CV-14-427

BEFORE THE ARKANSAS SUPREME COURT

M. KENDALL WRIGHT, et al. **PLAINTIFFS-APPELLEES**

VS. **Case No. CV-14-427**

NATHANIEL SMITH, MD, MPH, et al. **DEFENDANTS-APPELLANTS**

ON APPEAL FROM THE
PULASKI COUNTY CIRCUIT COURT
HONORABLE CHRISTOPHER C. PIAZZA, CIRCUIT JUDGE

BRIEF OF *AMICUS CURIAE* ANTHONY B. TAYLOR, BISHOP OF THE ROMAN CATHOLIC DIOCESE OF LITTLE ROCK

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*Amicus curiae adopts the Abstract and Addendum of the Appellant.

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STATEMENT OF THE CASE

Plaintiffs/Appellees are same-sex couples who seek to marry in Arkansas and same-sex couples who have been married in other states and seek to have their marriages recognized in Arkansas. Appellees brought this lawsuit challenging two Arkansas laws. Act 144 of 1997 states that a marriage shall be only between a man and a woman and any marriage between persons of the same sex is void. Ark. Code Ann. § 9-11-109. Amendment 83 to the Arkansas Constitution also provides that marriage consists of only the union of one man and one women and adds that "[l]egal status for unmarried persons which is identical or substantially similar to marital status shall not be valid or recognized in Arkansas", with the exception of common law marriage from another state. ARK. CONST. amend. 83 §§1, 2. Appellees argued that these laws infringed on their equal protection and due process rights under the United States and Arkansas Constitutions.

On May 9, 2014, Judge Christopher Piazza of the Pulaski County Circuit Court granted summary judgment in favor of Appellees on both claims. ADD 786. The State appeals. Anthony B. Taylor, Bishop of the Roman Catholic Diocese of Little Rock (the "Diocese") moved for leave to file this *amicus* brief in support of Appellant and in support of the challenged laws. The Diocese is a nonpartisan, not-for-profit, charitable organization that encompasses the Catholic Church in Arkansas. In addition to ministering to Arkansas's Catholic population and providing charitable services to the poor and needy, regardless of religious

affiliation, the Diocese advocates for sound public policies in federal, state, and administrative forums in accordance with faith-based principles. The Diocese has advocated on issues spanning the political spectrum, including immigration reform, migrant rights, elimination of the death penalty, protection of the unborn, and freedom of religion.

Among the issues of particular importance to the Diocese are the promotion and defense of marriage and the development of the nation's jurisprudence on these issues. The Diocese has a strong interest in protecting the traditional institution of husband-wife marriage because of the religious beliefs of its members and this institution's benefits to children, families, and society. The Catholic Church teaches that marriage has its origin in the nature of the human person, created by God as male and female. When joined in marriage, a man and woman complement one another spiritually, emotionally, and physically—in the latter element, a man and woman complement one another in the capacity for procreation that, by nature, is unique to such a union. The Diocese's support for the established meaning of marriage arises from an affirmative view "of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony," *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885), and not from animosity toward anyone.

ARGUMENT

The Arkansas Legislature and the voters of Arkansas have enacted, via legitimate and constitutional means of the democratic process, a law that defines marriage in such a way as to simply maintain what has been the *status quo* from time immemorial. As such, this Court should defer to the definition of marriage as enacted by the state legislature and the voting electorate. Arkansas's definition of marriage is subject to rational-basis review, and there exist unique features of opposite-sex unions such that there are rational bases for distinguishing between opposite-sex and same-sex unions.

In the eyes of the Diocese and the entire Catholic Church, each and every human person, regardless of sexual orientation, has a dignity and worth that derives from his or her Creator. As such, the assertion that opposition to same-sex marriage is simply animus against persons who experience same-sex attraction is erroneous and inconsistent with the core beliefs of the Diocese and the Catholic Church. Furthermore, casting such aspersions on those who oppose the redefinition of marriage only serves to suppress rational dialogue and democratic conversation.

In this brief, the Diocese demonstrates that Arkansas's marriage laws should not be overturned on the misguided charge that the supporters of such laws do so out of animus. Proponents of Arkansas's marriage laws such as the Diocese bear no ill will toward same-sex couples. Rather, the Diocese has marriage-affirming

beliefs that, when merged with practical experience, counsel in favor of retaining the "husband and wife" definition of marriage. More importantly, and as explained below, the precedent before this Court supports the conclusion that Arkansas's marriage laws are constitutional.

The trial court and others who oppose Arkansas's marriage laws contend that the current fight for equality for same-sex couples is directly comparable to the fight against racial discrimination. Any comparison between Arkansas's marriage laws and racial discrimination is inapposite and irrelevant to the legal issues in question here. The trial court and others also contend, or at least imply, that Arkansas's marriage laws are akin to state recognition of a particular religious faith. Simply because legislators and voters may have been informed by religious principles in voting on Arkansas's marriage laws does not detract from the laws' rationality. That religious considerations may have informed legislators' and voters' viewpoints does not render Arkansas's marriage laws invalid, any more than laws related to poverty, health care, or the death penalty would be rendered invalid when informed in part by religious considerations.

I. This Court should defer to the definition of marriage duly enacted by the Arkansas Legislature and approved by Arkansas voters.

Marriage is a matter left to definition by the states. Indeed, "regulation of domestic relations" is "an area that has long been regarded as a virtually exclusive

province of the States." *Sosna v. Iowa*, 419 U.S. 393, 404 (1975). The significance of state responsibilities for the definition and regulation of marriage dates to the nation's beginning. "[W]hen the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States." *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379, 383-84 (1930); *see also Sosna*, 419 U.S. at 404 (A state "has [an] absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved." (internal citation and quotation omitted)); *Williams v. North Carolina*, 317 U.S. 287, 298 (1942) ("Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders.").

In *United States v. Windsor*, 133 S. Ct. 2675 (2013), the Supreme Court reaffirmed that "[t]he definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the '[p]rotection of offspring, property interests, and the enforcement of marital responsibilities.'" 133 S. Ct. at 2691 (quoting *Williams*, 317 U.S. at 298). Of course, a state's authority remains subject to constitutional guarantees. *Id.* However, as discussed *infra*, Arkansas's marriage laws do not run afoul of any constitutional rights.

The Supreme Court recently confirmed the power of a state's voters to enact

laws on sensitive moral issues. In *Schuette v. Coalition to Defend Affirmative Action, Integration & Immigration Rights*, 134 S. Ct. 1623 (2014), the Supreme Court upheld Michigan's ban on affirmative action in state university admissions. In his plurality opinion, Justice Kennedy emphasized that the question before the Court was not "the permissibility of race-conscious admissions policies," but rather "whether, and in what manner, voters in the States may choose to prohibit the consideration of racial preferences in governmental decisions." *Id.* at 1630. He emphasized that the historical, democratic right of the electorate to amend their constitutions was an important right that should not be undermined by judicial preference. *Id.*, 134 S. Ct. at 1635-36. Justice Kennedy concluded that voters could act through a constitutional amendment to prohibit the consideration of racial preferences, observing that the freedom secured by the Constitution "does not stop with individual rights"; the constitutional system also embraces the freedom of citizens to act democratically to shape "the course of their own times." *Id.* at 1636-37. This freedom encompasses the rights to "speak and debate and learn and then, as a matter of political will, to act through a lawful electoral process." *Id.* at 1637. Justice Kennedy cautioned against any holding that a "question addressed by [a state's] voters is too sensitive or complex to be within the grasp of the electorate." *Id.* Indeed, he reasoned, it would be "demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on

decent and rational grounds." *Id.*

The issue of how marriage should be defined, and whether the historical definition of marriage should be broadened to include same-sex couples, is one that prompts strong emotions. However, "[d]emocracy does not presume that some subjects are either too divisive or too profound for public debate." *Id.* at 1638. That same logic applies with even greater force to voters' choices concerning the definition of marriage. Under our federal system of government, each state has the sovereign right to prescribe the conditions upon which a marriage relationship between two of its citizens can be created. As in *Schuette*, there is no authority in the United States Constitution—nor is there authority in the Arkansas Constitution—that authorizes the judiciary to overturn the definition of marriage that has been adopted by both the Arkansas Legislature and Arkansas voters, and thereby forever remove that issue from voters' reach. *See id.*; *see also Windsor*, 133 S. Ct. at 2692.

The lower court too quickly discounted the impact of *Baker v. Nelson* in this federalism analysis. 409 U.S. 810 (1972). In *Baker*, the United States Supreme Court issued a summary dismissal of an appeal of a Minnesota Supreme Court decision finding that the right to marry someone of the same sex was *not* a fundamental right, and that Minnesota's marriage laws survived rational basis review. *See Baker v. Nelson*, 191 N.W.2d 185, 186-87 (Minn. 1971) (en banc). On

appeal, the Supreme Court dismissed "for want of a substantial federal question." *Baker*, 409 U.S. at 810.

Baker is significant because, as the lower court admits, summary dispositions by the Supreme Court are precedential. Lower courts are "not free to disregard th[ese] pronouncement[s]." *Hicks v. Miranda*, 422 U.S. 332, 344 (1975). Lower courts "are bound by summary decisions by [the Supreme] Court until such time as the Court informs them that they are not." *Id.* at 344-45 (internal quotation marks omitted) (internal alterations omitted). In this case, the lower court correctly notes that summary dispositions are precedential until such time as "doctrinal developments indicate otherwise." *See Hicks*, 422 U.S. at 344 (quotation omitted). However, the trial court incorrectly concluded that because doctrinal developments had occurred since *Windsor* in cases such as *Bostic v. Rainey,* 970 F.Supp.2d 456 (E.D. Va. 2014), the precedential value of *Baker* is no longer binding. ADD 9.

In so ruling, the trial court has put itself in the shoes of the United States Supreme Court, and has made the "doctrinal developments" determination in its stead. The trial court asserts the conclusory opinion that "the courts that have considered this issue since *Windsor* . . . have found that doctrinal developments render the decision in *Baker* no longer binding." ADD 9. It may be that many courts have held *Baker* to be no longer binding, but *Hicks* could not be more clear: "lower courts are bound by summary decisions by this Court 'until such time as the

[Supreme] Court informs them that they are not.'" *Hicks*, 422 U.S. at 344-45 (quoting *Doe v. Hodgson*, 478 F. 2d 537, 539, cert. denied sub nom (1973)).

Thus, although lower federal and state court decisions since *Windsor* may have concluded that there is a fundamental right to marry someone of the same sex, such decisions do not constitute a "doctrinal development" sufficient to overturn *Baker*. *See Kitchen v. Herbert*, 755 F.3d 1193, 1233 (10th Cir. 2014) (Kelly, J., dissenting) ("[N]one of these developments can override our obligation to follow (rather than lead) on the issue of whether a state is required to extend marriage to same-gender couples. At best, the developments relied upon are ambiguous and certainly do not compel the conclusion that the Supreme Court will interpret the Fourteenth Amendment to require every state to extend marriage to same-gender couples, regardless of contrary state law."); *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 8 (1st Cir. 2012) (rejecting the notion that recent doctrinal developments have repudiated *Baker*). Unless and until the United States Supreme Court—not a federal appellate court, a federal district court, or a state court—states that courts are no longer bound by the *Baker* decision, the *Baker* precedent still holds and is binding on this Court.

II. Arkansas's marriage laws are subject to and easily survive rational-basis review.

Aside from the strong deference to a state's definition of marriage, the trial court's ruling on privacy and equal protection grounds must be rejected because

Arkansas's marriage laws easily survive rational-basis scrutiny.

A. Non-recognition of same-sex marriage does not involve a fundamental right or a suspect class and, accordingly, is subject to only rational-basis review.

A classification based on sexual orientation, even one concerning marriage, does not involve either a fundamental right or a suspect class, and is therefore subject to rational-basis review. *Robicheaux v. Caldwell*, CA 13-5090, 14-97, 14-327, Sept. 3, 2014; 2014 WL 4347099 **5, 8 (E.D. La.) (applying rational basis review to equal protection and due process claims against State's ban on same-sex marriage); *see also Lawrence v. Texas*, 539 U.S. 558 (2003) (using rational basis review in deciding constitutionality of Texas statute criminalizing homosexual sodomy); *Romer v. Evans*, 517 U.S. 620 (1996) (using rational basis review in deciding constitutionality of Colorado constitutional amendment prohibiting government action designed to protect homosexual persons from discrimination); *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065 (D. Haw. 2012) (using rational basis review in deciding constitutionality of state statute limiting marriage to a man and a woman).

This holds true even after *Windsor*. *Robicheaux*, 2014 WL 4347099 at *3 ("As to standard of review, *Windsor* starkly avoids mention of heightened scrutiny."). *Windsor* did not announce a new fundamental right or identify a new suspect class. Indeed, the Court in *Windsor* did not declare all distinctions on the

basis of sexual orientation unconstitutional or the right to marry a person of the same sex a fundamental right. *Windsor*, along with *Lawrence* and *Romer*, thus requires the application of rational-basis review to Arkansas's marriage laws. Under controlling precedent, there is no basis upon which this Court may find a suspect class or fundamental right warranting heightened scrutiny.

B. The "animus" cases in the equal protection context do not apply.

Arkansas's marriage laws also do not warrant an inquiry into whether they were motivated by animus. Nevertheless, even if the Court conducts such an inquiry, Arkansas's marriage laws are not so motivated. Ascribing animus to Arkansas's voters and legislators due to their passage of Arkansas's marriage laws at issue is inconsistent with the Supreme Court's recent pronouncements in *Schuette*. Inquiring into animus when evaluating an equal protection claim serves the limited purpose of "ensur[ing] that classifications are not drawn *for the purpose of* disadvantaging the group burdened by the law." *Romer*, 517 U.S. at 633 (emphasis added). The plaintiff must show "that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). Only bare animus "unsubstantiated by factors which are properly cognizable" may render legislation unconstitutional. *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 367 (2001) (internal quotation marks and

emphasis omitted).

These limitations on the animus inquiry characterized the Supreme Court's approach to equal protection analysis in both *Windsor* and *Romer*. *Windsor* struck down Section 3 of DOMA as a "[d]iscrimination of an unusual character" requiring "careful consideration." 133 S. Ct. at 2693 (quoting *Romer*, 517 U.S. at 633). Only after concluding that Congress's definition of marriage was "unusual"—a "federal intrusion" on the States' "historic and essential authority to define the marital relation"—did the Court consider "the design, purpose, and effect of DOMA" to determine whether the law was "motived by an improper animus or purpose." *Id.* at 2689, 2692-93. Its purpose, the Court found, was to "impose restrictions and disabilities" on rights granted by those States that, through a deliberative process, had chosen to recognize same-sex marriage. *Id.* at 2692. The Court reasoned: "DOMA's unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage here operates to deprive same-sex couples of the benefits and responsibilities of their marriages. This is strong evidence of a law having the purpose and effect of disapproval of that class." *Id.* at 2693.

State laws reaffirming the historic definition of marriage cannot remotely be described as classifications of an "unusual character," particularly when *Windsor* so emphatically stressed that control of the marital relation lies within the

"virtually exclusive province of the States." 133 S. Ct. at 2691, 2693, citing *Sosna*, 419 U.S. at 404. Because state laws defining marriage are the norm, there is no need for the "careful consideration" applied in *Windsor* to Arkansas's marriage laws. *See id.* at 2693. Moreover, unlike DOMA, Amendment 83 of the Arkansas Constitution was adopted "[a]fter a statewide deliberative process" that carefully "weigh[ed] arguments for and against same-sex marriage." *Id.* at 2689.

Justice Kennedy has also explained that the equal protection guarantee requires a different analysis "where the accusation [of discrimination] is based not on hostility" allegedly reflected in a newly enacted law, "but instead [is based] on the failure to act or the omission to remedy" what is perceived by some to be unjust discrimination. *Garrett*, 531 U.S. at 375 (Kennedy, J., concurring). In compelling state courts to adhere to the traditional understanding of marriage, Arkansas's marriage laws did not create new legal rights for married couples or impose any new burdens on same-sex couples. They merely preserved the *status quo*.

Romer likewise offers no support for inquiring into allegations of animus behind Arkansas's marriage laws. Animus doomed the Colorado amendment in *Romer* because "all that the government c[ould] come up with in defense of the law is that the people who are hurt by it happen to be irrationally hated or irrationally feared." *Cook v. Gates*, 528 F.3d 42, 61 (1st Cir. 2008) (internal

quotation marks omitted). The *Romer* Court reasoned that "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *Romer*, 517 U.S. at 634-35 (quoting *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)) (some alterations omitted).

Unlike Colorado's amendment, Arkansas's marriage laws are not so "[s]weeping and comprehensive" as to render the State's rationales for the laws "inexplicable by anything but animus" toward same-sex couples. *Romer*, 517 U.S. at 627, 632. As even Justice O'Connor observed, "reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group." *Lawrence*, 539 U.S. at 585 (O'Connor, J., concurring).

In this case, the trial court rendered a conclusory opinion that Arkansas's marriage laws are "driven by animus rather than a rational basis," with no supportive argumentation or proof other than yet another conclusory opinion: that "[s]ame-sex couples are a morally disliked minority." ADD 9. For more than 2000 years, the Catholic Church has consistently distinguished between judging a person's actions and recognizing the fundamental dignity of the person performing those actions. It may well be that parts of the population view persons in same-sex relationships with moral derision, rather than loving and respecting them based on their inherent dignity as human beings. That said, the trial court paints with too

broad a brush by characterizing all those who support "traditional marriage" as having nothing but moral derision for same-sex couples. Thus, it is wholly inaccurate to state with unfounded certainty, as the trial court did, that same-sex couples are, as a general and universal norm, "morally disliked" and the object of animus. *See, e.g.*, *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1209 (D. Utah 2013) (noting that "it is impossible to determine what was in the mind of each individual voter," and that the support for Utah's marriage law included persons with "good intentions").

Regardless, an animus inquiry is not warranted, especially given the fact that the Supreme Court turned to the motivation behind DOMA only because it constituted a "federal intrusion" on the states' "historic and essential authority to define the marital relation." *Windsor*, 133 S. Ct. at 2692-93. Even if some who supported Arkansas's marriage laws harbor unfair prejudice towards homosexuals, such opinions cannot serve as the basis to invalidate a law. Evidence of the motives of a few legislators—evidence that has *not* been offered or substantiated in this instance—does not mean that the majority of legislators operated with the same motive. Moreover, such evidence—even if it existed—says little if anything about the *voters'* motives in enacting Amendment 83 to the Arkansas Constitution. *See, e.g.*, *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986) ("It is a familiar principle of constitutional law that this Court will not strike down an

otherwise constitutional statute on the basis of an alleged illicit legislative motive. . . . What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork." (internal quotation marks and citations omitted)); *Palmer v. Thompson*, 403 U.S. 217, 225 (1971) ("[T]here is an element of futility in a judicial attempt to invalidate a law because of the bad motives of its supporters. If the law is struck down for this reason, . . . it would presumably be valid as soon as the legislature . . . repassed it for different reasons.").

Similarly, the Court should not assume that the motive of partisan supporters dooms a law that is otherwise defensible on at least one rational basis. While "[d]eliberative debate on sensitive issues . . . may shade into rancor. . . .[,] that does not justify removing certain court-determined issues from voters' reach." *Schuette*, 134 S. Ct. at 1638.

III. Unique features of opposite-sex unions supply rational bases for distinguishing those unions from other relationships.

A. Appellees' burden under rational-basis review.

Sexual orientation is not a suspect classification for purposes of equal protection analysis; thus, Arkansas's marriage laws are subject only to rational basis review. *See Citizens for Equal Protection, Inc. v. Bruning*, 455 F.3d 859, 864-69 (8th Cir. 2006) (citing *Romer*, 517 U.S. 620 (1996)); *Robicheaux,* 2014 WL 4347099 **5, 8. In rational-basis review, the burden is on Appellees to negate

"every conceivable basis which might support [the legislation], whether or not the basis has a foundation in the record." *Heller v. Doe ex rel. Doe*, 509 U.S. 312, 320-21 (1993) (internal quotation marks and citations omitted); *Vance v. Bradley*, 440 U.S. 93, 111 (1979) ("In an equal protection case of this type, however, those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker."). Appellants have "no obligation to produce evidence to sustain the rationality of a statutory classification." *Heller*, 509 U.S. at 320. "A statutory classification fails rational-basis review only when it 'rests on grounds wholly irrelevant to the achievement of the p's objective.'" *Id.* at 324 (quoting *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 71 (1978)). Rational-basis review, "a paradigm of judicial restraint," does not provide "a license for courts to judge the wisdom, fairness, or logic of legislative choices." *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313-14 (1993). This is true "even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous." *Romer*, 517 U.S. at 632.

Here, Arkansas voters merely upheld the tradition of a marriage being between a man and a woman. "[R]easons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group." *Lawrence*, 539 U.S. at 585 (O'Connor, J., concurring). The Diocese highlights but a few *infra*.

Because Appellees cannot negate these reasons, Arkansas's marriage laws withstand constitutional challenge.

B. Capacity of opposite-sex couples to procreate.

The capacity to procreate is an attribute unique to opposite-sex couples. This is not a matter of morality; it is a matter of simple biological fact. Only sexual relationships between men and women can lead to the birth of children by natural means. Because these sexual relationships alone may generate new life, the State has an interest in steering the sexual and reproductive faculties of women and men into the kind of union where responsible childbearing will take place and children's interests will be protected. It is indisputable that procreation is and has been historically an important feature of the privileged status of marriage, and the characteristic of procreation is a fundamental, originating reason why the states privilege marriage. *See, e.g., Skinner v. Okla. ex rel. Williamson*, 316 U.S. 535, 541 (1942) ("Marriage and procreation are fundamental to the very existence and survival of the race."); *Maynard v. Hill*, 125 U.S. 190, 205, 211 (1888) (calling marriage "the most important relation in life" and "an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress"); *see also Lawrence*, 539 U.S. at 585 (O'Connor, J., concurring) (noting that "preserving the traditional institution of marriage" would

be a legitimate state interest beyond simply a moral disapproval).

Marriage is the lifelong commitment of exclusive fidelity between a man and a woman that helps to assure that children arising out of that relationship will be cared for by their biological parents. *See Kitchen*, 755 F.3d at 1237-1238 (Kelly, J., dissenting) ("It is biologically undeniable that opposite-gender marriage has a procreative potential that same-gender marriage lacks. The inherent differences between the biological sexes are permissible legislative considerations, and indeed distinguish gender from those classifications that warrant strict scrutiny.") (citing *United States v. Virginia*, 518 U.S. 515, 533 (1996)). Precisely *because* of their sexual difference, only the union of a man and woman can create new life. No matter how powerful reproductive technology becomes, the fact will always remain that two persons of the same sex can never become biological parents through each other. They will always depend on the donation of someone else's sperm or egg in order to bring about the birth of a child.

Society's interest in encouraging heterosexual couples to marry is based not on satisfying adult desires, but on assuring that children resulting from such relationships are cared for by their biological parents, and not by society at large. Because sexual activity between persons of the same sex never yields children, the government's interest in same-sex couples is fundamentally different and weaker. Arkansas is thus justified in distinguishing between a same-sex couple and an

opposite-sex couple in conferring the rights and duties of marriage.

Marriage provides "the important legal and normative link between heterosexual intercourse and procreation on the one hand and family responsibilities on the other. The partners in a marriage are expected to engage in exclusive sexual relations, with children the probable result and paternity presumed." *Morrison v. Sadler*, 821 N.E.2d 15, 26 (Ind. Ct. App. 2005). In this case, the trial court points out that not all heterosexual married couples choose to or are able to procreate and notes that procreation "is not a prerequisite in Arkansas for a marriage license." ADD 9. However, the fact that not all married opposite-sex couples reproduce does not undermine the rationality of laws that recognize the unique status of such unions. "Marriage's vital purpose is not to mandate procreation but to control or ameliorate its consequences—the so-called 'private welfare' purpose. To maintain otherwise is to ignore procreation's centrality in marriage." *Lewis v. Harris*, 875 A.2d 259, 276 (N.J. Super. Ct. App. Div. 2005) (Parrillo, J., concurring). Because of this unique capacity to procreate, the State is "justifie[d in] conferring the inducements of marital recognition and benefits on opposite-sex couples, who can otherwise produce children by accident, but not on same-sex couples, who cannot." *Bruning*, 455 F.3d at 867; *see also Kitchen*, 755 F.3d at 1238 (Kelly, J., dissenting) ("Nor is the State precluded from considering procreation in regulating marriage.") (citing *Turner v. Safley*, 482 U.S. 78, 96

(1987); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684-85 (1977)).

Other Arkansas laws on domestic relations support the contention that procreation is a rational basis for marriage laws. For example, under Arkansas law, a husband is presumed to be the father of a child if that child is born during marriage. Ark. Code Ann. § 28-9-209; *R.N. v J.M. & B.M.*, 347 Ark. 203, 61 S.W.3d 149 (2001). This legal presumption is "to protect the child whose interests should be considered first and foremost." *R.N.*, 347 Ark. at 214, 61 S.W.3d at 155. Indeed, public policy regarding the legitimacy of children born during marriage "is one of the strongest presumptions recognized by the law." *Id.* at 219, 61 S.W.3d at 159 (Thornton, J., concurring) ((quoting *Thomas v. Pacheco*, 293 Ark. 564, 740 S.W.2d 123 (1987)); *see also Earp v. Earp*, 250 Ark. 107, 110, 464 S.W.2d 70, 72 (1971) ("There is a presumption, said to be one of the strongest known to the law, that children born to a couple lawfully married, are the children of the husband.") (quoting *Morrison, Admx. v. Nix*, 211 Ark. 261, 263, 200 S.W.2d 100, 101 (1947)).

Additionally, an Arkansas statute prohibits various forms of incestuous marriage based on degrees of consanguinity. Ark. Code Ann. § 9-11-106. Marriages between parents and children, grandparents and grandchildren of every degree, brothers and sisters (of the half and the whole blood), uncles and nieces, aunts and nephews, and first cousins are void. *Id.* One of the obvious historical reasons for the statute is to eliminate the risk of birth defects that could arise in

children born between individuals who are too closely related, but such marriages are prohibited regardless of whether the couple intends to procreate.

If there is no inherent link between marriage and procreation, the above statute would make no sense and would potentially be unconstitutional. If marriage is solely about the kind and quality of love that two persons share and the legal rights and responsibilities they desire to undertake, and if the trial court's reasoning is taken to its logical conclusion, then states must allow couples such as mother and daughter, sister and sister, or brother and brother to marry. That inevitable conclusion would be all the more compelling in cases of same-sex incestuous unions: if procreation is not a rational basis for the State to enact boundaries on marital relationships, then a same-sex marriage between an uncle and his nephew, or a grandmother and her grandson, or first cousins would be legally unobjectionable. *See Robicheaux*, 2014 WL 4347099 at *10 ("[I]nconvenient questions persist . . . must the states permit or recognize a marriage between an aunt and niece? Aunt and nephew? Brother/brother? Father and child? May minors marry? Must marriage be limited to only two people? What about a transgender spouse? Is such a union same-gender or male-female? All such unions would be equally committed to love and caring for one another, just like the plaintiffs.").

If procreation, along with history, tradition, culture, morality, faith-based values, and other such intangibles are removed from civil marriage and marriage

becomes no more than a business arrangement, very few restraints on marriage will survive a constitutional challenge. The trial court focused on whether Arkansas can restrict marriage to only one man and one woman. The Diocese would pose a different question: how can the State *not* define marriage as such? What state-imposed limits on marriage *are* the courts willing to recognize as constitutional? For example, is monogamy an acceptable and constitutional limit on how the State can define marriage? Given the trial court's apparent disdain for the traditional limitation of marriage to one man and one woman, on what legal basis would the court deny polygamists the right to the benefits of marriage? *See, e.g.*, *Kitchen*, 755 F.3d at 1234 (Kelly, J., dissenting) (noting that, based on plaintiffs' proposed understanding of marriage as a freestanding right not subject to state regulation, "Utah's prohibition on bigamy would be an invalid restriction."). If the State is not constitutionally capable of placing limits on marriage based at least in part on procreation and the best interests of children, then there would also be nothing to prohibit the full legalization of bigamous, polygamous, or polyamorous relationships. If the meaning of marriage is so malleable and indeterminate as to embrace all lifelong and committed relationships, then marriage collapses as a coherent legal concept. The ultimate result of the trial court's decision is to prevent any restriction against polygamy or other non-traditional marriage, "unless, of course, polygamists for some reason have fewer constitutional rights than

homosexuals." *Romer*, 517 U.S. at 648 (Scalia, J., dissenting).

In expounding on the above hypotheticals, the Diocese does *not* intend to compare committed monogamous relationships between same-sex persons with incestuous or polygamous relationships, but to demonstrate that if the inherent connection between procreation and marriage is lost, and if the State is constitutionally precluded from enacting laws that are rationally based on that connection, the constitutional ramifications extend far beyond the limited issue of whether two same-sex persons can legally marry. The State has both the constitutional authority and an obligation to guard against such ramifications.

C. Value to children of being raised by their biological mother and father together.

Channeling the presumptive procreative potential of man-woman relationships into enduring marital unions assures that if any children are born, they are more likely to be raised in a stable family unit by their biological mother and father. Men and women bring unique gifts to the shared task of parenting. Each contributes in a distinct way to the formation of children. Moreover, having a parent of each sex raise a child exposes the child to the differences between a man and a woman—differences that do not exist in a same-sex relationship. These different gender role models, acting collectively, provide a different child-rearing experience than would exist in a same-sex relationship.

The Diocese recognizes that, in practice, many children in today's society

are being raised by a single parent or relative and commends those who sacrifice much to raise a child without the assistance of a spouse. Without discounting the positive contributions made by single parents, both social science and common-sense experience have taught that, in an ideal situation, children thrive best when cared for by both of their biological parents. *See, e.g.*, *Lofton v. Secretary of Department of Children & Family Services*, 358 F.3d 804, 819 (11th Cir. 2004) ("[C]hildren benefit from the presence of both a father and mother in the home."). Innate differences between men and women mean that they are not fungible in relation to child rearing. From those natural differences, it follows that "a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like." *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006).

"Although social theorists from Plato to Simone de Beauvoir have proposed alternative child-rearing arrangements, none has proven as enduring as the marital family structure, nor has the accumulated wisdom of several millennia of human experience discovered a superior model." *Lofton*, 358 F.3d at 820. Thus, it is reasonable for the State to view the union of one man and one woman united in marriage as the preferred environment for both the creation and upbringing of children—even if, as it happens, some children are born and raised in non-marital contexts as well. *See, e.g.*, *Lofton*, 358 F.3d at 819; *Bruning*, 455 F.3d at 867-68 (citing the notion that a husband and wife are "the optimal partnership for raising

children" as a rational basis on which the State could justify defining marriage as "the union of one man and one woman"); *Hernandez*, 855 N.E.2d at 7 ("The Legislature could rationally believe that it is better, other things being equal, for children to grow up with both a mother and a father.").

The Diocese emphasizes that a preference for a husband-wife union as the optimal environment in which to raise children is a judgment *about marriage,* insofar as marriage is the only institution that serves to connect children with their biological father and biological mother in a stable home. Despite what the trial court or others may believe, the preference for a husband-wife union is *not* a judgment about the dignity or worth of any *person*, and it is not a judgment about the parental competency of any one person over another.

Given the unique capacity of opposite-sex couples to procreate and the State's interest in encouraging homes with both a mother and father, defining marriage as the union of one man and one woman promotes societal values that are simply absent from other interpersonal relationships. Arkansas's definition of marriage advances these interests because the benefits of marriage are bestowed only on opposite-sex relationships and on no other interpersonal relationships. Because defining marriage in this way advances legitimate interests that other interpersonal relationships (like same-sex relationships) do not, the State is not required to treat them as equivalent. *See, e.g.*, *Johnson v. Robison*, 415 U.S. 361,

383 (1974) (a classification subject to rational-basis review will be upheld when "the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not").

Even if the Court does not agree with the aforementioned reasons, these rationales are legitimate and illustrate that the classification was not drawn simply "for the purpose of disadvantaging the group burdened by the law." *Romer*, 517 U.S. at 633; *see also Kitchen*, 755 F.3d at 1238 (Kelly, J., dissenting) ("It is also undeniable that the State has an important interest in ensuring the well-being of resulting offspring . . . . Consistent with the greatest good for the greatest number, the State could rationally and sincerely believe that children are best raised by two parents of the opposite gender (including their biological parents) and that the present arrangement provides the best incentive for that outcome."). The State is empowered to privilege marriage by restricting access to and drawing principled boundaries around it. Arkansas has done so here by placing that boundary at one man and one woman, for the reasons discussed.

Arkansas's voters have acted collectively to amend the State's constitution to confirm that definition. Arkansas's definition may be overinclusive and underinclusive in attaining its goals, but that is of no consequence in rational-basis review. *See Vance*, 440 U.S. at 108 ("Even if the classification . . . is to some extent both underinclusive and overinclusive, and hence the line drawn . . .

imperfect, it is nevertheless the rule that . . . perfection is by no means required." (internal quotation marks omitted)). Moreover, in defending Arkansas's marriage laws, the State can put forth any plausible reasons and argue that the law might advance those reasons, *Armour v. City of Indianapolis*, 132 S. Ct. 2073, 2080-81 (2012), regardless of whether those reasons actually motivated the decision of the voters or legislature. *See United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980). In the final analysis, a rational relationship exists between the classification created by Arkansas's marriage laws and the State's interests in responsible procreation and promoting a traditional mother-father family unit. *See Bruning*, 455 F.3d at 868.

The Constitution does not require the State of Arkansas to endorse or promote same-sex relationships if it endorses or promotes opposite-sex unions through its definition of marriage. Arkansas's marriage laws advance legitimate state interests, and, as a result, are constitutional.

IV. The comparison between Arkansas's marriage laws and racial discrimination is inapposite.

The trial court, like many supporters of same-sex marriage, compare the struggles of African-Americans for equal civil rights to those of today's same-sex couples seeking equal rights with opposite-sex couples. However, any comparison between Arkansas's marriage laws and previous racially discriminatory laws is misleading and inapposite. The instant issue is not about civil rights, but about the

fundamental nature of what marriage is and the ability of states to define it.

In its decision, the trial court leaned heavily on *Loving v. Virginia*, 388 U.S. 1 (1967), in sketching its moral judgment about the basis for and effect of Arkansas's marriage laws. Regardless of the trial court's moral judgment against the supporters of Arkansas's marriage laws—which, ironically, is precisely the kind of moral judgment out of which the trial court accuses those supporters of acting—the trial court's legal understanding and application of *Loving* is off base.

According to the trial court, *Loving* ultimately stands for the proposition that there is a fundamental "right to marry the person of [one's] choice." ADD 13. That conclusion is simply incorrect. Nowhere in *Loving* does the Supreme Court recognize a constitutional right to "marry the person of one's choice." If that were the case, then states would be unable to place any restrictions on marriage whatsoever—whether as to age, the proximity of blood relation, or the number of spouses one can marry.

What the *Loving* court did state, however, is that marriage is "fundamental to our very existence and survival." *Loving*, 388 U.S. at 12. Thus, if anything, the *Loving* decision *re-affirms* the opposite-sex nature of marriage and its essential ties to procreation. To expand *Loving* as broadly as the trial court would like would be to signal the end of states' ability to place any and all restrictions on marriage, no matter how rational or legitimate.

The trial court also waxes poetic about how it is time for "that beacon of freedom" that had been denied to the plaintiff in *Loving* to "shine brighter on all our brothers and sisters." ADD 13. The Diocese does not doubt the trial court's sincerity in desiring that freedom prevails. The Diocese shares in that desire. However, the Diocese takes issue with the lower court's application of *Loving*, as well as the court's insinuation that the Diocese and others who support Arkansas's marriage laws are uninterested in, if not entirely opposed to, the spread of freedom.

The Catholic Church is one of the world's leading voices on the inherent dignity of each human person (including those who are attracted to persons of the same sex), as well as the civil rights and freedoms that inure to all persons precisely because of their inherent equal dignity. Civil rights and freedoms, however, must always be framed and understood in the context of truth. It is the truth about the nature of marriage—and a state's right to recognize and enshrine that pre-existing truth in its statutes and constitution—that the Diocese seeks to promote. The Diocese—and, indeed, the entire Catholic Church—will continue to teach against discrimination and bigotry towards all persons, including homosexuals. For the trial court to assume otherwise about the Diocese's motivations is unfounded, misleading, and insulting.

V. That the creation of Arkansas's marriage laws may have been informed by religious principles does not detract from their rationality.

Arkansas's marriage laws also are not rendered invalid simply because some

of the laws' supporters are informed by religious considerations. That a law and religious teaching coincide does not detract from the law's rationality. The Supreme Court has squarely rejected any claim that "a statute violates the Establishment Clause because it 'happens to coincide or harmonize with the tenets of some or all religions.'" *Harris v. McRae*, 448 U.S. 297, 319 (1980) (quoting *McGowan v. Maryland*, 366 U.S. 420, 442 (1961)). Thus, the government may enact laws that "reflect[] 'traditionalist' values" toward an issue without being found to have adopted as laws "the views of any particular religion." *Id.*

Indeed, it is difficult to recall any significant legal reform in our nation's history that has not been influenced by religious and moral viewpoints. The movements that led to the abolition of slavery and the subsequent adoption of civil rights laws, for example, were strongly influenced by religious beliefs. Moreover, although the lower court does not reference a specific religious faith in arriving at its ultimate conclusion, it couches its analysis in a cloak of morality, inasmuch as the lower court compares Arkansas's marriage laws to the morally unjust anti-miscegenation laws in Virginia that were deemed unconstitutional in *Loving*. ADD 13. It is difficult to fathom how the lower court can appeal to its own greater sense of fundamental morality (i.e., natural law) in support of its ruling, while chastising those who support Arkansas' marriage laws for doing so based in part on moral teachings or their religious faith.

The Catholic faith may have helped inform Arkansas's marriage laws, but it did so not simply because of the unique faith of the Catholic Church. Rather, the Church's position in this matter is based primarily on natural law and biological and sociological facts—not the unique faith perspective of the Catholic Church. Thus, Arkansas's definition of marriage cannot be deemed unconstitutional simply because it is consistent with Catholic beliefs or supported by other religious groups.

CONCLUSION

The State of Arkansas has defined marriage as a union between one man and one woman. That definition requires this Court's deference. No fundamental right, suspect class, or motivation of animus exists such that this Court would be justified in applying anything but rational-basis review. Under a faithful application of rational-basis review, Arkansas's marriage laws survive scrutiny.

For the reasons stated above, the lower court erred when it held that Arkansas's marriage laws violate the United States and Arkansas Constitutions, and its decision should be overturned in its entirety.

Respectfully submitted this 15th day of September, 2014.

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CERTIFICATE OF SERVICE

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I, David F. Menz, do hereby certify that I have submitted and served on opposing counsel an unredacted PDF document that complies with the Rules of the Supreme Court and the Court of Appeals of Arkansas. The PDF document is identical to the corresponding parts of the paper document from which it was created as filed with the Court. To the best of my knowledge, information, and belief formed after scanning the PDF document for viruses with an antivirus program, the PDF document is free from computer viruses. A copy of this certificate has been submitted with the paper copies filed with the Court and has been served on all parties.

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