No. 14-124

In the Supreme Court of the United States

GARY R. HERBERT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF UTAH, AND SEAN D. REYES, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF UTAH,

Petitioners,

v.

DEREK KITCHEN, MOUDI SBEITY, KAREN ARCHER, KATE CALL, LAURIE WOOD, AND KODY PARTRIDGE, INDIVIDUALLY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF *AMICUS CURIAE* OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND, INC., IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Fourteenth Amendment to the United States Constitution prohibits a state from defining or recognizing marriage only as the legal union between a man and a woman.

TABLE OF CONTENTS

Pages

TABLE OF AUTHORITIES

Pages

Cases

Statutes

Legislative History

Rules, Regulations and Orders

Other Authorities

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Eagle Forum Education & Legal Defense Fund, Inc. ("Eagle Forum")[1] is a nonprofit corporation headquartered in Saint Louis, Missouri. Since its founding, Eagle Forum has consistently

[1] *Amicus* files this brief with consent by all parties, with 10 days' prior written notice; the parties have lodged blanket letters of consent with the Clerk. Pursuant to Rule 37.6, counsel for *amicus* authored this brief in whole, no party's counsel authored this brief in whole or in part, and no person or entity – other than *amicus* and its counsel – contributed monetarily to preparing or submitting the brief.

defended traditional American values, including traditional marriage, defined as the union of husband and wife. Eagle Forum participated as *amicus curiae* in the Tenth Circuit in this litigation, as well as in other related appellate proceedings on same-sex marriage both in this Court and in the Courts of Appeals. For all the foregoing reasons, Eagle Forum has a direct and vital interest in the issues before this Court.

STATEMENT OF THE CASE

Three same-sex couples (collectively, "Plaintiffs") seek to invalidate Utah's constitutional definition of marriage as "consist[ing] only of the legal union between a man and a woman," UTAH LAWS 2004, H.J.R. 25 §1(1) (hereinafter, "Amendment 3"), and to compel state and local officials (collectively, "Utah") to recognize same-sex marriage. The District Court granted Plaintiffs' motion for summary judgment, and the Tenth Circuit affirmed.

Forty-two years ago, in *Baker v. Nelson,* 409 U.S. 810 (1972), the Supreme Court faced essentially the same questions presented here: 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), this Court held that the federal husband-wife definition of marriage, 1 U.S.C. §7, from the Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) ("DOMA") violates the Constitution. In the

four-decade interval between *Baker* and *Windsor,* federal appeals courts routinely cited *Baker* to dismiss claims seeking to establish a right to same-sex marriage under the Fourteenth Amendment.[2] The question is whether *Windsor* changes the result.

STATEMENT OF FACTS

Plaintiffs are Utah residents in same-sex relationships. Two Plaintiff couples seek to compel Utah to allow them to marry in Utah. The third Plaintiff couple married in Iowa and seeks to compel Utah to recognize their Iowa relationship. Plaintiffs have not introduced evidence sufficient to negative the theoretical connections between husband-wife marriage and responsible procreation and childrearing.

SUMMARY OF ARGUMENT

In finding a fundamental right to same-sex marriage, the Tenth Circuit erred not only by rejecting *Baker* but also by expanding the fundamental marriage right without following the analysis required by *Washington v. Glucksberg,* 521 U.S. 702, 720-21 (1997). Under that analysis, same-sex marriage is not "deeply rooted in this Nation's history and tradition" and thus not a right (Section I.A). Instead, the rational-basis test applies, and Utah's preference for husband-wife marriage satisfies that test because Plaintiffs have not met their burden of producing evidence (which cannot yet and may never exist) to negative the *theoretical*

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[2] *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).

connection between biological mother-father families and improved parenting and childrearing outcomes (Section I.B). In any event, *Baker* is controlling, and the lower federal courts have an obligation to follow it, "leaving to this Court the prerogative of overruling its own decisions." *Agostini v. Felton,* 521 U.S. 203, 237 (1997) (interior quotations omitted).

In addition, marriage and family law are areas of near-exclusive state concern, into which federal courts have no basis to intrude. Given the rationality of Utah's optimizing outcomes for families and children *in aggregate,* the rational-basis test does not require Utah to optimize results for all families and children (Section II.A). Finally, federal intrusion by the lower courts into this area of state concern has created profound uncertainty, such that same-sex couples believe themselves to be married, based on lower-court orders and marriage licenses contrary to state law that cannot bind future state-court outcomes in matters such as probate and divorce (Section II.B).

ARGUMENT

I. THE TENTH CIRCUIT'S FINDNG OF A FUNDAMENTAL RIGHT TO SAME-SEX MARRIAGE TRAMPLES THIS COURT'S LIMITATIONS ON SUBSTANTIVE DUE-PROCESS ANALYSIS IN *GLUCKSBERG* AND REQUIRES THIS COURT'S REVIEW

Although the Tenth Circuit's decision warrants this Court's review for splitting with other federal circuits on the important matter of states' authority to set their own marriage laws, *see* S.Ct. Rule 10(a); note 2, *supra* (citing cases), the Tenth Circuit also

deviated from the *Glucksberg* protections against judicial usurpation of the law-making function. While the circuit split would suffice to warrant this Court's review, the deviation from *Glucksberg* is a more central and more important issue, both for federalism and for the separation of powers.

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. Because 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, this Court in 1997 set limits on the judiciary's ability to adopt new rights via substantive due process. *Glucksberg,* 521 U.S. at 720-21. The states' obvious intent in ratifying the Fourteenth Amendment should limit the judiciary's hand in imposing judicial preferences under the guise of constitutional interpretations. Indeed, as the this Court recently recognized, it is profoundly undemocratic for courts and plaintiffs to wrest control of important policy decisions from the People and their elected representatives: "Our constitutional system embraces ... the right of citizens to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course of their own times." *Schuette v. Coalition to Defend Affirmative Action,* 134 S.Ct. 1623, 1636-37 (2014). In the Tenth Circuit, the rights taken from the People were more significant than the rights conferred on the Plaintiffs.

A. *Glucksberg* Precludes Inventing New Substantive Due-Process Rights Not "Deeply Rooted in this Nation's History and Tradition"

Contrary to the Tenth Circuit's holding, same-sex marriage is not a fundamental right under the Due Process Clause. Although *husband-wife marriage* unquestionably is a fundamental right, *Turner v. Safley,* 482 U.S. 78, 95 (1987) ("decision to marry is a fundamental right"); *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535, 541 (1942) ("Marriage and procreation are fundamental"), the federal Constitution has never recognized the unrestricted right to marry *anyone.*

Instead, the fundamental right recognized by this Court applies only to marriages between one man and one woman: "Marriage is one of the basic civil rights of man, fundamental to our very existence and survival." *Loving v. Virginia,* 388 U.S. 1, 12 (1967). Unlike opposite-sex marriage, same-sex relationships are not fundamental to the existence and survival of the human race. Indeed, this 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. Since *Loving* was extant in 1972 when this Court decided *Baker, Loving* obviously does not relate to this litigation. In that respect, nothing has changed materially since 1972.

The Tenth Circuit misread this Court's *Windsor* and *Lawrence v. Texas,* 539 U.S. 558 (2003), decisions as authorizing departure from *Glucksberg* with respect to finding a fundamental right to same-sex marriage. As explained in the second and third

subsections below, however, neither decision allowed the Tenth Circuit to decline to follow *Glucksberg* (much less *Baker*) in identifying a new substantive right to same-sex marriage. *See also Agostini,* 521 U.S. at 237. But the Tenth Circuit also misread an amalgamation of pre-*Glucksberg* husband-wife marriage decisions as providing a generic right to marry anyone, including someone of the same sex. That error requires this Court's special attention and special rejection.

1. ***Glucksberg* Prospectively Narrowed the Pre-*Glucksberg* Marriage Authorities that the Tenth Circuit Cites Out of Context**

This Court's 1997 decision in *Glucksberg* finally reined in the judicial use of substantive due process to create new rights. The same-sex marriage cases now pending provide the Court the opportunity to clarify that federal courts cannot – prospectively – rely on generally worded constitutional provisions to create due-process rights foreign to the states that ratified those provisions.

Specifically, due to "[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), this Court recognized that federal 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. Before "extending constitutional protection to an asserted right or liberty interest," courts must use "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. Accordingly, 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" (*i.e.,* "neither liberty nor justice would exist if [the right] were sacrificed"). *Id.* at 720-21. Even those who fervently believe that same-sex marriage meets that test's second prong must admit that same-sex marriage cannot meet the first. Leaving aside what the Founders had in mind *in 1787* or what the states that ratified the Fourteenth Amendment had in mind *in the 1860s,* same-sex marriage (which this Court easily rejected in 1972) is not "deeply rooted" even *today*.

The application of that principle here directly undermines the Tenth Circuit's reliance on snippets from this Court's prior marriage decisions, taken out of context, to create a free-floating right to marry. While *Glucksberg* did not require courts to revisit rights previously created, the *Glucksberg* analysis nonetheless applies prospectively to limit *expansions* of those rights previously recognized and to require "the utmost care … lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the [federal judiciary]." *Glucksberg,* 521 U.S. at 720. Unless the expansion of prior rights is both "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty," *id.* at 720-21, *Glucksberg* precludes the expansion of that right by judicial action, particularly at the expense of limiting the states' reserved police-power and Tenth Amendment rights.

The limitations in *Glucksberg* on courts' creating new due-process rights resembles the limitations in *Cannon v. University of Chicago,* 441 U.S. 677, 689 (1979), on courts' reading implied rights of action into statutes.[3] In both situations, the limitation applies *prospectively,* even in areas in which courts previously have acted: "Having sworn off the habit of venturing beyond Congress's intent, we will not accept [the] invitation to have one last drink." *Alexander v. Sandoval,* 532 U.S. 275, 287 (2001) (declining to expand an existing implied right of action after having prospectively restricted implied-rights analysis in *Cannon*). Similarly here, courts cannot expand marriage rights under substantive due process without satisfying *Glucksberg*.

2. *Lawrence* Did Not Overturn *Baker*

Although this Court has never undermined *Baker* sufficiently for the lower courts to reject its holding, the Tenth Circuit found that *Lawrence* and *Windsor* render *Baker* non-controlling. *Lawrence* expressly disavows that result:

> 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*.

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[3] The limitation is more pressing here than with implied rights of action: If Congress disagrees with this Court's view of a statute, it is markedly easier for Congress to amend its own statute than it is for Congress and the states to amend the Constitution.

Moreover, 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*.[4]

3. ***Windsor*** **Did Not Overturn** ***Baker***

Because *Windsor* neither followed nor overruled the rational-basis analysis described in Section I.B, *infra,* the impact of *Windsor* here is unclear from the face of the majority decision. As explained in this section, *Windsor* can only be understood 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 the federal government lacked any authority to reject. As the Chief Justice signaled in his dissent, moreover, 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 Amendment 3. *See 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.

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[4] Similarly, the *Romer* majority found Colorado's Amendment 2 unconstitutional for broadly limiting the *political* rights to petition government that homosexuals – *as individuals* – theretofore had shared with all citizens under the federal and state constitutions. *Romer v. Evans,* 517 U.S. 620, 632-33 (1996). Guaranteeing universal political rights under *Romer* in no way undermines allowing husband-wife definitions of marriage under *Baker*.

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

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 pose thorny merits issues – even issues that might trigger elevated scrutiny if proved – courts sometimes can sidestep the difficult equal-protection merits by rejecting a law's underlying distinctions as wholly

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[5] Assuming *arguendo* there are no fundamental rights or protected classes at issue, substantive due process collapses into essentially the same question that arises under the equal-protection analysis: "'substantive' due process requires only that termination of that interest not be arbitrary, capricious, or without a rational basis." *Curtis v. Oklahoma City Pub. Schs. Bd. of Educ.,* 147 F.3d 1200, 1215 (10th Cir. 1998) (internal quotation and brackets omitted).

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 the as-applied, race-based 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.

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. Typically, a rational basis would excuse even a discriminatory purpose; in *Windsor,* the majority found only the purpose "to injure the very class New York seeks to protect," based on the perceived "unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage." *Windsor,* 133 S.Ct. at 2693. Under 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 made DOMA's *federal* action unusual. *Id.* Because Amendment 3 is entirely "usual" and falls within the "virtually exclusive province of the States." *Id.* at 2691 (interior quotations omitted), *Windsor* has no bearing here.

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

B. When Properly Viewed under the Rational-Basis Test, Plaintiffs' Claims Fail for Lack of Evidentiary Support

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 Utah's preference that the two biological parents raise Utah children in a family.[6]

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[6] 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) (*quoting Royster Guano Co. v. Virginia,* 253 U.S. 412, 415

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). 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 v. Hahn,* 505 U.S. 1, 11-12 (1992) (citations omitted, emphasis added). Under the 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). Amendment 3 easily meets this test.

With respect to husband-wife marriage, it is enough, for example, that Utah "rationally may have … considered [it] to be true" that marriage has

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(1920)). 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).

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 v. Sec'y of Dept. of Children & Family Services,* 358 F.3d 804, 818-20 (11th Cir. 2004). 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."). Further, "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *F.C.C. v. Beach Communications, Inc.,* 508 U.S. 307, 315 (1993). 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 *negative* 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:

> 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.

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. While Eagle Forum submits that Plaintiffs *never* will be able to negative 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.

II. THE LOWER COURTS' DECISIONS INTRUDE INTO AREAS OF EXCLUSIVE STATE CONCERN AND CREATE UNCERTAINTY THAT THIS COURT SHOULD RESOLVE

As explained in Section I.A, *supra,* the lower federal courts' decisions fail to recognize this Court's limits on judicially created rights. In addition, in our

federalist system, the lower courts' decisions tread on areas of near-exclusive state concern, which this Court should also restrain. What is worse, in doing so, the lower federal courts have created uncertainty that the states and their citizens will need to address and mitigate. To limit the damage to the states and their citizens and to resolve the issue of federal over-reach, this Court should grant the writ and reach the constitutional merits.

A. Amendment 3 Governs an Area of Exclusive State Concern

The lower courts' decisions insert the federal government into areas of dominant state concern:

> 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.

In re Burrus, 136 U.S. 586, 593-94 (1890); *see also Ankenbrandt v. Richards,* 504 U.S. 689, 703 (1992) ("the domestic relations exception … divests the federal courts of power to issue divorce, alimony, and child custody decrees"). In general, "[t]he State … has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created." *Pennoyer v. Neff,* 95 U.S. 714, 734-35 (1877) (*dicta*). Only when "family and family-property law … do major damage to clear and substantial federal interests" will "the Supremacy Clause … 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. at 2675 (*citing Hillman*).[7] Because Amendment 3 does not "do major damage to clear and substantial federal interests," this Court should reject the lower courts' intrusion into matters of state concern.

1. Amendment 3 Does Not Disparage or Demean Same-Sex Couples

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. Unlike DOMA §3 in *Windsor,* Amendment 3 fits within Utah's authority and is entirely "usual" as an exercise of that authority. Unlike Amendment 3 – which governs the marriage-related facts on the ground in Utah – DOMA §3 did not undo the fact of Ms. Windsor's New York marriage. Thus, unlike the "unusual" *Windsor* case, this "usual" case requires the Court to evaluate Utah's proffered rational bases for adopting Amendment 3, 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 Amendment 3 fails there, *see* Section I.B, *supra,* can Plaintiffs prevail.

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[7] Indeed, even if *Windsor* applied heightened scrutiny, that would not require heightened scrutiny here. 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).

2. Utah's Concern for Children *in Aggregate* Answers the 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" nationally in state-authorized, same-sex marriages. *Windsor,* 133 S.Ct. at 2694. As Utah argued below, however, the question of same-sex marriage affects not only the present (and future) children in same-sex marriages, but also *all future children.* Pet. at 24-27. If Utah and other states with similar marriage laws have permissibly concluded that reserving marriage for opposite-sex couples ensures the highest *aggregate* likelihood of optimal upbringings for future children, the *Windsor* concern for thousands of children being raised in same-sex marriages cannot trump Utah's and those states' concern for the best interests of the millions of children for whom they seek to optimize parenting and childrearing outcomes.[8]

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

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[8] 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 non-favored classes does not qualify as a "[d]iscriminatory purpose" under the Equal Protection Clause. *Pers. Adm'r v. Feeney,* 442 U.S. 256, 278-79 (1979).

holding on a 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 Utah because legislation – by an entity with the near-exclusive authority to legislate in this arena – necessarily involves choosing: "the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one." *Massachusetts Bd. of Retirement v. Murgia,* 427 U.S. 307, 314 (1976). 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 v. Doe,* 509 U.S. 312, 320 (1993). Here, Utah 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 in Utah, that state can make choices to ensure the best aggregate outcomes, without violating the Equal Protection Clause.

3. Imposing Same-Sex Marriage on the States Would Change Family Law Profoundly without Justification under the Fourteenth Amendment

States have developed family law to seek – as imperfectly as they can – the best interests of both society and family members. The imposition of same-sex marriage on the states under the Fourteenth Amendment would not only change but also federalize large parts of family law, with profound effects beyond merely who can marry.

To take one example, state family law commonly presumes that a husband is the father of children born during his marriage. UTAH CODE ANN. §78B-15-204(1)(a). Although such presumptions often are plausible even when not true, society has fashioned them to maximize children's chances of being raised in a nuclear family.

Same-sex marriage wrests these presumptions from their moorings. For example, the California appellate courts could not resolve the dueling presumptions between a presumed (and biological) father versus a female presumed-parent (and divorcing spouse who lived with the child for only three weeks), after the biological mother was imprisoned for attempting to murder the allegedly abusive same-sex spouse. *In re M.C.,* 195 Cal.App.4th 197, 222-23 (Cal. Ct. App. 2011); *see generally* Nancy D. Polikoff, *And Baby Makes … How*

Many? Using In re M.C. *To Consider Parentage of a Child Conceived Through Sexual Intercourse and Born to a Lesbian Couple,* 100 GEO. L.J. 2015 (2012). If nothing else, *M.C.* demonstrates the folly of a judicial Fourteenth-Amendment blanket assessment of the best interests of thousands of non-party children who have a biological parent in a same-sex relationship. Pushing M.C. closer to his biological mother's same-sex spouse pulled him away from his biological father to an equal, but opposite, degree. Since this nation's founding, state courts and authorities have determined these children's best interests on an individualized based, but Plaintiffs propose to federalize these issues under the Fourteenth Amendment.[9]

In response to *M.C.,* California amended its presumed-parent statute last year: "Most children have two parents, but in rare cases, children have more than two people who are that child's parent in every way," 2013 CAL. STAT. 564, §(1)(a), thereby expressly abrogating the *M.C.* decision. *Id.* §1(b). The same-sex marriage cases – and, if they succeed, their aftermath – threaten to federalize vast areas of law heretofore almost exclusively the purview of the

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[9] The presumed-parent issue is not the only one in which same-sex marriages will have profound effects state family law. *See, e.g., In re Marriage of J.B. and H.B.,* 326 S.W.3d 654, 670 (Tex. Ct. App. 2010) (denying state-court jurisdiction for same-sex divorce proceedings in state that does not recognize same-sex marriage), *petition for review granted,* 2013 Tex. LEXIS 608 (Tex. Aug. 23, 2013); *Kern v. Taney,* 11 Pa. D.&C 5th 558, 576 (Pa. Com. Pl. 2010) (same); *Miller-Jenkins v. Miller-Jenkins,* 180 Vt. 441, 459 (Vt. 2006) (custody dispute between biological mother and former same-sex partner to a civil union).

states.[10] States that voluntarily adopt same-sex marriage agree to struggle through these revisions to the very fabric of society, with the attendant implications for all involved (*e.g.,* the children, siblings, fathers outside female same-sex marriages, and grandparents). This Court should neither federalize these issues nor thrust them on states that do not adopt them voluntarily.

B. The Lower Courts' Decisions Create Uncertainty that Require this Court's Expeditious Resolution

Although it is critical to our federalist system that this Court rein in the lower federal courts by re-emphasizing the *Glucksberg* limits on judicially created rights, this Court's expeditious review is also required to clear up the uncertainty that the lower federal courts have created about marriage: "If there is one thing that the people are entitled to expect from their lawmakers, it is rules of law that will enable individuals to tell whether they are married and, if so, to whom." *Estin v. Estin,* 334 U.S. 541, 553 (1948) (Jackson, J., dissenting). Same-sex couples in various states – including Utah – have obtained marriage licenses and gone through with marriage ceremonies based only on lower federal courts' orders. If this Court ultimately decides that the Fourteenth Amendment allows state laws like Utah's

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[10] The recent case of *Adoptive Couple v. Baby Girl,* 133 S.Ct. 2552, 2556-57 (2013) (basing custody determination on "certain provisions of the federal Indian Child Welfare Act of 1978"), is not a genuine exception because it involved the construction of federal statutes concerning Indian tribes, over which Congress has constitutional authority. U.S. CONST. art. I, §8, cl. 3.

Amendment 3, those premature same-sex marriages may well fail Justice Jackson's test for sound lawmaking. This lingering uncertainty counsels for this Court's expeditious review.

First, with specific respect to Utah, marriage licenses were issued in the immediate aftermath of the district court's decision, *Kitchen v. Herbert,* 2013 U.S. Dist. LEXIS 180087, *3, 2013 WL 6834634 (D. Utah Dec. 23, 2013), until this Court subsequently issued its stays, *Herbert v. Kitchen,* 134 S.Ct. 893 (2014); *Herbert v. Evans,* 83 U.S.L.W. 3073 (2014), which the Tenth Circuit extended. Pet. App. 75a-76a. *Amicus* Eagle Forum respectfully submits that the uncertainty created by the lower federal courts compels this Court to resolve the merits question presented here expeditiously.

Second, without this Court's resolving the federal constitutional merits, thousands of same-sex couples will face unprecedented uncertainty over their legal status. While that uncertainty could remain throughout these couples' lives, it will complicate probate proceedings significantly if any of them dies intestate. For example, if a California same-sex couple who married after this Court declined review in the *Perry* litigation[11] has a sufficiently large estate and a sufficiently divided family, family members who would recover by intestate succession could challenge the marriage's validity in probate court: a "marriage *prohibited as … illegal and declared to be*

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[11] *Perry v. Schwarzenegger,* 704 F.Supp.2d 921 (N.D. Cal. 2010), *aff'd on other grounds sub nom. Perry v. Brown,* 671 F.3d 1052 (9th Cir. 2012), *appeal dismissed for lack of jurisdiction sub nom. Hollingsworth v. Perry,* 133 S.Ct. 2652 (2013).

'void' or 'void from the beginning' is a legal nullity, and its invalidity may be asserted or shown in any proceeding in which the fact of marriage may be material." *In re Gregorson's Estate,* 160 Cal. 21, 26 (Cal. 1911). *Perry* does not purport to enjoin the California judiciary in future state-law cases, nor could it credibly do so.

These future reviewing state courts will need to apply their state constitutions under their state supreme courts' precedents, without any gloss from the lower federal courts. In the case of California, the mere district-court decision in *Perry* cannot control those future state-court proceedings. CAL. CONST. art. III, §3.5 (appellate decision required to invalidate California statutes on constitutional grounds); *American Elec. Power Co., Inc. v. Connecticut,* 131 S.Ct. 2527, 2540 (2011) ("federal district judges … lack authority to render precedential decisions binding other judges, even members of the same court"). Under the California Supreme Court's precedents, same-sex marriages performed in violation of California law are void, *Lockyer v. City & County of San Francisco,* 33 Cal.4th 1055, 1114 (Cal. 2004), and California's husband-wife definition of marriage is valid. *Strauss v. Horton,* 46 Cal.4th 364 (Cal. 2009). As a result, all post-*Perry* same-sex California marriages are void, unless this Court finds California's constitutional definition of marriage to violate the Fourteenth Amendment.

Until this Court resolves the merits here, the same legal dynamic will play out in several states, not only where executive-branch state defendants

decline to appeal federal district-court orders but also where federal lower-court judgments against executive officers do not bind state probate courts. For that reason, *amicus* Eagle Forum respectfully submits that this Court's review is required.

CONCLUSION

The Court should grant the petition for a writ of *certiorari.*

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