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 Courts of Appeals for the Tenth Circuit

BRIEF OF *AMICUS CURIAE* FOUNDATION FOR MORAL LAW IN SUPPORT OF PETITIONERS URGING THAT A WRIT OF CERTIORARI BE GRANTED

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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.

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STATEMENT OF IDENTITY AND INTERESTS OF *AMICUS CURIAE* [1]

Amicus Curiae Foundation for Moral Law (the Foundation), is a national public-interest organization based in Montgomery, Alabama, dedicated to defending the unalienable right to acknowledge God as the moral foundation of our laws; promoting a return to the historic and original interpretation of the United States Constitution; and educating citizens and government officials about the meaning and foundational principles of the Constitution.

The Foundation has an interest in this case because it believes that this nation's laws should reflect the moral basis upon which the nation was founded, and that the ancient roots of the common law, the pronouncements of the legal philosophers from whom this nation's Founders derived their view of law, the views of the Founders themselves, and the views of the American people as a whole from the beginning of American history at least until very recently, have held that homosexual conduct is immoral and should not be sanctioned by giving it the official state sanction of marriage.

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[1] Pursuant to this Court's rule 37.3, all parties have consented to the filing of this *amicus* brief. Further, pursuant to Rule 37.6, these *amici curiae* state that no counsel for any party authored this brief in whole or in part, and no party and no counsel for a party made any monetary contribution intended to fund the preparation or submission of this brief. No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person other than the *amicus curiae*, its members, or its counsel, contributed money that was intended to fund preparing or submitting this brief.

The Foundation is interested in this case because a similar lawsuit has been filed challenging Alabama's Sanctity of Marriage Amendment, which was approved by Alabama voters 81%-19% in 2006. David Fancher, an Alabama resident who was in a same-sex relationship with Paul Hard, died in an vehicle accident August 1, 2011. Hard has sued the State of Alabama, arguing that Alabama's Sanctity of Marriage Amendment is unconstitutional and that he is therefore the lawful spouse of David Fancher and is entitled to one-half of Fancher's estate. The mother of David Fancher does not want her son's name used to advance the cause of same-sex marriage, and she has retained the Foundation for Moral Law to represent her interests. The federal district court has granted her motion to intervene, and the decision of this Court concerning the Utah case will very likely affect the outcome of our Alabama case. *See Hard v. Bentley*, Civ. Action No. 2-13-cv-00922-WKW-SRW (2013).

SUMMARY OF ARGUMENT

As Chief Justice John Marshall wrote for this Court in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819), "We must never forget, that it is a constitution we are expounding."

The decision of the District Court below and that of the Tenth Circuit U.S. Court of Appeals, were based upon speculative thinking and upon highly selective case precedents, rather than upon the Constitution itself. *Amicus* urges this Court to apply the first principles in this case and to embrace the plain and original text of the Constitution, the supreme law of the land. U.S. Const. art. VI.

The lower court decisions also rest upon a misinterpretation of this Court's ruling in *United*

States v. Windsor, 123 S. Ct. 2675 (2013). In that case, this Court struck down several provisions of the federal Defense of Marriage Act (DOMA), declaring that "[t]he 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." *Windsor*, 2691 (quoting *In re Burris*, 136 U.S. 586, 593-94). The supreme irony of this case is that the opponents of Utah's marriage law are now using this very decision (*Windsor*) to persuade the federal courts to strike down Utah's marriage laws and force the State of Utah to adopt a marriage policy favored by the federal courts. If *Windsor* is to have any status in its own right as an exposition of constitutional law rather than merely a milestone on the journey toward forcing same-sex marriage upon all fifty states, this Court should grant certiorari in this case and explain the true meaning of *Windsor*.

This Court can uphold the marriage laws of Utah and other states without contradicting its ruling in *Windsor*. This Court can recognize what Justice Kennedy in *Lawrence v. Texas*, called "choices central to personal dignity and autonomy" and "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." *Lawrence* at 574, quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992), and at the same time recognize that this right is does not require strict or intermediate scrutiny. This Court could conclude that there is, as Justice Blackmun said in his *Bowers v. Hardwick*, 478 U.S. 186 (1986), dissent, "the right to be let alone," at 199, but that this general right to be let alone does not merit strict or intermediate scrutiny except for a few narrow areas of activity. *Lawrence* indeed decriminalized homosexual conduct, but decriminalizing it is a far cry from

sanctioning same-sex relationships by giving them the honored status of marriage.

This Court should be most reluctant to give heightened scrutiny to the right to same-sex conduct, and even more the right to same-sex because that right would have been unthinkable to the overwhelming majority of Americans, as well as to most legal scholars and other professionals, only a few decades ago, and the public and the professionals are still sharply divided on this issue today. Some believe constitutional interpretation should reflect changing social mores. But if so, the change in social mores should come from the people and work its way upward through the local, state, and federals of government through the elected representatives of the people. Such changes should not be imposed from the top down by the federal judiciary, especially in the absence of a clear constitutional provision.

ARGUMENT

I. THE CONSTITUTIONALITY OF UTAH'S MARRIAGE LAWS SHOULD BE DETERMINED BY THE TEXT OF THE CONSTITUTION, THE SUPREME LAW OF THE LAND.

Few if any current issues are as fraught with emotion, as well as with sincere religious and moral conviction, as homosexuality and same-sex marriage. The American people, state and local governmental entities, and state and federal courts are confused and conflicted as to what they should do and what the Constitution allows or requires them to do.

It is therefore vitally important that this Court grant this petition for writ of certiorari to clarify the

confusion and to ensure that judicial pronouncements reflect the Constitution rather than emotion or ideological positions.

The Constitution itself and all federal laws pursuant thereto are the "supreme Law of the Land." U.S. Const. art. VI. All judges take their oaths of office to support *the Constitution* itself—not a person, office, government body, or judicial opinion. *Id*. The Constitution and the solemn oath thereto should control, above all other competing powers and influences, the decisions of federal courts.

As Chief Justice John Marshall observed, the very purpose of a *written* constitution is to ensure that government officials, including judges, do not depart from the document's fundamental principles. "[I]t is apparent that the framers of the constitution contemplated that instrument, as a rule of government of *courts* . . . Why otherwise does it direct the judges to take an oath to support it?" *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 179-80 (1803).

James Madison insisted that "[a]s a guide in expounding and applying the provisions of the Constitution . . . the legitimate meanings of the Instrument must be derived from the text itself." J. Madison, Letter to Thomas Ritchie, September 15, 1821, in 3 *Letters and Other Writings of James Madison* 228 (Philip R. Fendall, ed., 1865). "The object of construction, applied to a constitution, is to give effect to the intent of its framers, and of the people in adopting it. This intent is to be found in the instrument itself." *Lake County v. Rollins*, 130 U.S. 662, 670 (1889). A textual reading of the Constitution, according to Madison, requires "resorting to the sense in which the Constitution was accepted and ratified by the nation" because "[i]n that sense alone it is the

legitimate Constitution." J. Madison, Letter to Henry Lee (June 25, 1824), *in Selections from the Private Correspondence of James Madison from 1813-1836*, at 52 (J.C. McGuire ed., 1853).

> As men whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said.

Gibbons v. Ogden, 22 U.S. 1, 188 (1824). The words of the Constitution are neither suggestive nor superfluous: "In expounding the Constitution . . . every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added." *Holmes v. Jennison*, 39 U.S. (14 Peters) 540, 570-71 (1840).

This Court affirmed this approach in *South Carolina v. United States*, 199 U.S. 437, 448 (1905), declaring that "The Constitution is a written instrument. As such, its meaning does not alter. That which it meant when it was adopted, it means now." This Court reaffirmed this approach in *District of Columbia v. Heller*, 554 U.S.570, 128 S. Ct. 2783, 2788 (2008):

> [W]e are guided by the principle that "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." *United States v. Sprague*, 282 U.S. 716, 731 (1931); *see also Gibbons v. Ogden*, 9 Wheat. 1, 188 (1824).

The meaning of the Constitution is not the province of only the most recent or most clever judges and lawyers: "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them." *Heller*, 128 S. Ct. at 2821.

Moreover, if the Constitution as written is not a fixed legal standard, then it is no constitution at all. By adhering to court-created tests rather than the legal text, federal judges turn constitutional decision-making on its head, abandon their duty to decide cases "agreeably to the constitution," and instead mechanically decide cases agreeably to judicial precedent. *See also*, U.S. Const. art. VI. James Madison observed in *Federalist No. 62* that

> [i]t will be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes, that no man who knows what the law is today, can guess what it will be tomorrow.

The Federalist No. 62 (James Madison), at 323-24 (George W. Carey & James McClellan eds., 2001). "What distinguishes the rule of law from the dictatorship of a shifting Supreme Court majority is the absolutely indispensable requirement that judicial opinions be grounded in consistently applied principle." *McCreary County, Ky. v. ACLU of Kentucky*, 545 U.S. 844, 890-91 (2005) (Scalia, J., dissenting). The constitutional text should be the basis for the judicial analysis in this and all other cases.

This Court should grant petitioners' petition for a writ of certiorari to ensure that court rulings in this vital and controversial issue are decided according to the Constitution rather than according to emotion or individual ideological preferences.

II. THE UTAH CONSTITUTION, ARTICLE III, AND UTAH CODE PROVISIONS DO NOT VIOLATE THE PRIVILEGES AND IMMUNITIES CLAUSE, THE DUE PROCESS CLAUSE, OR THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT, AS INTERPRETED BY THIS COURT IN *LAWRENCE V. TEXAS* AND *UNITED STATES V. WINDSOR*.

This Court had previously held in *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885):

> Certainly no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take rank as one of the co-ordinate States of the Union, than that which seeks to establish it on *the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy state of matrimony*; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement. (emphasis added)

In *United States v. Windsor*, 133 S.Ct. 2675 (2013), this Court struck down several provisions of the federal Defense of Marriage Act (DOMA), declaring

that "[t]he 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." *Windsor*, 2691 (quoting *In re Burris*, 136 U.S. 586, 593-94).

The supreme irony of this case is that the opponents of Utah's marriage law are now using this very decision (*Windsor*) to persuade the federal courts to strike down Utah's marriage laws and force the State of Utah to adopt a marriage policy favored by some federal courts. If *Windsor* is to have any status at all in its own right as a constitutional decision rather than merely another milestone on the journey toward forcing same-sex marriage upon all fifty states, this Court should grant certiorari in this case and explain the true meaning of *Windsor*.

This Court can uphold the marriage laws of Utah and other states without overruling or modifying its decision in *Windsor*. This Court can do so by simply ruling that the regulation of marriage is a matter traditionally left to the states, that the states' same-sex marriage policies require only rational-basis analysis, and that Utah has a rational basis for its same-sex marriage policy.

Likewise, this Court can uphold Utah's marriage policy without overruling or modifying its decision in *Lawrence v. Texas*, 539 U.S. 558 (2003). Although *Lawrence* is commonly cited as legalizing homosexual activity, the decision is actually much narrower than is commonly supposed. As the Court said at 578,

> The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily

> be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.

It would appear that the language of *Windsor* and *Lawrence* was carefully crafted to preserve for this Court the option to stop short of a full recognition of a right to same-sex marriage. Saying, as the Court did in *Lawrence*, that the state may not prohibit private homosexual activities, is far different from saying that the state must give such activities the official status and recognition of marriage. Saying, as the Court did in *Windsor*, that Congress may not impede states that choose to legalize same-sex marriage, is far different from saying all fifty states must adopt a uniform policy of legalized same-sex marriage. And saying, as the Court did in *Lawrence*, that one has "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life," and concluding that this right includes the right to be left alone to do whatever one wants to do, is far different from saying this right is entitled to the heightened protection of strict scrutiny or intermediate scrutiny.

Before taking such a revolutionary step, the Court should consider the history and meaning of marriage, the many state benefits associated with marriage, the unique role of religion in marriage, and many other factors. It is one thing to take a practice that is nowhere mentioned in the Constitution or the Fourteenth Amendment and that was strongly disapproved at the time the Constitution was adopted and equally disapproved when the Fourteenth Amendment was adopted and extend to that practice constitutional protection. It is far different to

suddenly elevate that practice to the status of a preferred constitutional right and accord to it strict or intermediate scrutiny.

The role of the Court is to *expound* the Constitution, not to *expand* the Constitution. Before taking such a drastic and revolutionary step, the Court should consider the nature of equal protection historically through the present.

A. "All men are created equal" and as either male or female.

An analysis of "equal protection" should at least start with the foundation of the American concept of created equality. The "birth certificate" of the United States and the first document in our organic law asserts the self-evident truth that "all men are created equal, [and] that they are endowed by their Creator with certain unalienable rights." *Declaration of Independence* (1776). These rights were recognized by the Declaration, but they did not originate with it: "The sacred rights of mankind are not to be rummaged for, among old parchments, or musty records. They are written, as with a sun beam, in the whole volume of human nature, *by the hand of the divinity itself*; and can never be erased or obscured by mortal power." Alexander Hamilton, *The Farmer Refuted*, February 23, 1775 (emphasis added). Such rights are natural, unalienable, and are defined by God:

> Those rights then which God and nature have established, and are therefore called natural rights, such as are life and liberty, need not the aid of human laws to be more effectually invested in every man than they are; neither do they receive any additional strength when declared by the municipal laws to be

> inviolable. On the contrary, no human legislature has power to abridge or destroy them, unless the owner shall himself commit some act that amounts to a forfeiture.

1 William Blackstone, *Commentaries on the Laws of England* 54 (1765).

Although we are "created equal," we are not created all the same. Rather, this equality speaks to our standing before the law as equal bearers of rights. But He Who created us with such rights defines the limits of those rights. We are told in Genesis that "God created man in His own image, in the image of God He created him; male and female He created them. . . . For this reason a man shall leave his father and his mother, and be joined to his wife; and they shall become one flesh." Genesis 1:27, 2:24 (King James Version).

The law of the Old Testament enforced this distinction between the sexes by stating that "[i]f a man lies with a male as he lies with a woman, both of them have committed an abomination." Leviticus 20:13 (KJV). At creation, therefore, the sexes were established as "male and female" and "*[f]or this reason*," marriage was defined at its inception as a union between a man and his wife. Genesis 2:18-25. Only the male-female marriage is inherent in the same created order that gives us our legal equality before the law, as recognized in the Declaration of Independence. The Bible has been considered the authoritative source of morality and worldview for Western civilizations for nearly two millennia (three millennia for the Tanakh or Old Testament), including the time period in which the institutions of American

law and government were established.[2] The concept of being "created equal" cannot be properly understood without a recognition of "the laws of nature and of nature's God" upon which the concept of equality depends.

B. Rightly or wrongly, homosexual conduct was, at least until recently, strongly disapproved in most cultures and in Anglo-American law, and opinion remains sharply divided today.

Prohibitions against homosexual conduct go back to ancient times. The Bible, which has influenced moral values for Judaism, Christianity, Islam, and other religions, contains clear disapproval of homosexual conduct in the Old Testament (Leviticus 18:22) and in the New Testament (Romans 1:26-27).[3] Among the Romans, homosexual conduct did exist, but homosexual acts were capital offenses under the Theodosian Code (IX.7.6) and under the Justinian Code (IX.9.31). In the Middle Ages, St. Thomas Aquinas, a preeminent disciple of natural-law theory,

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[2] *See*, for example, *Hebrew and the Bible in America: The First Two Centuries,* Shalom Goldman, ed. (Hanover: University Press of New England 1993); Eran Shalev, *American Zion: The Old Testament as a Political text from the Revolution to the Civil War* (New Haven: Yale University Press 2013); Michael Novak, *On Two Wings: Humble Faith and Common Sense at the American Founding* (San Francisco: Encounter Books 2002); John Eidsmoe, *Historical and Theological Foundations of Law* 3 vols. (American Vision/Tolle Lege 2012); John Eidsmoe, *Christianity and the Constitution: The Faith of Our Founding Fathers* (Grand Rapids: Baker Book House 1987).

[3] Although recently certain writers have tried to reinterpret these and other passages, throughout most of history Jews, Christians, and Muslims have interpreted them as prohibiting and/or disapproving homosexual conduct.

called homosexuality "contrary to right reason" and "contrary to the natural order." St. Thomas Aquinas, 4 *Summa Theologica, Secunda Secundae*, Quest. 154, Art. 11 (Benziger Bros. Press 1947).

The English common law maintained similar provisions. Sodomy was codified by statute as a serious crime early in England. "The earliest English secular legislation on the subject dates from 1533, when Parliament under Henry VIII classified buggery (by now a euphemism for same-sex activity, bestiality, and anal intercourse) as a felony. Penalties included death, losses of goods, and loss of lands." Vern L. Bullough, *Homosexuality: A History* 34 (New American Library 1979). Sir Edward Coke, the "Dean of English Law," called homosexuality "a detestable, and abominable sin, amongst Christians not to be named, committed by carnal knowledge against the ordinance of the Creator, and order of nature, by mankind with mankind, or with brute beast, or by womankind with brute beast." "At common law 'sodomy' and the phrase 'infamous crime against nature' were often used interchangeably." Raymond B. Marcin, *Natural Law, Homosexual Conduct, and the Public Policy Exception*, 32 Creighton L. Rev. 67 (1998).

Sir William Blackstone—of whose *Commentaries on the Laws of England* (1763) Justice James Iredell said in 1799 that "[F]or near 30 years [it] has been the manual of almost every student of law in the United States"[4]—wrote in his Commentaries concerning homosexual conduct:

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[4] U.S. Supreme Court Justice James Iredell, *Claypool's American Daily Advisor,* April 11, 1799 (Philadelphia) 3; *Documentary History of the Supreme Court of the United States,*

> IV. WHAT has been here observed, especially with regard to the manner of proof [for the crime of rape], which ought to be the more clear in proportion as the crime is the more detestable, may be applied to another offense, of a still deeper malignity; the infamous crime against nature, committed either with man or beast. A crime, which ought to be strictly and impartially proved, and then as strictly and impartially punished. But it is an offense of so dark a nature, so easily charged, and the negative so difficult to be proved, that the accusation should be clearly made out: for, if false, it deserves a punishment inferior only to that of the crime itself.
>
> I WILL not act so disagreeable part, to my readers as well as myself, as to dwell any longer upon a subject, the very mention of which is a disgrace to human nature. It will be more eligible to imitate in this respect the delicacy of our English law, which treats it, in its very indictments, as a crime not fit to be named; "*peccatum illud horribile, inter christianos non nominandum*" ["that horrible crime not to be named among Christians"]. A taciturnity observed likewise by the edict of Constantius and Constans: "*ubi scelus est id, quod non proficit scire, jubemus insurgere leges, armari jura gladio ultore, ut exquisitis poenis subdantur infames, qui sunt, vel qui futuri sunt, rei*."

1789-1800, at 347 (Maeva Marcus, ed., Columbus University Press 1990).

The "crime against nature" was prohibited in many of the colonial law codes. When the Constitution was adopted, homosexual conduct was prohibited either by statute or by common law in all thirteen states. *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986). When the Fourteenth Amendment was adopted, homosexual conduct was prohibited in 32 of 37 states, and during the twentieth century it was prohibited in all states until 1961. *Id*. at 192-3.

In light of this history, it is inappropriate for the Tenth Circuit to take this newly-discovered right to engage in homosexual conduct and require the State of Utah to not only permit it but also give it the honored status of marriage.

C. Same-sex "marriage" was inconceivable in Anglo-American common law.

Defenders of marriage who seek to review ancient and common-law texts for support of their position do not easily find written sources stating "two men or two women cannot marry" because it was, to those early writers, as unnecessary and obvious as saying that men cannot bear children. Rather, the common law assumes the only definition of marriage is a union between one man and one woman. In Blackstone's *Commentaries*, Chapter 15 of Volume I ("Of the Rights of Persons") is simply titled "Of Husband and Wife," in which is discussed the "second private relations of persons . . . that of marriage, which includes the reciprocal duties of *husband and wife*. . . ." 1 *Commentaries* 421 (emphasis added). Blackstone notes that some legal disabilities prohibit a marriage as "void *ab initio*, and not merely voidable: not that they dissolve a contract already formed, but they render the parties incapable of forming any contract at all." *Id*. at 423-4. The first of these legal disabilities

is "having another husband or wife living; in which case, besides the penalties consequent upon it as a felony, the second marriage is to all intents and purposes void: *polygamy being condemned both by the law of the new testament, and the policy of all prudent states*." *Id*. at 424 (emphasis added). If the aforementioned prohibition on polygamous marriages was rooted in the New Testament of the Bible and in international law, then especially considering the strong condemnation of homosexual activity, *a fortiori*, a "marriage" between two men or two women would be void *ab initio* at common law.

Almost 60 years after the publication of Blackstone's *Commentaries*, Noah Webster's *American Dictionary of the English Language* (1828) defined marriage as follows:

> MAR'RIAGE, n. [L. mas, maris.] The act of uniting a man and woman for life; wedlock; *the legal union of a man and woman for life*. Marriage is a contract both civil and religious, by which the parties engage to live together in mutual affection and fidelity, till death shall separate them. . . .

Noah Webster, *American Dictionary of the English Language* (Foundation for American Christian Educ. 2002) (1828).[5] Marriage at common law was defined as only between one man and one woman because there was and is no other definition of marriage.

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[5] Noah Webster was a close associate of many of the Convention delegates, frequently dined with some of them in the evenings after sessions of the Convention, and at their request wrote an essay urging ratification of the Constitution. Harlow Giles Unger, *Noah Webster: The Life and Times of an American Patriot* (John Wiley & Sons 1998).

III. BECAUSE OF THIS HISTORY, THE JUDICIARY SHOULD EXERCISE RESTRAINT AND NOT MAKE SAME-SEX MARRIAGE A CONSTITUTIONALLY-MANDATED RIGHT.

Amicus has presented the Biblical, historical, and common law background of marriage, not to persuade the Court that *Lawrence* and *Windsor* were erroneous and should be overruled. Rather, *Amicus* has presented this background to ask the Court to consider that, because homosexual conduct was generally illegal and regarded as immoral, a sudden judicial decision to elevate this practice not only to a basic privacy right but also to the preferred status of a strict or intermediate scrutiny right that the states are required to endorse, sanction and approve by giving it the revered status of marriage, would be an unprecedented step of judicial activism.

Forcing states to recognize same-sex marriages in effect forces the states to make statements they do not want to make, to endorse what they do not want to endorse, to approve same-sex marriage as moral, healthy, and wholesome for children and adults, when in fact those states and the majority of the people thereof believe and want to say the opposite. In *Glassroth v. Moore*, 229 F. Supp. 1290 (M.D. Ala. 2002), a federal district court ordered the Chief Justice of the Alabama Supreme Court, and by implication the people of the State of Alabama, to remove a Ten Commandments monument from their Judicial Building. But even in this case, the federal judge did not order the Chief Justice and the people of Alabama to erect a sign disclaiming the Ten Commandments. But the Tenth Circuit has taken that further step: the Tenth Circuit has ordered the State of Utah, and the

people thereof, to endorse and approve a practice they do not want to endorse or approve.

This Court recently confronted a similar divisive issue: physician-assisted suicide. In *Washington v. Glucksberg*, 521 U.S. 702 (1997). Chief Justice Rehnquist wrote for the Court that "for over 700 years, the Anglo-American common-law tradition has punished or otherwise disapproved of both suicide and assisting suicide," *Id. at syllabus of the Court*, but that in recent years attitudes were being re-examined. Nevertheless, the Court upheld Washington's ban on physician-assisted suicide, concluding at 735:

> Throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society.

Amicus believes the courts should do the same with same-sex marriage. Granted, public acceptance of homosexuality, like public acceptance of physician-assisted suicide, has risen in recent decades. But the public is still sharply divided on whether homosexual activity is moral or immoral, healthy or unhealthy, safe or dangerous, and experts are similarly divided. The public and the experts are still sharply divided on whether children fare better in heterosexual vs. homosexual homes and on whether or not same-sex marriage would have long-term detrimental consequences for society.

If the decision of the Tenth Circuit below is allowed to stand, and if other courts follow that decision, the debate will be closed before the issues are resolved. Same-sex marriage will be the nationally-mandated

policy of all fifty states regardless of whatever negative consequences may result.

Before taking that plunge, we should consider words of warning from the not-too-distant past. Dr. J.D. Unwin (1895-1936), ethnologist and social anthropologist at Oxford University and Cambridge University, undertook an exhaustive study of eighty primitive tribes and six advanced civilization through 5,000 years of history. Those he studied included island people of Melanesia and Polynesia, tribes in Africa and Central America, Paleo-Siberians, Native Americans of the Northwest, the Plains, the Great Lakes, the South, and the Southeast, as well as the Babylonians, the Athenians, the Romans, the Anglo-Saxons, and the modern English. In 1934 he published his findings in a 619-page book titled *Sex and Culture*.[6] Dr. Unwin concluded that the most successful societies, those which advanced most rapidly and retained their advanced state, were those which restrained sexual energy by heterosexual monogamous marriage. He wrote that "if the male as well as the female is compelled to confine himself to one sexual partner, the society begins to display some expansive energy. It bursts over the boundaries of its habitat, explores new countries, and conquers less energetic peoples."[7] He also noted, however, that "We must remember that no change in the sexual opportunity of a society produces its full effect until the third generation."[8]

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[6] J.D. Unwin, *Sex and Culture* (London: Oxford University Press 1934).

[7] *Id.* 428.

[8] *Id.* 429.

Similarly, Dr. Carle E. Zimmerman, Professor of Sociology at Harvard University, studied various types of family structures throughout history: the trustee family in which the marital union is considered sacred, immortal, and absolute; the domestic family in which the marital union is strong but retains more freedom; and the atomistic family in which marriage is merely a contract for the parties' mutual benefit. Dr. Zimmerman compared societies of the ancient world, the medieval period, up to the modern period, and published his findings in *Family and Civilization*.[9] He concluded that there is a general regression from the trustee family to the domestic family to the atomistic family structure, and that when the atomistic family structure becomes prevalent, social cohesion suffers.

Such words of warning by eminent scholars should not be disregarded. Time must be given to see if their forecasts are accurate.

Even the full legal fall-out from the decision of the Tenth Circuit and other courts cannot yet be measured. On 27 August 2014 U.S. District Judge Clark Waddoups finalized an earlier ruling declaring a portion of Utah's polygamy ban—a ban that Congress had required Utah to include in its state constitution as a pre-condition for statehood—unconstitutional.[10] It is of course too early to determine the final outcome of this case, but if the rationale for recognizing same-sex marriage as a constitutional

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[9] Carle C. Zimmerman, *Family and Civilization* (New York: Harper 1947; Wilmington: ISI Books 2007).

[10] *Brown et al. v. Herbert et. al,* Case 2:11-cv-00652-CW Memorandum Decision and Judgment filed 08/27/14.

right is accepted, a ban on polygamy (or other unions) may be difficult to defend.

On the other hand, in the State of Tennessee Roane County Circuit Judge Russell E. Simmons, Jr., has rejected the suggestion that *Windsor* requires states to recognize same-sex marriages and has therefore refused to grant a divorce to two men who had gone through a marriage ceremony in Iowa. *See Borman v. Pyles-Borman*, No. 2014CV36, Roane County, Tennessee, August 5, 2014.

Lower courts are divided and uncertain as to whether *Windsor* requires states to grant same-sex marriages, whether *Windsor* requires states to give full faith and credit to same-sex marriages performed in other states, what level of scrutiny is required in such cases, and what other practices and arrangements are similarly required. Not only courts, but legislatures, commissions, councils, and boards are also uncertain as to what is permitted or required of them. All of them are looking to this Court to provide guidance. This Court can do so by allowing the debate to continue at the state and local levels.

If the American people are moving toward full acceptance of same-sex marriage, that revolution should come from the bottom up, through the elected voices of the people at the local, state, and federal levels. It should not be imposed upon them from the top by the federal judiciary, especially in the absence of a clear constitutional provision requiring it.

By granting certiorari and reversing the decision of the Tenth Circuit, this Court can allow the debate to continue, and hopefully with time the best wisdom will prevail.

CONCLUSION

Marriage is more than a private act; it is a civil and religious institution that involves child welfare, child-rearing, income tax status (individual, joint, or separate tax returns; deductions; credits) estate and inheritance tax considerations, testamentary rights, privileged communications (husband-wife privilege), Social Security and Medicare benefits, military housing allowances, and a host of other matters.

Justice Frankfurter once wisely wrote, "[T]he ultimate touchstone of constitutionality is the Constitution itself and not what we have written about it." *Graves v. O'Keefe*, 306 U.S. 466, 491-92 (1939) (Frankfurter, J. concurring). As in any case, the proper solution here is for this Honorable Court to fall back to the supreme law of the land, the text of the Constitution.

For the foregoing reasons, *Amicus* respectfully submits that the petition be granted, that the decision of the Tenth Circuit below should be reversed, and that Utah's marriage laws be upheld.

Respectfully submitted,

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