No. 12-144

IN THE
Supreme Court of the United States

DENNIS HOLLINGSWORTH, ET AL.,
Petitioners,

v.

KRISTIN M. PERRY, ET AL.,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF ADOPTION AND CHILD WELFARE ADVOCATES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici are organizations and individuals who care deeply about finding stable, permanent, and loving homes for children in need of such homes, and about helping their families succeed.

The Evan B. Donaldson Adoption Institute is a national not-for-profit organization whose mission is to provide leadership that improves laws, policies, and practices in order to better the lives of everyone touched by adoption. To achieve those goals, the Institute conducts and synthesizes research; offers education to inform public opinion; promotes ethical practices and legal reforms; and works to translate policy into action.

Families Like Ours, Inc. is an independent non-profit adoption exchange providing information, resources, and support services to adoptive and pre-adoptive families. Its mission is to overcome barriers for all families — traditional and non-traditional — wishing to foster or adopt children of all ages and backgrounds. David Wing-Kovarik founded Families Like Ours after he and his partner adopted two sons. The two men adopted their sons in Washington; they had wished to adopt when they previously lived in Arizona but that State's laws prohibited them from jointly adopting a child.

The North American Council on Adoptable Children was founded in 1974 by adoptive parents to meet the needs of children waiting for permanent

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that none of the parties or their counsel authored this brief in whole or in part and that no person or entity other than *amici* or their counsel made a monetary contribution to its preparation or submission. All parties have filed letters with the Clerk granting blanket consent to the filing of *amicus* briefs.

families and the families who adopt them. NACAC promotes and supports permanent families for children and youth in the United States and Canada who are in state care — especially those in foster care and those who have special needs. Dedicated to the belief that every child deserves a permanent, loving family, NACAC's activities include advocacy, parent leadership development, adoption support, and education and information sharing.

Sue and Hector Badeau built their family by adopting the children "most in need of a home and least likely to get one." Over two decades, they brought 22 children into their permanent home — two biological and 20 adopted — in addition to fostering children. Their children comprise a variety of nationalities, ethnicities, and ages. Some have had disabilities or even a terminal illness. And, in addition to providing a stable home for their own children, the Badeaus also placed about 200 adopted children with permanent families through their agency, Rootwings, between 1986 and 1991. Since 1991, Sue Badeau has continued to work in the field of adoption and child welfare and has become a nationally recognized expert on adoption policy and practice. Together, Sue and Hector have written a book about their parenting experience. *Are We There Yet? The Ultimate Road Trip Adopting and Raising 22 Kids* will be published later this year by Carpenter's Son Publishing.

Penelope L. Maza, Ph.D., Donaldson Adoption Institute Senior Research Fellow, has worked in the child welfare field for more than 30 years. She was the Senior Policy Research Analyst at the Children's Bureau, U.S. Department of Health and Human Services, and Research Director of the Child Welfare League of America, in addition to working as a con-

sultant to a wide range of adoption, foster care, and child welfare organizations. Throughout her career, she has emphasized work designed to facilitate the adoption of children from foster care.

Brian Tessier is a single, gay man who adopted two sons, Ben and Bryce, in 2005 and 2007, respectively. In 2009, he started We Hear the Children, "a nonprofit dedicated to advocacy and support for children's causes related to adoption, diversity, and education." Also that year, Massachusetts recognized Brian as Adoptive Parent of the Year, proving this simple truth: "The only men who are going to adopt are men who have a true passion for being a father — men who would give anything to care for a child of their own."

SUMMARY OF ARGUMENT

Petitioners find a rational basis for Proposition 8 in their assertion that marriage exists only to promote "responsible procreation and childrearing," *e.g.*, Pet. Br. 36, so that children can be "raised in stable and enduring family units by" their biological parents, *id.* at 33. From this premise they argue that a State can rationally withdraw marriage rights from same-sex couples (and, by the same logic, could presumably withdraw marriage rights from infertile or older couples). That action neither helps children nor promotes responsible childrearing. It instead denies the children of same-sex couples the very benefits that petitioners assert.

Even this indefensibly cramped view of marriage, however, would not justify taking marriage rights away from same-sex couples. Both history and scholarly research demonstrate that loving, nurturing families for children come in many different sorts and sizes. A biological connection between a

parent and a child is neither necessary nor sufficient to ensure "responsible childrearing."

1. For centuries, adoption law and practice have recognized a public interest in child welfare served by placing children with non-biological parents. The earliest modern adoption statute, in 1851, recognized that diverse types of adopting families — not only those led by a husband and a wife — can advance a State's interest in child welfare.

In the twentieth century, States have recognized that adoption decisions should be made in "the best interests of the child," and those interests are best served by giving children a stable, permanent home that provides a loving, nurturing environment. Experience shows that long-held prejudices against interracial and gay or lesbian adoption are unfounded. Many types of families, including those led by same-sex couples, can provide a stable, permanent home for children who desperately need one. Centuries of adoptions prove that parents with no biological connection with their children can provide that kind of home.

2. Scholarly research also proves that non-biological families can provide loving, nurturing, and stable homes for children. Overwhelming evidence shows, by any number of different measures, that children benefit from adoption — particularly those who would otherwise be in foster care because their biological families have failed them.

The benefits of adoption are shared equally by those children raised in a same-sex two-parent family and those raised in an opposite-sex two-parent family. Petitioners' assertion that children are best raised "by both the mothers and the fathers who brought them into this world," Pet. Br. 33, is simply

unfounded. The weight of empirical evidence shows that two committed, compatible parents are generally the best for children, regardless of sex and biological connection.

What evidence petitioners have cited to support their assertions is, as the trial court found, "inapposite." For example, petitioners cited a study to support their assertion that children do best in households with married biological parents, but the study itself never compared biological and non-biological parents. Other cited studies treated (non-biological) adoptive parents as biological parents for purposes of their analysis. Indeed, petitioners' own trial expert contradicted the principal argument on which petitioners rely.

Petitioners cite no evidence that actually supports their argument that a State has a rational basis for limiting marriage to couples who can be biological parents. Thus, no rational reason grounded in the State's interest in responsible childrearing supports the decision to withdraw marriage rights from same-sex couples.

ARGUMENT

Petitioners assert that the "animating purpose of marriage" is to promote and safeguard the "relationship of 'parent and child.'" Pet. Br. 34. According to this view, the parent-child relationship is "the principal end and design [of marriage]: and it is by virtue of this relation that infants are protected, maintained, and educated." *Id.* (citing Blackstone). Yet the *only* effect of Proposition 8 is to withdraw the right to marry from gay and lesbian couples, many of whom are raising adopted children. Those men and women, no less than their heterosexual counterparts, are parents who have formed families to "protect[],

maintain[], and educate[]" their children. Their children are as in need of, and deserving of, the "special recognition, encouragement, and support" that the "institution of marriage" provides to opposite-sex families raising children. *Id.* at 36.

Moreover, many opposite-sex couples whose unions are infertile turn to adoption as a way to complete their families. But if this Court embraces petitioners' cramped and ahistorical understanding of the institution of marriage as serving *only* "society's vital interest in responsible procreation" and childrearing "by the fathers and mothers who brought them into the world," *id.* at 35, States would, by implication, be free to withdraw marriage rights from infertile opposite-sex couples as well, including older couples who wish to marry after their childrearing days are behind them.

If petitioners are right that marriage can help provide "status and stability to the environment in which children are raised," *id.* at 36, then withdrawing marriage rights from gay men and lesbians who wish to raise children in committed relationships (and calling into question the marriage rights of infertile or older opposite-sex couples) will deprive children of the benefits of that status and stability. Petitioners have offered no rational basis — nor could they — for inflicting this unwarranted injury on innocent children.

Our nation's long and successful experience promoting and supporting adoptive families for children in need of permanent homes demonstrates that stable, loving, and nurturing families come in many different forms. The great weight of the social science research confirms this reality. Thus, contrary to petitioners' assertions, a biological connection

between a parent and a child is neither necessary nor sufficient to ensure responsible childrearing, as evidenced by the tens of millions of stable families with parental configurations that diverge from that narrow vision.

I. THROUGH THEIR EVOLVING ADOPTION POLICIES, THE STATES HAVE LONG RECOGNIZED THAT NON-BIOLOGICAL FAMILIES PROVIDE LOVING, NURTURING, AND STABLE HOMES FOR CHILDREN

The history of U.S. adoption law shows that States have long recognized what experience and social science research demonstrate: All sorts of families can successfully partner with States to advance the common interest in child welfare. Petitioners argue (at 36) that restricting marriage to opposite-sex couples serves a government interest in "responsible procreation and childrearing." But the history of U.S. adoption law contradicts that constricted understanding of the State's interest. The history, together with the social science research presented below, demonstrates that the central goal of adoption policy is to provide stable, healthy families for children who otherwise lack them — and that a biological relationship between parents and children is neither necessary nor sufficient to achieve that goal.

A. Early U.S. Childcare Law Recognized The Public Interest In Child Welfare

The modern U.S. adoption system developed from social and religious movements reflecting a growing awareness of child welfare. The common law lacked a sophisticated system of adoption recognizable as such today. *See* Madelyn Freundlich, *A Legal History of Adoption and Ongoing Legal Challenges*, *in* HAND-

BOOK OF ADOPTION 44, 45 (Rafael A. Javier et al. eds., 2007) ("Freundlich"); *see also Ex parte Clark*, 87 Cal. 638, 641 (1891) ("The right of adoption . . . was unknown to the common law, and . . . it is repugnant to the principles of the common law"), *abrogated on other grounds by In re Adoption of Barnett*, 54 Cal. 2d 370 (1960). Modern adoption law instead expanded from improvised community-based systems of care to a partnership among governments, individuals, and private organizations. The story of U.S. adoption law reflects the States' recognition that their interest in child welfare is best served by the extension of adoption rights to stable families of many types.

Early efforts to care for disadvantaged children acknowledged an embryonic form of this interest. The seventeenth-century practice of "putting out," by which troubled children could be removed from their home and placed in another — voluntarily or on the community's insistence — is best understood as an early form of foster care. *See* Stephen B. Presser, *The Historical Background of the American Law of Adoption*, 11 J. FAM. L. 443, 456-57 (1971). And early regulation of the Colonial apprenticeship system "provided that apprentices and indentured servants who were orphans must be well cared for and trained, or the state would remove them from their masters." *Id.* at 459. In sum, even in the seventeenth and eighteenth centuries — long before modern child-labor regulations and adoption law — early Americans recognized the common interest in child welfare.

But despite that recognition, care for at-risk children was sorely lacking before the nineteenth century. According to the leading historical account:

> The chief public institution from the colonial days until the middle of the nineteenth century for the care of children, and indeed all dependent persons, was the almshouse. . . . In general, the children would be taken from the almshouses between seven and fourteen years of age and given in indenture or apprenticeship by the overseers of the poor.

Id. at 472. Such labor regulations as existed at the time were ineffectively enforced, and health care for children in the almshouses was often inadequate. *Id.* at 472-73. Abuses within the apprenticeship system continued even into the early nineteenth century. *See* PETER CONN, ADOPTION: A BRIEF SOCIAL AND CULTURAL HISTORY 70 (2013) ("CONN") ("Children were supposed to have legal redress against cruelty, but justice proved predictably and perpetually elusive.").

Thus, while early Americans shared some understanding of the common interest in child welfare, U.S. institutions for realizing that interest remained poorly developed until the mid-nineteenth century.

In response to the inadequate care for indigent children, social movements arose in the first half of the nineteenth century to provide community care. In the early 1800s, private "child-saving" organizations were "established to care for poor and neglected children," and it is within this context that later adoption laws developed. Naomi Cahn, *Perfect Substitutes or the Real Thing?*, 52 DUKE L.J. 1077, 1089-91 (2003); *see also* Presser, 11 J. FAM. L. at 472 ("The activity of ['foundling societies'] is demonstrative of a larger movement for child welfare of which the passage of the adoption statutes also represents a part."). As Presser notes:

> This movement came about as a result of the economic changes which made the stop-gap institutions of apprenticeship, service, and indenture quite unable to cope with the great numbers of children who had been neglected by their families and also were neglected, until about the middle of the nineteenth century in most cases, by the society and the state.

Presser, 11 J. FAM. L. at 472. Initially, "child-savers" worked within the apprenticeship and indenture systems, but that practice ultimately gave way to a more institutionalized system that not only cared for children but often served more temporary needs of families with economic struggles. *See* Cahn, 52 DUKE L.J. at 1090-94. Indeed, "[t]he tension in child saving between removing children from their homes and providing services to them within their homes remains today." *Id.* at 1091.

Adoption law developed in response to these and related social pressures. "By the first half of the nineteenth century, American judges were beginning to formulate what became known as 'the best interests of the child' doctrine," recognized as "America's most important contribution to the concept and practice of adoption around the world." CONN at 71, 75.

B. The Earliest Modern Adoption Statute Recognized That Diverse Families Can Advance The Government's Interest In Child Welfare

In 1851, Massachusetts passed the first modern adoption statute, which recognized that different sorts of families can provide stable homes for children. *See* An Act to provide for the Adoption of Children, 1851 Mass. Acts ch. 324 ("Massachusetts 1851 Act"). As a leading adoption law casebook

explains, "[the Act] was considered revolutionary because it transformed adoption from a parent-centered process to a more structured child-centered process." CYNTHIA R. MABRY & LISA KELLY, ADOPTION LAW: THEORY, POLICY, AND PRACTICE 3 (2d ed. 2010) ("MABRY & KELLY"); *see also* CONN at 66 ("In 1851, when Massachusetts enacted a statute defining and regulating adoption, the United States became the first country in the world to recognize and codify the legal practice as we understand it today.").

The Act's structure refutes petitioners' claim that child welfare justifies restricting marriage to opposite-sex couples. The Act required that, when considering an adoption petition,

> the judge of probate [must] be satisfied . . . that the petitioner, or, in case of husband and wife, the petitioners, are of sufficient ability to bring up the child, and furnish suitable nurture and education . . . and that it is fit and proper that such adoption should take effect[.]

Massachusetts 1851 Act § 5. By orienting the judicial inquiry toward the fitness of the parents for childrearing — and away from, for example, the best interests of the adopting parent(s) — the Act introduced "the best interests of the child" concept, which has become the watchword of modern adoption law. *See* Presser, 11 J. FAM. L. at 446 ("Current adoption law . . . has as its purpose the 'best interests' of the child"); *see also* Freundlich at 45 (explaining that the Massachusetts Act and similar laws "set the stage for the later development of the principle of 'best interest of the child'").

By permitting single adults to adopt, Massachusetts acknowledged that family structures other than those led by opposite-sex couples can be "of sufficient

ability to bring up [children]." Massachusetts 1851 Act § 5. It also required married adults to petition with the consent of their spouses, *id.* § 4, implicitly recognizing that child welfare is not served merely by placing children with opposite-sex couples. Rather, children's interests are best served by stable homes in which adults willingly accept the responsibilities of parenthood.

Taken together, those provisions send a clear message: From the very birth of modern adoption law, States have recognized that their interest in child welfare is not limited to family units led by opposite-sex couples with procreative capacity. Rather, States have long entrusted adoptive parents lacking that capacity with the responsibility of caring for adopted children. Petitioners cannot rationally maintain that a State's interest in child welfare justifies limiting marriage to opposite-sex couples when adoption systems from their inception have successfully included other arrangements.

The Massachusetts innovations set the trajectory for later developments in adoption law. Indeed, many later state adoption statutes were patterned on the Massachusetts 1851 Act. *See* Ruth-Arlene W. Howe, *Adoption Practice, Issues, and Laws 1958-1983*, 17 FAM. L.Q. 173, 176 (1983) ("[The Act] became a model for legislation in most of the common law states in the United States.").

The legal revolution launched in Massachusetts was coupled with contemporaneous religious and social movements dedicated to adoption. Perhaps the most famous example is the "orphan train" system begun by Charles Loring Brace's New York Children's Aid Society. CONN at 75. Brace founded the Society in 1853, driven in large part by his religious

convictions about caring for poor children and his belief that "'[t]he same principles which influence the good or evil development of every child in comfortable circumstances, will effect, in greater or less degree, the child of poverty.'" Presser, 11 J. FAM. L. at 482 (quoting CHARLES L. BRACE, THE BEST METHOD OF DISPOSING OF PAUPER AND VAGRANT CHILDREN 4 (1859)). The Society placed children with families in the West. *Id.* at 485-86. Brace believed this "emigration" program was a significant improvement over the earlier institutionalized system:

> For Brace, the policy brought three connected advantages: farmers would gain additional workers, children would learn useful skills (and good manners) in a "wholesome atmosphere" removed from the crowded slums, and the city would be relieved of the dangers of juvenile criminals. The core insights here, that children will be better off in families than institutions, and that society will thereby best serve its own purposes, remain solidly fixed in social work theory and practice to this day, eight decades after the last orphan train travelled West.

CONN at 78. Between the beginning of this "extraordinary adoption experiment[]" and "the late 1920s, upwards of 250,000 children were sent from eastern cities to the West and Midwest, where they were adopted (either legally or informally), usually by farming families." *Id.* at 75.

In many respects, the Society's program was a forerunner of modern private adoption agencies. Having been liberated from the indenture system, "there are many indications that the children themselves were thought of in the same way that we now think of adopted children." Presser, 11 J. FAM. L. at

486. Indeed, the Society's activities were the catalyst for New York's later efforts to release children from ineffective forms of institutionalized care that exposed them to crime and poverty and instead to place them in families or in institutions designed with child care in mind. *Id.* at 486-87 (stating that "the movement of which Brace's activities were a part led to the passage of [New York's adoption statute]," and noting that Brace's efforts also led to key institutional reforms).

This formative adoption-law episode demonstrates that States best promote child welfare in partnership with institutions focusing on adoption. The experience of modern adoption advocates demonstrates that the States' interest in child welfare is unconcerned with whether adoptive parents are capable of reproduction or of the opposite sex. Rather, what matters is that potential parents are dedicated to providing a loving and stable environment to raise their children. The interest in child welfare simply does not provide a rational basis to deprive same-sex couples of the right to marry.

C. The Social And Legal Transformations Of The Early Twentieth Century Led To The Professionalization Of The Adoption Process To Ensure That Adoptive Families Were Well Qualified To Meet The Physical, Emotional, And Social Needs Of Adopted Children

In the first half of the twentieth century, the social and legal transformations brought about by the Progressive movement fundamentally changed the approach to child welfare. Many institutions central to modern child-rearing developed during the era. And the study of child development changed dramat-

ically with the emergence of professional social workers. *See* CONN at 84.

As those social institutions grew and the need for improved adoption procedures increased in the years following World War I and the Great Depression, many States revised their adoption laws to reflect the emerging understanding of their interest in providing stable homes for adopted children. *See id.* at 87 ("One contemporary observer noted that thirty-nine states had enacted new or revised adoption legislation in the decade 1925-1935.").

The federal government also entered the area during the first half of the twentieth century and reinforced the state-level efforts. In 1912, the United States Children's Bureau was created within the Department of Labor "to investigate and report on all matters pertaining to the welfare of children and child life among all classes of our people." *Id.* at 83. In 1925, the Children's Bureau published a comprehensive study of U.S. adoption law that remains a key reference work today. *See* EMELYN FOSTER PECK, U.S. DEP'T OF LABOR, ADOPTION LAWS IN THE UNITED STATES: A SUMMARY OF THE DEVELOPMENT OF ADOPTION LEGISLATION AND SIGNIFICANT FEATURES OF ADOPTION STATUTES (U.S. Children's Bureau, Pub. No. 148, 1925). And, "[i]n 1935, under the Social Security Act, Congress allocated federal funding for child welfare services." MABRY & KELLY at 7.

Despite those social and legal advancements, lingering prejudice — particularly against racial minorities, disabled children, and unwed mothers — too often harmed the interests of adopted children. CONN at 87. As one author explained, "Nasty and racist rhetoric [of the time] reminds us that the dignity of children is always at risk: gradual progress

toward recognizing 'the best interests of the child' was threatened by the transformation of children . . . into exploited commodities." *Id.*

U.S. adoption law started to take its modern shape in the 1930s. The shared understanding of its purpose changed, as "[t]he concept of 'best interest of the child' broadened beyond economic well-being to include social and psychological well-being." Freundlich at 47-48. The States also initiated "greater oversight of the entities that placed children with adoptive families," including more comprehensive licensing and record-keeping requirements. *Id.* at 48. Further, new state statutes began to require "formal home studies of prospective adoptive parents that extended beyond an inquiry into financial solvency," and "[c]ourts also began to interpret existing statutes to ensure that the interests of children were met." *Id.* While significant differences among the States continue, "[b]y the 1940s and 1950s, the general statutory framework for adoption laws had been set." *Id.*

D. Modern Adoption Practice Recognizes That The Best Interests Of The Child Are Satisfied By An Inclusive Understanding Of The Types Of Families That Can Provide Loving, Stable Homes

"Most experts agree that two principles have emerged to guide modern adoption practice: decisions should be made in the best interests of the child, and a permanent home for every child is the primary goal of adoption." BARBARA A. MOE, ADOPTION: A REFERENCE HANDBOOK 1 (2d ed. 2007). Governments have recognized that those principles are fully consistent with an inclusive understanding of the families that can provide homes for adoptive children. Consider

two examples: transracial adoption and adoption by gay or lesbian parents.

In 1996, Congress, seeking to eliminate racial barriers to adoption, passed § 1808(c) of the Small Business Job Protection Act of 1996, Pub. L. No. 104-188, 110 Stat. 1755, 1904 (codified at 42 U.S.C. § 1996b), which "forbade individuals and government entities that received federal funding from denying an application or denying/delaying an adoptive placement based on the adoptive parent's or the child's 'race, color, or national origin.'" MABRY & KELLY at 10. The statute recognizes that devoted parents can provide good homes for adopted children with no regard to whether they are of the same race.

In the 1970s, in light of the continuing unmet need for permanent families for children whose biological families had failed them, lesbian and gay adoption emerged as an important issue in the United States. *See* Nancy D. Polikoff, *Lesbian and Gay Couples Raising Children: The Law in the United States*, *in* LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN, AND INTERNATIONAL LAW 153, 157 (Robert Wintemute & Mads Andenæs eds., 2001) ("Polikoff, *Lesbian and Gay Couples*"). Some States quickly recognized that the best interest of the child meant placing the child in a supportive, caring home regardless of the parents' sexuality. Courts in Washington, California, Maine, Ohio, Oregon, and South Carolina all allowed lesbian and gay parents to retain custody of their children. *See* David L. Chambers & Nancy D. Polikoff, *Family Law and Gay and Lesbian Family Issues in the Twentieth Century*, 33 FAM. L.Q. 523, 533 (1999). Several States placed children in foster care with lesbians and gay men. *See* Wendell Ricketts & Roberta Achten-

berg, *The Adoptive and Foster Gay and Lesbian Parent*, *in* GAY AND LESBIAN PARENTS 89, 90-91 (Frederick W. Bozett ed., 1987). The City of Los Angeles actively sought out gay men who would be willing to adopt older children. *See id.* at 89, 92. And, by the end of the 1970s, there were reported cases of openly gay men adopting children. *See id.*

Other States initially resisted lesbian and gay adoption. *See* Vanessa A. Lavely, Comment, *The Path to Recognition of Same-Sex Marriage: Reconciling the Inconsistencies Between Marriage and Adoption Cases*, 55 UCLA L. REV. 247, 264 (2007) ("[In the 1970s], many judges were unsympathetic to the idea of allowing a homosexual man or woman to parent a nonbiological child."). Perhaps most notably, in 1977, Florida passed a statute banning lesbians and gay men from adopting children. *See* Polikoff, *Lesbian and Gay Couples* at 158.

Over the past 40 years, however, research has proven the value of gay and lesbian adoption. Studies show that lesbians and gay men "are very willing to adopt children with special needs and, as a demographic group, may be more willing to do so than heterosexual adults." EVAN B. DONALDSON ADOPTION INST., EXPANDING RESOURCES FOR CHILDREN II: ELIMINATING LEGAL AND PRACTICE BARRIERS TO GAY AND LESBIAN ADOPTION FROM FOSTER CARE 5 (2008); *see, e.g.*, Karina Bland, *2 Gay Dads*, The Arizona Republic, May 1, 2011, at E1 (reporting the story of a gay couple that has adopted 12 children from state foster care), *available at* http://www.azcentral.com/news/azliving/articles/2011/05/02/20110502gay-dads-ham-family-12-adopted-kids.html. Leading professional organizations such as the American Psychological Association and the American Academy of Pediatrics

have issued policy statements supporting increased adoption rights for lesbians and gay men. *See* Am. Psychol. Ass'n, *Sexual Orientation, Parents & Children* (July 30, 2004) ("[T]he APA opposes any discrimination based on sexual orientation in matters of adoption, child custody and visitation, foster care, and reproductive health services."), *available at* http://www.apa.org/about/policy/parenting.aspx; Am. Ass'n of Pediatrics, *Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 PEDIATRICS 339, 339-40 (2002).

States have reflected this increased understanding of the value of lesbian and gay adoption through expanded adoption rights. After a Florida court struck down the 1977 statute banning lesbian and gay adoption, *see Florida Dep't of Children & Families v. Adoption of X.X.G.*, 45 So. 3d 79 (Fla. Dist. Ct. App. 2010), every State now allows gay and lesbian individuals to adopt. *See* DAVID M. BRODZINSKY, EVAN B. DONALDSON ADOPTION INST., EXPANDING RESOURCES FOR CHILDREN III: RESEARCH-BASED BEST PRACTICES IN ADOPTION BY GAYS AND LESBIANS 12 (2011). Several States have enacted statutes affirmatively allowing lesbian and gay couples to adopt children. *See*, *e.g.*, CAL. WELF. & INST. CODE § 16013(a) (West 2012) (prohibiting discrimination against adoptive parents on the basis of sexual orientation); N.Y. DOM. REL. LAW § 110 (McKinney 2010) ("An adult unmarried person, an adult married couple together, or any two unmarried adult intimate partners together may adopt another person."). An increasing number of States also allow joint adoption, which allows both members of a lesbian or gay couple to adopt a child, or second-parent adoption, "in which a biological (or legally adoptive) parent's partner adopts his or

her child." Polikoff, *Lesbian and Gay Couples* at 159 (defining joint adoption and second-parent adoption); *see Adoption of Tammy*, 416 Mass. 205 (1993) (allowing joint adoption by two women); *Sharon S. v. Superior Court*, 31 Cal. 4th 417 (2003) (recognizing second-parent adoptions). As the California Supreme Court observed, those types of changes "benefit children" and "offer the possibility of obtaining the security and advantages of two parents for some of . . . [the] neediest children." *Sharon S.*, 31 Cal. 4th at 438.

II. RESEARCH SUPPORTS THE ADOPTION PREMISE — THAT NON-BIOLOGICAL FAMILIES CAN PROVIDE LOVING, NURTURING, AND STABLE HOMES FOR CHILDREN

The history of adoption in this country reveals a deepening commitment to providing permanent families for all children in need of them and a recognition that qualified parents of all types can provide loving, nurturing, and stable homes for those children. The vast weight of the available social science on this topic validates both insights: children whose biological families have failed them do better when matched with permanent families than their peers who do not find such a match, and the gender or sexual orientation of adoptive parents is irrelevant to their ability to provide stable homes to their adopted children.

Petitioners concede (at 36) that marriage confers "special recognition, encouragement, and support" and "provid[es] status and stability to the environment in which children are raised." But they offer no rational basis for withdrawing that same "special recognition" from the families that the State helps create through adoption.

A. Adoption Is Good For Children In Need Of Permanent Families

More than 400,000 children are currently in the public foster-care system in the United States, with more than 100,000 of them lingering in foster care while waiting to be adopted. *See* U.S. Dep't of Health & Human Services, *Trends in Foster Care and Adoption FY 2002-FY 2011*, at 1 (2011), *available at* http://www.acf.hhs.gov/sites/default/files/cb/trends_fostercare_adoption.pdf. Approximately 60,000 of the children in foster care reside in California. *See* Public Policy Inst. of California, *Just the Facts: Foster Care in California* 1 (Mar. 2010), *available at* http://www.ppic.org/content/pubs/jtf/JTF_FosterCareJTF.pdf. "Most of these children enter foster care after experiencing abuse and neglect, and many have significant mental and physical health needs as a result." Justin A. Lavner et al., *Can Gay and Lesbian Parents Promote Healthy Development in High-Risk Children Adopted from Foster Care?*, 82 AM. J. ORTHOPSYCHIATRY 465, 465 (2012). While estimates vary greatly, most studies indicate that at least half of those children have an identified physical health problem, and many more have psychological disorders. *See id.* For all of those children, adoption offers a chance at a permanent home in a loving, stable family. The benefits of adoption for those children can hardly be overstated.

Adopted children, especially those who are adopted with pre-existing mental or physical health challenges, benefit from the investments their adoptive parents make in their well-being. Thus, it is not surprising that "adoption is . . . associated with better psychological outcomes (adjustment, emotional security) than long-term foster care." *Id.* Adoptive

parents have been found to be as involved in their child's schooling as biological parents and to purchase similar numbers of books for their child. *See* Laura Hamilton et al., *Adoptive Parents, Adaptive Parents: Evaluating the Importance of Biological Ties for Parental Investment*, 72 AM. SOC. REV. 95, 106 tbl. 4 (2007). The same is true of a number of other outward investments in the child's well-being, including investment in private schooling, reading- and math-related activities, and talking with the child. *See id.* at 107 tbl. 5. In fact, one study found that adoptive parents tend to devote statistically significantly greater amounts of resources to their adopted children than their biological children. *See* Kyle Gibson, *Differential Parental Investment in Families with Both Adopted and Genetic Children*, 30 EVOL. & HUM. BEHAV. 184, 187 (2009). In addition, adopted children generally have IQs that cannot be statistically distinguished from those of their non-adopted "environmental" siblings and peers, but that are higher than the siblings or peers they "left behind." Marinus H. van IJzendoorn et al., *Adoption and Cognitive Development: A Meta-Analytic Comparison of Adopted and Non-adopted Children's IQ and School Performance*, 131 PSYCHOL. BULL. 301, 308-09 (2005). One author accordingly inferred "that stable adoptive homes can provide a cognitively enriching environment that allows children to overcome their previous adverse circumstances." Lavner, 82 AM. J. ORTHOPSYCHIATRY at 465.

Studies also show that adopted children can and do successfully attach to their adoptive parents in the same manner that children attach to their biological parents. A meta-analysis of psychological attachment between parent and child found no significant

difference in the attachment of children adopted in their first year of life and children raised by their biological families. *See* Linda van den Dries et al., *Fostering Security? A Meta-analysis of Attachment in Adopted Children*, 31 CHILDREN & YOUTH SERVS. REV. 410, 416 (2009). Another study found that mothers of adoptive children in two-parent families report similar amounts of family cohesion, time with children, satisfaction with family life, and quality of parent-child relationship as mothers of biological children in two-parent families. *See* Jennifer E. Lansford et al., *Does Family Structure Matter? A Comparison of Adoptive, Two-Parent Biological, Single-Mother, Stepfather, and Stepmother Households*, 63 J. MARRIAGE & FAM. 840, 846 tbl. 1 (2001). Children in adoptive and biological two-parent families in the study reported similar levels of parental monitoring and family cohesion as well. *See id.* at 848 tbl. 3.

This research confirms the wisdom of the increasing expansiveness of adoption policy. Adoption is good for children whose biological families have failed them, and providing stable, permanent homes for those children is a valid and vital state interest. Furthermore, the scholarly evidence demonstrates that it is the stability of the homes, not the composition of the parental units, that accounts for the success of the children.

B. Children Raised In Same-Sex Two-Parent Households Fare As Well As Children Raised In Opposite-Sex Two-Parent Households

Over the past 20 years, an overwhelming scholarly consensus has formed that child adjustment and academic advancement in same- and opposite-sex

families is fundamentally the same.[2] Contrary to petitioners' insistence that children are best raised "by both the mothers and the fathers who brought them into this world," Pet. Br. 33, "the best scientific evidence" demonstrates that "families headed by . . . two committed, compatible parents are generally the best for children," regardless of sex and biological connection. Timothy Biblarz & Judith Stacey, *How Does the Gender of Parents Matter?*, 72 J. MARRIAGE & FAM. 3, 17 (Feb. 2010). That holds true in a variety of evaluative measures, including the development and quality of peer relationships by children, the existence and number of behavioral problems in children, and the overall, self-reported psychological well-being of children.

For example, studies have found no difference between children raised in same-sex households and those raised by their biological parents in the ability to be social or to form quality, peer relationships. *See* Jennifer L. Wainright & Charlotte J. Patterson, *Peer Relations Among Adolescents With Female Same-Sex Parents*, 44 DEV. PSYCHOL. 117, 121 (2008). Rather, children living with same-sex parents had friendship networks that were "very similar in heterogeneity and member characteristics of those adolescents living with opposite-sex parents." *Id.* These findings reinforce previous studies in which children raised in same-sex households reported similar levels of friendships growing up and were no more likely to remember peer teasing than those from heterosexual single-parent homes. *See*, *e.g.*, Fiona Tasker & Susan Golombok, *Adults Raised as Children in Lesbian*

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[2] *Amici* understand that the American Sociological Association intends to file an *amicus* brief in this case that provides further detail on this scholarly consensus.

Families, 65 AMER. J. ORTHOPSYCHIATRY 203, 210 (Apr. 1995).

Studies of behavioral outcomes — whether measured by teacher or parental reports — were also unable to identify differences in the outcomes of children adopted by opposite-sex couples and those adopted by same-sex couples. A 2010 study comparing lesbian, gay, and heterosexual adoptive couples on the basis of teacher reports and the Child Behavior Checklist ("CBCL"), a checklist that asks parents to rate various behavioral problems, actually found that the children of lesbian and gay parents "were described as having fewer behavior problems" than the children of heterosexual parents, though the effects were not statistically significant. *See* Rachel H. Farr et al., *Parenting and Child Development in Adoptive Families: Does Parental Sexual Orientation Matter?*, 14 APPLIED DEVELOPMENTAL SCI. 164, 172 (2010). The results indicated that children of lesbian and gay parents were "as well-adjusted as those adopted by heterosexual parents" and that there were no significant differences between same-sex and opposite-sex adoptive parents in terms of child adjustment, parenting behaviors, or couples' adjustment. *See id.* at 174-75. Those findings are consistent with other, similar studies. *See*, *e.g.*, Rachel H. Farr & Charlotte J. Patterson, *Coparenting Among Lesbian, Gay, and Heterosexual Couples: Associations With Adopted Children's Outcomes*, 00 CHILD DEV. 1, 13-14 (2013); Paige Averett et al., *An Evaluation of Gay/Lesbian and Heterosexual Adoption*, 12 ADOPTION Q. 129, 143-44 (2009).

Results of studies comparing same-sex and opposite-sex parents hold across both age ranges and the circumstances of the adoption. A recent UCLA

study found minimal differences in the outcomes for high-risk youths adopted by same-sex and opposite-sex households. The researchers conducted interviews with families who had adopted high-risk youths from foster care. *See* Lavner, 82 AM. J. ORTHOPSYCHIATRY at 466-67. Those interviews came at three intervals: two months, 12 months, and 24 months after adoption. *Id.* at 467. Despite the fact that children adopted by gay and lesbian couples had significantly higher "background risk" and were more likely to be of a different ethnicity or require special needs, children adopted by gay and lesbian couples performed similarly to children adopted by opposite-sex couples in cognitive development, intelligence, and behavioral adjustment. *Id.* at 470. In fact, the only significant difference is that children in gay- or lesbian-headed households had significantly *fewer* internalizing problems at the first assessment. *Id.* at 469.

Not only do parents and teachers rate the psychological well-being of children raised in same-sex-parent homes as similar to those raised in opposite-sex-parent homes, but the children in same-sex-parent families also score their own personal well-being as similar to their peers. In a 2012 study gauging the quality of life of 78 adolescents in lesbian-mother families, there was no difference between the children of lesbian couples and heterosexual couples on six different self-reported metrics for well-being. *See* Loes van Gelderen et al., *Quality of Life of Adolescents Raised from Birth by Lesbian Mothers: The US National Longitudinal Family Study*, 33 J. DEVELOPMENTAL & BEHAV. PEDIATRICS 1, 5 (2012). Those metrics included asking the participants to assess their feelings about the future, whether they felt alone, whether they were satisfied with their

lives, whether they felt good about themselves, how they were getting along with their parents, and how they compared their lives to their peers. *Id.* at 3. On all six questions, the children of lesbian couples answered in a statistically similar fashion to children of heterosexual couples. *Id.* at 4, 5.

On every level — peers, parents, teachers, and children themselves — the vast weight of empirical data points to the inescapable conclusion that there is no cognizable difference in the psychological and behavioral well-being of children raised by same-sex families compared to their counterparts with opposite-sex parents. Professors Timothy J. Biblarz and Judith Stacey evaluated the findings of 16 peer-reviewed studies comparing the parenting methods and outcomes of same-sex couples against those of opposite-sex couples. On the vast majority of metrics, the authors found no significant differences. *See* Biblarz & Stacey, 72 J. MARRIAGE & FAM. at 8. Moreover, the statistically relevant differences that did exist often favored the same-sex couples. *Id.* at 7-8 tbl. 1. For example, children raised in same-sex-parent households were more likely to perceive their parents as available and dependable, more likely to be interested in success in school, and less likely to have their teachers report behavioral problems. *Id.* at 8 tbl. 1. Using that information, the authors rightly concluded that the real, relevant factor in determining good parenting is not biology or gender — but stability. The "best scientific evidence" indicates that having two committed parents, regardless of who they are and how they became the child's parents, is "generally best" for the children. *Id.* at 17. Biological and non-biological parents can be equally good parents.

C. Petitioners' Own Experts Confirmed The Importance Of Family Stability Rather Than Biological Ties

Petitioners' rational-basis argument is premised, at its root, on the innate superiority of families with two biological parents. The history of successful adoptions belies that premise. Every child adopted out of, or languishing in, the public foster-care system represents a failed biological family unit. And every successful adoption saves such a child from a lifetime without a permanent family. Not surprisingly, then, petitioners were unable to present any evidence of the superiority of two-parent biological families over two-parent adopted families. On the contrary, their own experts confirmed the importance of family stability rather than biological ties.

As Judge Walker noted at trial, petitioners' social science evidence is inapposite to their argument. *See* Pet. App. 192a (petitioners' empirical evidence "does not, and does not claim to, compare biological to non-biological parents"). Incongruously, in trying to make a case for the rationality of withdrawing marriage rights from same-sex couples, petitioners relied on research comparing stable two-parent families with families comprised of single parents, unmarried mothers, stepparents, cohabitative heterosexual-couple households, or divorced or divorcing parents. None of those studies is probative of their assertion that married biological parents offer children a superior family environment over same-sex couples.[3]

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[3] *Amici* understand that the American Sociological Association intends to file an *amicus* brief in this case that reviews and rebuts every study on which petitioners rely. This brief accordingly focuses only on representative examples of petitioners' studies.

For example, in the court below, petitioners and their expert each cited a research survey to support the argument that children do best in households with married biological parents. *See* Appellants' Br. 78-79 (filed Sept. 17, 2010) (citing Kristin A. Moore et al., *Marriage from a Child's Perspective: How Does Family Structure Affect Children, and What Can We Do About It*, Child Trends Research Brief (June 2002)). The Moore survey, however, includes no study comparing biological parents with non-biological parents, or heterosexual couples with gay couples, but instead relies solely on research involving non-analogous groups, including divorced parents,[4] unmarried mothers,[5] step-parents,[6] and cohabitating heterosexual-couple households.[7]

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[4] *See* E. MAVIS HETHERINGTON & JOHN KELLY, FOR BETTER OR FOR WORSE: DIVORCE RECONSIDERED (2002); Paul R. Amato, *The Consequences of Divorce for Adults and Children*, 64 J. MARRIAGE & FAM. 1269 (2000); James Peterson & Nicholas Zill, *Marital Disruption, Parent-Child Relationships, and Behavior Problems in Children*, 48 J. MARRIAGE & FAM. 295 (1986); ANDREW CHERLIN, MARRIAGE, DIVORCE, REMARRIAGE (1992, rev. & enl. ed.).

[5] *See* Judith Seltzer, *Families Formed Outside of Marriage*, 62 J. MARRIAGE & FAM. 1247 (2000); SARA MCLANAHAN & GARY SANDEFUR, GROWING UP WITH A SINGLE PARENT: WHAT HURTS, WHAT HELPS (1994); STEPHANIE VENTURA ET AL., THE DEMOGRAPHY OF OUT-OF-WEDLOCK CHILDBEARING, REPORT TO CONGRESS ON OUT-OF-WEDLOCK CHILDBEARING (1995); Stephanie J. Ventura & Christine A. Bachrach, Nat'l Ctr. for Health Statistics, *Nonmarital Childbearing in the United States, 1940-99*, National Vital Statistics Reports, Vol. 48, No. 16 (Oct. 18, 2000).

[6] *See* Marilyn Coleman et al., *Reinvestigating Remarriage: Another Decade of Progress*, 62 J. MARRIAGE & FAM. 1288 (2000).

[7] *See* Deborah R. Graefe & Daniel T. Lichter, *Life Course Transitions of American Children: Parental Cohabitation,*

Second, a significant number of the studies cited below in support of Proposition 8 note no significant distinction between biological parents and adoptive parents. Indeed, several treat the two groups as equivalent.[8] The fact that equivalence-based methodological approaches have been widely used by researchers is further evidence that no significant difference exists between married adoptive parents and married biological parents with respect to providing stable environments for children. The two groups are equivalent.

Marriage, and Single Motherhood, 36 DEMOGRAPHY 205 (1999); Larry Bumpass & Hsien-Hen Lu, *Trends in Cohabitation and Implications for Children's Family Contexts in the United States*, 45 POPULATION STUDIES 29 (2000).

[8] *See* Paul D. Allison & Frank F. Furstenberg, *How Marital Dissolution Affects Children: Variations by Age and Sex*, 25 DEVELOPMENTAL PSYCHOL. 540, 541 (1989) ("Intact families are those in which the child was living with both biological parents (or both adopted parents if the adoption occurred in infancy) at the time of the interview."); PAUL AMATO & ALAN BOOTH, A GENERATION AT RISK: GROWING UP IN AN ERA OF FAMILY UPHEAVAL 29 (2000) ("Only 2% of the interviewed parents in 1992 were stepparents; the rest were biological (or adoptive) parents."); ROBERT A. JOHNSON ET AL., SUBSTANCE ABUSE & MENTAL HEALTH SERVICES ADMIN., U.S. DEP'T OF HEALTH & HUMAN SERVICES, THE RELATIONSHIP BETWEEN FAMILY STRUCTURE & ADOLESCENT SUBSTANCE USE 12 (July 1996) (defining, for the purpose of the study, a "mother" as "either a biological or an adoptive mother" and a "father" as "either a biological or an adoptive father"); Diana E. H. Russell, *The Prevalence and Seriousness of Incestuous Abuse: Stepfathers vs. Biological Fathers*, 8 CHILD ABUSE & NEGLECT 15, 19 tbl. 2 (1984) (grouping adoptive fathers with biological fathers).

Finally, petitioners' own expert testimony at trial contradicted petitioners' main argument:

> Q. And you were not meaning to imply, were you, that biological parents were any better parents than adoptive parents?
>
> A. No, sir.
>
> Q. In fact, the studies show that all other things being equal, two adoptive parents raising a child from birth will do as well as two biological parents raising a child from birth, correct?
>
> A. No, sir, that's incorrect.
>
> Q. Well, sir —
>
> A. May I say another word on that, please?
>
> Q. You will have an opportunity on redirect.
>
> A. Okay. It was a clarifying thing and actually supports something you just said. The studies show that adoptive parents . . . *actually on some outcomes outstrip the biological parents* in terms of providing protective care for their children.

Trial Tr. 2794-95 (testimony of David Blankenhorn) (emphasis added).

In sum, petitioners provide no support for their argument that the States have a rational basis for preferring married biological parents over married adoptive parents when it comes to providing a stable family environment for children. Rather, the vast bulk of empirical research fails to find any significant differences in outcomes between children raised by their biological parents and those raised by adopted parents, as long as both homes are stable and supportive. Thus, petitioners have offered no rational reason premised on the well-being of children to

withdraw marriage rights from same-sex couples. Privileging biological families over families with adopted children does not help children born to opposite-sex couples. It simply hurts children living in families with same-sex parents, whether they are adopted children, foster children, or children who are biologically related to only one of their parents.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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