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

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BRIEF *AMICUS CURIAE* OF UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, NATIONAL ASSOCIATION OF EVANGELICALS, THE ETHICS & RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, AND THE LUTHERAN CHURCH – MISSOURI SYNOD IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

The United States Conference of Catholic Bishops is a nonprofit corporation whose members are the Catholic Bishops in the United States.[1] Approximately 69.5 million Americans are members of the Catholic Church.

The National Association of Evangelicals is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It represents more than 45,000 local churches from 40 different denominations and serves a constituency of millions.

The Ethics & Religious Liberty Commission is the moral concerns and public policy entity of the Southern Baptist Convention, the Nation's largest Protestant denomination, with over 46,000 churches and nearly 15.8 million members.

The Church of Jesus Christ of Latter-day Saints is a Christian denomination with 6.4 million members in the United States.

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* U.S. Conference of Catholic Bishops, *et al.* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2, counsel of record for all parties received at least 10 days' notice of *amici*'s intent to file and have consented to this brief in letters on file with the Clerk's office.

The Lutheran Church-Missouri Synod, a religious nonprofit corporation, is the second-largest Lutheran denomination in North America. It has approximately 6,200 member congregations and 2.3 million baptized members.

These *amici curiae* – representing the faith communities of more than 100 million Americans – are united by their solemn commitment to the institution of marriage, understood as the union of one man and one woman.

SUMMARY OF ARGUMENT

The time has come to end the divisive national debate as to whether the Constitution mandates same-sex marriage. We are convinced that a charter "made for people of fundamentally differing views," *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting), does not prescribe a single national definition of marriage so contrary to the beliefs, practices, and traditions of the American people. We are convinced that the best way to resolve this wrenching controversy is by trusting the People and their democratic institutions. But a chorus of federal courts disagrees. Divided panels of the Tenth and Fourth Circuits, along with numerous federal district courts, have held that State laws defining marriage as the union of a man and a woman violate the Fourteenth Amendment. *But see* Pet. at 25 (collecting decisions holding that the traditional definition of

marriage is constitutional). Those rulings, when read alongside this Court's decision in *United States v. Windsor*, 570 U.S. ___, 133 S. Ct. 2675 (2013), declaring that section 3 of the Defense of Marriage Act, 1 U.S.C. § 7, violated the Fifth Amendment, have created legal uncertainty for religious organizations.

Uncertainty arises because the pattern of lower federal court decisions nullifying State marriage laws stands in tension not only with a proper reading of *Windsor* but also with this Court's leading precedents elucidating principles of federalism and individual rights. Legal uncertainty is especially burdensome for religious organizations and religious believers increasingly confronted with thorny questions. Is their right to refrain from participating in, recognizing, or facilitating marriages between persons of the same sex, contrary to their religious convictions, adequately shielded by the First Amendment and other legal protections? Or is further legislation needed to guard religious liberties in these and other sensitive areas? Only a prompt decision by this Court can reduce the mounting tension surrounding such unresolved questions by removing the threat of judicially imposed same-sex marriage or freeing the democratic process to mitigate its effects.

In our view, Utah's petition offers the ideal vehicle to decide the constitutionality of State laws defining and recognizing marriage as only between a man and a woman. The Tenth Circuit, echoing the district court, removed a potential distraction by finding no animus, although plaintiffs had proffered

it as a reason for invalidating Utah's marriage law. Also, the decision below stands out because it squarely addressed the State's contention that avoiding potential conflicts between religious liberty and same-sex marriage is a legitimate ground for preserving the traditional definition of marriage.

ARGUMENT

I. Religious Organizations and Their Members Need the Court to Resolve the Constitutional Status of Man-Woman Marriage Laws.

A. Uncertainty over the constitutionality of State laws retaining marriage as between a man and a woman seriously burdens religious organizations and religious believers.

The State of Utah has ably described several reasons for granting review. We agree with petitioners that the question presented involves a constitutional issue of national importance that ought to be resolved promptly. In addition to the considerations detailed in the petition, we draw the Court's attention to another reason for granting review now: judicial decisions declaring State marriage laws invalid create significant legal uncertainty that burdens religious organizations and religious believers.

Uncertainty is the product of a simmering national dispute over the question presented – whether

the Fourteenth Amendment requires every State to license and recognize marriage between persons of the same sex. Marriage between a man and a woman is for us an article of faith and a profound social good. Our understanding of God's law, fortified by experience, confirms the centrality of marriage between a man and a woman as a foundational institution for protecting children and sustaining the American scheme of ordered liberty. And our understanding of the limits of judicial authority under the Fourteenth Amendment leads us to conclude that laws reaffirming that ancient yet vibrant understanding are constitutional.

But court after court has ruled that State laws prohibiting the licensing and recognition of marriage between two men or two women violate the Fourteenth Amendment. Those decisions rest, in our view, on an egregious error. Barely a year ago this Court struck down section 3 of the Defense of Marriage Act, 1 U.S.C. § 7, *see Windsor*, 133 S. Ct. at 2695-96, but qualified its decision by underscoring that "[t]his opinion and its holding are confined to those lawful marriages," *id.* at 2696. Indeed, much of the Court's analysis in *Windsor* turned on the preeminent role of the States in defining and regulating marriage. *Id*. at 2689-92. But this plain limitation did not stop a cascade of lower federal court decisions, starting in Utah, from relying on *Windsor* as authority for nullifying the marriage laws of more than a dozen States. Without this Court's guidance, this trend causes religious organizations considerable legal uncertainty.

Notwithstanding concerted political and legal efforts to reduce marriage to a bare civil contract, the reality for these *amici* and tens of millions of Americans is that marriage is a legal *and* a religious institution. Unresolved conflicts over the validity of State laws reserving marriage for husband-wife couples therefore put religious organizations and their members in a legal limbo where their rights and duties are unclear. If the Constitution requires every State to license and recognize same-sex marriages, for instance, do State laws need to be amended to clarify that clergy members who decline to perform same-sex marriages nevertheless retain their authority to perform legally-binding marriages or that religious institutions need not make their properties available to perform or celebrate same-sex weddings? And because marriage is not just a legal status but also a proxy for social and legal legitimacy, corollary issues are arising with increasing intensity. Will sexual orientation be recognized as the basis for a new suspect class akin to race, thus providing government with purportedly compelling reasons to override long-standing religious freedoms? If so, what statutory protections and exemptions should religious organizations seek to ensure their independence from State control and guard against retaliation? What exactly are the rights of organizations and individuals with sincerely-held religious objections to participating in, facilitating, or recognizing same-sex marriage?

Today's unsettled legal environment is not only burdensome in itself but also tends to discourage

democratic solutions. In our experience, legislators and other officials are frequently excusing their unwillingness to negotiate protections for religious liberty in the context of same-sex marriage on the specious grounds that such protections are invidious because same-sex marriage is a constitutional right or, conversely, unnecessary because this Court has yet to decide it is a constitutional right. Impeding the channels of democratic debate and engagement has been especially detrimental for religious organizations, given that States adopting same-sex marriage through legislative or popular lawmaking have often included at least some protections for religious organizations, while States compelled to make that change by courts have tended not to include such protections at all. *Compare* N.Y. DOM. REL. LAW § 10-b (codifying religious exemptions related to same-sex marriage), *with Goodridge v. Dep't Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003) (holding that prohibiting same-sex marriage "violates the Massachusetts Constitution," without considering the implications for religious organizations). One scholar generally supportive of same-sex marriage has documented the fact that religious accommodations are possible when same-sex marriage is adopted through the legislative process but not when compelled by judicial decision.[2]

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[2] *See* Robin Fretwell Wilson, *Marriage of Necessity: Same-Sex Marriage and Religious Liberty Protections*, 64 CASE W. RES. L. REV. (forthcoming 2014) (App. A), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2448344&download=yes

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Clarification by this Court is urgently needed to remove a major impediment to democratic deliberation and reasoned compromise in addressing the competing and legitimate needs of homosexual persons, same-sex couples, religious organizations, and people holding traditional religious beliefs.

B. The Court should promptly end the long-coming and sharply divisive controversy over the constitutional status of same-sex marriage.

In every great controversy there comes a moment when the value of prolonging the debate is outweighed by the cost of the divisions it engenders. We believe that moment has arrived. We respectfully urge the Court to resolve without delay whether the Constitution requires the redefinition of marriage to include same-sex couples. Social and political tensions over the uncertain constitutional status of same-sex marriage are engendering deep divisions in our communities and interfering with the ordinary operation of our democratic institutions. The American people deserve to know whether this Court deems same-sex marriage a fundamental right beyond the reach of democratic majorities or whether the nature and meaning of marriage remains a matter for deliberation, compromise, and decision by the People

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(charting religious liberty protections in same-sex marriage states).

acting through their State democratic institutions. Only a final decision by this Court can definitively declare what, in its judgment, the Constitution permits and requires, freeing our democratic institutions to respond with any adjustments and compromises that the People deem necessary. *See Schuette v. Coalition to Defend Affirmative Action*, 572 U.S. ___, 134 S. Ct. 1623, 1637 (2014) (voiding a Michigan constitutional provision, enacted through popular referendum, "would be an unprecedented restriction on the exercise of a fundamental right . . . to speak and debate and learn and then, as a matter of political will, to act through a lawful electoral process"). The sooner the focus of this great controversy shifts away from this Court and to the People and their democratic institutions, the better.

Further delay makes little sense. The State of Utah has made a compelling case that its petition is suitable for review, and putting off a decision to await additional lower court developments will merely deepen the uncertainty regarding the constitutional status of same-sex marriage without any discernible benefit to the Court. Even before the Tenth Circuit issued the decision below, the constitutionality of State laws reaffirming the historic definition of marriage had been percolating among lower courts for nearly a decade. *See, e.g.*, *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859 (8th Cir. 2006); *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006), *superseded by* N.Y. DOM. REL. LAW § 10-a(1) (authorizing same-sex marriage). Last year that question was fully briefed and

argued in *Hollingsworth v. Perry*, 570 U.S. ___, 133 S. Ct. 2652 (2013), although lack of standing prevented the Court from addressing the merits, *id.* at 2668.

Since then the pace has quickened, as the Tenth and Fourth Circuits have nullified the marriage laws of Utah, Oklahoma, and Virginia. *See* Pet. App. 75a (Utah); *Bishop v. Smith*, Nos. 14-5003 & 14-5006, ___ F.3d ___, 2014 WL 3537847, at *1 (10th Cir. July 18, 2014) (Oklahoma); *Bostic v. Schaefer*, Nos. 14-1167, 14-1169 & 14-1173, ___ F.3d ___, 2014 WL 3702493, at *17 (4th Cir. July 28, 2014) (Virginia). And substantially identical cases are pending before the Fifth, Sixth, Seventh, and Ninth Circuits. *See DeLeon v. Perry*, 975 F. Supp. 2d 632 (W.D. Tex. 2014), *appeal docketed*, No. 14-50196 (5th Cir. Mar. 1, 2014); *DeBoer v. Snyder*, No. 14-1341 (6th Cir. argued Aug. 6, 2014); *Baskin v. Bogan*, Nos. 14-2386, 14-2387, 14-2388 & 14-2526 (7th Cir. consolidated July 11, 2014); *Latta v. Otter*, No. 1:13-CV-00482-CWD, 2014 WL 1909999 (D. Idaho May 13, 2014), *appeal docketed*, Nos. 14-35420 & 14-35421 (9th Cir. May 14, 2014).

Additional decisions are unlikely to produce greater clarity because lower courts appear to have reached analytical exhaustion, as case after case reiterates holdings issued by other courts. Both the Tenth and Fourth Circuits, for instance, chiefly relied on lines of argument that first appeared in the Utah district court's ruling. *Compare* Pet. App. 140a ("[T]he fundamental right to marry encompasses the Plaintiffs' right to marry a person of the same sex.") (district court) *with id.* at 49a ("[W]e conclude that

plaintiffs possess a fundamental right to marry and to have their marriages recognized.") (Tenth Circuit) *and Bostic*, 2014 WL 3702493, at *9 ("[T]he fundamental right to marry encompasses the right to same-sex marriage.") (Fourth Circuit). By any reasonable measure, the question presented is ripe for decision.

II. Utah's Petition for Certiorari Offers the Best Vehicle for Resolving the Question Presented.

Considering the number of cases in the pipeline raising the same constitutional question, the issue naturally arises whether Utah's petition is the best vehicle. *See* Stephen M. Shapiro, *Certiorari Practice: The Supreme Court's Shrinking Docket*, 24 LITIG. 25, 29 (1998) ("In determining whether a particular case is an appropriate vehicle, the clerks and Justices also consider what is in the pipeline."). Utah's petition describes no fewer than eight reasons why this case is ideal for resolving the question presented.[3] *See* Pet. at 29-31. Four deserve special emphasis.

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[3] Our comparative assessment that Utah provides the ideal vehicle for resolving the question presented should not be misunderstood as a judgment that other cases raising the same question do not warrant review. For instance, the petitioner in *Bishop*, 2014 WL 3537847, at *1, *petition for cert. filed*, No. 14-136 (U.S. Aug. 6, 2014), makes a strong case for reviewing the question whether a State law defining marriage solely as the union of a man and a woman violates the Fourteenth Amendment. But for the reasons discussed in this brief and in the *Kitchen* petition, we believe Utah's case presents the best vehicle

(Continued on following page)

First, Utah's case provides an attractive vehicle because the Tenth Circuit (following the district court's lead) rejected spurious allegations of voter animus. The court of appeals sensibly held that "[o]ur conclusion that plaintiffs possess a fundamental right to marry and to have their marriages recognized in no way impugns the integrity or the good-faith beliefs of those who supported Amendment 3." Pet. App. 75a; *accord id*. at 89a-90a ("Not surprisingly, the district court resisted a finding of animus. . . . That was undoubtedly correct.") (Kelly, J., concurring in part and dissenting in part). In granting Utah's case, this Court will not need to address the inflammatory and unjust accusation that the support of religious organizations and their members for traditional marriage is rooted in prejudice or animosity.

Second, unlike other courts, the Tenth Circuit squarely addressed the State's contention that Utah laws codifying the historic definition of marriage serve the legitimate purpose of avoiding potential conflicts between same-sex marriage and religious liberty. Discussing the implications of redefining marriage for religious liberty places the court of appeals on record regarding a conflict that other courts have tended not to treat with the seriousness it deserves. *Cf.* Douglas Laycock, *Afterword*, *in* SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY 189 (Douglas

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for definitively resolving all important same-sex marriage issues and putting an end to the uncertainties and confusion discussed above.

Laycock, et al. eds., 2008) (explaining that scholars of all ideological stripes agree that "same-sex marriage is a threat to religious liberty").

That said, the Tenth Circuit's religious-liberty analysis rests on a serious error. Easy assurances in dicta that the court's decision "relates solely to civil marriage," that "religious institutions remain as free as they always have been to practice their sacraments and traditions as they see fit," and that religious communities still have the right "to define marriage according to their moral, historical, and ethical precepts" vastly underestimate the legal and social conflicts that constitutionally mandated same-sex marriage will unleash. Pet. App. 70a.

Judicially redefining marriage powerfully conflicts with religious liberty because, among other reasons, such a dramatic change in the law inevitably will lead to "forcing or pressuring both individuals and religious organizations – throughout their operations, well beyond religious ceremonies – to treat same-sex sexual conduct as the moral equivalent of marital sexual conduct." An Open Letter from Religious Leaders in the United States to All Americans, *Marriage and Religious Freedom: Fundamental Goods That Stand or Fall Together* (Jan. 12, 2012), *available at* http://www.usccb.org/issues-and-action/religious-liberty/fortnight-for-freedom/upload/Free-Exercise-of-Religion-Putting-Beliefs-into-Practice.pdf. The risk of a new wave of litigation targeted at religious institutions cannot be brushed aside on the ground that "such lawsuits would be a function of

antidiscrimination law, not legal recognition of same-sex marriage," Pet. App. 71a n.13, when judicially-mandated same-sex marriage can itself be cited to justify enforcement or enactment of antidiscrimination laws that limit the rights of religious conscience. Utah's petition provides an opportunity to address whether avoiding religious conflicts and church-state entanglements is a sufficiently weighty reason, alone or combined with other interests, to warrant allowing States to retain the age-old definition of marriage.

Third, Utah's case addresses both constitutional claims animating the nationwide controversy over same-sex marriage – that State laws like Utah's violate the Fourteenth Amendment by denying marriage licenses to same-sex couples and by withholding official State recognition to same-sex marriages performed in other States. *See id.* at 72a ("Plaintiffs in this case have convinced us that Amendment 3 violates their fundamental right to marry and to have their marriages recognized."). Utah's petition thus offers the Court an opportunity to resolve the entire controversy in a single case.

Fourth, Utah's case offers an optimal vehicle for deciding the question presented because the Tenth Circuit directly addressed the claim that same-sex marriage is a fundamental right protected by the Fourteenth Amendment's Due Process Clause. *See id.* at 49a ("[W]e conclude that plaintiffs possess a fundamental right to marry and to have their marriages recognized."). The court of appeals addressed respondents' equal protection claim too. *Id.* at 75a.

But in placing the substantive due process claim at the forefront of its reasoning, the lower court correctly focused on the driving issue in this dispute – whether the Constitution allows the People of the several States to retain marriage as an historically gendered institution that exists primarily to unite a man and a woman for the welfare of their children, or whether it compels them to redefine marriage as a genderless institution aimed at providing social acceptance and recognition of intimate adult relationships. *See Windsor*, 133 S. Ct. at 2718 (Alito, J., dissenting) (describing "two competing views of marriage" – the "'conjugal' view" and "'consent-based' vision of marriage" – at the heart of the controversy over constitutionalizing same-sex marriage). Thanks to the Tenth Circuit's focus, Utah's case directly engages this core issue in the same-sex marriage cases.

CONCLUSION

For the foregoing reasons, as well as those articulated by the State of Utah, the petition for a writ of certiorari should be granted.

September 4, 2014

Respectfully submitted,

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