.g., Stacey & Biblarz, *supra* note 16; Perrin & Committee, *supra* note 15; C.J. Patterson, *Family Relationships of Lesbians and Gay Men*, 62 *J. Marriage & Fam.* 1052 (2000); N. Anderssen et al., *Outcomes for Children with Lesbian or Gay Parents: A Review of Studies from 1978 to 2000*, 43 *Scand. J. Psychol.* 335 (2002); J.G. Pawelski et al.,

Rather, the scientific research that has directly compared gay and lesbian parents with heterosexual parents has consistently shown that the former are as fit and capable parents as the latter and that their children are as psychologically healthy and well adjusted. More research has focused on lesbian mothers than on gay fathers and thus our knowledge of them is broader,²³ but the studies that exist of gay fathers also find that they are as fit and able parents as heterosexual fathers.²⁴

Notwithstanding the strong consensus noted above, opponents of homosexuality have argued against the parental rights of lesbian and gay people on the basis of research showing that outcomes for children are better when they have

The Effects of Marriage, Civil Union, and Domestic Partnership Laws on the Health and Well-being of Children, 118 *Pediatrics* 349, 358-60 (2006); Wainright et al., *supra* note 21, at 1895; A.E. Goldberg, *Lesbian and Gay Parents and Their Children: Research on the Family Life Cycle*, in *Am. Psychol. Ass'n, Contemporary Perspectives on Lesbian, Gay, and Bisexual Psychology* (2010); G.M. Herek, *Legal Recognition of Same-Sex Relationships in the United States: A Social Science Perspective*, 61 *Am. Psychol.* 607, 614 (2006).

²³ See, e.g., R.H. Farr et al., *Parenting and Child Development in Adoptive Families: Does Parental Sexual Orientation Matter?*, 14 *Applied Developmental Sci.* 164, 176 (2010); E.C. Perrin, *Sexual Orientation in Child and Adolescent Health Care* 105, 115-16 (2002); C.A. Parks, *Lesbian Parenthood: A Review of the Literature*, 68 *Am. J. Orthopsychiatry* 376 (1998); S. Golombok et al., *Children with Lesbian Parents: A Community Study*, 39 *Developmental Psychol.* 20 (2003).

²⁴ Farr et al., *supra* note 23, at 176; Perrin & Committee, *supra* note 15, at 342; C.J. Patterson, *Gay Fathers*, in *The Role of the Father in Child Development* 397, 413 (M.E. Lamb ed., 4th ed. 2004); see also S. Erich et al., *Gay and Lesbian Adoptive Families: An Exploratory Study of Family Functioning, Adoptive Child's Behavior, and Familial Support Networks*, 9 *J. Fam. Soc. Work* 17 (2005); S. Erich, et al., *A Comparative Analysis of Adoptive Family Functioning with Gay, Lesbian, and Heterosexual Parents and Their Children*, 1 *J. GLBT Fam. Stud.* 43 (2005).

two parents.²⁵ But differences resulting from the *number* of parents in a household cannot be attributed to the parents' *gender* or *sexual orientation*. Research regarding heterosexual parents generally indicates that children do better with two parenting figures,²⁶ but most of these studies allow no conclusions about the consequences of having two parents of the same versus different genders.²⁷

As for children, the scientific literature provides “no evidence that psychological adjustment among lesbians, gay men, their children, or other family

²⁵ In *Lofton v. Secretary of the Department of Children & Family Services*, 358 F.3d 804 (11th Cir. 2004), upholding a Florida statute banning adoption by homosexuals, the court cited as scientific evidence a booklet by an anti-marriage-equality advocacy group, an article calling for additional studies, and an article concluding, contrary to the court's description, that “there is no evidentiary basis for considering parental sexual orientation in decisions about children's interests.” Substantial additional research has been published since then. Moreover, the statute was held to violate Florida's constitutional guarantee of equal protection in *Fla. Dep't of Children & Families v. Adoption of X.X.G. & N.R.G.*, 45 So.3d 79 (Fla. Dist. Ct. App. 2010). The State did not appeal.

²⁶ See, e.g., S. McLanahan & G. Sandefur, *Growing Up With a Single Parent: What Hurts, What Helps* 39 (1994).

²⁷ A review of 21 published empirical studies criticizes the practice of “extrapolat[ing] (inappropriately) from research on single-mother families to portray children of lesbians as more vulnerable to everything from delinquency, substance abuse, violence, and crime, to teen pregnancy, school dropout, suicide, and even poverty,” and notes that “the extrapolation is ‘inappropriate’ because lesbian-parent families have never been a comparison group in the family structure literature on which these authors rely.” Stacey & Biblarz, *supra* note 16, at 162 & n.2. One study of 2000 U.S. Census data found, after controlling for socio-economic status and characteristics of the children, that differences in the grade retention performance of children of cohabiting gay parents and heterosexual married parents were not statistically significant. See M.J. Rosenfeld, *Nontraditional Families and Childhood Progress through School*, 47 *Demography* 755, 770 (2010).

members is impaired in any significant way”;²⁸ rather, “every relevant study to date shows that parental sexual orientation per se has no measurable effect on the quality of parent-child relationships or on children’s mental health or social adjustment.”²⁹ A comprehensive survey of peer-reviewed scientific studies reported no differences between children reared by lesbian mothers and those raised by heterosexual parents with respect to the crucial factors of self-esteem, anxiety, depression, behavioral problems, performance in social arenas (sports, school, and friendships), use of psychological counseling, mothers’ and teachers’ reports of children’s hyperactivity, unsociability, emotional difficulty, or conduct difficulty.³⁰

Nor does empirical research support the proposition that having a homosexual parent affects the development of children’s *gender identity* (one’s psychological sense of being male or female). A panel of the American Academy of Pediatrics concluded on the basis of its examination of peer-reviewed studies that “[n]one of the more than 300 children studied to date have shown evidence of

²⁸ Patterson, *Family Relationships*, *supra* note 22, at 1064. G.P. Mallon, *Gay Families and Parenting*, in 2 *Encyclopedia of Social Work* 241-47 (T. Mizrahi & L.E. Davis eds., 20th ed. 2008).

²⁹ Stacey & Biblarz, *supra* note 16, at 176.

³⁰ *Id.* at 169, 171.

gender identity confusion, wished to be the other sex, or consistently engaged in cross-gender behavior.”³¹

Similarly, most published studies have found no reliable differences between the children of lesbian and heterosexual mothers in *social gender role* conformity (adherence to cultural norms defining feminine and masculine behavior).³² A recent study also found that adoptive children of gay fathers showed typical gender role development, as did those of lesbian mothers and those of heterosexual mothers and fathers.³³

No scientific consensus exists about the specific factors underlying the development of sexual orientation.³⁴ The available evidence indicates, however, that the vast majority of homosexual adults were raised by heterosexual parents and the vast majority of children raised by homosexual parents grow up to be heterosexual.³⁵

³¹ Perrin & Committee, *supra* note 15, at 342.

³² See Patterson, *Family Relationships*, *supra* note 22 (reviewing published studies).

³³ See Farr et al., *supra* note 23.

³⁴ See generally 7 Am. Psychol. Ass’n, *Encyclopedia of Psychology* 260 (A.E. Kazdin ed., 2000); G.M. Herek, *Homosexuality*, in 2 *The Corsini Encyclopedia of Psychology* 774-76 (I.B. Weiner & W.E. Craighead eds., 4th ed. 2010).

³⁵ See Patterson, *Gay Fathers*, *supra* note 24, at 407-09; Patterson, *Family Relationships*, *supra* note 22, at 1059-60.

Amici emphasize that the abilities of gay and lesbian persons as parents and the positive outcomes for their children are *not* areas where credible scientific researchers disagree.³⁶ Thus, after careful scrutiny of decades of research, the American Psychological Association concluded in 2004 that (a) “there is no scientific evidence that parenting effectiveness is related to parental sexual orientation: Lesbian and gay parents are as likely as heterosexual parents to provide supportive and healthy environments for their children” and (b) that “research has shown that the adjustment, development, and psychological well-being of children are unrelated to parental sexual orientation and that the children of lesbian and gay parents are as likely as those of heterosexual parents to flourish.” Am. Psychol. Ass’n, *Resolution on Sexual Orientation, Parents, and Children* (2004), available at <http://www.apa.org/about/governance/council>

³⁶ One unreplicated 1996 Australian study purports to show deficits in lesbian and gay parents and their children. See S. Sarantakos, *Children in Three Contexts: Family, Education, and Social Development*, 21 *Child. Australia* 23 (1996). But the anomalous Sarantakos results are likely the result of multiple methodological problems, especially confounding the effects of parental sexual orientation with the effects of parental divorce, which is known to correlate with poor adjustment and academic performance. See, e.g., P.R. Amato, *Children of Divorce in the 1990s: An Update of the Amato and Keith (1991) Meta-Analysis*, 15 *J. Fam. Psychol.* 355 (2001). Some commentators have cited publications by Paul Cameron, but his work has been repeatedly discredited for bias and inaccuracy. See G.M. Herek, *Bad Science in the Service of Stigma: A Critique of the Cameron Group’s Survey Studies*, in *Stigma and Sexual Orientation: Understanding Prejudice Against Lesbians, Gay Men, and Bisexuals* 223 (G.M. Herek ed., 1998); *Baker v. Wade*, 106 F.R.D. 526, 536 (N.D. Tex. 1985) (ruling Cameron made “misrepresentations” to the court).

/policy/parenting.pdf).

NASW has similarly determined that “[t]he most striking feature of the research on lesbian mothers, gay fathers, and their children is the absence of pathological findings. The second most striking feature is how similar the groups of gay and lesbian parents and their children are to heterosexual parents and their children that were included in the studies.” Nat’l Ass’n of Soc. Workers, Policy Statement: *Lesbian, Gay, and Bisexual Issues, in Social Work Speaks* 193, 194 (4th ed. 1997). See also Nat’l Ass’n of Soc. Workers, Policy Statement: *Family Planning and Reproductive Choice, in Social Work Speaks* 129, 132 (9th ed. 2012).

The American Psychoanalytic Association has likewise determined that “[t]here is no credible evidence that shows that a parent’s sexual orientation or gender identity will adversely affect the development of the child.” Am. Psychoanalytic Ass’n, Position Statement: *Parenting* (2012), available at http://www.apsa.org/about_apsaa/position_statements/parenting.aspx.

In adopting an official Position Statement in support of legal recognition of same-sex civil marriage, the American Psychiatric Association observed that “no research has shown that the children raised by lesbians and gay men are less well adjusted than those reared within heterosexual relationships.” Am. Psychiatric Ass’n, Position Statement: *Support of Legal Recognition of Same-Sex Civil*

Marriage (2005), available at <http://www.psych.org/Departments/EDU/Library/APAOfficialDocumentsandRelated/PositionStatements/200502.aspx>.³⁷

Amicus American College of Pediatricians – not to be confused with *amicus* herein, the American Academy of Pediatrics – seriously mischaracterizes a recent study (“the Regnerus study”) as having shown negative outcomes for “children raised by same-sex couples.” *Amicus* Brief at 6-8.³⁸ The Regnerus study placed participants (individuals between the age of 18 and 39) into one of eight categories, six of which were defined by the family structure in which they grew up — e.g., married biological parents, divorced parent, divorced but remarried parent, etc. *There was no category for “same-sex couple.”* Instead, the final two categories included all participants, regardless of family structure, who believed that at some time between birth and their 18th birthday their mother or their father “ever ha[d] a romantic relationship with someone of the same sex.”³⁹ Hence the data do not show whether the perceived romantic relationship ever in fact occurred; nor whether the parent self-identified as gay or lesbian; nor whether the same sex

³⁷ The American Medical Association likewise has adopted a policy supporting legislative and other reforms to allow adoption by same sex partners. Am. Med. Ass’n, Policy H-60.940, *Partner Co-Adoption*, available at <http://www.ama-assn.org/ama/pub/about-ama/our-people/member-groups-sections/glb-t-advisory-committee/ama-policy-regarding-sexual-orientation.page>.

³⁸ Citing M. Regnerus, *How different are the adult children of parents who have same-sex relationships? Findings from the New Family Structures Study*, 41 Soc. Sci. Res. 752 (2012).

³⁹ *Id.* at 756 (emphasis in original).

relationship was continuous, episodic, or one-time only; nor whether the individual in these categories was actually raised by a homosexual parent (children of gay fathers are often raised by their heterosexual mothers following divorce), much less a parent in a long-term relationship with a same-sex partner. Indeed, most of the participants in these groups spent very little, if any, time being raised by a “same-sex couple.”⁴⁰ Hence the Regnerus study sheds no light on the parenting of stable, committed same-sex couples – as Regnerus himself acknowledges⁴¹ – and thus it is gravely misleading to suggest, as the American College of Pediatricians does (p. 6), that the study evaluated “child outcomes for children raised by same-sex couples.”

Accordingly, the conclusions by the leading associations of experts in this area reflect a consensus that children raised by lesbian or gay parents do not differ in any important respects from those raised by heterosexual parents.⁴²

⁴⁰ *Id.* at 757. Only 23% of those whose mother *ever* had a same-sex relationship had lived in a household with the mother’s partner for as much as 3 years. Only 23% of those whose father *ever* had a same-sex relationship had lived in a household with the father’s partner for even 4 months, and more than half had never done so. Regnerus does not provide the number who were raised exclusively by a same-sex couple from infancy to age 18. Possibly none were.

⁴¹ *Id.* at 765 (“Child outcomes in stable, ‘planned’ GLB families and those that are the product of previous heterosexual unions are quite likely distinctive, as previous studies’ conclusions would suggest.”).

⁴² The suggestion by *amici* American College of Pediatricians that an “important new study” provides a substantive “critique” of this consensus is unwarranted. Amicus Brief at 4, citing L. Marks, *Same-sex parenting and children’s outcomes:*

V. Denying Federal Recognition to Legally Married Same-Sex Couples Stigmatizes Them.

The foregoing shows that the attitudes towards and beliefs about lesbians and gay men relied on by Congress in enacting DOMA – about their capacity for committed, long lasting relationships, and their ability to raise healthy well-adjusted children – are contradicted by the scientific evidence and instead reflect an unreasoned antipathy towards an identifiable minority. In institutionalizing greater access by heterosexuals than gay men and lesbians to the many federal resources and benefits accorded married couples and their children, the Act conveys the federal government’s judgment that committed intimate relationships between people of the same sex – even when recognized as legal marriages by the couple’s state – are inferior to heterosexual relationships.⁴³ The American Medical Association has specifically recognized that “exclusion from civil marriage contributes to health care disparities affecting same-sex households.” Am. Med.

A closer examination of the American Psychological Association’s brief on lesbian and gay parenting, 41 Soc. Sci. Res. 735 (2012). The Marks paper presents no new empirical data. Rather, it simply reviews studies cited in a 2005 pamphlet and ignores all subsequent research. It notes limitations of the cited studies but does not contest their findings, and its argument that the children of same-sex couples are disadvantaged relies solely on the unreplicated work of a single researcher, Sarantakos (at 742-44). *See supra* note 35.

⁴³ By not recognizing same-sex marriages, DOMA makes children more vulnerable. For example, in a family where a working parent dies, the surviving parent is not considered a surviving “spouse” eligible for “mother’s” or “father’s” benefits, depriving the family and child of significant economic protection. 42 U.S.C. § 402(g). *See also supra* note 20.

Ass'n, Policy H-65.973, *Health Care Disparities in Same-Sex Partner Households*, available at <http://www.ama-assn.org/ama/pub/about-ama/our-people/member-groups-sections/glb-adv-com/ama-policy-regarding-sexual-orientation.page>. Hence DOMA both reflects and perpetuates the stigma attached to homosexuality and the attendant adverse consequences to those against whom it discriminates.

Stigma refers to a condition or status that is negatively valued by society, defines a person's social identity, and thus disadvantages that person.⁴⁴ Exclusion is central to the concept of stigma: social psychological research confirms the common sense idea that individuals are treated differently according to whether they are considered "us" or "them."⁴⁵ Laws that accord majority and minority groups differing status highlight the perceived "differentness" of the minority and thereby tend to legitimize prejudicial attitudes and individual acts against the disfavored group, including ostracism, harassment, discrimination, and violence.

⁴⁴ See E. Goffman, *Stigma: Notes on the Management of Spoiled Identity* (1963); B.G. Link & J.C. Phelan, *Conceptualizing Stigma*, 27 *Ann. Rev. Soc.* 363 (2001); J. Crocker et al., *Social Stigma*, in 2 *The Handbook of Social Psychology* 504 (D.T. Gilbert et al. eds., 4th ed. 1998).

⁴⁵ P.G. Devine, *Prejudice and Outgroup Perception*, in *Advanced Social Psychology* 467-524 (A. Tesser ed., 1995) (reviewing research on the psychological consequences of categorization of people into in groups and out groups).

Large numbers of lesbian, gay, and bisexual people experience such acts of prejudice because of their sexual orientation.⁴⁶

In sum, DOMA conveys the government's judgment that, in the realm of intimate relationships, a legally married same-sex couple is inherently less deserving of society's full recognition through the provision of federal marriage-linked benefits than are heterosexual couples. By devaluing and delegitimizing the relationships that constitute the very core of a homosexual orientation, the Act compounds and perpetuates the stigma historically attached to homosexuality. Indeed, this effect of the statute condemns it quite apart from its denial of tangible financial benefits to married same-sex couples, for the Supreme Court has repeatedly recognized the unconstitutional nature of stigmatizing legislation based on stereotypic classifications. *See Heckler v. Mathews*, 465 U.S. 728, 739-40 (1984) (“[A]s we have repeatedly emphasized, discrimination itself, by

⁴⁶ A recent national survey of a representative sample of sexual minority adults found that 21% of them had been the target of a physical assault or property crime because of their sexual orientation since age 18. Thirty-eight percent of gay men had been the target of assault or property crime because of their sexual orientation. Eighteen percent of gay men and 16% of lesbians reported they had experienced discrimination in housing or employment. G.M. Herek, *Hate Crimes and Stigma-Related Experiences Among Sexual Minority Adults in the United States: Prevalence Estimates from a National Probability Sample*, 24 J. Interpersonal Violence 54 (2009); see also G.M. Herek et al., *Psychological Sequelae of Hate-Crime Victimization Among Lesbian, Gay, and Bisexual Adults*, 67 J. Consulting & Clinical Psychol. 945, 948 (1999); M.V.L. Badgett, *Money, Myths, and Change: The Economic Lives of Lesbians and Gay Men* (2001).

perpetuating ‘archaic and stereotypic notions’ or by stigmatizing members of the disfavored group as ‘innately inferior’ and therefore as less worthy participants in the political community* * * can cause serious non-economic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group.”) (footnote and citations omitted).

Accordingly, as Judge Jones correctly held, the Defense of Marriage Act establishes a classification that bears no rational relationship to any legitimate government purpose and is therefore unconstitutional under the Equal Protection component of the Due Process Clause.

CONCLUSION

The judgment below should be affirmed.

September 7, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,694 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii). The brief also complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in fourteen-point Times New Roman.

/s/ William F. Sheehan

CERTIFICATE OF SERVICE

On September 7, 2012, I caused to be filed electronically, with the Clerk of the Court for the U.S. Court of Appeals for the Second Circuit, using the appellate CM/ECF system, the foregoing Brief for *Amici Curiae*. I further certify that all parties in this case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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