

No. DF-104107

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

C. O'DARLING,
Petitioner/Appellant,

vs.

S. O'DARLING,
Respondent/Appellee.

FILED
SUPREME COURT
STATE OF OKLAHOMA

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**BRIEF OF *AMICUS CURIAE*
OKLAHOMA FAMILY POLICY COUNCIL**

Appeal From The District Court, Tulsa County, Oklahoma
The Honorable Michael Zacharius, Presiding

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INDEX

INTRODUCTORY STATEMENT	1
ARGUMENT AND AUTHORITIES	
PROPOSITION I:	
ALL KNOWN SOCIETIES HAVE RECOGNIZED MARRIAGE – IT EXISTED LONG BEFORE HOMOSEXUALITY WAS A STATUS AND HAS ALWAYS BEEN EXCLUSIVELY HETEROSEXUAL.....	1
<i>Lawrence v. Texas</i> , 539 U.S. 558, 568 (2003).....	1
<i>Mudd v. Perry</i> , 108 OK 168 (syllabus), 235 P.479 (Okla. 1925).....	3
<i>Mueggenborg v. Walling</i> , 1992 OK 121 n. 1, 836 P.2d 112.....	3
William J. Doherty, William A. Galston, Norval D.Glenn, John Gottman et al., <i>Why Marriage Matters: Twenty-One Conclusions from the Social Sciences</i> 8-9 (Institute for American Values) (2002)	1
David Blankenhorn, <i>The Future of Marriage</i> 91 (2007).....	2
William N. Eskridge, Jr., <i>A History of Same-Sex Marriage</i> 79 VA. L. REV. 1419 (1993)	2
Okla. Stat. Tit. 43 sec. 3(A)	4
Peter Lubin & Dwight Duncan, <i>Follow the Footnote or the Advocate as Historian of Same-Sex Marriage</i> 47 CATH. U. L. REV. 1271 (1998).....	2
Charles P. Kindregan, Jr., <i>Same-Sex Marriage: The Cultural Wars and the Lessons of Legal History</i> 38 FAM. L. Q. 427, 430 (2004).....	2
CONOR MCCARTHY, MARRIAGE IN MEDIEVAL ENGLAND 8 (2004).....	3
Jan Knappert, <i>The Family in Antiquity</i> in THE FAMILY IN GLOBAL TRANSITION 29 (Gordon L. Anderson, editor, 1997).....	3

BERNARD I. MURSTEIN, LOVE, SEX AND MARRIAGE THROUGH THE AGES 10 (1974).....	3
G. ROBINA QUALR, A HISTORY OF MARRIAGE SYSTEMS (1988)	3
PROPOSITION II:	
MARRIAGE IS NOT A PURELY LEGAL CONSTRUCT, ITS ROOTS ARE IN SOCIETY AND RELIGION AND CANNOT BE UNDERSTOOD AS INTENDING TO DISCRIMINATE AGAINST ANY GROUP.....	4
Richard W. Garnett, <i>Taking Pierce Seriously: The Family, Religious Education, and Harm to Children</i> 76 NOTRE DAME L. REV. 109, 114 note 29 (2000)	4
F.C. DeCoste, <i>Courting Leviathan: Limited Government and Social Freedom in Reference re Same-Sex Marriage</i> , 42 ALBERTA L. REV. 1099, 1112-13 (2005)	5
William J. Doherty, William A. Galston, Norval D.Glenn, John Gottman et al., <i>Why Marriage Matters: Twenty-One Conclusions from the Social Sciences</i> 8-9 (Institute for American Values) (2002)	5
Roger Scruton, <i>Sacrilege and Sacrament in THE MEANING OF MARRIAGE</i> 5 (Robert P. George & Jean Bethke Elshtain, eds., 2006)	5
George W. Dent, Jr., "How Does Same-Sex Marriage Threaten You?" 59 RUTGERS L. REV. 233, 249 (2006)	5
Maggie Gallagher, <i>(How) Will Gay Marriage Weaken Marriage as a Social Institution: A Reply to Andrew Koppelman</i> 2 U. ST. THOMAS L. J. 33, 43-44 (2004)	6
CONCLUSION	7

INTRODUCTION

OKLAHOMA'S MARRIAGE LAWS FOLLOW UNIVERSAL HISTORICAL TRADITION

The history and tradition of marriage refutes the claim that marriage can embrace the union of persons of the same sex. Rather, marriage as reflected in our nation's history and Oklahoma law has a meaning and logic that has roots embedded deeply in the fundamental concept that marriage is the union between one man and one woman.

The question of this case is whether same-sex couples can demand recognition from the state that prefers not to give it.

PROPOSITION I

ALL KNOWN SOCIETIES HAVE RECOGNIZED MARRIAGE—IT EXISTED LONG BEFORE HOMOSEXUALITY WAS A STATUS AND HAS ALWAYS BEEN EXCLUSIVELY HETEROSEXUAL.

In its decision invalidating the sodomy law of the State of Texas, the U.S. Supreme Court noted recent scholarship demonstrating that “the concept of the homosexual as a distinct category of person did not emerge until the late 19th century.” *Lawrence v. Texas*, 539 U.S. 558, 568 (2003) (citing J. Katz, *The Invention of Heterosexuality* 10 (1995); J. D. Emilio & E. Freedman, *Intimate Matters: A History of Sexuality in America* 121 (2d ed. 1997)).

It hardly needs saying that marriage emerged as a social institution long before that point. The definition of marriage as the union of a man and a woman itself goes back farther than our modern understanding of sexual orientation as a classification. A group of scholars recently pointed out: “At least since the beginning of recorded history, in all the flourishing varieties of human cultures documented by anthropologists, marriage has been a universal human institution.” William J. Doherty, William A. Galston, Norval D. Glenn, John Gottman et al., *Why Marriage Matters: Twenty-One Conclusions from the Social Sciences* 8-9

(Institute for American Values) (2002). In a recent book, David Blankenhorn said: “In all or nearly all human societies, marriage is socially approved sexual intercourse between a woman and a man, conceived both as a personal relationship and as an institution, primarily such that any children resulting from the union are understood to be—emotionally, morally, practically and legally affiliated with both of the parents.” *The Future of Marriage* 91 (2007).

Some have suggested that various cultures have given some recognition to same-sex unions, in the past. *See* William N. Eskridge, Jr., *A History of Same-Sex Marriage* 79 VA. L. REV. 1419 (1993). This author, however, notes that the evidence he cites is “episodic and fragmentary” and reveals that in the “modern period” society has generally “suppressed same-sex marriage.” *Id.* at 1435-1436. A review of these historical assertions strongly rebuts the claim for a historical practice of same-sex marriage and notes that the adduced evidence is more equivocal (when not downright contradictory). Peter Lubin & Dwight Duncan, *Follow the Footnote or the Advocate as Historian of Same-Sex Marriage* 47 CATI. U. L. REV. 1271 (1998).

In the United States, the original thirteen colonies and all of the states inherited the definition of marriage as the union of a man and a woman from English law. Charles P. Kindregan, Jr., *Same-Sex Marriage: The Cultural Wars and the Lessons of Legal History* 38 FAM. L. Q. 427, 430 (2004) (“Even though many colonies were established by religious dissenters and ecclesiastical courts based on the Church of England model were rare, the colonies, nonetheless, imported most of the substantive law of marriage created by the English Church and its ecclesiastical courts. Thus, the civil law reflected the religious English view of marriage as a permanent monogamous union of one man and one woman.”) The English “inherited traditions relating to marriage from three major sources: from Roman

law, from Judaeo-Christian tradition, and from Germanic society.” CONOR MCCARTHY, MARRIAGE IN MEDIEVAL ENGLAND 8 (2004). Even more ancient history illustrates male-female marriage as a common element in diverse societies from Mesopotamia, India, etc. See Jan Knappert, *The Family in Antiquity* in THE FAMILY IN GLOBAL TRANSITION 29 (Gordon L. Anderson, editor, 1997). One scholar notes that “[m]arriage was a firmly established institution when recorded history began a few thousand years ago, and we can only speculate on its origins.” BERNARD I. MURSTEIN, LOVE, SEX AND MARRIAGE THROUGH THE AGES 10 (1974). Another says: “Marriage, as the socially recognized linking of a specific man to a specific woman and her offspring, can be found in all societies.” G. ROBINA QUALE, A HISTORY OF MARRIAGE SYSTEMS (1988).

Oklahoma law has recognized both the tradition of marriage and its limitation to people of the opposite sex. In *Mueggenborg v. Walling*, the Oklahoma Supreme Court noted that:

Ancient canon law, which consisted of the decrees of the various popes was the basis of matrimonial law in England. Before the Council of Trent (Trident in Latin) in 1563 canon law required no ceremony or religious sacrament for a valid marriage. The canon and civil laws administered in the ecclesiastical courts of England were brought from England to this side of the Atlantic and have been received as a part of Oklahoma law.

Mueggenborg v. Walling, 1992 OK 121 n. 1, 836 P.2d 112 (citing *Reaves v. Reaves*, 15 OK 240, 82 P. 490 (Okla. 1905)). Oklahoma case law and statutes recognize the long held norm that marriage is between a man and a woman. For example, the Oklahoma Supreme Court held that “ ‘ Marriage’ as at common law creates the status of husband and wife under the law of this state. Whenever the minds of the parties meet in a common consent thereto, the marriage immediately arises. It is a contract between the **man and woman**” *Mudd v. Perry*, 108 OK 168 (syllabus), 235 P.479 (Okla. 1925) (emphasis added). Oklahoma statutes

governing marriage state that “[a]ny unmarried person who is at least eighteen (18) years of age and not otherwise disqualified is capable of contracting and consenting to marriage with a person of the opposite sex.” Okla. Stat. Tit. 43 sec. 3(A) (emphasis added).

The history of marriage demonstrates that non-recognition of same-sex marriages does not stem from a particular religious tradition; it is universal. Even secular and aggressively atheist regimes (like Soviet Russia) have never recognized same-sex marriages. The cultural practices of human societies are remarkably varied including those related to marriage. Some cultures favor endogamy; others prohibit it. Some societies condone polygamy; others forbid it. It is particularly noteworthy, then, when all societies adhere to some norm. In such cases there is probably a good reason for that norm, a reason so strong that a society that abandoned that norm would probably suffer serious damage. As the next section will describe, the importance of encouraging the raising of children by their biological parents explains the exclusively heterosexual focus of marriage in all societies in history.

PROPOSITION II

MARRIAGE IS NOT A PURELY LEGAL CONSTRUCT, ITS ROOTS ARE IN SOCIETY AND RELIGION AND CANNOT BE UNDERSTOOD AS INTENDING TO DISCRIMINATE AGAINST ANY GROUP

As the history above indicates, marriage is not a purely legal construct. As Professor Richard Garnett points out: “The law no more ‘creates’ the family than the Rule Against Perpetuities ‘creates’ dirt.” Richard W. Garnett, *Taking Pierce Seriously: The Family, Religious Education, and Harm to Children* 76 NOTRE DAME L. REV. 109, 114 note 29 (2000). In reference to the history of marriage, Professor F.C. DeCoste notes that the state cannot “claim ownership” over marriage:

[T]he facts are these: (a) prior to the thirteenth century, when the Church finally managed to take control of it, marriage was an entirely social practice;

(b) marriage only became a sacrament in 1439; and c) the Catholic Church only began requiring the attendance of a priest for a valid marriage in 1563, after the Reformation. The state came to marriage even later than did the Church. Indeed, it was not until 1753, with the passage of Lord Hardwicke's Marriage Act, that the British state became a significant player in the joining together of men and women as husbands and wives. F.C. DeCoste, *Courting Leviathan: Limited Government and Social Freedom in Reference re Same-Sex Marriage*, 42 ALBERTA L. REV. 1099, 1112-13 (2005) (citation omitted).

Rather, marriage has developed in society and only later been extended legal recognition and regulation. Neither the social institution of marriage nor its later legal forms can be understood as a vehicle for promoting discrimination against discrete classes of people. Marriage has always been primarily about inclusion in the service of future generations.

The scholars' statement cited above notes that, "[a]s a virtually universal human idea, marriage is about the reproduction of children, families, and society. . . . marriage across societies is a publicly acknowledged and supported sexual union which creates kinship obligations and sharing of resources between men, women, and the children that their sexual union may produce." William J. Doherty, William A. Galston, Norval D. Glenn, John Gottman et al., *Why Marriage Matters: Twenty-One Conclusions from the Social Sciences* 8-9 (Institute for American Values) (2002). English philosopher Roger Scruton says, "In all observed societies some form of marriage exists, as the means whereby the work of one generation is dedicated to the well-being of the next." Roger Scruton, *Sacrilege and Sacrament* in *THE MEANING OF MARRIAGE* 5 (Robert P. George & Jean Bethke Elshtain, eds., 2006).

Professor George Dent explains: "The law has traditionally been concerned with marriage because of the need to help children." George W. Dent, Jr., *How Does Same-Sex*

Gallagher elaborated:

Historically, the reason marriage exists as a legal institution is clear. A virtually uninterrupted series of both lower court decisions and Supreme Court decisions until quite recently affirmed the primary purpose of marriage as a legal institution is to manage the sexually-based phenomenon known as “procreation.” This is not quite the same as saying “marriage is in order to produce children.” Marriage is not a factory for childbearing. Marriage existed to encourage men and women to create the next generation in the right context and simultaneously to discourage the creation of children in other contexts—out of wedlock in fatherless homes. The reason marriage was singled out for special legal attention is that it is the only human relationship that can both (a) produce the next generation of babies and (b) connect those babies to both their mother and father. Maggie Gallagher, *(How) Will Gay Marriage Weaken Marriage as a Social Institution: A Reply to Andrew Koppelman* 2 U. ST. THOMAS L. J. 33, 43-44 (2004) (citations omitted).

Some will claim, of course, that the recognition of marriages involving infertile couples belies the child-centered rationale for state regulation of marriage. It is important to note that the law often employs broad categories rather than making individual distinctions. For example, the age at which one may vote or drive a car is selected on the basis of general patterns of maturation, not on each individual’s development. In the same vein, it makes sense for the law to recognize all marriages between opposite-sex couples rather than to make individual determinations of reproductive capacity (or intent). First, the ability to bear children often cannot be ascertained without an invasion of the body that would grossly violate our society’s notions of human dignity. If the obstacle is intent not to bear children, a couple may still change its mind or create them accidentally. Even then a medical determination could be wrong; couples told they can’t have children still often manage to do so. In short, any real effort to exclude infertile opposite-sex couples from marriage would be complicated, expensive and error-prone. Additionally, men and women who marry even

without the ability to have children together are, as a result of observing their marriage vows, not creating children with others to whom they are not married.

None of these long-recognized purposes of marriage, it should be noted, has anything to do with disadvantaging any person or group of person because of their orientation. Marriage has been recognized as a social institution not because of whom it excludes but because it brings together men and women to form stable unions that provide the optimal environment for raising the children their union may produce. The definition of marriage as requiring an opposite-sex relationship is not even related to a society's treatment of same-sex sexual acts. Some societies have tolerated and even condoned homosexual acts in certain cases while still retaining the understanding of marriage as the union of a man and a woman.

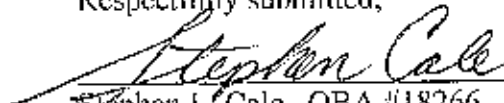
CONCLUSION

Marriage has long played a vital role in society as a universal social institution that provides the inestimable benefit of a husband and wife committed to one another and to the children they may create.

The near universal and continuous understanding of marriage throughout recorded history calls, at least, for great caution in considering its redefinition.

Amicus respectfully urges this court to defer to the inherited understanding of marriage as the union of a man and a woman by affirming the decision of the trial court.

Respectfully submitted,



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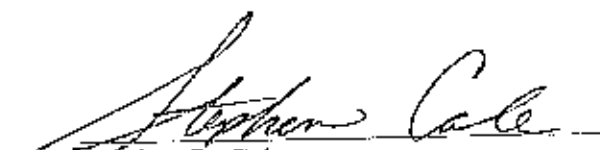
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