NOS. 14-556, 14-562, 14-571, 14-574

In the Supreme Court of the United States

JAMES OBERGEFELL, *et al.*, *Petitioners*,
v.
RICHARD HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH, *et al.*, *Respondents*.

VALERIA TANCO, *et al.*, *Petitioners*,
v.
BILL HASLAM, GOVERNOR OF TENNESSEE, *et al.*, *Respondents*.

APRIL DEBOER, *et al.*, *Petitioners*,
v.
RICK SNYDER, GOVERNOR OF MICHIGAN, *et al.*, *Respondents*.

GREGORY BOURKE, *et al.*, *Petitioners*,
v.
STEVE BESHEAR, GOVERNOR OF KENTUCKY, *et al.*, *Respondents*.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

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QUESTIONS PRESENTED

1.

Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex?

2.

Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state?

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INTEREST OF *AMICI* STATES

The citizens of the *amici* States have always defined marriage as a man-woman institution. In choosing to retain that definition, they engaged in the most elementary form of self-government guaranteed by our Constitution. That authority will be lost irretrievably, however, if the Court accepts the plaintiffs' arguments in these cases. The *amici* States therefore have a keen interest in the outcome.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

When state citizens determine the shape and meaning of civil marriage, they reflect as a community about an institution more fundamental to our civilization than any other. In recent years, some States have concluded that marriage should include couples of the same sex. Accordingly, they have altered their marriage laws through the democratic process. Others have come to the different conclusion that marriage has always been, and should remain, intrinsically a man-woman relationship. They have accordingly declined to alter their marriage laws. Whether taking one path or the other, these citizens have acted upon their "considered perspective on the historical roots of the institution of marriage." *United States v. Windsor*, 133 S. Ct. 2675, 2692-93 (2013). Our federal system peacefully accommodates Americans on both sides of this profound issue. This is why Justice Holmes wrote that our "Constitution … is made for people of fundamentally differing views." *Lochner v. New York*, 198 U.S. 45, 75-76 (1905) (Holmes, J., dissenting).

These cases ask whether States and their citizens may continue to govern themselves on this issue. The plaintiffs, and even some States, assert that the Fourteenth Amendment removes same-sex marriage from democratic deliberation.

They urge the Court to declare that the Constitution compels all fifty States to adopt this new form of marriage that did not exist in a single State twelve years ago. The Court should decline that invitation.

The Constitution takes no sides on same-sex marriage, and therefore leaves the issue up to the free deliberations of state citizens. The fact that Americans have reached different conclusions about this novel question is not a sign of a constitutional crisis that requires correction by this Court. It is rather a sign that our Constitution is working as it should. In our federal system, this issue must be resolved by the "formation of consensus" at the state level. *Windsor*, 133 S. Ct. at 2692. To resolve it instead through federal judicial decree would demean the democratic process, marginalize the views of millions of Americans, and do incalculable damage to our civic life in this country.

ARGUMENT

I. DETERMINING THE SHAPE AND MEANING OF MARRIAGE IS A FUNDAMENTAL EXERCISE OF SELF-GOVERNMENT BY STATE CITIZENS.

A. Our Constitution ensures that state citizens have the sovereign authority to govern themselves.

1. The structure of our Constitution is premised on the dignity of the sovereign States. Today, this is one of those "truths … so basic that, like the air around us, they are easily overlooked." *New York v. United States*, 505 U.S. 144, 187 (1992). It was not as obvious during the Constitution's drafting and ratification. In the ratification debates, James Madison explained that the people would approve the Constitution, "not as individuals composing one entire nation, but as composing the distinct and independent states to which they respectively belong." THE FEDERALIST NO. 39, at 196 (Madison) (Gideon ed., 2001). Likewise, Alexander Hamilton

assured his readers that "[t]he proposed constitution, so far from implying an abolition of the state governments, makes them constituent parts of the national sovereignty, … and leaves in their possession certain exclusive, and very important, portions of the sovereign power." THE FEDERALIST NO. 9, at 41 (Hamilton). As Madison and Hamilton promised, the Constitution ultimately ratified by the people "specifically recognizes the States as sovereign entities." *Alden v. Maine*, 527 U.S. 706, 713 (1999) (internal quotations omitted).

2. To have any vital meaning at all, the state sovereignty recognized by the Constitution means that state citizens must retain the basic ability to govern themselves. This Court has explained that the Constitution "assume[s] the States' … active participation in the fundamental processes of governance." *Id.*; *see also Printz v. United States*, 521 U.S. 898, 935 (1997) (commanding state officers to administer a federal program is "fundamentally incompatible with our constitutional system of dual sovereignty"). "States are not mere political subdivisions of the United States," *New York*, 505 U.S. at 188, nor are they "relegated to the role of mere provinces or political corporations." *Alden*, 527 U.S. at 715. Rather, as this Court has correctly and consistently taught, States "retain the dignity … of sovereignty." *Id.*

3. The fact that the United States has multiple sovereigns means the American people have more freedom, not less. "The federal system rests on what might at first seem a counterintuitive insight, that 'freedom is enhanced by the creation of two governments, not one.'" *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011) (quoting *Alden*, 527 U.S. at 758). Federalism enhances collective freedom through "the diffusion of sovereign power." *New York*, 505 U.S. at 181. This diffusion enhances individual freedom by promoting self-government:

> Federalism secures the freedom of the individual. It allows States to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power.

Bond, 131 S. Ct. at 2364. Judge Friendly previously reached a similar insight: "We must stand in awe and admiration" of our federal republic, which "leav[es] to the states the final decision on the bulk of day-to-day matters that can be best be decided by those who are closest to them." Henry J. Friendly, *Federalism: A Foreword*, 86 Yale L.J. 1019, 1034 (1977).

4. By protecting state sovereignty, our Constitution reinforces the stability of an increasingly diverse Nation. A century ago, Justice Holmes rightly observed that our Constitution "is made for people of fundamentally differing views." *Lochner*, 198 U.S. at 75-76 (Holmes, J., dissenting). The Constitution remains such a document because of its federal structure. By allowing States to differ on important matters, the Constitution ensures the States' vital ability to serve as "laboratories for social and economic experiment." *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528, 546 (1985) (citing *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)). Federalism thus "assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

B. The States' exercise of sovereign authority is at its apex in domestic relations law.

1. Numerous areas of law lie squarely within state sovereign authority. One thinks of laws on crime, property, contracts, education, and public health. *See, e.g., Bond v. United States*, 134 S. Ct. 2077, 2086 (2014) ("For nearly two

centuries it has been 'clear' that, lacking a police power, 'Congress cannot punish felonies generally.'") (quoting *Cohens v. Virginia*, 6 Wheat. 264, 428 (1821)); *Wos v. E.M.A.*, 133 S. Ct. 1391, 1400 (2013) ("In our federal system, there is no question that States possess the 'traditional authority to provide tort remedies to their citizens' as they see fit.") (quoting *Silkwood v. Kerr–McGee Corp.*, 464 U.S. 238, 248 (1984)). States are in the heartland of their authority, however, when they act in the realm of domestic relations.

2. This Court has long affirmed the centrality of domestic relations law to state sovereignty. Near the end of the twentieth century, the Court repeated this maxim from the end of the nineteenth: "'The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.'" *Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992) (quoting *In re Burrus*, 136 U.S. 586, 593-94 (1890)). That principle explains why federal courts avoid adjudicating marital status, even when they otherwise have jurisdiction. *Windsor*, 133 S. Ct. at 2691. It also explains why the diversity statute has been construed to "divest[] the federal courts of power to issue divorce, alimony, and child custody decrees." *Ankenbrandt*, 504 U.S. at 703; *see generally id.* at 695-704 (discussing "domestic relations exception" incorporated into 28 U.S.C. § 1332); *Barber v. Barber*, 21 How. 582 (1859) (determining federal courts have no jurisdiction over divorce or alimony suits). These venerable limits on federal power reflect what the Court has called "'the virtually exclusive primacy … of the States in the regulation of domestic relations.'" *Windsor*, 133 S. Ct. at 2691 (quoting *Ankenbrandt*, 504 U.S. at 714 (Blackmun, J., concurring in judgment)); *see also, e.g., Williams v. North Carolina*, 317 U.S. 287, 304 (1947) (Frankfurter, J., concurring) ("We are not authorized nor are we qualified to formulate a national code of domestic relations.").

3. a. Among the facets of domestic relations law, states have a keen interest in regulating marriage. *See, e.g., Haddock v. Haddock*, 201 U.S. 562, 575 (1906) (noting "the Constitution delegated no authority to the Government of the United States on the subject of marriage and divorce"). This is because "[t]he marriage relation creates problems of large social importance." *Williams*, 317 U.S. at 298. Such problems ripple across vital areas of law, including the "[p]rotection of offspring, property interests, and the enforcement of marital responsibilities." *Id.* One could add to that list laws regulating adoption, taxation, inheritance, insurance, health care, reproductive technology, and employment.

b. Within marriage law States have a paramount interest in how the marital relation is *defined*. The Court has endorsed the broad statement from *Pennoyer v. Neff* that "'[t]he State … has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved.'" *Sosna v. Iowa*, 419 U.S. 393, 404 (1975) (quoting *Pennoyer v. Neff*, 95 U.S. 714, 734-35 (1878)). More recently, the Court confirmed that "[t]he *definition of marriage* is the foundation of the State's broader authority to regulate the subject of domestic relations[.]" *Windsor*, 133 S. Ct. at 2691 (citing *Williams*, 317 U.S. at 298); *see also id.* (noting that "[t]he significance of state responsibilities for the *definition* and regulation of marriage dates to the Nation's beginning") (emphases added). *Windsor* called States' "authority to define the marital relation" not just important but "essential." *Id.* at 2692. This explains the outcome in *Windsor*: the Court struck down a broad federal marriage definition because it sought to "interfere with *state sovereign choices* about who may be married" and to "'influence *a state's decision* as to how to shape its own marriage laws.'" *Id.* at 2693 (quoting *Massachusetts v. United States Dept. of Health and Human*

Servs., 682 F.3d 1, 12-13 (1st Cir. 2012)) (emphases added); *see infra* II.A.

4. None of this is to say that States' authority over marriage somehow immunizes marriage laws from constitutional constraints. Far from it: "[s]tate laws defining and regulating marriage, of course, must respect the constitutional rights of persons." *Windsor*, 133 S. Ct. at 2691 (citing *Loving v. Virginia*, 388 U.S. 1 (1967)). For instance, it is settled that the Fourteenth Amendment forbids States from defining marriage or its incidents to perpetuate racial or gender discrimination. *See Loving*, 388 U.S. at 12 ("The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discrimination."); *Kirchberg v. Feenstra*, 450 U.S. 455, 460 (1981) (Fourteenth Amendment violated by "express gender-based discrimination" in marital property law). Furthermore, the Full Faith and Credit Clause requires interstate recognition of a divorce decree, given that divorce (unlike marriage) arises from a judgment. *See Williams*, 317 U.S. at 303-04; *see generally Baker v. Gen. Motors Corp.*, 522 U.S. 222, 232-33 (1998) (explaining that the Clause "differentiates the credit owed to laws … and to judgments"). But the fact that constitutional guarantees apply to marriage laws—as they do to every other state law—does not dilute the States' particular authority to regulate and define marriage. If there were any doubt of that, this Court recently laid it to rest by confirming that "[t]he definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations." *Windsor*, 133 S. Ct. at 2691.

C. In deciding whether to adopt same-sex marriage, state citizens exercise their sovereign authority to determine the meaning of marriage.

1. The past decade has seen the rapid emergence of the idea that civil marriage should include couples of the same

sex. *See, e.g., Sevcik v. Sandoval*, 911 F.Supp.2d 996, 1013 (D. Nev. 2012) (observing "[t]he States are in the midst of an intense democratic debate about the novel concept of same-sex marriage"), *rev'd by Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014), *petition for cert. filed* (U.S. Dec. 30, 2014) (No. 14-765). When the Court decided *Windsor* in June 2013, twelve States and the District of Columbia had democratically adopted same-sex marriage. *See Windsor*, 133 S. Ct. at 2689, 2690. Whether one sees this development as encouraging or alarming, it is obviously brand new. No State recognized same-sex marriage until Massachusetts in 2003; no country in the world did until the Netherlands in 2000. *See, e.g., Windsor*, 133 S. Ct. at 2715 (Alito, J., dissenting); *see also Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003).

2. What should also be obvious is that the step from the older to the newer version of marriage is a momentous one, both culturally and legally. The concept of marriage as a man-woman institution is "measured in millennia, not centuries or decades," and "until recently [it] had been adopted by all governments and major religions of the world." *DeBoer v. Snyder*, 772 F.3d 388, 395-96 (6th Cir. 2014), *cert granted*, 83 U.S.L.W. 3315 (U.S. Jan. 16, 2015) (No. 14-571). In *Windsor*, this Court made the similar observation that "marriage between a man and a woman had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization." *Windsor*, 133 S. Ct. at 2689.

3. Thus, when state citizens decide whether to adopt same-sex marriage, one thing appears inescapably true: those citizens are exercising sovereign authority over their domestic relations law.

This is perhaps self-evident. For confirmation, however, one need only read the Court's opinion *Windsor*. In 2006, the

New York Court of Appeals ruled that the state constitution did not guarantee a right to same-sex marriage, but "express[ed] [its] hope that the participants in the controversy over same sex marriage will address their arguments to the Legislature." *Hernandez v. Robles*, 855 N.E.2d 1, 12 (2006). New Yorkers responded first by recognizing out-of-state same-sex marriages and then by amending New York law to adopt same-sex marriage. As the Court described this development, New Yorkers undertook "a statewide deliberative process that enabled [them] to discuss and weigh arguments for and against same-sex marriage." *Windsor*, 133 S. Ct. at 2689. Only then did they "act[] to enlarge the definition of marriage." *Id.* (citing MARRIAGE EQUALITY ACT, 2011 N.Y. Laws 749 (codified at N.Y. DOM. REL. LAW ANN. §§ 10–a, 10–b, 13 (West 2013)). What New Yorkers did was "without doubt a proper exercise of … sovereign authority within our federal system, all in the way that the Framers of the Constitution intended." *Windsor*, 133 S. Ct. at 2692.

II. A DECISION CONSTITUTIONALIZING SAME-SEX MARRIAGE WOULD ERASE THE SOVEREIGNTY OF STATE CITIZENS TO DETERMINE THE MEANING OF MARRIAGE.

1. The plaintiffs in these cases claim that the Fourteenth Amendment overrides the States' sovereign choices about same-sex marriage. In their view, the Fourteenth Amendment decrees that every State must recognize and adopt same-sex marriage, and that is the beginning and end of the matter. *See, e.g.,* Brief for Petitioners at 19, 21, *DeBoer v. Snyder*, No. 14-571 (U.S. Feb. 27, 2015) (asserting Michigan's laws "violate the Equal Protection Clause under any standard of scrutiny" and "den[y] the fundamental right to marry guaranteed by the Due Process Clause"). The plaintiffs are mistaken for the reasons set forth in the Sixth Circuit's majority opinion in *DeBoer* and in Judge Martin Feldman's opinion in *Robicheaux v. Caldwell*, 2 F.Supp.3d 910 (E.D. La. 2014),

appeal docketed, No. 14-31037 (5th Cir. Sept. 4 & 5, 2014). The respondent States have argued these points at length, and the *amici* States will only briefly address them here:

a. Defining marriage in man-woman terms does not violate equal protection for two principal reasons.

i. First, States may rationally structure marriage around the biological reality that the sexual union of a man and a woman—unique among all human relationships—produces children. *See DeBoer*, 772 F.3d at 404-05 (man-woman marriage furthers society's "need to regulate male-female relationships and the unique procreative possibilities of them"); *Robicheaux*, 2 F.Supp.3d at 920 (man-woman marriage is "directly related to achieving marriage's historically preeminent purpose of linking children to their biological parents"). Many lower courts have dismissed this understanding of traditional marriage laws as not merely out-of-date but *irrational*. *See, e.g., Baskin v. Bogan*, 766 F.3d 648, 665 (7th Cir. 2014) (concluding Indiana's marriage law "flunks [the] undemanding test" of rational basis review), *cert. denied*, 135 S. Ct. 316 (2014). They are profoundly mistaken. "To fail to acknowledge even our most basic biological differences … risks making the guarantee of equal protection superficial, and so disserving it." *Nguyen v. I.N.S.*, 533 U.S. 53, 73 (2001).

ii. Second, States may rationally place the man-woman definition in their constitutions—as many States have done—to ensure that the definition of marriage is altered only through the consensus of their citizens, and not through judicial interpretation. *See DeBoer*, 772 F.3d at 408 (nineteen States placed the man-woman definition in their constitutions out of concern that "the courts would seize control over an issue that people of good faith care deeply about"); *Robicheaux*, 2 F.Supp.3d at 920 (States have "a legitimate … interest in safeguarding that fundamental social change … is

better cultivated through democratic consensus"). Not only is this practice rational, but it has been commended by this Court. On this issue, *Windsor* taught that "[t]he dynamics of state government in our federal system are to allow the formation of consensus[.]" *Windsor*, 133 S. Ct. at 2692.

b. Defining marriage in man-woman terms does not violate due process because the right to marry someone of the same sex is not "objectively, deeply rooted in this Nation's history and tradition." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (internal quotation marks omitted); *see DeBoer*, 772 F.3d at 410-13 (explaining this Court's marriage cases "did not redefine [marriage] but accepted its traditional meaning") (discussing *Loving*, 388 U.S. 1; *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Turner v. Safley*, 482 U.S. 78 (1987)); *Robicheaux*, 2 F.Supp.3d at 923 (concluding that, "until recent years, [same-sex marriage] had no place at all in this nation's history and tradition"). As this Court has explained, marriage "between two persons of the same sex" began to arise only in a minority of States over the last decade and involves "a new perspective" on an institution that had been viewed across time and cultures as defined by man-woman relationships. *Windsor*, 133 S. Ct. at 2689.

2. Instead of duplicating the merits arguments on these points, the *amici* States will highlight the negative consequences that would flow from a decision that the Fourteenth Amendment compels recognition and adoption of same-sex marriage. Those consequences would be severe, unavoidable, and irreversible.

A. Such a decision would abandon the premise of *Windsor*.

The first casualty of a decision constitutionalizing same-sex marriage would be the coherence of this Court's precedent, which just last term emphatically reaffirmed the

authority of States to decide this very question on the basis of democratic deliberation. Although they avoid saying so, the plaintiffs ask this Court to jettison the underpinnings of that precedent and the two centuries of historical practice that undergird it. The Court should decline that invitation.

1. In *Windsor*, this Court confirmed the States' "historic and essential authority to define the marital relation." 133 S. Ct. at 2692. "The definition of marriage," *Windsor* explained, is "the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the '[p]rotection of offspring, property interests, and the enforcement of marital responsibilities.'" *Id.* at 2691 (quoting *Williams*, 317 U.S. at 298). The Court traced this state authority "to the Nation's beginning." *See Windsor*, 133 S. Ct. at 2691 (observing that "[t]he significance of state responsibilities for the definition of marriage dates to the Nation's beginning") (citing *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379, 383-84 (1930)); *see also Windsor*, 133 S. Ct. at 2691 (noting that "'[t]he states, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce'") (quoting *Haddock*, 201 U.S. at 575).

2. This longstanding state authority to define marriage was "of central relevance" to *Windsor*'s invalidation of the federal marriage definition in section 3 of the Defense of Marriage Act ("DOMA"), 110 Stat. 2419. *Windsor*, 133 S. Ct. at 2692. DOMA broadly defined marriage at the federal level, an "unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage." *Id.* at 2693. This intrusion on state authority marked DOMA as a "discrimination[ ] of unusual character," leading the Court to find that it infringed the rights of same-sex couples married under New York law. *Id.* (internal quotations omitted). DOMA's central flaw was that it undermined New York's sovereign authority to extend marriage to same-sex couples.

As the Court put it, DOMA's illegitimate "purpose [was] to influence or interfere with *state sovereign choices about who may be married*," and "to put a thumb on the scales and influence *a state's decision as to how to shape its own marriage laws*." *Id.* at 2693 (emphasis added) (internal quotations omitted).

3. *Windsor* thus vindicated the rights of married same-sex couples against federal intrusion by affirming New York's authority "to allow same-sex marriages" in the first place. *Id.* at 2692. New York's decision was "without doubt a proper exercise of its sovereign authority within our federal system, all in the way that the Framers of the Constitution intended." *Id*. Confirming its reliance on state authority, the Court limited its holding to those couples "joined in same-sex marriages *made lawful by the State*." *Id.* at 2695 (emphasis added); *see also id*. ("This opinion and holding are confined to those lawful marriages.").

4. a. Ironically, the plaintiffs ground their arguments for overturning state marriage laws on *Windsor* itself. *See, e.g.,* Brief for Petitioners at 18, *Obergefell v. Hodges*, No. 14-556 (U.S. Feb. 27, 2015) (arguing that Ohio's marriage law "violate[s] the Fourteenth Amendment for all the reasons this Court struck down DOMA as unconstitutional in *Windsor*"). They can do so, however, only by maintaining a studied silence about *Windsor*'s affirmation of state authority over marriage—an authority this Court identified as "of central relevance" to its outcome. *See Windsor*, 133 S. Ct. at 2692 ("The State's power in defining the marital relation is of central relevance in this case quite apart from principles of federalism."); *see also id.* at 2691 (observing "it is necessary to discuss the extent of the state power and authority over marriage"). That plaintiffs avoid discussing what *Windsor* actually said about state authority is unsurprising, because "it takes inexplicable contortions of the mind … to interpret

Windsor's endorsement of the state control of marriage as eliminating the state control of marriage." *Conde-Vidal v. Garcia-Padilla*, __ F.Supp.3d __, 2014 WL 5361987, at *8 (D. Puerto Rico Oct. 21, 2014), *appeal docketed*, No. 14-2184 (1st Cir. Nov. 13, 2014).

b. Several lower courts have also mistakenly discounted *Windsor*'s grounding in state authority. For instance, a split panel of the Tenth Circuit reduced *Windsor*'s reliance on state sovereignty to a "prudential concern[]" and "a mere preference that [the] arguments be settled elsewhere." *Kitchen v. Herbert*, 755 F.3d 1193, 1228 (10th Cir. 2014), *cert. denied*, 83 U.S.L.W. 3102 (U.S. Oct. 6, 2014).[1] Judge Kelly's dissent rightly rejected this reading. "*Windsor* recognized the authority of the States to redefine marriage and stressed the need for popular consensus in making such change." *Id.* at 1235-36 (Kelly, J., dissenting) (citing *Windsor*, 133 S. Ct. at 2692). Ignoring that "the States are laboratories of democracy" on this issue would "turn[] the notion of a limited national government on its head." *Id.* at 1231 (Kelly, J., dissenting); *see also, e.g., Latta v. Otter*, __ F.3d __, 2015 WL 128117, at *9 (9th Cir. Jan. 9, 2015) (O'Scannlain, J., dissenting from denial of rehearing *en banc*) ("In the latest Supreme Court opinion addressing the issue of same-sex marriage, the Court gave a ringing endorsement of the central role of the states in fashioning their own marriage policy.") (citing *Windsor*, 133 S. Ct. at 2689-93).

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[1] *See also, e.g., Bostic v. Schaefer*, 760 F.3d 352, 378 (4th Cir. 2014) (compelling recognition of same-sex marriage, despite recognizing that "*Windsor* … rested in part on the Supreme Court's respect for states' supremacy in the domestic relations sphere"), *cert denied*, 135 S. Ct. 308 (2014); *Wolf v. Walker*, 986 F.Supp.2d 982, 996 (W.D. Wis.), *aff'd sub nom. Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014), *cert. denied*, 83 U.S.L.W. 3127 (Oct. 6, 2014) (invalidating Wisconsin marriage law, despite admitting that *Windsor* "noted multiple times … that the regulation of marriage is a traditional concern of the states").

5. Simply because *Windsor* required the *federal* government to recognize state marriage definitions, the decision does not mean that a *State* must recognize another State's same-sex marriage. That reading fundamentally misunderstands both *Windsor* and our federal system.

a. *Windsor*'s reasoning depended on the starkly different authority possessed by federal and state governments over the law of marriage. The federal government has limited authority in this area and, thus, has historically deferred to state marriage laws. By contrast, the States have always exercised virtually exclusive authority over marriage. *See, e.g., Windsor*, 133 S. Ct. at 2689-90 (while "Congress, in enacting discrete statutes, can make determinations that bear on marital rights and privileges," nonetheless "[b]y history and tradition the definition and regulation of marriage … has been treated as being within the authority and realm of the separate States"). That dichotomy explains *Windsor*'s outcome—*i.e.*, that DOMA's federal marriage definition was an ahistorical intrusion on a State's authority to shape its own marriage laws. *See, e.g., id*. at 2692 (concluding that "DOMA, because of its reach and extent, departs from this [federal] history and tradition of reliance on state law to define marriage"). But *Windsor* never taught the simplistic and erroneous view that one sovereign must always and everywhere recognize another sovereign's marriage laws.

b. That view is foreclosed by basic principles of interstate comity. It is settled that the Full Faith and Credit Clause "does not compel a state to substitute the statutes of other states for its own statues dealing with a subject matter concerning which it is competent to legislate." *Baker*, 522 U.S. at 232-33 (internal quotations omitted). To be sure, the *judgments* of one State receive exacting credit in other States, *id.* at 233, but no one contends that marriages arise from judgments. One State may thus apply its own marriage laws

to its domiciliaries. *See, e.g., Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488, 494-95 (2003) (a State may apply its laws if it has "a significant contact or significant aggregation of contacts, such that choice of its law is neither arbitrary nor fundamentally unfair"); *DeBoer*, 772 F.3d at 418 ("If defining marriage as an opposite-sex relationship amounts to a legitimate public policy … the Full Faith and Credit Clause does not prevent a State from applying that policy to couples who move from one State to another.").

Nor is there anything unusual in one State refusing to recognize an out-of-state marriage on public policy grounds. The field of conflicts-of-laws is based on the premise that States have wide latitude in determining whether to apply their own or another sovereign's laws to legal disputes within their borders. *See, e.g., Sun Oil v. Wortman*, 486 U.S. 717, 727 (1988) (explaining "it is frequently the case under the Full Faith and Credit Clause that a court can lawfully apply either the law of one State or the contrary law of another"). It is established that States may refuse to enforce out-of-state rules on public policy grounds, and "[e]ven more telling, States in many instances have refused to recognize marriage performed in other States on the grounds that these marriages depart from cardinal principles of the States domestic-relations laws." *DeBoer*, 772 F.3d at 419 (citing RESTATEMENT (FIRST) CONFLICT OF LAWS § 134; RESTATEMENT (SECOND) CONFLICT OF LAWS § 283)); *see also, e.g., Brinson v. Brinson*, 96 So.2d 653, 659 (La. 1957) (refusing to recognize fraudulent Mississippi common-law marriage). To be sure, States may decide to recognize out-of-state marriages as a matter of comity. *See, e.g., Bloom v. Willis*, 60 So.2d 415, 417 (La. 1952) (recognizing non-ceremonial marriage "out of comity"). But when States decide their public policy prevents them from doing so, they exercise the same domestic relations authority that empowers them to define marriage in the first place. *See, e.g., Nevada v.*

Hall, 440 U.S. 410, 422 (1979) (full faith and credit "does not require a State to apply another State's law in violation of its own legitimate public policy").

B. Such a decision would dilute the numerous democratic victories recently won in the States by proponents of same-sex marriage.

A decision constitutionalizing this issue would sweep away not only *Windsor*'s affirmation of state authority, but also the value of the democratic process in those States whose citizens have recently decided to confer the benefits of marriage on same-sex couples.

1. Over the past decade, proponents of same-sex marriage have achieved a remarkable string of successes by convincing their fellow citizens that they have the better argument about the meaning of marriage. Despite numbering from 1.5% to 3.5% of the population, in the space of about five years they have used the political process to change the marriage laws in Delaware, Hawaii, Illinois, Maine, Maryland, Minnesota, New Hampshire, New York, Rhode Island, Vermont, and Washington.[2] That is a stunning feat, given that the man-woman concept of marriage had been so deeply ingrained in American history and culture. *See, e.g., Windsor*, 133 S. Ct. at 2689 (noting that, "until recent years, many citizens had not even considered the possibility" of same-sex marriage).

2. One should not lightly conclude that these democratic victories arose merely from savvy politics or the movement of a few thousand voters from one side of the ledger to the other. To the contrary, the removal of the man-woman

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[2] *See* Del. Stat. Tit. 13 § 101; Haw. Rev. Stat. § 572-1; Ill. St. Ch. 750 § 5/213.1; Me. Rev. Stat. Ann. tit. 19-A §650-A; Md. Fam. Law Code Ann. §2–201; 2013 Minn. Laws ch. 74; N. H. Rev. Stat. Ann. §457:1-a; N. Y. Dom. Rel. Law Ann. §10-a; 2013 R. I. Laws ch. 4; Vt. Stat. Ann., Tit. 15, §8; Wash. Rev. Code §26.04.010.

definition from marriage laws may well be the political outcome of a significant cultural shift towards a new vision of marriage in those States. This is evident in the Court's description of the process that led New Yorkers to alter their marriage definition in 2011.

Windsor taught that New Yorkers' decision to confer "acknowledgment" and "dignity" on a new form of marriage was a matter of epochal significance. *Windsor*, 133 S. Ct. at 2692. This was no mere technical alteration of statutory language. New Yorkers acted on "the understanding that marriage is more than a routine classification for the purposes of certain statutory benefits," but is instead a "far-reaching legal acknowledgment of the intimate relationship between two people." *Id.* The move represented a philosophical and cultural shift, as much as a legal one. What New Yorkers did, the Court explained, demanded "both the community's considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality." *Id.* at 2692-93. This momentous step required the stamp of legitimacy conferred by citizen deliberation: "The dynamics of state government in the federal system," *Windsor* explained, "are to allow the formation of consensus respecting the way the members of a discrete community treat each other in their daily contact and constant interaction with each other." *Id.* at 2692.

3. A decision from this Court constitutionalizing the issue of same-sex marriage would obliterate the significance of those remarkable democratic victories by same-sex marriage proponents. This may seem paradoxical, but it is not.

Again, take New York as an example. *Windsor* emphasized that New Yorkers' "new insight" about marriage and equality led them to confer the dignity of marriage on same-sex couples. *Id.* at 2689, 2692. But if the Constitution itself dictates adoption of same-sex marriage, then New

Yorkers' insights were beside the point. On that view, New Yorkers were not enacting a new perspective on marriage, but correcting an unconstitutional defect in their marriage laws. That view is, of course, utterly contrary to *Windsor*'s discussion of what New Yorkers were doing. New Yorkers enlarged their marriage definition "[a]fter a statewide deliberative process that enabled [them] to discuss and weigh arguments for and against same-sex marriage." *Windsor*, 133 S. Ct. at 2689. *Windsor* thus *praised* the democratic deliberation of New Yorkers as they pondered the profound issues set before them. A decision that the Constitution compelled them to reach only one result would make a mockery of those deliberations.

The same can be said for all the States that have adopted same-sex marriage through the political process. Those States altered their marriage laws based on their "considered perspective on the historical roots of the institution of marriage and [their] evolving understanding of the meaning of equality." *Id.* at 2692-93. But why should their citizens' perspectives matter, if the Constitution itself demanded the change? A decision that the Fourteenth Amendment compels what those States spent so much energy to accomplish would dissolve any democratic legitimacy they conferred on same-sex couples by granting them the status of marriage.

C. Such a decision would eliminate the States' role as laboratories of democracy in the realm of domestic relations.

A decision constitutionalizing this issue would damage a related and no less valuable aspect of our federal system: the ability of States to experiment in their traditional domain of domestic relations law.

1. Throughout our history, evolution in domestic relations laws has occurred in the laboratories of the States. For

instance, in the past our federal system allowed the States to test the ramifications of a no-fault divorce regime. Today, States are in the midst of a similar experiment with same-sex marriage. Tomorrow, the question may be whether to recognize three-person relationships as marriage.[3] Evidently, we live in a time of rapid flux in this realm. Whatever the particular issue, however, decisions on these matters reflect deep cultural understandings about what marriage is, what societal benefits it achieves, and the extent to which evolving visions of marriage should shape the law. The consequences of a decision to take a particular road will not become apparent for decades. Different States have taken different positions on these issues over time, and they continue to learn as other States grapple with evolving perspectives on matters once thought so basic to law and culture.

2. These matters are the subject of real deliberations taking place now in homes, gathering places, the media, and legislatures. Those deliberations must be allowed to continue if the States and their citizens have any real value in our constitutional system of self-government. *See, e.g., New State Ice Co.*, 285 U.S. at 311 (Brandeis, J., dissenting) ("There must be power in the States and the Nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs. . . . To say experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation."). Openness

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[3] *See e.g.*, Fahima Haque, *Meet the "World's First" Gay Married "Throuple,"* N.Y. POST, Feb. 27, 2015, http://nypost.com/2015/02/27/thai-throuple-believed-to-be-worlds-first-gay-married-trio/; Steven Hopkins, *"I Do, I Do, I Do": Three Men Tie the Knot in Thailand to Become the World's First Wedded Threesome*, THE MIRROR, Feb. 27, 2015, http://www.mirror.co.uk/news/uk-news/i-do-do-do-three-5241726.

to debate on this issue should not be closed by the simple linguistic step of defining the "right" at issue as a fundamental right "to marry the person of their choice." *Kitchen*, 755 F.3d at 1200. That is a facile way to resolve a debate of profound complexity. It would bypass the nationwide conversation now taking place about the meaning of marriage. It would elevate a preordained conclusion over reasoned consideration. And it would inevitably override legitimate policy differences in other areas, such as how the institution is to be limited based on age, consanguinity, and number of participants.[4] A crucial and intended aspect of our federal system is that state citizens should vigorously debate matters like these. This Court should not ordain an abrupt end to that conversation.

D. Such a decision would announce that state citizens are incapable of resolving this issue through constructive civil discourse.

A decision constitutionalizing same-sex marriage would discount the democratic process in an even more troubling way. It would send the unmistakable message that state citizens are incapable of constructively resolving this issue, and that they instead require federal tutelage in a area that lies at the heart of state sovereignty. That would flout *Windsor*'s affirmation of democratic consensus, and it would be utterly false to the Court's recent teaching in *Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623 (2014).

1. In *Schuette*, the Court rejected an equal protection challenge to a Michigan constitutional amendment forbidding affirmative action in public universities. *Schuette* found that

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[4] For instance, the issue of polygamy is pending in the Tenth Circuit, where the district court struck down Utah's laws restricting polygamy. *Brown v. Buhman*, 947 F.Supp.2d 1170 (D. Utah 2013), *appeal docketed*, No. 14-4117 (10th Cir. Sept. 25, 2014).

"Michigan voters [had] exercised their privilege to enact [the amendment] as a basic exercise of their democratic power." *Id.* at 1636 (plurality op.). Recognizing the amendment reflected "the national dialogue regarding the wisdom and practicality of [affirmative action]," *Schuette* held that "courts may not disempower the voters from choosing which path to follow." *Id.* at 1631, 1635 (plurality op.). "It is demeaning to the democratic process," *Schuette* explained, "to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds," and even if debates like these "may shade into rancor … that does not justify removing [them] from the voters' reach." *Id.* at 1637, 1638 (plurality op.).

2. What *Schuette* taught about affirmative action underscores the value of democratically resolving the similarly divisive question of same-sex marriage. As with affirmative action, there is an ongoing "national dialogue regarding … [same-sex marriage]," and "courts may not disempower the voters from choosing which path to follow." *Id.* at 1631, 1635 (plurality op.). As with affirmative action, it would be "demeaning to the democratic process to presume … voters are not capable of deciding an issue of this sensitivity on decent and rational grounds." *Id.* at 1637 (plurality op.). It is the responsibility of voters—not the courts—to decide sensitive issues like these, because "[f]reedom embraces the right, indeed the duty, to engage in a rational, civic discourse in order to determine how best to form a consensus to shape the destiny of the Nation and its people." *Id.*; *cf. Windsor*, 133 S. Ct. at 2692 ("In acting first to recognize and then to allow same sex marriages, New York was responding 'to the initiative of those who [sought] a voice in shaping the destiny of their own times.'") (quoting *Bond,* 131 S. Ct. at 2359).

Schuette thus reinforced the premise, central to *Windsor*, that citizens' deliberation over whether to adopt same-sex marriage is "without doubt a proper exercise of [their] sovereign authority within our federal system." *Windsor*, 133 S. Ct. at 2692. Going further, *Schuette* taught that when courts override that sovereign authority, they damage the people's ability to govern themselves. If that was true in *Schuette* with respect to affirmative action, how much more is it true in these cases, involving as they do the "State[s'] … historic and essential authority to define the marital relation." *Windsor*, 133 S. Ct. at 2692.

3. a. Regrettably, *Schuette*'s warning that courts should avoid "demeaning … the democratic process," 134 S. Ct. at 1637 (plurality op.), has proven prophetic. In the wave of post-*Windsor* decisions striking down state marriage laws, those citizens who do not support same-sex marriage have been called "barking crowds" (*Geiger v. Kitzhaber*, 994 F.Supp.2d 1128, 1147 (D. Ore. 2014)). They have been compared to those who "believed that racial mixing was just as unnatural and antithetical to marriage as … homosexuality" (*Wolf*, 986 F.Supp.2d at 1004). They have been told that their marriage laws "achieve[ ] the same result" as interracial marriage bans (*Kitchen v. Herbert*, 961 F.Supp.2d 1181, 1215 (D. Utah 2013)), or worse. *See Baskin*, 766 F.3d at 667 (asserting that under interracial marriage bans, people could "find[ ] a suitable marriage partner of the same race"). Their defense of marriage as grounded in the biological reality of procreation has been openly mocked. *See id.* at 662 ("Heterosexuals get drunk and pregnant, producing unwanted children; their reward is to be allowed to marry. Homosexual couples do not produce unwanted children; their reward is to be denied the right to marry. Go figure."). They have been lectured that their views are "callous and cruel," *Latta*, 771 F.3d at 470, and should be "discard[ed] into the

ash heap of history." *Whitewood v. Wolf*, 992 F.Supp.2d 410, 431 (M.D. Pa. 2014).

b. This unsettling trend is also reflected in the lower courts' frequent reliance on *Loving v. Virginia*. Courts have repeatedly drawn a direct analogy between the white supremacist laws correctly invalidated in *Loving* and the man-woman marriage laws challenged here. *See, e.g., Latta*, 771 F.3d at 478 (Reinhardt, J., concurring) (asserting that, of the Court's right-to-marry cases, *"Loving* is … the most directly on point"); *Baskin*, 766 F.3d at 666 (reasoning that "[t]he State's argument from tradition runs head on into *Loving v. Virginia*").[5] Indeed, some lower courts have gone so far as to quote extrajudicial statements by one of the plaintiffs in *Loving* in order to link it directly to these cases. *See Wolf*, 986 F.Supp.2d at 1004 (observing that "Mildred Loving herself, one of the plaintiffs in *Loving*, saw the parallel between her situation and that of same-sex couples") (citing Martha C. Nussbaum, *From Disgust to Humanity: Sexual Orientation and the Constitution* 140 (Oxford Univ. Press 2010)); *Bostic*, 970 F.Supp.2d at 460 (epigraph) (quoting Mildred Loving, *Loving for All*, Public Statement on the 40th Anniversary of *Loving v. Virginia* (June 12, 2007)).

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[5] *See also, e.g., Rosenbrahn v. Daugaard*, __ F.Supp.3d __, 2015 WL 144567, at *11 (D.S.D. Jan. 12, 2015) ("Little distinguishes this case from *Loving*."); *Campaign for Southern Equality v. Bryant*, __ F.Supp.3d __, 2014 WL 6680570, at *13 (S.D. Miss. Nov. 25, 2014) ("Perhaps the most significant case demonstrating the evolving conception of the right to marry is *Loving v. Virginia*."), *appeal docketed*, No. 14-60837 (5th Cir. Nov. 26, 2014); *De Leon v. Perry*, 975 F.Supp.2d 632, 659 (W.D. Tx. 2014) ("Plaintiffs … seek to exercise the right to marry the partner of their choosing, just as the plaintiffs in *Loving* did, despite the State's purported moral disdain for their choice of partner."), *appeal docketed*, No. 14-50196 (5th Cir. Mar. 1, 2014); *Bostic v. Rainey*, 970 F.Supp.2d 456, 474 (E.D. Va. 2014) (rejecting defendants' arguments as asserting "[n]early identical concerns about the significance of tradition" that were "resolved by … the Supreme Court in its *Loving* decision").

That is a troubling misapplication of a landmark decision. *Loving* rightly invalidated anti-miscegenation laws—racist relics of slavery that violated "the clear and central purpose of the Fourteenth Amendment." *Loving*, 388 U.S at 6, 10. Those odious laws have nothing—*nothing*—to do with the issues in these cases. "[I]n commonsense and in a constitutional sense . . . 'there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex.'" *DeBoer*, 772 F.3d at 400 (quoting *Baker v. Nelson*, 191 N.W.2d 185, 187 (Minn. 1971)). While the Fourteenth Amendment outlaws invidious racial discrimination, this Court in *Windsor* recognized that the Constitution leaves citizens free "to discuss and weigh arguments for and against same-sex marriage." *Windsor*, 133 S. Ct. at 2689. It is laughable to suppose that *Windsor* would have praised New Yorkers' deliberations for and against same-sex marriage if, unbeknownst to them, a refusal to recognize same-sex marriage was equivalent to racism. The two issues are worlds apart. That should be obvious given that, five short years after *Loving*, this Court summarily rejected "for want of a substantial federal question" the claim that the Fourteenth Amendment requires a State to recognize same-sex marriage. *Baker v. Nelson*, 409 U.S. 810 (1972).[6]

c. When state citizens decline to adopt the novel institution of same-sex marriage, they are not voting to roll back the achievements of the Civil Rights Movement. That

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[6] Four of the Justices who decided *Loving* sat on the Court that decided *Baker* (Justices Douglas, Brennan, Stewart, and White), and Justice Marshall was nominated to the Court on June 13, 1967, the day after *Loving* was decided. If *Loving* had any relevance to the issues here, one surely would have expected to hear that view from these Justices. Instead, they joined a unanimous Court that summarily rejected any equivalence between the two.

insinuation is degrading to millions of Americans, who simply wish to retain a definition of marriage "thought of by most people as essential to … [marriage's] role and function throughout the history of civilization." *Windsor*, 133 S. Ct. at 2689. This Court "should not lightly conclude that everyone who [holds] this belief [is] irrational, ignorant or bigoted." *Hernandez*, 855 N.E.2d at 8. To the contrary, this Court should roundly denounce any such notion.

And yet that is the corrosive premise so many lower court opinions have eagerly adopted over the past eighteen months. Those decisions, both in their rhetoric and their reasoning, forget that our "Constitution … is made for people of fundamentally differing views." *Lochner*, 198 U.S. at 75-76 (Holmes, J., dissenting). Many Americans believe in a new conception of marriage that would extend to same-sex relationships. Many do not. This Court has treated *both* sides of that debate as deserving respect, not derision. Of those Americans who hold that the man-woman aspect of marriage is "essential to the very definition of that term," the Court has observed that their "belief … became even more urgent, more cherished, when challenged." *Windsor*, 133 S. Ct. at 2689. Of those who advocate for same-sex marriage, the Court has said they are sincerely acting on a "new perspective" about marriage. *Id.* Accordingly, this Court has held up as a model for resolving the issue a "statewide deliberative process that enable[s] [state] citizens to discuss and weigh arguments for and against same-sex marriage." *Id.* In other words, the Court has treated Americans holding opposing views on this question as honorable participants in a strenuous democratic debate over a question of profound civic importance.

A decision from this Court constitutionalizing the issue, however, would erase the benefits of that wise course. Inevitably, it would validate in the public mind the numerous decisions that have characterized this issue, not as a debate

between good people on either side, but as a battle between those who love individual freedom and those who cling blindly to tradition. That would do incalculable damage to our civic life in this country. *See Schuette*, 134 S. Ct. at 1637 (plurality op.) (explaining that "[i]t is demeaning to the democratic process" to "insist that a difficult question of public policy must be taken from the reach of the voters, and thus removed from the realm of public discussion, dialogue, and debate"). How much better for this issue to play out, state-by-state, with citizens locked in urgent conversation. That is precisely what was happening before the courts began to intervene two years ago. The Court should let that process of self-governance continue.

CONCLUSION

The Court should affirm the decision of the Sixth Circuit.

Respectfully submitted,

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