14-5291

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GREGORY BOURKE, ET AL
PLAINTIFFS-APPELLEES

v.

STEVE BESHEAR, ET AL
DEFENDANTS-APPELLANTS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

BRIEF OF DAVID A. ROBINSON AS *AMICUS CURIAE*
IN SUPPORT OF DEFENDANTS-APPELLANTS
IN SUPPORT OF REVERSAL OF DISTRICT COURT DECISION

David A. Robinson
P.O. Box 780
North Haven, CT 06473
Tel. 203-214-4078

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My Identity, Counsel, Expenditures, and Interest in This Case

I am an individual, not a corporation or organization. I am a 61 year-old man, lifelong U.S. citizen, and current resident of Connecticut. I wrote this brief because I am in a relatively unique position to opine about court-ordered legalization of same-sex marriage. In 2003 I wrote a book that I believe possibly played a role, albeit a small one, in the court-ordered legalization of same-sex marriage in Massachusetts, the first state to legalize it. I am my own counsel; I happen to be a lawyer myself. I wrote this brief myself and paid all costs associated with it. I have received no payment for it.

I lived in Massachusetts from my birth in 1953 to 2002, then moved to Connecticut. I earned a J.D. at Washington University in St. Louis in 1977 and was admitted to the Massachusetts bar later in 1977. I practiced law in Massachusetts from 1977 to 2008. I was admitted to the Connecticut bar in 2006. I am now an active member of the Connecticut bar and retired member of the Massachusetts bar. I also teach part-time. I currently teach human resource management, including the laws pertaining to sexual orientation discrimination, at the University of New Haven. I have taught there since 2005.

I practice labor and employment law. In early 2003 I wrote a book entitled *A Legal and Ethical Handbook for Ending Discrimination in the Workplace*. It was published by Paulist Press, a Christian book publisher, in the late spring or early

summer of 2003. In addition to legal tips and practical tips, the book included some Bible quotes I thought might motivate employers to provide equal opportunity to all. It received some publicity in Massachusetts in October 2003. *See, e.g.*, Kenneth L. Ross, "Book targets workplace discrimination," *Sunday Republican* (the Springfield, Mass., daily newspaper is called *The Republican* because that was its original name in 1824; it is not a reference to the political party; the name predates the party), Oct. 19, 2003. I think it is possible that something I said in the book was misconstrued as an argument in favor of same-sex marriage. I said on page 71:

> Some of you might feel that laws protecting homosexuals from discrimination conflict with the Bible. The Bible forbids homosexuality (Lev 18:22; 20:13; 1 Cor. 6:9), but there is no conflict. These laws do not require you to *approve of* homosexuality. They require you *not to discriminate against* employees for being homosexual. In other words, these laws permit you to disapprove, in your heart and mind, of homosexuality, but do not permit you to play God. The law is the same as stated in the *Catechism of the Catholic Church*, which requires acceptance of homosexuals but does not require approval of homosexuality. "They must be accepted with respect, compassion, and sensitivity. Every sign of unjust discrimination in their regard should be avoided" (*Catechism*, paragraph 2358).

(emphasis in original). I was trying to make a magnanimous statement of goodwill and equality for gays in the workplace. I was trying to persuade Bible-reading employers not to discriminate against gays. I was talking about employment, not marriage.

But one month later, on November 18, 2003, the Massachusetts Supreme Judicial Court (SJC), in a 4-3 decision, became the first court in the United States, and possibly the world, to hold that same-sex couples have the right to marry. *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003). The court held that the Due Process and Equal Protection clauses of the Constitution require Massachusetts to issue marriage certificates to same-sex couples who request them. The *Goodridg*e decision shocked many people on both sides of the gay rights debate.[1] For reasons I will explain, I disagreed, and continue to disagree, with *Goodridge*. More importantly, I wondered if someone on the SJC read my book and construed, or misconstrued, my statement of goodwill and equality for gays as an argument in favor of same-sex marriage.

Whether anyone on the Massachusetts SJC read or was influenced by my book, I do not know for certain. I think a number of lawyers and judges read it or parts of it, but I don't know exactly who.

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[1] *See, e.g.*, Kathleen Burge, "Gays have right to marry, SJC says in historic ruling," *Boston Globe* Nov. 19, 2003 ("This is such an incredible event," said a lawyer who wrote the amicus brief for the Boston Bar Association supporting gay marriage. "I think for the gay community, it is somewhat akin to the Berlin Wall coming down."); Michael Paulson, "Strong, divided opinions mark clergy response," *Boston Globe*, Nov. 19, 2003 (Boston archbishop O'Malley says "It is alarming that the Supreme Judicial Court in this ruling has cast aside what has been . . . the very definition of marriage held by peoples for thousands of years"; Massachusetts Catholic Conference calls *Goodridge* "radical").

In any event, same-sex marriage remained largely a Massachusetts-only phenomenon from 2003 to 2008. And except for Iowa in 2009, when the Iowa Supreme Court issued a decision similar to *Goodridge*, it remained largely a "liberal" New England-New York and California phenomenon from 2008 to 2012.

But today (2014), a number of courts, citing the Due Process and Equal Protection clauses, are ordering states such as Kentucky to allow same-sex marriage even if most voters in that state are against it. Some states' legislatures are enacting laws allowing same-sex marriage because they fear that courts will order them to. New Jersey Governor Chris Christie, who opposes same-sex marriage, allowed it because he worried that the New Jersey Supreme Court would order him to.

I think this is a serious threat to democracy. I feel compelled to speak up. I want to explain why the indented paragraph on page 2 above ("Some of you might feel . . . .") is not an argument for same-sex marriage. I want to explain why I think laws that protect gays from discrimination in the workplace are good public policy but laws allowing same-sex marriage are not. Of course, whether I am correct or incorrect about the latter is something each state has, or should have, the right to decide for itself. A federal court should honor the state's decision. *United States v. Windsor*, 133 S. Ct. 2675, 2689-91 (2013).

Another reason my perspective is unique is I did not get married until I was 50 years old. Purely by coincidence, I got married on November 9, 2003, nine days before *Goodridge* was decided. I married a woman. We remain married today. Like most people who do not get married until they are 50, I have known many gay men and women. I have known men and women who were gay for a period of time—some were gay for a long time—but eventually married someone of the opposite sex. I am glad they were free to do so. Had they been legally married to someone of the same sex, they would not have been as free to do so. That is one reason (not the only reason, but one reason) it is rational for Kentucky not to allow same-sex marriage. Same-sex marriage legally obliges a person to remain homosexual for life.

ARGUMENT

There is No Rational Basis for the Government to Financially Reward a Same-Sex Couple for Staying Together. That is What Same-Sex Marriage Does.

Let me begin by explaining the statement in my 2003 book that gays should be "accepted" and "unjust discrimination in their regard should be avoided."

There is a difference between "accepted" and "applauded." Civil marriage is applause from the government. The government applauds the couple for entering into the type of intimate relationship the government desires. The government

desires that if a man and woman have, or plan to have, sexual intercourse, they exchange promises of lifelong commitment. Why? There may be several reasons but the main reason is this: There exists a possibility with most (not all, but most) male-female couples that the woman will get pregnant and give birth to a child. Someone must raise, nurture, and pay for the child for the first twenty or so years of the child's life. Since it takes two—a man and woman—to create a child, the government ordinarily (not always) wants the man and woman to stay together and raise the child together. The government does not *require* them to stay together, but the government hopes they do. The government created a status called "marriage" to give the couple an incentive to stay together and reward them for staying together. The government does not require them to marry, but many do marry. If the man and woman marry, the incentives and rewards include tax benefits, insurance benefits, social security benefits, and some other benefits. The government allows the couple to divorce, but if they divorce, the benefits end. Due to the increased risk of birth defects if the man and woman are blood relatives of each other, the government prohibits such a couple to marry, and in some states prohibits them to have sexual intercourse.

A same-sex couple cannot conceive a child. One member of the couple can conceive a child with someone of the opposite sex, but a same-sex couple, just the two of them, cannot conceive a child. Therefore, it makes no sense for the

government to spend money rewarding a same-sex couple for staying together. I'll discuss adoption, as distinguished from conception, below.

Same-sex marriage supporters point out that male-female couples are allowed to marry, and to stay married, even if they do not conceive children. They argue that laws defining marriage as the union of a man and woman are over-inclusive. They argue that such laws reward some male-female couples that don't deserve reward. Even if they are correct about that, it does not mean the government should reward two men for staying together. The government should not have to ascertain the plans and fertility of every male-female couple that applies for a marriage license, nor monitor whether they conceive a child. The government has made a rational, administratively manageable decision: An unmarried adult male can marry an unmarried adult female who is not a blood relative of his. It is rational because according to a 2011 *New York Times* article citing Census data, 87% of male-female married couples conceive children.[2]

Although a same-sex couple cannot conceive a child, they can adopt a child. But adoption is not conception. In regard to the natural parents of many (not all)

[2] James B. Stewart, "A C.E.O.'s Support System, aka Husband," *N.Y. Times*, Nov. 4, 2011, www.nytimes.com/2011/11/05/business/a-ceos-support-system-a-k-a-husband.html?pagewanted=all&_r=0iting (last visited May 4, 2014). The *Times* derived the 87% figure from a Pew Research report that says, "Among 40-44-year-old women currently married or married at some point in the past, 13% had no children of their own in 2008." www.pewsocialtrends.org/2010/06/25/childlessness-up-among-all-women-down-among-women-with-advanced-degrees/ (last visited May 4, 2014).

children put up for adoption, the purpose of the marriage laws has already been defeated. The natural parents are not raising the child together. Furthermore, the percent of same-sex couples who adopt a child (a child not conceived by either member of the couple) is, I surmise (I cannot ascertain the exact figure), only a small fraction of the percent of male-female married couples who conceive a child.

If the government grants the financial benefits of marriage to same-sex couples, the government is declaring that it is better to be in a long-term homosexual relationship than to be single. The government should not do that. It is irrational. Having been single until I was 50, I object to it. Same-sex couples ask, "Why should the government treat us less equal than male-female couples?" I ask, "Why should the government treat two men who have sex better than the government treats two men who don't have sex? The government should treat same-sex couples as best friends—nothing more, nothing less.

Here is another reason it is rational to allow male-female couples to marry and stay married even if they do not conceive children. I will explain it by way of my own history. I met my wife in 1997. I was 44; she, 49. We have been a couple since April 1997, although we did not get married until 2003. At all times in the 17 years we have been a couple, she has been at least a little, and now more than a little, too old to get pregnant. Why should she and I be allowed to marry and stay married but same-sex couples not be? Indeed, why, considering that I was 50 and

she was 55 when we married, did we marry at all? She and I had a great life together from April 1997 to November 2003 without being married. I have no children. She was happily married to a man for 28 years (1968 to 1996). He died from a heart attack in August 1996. She has two adult children from that marriage. She and I saw no reason to marry.

But by 2003, her children, nieces, and nephew, and my older niece and oldest nephew, were marriage age. Some were already married. One of them had a child in early 2002. By late 2003, that child was beginning to understand human relationships. My wife and I probably would have married anyway, but the main reason we married at that time was to look respectable in the eyes of that child and the children yet to come in our respective families.

So, is marriage about procreation? I wouldn't say marriage is "about procreation," but the possibility of procreation is a major reason a man and woman like my wife and me are allowed to marry even though we are too old to procreate. We may be too old, but the younger generation of our families is procreating, and we want to look respectable in their eyes.

Same-sex marriage supporters might argue that that is a good reason to allow same-sex marriage. They might argue that if married, they will look more respectable. I disagree. Here is why. Suppose a state (Connecticut, Massachusetts, Kentucky, or other state) were to allow any unmarried adult to marry any other

unmarried adult, except that a man could not marry a female blood relative of childbearing age. A 50-year-old man would be allowed to marry his 60-year-old sister. Would allowing a 50-year-old man to marry his 60-year-old sister make their sexual relationship—if they have a sexual relationship—respectable? No. The only sexual relationship marriage makes respectable is heterosexual, and even then its respectability is limited, in the eyes of many people, to a subcategory: heterosexual *intercourse* (penetration of the vagina by the penis).

Heterosexual intercourse is respectable in human civilization only if the man and woman 1) are above the age of consent, 2) have promised not to have sex with anyone else unless and until one of them dies, 3) have promised to stay together for life ("till death do us part"), and 4) are not blood relatives of each other. A marriage certificate is a proclamation that a man and woman meet all four of those criteria. It proclaims, essentially, that if the man and woman have sexual intercourse, their sexual intercourse is respectable.

Succinctly stated, the purpose of the marriage laws is to make heterosexual intercourse respectable. Society has little or no respect for heterosexual intercourse unless the couple is married. Society also has little or no respect for other types of sexual contact, such as oral sex, anal sex, underage sex, mutual masturbation, and incestuous sex—whether heterosexual or homosexual. If people who engage in those types of sex are married or allowed to marry, it does not increase the

respectability of those types of sex. Some of those types of sex are allowed (not illegal) whether people are married or not, but those types of sex are not generally respected. Allowing same-sex couples to marry would not increase the respectability of homosexual sex any more than allowing a 50-year old man to marry his 60-year-old sister would increase the respectability of middle-aged incestuous sex.

In addition, the marriage laws reward the couple for maintaining that respectability, that is, for *staying* married. The rewards consist of tax benefits, insurance benefits, social security benefits, and some other benefits. If the couple divorces, the benefits end. Of course, a marriage certificate does not *guarantee* monogamy or say anything about a couple's sex habits or fertility, but is at least a solemn, public promise of monogamy and togetherness.

Denying marriage certificates to same-sex couples does not "single out" homosexual sex as unworthy or less worthy of respect. Rather, it classifies homosexual sex with all the other types of sex, including many types of heterosexual sex, that society has little or no respect for, such as underage sex, incestuous sex, oral sex, anal sex, and mutual masturbation. Indeed, those last three—oral sex, anal sex, and mutual masturbation—are what homosexual sex often is. Denying marriage certificates to same-sex couples is no more unfair than denying it to the 50 year-old man and his 60-year old sister.

Now I will discuss "unjust discrimination." My book said "unjust discrimination in their regard should be avoided." The marriage laws discriminate, but so do most laws. The word "discriminate" does not necessarily mean something bad or illegal. If someone has discriminating taste, that is good, not bad. For the reasons I have stated, the laws that define marriage as the union of a man and woman who are not blood relatives of each other are "just," not "unjust." By contrast, discrimination against gays in the *workplace* is usually unjust.

A promise to remain in a homosexual relationship for life should be nonbinding. Same-sex marriage binds it.

Same-sex marriage is a legally binding (the bonds of marriage) mutual promise to remain in a homosexual relationship for life. If two people of the same sex want to make and keep a mutual promise to remain in a homosexual relationship for life, they are free to do so in all 50 states. But in my opinion, such a promise should not be legally binding. Same-sex marriage binds it. In states that do not allow same-sex marriage, such a promise is nonbinding. It should be nonbinding. It is rational for the government to make sure no person is *legally bound* to be homosexual for life. By contrast, for reasons I explained above, heterosexual marriage is, and should be, legally binding. Heterosexual marriage is, and should be, breakable by divorce, but divorce is not, and should not be, easy.

Sadly, a goal of the same-sex marriage movement seems to be to encourage people who feel gay to *commit* to being gay. Gay is indeed a feeling: a physical and emotional feeling. It is not always a permanent feeling. A good way to encourage people to make it permanent is to legalize same-sex marriage. Another way is to enact statutes such as those recently enacted in California, Cal. Bus. & Prof. Code § 865(b)(1), and New Jersey, N.J.S.A. 45:1-54, -55, which prohibit mental health professionals from trying to help a child or teenager under the age of 18, who is just beginning to have sexual feelings and whose first sexual feelings might be for people of the same sex, become interested in the opposite sex. Even if the child asks for help, it is illegal for the mental health professional to provide such help. Is that good public policy? I don't think it is, but each state should decide for itself.

Each state should be allowed to decide for itself whether a promise to remain in a homosexual relationship for life should be binding. *United States v. Windsor*, 133 S. Ct. 2675, 2691 (2013). Kentucky has chosen to make it nonbinding.

> Court-ordered legalization of same-sex marriage based on "equal protection" will lead to a man's being allowed to marry his brother, elderly (too old to get pregnant) sister, or elderly mother. Massachusetts and New York now allow a man to marry his brother.

The district court held that same-sex couples have an equal right—equal to heterosexual couples' right—to marry. If same-sex couples have the right to marry, do two brothers have the right to marry? Two brothers are a same-sex couple.

At first glance, the answer might seem to be no. Since a man is not allowed to marry his sister, he should not be allowed to marry his brother, either, the answer might seem. The problem is, that statement, "Since a man is not allowed to marry his sister, he should not be allowed to marry his brother, either," makes no sense. It compares apples with oranges. The reason a man is not allowed to marry his sister is that if they conceive a child, there is an increased likelihood of birth defects. Two men cannot conceive a child. If two men have the right to marry, it logically follows that two adult brothers have the right to marry. It would violate "equal protection" to give two adult brothers fewer rights (no right to marry) than two male friends. Massachusetts and New York recognize this. They now allow two brothers to marry. Mass. Gen. Laws ch. 207, § 1; N.Y. Dom. Rel. Law § 5. Prior to allowing same-sex marriage, Massachusetts and New York did not allow two brothers to marry. Other states that allow same-sex marriage will eventually follow and allow two brothers to marry. Courts that hold that "equal protection"

means same-sex couples have a constitutional right to marry will order these states to allow two brothers to marry.

Goodridge, the 2003 Massachusetts case, tried, or seemed to try, to avoid such a result. "Nothing in our opinion today should be construed as relaxing or abrogating the consanguinity or polygamy prohibitions of our marriage laws. . . . Rather, the statutory provisions concerning consanguinity or polygamous marriages shall be construed in a gender neutral manner." 798 N.E.2d at 969 n.34. But as I just explained, that statement in *Goodridge* makes no sense. The consanguinity prohibitions of our marriage laws make sense (are rational) only if they are gender-specific, not gender-neutral. The very purpose of those consanguinity laws is to discourage a couple of blood relatives from conceiving a child. Two brothers cannot conceive a child.

Most same-sex marriage supporters are trying to prevent two brothers from marrying. In 11 of the 13 states with statutes allowing same-sex marriage (Massachusetts and New York are the two exceptions), these statutes, all written within the past five or six years, are carefully worded to prohibit a man to marry his brother.[3] But, for reasons I just explained, their effort will fail if same-sex

[3] Conn. Gen. Stat. § 46b-21; Del. Laws tit. 13, § 101(a); Haw. Rev. Stat. § 572-1(1); Ill. Comp. Stat. 750, ch. 40, par. 212(a)(2) (new legislation is Ill. Public Act 098-0597, SB0010, effective June 1, 2014); Maine Rev. Stat. § 701(2)(a); Md. Code Ann., Fam. Law § 2-202(b)(1); Minn. Statutes 2013, § 517.03(2); N.H. Rev. Stat. § 457:2; R.I. Gen. Laws § 15-1-2; Vt. Stat. tit. 15 § 1a; and

couples are given a constitutional (equal protection) right to marry. Two brothers will make the same argument all same-sex couples make when arguing they have a constitutional right to marry: They 1) love each other, 2) want the benefits of marriage (just being brothers does not entitle them to those benefits), 3) aren't harming anyone (they cannot conceive a child together), and 4) aren't diminishing anyone else's marriage. The brothers might also argue, if it's true, that they don't have a sexual relationship. It is quite possible, even likely, these courts (courts that hold that "equal protection" means same-sex couples have a constitutional right to marry) will agree that the brothers have the right to marry.

Same-sex marriage supporters might argue that the man and his brother are already "related" and therefore should not be allowed to marry. However, for reasons I just explained, that is unfair ("unequal") to the two brothers. It treats them less favorably than two male friends are treated. Just being brothers does not give them the tax benefits, insurance benefits, and social security benefits of marriage. Only marriage (or civil union with all the benefits of marriage) would give them those benefits. If same-sex marriage supporters argue that marriage is about gaining a new relative, why only one? A man can have ten brothers. Why should he be allowed only one more relative? Why not ten more?

Wash. Rev. Code § 26.04.020(2). Four other states, California, Iowa, New Jersey, and New Mexico, allow same-sex marriage but only as a result of court order. I do not know if those four states allow a man to marry his brother.

Why do same-sex marriage supporters oppose two brothers' marrying? Here is why, or at least here is what I think their reason is. They don't want people to equate homosexuality with incest. They want people to equate homosexuality with heterosexuality. They want government and society to show the same respect for homosexual sex as for heterosexual sex. Since heterosexual sex between blood relatives is not respectable, they are saying homosexual sex between blood relatives is not respectable. Their effort to dissociate homosexuality from incest may be well-intentioned but is hypocritical and absurd. It is hypocritical because they do exactly what they complain is done to them. They devalue the sex life of two loving, consenting, same-sex adults who aren't harming anybody and who want the benefits of marriage: a man and his brother. It is absurd because in those 11 states, two brothers have fewer rights (no right to marry) than two male friends.

I am not "equating" homosexuality with incest. I am just trying to foresee what courts will do. There is no difference, biological or otherwise, between two adult brothers' having sex and two adult male friends' having sex. Courts that hold that same-sex couples have a constitutional ("equal protection") right to marry will, I expect, sooner or later hold that two adult brothers have the right to marry.

After these courts (courts that hold that "equal protection" means same-sex couples have a constitutional right to marry) hold that two brothers have the right to marry, a man will try to marry his elderly (post-menopause) mother. Same-sex

marriage supporters will vehemently oppose it. "That is incest! Incest is illegal!" they'll say. But same-sex marriage supporters also say, "Marriage is about love, not sex or procreation." Vice President Joseph Biden, speaking in support of same-sex marriage on March 22, 2014, said, "The single most basic of all human rights is the right to decide who you love."[4] If marriage is about "love," it should come as no surprise that a man will try to marry a woman he loves: his mother. His mother will produce a medical certificate that she has reached menopause and cannot get pregnant, or she might argue, if it's true, that she and her son don't have sex. She and her son will argue they should be treated like the two brothers and the two male friends, because they 1) love each other, 2) want the benefits of marriage (just being mother and son does not give them those benefits), 3) aren't harming anyone (they cannot conceive a child together), and 4) aren't diminishing anyone else's marriage. They will argue that if the relationship between two men is "equal to" the relationship between a man and woman, then surely the relationship between a man and his mother is "equal to" the relationship between a man and woman. A man and his mother *are* a man and woman. And since the mother is too old to get pregnant, the relationship between them is "equal to" the relationship between two men. They'll argue that "equal protection" gives them the right to marry.

[4] Ian Lovett, "Biden notes progress in gay rights, but says there is 'much left to do,'" *N.Y. Times*, Mar. 23, 2014.

Same-sex marriage supporters will respond by arguing that the man and his mother are committing "incest" and that it is, or might be, illegal for a man to have sex with his mother even if she is post-menopause. But the man and his mother will point out that it was, until recently, illegal for a man to marry a man. If the latter is a constitutional right, so is the former, the man and his mother will argue. The man and his mother will also point out that homosexual sex was illegal in many states prior to 2003. In 2003 gay rights supporters argued those laws are unconstitutional. The Supreme Court (*Lawrence v. Texas*, 2003) agreed. The man and his mother will argue that their "incest," if one can call it incest (she cannot get pregnant), is no more harmful than homosexual sex is, and therefore the man and his mother deserve a marriage certificate as much as two male friends do. It seems quite possible the court will agree with the man and his mother. If it sounds ridiculous to issue a marriage certificate to a man and his mother, many people before 2003 (before *Goodridge*), including many people who have little or no objection to homosexuality, said it is ridiculous to issue a marriage certificate to two men.

If, on the other hand, same-sex marriage becomes legal in a state because the state's citizens or legislators vote to make it legal, then it might not lead to "incestuous" marriage. The voters or legislators can, if they choose, write the law so as to prohibit same-sex blood relatives to marry. That is what 11 of the 13 states

with statutes allowing same-sex marriage have done. Does that restriction have a "rational basis?" Not in *my* mind, but I am not a legislator. A state legislature, after hearing all evidence and viewpoints, might conclude such a restriction has a rational basis. The legislation will certainly be entitled to some deference. *United States v. Windsor*, 133 S. Ct. 2675, 2691 (2013). Let me add that although I, for reasons stated herein, would vote against legalization of same-sex marriage if given the opportunity to, I greatly respect the right of each state, through a "deliberative process that enable[s] its citizens to discuss and weigh arguments for and against same-sex marriage," to choose to legalize it or not. *Id.* at 2689.

The district court analogized laws defining marriage as the union of a man and woman to laws that prohibited whites to marry blacks. But skin color is just a covering. It has nothing to do with behavior. A person has no control over his skin color. A person does have control over his behavior. Even if we assume *arguendo* that a person has little control over what sexual thoughts and impulses enter his or her mind and body, a person does have control over how he or she deals with them (behavior). That is the difference between laws prohibiting same-sex marriage and laws prohibiting interracial marriage: No intelligent person ever said it is wrong to be black. No respectable religion says it is wrong to be black. By contrast, due to the design of the male and female sexual anatomies and the fact that it takes a man and woman to create a child, many intelligent people and many respectable

religions believe that homosexual behavior (not homosexual thoughts, but homosexual behavior) is contrary to anatomical design and therefore wrong.

Same-sex marriage diminishes the marriage of heterosexual couples.

I write this section of the brief with great reluctance. It might sound arrogant for me to say same-sex marriage diminishes my opposite-sex marriage. But the district court went to great length to proclaim that same-sex marriage does not diminish opposite-sex marriage at all. "No one has offered any evidence that recognizing same-sex marriages will harm opposite-sex marriages, individually or collectively." Doc. 47, Page ID #742. I don't know what evidence other people offered, but the search for the truth compels me to offer some truths I have experienced on this point.

I have resided in either Massachusetts or Connecticut—the two states that have continuously allowed same-sex marriage the longest—my entire life (I went away to college and law school but was still a legal resident of Massachusetts). I wouldn't say that same-sex marriage diminishes my opposite-sex marriage *much*, but it diminishes it *somewhat*.

I got married on November 9, 2003, nine days before the Massachusetts Supreme Judicial Court held that same-sex couples have a constitutional right to

marry. I was still working in Massachusetts but no longer residing there. I resided in Connecticut. I got married in Connecticut.

In early 2004, my wife and I were in Florida for vacation. One day she was in the hotel room and I was in the hotel lobby. I got into a conversation with a man. Somehow I mentioned that I am from Massachusetts (I lived the first 49½ of my then 51 years in Massachusetts, and was still working in Massachusetts, so I said I was "from Massachusetts") and just got married. Massachusetts was the only state allowing same-sex marriage at the time. He said, "Massachusetts?! Did you marry a man or a woman?"

I did not appreciate being asked if I married a man or a woman. When a man marries a woman, he is proud of her. He does not want to be asked if he married a man or a woman. It took me more than 30 years, from the time I began dating until the day I married, to marry a woman. On November 9, 2003, I married a woman. I wore a wedding ring to show it. Nine days later, the Massachusetts Supreme Judicial Court essentially told me the ring does not mean that. The SJC essentially told me the ring means I married someone but not necessarily a woman. Five years later, the Connecticut Supreme Court told me the same thing. *Kerrigan v. Commissioner of Public Health*, 957 A.2d 407 (Conn. 2008).

Based on my experience living and working in Connecticut and Massachusetts, I believe that states that allow same-sex marriage are becoming

increasing "genderless" in many ways. They are apt to call a man a woman if he wants to be "regarded as," or he "identifies as," a woman. On the State of Connecticut's website as of May 5, 2014, there is a document entitled "Guidelines for Connecticut Schools to Comply with Gender Identity and Expression Non-Discrimination Laws."[5] It is from the Connecticut Safe Schools Coalition and is in a question and answer format. One question is, **"**What is the proper use of pronouns for transgender and gender non-conforming youth?" The answer: **"**School personnel should use the name and pronouns appropriate to the student's gender identity regardless of the student's assigned birth sex." In other words, Connecticut school personnel are being asked to refer to a boy as "she" and "her" if the boy "identifies" as a girl. Will this happen in Kentucky?

A headline on the Springfield, Mass., daily newspaper's website (masslive.com) on March 1, 2014, read, "Holyoke woman, 30, testified in Hampden Superior Court Friday she was raped when she was a boy." In Connecticut, an op-ed piece in the April 21, 2014, *Hartford Courant*, "Teen's Violent History Left State No Option," referred to a 16-year-old "transgender" juvenile in a women's correctional institution as "her" and "she." I had to read several news stories about this youth to learn what I was trying to learn: the youth's gender. An April 17, 2014, op-ed piece in the *Courant*, "State Must

[5] http://www.ct.gov/chro/lib/chro/Guidelines_for_Schools_on_Gender_Identity_and_Expression_final_4-24-12.pdf (last visited May 5, 2014).

Answer For Imprisoning 16-Year-Old," clarified it somewhat, saying, "This young person was considered male at birth but she identifies as female." What does "considered male at birth" mean? I'm not sure I know what the words "he," "she," "male," and "female" mean in Connecticut and Massachusetts anymore. It is very confusing. I assume, unless I'm mistaken, this youth was born male.

The April 21 *Courant* op-ed piece was written by the Commissioner of the Connecticut Department of Children and Families. The commissioner ordered that the "transgender" juvenile be moved from a juvenile facility to an adult women's correctional facility. Why? According to the commissioner, this juvenile "has repeatedly, and over an extended period, assaulted girls and female staff members." The commissioner said that one of the assaulted staff members "suffered a concussion, an eye injury that temporarily impaired her sight, bites to her skull and arm, and bruises to her jaw, chest and arms."

Is this what Kentucky wants? Does Kentucky want to place a person in a women's correctional facility who was born male and allegedly assaults girls and women?

Maine allows same-sex marriage. On January 30, 2014, the Maine Supreme Judicial Court held that a student who was born male but eventually expressed and adhered to a "female gender identity" has the right to use the girl's bathroom in school. The court held that the school violated the student's rights by asking the

student to use a unisex bathroom. *Doe v. Regional Sch. Dist. Unit 26*, 86 A.3d 600 (Maine 2014). Is this what Kentucky wants? Does Kentucky want people who were born male to be in girls' bathrooms?

Whether this gender confusion is an outgrowth of legalization of same-sex marriage, I do not know for certain. But I think the issue belongs in state legislatures, not federal courtrooms. I am mentioning it in a federal courtroom (this case) because same-sex marriage supporters have chosen the federal courtroom as their forum. They filed this lawsuit. If the factual statements in this brief read like testimony I might give at a public hearing before a legislative committee, it is because that is where they belong.

The irony here is that my 2003 book urged employers to be gender-blind. I think gays should be protected from discrimination in the workplace. But protection is one thing; *governmental applause* is another. A marriage certificate is governmental applause. Same-sex marriage supporters have used the good intentions of people like me to further their goal of trying to force the government to applaud, not just accept, homosexual relationships. Whether the government should applaud homosexual relationships is, in my opinion, an issue that belongs in state legislatures, not federal courtrooms.

Same-sex couples can fully enjoy their lives without a marriage certificate.

There are very, very few things married people can do that unmarried people cannot do. Even in states that do not allow same-sex marriage, same-sex couples can live together; have private, consensual sex together (*Lawrence v. Texas*); leave property to each other in their wills; own property jointly; and, in most (not all, but most) places, visit each other in the hospital and, with a simple legal document, make health care decisions for each other if one of them is disabled. They can exchange promises of lifelong commitment. They can keep those promises. They don't need "applause" (a marriage certificate) from the government. They shouldn't be *bound* by those promises.

The district court's decision should be reversed.

Date: May 8, 2014

/s/ David A. Robinson
P.O. Box 780
North Haven, CT 06473
Tel. 203-214-4078
E-Mail: david@davidalanrobinson.com

Certificate of Compliance With Rule 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,528 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii). This brief complies with the requirements of Rules 32(a)(5)

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/s/ David A. Robinson

Certificate of Service

As an unrepresented or self-represented *amicus* who is not a member of the Sixth Circuit bar, I certify that on May 8, 2014, I filed the foregoing brief by emailing it to the clerk of the court, and I understand that service will be accomplished by the appellate CM/ECF system.

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