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1st CIRCUIT COURT
STATE OF HAWAII
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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

NINIA BAEHR; GENORA DANCEL;)	CIVIL No. 91-1394-05
TAMMY RODRIGUES; ANTOINETTE)	(Injunctions)
PREGIL; PAT LAGON; JOSEPH MELILLO,)	
)	BRIEF OF <i>AMICI CURIAE</i>
Plaintiffs,)	& CERTIFICATE OF SERVICE
)	
vs.)	
)	
LAWRENCE H. MIKE, in his)	
Official Capacity as Director of the)	
Department of Health,)	
State of Hawaii,)	
)	
Defendant.)	Judge: Kevin S.C. Chang
)	

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I. STATEMENT OF THE ISSUES

The issues addressed by *amici* in this brief are whether Hawaii Revised Statutes ("HRS") § 572-1 (1995) furthers a "compelling state interest" in protecting and promoting the health and welfare of children, and whether HRS § 572-1 is "narrowly drawn to avoid unnecessary abridgments of constitutional rights" of same-sex couples. Baehr v. Lewin, 74 Haw. 530, 74 Haw. 645, 646, 852 P.2d 44, 74, *recons. granted in part, denied in part*, 74 Haw. 650 (1993).

II. INTEREST OF *AMICI CURIAE*

Amici are among the nation's most distinguished researchers and scholars of marriage and the family in the field of sociology. *Amici* submit this brief to advise the Court that, because research of *amici* and others in the field provides no scientifically valid basis for concluding or even suggesting that children raised by same-sex parents fare worse than children raised by two biological or opposite-sex parents, this research cannot support the State's assertion that HRS § 572-1 furthers compelling interests in protecting and promoting the health and welfare of children. Moreover, in contrast to policies derived from this research which *do* protect and promote the health and welfare of children, HRS § 572-1 fails to do so and is not narrowly drawn.

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the University of Wisconsin-Madison and a former member of the Social Science and Population Study Section of the National Institutes of Health. Lawrence L. Wu, Ph.D. is Associate Professor of Sociology at the University of Wisconsin-Madison and Chair of the American Sociological Association's Committee on the Status of Gays, Lesbians and Bisexuals in Sociology.

III. ARGUMENT

A. **The Social Science Research Regarding Children of Never-Married, Divorced, and Step-Parents Provides No Basis for Concluding that Children Would Be Harmed by Allowing Same-Sex Couples To Marry**

Amici have been major contributors to the large body of empirical research, relied on by experts at trial, that examines the consequences for children of being raised by never-married, divorced, and step-parents.¹ These studies use statistical methods and nationally representative data to compare outcomes for children raised in such families with outcomes for children raised by two biological or opposite-sex parents. Based largely on the premise that the social science research shows that two biological parents comprise the "optimal" child-rearing environment, the State argued at trial that HRS § 572-1 furthers a compelling State interest in protecting the health and welfare of children. The implication of this argument is that children would be harmed if same-sex couples were allowed to marry. It is improper for the State to infer such a conclusion. Because none of the data sources from which this body of research derives permits identification of same-sex couples or of children residing in such families, this research provides no scientifically

¹ *E.g.*, Furstenberg & Cherlin, Divided Families: What Happens to Children When Parents Part (1991); McLanahan & Sandefur, Growing Up With a Single Parent: What Hurts, What Helps (1994); Wu & Martinson, Family Structure and the Risk of a Premarital Birth, 58 Am. Soc. Rev. 210 (1993).

valid basis for comparing outcomes for children raised by same-sex and opposite-sex parents — let alone to conclude or suggest that outcomes are poorer for children raised by same-sex couples.

B. Researchers Other Than *Amici* Conclude that Children of Lesbian and Gay Parents Do Not Differ Significantly from Children of Heterosexual Parents²

Drs. Cherlin, Furstenberg and Wu have reviewed the growing body of research and literature compiled by researchers other than *amici* that specifically considers the consequences for children of being raised by lesbian and gay parents and by same-sex couples. These studies consistently find that children raised by lesbian and gay parents and same-sex couples do not differ significantly from those raised by heterosexual parents.³ These findings suggest no systematic differences between gay or lesbian and heterosexual parents in parenting ability, quality of parent-child relationships, stability of home environments or patterns of child rearing. In summary, and as the plaintiffs' (and some of the State's) witnesses testified at trial, all available evidence suggests that sexual orientation is irrelevant to an individual's or a couple's ability to establish and maintain optimal home environments for children.

Therefore, this body of research provides no basis for the State to claim a compelling interest in prohibiting marriage for same-sex couples based on any alleged difference between gay or lesbian and heterosexual parents.

² Drs. McLanahan and Sandefur have not reviewed the research or literature referred to in this section and therefore do not express any opinion on its findings or conclusions.

³ *E.g.*, Golombok et al., Children in Lesbian and Single-Parent Households, 24 J. Child Psychol. & Psychiatry 551 (1983); Patterson, Children of Lesbian and Gay Parents, 63 Child Dev. 1025 (1992).

C. The State Cannot Legitimately Claim that Child Outcomes Are Determined Solely by Family Structure

There is broad consensus among social scientists that child outcomes are affected by a large number of factors. These factors include pre- and post-natal care; adequate nutrition and health care; whether the child was planned or wanted; the mother's age at conception; parental socioeconomic resources; qualitative aspects of interactions between parents and children such as parental love, involvement and consistency; quality of neighborhood and schools; influences of peers and siblings; and the child's own abilities, temperament, attitudes and psychological resources.⁴ Moreover, social scientists observe wide variation in child outcomes even for siblings residing in the same family. As no one study can adequately control for all factors relevant to child outcomes, and because child outcomes vary so greatly, it is scientifically invalid to assert that the presence or absence of a single variable — such as residing with two biological parents — will provide an "optimal" environment for every child. Furthermore, individual children possess different temperaments, traits and needs, and these attributes may change over time.⁵ Hence, what is optimal for one child may prove suboptimal for another, and what is optimal for a child at

⁴ Astone & McLanahan, Family Structure and High School Completion: The Role of Parental Practices, 56 Am. Soc. Rev. 309 (1991); Chase-Lansdale et al., The Long-Term Effects of Parental Divorce on the Mental Health of Young Adults, 66 Child Dev. 1614 (1995); Cherlin et al., Longitudinal Studies of Effects of Divorce on Children in Great Britain and the United States, 252 Science 1386 (1991); Confronting Poverty (Danziger et al. eds., 1994); Furstenberg, Unplanned Parenthood: The Social Consequences of Teenage Childbearing (1994); Wu, Effects of Family Instability, Income, and Income Instability on the Risk of a Premarital Birth, 61 Am. Soc. Rev. 386 (1996).

⁵ Allison & Furstenberg, How Marital Dissolution Affects Children: Variations by Age and Sex, 25 Developmental Psychol. 540 (1989); Cherlin, Public and Private Families (1996); Furstenberg et al., Paternal Participation and Children's Well-Being After Marital Dissolution, 52 Am. Soc. Rev. 695 (1987).

one age may shift with age and changing family circumstances.

Therefore, simplistic assertions describing "optimal" parenting based on a sole variable fail to acknowledge the myriad and dynamic factors influencing child outcomes. Clearly, the State can have no compelling interest in restricting marriage to opposite-sex couples based on any alleged superseding importance to children of being raised by both biological parents.

D. Allowing Same-Sex Couples To Marry Would Benefit Children and Families

The State's witnesses conceded at trial, and *amici* agree, that same-sex couples would benefit, as do opposite-sex couples, from the status and benefits that accompany marriage.⁶ In *amici's* opinion, it is also reasonable to expect that the children of same-sex couples would benefit from the extension of marriage to their parents in ways similar to those in which the children of married opposite-sex couples currently benefit.⁷

For example, children of same-sex couples who marry can reasonably be expected to benefit from the increased financial resources of a second legally-committed parent. An alarming number of the nation's children reside in families characterized by chronic poverty, which is a significant threat to children's well-being and a consistent determinative factor of child outcomes.⁸

⁶ As the Hawaii Supreme Court recognized, marriage offers immediate legal and social recognition for a couple's marital "status" and immediate access to "a multiplicity of rights and benefits that are contingent upon that status." *Baehr*, 74 Haw. at 560, 852 P.2d at 59.

⁷ These benefits include all of those which currently accrue to children as a result of a legal parent-child relationship such as rights to insurance coverage, inheritance, child support and the right to bring wrongful death actions.

⁸ Furstenberg & Cherlin, *supra* note 1; Garfinkel & McLanahan, Single Mothers and Their Children (1986); McLanahan & Bumpass, Intergenerational Consequences of Family Disruption, 94 Am. J. Soc. 130 (1988); McLanahan & Sandefur, *supra* note 1; Wu, *supra* note 4.

Chronic poverty is increasingly concentrated in single-parent households.⁹ The potential for two incomes, which exists for most married couples, is known to reduce the incidence of poverty substantially.¹⁰ Thus, children whose same-sex parents are allowed to marry will, on average, be less likely to reside in poverty than the average child.

Another determinative factor of child outcomes is the degree of parents' commitment to and investment in their children. So-called "selection" effects suggest that those same-sex couples who choose both to marry and to have children will, on average, differ behaviorally from heterosexual parents in ways that yield expectations of positive outcomes for their children. For example, a substantial fraction of the nation's children are unwanted or unintended, leading to less-than-optimal environments for these children.¹¹ In contrast, children born to or adopted by same-sex couples are clearly both wanted and intended.¹² The actions such couples must take in order to become parents typically involve artificial insemination or adoption, both of which require extensive effort and personal commitment. Thus same-sex couples who choose to marry and have children are "self-selected" on these and other behavioral characteristics. Although

⁹ Cherlin, Marriage, Divorce, Remarriage (rev. ed. 1992); Furstenberg & Cherlin, *supra* note 1; Garfinkel & McLanahan, *supra* note 8; McLanahan & Sandefur, *supra* note 1.

¹⁰ Confronting Poverty, *supra* note 4.

¹¹ Furstenberg, *supra* note 4; Furstenberg et al., Adolescent Mothers and Their Children in Later Life, 19 Family Plan. Persp. 142 (1987); Hoffman et al., Reevaluating the Costs of Teenage Childbearing, 30 Demography 1 (1993); Risking the Future: Adolescent Sexuality, Pregnancy, and Childbearing (Hayes ed., 1987).

¹² *Amici* dispute claims made by the State's witnesses at trial that children in same-sex families are, by definition, in step-families. *Amici* believe that the situation of children born into or adopted by same-sex parents is most like that of children born into or adopted by opposite-sex parents. The situation of children in same-sex families will resemble that of children in step-families only when those children are the product of one parent's prior relationship.

amici are aware of no research estimating the magnitude of such selection effects, these arguments suggest that such couples will, on average, differ systematically from heterosexual parents in having a greater commitment both to one another and to raising their children.

Recent court decisions have recognized this increased potential for higher child outcomes that self-selection suggests. In Adoption of Tammy, 619 N.E.2d 315 (Mass. 1993), the court allowed a second parent to adopt the child conceived by her lesbian partner through artificial insemination and raised by both women since birth. The court recognized the following:

"[T]he fact that this parent-child constellation came into being as a result of thoughtful planning and a strong desire on the part of these women to be parents to a child and to give that child the love, the wisdom and the knowledge that they possess . . . [needs to be taken into account] The maturity of these women, their status in the community, and their seriousness of purpose stands in contrast to the caretaking environments of a vast number of children who are born to heterosexual parents but who are variously abused, neglected and otherwise deprived of security and happiness."

Id. at 317 (quoting testimony of trial expert); *see also* Adoptions of B.L.V.B. & E.L.V.B., 628 A.2d 1271, 1275–76 (Vt. 1993) (defining court's "paramount concern" as "the effect of our laws on the reality of children's lives" and holding that "[t]o deny the children of same-sex partners, as a class, the security of a legally recognized relationship with their second parent serves no legitimate state interest").

These examples of expected benefits for children further undermine the validity of the State's claim that preventing same-sex couples from marrying is even remotely connected to — let alone necessary for — the protection and promotion of child health and welfare. To the contrary, *amici* suggest that optimal outcomes for children would be furthered by *allowing* same-sex couples to marry and to raise their children with State support and encouragement.

E. The Social Science Research Suggests Numerous Direct Means by Which the State Could Promote Optimal Outcomes for Children

Social scientists agree with the State of Hawaii that society has a compelling interest in protecting and promoting the health and welfare of children. The research of *amici* has led to a number of policy recommendations, implemented on both state and federal levels, designed to further this interest directly. These policies include access to quality health care and universal health insurance, supplementation and stabilization of parental income, and provision of day care for working parents.¹³ Such policies provide examples of direct means by which the State of Hawaii could promote optimal child outcomes in all families without abridging the constitutional rights of same-sex couples or maintaining sex discrimination in marriage.

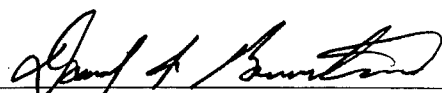
IV. CONCLUSION

If the State of Hawaii truly desires to promote and protect the health and welfare of Hawaii's children by supporting the formation and stability of families comprised of married couples raising their children in committed, caring households, one of the most direct means to accomplish this goal is to allow same-sex couples to live together in marriage and to raise their children with the State of Hawaii's sanction, encouragement, and support.

For all of the above reasons, *amici* urge the Court to find for the plaintiffs in this case.

DATED: Honolulu, Hawaii,

OCT 10 1996



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¹³ Furstenberg & Cherlin, *supra* note 1; Garfinkel & McLanahan, *supra* note 8; McLanahan & Sandefur, *supra* note 1.

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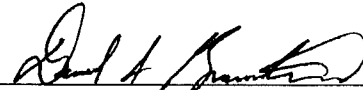
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