
Nos. 14-1167(L), 14-1169, 14-1173

United States Court of Appeals
for the Fourth Circuit

TIMOTHY B. BOSTIC, *et al.*,
Plaintiffs-Appellees, and
CHRISTY BERGHOFF, *et al.*,
on behalf of themselves and all others similarly situated,
Intervenors,

v.

GEORGE E. SCHAEFER, III, *et al.*,
Defendants-Appellants, and
MICHÈLE B. MCQUIGG,
Intervenor-Defendant-Appellant.

On Appeal from the United States District Court
for the Eastern District of Virginia
Case No. 2:13-cv-00395-AWA

**BRIEF OF AMICUS CURIAE
GARY J. GATES IN SUPPORT OF
PLAINTIFFS-APPELLEES
AND INTERVENORS**

Brad W. Seiling
Benjamin G. Shatz
Manatt, Phelps & Phillips, LLP
11355 W. Olympic Boulevard
Los Angeles, CA 90064
(310) 312-4000
BShatz@manatt.com
Counsel for Gary J. Gates

TABLE OF CONTENTS

I.	Introduction.....	3
II.	Argument.....	7
A.	Same-Sex Couples: Nearly 1.3 Million Adults in the U.S. and 28,500 Adults in Virginia Are Members of Same-Sex Couples	7
1.	Same-Sex Couples Live Throughout the U.S. and Throughout Virginia	8
2.	Same-Sex Couples Are Diverse in Terms of Sex, Age, Race, and Ethnicity.....	8
B.	Same-Sex Couples With Children: Approximately One in Five Same-Sex Couples in the U.S. and in Virginia Are Raising Children	12
1.	Same-Sex Couples with Children Live Throughout the U.S. and Virginia.....	14
2.	Members of Same-Sex Couples with Children Are Diverse in Terms of Race, Ethnicity, and Income.....	15
3.	Same-Sex Couples Are More Likely Than Different-Sex Couples to Be Raising Adopted Children and Foster Children.....	17
C.	Same-Sex Couples in Marriages, Civil Unions, or Registered Domestic Partnerships: As of 2010, Approximately 114,300 Same-Sex Couples in the U.S. Were Legally Married, and Over 108,000 Were in Civil Unions or Registered Domestic Partnerships	18
1.	When Permitted By Law, Same-Sex Couples Are More Likely to Marry Than to Enter into a Civil Union or a Domestic Partnership.....	20

TABLE OF CONTENTS (CONT'D)

2. Dissolution Rates Are Slightly Lower for Same-Sex Couples Than for Different-Sex Couples 23

D. LGBT Adults: Over 8 Million American Adults and 178,000 Adults in Virginia Identify as LGBT 23

III. Conclusion.....26

TABLE OF AUTHORITIES

Case

<i>DeBoer v. Snyder</i> , __ F. Supp. 2d __, 2014 WL 1100794, No. 12-CV-10285 (E.D. Mich. Mar. 21, 2014)	3, 26
--	-------

Constitution & Statutes

Va. Const. art. 1, § 15-A	3, 26
Va. Code §§ 20-45.2, 20-45.2	3, 26

Rules

Fed. R. App. P. 29(a).....	2
Fed. R. App. P. 29(c)(5).....	2

Other Authorities

<i>About GSS</i> , GSS GENERAL SOCIAL SURVEY, http://www3.norc.org/GSS+Website/About+GSS/	4
<i>American Community Survey</i> , U.S. CENSUS BUREAU, http://www.census.gov/acs/	3
Badgett, M. V. Lee & Jody L. Herman, The Williams Institute, UCLA School of Law, <i>Patterns of Relationship Recognition by Same-Sex Couples in the United States</i> (Nov. 2011).....	20
<i>Decennial Census Data on Same Sex Couples</i> , U.S. CENSUS BUREAU, http://www.census.gov/hhes/samesex/data/decennial.html	3
Gates , Gary J. & Abigail M. Cooke, The Williams Institute, UCLA School of Law, <i>United States Census Snapshot: 2010</i> (2011).....	8, 18, 19
Gates, Gary J. & Abigail M. Cooke, The Williams Institute, UCLA School of Law, <i>Virginia Census Snapshot 2010</i> (2011)	8, 15
Gates, Gary J. & Frank Newport, <i>Special Report: 3.4% of U.S. Adults Identify as LGBT</i> , GALLUP (Oct. 18, 2012)	4, 9

TABLE OF AUTHORITIES (CONT'D)

Gates, Gary J. & Frank Newport, <i>LGBT Percentage Highest in D.C., Lowest in North Dakota</i> , GALLUP (Feb. 15, 2013).....	4, 23, 24
Gates, Gary J., <i>LGBT Identity: A Demographer's Perspective</i> , 45 Loy. L.A. L. Rev. 693 (2012)	25
Gates, Gary J., The Williams Institute, UCLA School of Law, <i>How Many People Are Lesbian, Gay, Bisexual, and Transgender?</i> (Apr. 2011)	24
Gates, Gary J., The Williams Institute, UCLA School of Law, <i>LGBT Parenting in the United States</i> (Feb. 2013).....	passim
Gates, Gary J., The Williams Institute, UCLA School of Law, <i>Same-sex and Different-sex Couples in the American Community Survey: 2005-2011</i> (Feb. 2013)	9, 10, 11, 12
Gates, Gary J., The Williams Institute, UCLA School of Law, <i>Same-sex Couples in US Census Bureau Data: Who Gets Counted and Why</i> (Aug. 2010).....	passim
Gates, Gary J., The Williams Institute, UCLA School of Law, <i>Same-sex Couples in Virginia: A Demographic Summary</i> (2014).....	passim
Grant, Jaime M., et al., <i>Injustice at Every Turn: A Report of the National Transgender Discrimination Survey</i> (2011).....	25
Howden , Lindsay M. & Julie A. Meyer, U.S. CENSUS BUREAU, <i>Age and Sex Composition: 2010 Census Briefs</i> (May 2011)	24
Women in the Labor Force: A Databook, U.S. BUREAU OF LABOR STATISTICS (Dec. 2011).....	16, 17

STATEMENT OF INTEREST

Amicus Curiae Gary J. Gates is the Williams Distinguished Scholar at the Williams Institute on Sexual Orientation and Gender Identity Law and Public Policy at the UCLA School of Law. He is also a member of the Scientific Advisory Committee of the U.S. Census Bureau and the Data Users Advisory Committee of the Bureau of Labor Statistics.

Gates co-authored *The Gay and Lesbian Atlas* and is a recognized expert on the geography and demography of the lesbian, gay, bisexual, and transgender (LGBT) population. He conducted the first significant research study using U.S. Census data to explore characteristics of same-sex couples. He publishes extensively on the demographic and economic characteristics of the LGBT population. Many national and international media outlets routinely feature his work. In addition, Gates regularly consults with federal and state governments and non-governmental organizations on data collection issues regarding LGBT populations. In *DeBoer v. Snyder*, he provided “highly credible” expert testimony relied upon by the court in holding unconstitutional Michigan’s prohibition on marriage for same-sex couples. No. 12-CV-10285, __ F. Supp. 2d __, 2014 WL 1100794, at *5 (E.D. Mich. Mar. 21, 2014).

As a scholar of sexual orientation and gender identity law and public policy, Gates has a substantial interest in the issues before this

Court. Gates has conducted extensive research and authored numerous studies regarding the geographic, demographic, and economic characteristics of same-sex couples in the United States. Gates believes that this expertise and perspective as an academic scholar may help the Court more fully appreciate the impact of Virginia's non-recognition of the marriages of same-sex couples and the exclusion of same-sex couples and their families from marriage.

This brief is filed with consent of all parties and no motion for leave to file is required. Fed. R. App. P. 29(a). No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief, and no person other than the *amicus curiae* or his counsel contributed money that was intended to fund preparing or submitting this brief. Fed. R. App. P. 29(c)(5).

I. Introduction

This brief presents and analyzes demographic and economic data available regarding same-sex couples and their children in the United States and in Virginia and regarding LGBT adults, regardless of their relationship status, in order to assist the Court in understanding the possible effects of rulings in this case regarding the validity of Article 1, section 15-A of the Constitution of Virginia, sections 20-45.2 and 20-45.3 of the Virginia Code, and all other sources of state law that preclude marriage for same-sex couples or prevent recognition of same-sex marriages.¹

This brief uses data primarily from four sources:

- **2010 U.S. Census:** The U.S. Census Bureau has been collecting data regarding same-sex couples for more than two decades, including as part of the 1990, 2000, and 2010 censuses.²
- **American Community Survey (“ACS”):** The ACS is an annual survey conducted by the U.S. Census Bureau that provides demographic information about the U.S. population.³

¹ Throughout this brief, the acronym “LGBT” refers collectively to lesbian, gay, bisexual, and transgender persons, and the acronym “LGB” refers collectively to lesbian, gay, and bisexual persons.

² *Decennial Census Data on Same Sex Couples*, U.S. CENSUS BUREAU, <http://www.census.gov/hhes/samesex/data/decennial.html> (last visited Apr. 17, 2014).

³ *American Community Survey*, U.S. CENSUS BUREAU, <http://www.census.gov/acs/> (last visited Apr. 17, 2014).

- **General Social Survey (“GSS”)**: The GSS is a biannual survey of the National Opinion Research Center (“NORC”) at the University of Chicago. The GSS, initiated in 1972, is the largest project funded by the National Science Foundation’s Sociology Program and is the most frequently used source of information in the social sciences other than the U.S. Census.⁴
- **Gallup**: The Gallup Daily Tracking Survey asks respondents whether they identify as lesbian, gay, bisexual, or transgender. Data in this brief draw upon responses from more than 121,000 adults in the United States from June through September 2012, plus 85,000 more respondents from October through December 2012.⁵ These data constitute the largest population-based survey of LGBT persons in U.S. history.⁶

Based primarily on these sources, this brief describes demographic data about four groups of people in the United States and Virginia: (A) same-sex couples; (B) same-sex couples with children; (C) same-sex

⁴ *About GSS*, GSS GENERAL SOCIAL SURVEY, <http://www3.norc.org/GSS+Website/About+GSS/> (last visited Apr. 17, 2014).

⁵ Gary J. Gates & Frank Newport, *Special Report: 3.4% of U.S. Adults Identify as LGBT*, GALLUP (Oct. 18, 2012), <http://www.gallup.com/poll/158066/special-report-adults-identify-lgbt.aspx> (last visited Apr. 17, 2014); Gary J. Gates & Frank Newport, *LGBT Percentage Highest in D.C., Lowest in North Dakota*, GALLUP (Feb. 15, 2013), <http://www.gallup.com/poll/160517/lgbt-percentage-highest-lowest-north-dakota.aspx> (last visited Apr. 17, 2014).

⁶ Gates & Newport, *LGBT Percentage Highest in D.C., Lowest in North Dakota*, *supra* note 5.

couples in marriages, civil unions, or registered domestic partnerships; and (D) LGBT adults. The data show:

(A) Same-Sex Couples: There are nearly 1.3 million adults who were members of 646,464 same-sex couples identified in the 2010 Census. The Census identified same-sex couples in all 50 states and in 93% of counties in the United States. In Virginia, according to the 2010 Census, there are nearly 28,500 adults in nearly 14,250 same-sex couples, and these couples were identified in all but one of Virginia's counties. The racial and ethnic distributions of individuals in same-sex and different-sex married couples are similar.

(B) Same-Sex Couples with Children: U.S. Census Bureau data suggest that almost one-fifth of same-sex couples in the United States and in Virginia are raising children under age 18. In other words, nationally, more than 125,000 same-sex couple households collectively include nearly 220,000 children in their homes. In Virginia, more than 2,500 same-sex couples are raising more than 4,000 children under age 18. Same-sex couples raising children live throughout the United States and Virginia.

Most children being raised by same-sex parents in the United States and in Virginia are biologically related to one of their parents. Nationally, same-sex couples are more likely than their different-sex married counterparts to be raising an adopted child or foster child. In

Virginia, same-sex and different-sex married couples are nearly equally as likely to be raising an adopted child.

Parenting among same-sex couples is more prevalent among couples who are female, younger, and racial and ethnic minorities. Nationally, the median annual household income of same-sex couples with children under 18 in the home is more than 16% lower than for comparable different-sex couples. In Virginia, the median annual household income of same-sex couples with children under age 18 in the home is 36% lower than for comparable different-sex married couples.

(C) Same-Sex Couples in Marriages, Civil Unions, or Registered Domestic Partnerships: As of 2010, approximately 114,300 same-sex couples were legally married in the United States, and more than 108,000 same-sex couples were in civil unions or registered domestic partnerships. When offered the choice, same-sex couples are much more likely to marry than to pursue a civil union or a registered domestic partnership. Female same-sex couples are more likely to marry or to enter into a civil union or registered domestic partnership than are male same-sex couples. In states with available data, dissolution rates for same-sex couples are slightly lower on average than divorce rates for different-sex married couples.

(D) LGBT Adults: More than 8 million adults in the United States and 178,000 adults in Virginia identify as LGBT. An estimated

37% of LGBT-identifying adults in the United States have had a child at some point during their lifetimes.

II. Argument

A. Same-Sex Couples: Nearly 1.3 Million Adults in the U.S. and 28,500 Adults in Virginia Are Members of Same-Sex Couples

Since 1990, it has been possible to identify same-sex couples using U.S. Census data by combining responses to Census questions regarding sex and relationship to the householder.⁷ In the 2010 Census, 646,464 same-sex couples identified as such, meaning that nearly 1.3

⁷ Same-sex couples are defined as such when a householder (Person 1 on the survey form) identifies another individual aged 16 or older as being of the same sex and as his or her “husband/wife” or “unmarried partner.” Gary J. Gates, The Williams Institute, UCLA School of Law, *Same-sex Couples in US Census Bureau Data: Who Gets Counted and Why*, at 3 (Aug. 2010), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-Who-Gets-Counted-Aug-2010.pdf> (last visited Apr. 17, 2014). A post-Census follow-up survey of same-sex couples suggests that approximately one in seven same-sex couples who live in the United States (14.4%) did not identify themselves in the 2010 Census. *Id.* Approximately 9.7% identified themselves as “roommates” or “non-relatives”; for many, this was because they were concerned about confidentiality, because they understood that the Census was a federal survey and that the federal government did not recognize their relationships and/or did not have a question about sexual orientation, or because they understood their relationship in a way other than the responses provided on the Census forms. *Id.* The remaining 4.7% were couples in which neither partner was “Person 1” (the householder) on the Census form—for example, if a same-sex couple lived in the home of another person who was designated as householder. *Id.*

million Americans were members of a same-sex couple.⁸ In the 2010 Census, 14,243 same-sex couples identified as such in Virginia, meaning that nearly 28,500 Virginians are members of a same-sex couple.⁹

1. Same-Sex Couples Live Throughout the U.S. and Throughout Virginia

Same-sex couples live in all parts of the country. In the 2010 Census, same-sex couples were identified in all 50 states and in 93% of counties in the United States.¹⁰ In the 2010 Census, same-sex couples were identified in all but one of Virginia's counties.¹¹

2. Same-Sex Couples Are Diverse in Terms of Sex, Age, Race, and Ethnicity

Analyses from the U.S. Census Bureau's American Community Survey ("ACS") show that same-sex couples are often demographically

⁸ Gary J. Gates & Abigail M. Cooke, The Williams Institute, UCLA School of Law, *United States Census Snapshot: 2010* (2011), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census2010Snapshot-US-v2.pdf> (last visited Apr. 17, 2014).

⁹ Gary J. Gates & Abigail M. Cooke, The Williams Institute, UCLA School of Law, *Virginia Census Snapshot 2010* (2011), available at http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census2010Snapshot_Virginia_v2.pdf (last visited Apr. 17, 2014).

¹⁰ Gates & Cooke, *United States Census Snapshot: 2010*, *supra* note 8, at 1 & 5.

¹¹ Gates & Cooke, *Virginia Census Snapshot 2010*, *supra* note 9, at 5-6.

diverse.¹² The majority of same-sex couples are female (51%), and members of same-sex couples span all age groups.¹³ The average age of individuals in same-sex couples in the United States is more than 6 years younger than that of individuals in different-sex married couples—44.4 and 50.8 years old, respectively.¹⁴ This pattern is similar in Virginia, where the average age of individuals in same-sex couples is more than seven years younger than that of different-sex married couples—43.0 and 50.4 years old, respectively.¹⁵ Table 1 shows the

¹² Compare Gary J. Gates, The Williams Institute, UCLA School of Law, *Same-sex and Different-sex Couples in the American Community Survey: 2005-2011* (Feb. 2013), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/ACS-2013.pdf> (last visited Apr. 17, 2014) (providing demographic data on same-sex couples) with Gates & Newport, *Special Report: 3.4% of U.S. Adults Identify as LGBT*, *supra* note 5 (providing demographic data on LGBT individuals).

¹³ Gates, *Same-sex and Different-sex Couples in the American Community Survey: 2005-2011*, *supra* note 12, at 2. The versions of this brief filed in *United States v. Windsor*, No. 12-307 (U.S. Mar. 1, 2013) and *Sevcik v. Sandoval*, No. 12-17668 (9th Cir. Oct. 25, 2013) reported ACS data for different-sex couples, married and unmarried. Aside from the LGBT parenting report cited at *infra* note 20, this brief reports ACS data for only different-sex married couples and compares them to same-sex couples, married and unmarried. This is a more precise comparison in light of the issues presently before this Court.

¹⁴ *Id.*

¹⁵ Gary J. Gates, The Williams Institute, UCLA School of Law, *Same-sex Couples in Virginia: A Demographic Summary* (2014), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/VA-same-sex-couples-demo-apr-2014.pdf> (last visited Apr. 18, 2014).

percentages of adults in same-sex couples by age group. In both the United States and Virginia, the lowest percentage of same-sex couples is in the 65 and over group.

Table 1. Adults in same-sex couples, by age¹⁶

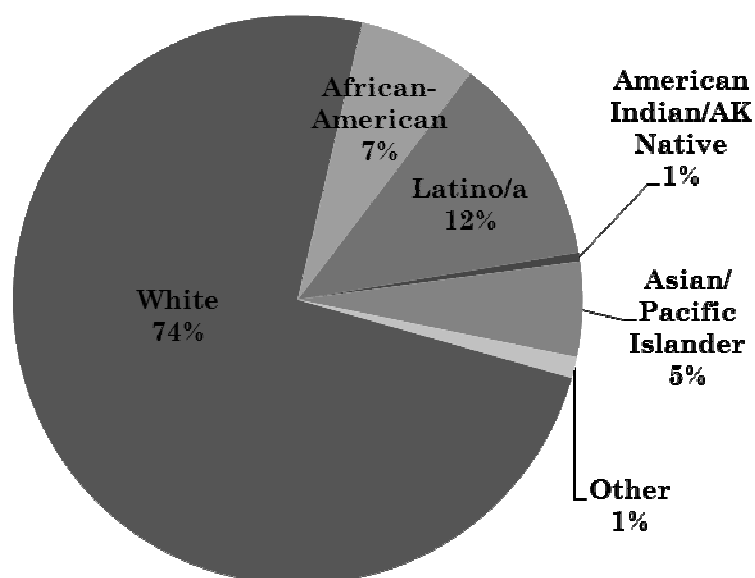
Age	Percentage of Adults in Same-Sex Couples	
	U.S.	Virginia
<30	15%	20%
30-49	50%	49%
50-64	28%	27%
65+	6%	5%

In the United States, the racial and ethnic distributions of individuals in same-sex and different-sex married couples are similar. In total, 24% of individuals in same-sex couples are members of racial or ethnic minorities, compared to 26% of individuals in different-sex married couples. The portion of African-Americans is the same in each group (7%), while Latinos and Latinas comprise 11% of those in same-sex couples and 12% of those in different-sex married couples. Asians, Native Hawaiians, and Pacific Islanders comprise 3% of individuals in same-sex couples and 5% of those in different-sex married couples.¹⁷

¹⁶ Gates, *Same-sex and Different-sex Couples in the American Community Survey: 2005-2011*, *supra* note 12, at 8; Gates, *Same-sex Couples in Virginia: A Demographic Summary*, *supra* note 15.

¹⁷ Gates, *Same-sex and Different-sex Couples in the American Community Survey: 2005-2011*, *supra* note 12, at 3-4. The racial and ethnic identification terms used here (African-American, Latino/Latina,

Figure A. Race/ethnicity of adults in same-sex couples in the U.S.¹⁸



In Virginia, nearly one in five individuals in same-sex couples are members of racial or ethnic minorities. In total, 19% of individuals in same-sex couples are members of racial or ethnic minorities compared to 26% of individuals in different-sex married couples. Latinos and Latinas comprise 11% of individuals in same-sex couples and 6% of those in different-sex married couples. The portion of African-Americans is 4% among those in same-sex couples and 12% among those in different-sex married couples. Asians, Native Hawaiians, and

and Asian, Native Hawaiian, and Pacific Islander) are consistent with the terminology used in the report. *Id.*

¹⁸ *Id.* at 8.

Pacific Islanders comprise 3% of individuals in same-sex couples and 7% of those in different-sex married couples.¹⁹

B. Same-Sex Couples With Children: Approximately One in Five Same-Sex Couples in the U.S. and in Virginia Are Raising Children

U.S. Census Bureau data suggest that almost one in five same-sex couples in the United States (19%) are raising children under age 18.²⁰ In other words, more than 125,000 same-sex couple households include nearly 220,000 children under age 18 in their homes.²¹

Nearly one in five same-sex couples in Virginia (18%) are raising children under age 18 in their homes.²² More than 2,500 same-sex-couple households in the state include more than 4,000 children.²³

In the United States, most children being raised by same-sex couples are biologically related to one of their parents (59%). However,

¹⁹ Gates, *Same-sex Couples in Virginia: A Demographic Summary*, *supra* note 15.

²⁰ Gary J. Gates, The Williams Institute, UCLA School of Law, *LGBT Parenting in the United States*, at 1 (Feb. 2013), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Parenting.pdf> (last visited Apr. 17, 2014). Among different-sex couples the proportion with children is 43.5%. Gates, *Same-sex and Different-sex Couples in the American Community Survey: 2005-2011*, *supra* note 12, at 5.

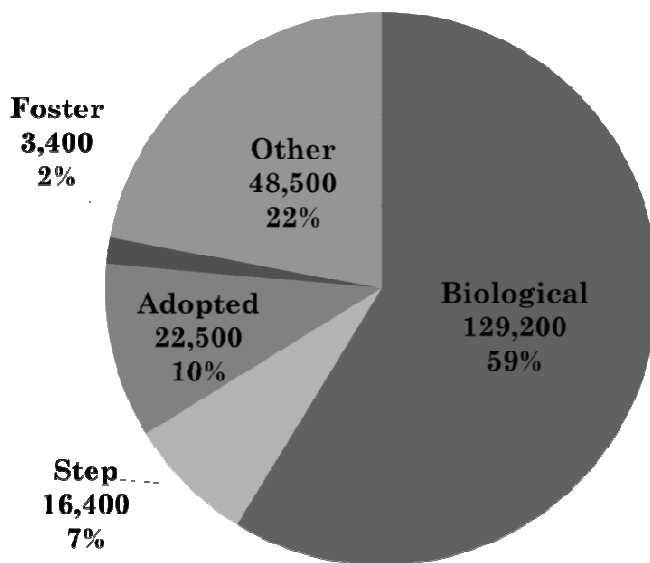
²¹ Gates, *LGBT Parenting in the United States*, *supra* note 20, at 1.

²² Gates, *Same-sex Couples in Virginia: A Demographic Summary*, *supra* note 15.

²³ *Id.*

same-sex couples are more likely to adopt or foster children than are different-sex couples.²⁴

Figure B. Relationship of children under age 18 to householder (person 1) in same-sex couple households in the U.S.



Among the 125,000 same-sex couples raising children in the United States, more than 111,000 same-sex couples are raising an estimated 129,200 biological children, 16,400 stepchildren, and 22,500 adopted children.²⁵ Approximately 2,600 same-sex couples are raising 3,400 foster children.²⁶ Finally, more than a quarter of same-sex couples raising children (25.6%) are raising children identified as

²⁴ Gates, *LGBT Parenting in the United States*, *supra* note 20, at 3, Fig. 4.

²⁵ *Id.*

²⁶ *Id.*

grandchildren, siblings, or other children.²⁷ Roughly 32,000 same-sex couples are raising approximately 48,500 such children.²⁸

In Virginia, 64% of children being raised by same-sex couples are biological children, 11% are stepchildren, and 2% are adopted. This implies that the same-sex couples are raising an estimated 2,600 biological children, 430 stepchildren, and 100 adopted children. Nearly 23% of same-sex couples in Virginia raising children are raising 900 children identified as grandchildren or other children.²⁹

1. Same-Sex Couples with Children Live Throughout the U.S. and Virginia

Same-sex couples raising children live throughout the United States. Childrearing among same-sex couples in the United States is most common in the South, Upper Midwest, and Mountain regions of the country.³⁰ Same-sex couples raising children also live throughout

²⁷ *Id.* at 3.

²⁸ *Id.* Note that a same-sex couple household can include more than one of the different types of children discussed here (*e.g.*, biological, step, adopted, foster, grandchildren), so the number of couples raising each particular type of children will not add up to the total number of same-sex couples raising children.

²⁹ Gates, *Same-sex Couples in Virginia: A Demographic Summary*, *supra* note 15.

³⁰ *Id.*

Virginia. In the 2010 Census, the vast majority of Virginia's counties included a same-sex couple with children.³¹

2. Members of Same-Sex Couples with Children Are Diverse in Terms of Race, Ethnicity, and Income

In the United States, parenting by same-sex couples is more prevalent among racial and ethnic minorities. 41% of women who are members of racial or ethnic minorities and are in same-sex couples are raising a biological, step, or adopted child, compared to 23% of their White counterparts.³² For men, the same comparison is 20% versus 8%, respectively.³³

In Virginia, 19% of individuals in same-sex couples who are members of racial or ethnic minorities are raising a child under age 18, compared to 18% of their White counterparts.³⁴

Nationally, the median annual household income of same-sex couples with children under age 18 in the home is more than 16% lower than the median annual household income of comparable different-sex couples (\$63,900 versus \$74,000).³⁵ In Virginia, the median annual

³¹ Gates & Cooke, *Virginia Census Snapshot: 2010*, *supra* note 9, at 4-6.

³² Gates, *LGBT Parenting in the United States*, *supra* note 20, at 4.

³³ *Id.*

³⁴ Gates, *Same-sex Couples in Virginia: A Demographic Summary*, *supra* note 15.

³⁵ Gates, *LGBT Parenting in the United States*, *supra* note 20, at 5.

household income of same-sex couples with children under age 18 in the home is 36% lower than the median annual household income of comparable different-sex married couples (\$60,700 versus \$94,800).³⁶

Several factors likely contribute to the relative economic disadvantage of same-sex couples with children. *First*, research suggests that LGB parents (including, presumably, LGB individuals in same-sex couples) are, on average, younger than their different-sex counterparts.³⁷ *Second*, same-sex couples with children are disproportionately female, and in the United States, women, on average, have lower incomes than men.³⁸ *Third*, same-sex couples raising children are disproportionately members of racial and ethnic minorities. African-Americans and Latino or Latinas comprise 33% of those in same-sex couples with children under age 18 in the home compared to 27% of their counterparts in different-sex couples.³⁹ In the

³⁶ Gates, *Same-sex Couples in Virginia: A Demographic Summary*, *supra* note 15.

³⁷ Gates, *LGBT Parenting in the United States*, *supra* note 20, at 4.

³⁸ *Id.*; Women in the Labor Force: A Databook, U.S. BUREAU OF LABOR STATISTICS 51-52 (Dec. 2011), <http://www.bls.gov/cps/wlf-databook-2011.pdf> (last visited Apr. 17, 2014).

³⁹ Gates, *LGBT Parenting in the United States*, *supra* note 20, at 4, Fig. 5.

United States, African-Americans, Latinos, and Latinas have lower incomes, on average, than White persons.⁴⁰

3. Same-Sex Couples Are More Likely Than Different-Sex Couples to Be Raising Adopted Children and Foster Children

Nationally, same-sex couples raising children are more than four times as likely as their different-sex counterparts to be raising an adopted child.⁴¹ While only 2% of the children of different-sex couples are adopted, approximately 10% of the children of same-sex couples are adopted.

Same-sex couples raising children in Virginia are about as likely as their different-sex married counterparts to be raising an adopted child. Approximately 3% of different-sex married couples with children in Virginia include an adopted child, compared to 4% of same-sex couples with children.⁴²

In the United States, same-sex couples are six times as likely as their different-sex counterparts to be raising foster children.⁴³ Among couples with children under age 18, 2% of same-sex couples are raising

⁴⁰ *Women in the Labor Force*, *supra* note 38, at 51.

⁴¹ Gates, *LGBT Parenting in the United States*, *supra* note 20, at 1.

⁴² Gates, *Same-sex Couples in Virginia: A Demographic Summary*, *supra* note 15.

⁴³ Gates, *LGBT Parenting in the United States*, *supra* note 20, at 3.

a foster child, compared to just 0.3% of different-sex couples.⁴⁴ In Virginia, while the most recent Census Bureau data do not identify any same-sex couples fostering children, only 0.2% of different-sex couples are doing so in the state.⁴⁵

C. Same-Sex Couples in Marriages, Civil Unions, or Registered Domestic Partnerships: As of 2010, Approximately 114,300 Same-Sex Couples in the U.S. Were Legally Married, and Over 108,000 Were in Civil Unions or Registered Domestic Partnerships

Of the 646,464 same-sex couples who identified as such in Census 2010, nearly 132,000 couples identified as spouses, while nearly 515,000 identified as unmarried partners.⁴⁶

For all couples, both different-sex and same-sex, Census data are based on how individuals describe their relationship, which is not always consistent with their legal relationship status. Accordingly, same-sex couples who are legally married, as well as those who are not legally married but identified themselves as spouses, can identify one partner as a “husband or wife.”⁴⁷ Based on a 2010 survey of same-sex couples funded by the Census Bureau, an estimated 71% of same-sex

⁴⁴ *Id.*

⁴⁵ Gates, *Same-sex Couples in Virginia: A Demographic Summary*, *supra* note 15.

⁴⁶ Gates & Cooke, *United States Census Snapshot: 2010*, *supra* note 8, at 1.

⁴⁷ *Id.* at 4.

couples who identified a partner as “husband” or “wife” in Census 2010 were legally married, 15% were in civil unions or registered domestic partnerships, and 14% were not in a legally recognized relationship.⁴⁸ For those who identified as “unmarried partner,” 79% were not in a legally recognized relationship, 17% were in civil unions or registered domestic partnerships, and only 4% were legally married.⁴⁹

Combining these estimates with Census 2010 data suggests that approximately 114,300 same-sex couples in the United States were legally married in 2010, having legally married either in the United States or in another country, and over 108,600 were in civil unions or registered domestic partnerships.⁵⁰

⁴⁸ Gates, *Same-sex Couples in US Census Bureau Data: Who Gets Counted and Why*, *supra* note 7, at i-ii.

⁴⁹ *Id.* at 6. Put differently, 22% of legally married same-sex couples decided to identify as unmarried partners in Census 2010. *Id.* at 5. When asked why they made this choice, most said this was primarily because they thought it was the “correct” answer since either their state or the federal government did not formally recognize their marriage. *Id.*

⁵⁰ Gates & Cooke report 131,729 same-sex couples who identified as spouses and 514,735 who identified as unmarried partners. Gates & Cooke, *United States Census Snapshot: 2010*, *supra* note 8, at 1. Gates suggests that 71% of spousal couples are legally married (amounting to approximately 93,700 legally married same-sex couples) along with 4% of unmarried partner couples (approximately 20,600 married couples). See Gates, *Same-sex Couples in US Census Bureau Data: Who Gets Counted and Why*, *supra* note 7, at 6. Combined, this implies an estimated 114,300 legally married same-sex couples.

1. When Permitted By Law, Same-Sex Couples Are More Likely to Marry Than to Enter into a Civil Union or a Domestic Partnership

Analyses of state-level administrative data provide additional information about approximately 50,000 same-sex couples who had legally married in the United States as of 2010 and a similar number who had entered into other forms of legal recognition such as civil unions or registered domestic partnerships by that date.⁵¹

These administrative data show that when offered the choice, same-sex couples are much more likely to marry than to pursue a civil union or a registered domestic partnership. On average, 30% of same-sex couples married in the first year that their state allowed them to marry,⁵² while only 18% entered into civil unions or broad domestic partnerships in the first year states offered those statuses.⁵³ Furthermore, only 8% entered into legal relationship statuses with

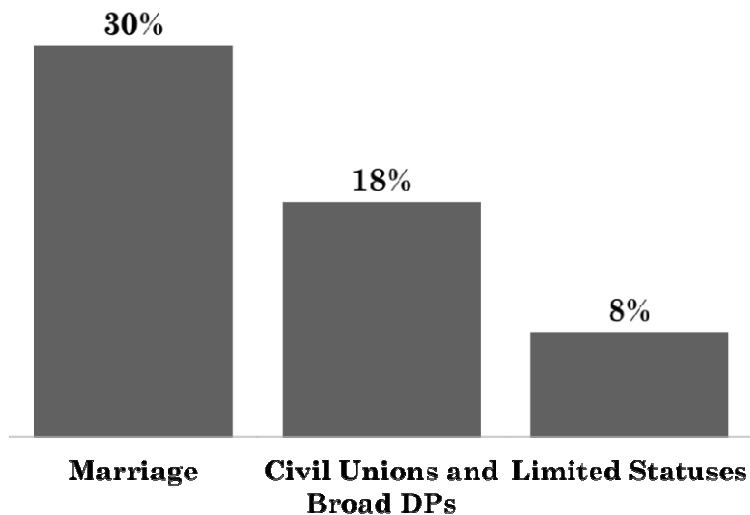
⁵¹ M. V. Lee Badgett & Jody L. Herman, The Williams Institute, UCLA School of Law, *Patterns of Relationship Recognition by Same-Sex Couples in the United States* (Nov. 2011), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Badgett-Herman-Marriage-Dissolution-Nov-2011.pdf> (last visited Apr. 17, 2014).

⁵² *Id.* at 12-13 (analyzing data from the following three states that had extended marriage to same-sex couples: Iowa, Massachusetts, Vermont).

⁵³ *Id.* (analyzing data from the following six states that had extended civil union or domestic partnership statuses to same-sex couples offering all or almost all of the rights and obligations to marriage to same-sex couples: Connecticut, Nevada, New Hampshire, New Jersey, Oregon, and Vermont).

more limited rights and obligations,⁵⁴ such as reciprocal beneficiary relationships, in the first year that their respective states offered those statuses.⁵⁵

Figure C. Percentage of same-sex couples who pursued legal relationship recognition in the first year it was offered, by type of recognition⁵⁶



Looking past the first year that recognition was offered, almost half of same-sex couples (47%) who live in a state that offers some form of legal relationship recognition have entered into such a status.⁵⁷ In

⁵⁴ *Id.* at 12.

⁵⁵ *Id.* at 11-12 (analyzing data from the following five states and the District of Columbia that had extended a more limited set of rights to same-sex couples through limited domestic partnerships or reciprocal or designated beneficiary statuses: California, the District of Columbia, Hawaii, Maine, New Jersey, and Washington).

⁵⁶ *Id.*

⁵⁷ *Id.* at 6.

Massachusetts, where marriage for same-sex couples has been legal since 2004, this is true of 68% of same-sex couples.⁵⁸

Female same-sex couples are more likely to marry or to formalize their relationships by entering into another legal status such as a civil union or registered domestic partnership than are male same-sex couples. In eight states that release marriage, civil union, or registered domestic partnership data by gender, 62% of same-sex couples who sought legal recognition were female couples.⁵⁹

Same-sex couples who are legally married or have another legally recognized relationship are younger than the general population of married different-sex couples in states where same-sex couples can marry or enter into other legally recognized relationships.⁶⁰ However, comparing the ages of same-sex and different-sex couples at the time of marriage, newly married same-sex couples tend to be older than newly married different-sex couples.⁶¹ This is most likely due to the fact that when states first offer marriage to same-sex couples, many couples have been waiting years or decades to marry.

⁵⁸ *Id.* at 19.

⁵⁹ *Id.* at 7-8 (analyzing data from the following seven states and the District of Columbia: Connecticut, Iowa, Maine, New Hampshire, New Jersey, Oregon, and Washington).

⁶⁰ *Id.* at 8 (analyzing data from Connecticut and Washington).

⁶¹ *Id.* at 9 (analyzing data from Connecticut).

2. Dissolution Rates Are Slightly Lower for Same-Sex Couples Than for Different-Sex Couples

In states with available data, dissolution rates for same-sex couples are slightly lower on average than divorce rates for different-sex couples.⁶² The percentage of those in same-sex couples who have ended legal relationships ranges from 0% to 1.8% annually in those states. By comparison, 2% of married different-sex couples divorce annually.⁶³

D. LGBT Adults: Over 8 Million American Adults and 178,000 Adults in Virginia Identify as LGBT

Marriage and relationship recognition laws affect not only same-sex couples, but also LGBT individuals who are not members of same-sex couples. Many such LGBT individuals may want to marry a same-sex partner at some time in their lives. In a recent Gallup survey of adults aged 18 and older in the United States, 3.5% identified themselves as LGBT.⁶⁴ Extrapolating that percentage to 2010 U.S.

⁶² *Id.* at 18-19 (analyzing data from the following ten states and the District of Columbia: California, Colorado, Connecticut, Hawai'i, Maine, Nevada, New Hampshire, New Jersey, Vermont, and Washington).

⁶³ *Id.* at 19.

⁶⁴ Gates & Newport, *LGBT Percentage Highest in D.C., Lowest in North Dakota*, *supra* note 5 (noting that “[t]hese results are based on responses to the question, ‘Do you, personally, identify as lesbian, gay, bisexual, or transgender?’ included in 206,186 Gallup Daily tracking interviews conducted between June 1 and Dec. 30, 2012”). The Gallup data did not allow for separate estimates or analyses of the lesbian, gay, and bisexual population from the transgender population. *Id.* Based on analysis of multiple studies estimating the LGBT population in the United States, Gates suggests that approximately 0.3% of adults in the

Census data suggests that, out of nearly 235 million adults then in the United States,⁶⁵ more than 8 million adults were LGBT.

The Gallup survey also showed that 2.9% of adults in Virginia identified as LGBT.⁶⁶ Extrapolating that percentage to Virginia data from the 2010 U.S. Census suggests that, out of the 6.1 million adults then in Virginia,⁶⁷ more than 178,000 self-identified as LGBT. The actual number of LGBT adults is likely higher because evidence suggests that many adults who have a same-sex sexual orientation are reluctant to self-identify as LGBT, perhaps due in part to social stigma associated with LGBT identity.⁶⁸

United States identify as transgender and 3.5% as lesbian, gay, or bisexual. Gary J. Gates, The Williams Institute, UCLA School of Law, *How Many People Are Lesbian, Gay, Bisexual, and Transgender?*, at 1 (Apr. 2011), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-How-Many-People-LGBT-Apr-2011.pdf> (last visited Apr. 17, 2014).

⁶⁵ Lindsay M. Howden & Julie A. Meyer, U.S. CENSUS BUREAU, *Age and Sex Composition: 2010 Census Briefs 2* (May 2011), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-03.pdf> (last visited Apr. 17, 2014).

⁶⁶ Gates and Newport, *LGBT Percentage Highest in D.C., Lowest in North Dakota*, *supra* note 5.

⁶⁷ Howden and Meyer, *Age and Sex Composition: 2010 Census Briefs*, *supra* note 65, at 7.

⁶⁸ Analyses of the 2008 General Social Survey suggest that about 1% of adults in the United States (approximately 2.3 million) reported having a same-sex sexual partner within the last year, but do not identify as lesbian, gay or bisexual. About 1.3% of adults in the United States

An estimated 37% of LGBT adults in the United States have had at least one child over the course of their lives⁶⁹ (including children who have now reached adulthood). This implies that more than 3 million LGBT Americans have had at least one child at some point during their lifetimes.⁷⁰ On average, LGBT individuals who have had children report

(more than 3 million) report having a same-sex sexual partner within the last five years, but do not identify as lesbian, gay, or bisexual. Gary J. Gates, *LGBT Identity: A Demographer's Perspective*, 45 Loy. L.A. L. Rev. 693, 704 (2012), available at <http://digitalcommons.lmu.edu/llr/vol45/iss3/2> (last visited Apr. 17, 2014).

⁶⁹ The exact nature of parentage is not available as this figure is based on data from two different surveys, and neither has great specificity about the nature of parentage. The General Social Survey (GSS) asked respondents, "How many children have you ever had?" while the National Transgender Discrimination Survey asked a variety of questions that indicated whether a respondent ever had children or parented any children. Gates, *LGBT Parenting in the United States*, *supra* note 20, at 2 n.1. For more information on the GSS, see *supra* note 4 and accompanying text. The National Transgender Discrimination Survey was conducted by the National Gay and Lesbian Task Force and the National Center for Transgender Equality and was a web-based survey of more than 6,000 transgender individuals in the United States. Jaime M. Grant et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* 12 (2011), available at http://www.thetaskforce.org/reports_and_research/ntds (last visited Apr. 17, 2014).

⁷⁰ Gates, *LGBT Parenting in the United States*, *supra* note 20, at 2. State-specific demographic data is not available on this point.

having 2 children, implying that there may be as many as 6 million American children and adults who have an LGBT parent.⁷¹

III. Conclusion

In light of the foregoing and for the reasons set forth by the parties challenging the constitutionality of Article 1, section 15-A of the Constitution of Virginia, sections 20-45.2 and 20-45.3 of the Virginia Code, and all other sources of state law that preclude marriage for same-sex couples or prevent recognition of same-sex marriages, this Court should affirm the district court judgment in this case.

Dated: April 18, 2014

Respectfully submitted,
Manatt, Phelps & Phillips, LLP

s/ Benjamin G. Shatz

Counsel for *Amicus Curiae*
Gary J. Gates

⁷¹ *Id.*

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,346 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the type-face requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a 14-point proportionally spaced Century Schoolbook typeface using Microsoft Word 2010.

Dated: April 18, 2014

s/ Benjamin G. Shatz

Counsel for *Amicus Curiae*

Gary J. Gates

CERTIFICATE OF SERVICE

U.S. Court of Appeals Docket Number(s): 14-1167, 14-1169, 14-1173

BRIEF OF *AMICUS CURIAE*
GARY J. GATES IN SUPPORT OF
PLAINTIFFS-APPELLEES AND INTERVENORS

I hereby certify that on April 18, 2014 I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Bess Hubbard

BESS HUBBARD