No. 14-50196

In the United States Court of Appeals for the Fifth Circuit

CLEOPATRA DELEON; NICOLE DIMETMAN; VICTOR HOLMES; MARK PHARISS,
Plaintiffs-Appellees,

v.

RICK PERRY, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF TEXAS;
GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS TEXAS ATTORNEY GENERAL;
DAVID LAKEY, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE
DEPARTMENT OF STATE HEALTH SERVICES,
Defendants-Appellants.

ON APPEAL FROM THE U.S. DISTRICT COURT FOR THE
WESTERN DISTRICT OF TEXAS, SAN ANTONIO DIVISION,
NO. 5:13-CV-982 (HON. ORLANDO L. GARCIA)

BRIEF FOR *AMICI CURIAE* TEXAS EAGLE FORUM AND EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF APPELLANTS AND REVERSAL

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CERTIFICATE OF INTERESTED PERSONS

The case number is 14-50196. The case is styled as *DeLeon v. Perry*. Pursuant to the fourth sentence of Circuit Rule 28.2.1, the undersigned counsel of record certifies that the parties' list of persons and entities having an interest in the outcome of this case is complete, to the best of the undersigned counsel's knowledge. The undersigned counsel also certifies that *amici curiae* Texas Eagle Forum and Eagle Forum Education & Legal Defense Fund are nonprofit corporations with no parent corporations and that no publicly held corporation owns ten percent or more of their stock. These presentations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Dated: August 4, 2014

Respectfully submitted,

/s/ Lawrence J. Joseph

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IDENTITY, INTEREST AND AUTHORITY TO FILE

Amici curiae Texas Eagle Forum and Eagle Forum Education & Legal Defense Fund (collectively, "*Amici*"), file this brief with the consent of the parties.[1] *Amici* have defended traditional American values – including traditional marriage, defined as the union of husband and wife – since their respective foundings over 30 years ago. In 2005, Texas Eagle Forum was actively involved in campaigning for the constitutional amendment challenged here. For the foregoing reasons, *Amici* have a direct and vital interest in the issues raised here.

STATEMENT OF THE CASE

Texas's Constitution defines marriage as "solely the union of one man and one woman," and its Family Code prohibits licensing same-sex marriages in Texas or recognizing out-of-state same-sex marriages as contrary to Texas's public policy (and thus void in Texas). TEX. CONST. art. I, §32; TEX. FAM. CODE §§2.001(b), 6.204(b) (collectively, hereinafter, "Texas's Marriage Laws"). Two Texas same-sex couples (collectively, "Plaintiffs") sued Texas's Governor, Attorney General, and Commissioner of State Health Services (collectively, "Texas") to invalidate Texas's Marriage Laws. Against decades of legal precedent and centuries of human history, the District Court held that the husband-wife definition of marriage

[1] Pursuant to FED. R. APP. P. 29(c)(5), the undersigned counsel certifies that: counsel for *Amici* authored this brief in whole; no party's counsel authored this brief in any respect; and no person or entity – other than *Amici*, their members, and their counsel – contributed monetarily to this brief's preparation or submission.

is irrational under the Equal Protection Clause and violates Plaintiffs' due-process right to marry.

Over forty years ago, in *Baker v. Nelson,* 409 U.S. 810 (1972), the Supreme Court faced essentially the same question: whether the Constitution provides a right to same-sex marriage. The Court answered that question in the negative, dismissing "for want of a substantial federal question," *id.,* a mandatory appeal under former 28 U.S.C. §1257(2) (1988) from *Baker v. Nelson,* 291 Minn. 310, 191 N.W.2d 185 (Minn. 1971).

Last year, in *U.S. v. Windsor,* 133 S. Ct. 2675 (2013), the Supreme Court held that the federal husband-wife marriage definition, 1 U.S.C. §7, from the Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) ("DOMA"), violates the Constitution. *See* Section I.C, *infra,* In the four-decade interval between *Baker* and *Windsor,* federal appeals courts routinely cited *Baker* to dismiss claims seeking to establish a constitutional right to same-sex marriage. *See, e.g., Citizens for Equal Protection v. Bruning,* 455 F.3d 859, 870-71 (8th Cir. 2006); *Adams v. Howerton,* 673 F.2d 1036, 1042 (9th Cir. 1982). Nothing in *Windsor* or any other Supreme Court decision changed that result.

The District Court fundamentally misunderstood the factual issue presented to it. While neither legislatures nor judges are fully competent to tinker with the wisdom of millennia, based on incomplete data, Thomas Sowell, Ph.D., *The Vision*

of the Anointed, at 112 (BasicBooks 1995),[2] our system gives legislatures "[t]he initial discretion to determine what is 'different' and what is 'the same.'" *Plyler v. Doe*, 457 U.S. 202, 216 (1982). Although congressional social engineering often proves disastrous for even the intended beneficiaries, Charles A. Murray, LOSING GROUND: AMERICAN SOCIAL POLICY, 1950-1980 (1984), the judiciary is even less suited for that task. *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 766 (2007) (Thomas, J., concurring). This Court should decline the request to second-guess Texas and its voters on how that state defines so basic a social relationship as marriage.

Whatever marginal advantage (if any) elites have over the general public in understanding these issues is dwarfed by "the total direct knowledge brought to bear though social processes (the competition of the marketplace, social sorting, etc.), involving millions of people" over millennia. Sowell, *Vision of the Anointed*, at 114. At its best, the judiciary recognizes these limitations:

> Although social theorists ... have proposed alternative child-rearing arrangements, none has proven as enduring as the marital family structure, nor has the accumulated wisdom of several millennia of human experience discovered a superior model.

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[2] "No one man, however brilliant or well-informed, can come in one lifetime to such fullness of understanding as to safely judge and dismiss the customs or institutions of his society, for those are the wisdom of generations after centuries of experiment in the laboratory of history." *Id.*

Lofton v. Sec'y of Dept. of Children & Family Services, 358 F.3d 804, 820 (11th Cir. 2004) (citations omitted). Judges would lack the training to evaluate the social-science data on the effects of shifting away from husband-wife marriage, even if the required longitudinal studies – as yet, at least a generation away, *see* Section I.B, *infra* – existed today. In any event, despite impressing the District Court with their evidence, Plaintiffs cannot prove that Texas's Marriage Laws are irrational because the evidence on which they must rely *to meet their burden of proof* neither exists now nor will exist for at least a generation.

Relying largely on its one-sided review of the parties' evidence on the wisdom of preferring husband-wife marriage as the building block for responsible procreation and childrearing, the District Court found Texas's Marriage Laws irrational. Slip Op. at 25-29. Contrary to the District Court's facile acceptance of Plaintiffs' (and other courts') social-science evidence, however, the Texas electorate was entitled to take a more jaundiced view of academic cherry-picking over an incomplete period to establish anything about same-sex families:

> We must assume, for example, that the legislature might be aware of the critiques of the studies cited by appellants – critiques that have highlighted significant flaws in the studies' methodologies and conclusions, such as the use of small, self-selected samples; reliance on self-report instruments; politically driven hypotheses; and the use of unrepresentative study populations consisting of disproportionately affluent, educated parents.

Lofton, 358 F.3d at 325. Unlike the Eleventh Circuit in *Lofton*, the District Court failed to recognize the "politically driven hypotheses" in Plaintiffs' faculty-lounge evidence.

Unfortunately for Plaintiffs, this type of "courtroom fact-finding" has no place in rational-basis cases. *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993). The types of relationships that Plaintiffs seek to prove are equal to husband-wife marriage are incredibly new. No one knows how the children raised in these relationships will perform as adults and as parents. Those data simply do not exist yet. Since Plaintiffs cannot support their claims, this Court must defer to the Legislature and the People.

STATEMENT OF FACTS

Plaintiffs are Texas residents who wish to enter a same-sex marriage in Texas or have Texas recognize their out-of-state, same-sex marriages. Plaintiffs have not introduced evidence that negates all theoretical connections between husband-wife marriage and responsible procreation and childrearing, as any rational observer – however grudgingly – must admit:

> The most that can be said of these witnesses' testimony is that *the "no differences" consensus has not been proven with scientific certainty*, not that there is any credible evidence showing that children raised by same-sex couples fare worse than those raised by heterosexual couples.

DeBoer v. Snyder, 973 F. Supp. 2d 757, 768 (E.D. Mich. 2014) (emphasis added).

Because rational-basis defendants need not present *any* evidence and rational-basis plaintiffs must negate every theoretical connection between a statute's purposes and consequences, even that admission is fatal for Plaintiffs.

SUMMARY OF ARGUMENT

Plaintiffs cannot state an equal-protection claim because they are not similarly situated with opposite-sex married couples; Plaintiffs cannot parent and raise children as biological mother-father families (Section I.A). Texas's preference for that family arrangement satisfies the rational-basis test because Plaintiffs have not met their burden of producing evidence (which cannot yet and may never exist) to negate any *theoretical* connection between biological mother-father families and parenting and childrearing outcomes (Section I.B).

Windsor cannot help Plaintiffs because it held that Congress acted irrationally to impose an across-the-board federal definition over state-created relationships that Congress lacked a rational basis to reject; by contrast, Texas acts within an area of traditional, and near-exclusive, state authority (Section I.C), where *Baker* controls (Section I.D). Because the concept of same-sex marriage was so foreign to the states that ratified the Fourteenth Amendment, a court's using that Amendment to impose same-sex marriage on the states impermissibly *amends* the Constitution under the guise of *interpreting* it (Section I.E).

With substantive due process, elevated scrutiny does not apply because the

fundamental right to marry applies only to opposite-sex marriage (Section II).

ARGUMENT

I. TEXAS'S MARRIAGE LAWS SATISFY THE RATIONAL-BASIS TEST

Under the Equal Protection Clause, courts evaluate differential treatment based on sexual orientation under the rational-basis test. *Romer v. Evans*, 517 U.S. 620, 631-32 (1996); *Johnson v. Johnson*, 385 F.3d 503, 532-33 (5th Cir. 2004). As explained in this section, Texas's Marriage Laws readily meet that test, as recognized in *Baker* and not changed by *Windsor*.

A. Plaintiffs Are Not Similarly Situated with Married Opposite-Sex Couples, and Texas Has No Discriminatory Purpose

The Equal Protection Clause "embodies a general rule that States must treat like cases alike but may treat unlike cases accordingly." *Vacco v. Quill*, 521 U.S. 793, 799 (1997). For a class to raise an equal-protection claim vis-à-vis the government's treatment of a similarly situated class, the two classes must be "in all relevant respects alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). Further, "ordinary equal protection standards" require plaintiffs to "show both that the [challenged action] had a discriminatory effect and that it was motivated by a discriminatory purpose." *Wayte v. U.S.*, 470 U.S. 598, 608 (1985). The required "discriminatory purpose" means "more than intent as volition or intent as aware of consequences. It implies that the decisionmaker ... selected or reaffirmed a course of action at least in part '*because of*,' not merely '*in spite of*' its adverse effects

upon an identifiable group." *Pers. Adm'r v. Feeney*, 442 U.S. 256, 279 (1979) (emphasis added). Plaintiffs cannot either establish that they are similarly situated with opposite-sex married couples or show an impermissibly discriminatory purpose in Texas's Marriage Laws.

First, same-sex couples and opposite-sex couples are not "similarly situated" with respect to procreation: "an individual's right to equal protection of the laws does not deny … the power to treat different classes of persons in different ways." *Johnson v. Robison*, 415 U.S. 361, 374-75 (1974) (interior quotations omitted, alteration in original). A classification is clearly "reasonable, not arbitrary" if it "rest[s] upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Reed v. Reed*, 404 U.S. 71, 75-76 (1971) (interior quotations omitted); *Rostker v. Goldberg*, 453 U.S. 57, 67 (1981) (Equal Protection allows Navy to base actions on uncontested differences between male and female officers). Provided that Texas rationally may prefer married biological parents' raising their children in a family, *see* Section I.B, *infra*, Plaintiffs are not similarly situated with opposite-sex married couples.

Second, any "foreseeable" or even "volitional" impact on the non-favored class does not qualify as a "[d]iscriminatory purpose" if the state lawfully may benefit the favored class. *Feeney*, 442 U.S. at 278-79. Put another way, "where a

group possesses distinguishing characteristics relevant to interests the State has the authority to implement, a State's decision to act on the basis of those differences does not give rise to a constitutional violation." *Bd. of Trustees of Univ. of Alabama v. Garrett,* 531 U.S. 356, 366-67 (2001) (interior quotations omitted). While it may not be Plaintiffs' fault that their union cannot engage in procreation as mother and father, it certainly is not Texas's fault. Provided that Texas rationally may prefer married biological parents' raising their children in a family, *see* Section I.B, *infra*, the impact of Texas's Marriage Laws on Plaintiffs does not qualify as a "discriminatory purpose."

If Plaintiffs are not similarly situated with opposite-sex married couples and Texas lacks an impermissible "discriminatory purpose," Plaintiffs cannot state an Equal Protection claim on which relief can be granted. As indicated, the question then becomes whether Texas has a rational basis for preferring that biological mothers and fathers raise their children.

B. The Rational-Basis Test Is Flexible for Defendants, Demanding for Most Plaintiffs, and Impossible for these Plaintiffs to Satisfy

Assuming *arguendo* that Plaintiffs' complaint states a potential claim under the rational-basis test, Plaintiffs must offer far more evidence than they have – indeed, evidence that will not even exist for *at least* a generation – before they could ever dislodge Texas's preference that married biological parents raise their

children in a family.[3]

Specifically, rational-basis plaintiffs must "negative every conceivable basis which might support [the challenged statute]," including those bases on which the state plausibly *may have* acted. *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356, 364 (1973) (internal quotations omitted); *Kadrmas v. Dickinson Public Schools,* 487 U.S. 450, 462-63 (1988).[4] Further, it is enough that a plausible policy *may have guided* the decisionmaker and that "the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational." *Nordlinger,* 505 U.S. at 11-12 (citations omitted, emphasis added). Under the

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[3] Summary judgment for Texas is appropriate because Plaintiffs cannot provide the evidence on an element of their case on which they bear the burden of proof. *Little v. Liquid Air Corp.,* 37 F.3d 1069, 1075 (5th Cir. 1994) (*en banc*); *cf. Heller v. Doe,* 509 U.S. 312, 320 (1993) ("State … has no obligation to produce evidence to sustain the rationality of a statutory classification"). Because Plaintiffs cannot support their claim, summary judgment for Texas is required.

[4] The District Court's straw-man argument (Slip Op. at 27) that allowing infertile opposite-sex marriages violates Equal Protection is unavailing. First, unlike strict scrutiny, rational-basis review does not require narrowly tailoring marriage to legitimate purposes (*e.g.,* procreation or childrearing). To the contrary, rational-basis review "compel[s] [courts] to accept a legislature's generalizations even when there is an imperfect fit between means and ends," and the classification "is not made with mathematical nicety or … in practice … results in some inequality," however "illogical … and unscientific" it may seem to the reviewing court. *Heller,* 509 U.S. at 321 (internal quotations and citation omitted); *Massachusetts Bd. of Retirement v. Murgia,* 427 U.S. 307, 316 (1976). Second, some couples marry with the intent not to have children or with the mistaken belief they are infertile, yet later do have children. Third, by reinforcing the optimal family unit, husband-wife marriage at least reinforces marriage's procreation and childrearing function even when particular marriages are childless.

rational-basis test, government action need only "further[] a legitimate state interest," which requires only "a plausible policy reason for the classification." *Id.* Moreover, courts give economic and social legislation a presumption of rationality, and "the Equal Protection Clause is offended only if the statute's classification rests on grounds wholly irrelevant to the achievement of the State's objective." *Kadrmas,* 487 U.S. at 462-63 (interior quotations omitted). Texas's Marriage Laws easily meet this test.

With respect to husband-wife marriage, it suffices, for example, that Texas "rationally may have … considered [it] to be true" that marriage has benefits for responsible procreation and childrearing. *Nordlinger,* 505 U.S. at 11-12; *Adar v. Smith*, 639 F.3d 146, 162 (5th Cir. 2011) (*en banc*); *Lofton,* 358 F.3d at 818-20. Numerous courts and social scientists have recognized the rationality of states' limiting marriage to opposite-sex couples. *See, e.g., Hernandez v. Robles,* 7 N.Y.3d 338, 359, 855 N.E.2d 1, 7 (N.Y. 2006) ("Legislature could rationally believe that it is better, other things being equal, for children to grow up with both a mother and a father"); Wendy D. Manning & Kathleen A. Lamb, *Adolescent Well Being in Cohabiting, Married, and Single-Parent Families,* 65 J. MARRIAGE & FAM. 876, 890 (2003) ("Adolescents in married, two-biological-parent families generally fare better … The advantage of marriage appears to exist primarily when the child is the biological offspring of both parents."). So, while Texas has no

obligation to submit evidence, evidence supports Texas's position.

With no credible data, the District Court claims that opposite-sex marriage will continue, unaffected, by the wholesale changes ordered by the opinion below. Slip Op. at 28. If Texas wants more children raised in husband-wife families, Texas's police power gives her the right to privilege that relationship over all others. *Maynard v. Hill,* 125 U.S. 190, 205 (1888). Insofar as Plaintiffs seek to privilege same-sex marriages via the Equal Protection Clause, they necessarily concede that marriage is a valuable benefit that Texas bestows on couples eligible to marry:

> [W]hen the right invoked is that to equal treatment, the appropriate remedy is a *mandate* of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class.

Heckler v. Mathews, 465 U.S. 728, 740 (1984) (emphasis in original, interior quotations omitted). Both purely as a matter of equal-protection law and also as a matter of the applied economics of government subsidies, *see* Texas Br. at 14, elevating same-sex couples into eligibility for marriage's benefits lowers the value of the benefit, relatively, for those who already enjoy it. Aside from any impacts on couples receiving subsidies, Texas plainly has the right to target its subsidies.

In any event, "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical

data." *Beach Communications,* 508 U.S. at 315. Accordingly, Plaintiffs cannot prevail by marshaling "impressive supporting evidence … [on] the probable consequences of the [statute]" vis-à-vis the legislative purpose, but must instead negate "the *theoretical* connection" between the two. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463-64 (1981) (emphasis in original). Although the typical rational-basis plaintiff has a difficult evidentiary burden, Plaintiffs here face an *impossible* burden.

Unfortunately for Plaintiffs, the data simply do not exist to *negate* the procreation and childrearing rationale for traditional husband-wife marriage. And yet those data are Plaintiffs' burden to produce. Nothing that Plaintiffs have produced or could produce undermines the rationality of believing that children raised in a marriage by their biological mother and father may have advantages over children raised under other arrangements:

> At present, no one – including social scientists, philosophers, and historians – can predict with any certainty what the long-term ramifications of widespread acceptance of same-sex marriage will be.

Windsor, 133 S.Ct. at 2716 (Alito, J., dissenting); *Lofton*, 358 F.3d at 820. Society is *at least* a generation away from the most minimal longitudinal data that could even purport to compare the relative contributions of same-sex versus opposite-sex marriages to the welfare of society. Quite simply, these living arrangements are new, and the few children that have grown up in them cannot present a sufficiently

large sample size to provide any basis for meaningful study. Further, the children need to be studied from their own childhood into adulthood and parenthood. While *Amici* submit that Plaintiffs *never* will be able to negate the value of traditional husband-wife families for childrearing, Plaintiffs cannot prevail when the data *required by their theory of the case* do not (and cannot) yet exist.

C. *Windsor* Does Not Support Plaintiffs Here

Because *Windsor* neither follows nor overrules the rational-basis outline described in Section I.B, *supra*, the impact of that decision here is unclear from the *face* of the majority decision. As explained in this section, *Windsor* can only be read as a holding that the federal government lacked any rational basis to prefer opposite-sex marriage over same-sex marriage, when doing so required the federal government to reject state-authorized same-sex marriages that it lacked any authority to change. As Chief Justice Roberts signaled in his dissent, that deference to the states as the entities with the authority to define marital relationships in *Windsor* translates to deference to the states when courts are presented with state legislation like Texas's Marriage Laws. *Windsor,* 133 S.Ct. at 2697 (Roberts, C.J., dissenting). As shown in this section, nothing in *Windsor* or the Equal Protection Clause requires sovereign states to recognize same-sex marriage.

1. *Windsor* Applied a Truncated Form of Rational-Basis Review to Conclude that DOMA §3's Principal Purpose Was to Demean Same-Sex Marriages

Windsor plainly held that Congress lacked a "legitimate purpose" for DOMA §3's "principal purpose and … necessary effect" that the majority perceived (namely "to demean those persons who are in a lawful same-sex marriage"). *Windsor,* 133 S.Ct. at 2695-96. As the *Windsor* dissents explain, however, the surface of the opinion does not reveal what rationale – exactly – led the *Windsor* majority to that holding:

> The sum of all the Court's nonspecific hand-waving is that this law is invalid (maybe on equal-protection grounds, maybe on substantive-due-process grounds, and perhaps with some amorphous federalism component playing a role) because it is motivated by a "'bare … desire to harm'" couples in same-sex marriages.

Id. at 2705 (Scalia, J., dissenting). Reading below the surface, three factors make clear that *Windsor* was decided under equal-protection principles via the rational-basis test, premised on the perceived irrationality of federal legislation imposing an across-the-board federal definition of "marriage," when states – not the federal government – have the authority to define lawful marriages within their respective jurisdictions.[5]

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[5] Although *Windsor* discusses due process and equal protection, the Fifth Amendment's equal-protection component falls within the Due Process Clause's liberty interest. *Jimenez v. Weinberger,* 417 U.S. 628, 637 (1974) (referencing "the equal protection of the laws guaranteed by the due process provision of the Fifth

First, *Windsor* does not rely on elevated scrutiny of any sort, holding only that DOMA §3 lacks any "legitimate purpose" whatsoever. *Windsor,* 133 S.Ct. at 2696. In equal-protection cases that present thorny merits issues – even issues that might implicate elevated scrutiny if proved – courts sometimes can sidestep the difficult merits questions by rejecting a law's underlying distinctions as wholly arbitrary. For example, as-applied, race-based challenges to *facially neutral* limits on voting or holding office could proceed *facially* against freeholder requirements on the theory that restricting those privileges to freeholders (*i.e.,* property owners) was arbitrary, even without proving that an as-applied, race-correlated impact constituted racial discrimination. *Turner v. Fouche*, 396 U.S. 346, 362 (1970); *Quinn v. Millsap*, 491 U.S. 95, 103 n.8 (1989). As in *Turner* and *Quinn*, the *Windsor* majority found DOMA §3 void under the rational-basis test, without needing to resort to elevated scrutiny under other theories pressed by the parties.[6]

Amendment"); *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954). Thus, for federal defendants, equal-protection rights *are* due-process issues. In any event, assuming *arguendo* that no fundamental rights apply, *see* Section II, *infra,* substantive due process collapses into essentially the same question that arises under the equal-protection analysis under the rational-basis test. *Jackson Court Condominiums, Inc. v. New Orleans*, 874 F.2d 1070, 1079 (5th Cir. 1989).

[6] Even if *Windsor* applied elevated scrutiny to federal intrusions into state marriage law, that would not compel the conclusion that courts should apply the same level of scrutiny to state laws: "family and family-property law must do major damage to clear and substantial federal interests before the Supremacy Clause will demand that state law will be overridden." *Hillman v. Maretta,* 133 S.Ct. 1943, 1950 (2013) (interior quotations omitted); *see also Windsor,* 133 S.Ct.

Second, DOMA §3's "discrimination of an unusual character" lacked any perceived legitimate purpose, evidencing the animus that established an equal-protection violation. *Windsor*, 133 S.Ct. at 2693. As such, the majority did not need even to consider the bases – such as responsible parenting and childrearing – proffered by the House interveners or the enacting Congress in defense of DOMA. *See* H.R. Rep. No. 104-664, at 12 (1996), *reprinted at* 1996 U.S.C.C.A.N. 2905, 2916. In DOMA §3, the *Windsor* majority found only the purpose "to injure the very class New York seeks to protect," based on a perceived "unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage." *Windsor*, 133 S.Ct. at 2693. In that unusual posture, *Windsor* did not even need to evaluate the rational bases on which Congress claimed to have acted.

Third, federalism is essential to the *Windsor* holding. Federalism not only defines "the very class … protect[ed]" (*i.e.*, state-approved same-sex marriages), but also makes the *federal* action unusual. *Id.* Because Texas's Marriage Laws are entirely "usual" and fall within the "virtually exclusive province of the States." *Id.* at 2691 (interior quotations omitted), *Windsor* has no bearing here.

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at 2675 (*citing Hillman*). It is no more unusual for states to have a freer hand in family law (where their interests predominate) than for the federal government to have a freer hand in, say, immigration (where its interests predominate): "states on their own cannot treat aliens differently from citizens without a compelling justification," whereas "the federal government can treat aliens differently from citizens so long as the difference in treatment has a rational basis." *Soskin v. Reinertson*, 353 F.3d 1242, 1254 (10th Cir. 2004).

These three interrelated factors establish that *Windsor* cannot help Plaintiffs here. All three are absent when states regulate marriage under their own sovereign authority.

2. Texas's Marriage Laws Do Not Disparage or Demean Same-Sex Couples as DOMA §3 Did under *Windsor*

Although the *Windsor* majority found DOMA §3's primary purpose was to demean certain same-sex couples, *id.* at 2693, that holding does not translate to this litigation for the reasons identified in the prior section. Unlike DOMA §3 in *Windsor*, Texas's Marriage Laws fit within Texas's authority and is entirely "usual" as an exercise of that authority. Unlike Texas's Marriage Laws – which govern the marriage-related facts on the ground in Texas – DOMA §3 did not undo the fact of Ms. Windsor's New York marriage. Thus, unlike the "unusual" *Windsor* case, this "usual" case requires this Court to evaluate the rational bases for adopting Texas's Marriage Laws, which *Windsor* did not even consider: "cases cannot be read as foreclosing an argument that they never dealt with." *Waters v. Churchill*, 511 U.S. 661, 678 (1994). Only if Texas's Marriage Laws fail there, *see* Section I.B, *supra*, can Plaintiffs prevail.

3. Texas's Concern for *All* Texas Children in the Aggregate Is Rational and Suffices to Answer the *Windsor* Majority's Concern for Children Raised in Same-Sex Marriages

The *Windsor* majority also considered it relevant that DOMA §3 "humiliates tens of thousands of children now being raised" in state-authorized, same-sex

marriages. *Windsor*, 133 S.Ct. at 2694. The question of same-sex marriage affects not only the present (and future) children in same-sex marriages, but also *all future children.* If Texas and other states with similar marriage laws have permissibly concluded that reserving marriage for opposite-sex couples ensures future children's highest *aggregate* likelihood of optimal upbringings, the *Windsor* concern for thousands of children raised in same-sex marriages cannot trump Texas's and those states' concern for the best interests of the millions of children for whom the states seek optimized parenting and childrearing outcomes.[7]

Assuming *arguendo* that the *Windsor* opinion's concern for children living in homes headed by same-sex couples could qualify as part of the Court's holding on an elderly, childless couple's estate taxation, that holding would go to the arbitrariness of the federal government's rejecting an aspect of New York family law that the federal government had no authority to define, reject, or redefine for federal purposes. *See Windsor*, 133 S.Ct. at 2693-94. The same cannot be said of Texas because legislation – by an entity with the near-exclusive authority to legislate in this arena – necessarily involves choosing: "the drawing of lines that

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[7] While any negative impact on children of non-favored relationships is something that a state legislative process may consider in making a legislative judgment, that impact – like the impact on adults in non-favored relationships – is not a judicial concern, *provided that the state law permissibly favors marriage. See* Section I.B, *supra.* Simply put, any "foreseeable" or even "volitional" impact on the non-favored class does not qualify as a "[d]iscriminatory purpose" under the Equal Protection Clause. *Feeney*, 442 U.S. at 278-79.

create distinctions is peculiarly a legislative task and an unavoidable one." *Murgia*, 427 U.S. at 314. Assuming that it does not involve either fundamental rights or suspect classes, "[s]uch a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller*, 509 U.S. at 320. Here, Texas permissibly based its classification on optimizing aggregate parenting and childrearing outcomes.

Classifications do not violate Equal Protection simply because they are "not made with mathematical nicety or because in practice it results in some inequality." *Dandridge v. Williams*, 397 U.S. 471, 485 (1970). "Even if the classification involved here is to some extent both underinclusive and overinclusive, and hence the line drawn by [the legislature] imperfect, it is nevertheless the rule that in a case like this perfection is by no means required." *Vance v. Bradley*, 440 U.S. 93, 108 (1979) (interior quotations omitted); *Murgia*, 427 U.S. at 315-317 (rational-basis test does not require narrow tailoring). As the entity vested with authority over family relationships, Texas can make choices to ensure the best aggregate outcomes, without violating the Equal Protection Clause.

D. *Baker* Remains Controlling

In *Baker*, the Supreme Court considered and rejected the concept that the Fourteenth Amendment's Due Process and Equal Protection Clauses include a

federal right to same-sex marriage. The *Baker* plaintiffs sought the same rights and benefits that Minnesota conveyed to husband-wife marriage, and the Supreme Court dismissed the case for want of a substantial federal question. *Baker*, 409 U.S. at 810. That holding requires this Court to rule for Texas here.[8]

1. When Faced with Supreme Court Precedents Having Direct Application, Lower Courts Cannot Reject those Precedents Based on Novel or Even Related Legal Theories

Because it resolved *Baker* summarily and dismissed for want of a substantial federal question, the issues "presented and necessarily decided" in *Baker* are binding on both the District Court and this Court. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). Given that *Baker* remains on point for same-sex marriages, the lower federal courts have an obligation to follow that authority and leave it to the

[8] The District Court's invocation of the anti-miscegenation statutes struck down in *Loving v. Virginia*, 388 U.S. 1 (1967), is inapposite. *See* Slip Op. at 35. In *Loving*, the Supreme Court rightly rejected Virginia's claim that its miscegenation statute applied neutrally, treating whites and blacks equally. *Loving*, 388 U.S. at 8-9. That statute *did not* apply equally to whites and non-whites, had a race-based purpose, and indeed was held to be "designed to maintain White Supremacy." *Id.* at 11-12. Accordingly, the Court correctly applied heightened scrutiny. *Lawrence v. Texas*, 539 U.S. 558, 600 (2003) (Scalia, J., dissenting). By contrast, Texas's Marriage Laws do not discriminate on the basis of any protected status whatsoever. For example, discrimination based on sex means that "members of one sex are exposed to disadvantageous terms or conditions … to which members of the other sex are not exposed." *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 81 (1998). Here, Texas's Marriage Laws treat male and female same-sex couples the same, but treats those same-sex couples differently from opposite-sex couples. Even if that constituted differential treatment under the Equal Protection Clause, it would not be differential treatment *because of sex.*

Supreme Court to reverse *Baker:*

> "[I]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."

Agostini v. Felton, 521 U.S. 203, 237 (1997) (interior quotation omitted). Accordingly, "lower courts are bound by summary decision by [the Supreme] Court 'until such time as the Court informs [them] that [they] are not.'" *Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975) (*quoting Doe v. Hodgson*, 478 F.2d 537, 539 (2d Cir. 1973)). Of course, *Windsor* presented an obvious opportunity for the Supreme Court to have done so, if the Supreme Court believed that its *Windsor* reasoning applied to state marriage laws. The Court's failure to reject *Baker* speaks volumes and forecloses the conclusion that *Baker* is no longer controlling.[9]

2. No Doctrinal Developments Justify Departure from *Baker*, Especially on Plaintiffs' Due-Process Claims

The District Court makes two mistakes in rejecting *Baker* based on perceived doctrinal developments since 1972: "summary dispositions may lose their precedential value" and become "no longer binding 'when doctrinal

[9] The *Baker* jurisdictional statement plainly presented the question whether denying same-sex marriage violates the Constitution's equal-protection and due-process rights that Plaintiffs here assert. *Baker v. Nelson*, No. 71-1027, Jurisdictional Statement at 3 (Oct. Term 1972). Under *Mandel* and *Hicks* then, *Baker* necessarily decided that there is no basis under federal equal-protection or due-process analysis to support the claim that same-sex relationships deserve the same recognition, rights, or benefits as husband-wife marriage.

developments indicate otherwise.'" Slip Op. at 15-17 (*quoting Hicks*, 422 U.S. at 344). First, with respect to substantive due process, the District Court does not cite *any* pertinent doctrinal developments. *See* Section II, *infra* (marriage already was a fundamental right in 1972 when the Supreme Court summarily rejected same-sex marriage as *any* type of federal right). Second, nothing in *Lawrence*, *Romer*, or *Windsor* qualifies as a "doctrinal development" sufficient to undermine *Baker* and to authorize lower courts to ignore that controlling Supreme Court precedent.[10] Instead, judges "eager – *hungry*" –to join the bandwagon and "tell everyone [their] view of the legal question at the heart of this case," regardless of legal "obstacle[s]," *Windsor*, 133 S.Ct. at 2698 (Scalia, J., dissenting) (emphasis in original), misperceive these inapposite decisions as "doctrinal developments" that undermine *Baker*.

With respect to *Lawrence*, there is an obvious difference between criminalizing consensual and private adult behavior in *Lawrence* and requiring public and societal recognition, including monetary benefits, in *Baker*. In any event, *Lawrence* expressly disavows any suggestion of undermining *Baker:*

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[10] The Supreme Court cabined its doctrinal-development exception with the proviso "that the lower courts are bound by summary decisions by this Court until such time as the Court informs [them] that [they] are not." *Hicks*, 422 U.S. at 344-45 (interior quotations omitted, alteration in original). It is not clear, therefore, "doctrinal developments" justify a lower court's ignoring an on-point Supreme Court decision without the Supreme Court's first saying so.

> The present case … does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.

Lawrence, 539 U.S. at 578. As such, the suggestion that *Lawrence* undermines *Baker* cannot be squared with *Lawrence* itself, much less *Baker* and *Agostini.*

Similarly, *Romer* held Colorado's Amendment 2 to be unconstitutional for broadly limiting the *political* rights to seek or obtain various forms of government redress that homosexuals theretofore had shared with all citizens under the federal and state constitutions. *Romer*, 517 U.S. at 632-33. Guaranteeing universal political rights under *Romer* does not undermine allowing husband-wife definitions of marriage under *Baker*. Unlike the targeted and common definition of "marriage" at issue here, the *Romer* law was held to be sufficiently overbroad and unusual to allow the *Romer* majority to infer animus. *Romer*, 517 U.S. at 633. Texas's Marriage Laws do not present that situation.

Finally, the *Windsor* majority rejected what it perceived as an overbroad federal intrusion into an area of state dominance, with the resulting "discrimination" so unusual as to provide evidence of animus as the law's principal purpose. 133 S.Ct. at 2693-95. By contrast, here Texas acts within that primary area of dominance to enact a law that is hardly unusual. Indeed, as the Chief Justice explained, that state "power will come into play on the other side of the board in future cases about the constitutionality of state marriage definitions." *Id.*

at 2697 (Roberts, C.J., dissenting). Because none of the features relevant to the *Windsor* majority apply here, *see* Sections I.A.1-I.A.3, *supra*, *Windsor* does not undermine *Baker*.[11]

In summary, *Lawrence*, *Romer*, and *Windsor* did not undermine *Baker*. As such, *Baker* remains binding precedent that the District Court and this Court have an obligation to follow.

E. The Equal Protection Clause Ratified by the States Does Not Compel Same-Sex Marriage and a Court's Contrary Holding Would Impermissibly Amend the Constitution

As Texas explains, the District Court's extension of the Fourteenth Amendment amends the Constitution, without following the Constitution's procedural protections of the States and People. Texas Br. at 26-27. The *Windsor* majority carefully tied its rationale and limited its holding to state-recognized same-sex marriages that DOMA §3 declined to recognize for all federal purposes, notwithstanding that states hold the authority over family relationships. *Windsor*, 133 S.Ct. at 2691. That is entirely different from the question presented here: whether the Fourteenth Amendment *requires states* to recognize same-sex

[11] Justice Scalia's *Windsor* dissent on the ease of transferring the *Windsor* reasoning on DOMA to states' same-sex marriage laws was not (and, as a dissent, could not be) an invitation that lower courts make that leap, contrary to both otherwise-controlling precedent and limitations in the *Windsor* holding itself. Justice Scalia was clearly speaking to the *Supreme Court's* "sense of what it can get away with," not what the lower courts can get away with. *See Windsor*, 133 S.Ct. at 2709 (Scalia, J., dissenting). Lower courts lack the same legal flexibility.

marriages in the first place.

While the "power to interpret the Constitution … remains in the Judiciary," *City of Boerne v. Flores*, 521 U.S. 507, 524 (1997), the power to *amend* the Constitution remains with the states. U.S. CONST. art. V. The Constitution is not a blank check with which the federal judiciary can remake this Nation, wholly apart from the states' and the People's intent in ratifying the Constitution's generally worded provisions. The Supreme Court already has recognized the limits posed on using the Due Process Clause to legislate beyond "fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). The states' obvious intent in ratifying the Equal Protection Clause should limit the judiciary's hand in imposing judicial preferences under the guise of constitutional interpretations.

With statutes, the Supreme Court readily recognizes the judiciary's role as arbiter, not author, of our laws: "it is not this Court's function to sit as a super-legislature and create statutory distinctions where none were intended." *Securities Industry Ass'n v. Bd. of Governors of Fed'l Reserve Sys.*, 468 U.S. 137, 153 (1984) (interior quotations omitted). Similarly, in preemption cases, federal courts do not presume federal preemption of state authority "unless that was the *clear and manifest purpose* of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (emphasis added), "because respect for the States as independent

sovereigns in our federal system leads [federal courts] to assume that Congress does not cavalierly pre-empt [state law]." *Wyeth v. Levine*, 555 U.S. 555, 565 n.3 (2009) (internal quotations omitted). *Amici* respectfully submit that the same respect for the states – as well as respect for the People – requires restraint in interpreting the Constitution.

Sodomy was a criminal offense in the original thirteen states that ratified the Bill of Rights and all but five of the thirty-seven states that ratified the Fourteenth Amendment. *Bowers v. Hardwick*, 478 U.S. 186, 192-94 & nn.5-6 (1986), *rev'd on other grounds, Lawrence*, 539 U.S. at 558; *see also* 4 WILLIAM BLACKSTONE, COMMENTARIES *215. It is simply inconceivable that those states understood the Amendment to *require* the states to recognize same-sex marriage.

Given states' "virtually exclusive" authority over marriage, *Windsor*, 133 S.Ct. at 2691, as "a traditional area of state concern," *Moore v. Sims*, 442 U.S. 415, 435 (1979), *Amici* respectfully submit that courts should interpret the Constitution to allow states to retain their marriage definitions: "When the text … is susceptible of more than one plausible reading," federal courts "ordinarily accept the reading that disfavors" overturning the intent of those who enacted that text. *Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008) (interior quotations omitted). Nothing that the states or the People intentionally ratified mandates same-sex marriage.

II. SUBSTANTIVE DUE PROCESS DOES NOT PROVIDE A FUNDAMENTAL RIGHT TO SAME-SEX MARRIAGE

Same-sex marriage is not a fundamental right. Although husband-wife marriage is a fundamental right, *Turner v. Safley*, 482 U.S. 78, 95 (1987); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942), the federal Constitution has never required an unrestricted right to marry *anyone*.

Instead, the fundamental right recognized by the Supreme Court applies only to husband-wife marriages. *See* Texas Br. at 22-27. Indeed, the Supreme Court already has held that same-sex couples have *no right* to marry, much less a fundamental right do so. *Baker*, 409 U.S. at 810; Section I.D, *supra.* Since *Loving* was extant when the Supreme Court decided *Baker*, *Loving* obviously does not apply here, and nothing material has changed since 1972.

Given "[t]he tendency of a principle to expand itself to the limit of its logic," *Glucksberg*, 521 U.S. at 733 n.23 (interior quotations omitted), the Supreme Court has recognized that courts must tread cautiously when expounding substantive due-process rights outside the "fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition." *Id.* at 720-21. "[E]xtending constitutional protection to an asserted right or liberty interest" thus requires "the utmost care … lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the [federal judiciary]." *Id.* at 720. To qualify as "fundamental," a right must be both "deeply rooted in this Nation's

history and tradition" and "implicit in the concept of ordered liberty." *Id.* at 720-21. Even those who fervently believe that same-sex marriage meets the second prong must admit that it cannot meet the first. Leaving aside what the states that ratified the Fourteenth Amendment believed *in the 1860s,* same-sex marriage (which *Baker* easily rejected in 1972) is not "deeply rooted" *today.*

Although elevated scrutiny does not apply, *Amici* respectfully submit that Texas's Marriage Laws readily meet it. Altering something "fundamental to our very existence and survival," *Loving,* 388 U.S. at 12, implicates the most compelling governmental interests. Texas has every right to resist radical change to the social fabric. Even under elevated scrutiny, this Court should decline Plaintiffs' invitation to impose their brave new world on Texas.

CONCLUSION

This Court should direct entry of judgment for Texas.

Dated: August 4, 2014

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CERTIFICATE OF COMPLIANCE

1. The foregoing complies with FED. R. APP. P. 32(a)(7)(B)'s type-volume limitation because the brief contains 7,000 words excluding the parts of the brief that FED. R. APP. P. 32(a)(7)(B)(iii) exempts.

2. The foregoing complies with FED. R. APP. P. 32(a)(5)'s type-face requirements and FED. R. APP. P. 32(a)(6)'s type style requirements because the brief has been prepared in a proportionally spaced type-face using Microsoft Word 2010 in Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that, on August 4, 2014, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Sixth Circuit by using the Appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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