

No. 12-307

In the Supreme Court of the United States

THE UNITED STATES OF AMERICA,

Petitioner,

v.

EDITH SCHLAIN WINDSOR,

and

BIPARTISAN LEGAL ADVISORY GROUP
OF THE UNITED STATES HOUSE OF
REPRESENTATIVES,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

**BRIEF *AMICI CURIAE* OF
THE BEVERLY LAHAYE INSTITUTE AND
THE NATIONAL LEGAL FOUNDATION,**
in support of the Respondent, Bipartisan Legal
Advisory Group of the United States House of
Representatives, Addressing the Merits and
Supporting Reversal.

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INTEREST OF *AMICI CURIAE*¹

The Beverly LaHaye Institute (BLI) is the think tank and research arm of Concerned Women for America. BLI provides accurate academic and scientific data with sound analysis to inform and substantiate policy positions on contemporary issues from a traditional pro-family, feminine perspective. Through professional research and writings, BLI stands strong in defense of marriage, children, and families. BLI sponsors policy forums, provides legislative testimony, compiles and analyzes social science behavioral data. Additionally, BLI publishes literature reviews, opinion editorials, reports, and monographs in an effort to advance women's well-being through sound public policy.

The issues in this case will have a significant impact on women, children and families, the focus of BLI's work.

The National Legal Foundation (NLF) is a public interest law firm that litigates in the areas of religious freedom and in defense of the traditional family. Its supporters are dedicated to preserving the

¹ All parties have consented to the filing of this Brief through individual letters accompanying this Brief or through blanket letters of consent lodged with the Court. No counsel for any party has authored this Brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this Brief. No person or entity has made any monetary contribution to the preparation or submission of this Brief, other than the *Amici Curiae*, and their counsel.

traditional framework of marriage and believe that the work of Congress in enacting DOMA was entirely constitutional. The NLF and its supporters have been involved in the defense of DOMA in courts throughout the United States.

SUMMARY OF THE ARGUMENT

When Congress passed DOMA, it believed, and rationally so, that heterosexual marriage was the best institution in which to raise children, and that DOMA promoted this optimal environment. As Judge Straub of the United States Court of Appeals for the Second Circuit noted in dissent, this proposition is supported by common sense and has been accepted by numerous court.

In addition, this proposition is supported by social science research. The purpose of this Brief is to demonstrate why the *amici* who supported the Respondent, Ms. Windsor, below (and very likely those who will support her before this Court) are wrong to claim this is not so. In particular, recent “conventional wisdom” accepted by many social scientists claims that there is no difference between children raised in opposite-sex households and children of gay and lesbian parents. This Brief will examine a 2012 study that demonstrates that this is not the case. In fact, the study documents statistically significant differences between the adult children of opposite-sex households and adult children of gay and lesbian parents for thirty-one different variables.

ARGUMENT

I. CONGRESS'S INTEREST IN ENCOURAGING RESPONSIBLE CHILDREARING PROVIDES AT LEAST A RATIONAL BASIS FOR DOMA'S ENACTMENT BECAUSE COMMON SENSE AND SOCIAL SCIENCE TEACH THAT OPPOSITE-SEX FAMILIES PROVIDE THE OPTIMAL ENVIRONMENT IN WHICH TO RAISE CHILDREN.

As the Bipartisan Legal Advisory Group of the House of Representatives (BLAG) has repeatedly noted, when Congress passed DOMA, it believed, and rationally so, that heterosexual marriage was the best institution in which to raise children, and that DOMA promoted this optimal environment. (BLAG's Br. 11, 21, 41-42, 48). Yet the Second Circuit, when presented with the same argument below, dismissed it out of hand:

BLAG presents three related reasons why DOMA advances the goals of "responsible childrearing" . . . [one of which is that] DOMA facilitates the optimal parenting arrangement of a mother and a father. We agree that promotion of procreation can be an important government objective. But we do not see how DOMA is substantially related to it.

All three proffered rationales have the same defect: they are cast as incentives for heterosexual couples, incentives that DOMA does not affect in any way. DOMA does not

provide any incremental reason for opposite-sex couples to engage in “responsible procreation.” Incentives for opposite-sex couples to marry and procreate (or not) were the same after DOMA was enacted as they were before.

Windsor v. United States, 699 F.3d. 169, 187-88 (2d Cir. 2012) (footnote omitted).

This line of reasoning misses the point. True, the incentives for opposite-sex couples remain the same. However, those incentives are now *limited to* opposite-sex couples. In other words, Congress could have rationally decided—with the possibility of same-sex marriage on the horizon in various states—that it was important to make plain that its marriage incentives would be available only to those couples who are capable of natural procreation.

The conferring and withholding of benefits has a direct impact on the federal fisc, and Congress rationally decided to limit certain benefits to those whose ability to procreate warranted, in its judgment, the concomitant impact on the fisc.

Indeed this is the very point made by Judge Straub in his dissent in the court below. First, Judge Straub—echoing black letter law—noted that:

[u]nlike under heightened scrutiny, in a rational basis equal protection analysis courts look to any “conceivable basis” for the challenged law, not limited to those articulated by or even consistent with the rationales offered by the legislature. Those

attacking the rationality of a legislative classification have the burden “to negative every conceivable basis which might support it.”

Id. at 199 (Straub, J., concurring in part & dissenting in part) (citations and footnote omitted).

Judge Straub then demonstrated just how easy it is to understand how DOMA advances the goals of responsible childrearing. *Id.* at 199-202. Judge Straub explained that “[t]he interest in recognizing the connections between marriage and childrearing by biological parents can be broken down into several components.” *Id.* at 199. Judge Straub then explained these several components (and sub-components), noting for each the numerous courts that, unlike, his Second Circuit colleagues had no trouble seeing these as rationale bases for marriage and marriage-benefits regulations. *Id.* at 199-202.

One of the “component[s] of the procreation and childrearing rationale for restricting federal rights to opposite-sex marriage” that Judge Straub explicated “is the Congressional desire to have children raised in families with only biological mothers and fathers, which same-sex couples cannot provide.” *Id.* at 201. In support of the validity of this congressional desire as a rational basis for DOMA, Judge Straub quoted from *Hernandez v. Robles*, 855 N.E.2d 1,7 (N.Y. Ct. App. 2006) (plurality):

Plaintiffs seem to assume that they have demonstrated the irrationality of the view that opposite-sex marriages offer advantages to children by showing there is no scientific

evidence to support it. Even assuming no such evidence exists, this reasoning is flawed. In the absence of conclusive scientific evidence, the Legislature could rationally proceed on the commonsense premise that children will do best with a mother and father in the home.

Furthermore, Judge Straub agreed with the argument of BLAG, made before his court, that “the evidence offered by Windsor and the professional organizations and child welfare *amici* . . . does not make Congress's ‘common sense’ regarding the needs of children a forbidden governmental interest under rational basis review.” *Windsor*, 699 F.3d at 201.

In fact, the Second Circuit was presented with a battle of social science briefs—as this Court likely will be as well. On one side of the battle was the brief cited by Judge Straub, filed by several professional organizations and a child welfare organization. On the other side was a brief filed by the American College of Pediatricians. Brief for American College of Pediatricians as *Amicus Curiae* Supporting Intervenor–Defendant–Appellant, *Windsor v. United States*, 699 F.3d. 169 (2d Cir. 2012) (Nos. 12–2335 & 12–2435) (hereinafter, “Br. of American College of Pediatricians”).

As Judge Straub noted, the former brief claimed that “no credible evidence exists” that “opposite-sex marriages offer advantages to children.” *Windsor*, 699 F.3d. at 201 & n.6. Your *Amici* agree completely with Judge Straub that were this assertion true, it would still not render Congress’s assessment “forbidden.” However, your *Amici* write to point out another problem with this assertion by Windsor’s

amici below—and perhaps soon that of *amici* before this Court.

The problem with this assertion is that before Windsor’s *amici* made it, the American College of Pediatricians’ Brief had already presented just such evidence (since that brief, in support of BLAG, an Appellant below, had been filed first). In addition to remaining completely silent with regard to studies cited by American College of Pediatricians demonstrating that children “benefit from the unique parenting contributions of both men and women,” (Br. of American College of Pediatricians 10-14), Windsor’s *amici* very selectively attempted to refute the studies cited by American College of Pediatricians demonstrating that “[e]xisting research on child outcomes for children raised by same-sex couples as compared to married husband-wife couples . . . suggests differences that do not bode well for children.” (Br. of American College of Pediatricians 4-10).

In the just named section of their brief, the American College of Pediatricians cited six studies documenting flaws in research that claims that there are no differences between same-sex couples and husband-wife couples, *and* nine studies demonstrating negative consequences to children raised in same-sex households. Windsor’s *amici* ignored thirteen of these studies, and used a footnote to address another.² However, they could not ignore nor so lightly treat the last study.

² Windsor’s *amici* criticized Loren D. Marks, *Same-Sex Parenting and Children's Outcomes: A Closer Examination of the American Psychological Association's*

Windsor's *amici* were forced to interact at greater length with a July 2012 study by Dr. Mark Regnerus, Associate Professor of Sociology and Faculty Research Associate for the Population Research Center, University of Texas at Austin, that shows significant negative differences in thirty-one of forty studied outcome variables for children of lesbian mothers, gay fathers, or both.³ And there is no wonder that Windsor's *amici* chose to take that study more seriously: it greatly bolsters Congress's commonsense assessment and greatly undercuts their own contrary assertions. The remainder of this

Brief on Lesbian and Gay Parenting, 41 Social Science Research 735 (2012). In so doing, however, they acknowledge that Marks has identified a study that shows that children of same-sex couples *are* disadvantaged, Brief for American Psychological Association, *et al.* as *Amicus Curiae* Supporting Plaintiff-Appellee 23, n.42, *Windsor v. United States*, 699 F.3d. 169 (2d Cir. 2012) (Nos. 12–2335 & 12–2435), and that he has identified limitations of fifty-nine studies relied upon by the American Psychological Association, *see id.*, *together with* Br. of American College of Pediatricians 4-5.

Although Windsor's *amici* limited their criticism of this article to a footnote, this article has come under greater fire in the media and literature. This will be reflected, at one point, in the discussion that follows of the remaining article.

³ Mark Regnerus, *How Different are the Adult Children of Parents who have Same-sex Relationships? Findings from the New Family Structures Study*, 41 Soc. Sci. Research 752 (2012) (hereinafter, "*Adult Children Findings*.") This study appeared in the same issue of the journal *Social Science Research* as the study mentioned in footnote 2.

Brief will examine the results of this study, criticism of this study, and responses to that criticism.

A. Important New Research Demonstrates that Children of Lesbian and Gay Parents Fare Significantly Worse on Numerous Social, Emotional, and Relational Outcome Variables.

Dr. Mark Regnerus's study, *Adult Children Findings*, deserves careful attention for multiple reasons. Your *Amici* address those reasons briefly, before turning to the study's results.

1. The new study overcomes serious problems with prior studies.

Regnerus published his *Adult Children Findings* as the initial introduction of a new social science data set. This data set, the New Family Structures Study (NFSS), "is a social-science data-collection project that fielded a survey to a large, random sample of American young adults (ages 18–39) who were raised in different types of family arrangements." *Adult Children Findings*, supra, at 752. The NFSS was created to address a paradox in social science results and problems with social science study designs.

In the *Introduction to Adult Children Findings*, Regnerus notes the following paradox. On the one hand, "[s]ocial scientists of family transitions have until recently commonly noted the elevated stability and social benefits of the two-parent (heterosexual) married household, when contrasted to single

mothers, cohabiting couples, adoptive parents, and ex-spouses sharing custody.” *Id.* (citations omitted). On the other hand, “[s]ince [2001] the conventional wisdom emerging from comparative studies of same-sex parenting is that there are very few differences of note in the child outcomes of gay and lesbian parents.” *Id.* at 753 (citations omitted). Perhaps explaining this paradox,

[c]oncern has arisen . . . about the methodological quality of many studies focusing on same-sex parents. In particular, most are based on non-random, non-representative data often employing small samples that do not allow for generalization to the larger population of gay and lesbian families. For instance, many published studies on the children of same-sex parents collect data from “snowball” or convenience samples, [including] the National Longitudinal Lesbian Family Study

*Id.*⁴ Further problems exist because many studies are based on parental self-reporting. *Id.* at 754. Furthermore, studies provide much more information about lesbian mothers than about gay fathers and about children still living in lesbian and gay households than about adult children who grew up in such households. *Id.* at 755.

⁴ Snowball sampling is a technique wherein existing study subjects recruit additional subjects from people known to them and convenience sampling occurs when subjects are chosen on the basis of ease of recruitment rather than on being representative of the population.

Although the NFSS is not a longitudinal study, it avoids all the problems identified above: It is a study of adult children, it includes nearly 3,000 respondents, and is “a weighted probability sample, from which meaningful statistical inferences and interpretations can be drawn.” *Id.*

Further, the NFSS’s design, data collection techniques, and analytical approach give it inherent credibility. Its designers included “leading family researchers in sociology, demography, and human development—from Penn State University, Brigham Young University, San Diego State University, the University of Virginia, and several from the University of Texas at Austin” *Id.* The team crossed, not only disciplinary, but also ideological lines. *Id.*⁵ Additionally, “[s]everal additional external consultants also gave close scrutiny to the survey instrument, and advised on how best to measure diverse topics. Both the study protocol and the questionnaire were approved by the University of Texas at Austin’s Institutional Review Board.”

⁵ Despite the team crossing ideological lines, Regnerus was careful to reveal funding sources that might attract attention and to explain why funders could not influence results: “The NFSS was supported in part by grants from the Witherspoon Institute and the Bradley Foundation. While both of these are commonly known for their support of conservative causes—just as other private foundations are known for supporting more liberal causes—the funding sources played no role at all in the design or conduct of the study, the analyses, the interpretations of the data, or in the preparation of this manuscript.” *Id.*

Of special significance is the process by which the data was collected. The NFSS employed a research firm (Knowledge Networks) with a proven record of data collection for academic studies. *Id.* at 756.⁶ The participants are randomly recruited by telephone and mail. They include those with “both listed and unlisted numbers, those without a landline telephone and is not limited to current Internet users or computer owners, and does not accept self-selected volunteers.” *Id.* Regnerus also describes the process whereby Knowledge Networks screened participants to insure that the NFSS would contain sufficient numbers (*i.e.*, numbers matching national population percentages) of lesbian mothers, gay fathers, and adoptive parents to allow the generation of meaningful statistics while still keeping the sample random. Finally, by using these techniques, the NFSS avoided another problem that has been identified in other studies: the under representation of racial minorities:

existing studies of lesbian and gay couples and their families have largely included “white, middle-class persons who are relatively ‘out’ in the gay community and who are living in urban areas,” while “working-class sexual minorities, racial or ethnic sexual minorities, sexual minorities who live in rural or isolated

⁶ Ironically, Regnerus has been criticized for using Knowledge Networks, despite it having been used by “over 350 working papers, conference presentations, published articles, and books . . . including the 2009 National Survey of Sexual Health and Behavior, whose extensive results were featured in an entire volume of the *Journal of Sexual Medicine* . . .” *Id.*

geographical areas” have been overlooked, understudied, and difficult to reach.

Id. at 757 (quoting Abbie E. Goldberg, *Lesbian and Gay parents and Their Children: Research on the Family Life Cycle* 12-13. (2010: APA Books). By contrast, the NFSS racial percentages closely approach those of the 2010 Census data. *Id.*

2. *The study’s specific findings show dramatic differences between children raised by lesbian and gay parents and children raised in opposite-sex households.*

In this initial study from the NFSS data, Regnerus compared various “outcomes” across “eight different types of family-of-origin structure and/or experience.” *Id.* Three of those structures are of interest to this Brief, since they are germane to Congress’s rational belief that opposite-sex households provide the optimal environment for raising children: Intact biological families, household with lesbian mothers, and households with gay fathers.⁷

Adult Children Findings used three types of variables. First, Regnerus used dichotomous variables, *i.e.*, questions that can be answered “yes” or “no”. These variables included items such as

⁷ Four of Regnerus’s other categories are for respondents who were adopted by “strangers” at birth; whose parents divorced after the respondent turned eighteen; who lived in a step family household; and who lived with a single parent. His final category is a catch-all “other.”

whether the respondent was married, had voted in the last election, used public assistance, and whether they had been suicidal in the past twelve months. *Id.* at 758.⁸ Second, Regnerus used continuous variables, *i.e.*, variables the respondent rates on a scale of 1 to, for example, 5; or variables that are assigned a value on a scale. These included self-reporting on physical health and happiness, and on ranges of income. Third, Regnerus used count variables, *i.e.*, variables for which the Respondent reported a number, for example, the frequency of use of marijuana and alcohol, arrests, and sexual activity.

From these variables, Regnerus evaluated forty outcome variables for each of his eight family categories (which, of course, for statistical analysis were also variables). *Id.* at 761-62 (Tables 2-4). Each was examined in a bivariate and a multivariate manner. *Id.* at 760.

In the bivariate analysis each of the forty outcome variables was compared to each of the family category variables to determine the statistical relationship between them; then the results for each family category was compared to see whether a statistically significant difference existed.⁹ For

⁸ All variables, both the dichotomous variables just described, and the other types about to be described can be found in Table 1 in *id.* at 758-59.

⁹ The concept of statistical significance is a mathematical way of determining whether the numbers being compared are due to a true correlation or to chance. A key component of these calculations is the p-value. Regnerus used a value of $p < 0.05$.

example, 9% of the respondents who were raised in an intact biological family were currently cohabitating, while 24% of those raised by a lesbian mother were currently cohabitating. The difference between 9% and 24 % was statistically significant. On the other hand, 43% of the respondents who were raised in an intact biological family were currently married, whereas 36% of those raised by a lesbian mother were currently cohabitating. However, the difference between 43% and 36% was not statistically significant. *Id.* at 761 (Table 2).

In the multivariate analysis, variables are compared to each other after mathematically removing the influence of (*i.e.*, “controlling for”) other variables. In *Adult Children Findings*, Regnerus controlled for “respondent’s age, gender, race/ethnicity, level of mother’s education, perceived family-of-origin’s income, experience with having been bullied as a youth, and the ‘gay friendliness’ of the respondent’s current state of residence.” *Id.* Again, the results can be checked for statistical significance.¹⁰

Regnerus found statistically significant differences between respondents raised in intact biological families and respondents raised by lesbian mothers for the following outcome variables:

¹⁰ Here the statistical significance is determined by generating a “coefficient” for each category and comparing those, again using a p-value of $p < 0.05$.

- Currently cohabiting¹¹—LM¹² higher percent (B & M)¹³
- Family received welfare growing up—LM higher percent (B & M)
- Currently on public assistance—LM higher percent (B & M)
- Currently employed full-time—LM lower percent (B & M)
- Currently unemployed—LM higher percent (B & M)
- Voted in last presidential election—LM lower percent (B)
- Recently or currently in therapy—LM higher percent (M)
- Identifies as entirely heterosexual—LM lower percent (B & M)
- Had affair while married/cohabiting—LM higher percent (B & M)
- Ever had a sexually transmitted infection—LM higher percent (M)

¹¹ These outcome variables use Regnerus’s wording, except that for a few, abbreviations have been spelled out or an auxiliary verb has been deleted. Actual statistics are located in Tables 2-4 in *id.* at 761-62.

¹² For ease of annotating the following list, “LM” (for “lesbian mother”), indicates those respondents who reported same-sex behaviors by their mother. This abbreviation was used by Regnerus in his study for this family category. He has been criticized for this category. Your *Amici* will address this in the next section of this Brief.

¹³ The designation “B” indicates that the difference was statistically significant in the bivariable analysis; the designation “M” indicates that the difference was statistically significant in the multivariable analysis.

Ever touched sexually by parent/adult—LM higher percent (B & M)
 Ever forced to have sex against will—LM higher percent (B & M)
 Educational attainment—LM less (B & M)
 Family-of-origin safety/security¹⁴—LM lower (B & M)
 Family-of-origin negative impact—LM higher (B & M)
 Self-reported physical health—LM lower (B)
 CES-D depression index¹⁵—LM higher (worse) (B & M)
 Attachment scale (dependability)—LM higher (worse) (B & M)
 Level of household income—LM lower (B)
 Current relationship is in trouble—LM higher (worse) (B)
 Frequency of marijuana use—LM higher (B & M)
 Frequency of smoking—LM higher (B & M)
 Frequency of watching TV—LM higher (B & M)
 Frequency of having been arrested—LM higher (B & M)

¹⁴ Regnerus describes this and the next outcome variables as follows: “a pair of indexes captures (1) the overall safety and security in their family while growing up, and (2) respondents’ impressions of negative family-of-origin experiences that continue to affect them. These are part of a multidimensional relationship assessment instrument (dubbed RELATE) designed with the perspective that aspects of family life, such as the quality of the parent’s relationship with their children, create a family tone that can be mapped on a continuum from safe/predictable/rewarding to unsafe/chaotic/punishing.” *Id.* at 760 (citation omitted).

¹⁵ “CES-D” stands for “Center for Epidemiological Studies-Depression.”

Frequency pled guilty to non-minor offense—LM
higher (B & M)
Number of female sex partners (among women)—LM
higher (B & M)
Number of male sex partners (among women)—LM
higher (B & M)
Number of male sex partners (among men)—LM
higher (M)

Similar statistically-significant differences are seen when comparing the results for respondents raised in intact biological families and respondents raised by gay fathers:

Family received welfare growing up— GF¹⁶ higher
percent (B & M)
Voted in last presidential election—GF higher
percent (M)
Recently thought about suicide—GF higher percent
(M)
Identifies as entirely heterosexual—GF lower
percent (M)
Ever had a sexually transmitted infection—GF
higher percent (M)
Ever forced to have sex against will—GF higher
percent (M)
Educational attainment—GF less (B & M)
Family-of-origin safety/security—GF lower (B & M)

¹⁶ For ease of annotating the following list, “GF” (for “gay father”), indicates those respondents who reported same-sex behaviors by their father. As with “LM,” this abbreviation was used by Regnerus in his study for this family category, he has been criticized for this category, and your *Amici* will address this below.

- Family-of-origin negative impact—GF higher (B & M)
- Closeness to biological mother—GF less (B & M)
- CES-D depression index—GF higher (worse) (B & M)
- Current relationship quality index—GF lower) (B & M)
- Current relationship is in trouble—GF higher (worse) (B & M)
- Frequency of smoking—GF higher (M)
- Frequency of having been arrested—GF higher (B & M)
- Frequency pled guilty to non-minor offense—GF higher (M)
- Number of female sex partners (among women)—GF higher (B & M)
- Number of male sex partners (among women)—GF higher (B & M)
- Number of male sex partners (among men)—GF higher (M)

Unless the criticisms against *Adult Children Findings* are so devastating as to render it of no worth at all, it is simply untenable in its wake to claim there is no difference between children raised in intact biological families and those raised by gay and lesbian parents. And of all of these differences, one may assume that Congress only saw one as a positive: the higher voting rate among children raised by gay fathers. All the other differences would cause Congress to rationally believe that intact biological households are the best environment in which to raise children.

Furthermore, it is worth noting that many of the differences are more than merely “statistically significant.” Some of the differences are *multiple*

times different. This is most easily seen with those outcomes that are measured as a bivariable percentage. Just four examples suffice to show the radical difference in the statistics. Compared to respondents raised in intact biological families, respondents raised by lesbian mothers are over four times more likely to have received welfare growing up, between three and four times as likely to currently be on public assistance and to be unemployed, and a staggering eleven-and-a-half times more likely to have been touched sexually by a parent/adult. *Id.* at 761.

This Brief will now examine the criticism leveled against *Adult Children Findings* to see whether it is grounds for discounting all of this data that supports Congress's commonsense, rational basis for believing the opposite-sex families provide the optimal environment for raising children and that DOMA furthers that interest.

B. Politically and non-politically driven criticisms of the study have been well-answered and do not serve to discount the study's groundbreaking importance.

There are several sources of criticism of *Adult Children Findings*. First, as mentioned, Windsor's *amici* below attacked it in their brief and presumably *amici* will attack it in their briefing to this Court. Presumably those attacks will follow the lines taken by *amici* below or those taken in the social science literature and in media outlets. None of these attacks can undercut *Adult Children Findings* in any significant way.

First, the criticism by Windsor’s *amici* below, is—at bottom—more a criticism of the *use* of Regnerus’s study by the American College of Pediatricians in its brief than of the study itself. Windsor’s *amici* criticized the American College of Pediatricians for characterizing the study as being one of children of same-sex couples. Brief for American Psychological Association, *et al.*, *supra*, 22. The *amici* compare this description to that of Regnerus himself who was more careful in describing the family units studied. *See id.*

One may concede—or more properly, “readily acknowledge”—as Regnerus has, *Adult Children Findings* at 756, that respondents were asked whether their parents *ever* had a same-sex romantic relationship without destroying the legitimacy of the study. Indeed this procedure was carried out as part of the screening process implemented by *Knowledge Networks* in its efforts to ensure that enough gay and lesbian households were represented. *Id.*

Furthermore, Windsor’s *amici* below claim that the “data do not show whether the [respondent-] perceived romantic relationship ever in fact occurred” Brief for American Psychological Association, *et al.*, *supra*, 22. *This* criticism is easy to reject. The people reporting these relationships were all adults operating with the benefit of hindsight. Ninety-one percent of those who reported that their mothers had a same-sex relationship reported living with her during the relationship and 57% reported living with the mother and the partner for at least 4 months. *Adult Children Findings* at 757. The comparable statistics for gay fathers were 42% and 23%.

Some of the criticisms from other quarters are more serious but none is cause to discount the strong support *Adult Children Findings* lends to Congress's commonsense understanding that intact opposite-sex families are the optimal environment in which to raise children.

The most telling rebuttal to various criticisms of Regnerus's study is that the study and the scholar have survived them all. Because the subject matter of Regnerus's study is so emotionally charged, for reasons including its impact on the instant litigation, many of the criticisms have been ideologically driven.

One criticism came in the form of accusations of scientific misconduct leveled at Regnerus by Scott Rose of the website thenewcivilrightsmovement.com. The University of Texas at Austin conducted an internal inquiry and hired an outside consultant. Both the members of the inquiry panel and the consultant determined that no formal investigation was warranted. *University of Texas at Austin Completes Inquiry into Allegations of Scientific Misconduct*, Aug. 29, 2012, available at http://www.utexas.edu/news/2012/08/29/regnerus_scientific_misconduct_inquiry_completed/ (last visited Jan. 28, 2013). Significantly, the University noted that "good faith differences in interpretations or judgments of data, scholarly or political disagreements, good faith personal or professional opinions, or private moral or ethical behavior or views are not misconduct." *Id.*

Another criticism that was fueled in large part by a just-as-thinly-veiled "difference in . . . private moral . . . views," *id.*, came in the form of a letter

written by UCLA scholar Gary Gates and signed by about 200 other scholars. Gary J. Gates, *et al.*, *Letter to the Editor and Advisory Editors of Social Science Research*, 41 *Social Science Research* 1350 (2012). Gates is the Williams Distinguished Scholar at the Charles R. Williams Institute on Sexual Orientation and Gender Identity Law and Public Policy at the UCLA School of Law. The Gates letter contained two main criticisms: first, that the journal *Social Science Research* had not followed its own normal and proper procedures in publishing the study (hinting—or more than hinting—that the study was not worthy of publication) and second that Regnerus failed to distinguish between family structure (his eight categories) and family instability. *Id.*

Ironically, this criticism prompted four responses, the cumulative weight of which, more than prove that *Adult Children Findings* passes social science muster and, thus, lends strong credence to Congress's commonsense understanding that intact biological families are the optimal environment for raising children.¹⁷

First, the Gates letter prompted a counter-letter from academics who took the opposite view, namely that *Adult Children Findings* “helped inform the ongoing scholarly . . . conversation about same-sex families” and that much of the criticism was

¹⁷ Your *Amici* do mean to imply that the above represents all of the types of criticism nor that what follows represents all of the types of responses. Rather, they represent significant examples of the more important types (and in the case of the criticisms are limited to non-ad hominem types).

misplaced for three reasons. Byron Johnson, *et al.*, *A Social Science Response to the Regnerus Controversy*, <http://www.baylorisr.org/2012/06/a-social-scientific-response-to-the-regnerus-controversy> (last visited Jan. 27, 2012). Specifically, these professors first agreed with Regnerus on the limitations of prior studies and rebuked critics for not “acknowledging the superiority of Regnerus’s sample to most previous research.” *Id.* Second, the professors addressed the issue of family instability. They noted the difficulty in finding appropriate populations to study (*i.e.*, stable gay and lesbian households), the fact that instability was likely a valid hallmark of the families in the NFSS, and the fact that the findings on instability matched similarly finding of studies conducted in Great Britain, the Netherlands, and Sweden. *Id.* Third the professors noted that the major finding of Regnerus’s study—the very real differences in outcome variables—paralleled findings of a study which found differences in academic outcomes. *Id.*

The second, third, and fourth responses to the Gates letter all took place within the pages of *Social Science Research* itself. The second response was a so-called publication audit, which examined events surrounding the publication of *Adult Children Findings*. This audit was conducted by Darren E. Sherkat, a scholar who has “long harbored negative sentiment” towards Regnerus. Mark Regnerus, *Parental Same-sex Relationships, Family Instability, and Subsequent Life Outcomes for Adult Children: Answering Critics of the New Family Structures Study with Additional Analyses*, 41 *Soc. Sci. Research* 1367, n.1 (2012) (Hereinafter, “Regnerus, *Answering Critics*”). Given this animosity, it is not

surprising that the article containing the audit did not limit itself to that task, but added criticism of *Adult Children Findings* similar to that leveled against it by other sources. Darren E. Sherkat, *The Editorial Process and Politicized Scholarship: Monday Morning Editorial Quarterbacking and a Call for Scientific Vigilance*, 41 Soc. Sci. Research 1346 (2012). Furthermore, the audit leveled some criticisms at the peer reviewers of the study. However, these latter criticisms were of two types. First, the reviewers did not see the same “flaws” with the article that Sherkat saw. *E.g., id.* at 1348 (“Reviewers uniformly downplayed or ignored the fact that the study did not examine children of identifiably gay and lesbian parents . . .”). This “flaw” has been addressed already in the Brief and will be addressed again. Second, Sherkat lamented problems with conflicts held by reviewers, but admitted that these conflicts plague all social science journals.

In light of this last admission, Sherkat’s bottom line on the publication was that everything was done within the currently appropriate, if flawed bounds. Specifically, Sherkat noted the following: “As is normal, [*Social Science Research’s* editor James D.] Wright turned first to two editorial board members who work on topics related to the papers—and one of these board members reviewed both papers. Wright attempted to get five reviews for the Regnerus paper and he secured three reviewers . . .” *Id.* at 1347. “[A]ll of the reviews were positive.” *Id.* “All of the reviewers provided quick feedback, and all of the reviews were positive. The editor required revisions . . . as a result of the reviews, and the reviews were completed quickly and successfully with the guidance

of the reviewers and the editor.” *Id.* “Five of the reviewers [of the *Adult Children Findings* and of the Marks study cited in footnote 2 of this Brief] are very regular, reliable, *SSR* reviewers, and all six were notable scholars. Indeed, the three scholars who are not publicly conservative can accurately be described as social science superstars.” *Id.* “It can be argued that Wright should have been more aggressive in asking about such conflicts but this is probably unrealistic given the large number of papers *SSR* processes.” *Id.*

Sherkat also drew a comparison between Sherkat’s own submission of a study to *Social Science Research* and the situation with *Adult Children Findings*:

last year the top two downloaded papers in *Social Science Research* were on homosexuality and written from a pro-civil rights perspective; and I was a coauthor of one of them. Our paper was accepted by Wright over the objections of two conservative reviewers—out of three reviews, two were certainly voting “reject”. The accusation that Wright was somehow part of a conservative conspiracy to undermine civil rights for LGBT persons is ludicrous, and I know this from his prior actions.

Id. at 1348 (citation omitted).

Finally, although reiterating the problems he had earlier identified, Sherkat summarized his audit by declaring, “[m]y review of the editorial processing of

the Regnerus and Marks papers revealed that there were no gross violations of editorial procedures—the papers were peer reviewed, and the “peers” for papers on this topic were similar to what you would expect at *Social Science Research*.”

The third response to the Gates letter was an after-the-fact, in-depth analysis of *Adult Children Findings* from the point of view of social science standards with an eye towards all the criticisms that had been leveled against the study, written by Walter R. Schumm, Professor in the School of Family Studies and Human Services at Kansas Statute University. Walter R. Schumm, *Methodological Decisions and the Evaluation of Possible Effects of Different Family Structures on Children: The New Family Structures Survey (NFSS)*, 41 Soc. Sci. Research 1357 (2012).

Schumm examined all of the following items: random vs. non-random samples, sample size, family forms, measurement of sexual orientation, types of statistical analyses, research funding, and consistency of findings with prior studies.

Schumm’s overall conclusions are most succinctly stated in his article’s abstract:

Every social science researcher must make a number of methodological decisions when planning and implementing research projects. Each such decision carries with it both advantages and limitations. The decisions faced and made by Regnerus (2012) are discussed here in the wider context of social science literature regarding same-sex

parenting. Even though the apparent outcomes of Regnerus's study were unpopular, the methodological decisions he made in the design and implementation of the New Family Structures Survey were not uncommon among social scientists, including many progressive, gay and lesbian scholars. These decisions and the research they produced deserve considerable and continued discussion, but criticisms of the underlying ethics and professionalism are misplaced because nearly every methodological decision that was made has ample precedents in research published by many other credible and distinguished scholars.

Id. at 1356.¹⁸ Interacting as it does with 112 other studies and papers on statistical techniques, *see id.* at 1364-65 (References), Schumm's positive evaluation of *Adult Children Findings* would be an adequate stopping place for affirming its strong support for Congress's view of the family. However, a fourth response to the Gates letter is worth mentioning.

¹⁸ One of Schumm's observations is of particular interest in light of this Brief's mention of the value of Knowledge Networks and the criticism of it. *See, supra*, note 6 and accompanying text. "Some have criticized the use of [Knowledge Networks] but my brief search of the academic literature found KN having been used for data collection in many research studies with GLB persons, social science research, medical research, and psychiatric research." *Id.* at 1359 (citations to twenty-two representative studies omitted).

That fourth response was a reply article by Regnerus that appeared in the same issue as the Sherkat and Schumm articles. Regnerus, *Answering Critics, supra*. In his second article, Regnerus addressed six criticisms of his original study, *id.* at 1368-75, and also reported on additional analyses of the NFSS data, *id.* at 1375-77.

The first criticism addressed is the use of the labels LM (lesbian mother) and GF (gay father). Regnerus admits that these labels may conflate (presumably in the mind of the reader) sexual orientation and sexual behavior. *Id.* at 1368. A more significant criticism of the label LM is that it includes both respondents who lived with their mothers and her partner and those who did not. *Id.* Therefore, Regnerus adopts new labels¹⁹ and evaluates the two types of mothers in a new analysis. Thus, this criticism of the original study disappears in the face of the new study, which will be discussed below.

The second criticism addressed is the accusation that *Adult Children Findings* compares “apples to oranges” because of the built-in instability in the LM and GF family categories. Regnerus counters that attempting to control for instability, even were it possible, could easily produce a model that is unhelpful to understanding the very “social reality” the researcher is seeking to understand. This could be so because instability might not be a variable, properly so-called, but may instead be a “pathway” for other variables. *Id.* at 1369. However, Regnerus

¹⁹ To avoid confusion, this Brief will continue to use the terms used in *Adult Children Findings*.

also addresses the assertion that because the social stigma against gays and lesbians was more pronounced, the NFSS is in effect “dated” because instability has faded or will fade with the reduced stigma. *Id.* However, Regnerus discusses data available for Norwegian and Swedish same-sex marriages and *current* American same-sex couples that demonstrate the opposite. *Id.* Thus, Regnerus need not back away from his original findings based on this criticism.

The third criticism addressed is, as Regnerus points out, actually an extension of the second criticism. This criticism is that the NFSS does not contain a representative sample of stable lesbian families. *Id.* at 1370. Regnerus admits that the NFSS *could* contain an undercount for this family category, but that it is by no means certain. *Id.* Off-setting this problem, however, is that other studies which are based on women who can afford artificial reproductive technologies or on U.S. census data, likely skew stability in the opposite direction. *Id.* at 1370-71.

The fourth criticism addressed is that the original study may have largely captured “the challenges facing ‘mixed-orientation marriages’ wherein a respondent’s parent elects ‘against their orientation’ to marry someone of the opposite sex, only to witness the subsequent dissolution of their union followed by the commencement of a same-sex relationship.” *Id.* at 1371. In response to this criticism, Regnerus runs through possible scenarios based on new data, ultimately noting that the answer cannot be definitively ascertained. *Id.* at 1371-75 & Fig. 1 & Tables 1-3. At bottom, however, Regnerus reasserts

that his study was addressing sexual behavior, not sexual orientation and that this criticism does not directly impact his conclusions.

The fifth criticism addressed is an extension of the fourth criticism. Some critics have speculated that many of the LMs and GFs may actually be bisexuals. Regnerus concedes this possibility. However, although Regnerus does not raise the point, this criticism is subject to the same behavior/orientation point made above. Furthermore, the possibility that this is true and the additional possibility that this would have some impact on the original statistics certainly does not render the current results useless.

The sixth criticism addressed is that the *Adult Children's Findings* claim that LM respondents were the most likely to have been placed at some point in foster care could be wrong. *Id.* 1375. Regnerus examined additional data to attempt to address this criticism, ultimately concluding the situation is unclear. *Id.* For purposes of this brief it is sufficient to note that foster care placement was not one of the forty outcome variables (and thus was not previously addressed by this Brief). Regnerus addressed it only in portions of *Adult Children's Findings* dealing with non-outcome indications of instability and with possible scenarios of sexual abuse. *See, Adult Children's Findings* at 757, 763.

In addition to addressing these six criticisms, Regnerus reanalyzed the data. Based on criticism, he shifted some respondents into a different family category, and he expanded the family categories from eight to fifteen. *Answering Critics, supra*, at 1375-76.

By doing this, he was able to generate statistics for respondents who never lived with their lesbian mothers' partners and those who did. In addition, more family categories were available to be compared to these new categories and with gay father families (as well as with each other). For purposes of this Brief, it is sufficient to note respondents from both types of lesbian mother families and from gay father families continued to compare poorly. For children of lesbian mothers, all of the same outcomes are still statistically significantly worse (either bivariably, multivariably or both) for one or both categories except for "voted in the last presidential election" "thought recently about suicide." *Id.* at 1372-74 (Tables 2-4). In addition, "current relationship index" is now bivariably worse for respondents who did live with the mother's partner. *Id.* at 1373 (Table 3).²⁰

Thus, in total, one sees that *Adult Children Findings* does stand up to its critics. In addition, a refining of its data continues to demonstrate that it strongly supports Congress's commonsense view that opposite-sex marriage provides the optimal environment in which to raise children. And as Judge Straub and many courts and judges before him

²⁰ Too few respondents from gay father families reported living with their father to allow for that category to be divided. *Id.* at 1375. Twelve respondents reported that both parents had engaged in same-sex behavior. These respondents who were moved to one of the new lesbian mother categories. This change resulted in "thought recently about suicide," "educational attainment," "frequency of smoking," "frequency of having been arrested," and "frequency pled guilty to non-minor offense" no longer being statistically significantly different.

have recognized, DOMA is rationally related to encouraging this interest.

CONCLUSION

For the foregoing reasons and for other reasons stated by BLAG in its Brief, the judgment of the Second Circuit should be reversed.

Respectfully submitted,
this 29th day of January, 2013,

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