NO. 14-124

IN THE
Supreme Court of the United States

GARY R. HERBERT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF UTAH, ET AL.,
Petitioner,

v.

DEREK KITCHEN, ET AL.,
Respondents.

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

AMICUS CURIAE BRIEF OF TWENTY-ONE UTAH COUNTIES - JUAB, BEAVER, BOX ELDER, CACHE, CARBON, DAGGETT, DUCHESNE, EMERY, GARFIELD, IRON, KANE, MILLARD, MORGAN, RICH, SAN JUAN, SANPETE, SEVIER, UINTAH, UTAH, WASATCH AND WASHINGTON – IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Did the lower courts prejudicially err by improperly invalidating Utah's marriage laws and constitutional provision which define marriage as the union of a man and a woman, thus prohibiting and refusing recognition to same-sex marriages, because those courts mistakenly held that such laws and provisions violate the Constitution of the United States?

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INTEREST OF AMICI CURIAE[1]

The amici are twenty-one (of the twenty-nine) counties in the State of Utah (nearly three-fourths of the counties in the State). As County governmental entities, the amici counties carry out various duties delegated by the State relating to marriage including the issuance and processing of marriage licenses to eligible applicants and administration of other programs relating to marriage and for married families. The Utah citizens residing in the amici counties strongly support protecting marriage as the union of a man and a woman.

The amici counties include the counties of – JUAB, BEAVER, BOX ELDER, CACHE, CARBON, DAGGETT, DUCHESNE, EMERY, GARFIELD, IRON, KANE, MILLARD, MORGAN, RICH, SAN JUAN, SANPETE, SEVIER, UINTAH, UTAH, WASATCH, AND WASHINGTON.

SUMMARY OF ARGUMENT

There are many powerful and profound reasons why Utah, like most States and nation today, define (and historically have defined) marriage to be the union of a man and a woman – only -- and why they

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[1] In accordance with Rule 37.4, the parties have consented to the filing of this brief and that consent is on file with the Clerk of the Court. As required by Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than the *amicus* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

have declined to recognize the union of two men or two women as a valid marriage.

The definition of marriage as the union of a man and a woman – *only* - reflects very deeply-held values and powerful commitments of the people of Utah. The vote of the people of Utah in 2004 (two-thirds in favor of Amendment 3 constitutionally defining marriage as the union of a man and a woman only) expressed the people's strong sentiment and powerful public policy in favor of preserving the meaning of marriage as a gender-integrating public institution.

Among the reasons why Utah rejects same-sex marriage is concern about the direct and collateral social consequences of redefining that core social institution. Among those disturbing social consequences is the phenomenon of increased rates of abortion and diminished, diluted social shared understanding of marriage and marital responsibilities.

The rulings by the courts below invalidating Amendment 3 violated the core constitutional principle of federalism. Federalism in family law reserves to the states the decision whether or not to allow or recognize same-sex marriage.

ARGUMENT

I. The Legal Definition of Marriage As The Union Only of A Man and A Woman Reflects A Very Strong Public Policy and Very Deeply-Held, Prudent Values of the People of Utah, Especially in The 21 Amici Counties.

In 2004, in response to growing political pressures and various developments to legalize same-sex marriage, voters in Utah voted overwhelmingly for proposed Amendment 3 to amend the Constitution of Utah to define marriage specifically to consist "only of the legal union between a man and a woman," and to prohibit the state from recognizing any other "domestic union, however denominated" from being "recognized as a marriage or given the same or substantially equivalent legal effect." Laws 2004, H.J.R. 25 § 1 (Amendment 3).[2] In November 2004, two-thirds (65.86%) of all Utah voters cast ballots in favor of adopting Amendment 3's gender-integrating definition of marriage into the Utah Constitution. Pet. App. 109a. *See also Utah Same-Sex Marriage Ban, Amendment 3 (2004),* at http://ballotpedia.org/Utah_Same-

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[2] Amendment 3 of 2004 added Article 1, Section 29 to the Utah Constitution, which reads:

"1. Marriage consists only of the legal union between a man and a woman.

"2. No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect."

Sex_Marriage_Ban,_Amendment_3_(2004)#Election_results (viewed 3 September 2014).

In many Utah counties (including over one-third of the amici counties), more than 75% of the voters who voted in 2004 cast their votes in support of constitutionalizing the explicitly gender-integrating definition of marriage proposed in proposed Amendment 3. Thus, Utah's constitutional definition of marriage as the union only of a man and a woman, since January 2005 known as Article I, § 29 of the Utah Constitution, Pet. App. at 109a-110a, manifests a very strong, widely-supported public policy and reflects deeply-cherished values of the people of Utah, including those who live in the twenty-one amicus counties.

In December 2013, a U.S. District Court in Utah ruled that these laws and provisions prohibiting same-sex marriage irrationally and unconstitutionally infringed the plaintiffs' constitutional right to marry, discriminated on the basis or sex, and violated equal protection of the laws, and enjoined enforcement of Amendment 3 and related Utah marriage laws . *Kitchen v. Herbert*, 961 Supp.2d 1181 (D. Utah 2013). After the lower federal courts refused to do so, the Supreme Court of the United States granted a stay pending appeal. *Id.,* 134 S.Ct. 893 (2014). On appeal, the Tenth Circuit panel affirmed the district court judgment on essentially the same grounds. *Id.* 13-4178 (10th Cir. Jun. 25, 2014).

There are powerful reasons why the people of Utah wisely and responsibly may choose to continue to allow only male-female marriage. That is the universal historic and overwhelming global norm. Today, fewer than ten percent (10%) of the nations in the world permit same-sex couples to marry. Most of those nations are in one small region of the world, or are former colonies of those nations. *See generally* Lynn D. Wardle, *Legal Status of Same-sex Marriage and Unions in the USA and World* (August 2014), available at http://www.law2.byu.edu/files/marriage_family/Status%20of%20SSM-CUs%20World%20140627.pdf (seen 3 September 2014).

Until thirteen years ago, no nation in the world, in any period of world history, had ever allowed same-sex marriage. Currently, same-sex marriage is permitted in only sixteen of the 193 sovereign nations on earth. One additional nation is expected to begin allowing same-sex marriages this Fall 2014, and another is expected to begin permitting same-sex marriage next year in 2015.[3] That total

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[3] The Netherlands (2001), Belgium (2003), Canada (2005), Spain (2005), *South Africa** (2006), Norway (2009), Sweden (2009), Portugal (2010), Iceland (2010), Argentina (2010), Denmark (2012), Uruguay (2013), New Zealand (2013), France (2013), *Brazil** (2013?), UK (England/Wales) (effective summer 2014); Scotland (effective c. late 2014); Luxembourg (effective January 2015).[3] (Same-sex marriage is allowed in some non-national sub-jurisdictions, municipalities, or states, e.g., in Mexico and the USA.)

represents less than ten percent of all the (193) sovereign nations in the world.

The strong global consensus about the meaning of marriage as a gender-integrating institution provides a powerful reason for states like Utah to not legalize same-sex marriage, lest by so doing they impair the validity of other marriage celebrated and formed in their jurisdictions. That has happened before. For example, at one time courts in England refused to recognize monogamous marriages celebrated in an American territory where plural marriages were or had been permitted. *Hyde v. Hyde and Woodmansee*, [L.R.] 1 P. & D. 130 (20 March 1866).

II. The Adoption of Same-Sex Marriage Appears to Lead To A Less-Child-Centric Culture and More Abortions

There are many powerful public policy reasons why a state might wisely and responsibly choose to define marriage as the union – only – of a man and a woman. Many of those reasons relate to the effects upon society of legalizing same-sex marriage.

For example, it appears that legalization of same-gender marriage has led to a significant increase in abortion rates in many of the first nations in Europe to adopt genderless marriage.

Among the six European nations that first allowed same-sex marriage—either overtly or indirectly—there appears to have been a substantial

increase in abortion. Those six nations are listed in the following chart, which shows the years in which each nation either redefined marriage in genderless terms or adopted a genderless civil union or registered partnership regime that offered virtually all the incidents of marriage, including full adoption rights, to same-sex couples:[4]

Comparison of Abortion Percentages and Ratios In European Union Nations Adopting Same-Sex Marriage (Or Practical Equivalents) Before 2006[5] (cont'd below)

Nation	Year SSM or equal	Abortion% Prior Year	Abort % 2011	Change %
Sweden	1995 (2009)	22.4	25.2	12.5%
Norway	1993 (2009)[6]	20.1	20.3	1.0%

[4] Denmark adopted a registered partnership arrangement for same-sex couples in 1989. But as to adoption and other significant matters, and unlike the arrangements in Norway and Sweden, Denmark's registered partnership arrangement did not give same-sex couples the same rights as married couples. That did not occur until Denmark legalized same-sex marriage in 2012.

[5] Source: Wm. Robert Johnston, Abortion Statistics and Other Data, last updated 14 April 2014, www.johnstonsarchive.net.

[6] For Norway, Sweden, Iceland and the Netherlands, the year in parentheses is the year in which marriage was *formally* redefined in genderless terms, after having been effectively redefined previously because of a marriage-equivalent civil union or registered partnership regime—including full adoption rights for same-sex couples.

Iceland	1996 (2010)	15.9	17.8	11.9%
Netherlands	1998 (2001)	10.5	13.4	27.6%
Belgium	2003	12.4	13.4	8.0%
Spain	2005	15.8	18.8	19.0%
Average Increases				13.3%

Nation	**Year adopted SSM equal**	**Abortion % Prior Year**	**Abortion % 2011**	**Percent Change**
Norway	252.1	254.8	1.1%	1.1%
Sweden	287.9	333.7	15.9%	15.9%
Iceland	188.6	215.7	14.4%	14.4%
Netherlands	116.7	154.5	37.8%	37.8%
Belgium	133.0	154.8	16.4%	16.4%
Spain	187.6	231.2	24.2%	24.2%
Average Increases				18.3%

As the chart shows, since the adoption of same-sex marriage all but one of these six nations saw a substantial increase in both the abortion percentage—defined as the percentage of pregnancies ending in abortion—and the abortion ratio—the number of abortions per 1000 live births. Spain's progression is especially remarkable: Over the 2004-2011 period, it saw an increase of 19 percent in its abortion percentage and 24.2 percent in its abortion ratio. The average change in the abortion percentage for the entire group was 11.3 percent, while the average change in the abortion ratio was 17.9 percent.

These changes, moreover, stand in sharp contrast to overall trends in the developed world. According to a 2012 joint study by the Guttmacher Institute and the World Health Organization, overall abortion rates (the number of abortions per 1000 women of child-bearing age) in the developed world have consistently *declined* since 1995 (up to 2008, the last year analyzed by the study).[7] Specifically, in developed countries other than Eastern Europe (where abortion rates have been higher), between 1995 and 2008 the average abortion rate declined by about 15 percent. Abortion percentages and ratios have seen a similar decline.[8]

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[7] *See* Guttmacher Institute, "Facts on Induced Abortion Worldwide," January 2012, available at www.guttmacher.org/pubs/fb_IAW.html.

[8] This paper focuses on abortion percentages and ratios because more recent data are available for those measures than for abortion rates. *See* Johnston, *supra*. However, in years for

So why might the adoption of same-sex marriage lead to more abortions? There are at least three plausible reasons.

First, as a number of commentators have noted, the adoption of genderless marriage necessarily changes the public meaning or perception of marriage from an institution principally concerned with procreation and children to one that is principally concerned with the well-being of adults.[9] In all societies, marriage is the most significant (and in most societies the *only*) social institution largely dedicated to children, and its high status stands as a constant reminder to society that the interests of children should take precedence over the interests of adults. But a society that redefines marriage to accommodate the romantic interests of a small nonprocreative (jointly) subset of the adult population conveys to its members that adult interests can appropriately trump the interests of children. That message tends to legitimize decisions by adults (including married adults) to place their own interests above the interests of their children – including their unborn children. And that, in turn, may tend to increase the abortion rate.

Second, as other commentators have noted, the legal adoption of genderless marriage sends another, powerful message to men—especially young

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which abortion rates are available, those rates closely follow changes in abortion percentages and ratios. *See id.*

[9] *See, e.g., Girgis, Anderson, & George, What is Marriage? Man and Woman: A Defense,* at 23-28 (2012).

men—who self-identify as heterosexual. That regime creates a legal structure in which any two people of the same sex can easily form a family, obtain children (using artificial reproductive technology), and raise them to adulthood—all without any male involvement beyond a sperm donation. The adoption of that marriage regime conveys the message to young heterosexual men, "Aside from access to your DNA, we as a society no longer really need you in order to form families and effectively parent the resulting children."[10] Some young heterosexual men will inevitably take that message to heart and, as a result, lose interest in marriage—which will tend to produce declining marriage rates. But because these young men will *not* lose their ordinary interest in sex, the end result is likely to be a relative increase in the number of unmarried but pregnant women. And because unmarried pregnant women are much more likely than married pregnant women to obtain abortions,[11] a relative increase in the former will naturally lead to higher abortion rates.

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[10] *See, e.g.,* Alan Hawkins & Jason Carroll, *Beyond the Expansion Framework: How Samem-Sex Marriage Changes the Institutional Meaning of Marriage and Heterosexual Men's Conception of Marriage,* available at http://www.law2.byu.edu/marriage_family/140709-clean%20Hawkins%20&%20Carroll%20SSM%20BYU%20JPL%20citations%20edit-clean%20(1).pdf (posted 25 August 2014).

[11] *See, e.g.,* National Center for Health Statistics, Data Brief No. 136 (December 2013), available at www.cdc.gov/nchs/data/databriefs/db136.pdf (in the U.S., the abortion rate for unmarried women is "almost five times higher than for married women").

Statistics for the six European nations discussed above, moreover, appear to confirm (with one exception) a reasonably strong correlation between the adoption of genderless marriage and declining marriage rates, as shown in the chart below.

Third, same-sex marriage is a biologically non-procreative institution. To procreate the parties must go outside of the marriage. That weakens the channeling power of marriage to promote social stability, family integrity, and other essential social goods. That also diminishes the important tie between marriage and child-bearing that protects, especially, children and child-bearers in society.

Comparison of Marriage Rates In European Union Nations Adopting Same-Sex Marriage (Or Practical Equivalents) Before 2006[12]

Nation	Year Adopted SSM or Equal	Marriage Rate Prior Year	Marriage Rate 2010	% Change
Norway	1993 (2009)	5.3	4.8	-9.4%
Sweden	1995 (2009)	3.9	5.3	+35.9%
Iceland	1996 (2010)	5.6	4.9	-12.5%
Nether-lands	1998 (2001)	5.4	4.5	-16.7%
Belgium	2003	3.9	3.9	0%

[12] Sources: OECD Statistics on marriage rates for 2010 in OECD nations are available at www.oecd.org/statistics; other marriage rates available from Eurostat at epp.eurostat.ec.europa.eu/tgm.

Spain	2005	5.1	3.6	-29.4%

Although marriage rates have generally declined in Europe during this period—by around 6 percent[13]--the declines in four of these nations, the Netherlands at 16.7%, Spain at 29.4%, Norway at 9.4% and Iceland at 12.5%, greatly exceeded the overall European decline. And that is consistent with the common-sense prediction that the adoption of genderless marriage leads some percentage of the heterosexual male population to lose interest in marriage altogether.

The data for Belgium, which saw no change, are also consistent with this prediction. That is because, all else being equal, the advent of officially sanctioned same-sex marriage could be expected to cause a small but temporary increase in *overall* marriage rates because of pent-up demand for marriage by same-sex couples. If that expectation is correct—as same-sex marriage advocates claim—then it appears that marriages involving *heterosexual* men were also probably declining in Belgium faster than the overall decline in European marriage rates.

Finally, although Sweden saw a significant percentage increase in its marriage rate during this

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[13] *See id.* (showing average decline for all 27 EU nations from 5.18 in 2000 to 4.87 in 2007, or approximately 6 percent over that period).

period, that change is probably the result of factors independent of that Nation's decision to legalize same-sex marriage. For example, for many decades, Sweden has had a strong tradition of long-term cohabitation arrangements that are, both legally and culturally, the virtual equivalent of marriage[14]--a tradition that has resulted in relatively low rates of *formal* marriage as well as very high rates of out-of-wedlock births.[15] Thus, although the adoption of same-sex marriage in Sweden appears to be closely associated with increased abortion rates, for Sweden that result appears to have been driven by factors other than a declining interest in marriage by heterosexuals.

Still, other than Sweden, marriage rates among heterosexuals appear to have declined more rapidly than one would expect in the other five European nations that were "early movers" in enacting same-sex marriage or its functional equivalent. That strong correlation is unlikely to be a mere coincidence. And, as we have seen, that decline in marriage rates is also highly correlated with an increase in abortions.

In sum, there are multiple plausible avenues by which the adoption of same-sex marriage could lead

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[14] *See, e.g.,* David Bartal, "Love & Marriage: Scandinavian Style, *Nordic Reach* (2008).

[15] *See, e.g.,* European Commission, Eurostat Marriage and Divorce Statistics, October 2012 (showing very low marriage rates and high rates of out-of-wedlock births going back to 1960).

to more abortions. Available statistics suggest that one or more of those pathways may well have led to increased abortion rates in all six of the European nations that first embraced that regime. That underscores concerns that legalizing same-sex marriage causes societies to be less child-centric, and less marriage-and-family friendly.

III. The Effects of Legalizing Same-Sex Marriage Underscore Why the Constitution Reserved the Regulation of Marriage for the States to Decide.

What matters most in life matters differently to different people. Thus, in a democratic republic, it is essential that judges defer to and uphold the constitutional will of the people regarding policy issues such as the definition of marriage. "[T]he courts may not disempower the voters from choosing which path to follow." *Schuette v. Coalition to Defend Affirmative Action*, 134 S.Ct. 1623, 1635 (2014) (reversing a federal appellate court decision that struck down a controversial state constitutional amendment concerning delicate race issues), Certainly that principle applies equally here.

The courts below violated federalism principles and settled precedents, including *Windsor v. United States*, 133 S. Ct. 2675 (2013), confirming that our Constitution reserves the regulation of marriage to the states. The Constitution, its Amendments, Supreme Court precedents, and the unmistakable history and understanding of the Founders and

Founding deny the national government authority to define marriage, and commit the regulation of marriage to the States, within constitutional boundaries. Nothing in the text, history or legitimate judicial interpretation of the Constitution bars states from defining marriage as the union of a man and a woman – as they have done for centuries.

Federalism in family law – including federal deference to state regulation of marriage -- is a constitutional principle that is as old and as settled as our nation. *See generally* Lynn D. Wardle, *Tyranny, Federalism and the Federal Marriage Amendment,* 17 YALE J.L. & FEMINISM 221, 226–49 (2005); Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787, 1789 (1995) (both reviewing the history of federalism in family law). Federal respect for state prerogatives in marriage law is constitutionally required because the direct regulation of domestic relations was constitutionally reserved to the control and authority of the states.

In *Pennoyer v. Neff,* 95 U.S. 714, 734 (1878), the Supreme Court emphasized: "The State . . . has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created . . . ." A century later, the Court reiterated in *Sosna v. Iowa*, 419 U.S. 393 (1975): "Regulation of domestic relations [is] an area that has long been regarded as a virtually exclusive province of the States." *Id.* at 404; *see also Lehman v. Lycoming Cnty. Children's Servs. Agency*, 458 U.S. 502, 512 (1982) ("[F]ederal courts consistently have shown special solicitude for state interests "in the

field of family and family-property arrangements."); *Moore v. Sims*, 442 U.S. 415 (1979) ("Family relations are a traditional area of state concern. . . . We are unwilling to conclude that state processes are unequal to the task of accommodating the various interests and deciding the constitutional questions that may arise . . . "); *Barber v. Barber*, 62 U.S. (21 How.) 582, 584 (1858) ("We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce . . . .").

The justices of this Court have continued to "unite around the principle that family law constitutes a clearly defined realm of exclusive state regulatory authority." Anne C. Daily, *Federalism and Families*, 143 U. PA. L. REV. 1787, 1789 (1995). They all have "invoked the regulation of 'marriage, divorce, and child custody' as a paradigmatic example of lawmaking power beyond the constitutional competence of the federal government." *Id.*

In *United States v. Windsor*, 133 S.Ct. 2675 (2013) the Court soundly reconfirmed federalism in family law regarding state regulation of marriage. In ruling that Congress lacked the constitutional authority to refuse to recognize in federal law (same-sex) marriages that some states had chosen to create, the Court quoted its declaration of *In re Burrus,* 136 U.S. 586, 593-594 (1890) that: "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." 133 S.Ct. at 2691. The *Windsor* Court reiterated that: "[T]he states, at the time of the adoption of the

Constitution, possessed full power over the subject of marriage and divorce ... [and] the Constitution delegated no authority to the Government of the United States on the subject of marriage and divorce." *Id.* citing *Haddock v. Haddock,* 201 U.S. 562, 575 (1906). *Windsor* emphasized that: "By history and tradition the definition and regulation of marriage … has been treated as being within the authority and realm of the separate States." 133 S.Ct. at 2689-90. "The recognition of civil marriages is central to state domestic relations law applicable to its residents and citizens." *Id.* at 2691. The Court added: "State laws defining and regulating marriage, of course, must respect the constitutional rights of persons, *see*, *e.g., Loving v. Virginia,* 388 U.S. 1 (1967); but, subject to those guarantees, 'regulation of domestic relations' is 'an area that has long been regarded as a virtually exclusive province of the States.'" 133 S.Ct. at 2691 (quoting *Sosna v. Iowa,* 419 U.S. 393, 404 (1975)).

It is impossible to reconcile these precedents with the decision of the lower courts invalidating Utah's constitutional protection of the historic meaning of marriage as the union of a man and a woman. As Justice Kennedy noted in another context: "In choosing to ordain and establish the Constitution, the people insisted upon a federal structure for the very purpose of rejecting the idea that the will of the people in all instances is expressed by the central power, the one most remote from their control." *Alden v. Maine*, 527 U.S. 706, 759 (U.S. 1999). Four years later he explained: "A basic principle of federalism is that each State may

make its own reasoned judgment about what conduct is permitted or proscribed within its borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction. *Id*., at 569. He declared that federalism "is central to the American experience and remain[s] essential to our present-day self-definition and national identity." *Roper v. Simmons*, 543 U.S. 551, 578 (U.S. 2005). Just two years ago he emphasized that: "The allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States. The federal balance is, in part, an end in itself, to ensure that States function as political entities in their own right." *Bond v. United States*, 131 S. Ct. 2355, 2364 (U.S. 2011). *See also United States Term Limits v. Thornton*, 514 U.S. 779, 838 (U.S. 1995) ("Federalism was our Nation's own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other.")

"Preserving our federal system is a legitimate end in itself. It is, too, the means to other ends. It ensures that essential choices can be made by a government more proximate to the people than the vast apparatus of federal power." *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 684-685 (U.S. 1999) (Kennedy, J., dissenting). *See also United States v. Lopez*, 514 U.S. 549, 575-578 (U.S. 1995) (Kennedy, J., concurring, quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458-459 (1991): "Just as the separation and independence of the coordinate

branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front. . . . In the tension between federal and state power lies the promise of liberty.") . . .").

Behind federalism are many strong and important constitutional values. They include: (a) a desire to preserve pluralism, (b) belief that laws regulating families should reflect local values, (c) suspicion of concentration of power, (d) commitment to principles of comity and "shared sovereignty," (e) respect for the family law expertise of state courts and lawmakers, (f) federal judges' dislike for family disputes, and (g) the belief that federal government should focus on other more direct and immediate national economic and security concerns. Thus, the constitutional principle of federalism in family law commands respect for the primary authority of the states to regulate marriage. *See* Jonathan H. Adler, *Interstate Competition and the Race to the Top*, 35 HARV. J.L. & PUB. POL'Y 89, 89 (2012).

CONCLUSION

It is undeniable that social institutions profoundly affect human behavior. They provide human relationships with meaning, norms, and patterns, and in so doing encourage and guide conduct. Nobel Laureate Douglass North has described institutions as the "humanly devised

constraints that shape human interaction." DOUGLASS NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE, AND ECONOMIC PERFORMANCE 3 (1990). That is their function. And when the definitions and norms that constitute a social institution change, the behaviors and interactions that the institution shapes also change.

Marriage is society's most enduring and essential institution. From ancient times to the present, it has shaped and guided sexual, domestic, and familial relations between men, women, and their children. As with any institution, changing the basic definition and social understanding of marriage—such as by abandoning its gendered definition—will change the behavior of men and women in marriage, affect whether they enter marriage in the first place, impact other social relations, and shape society in general. Whether deemed good or bad, redefining marriage away from its historically gendered purposes will have significant consequences.

The people of Utah cherish deeply and protect carefully the institution of marriage. The people of Utah overwhelmingly voted to adopt Amendment 3 in 2004 to protect the legal meaning of marriage as a gender-integrating institution for the benefit of themselves and for their posterity. All Utah citizens, including same-sex couples, benefit from the direct and collateral social benefits that flow from gender-integrated marriage. The federal government, especially the federal judiciary, have no constitutional authority to compel Utah to legalize same-sex marriage by judicial mandate.

The courts below erred in invalidating and enjoining Article I, § 29 of the Utah Constitution, Utah's marriage amendment 3, This Court should reverse those erroneous judgments.

Respectfully submitted,

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