No. 14-124

IN THE
Supreme Court of the United States

GARY R. HERBERT, *ET AL.*,
Petitioners,

v.

DEREK KITCHEN, *ET AL.*,
Respondents.

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

BRIEF OF *AMICUS CURIAE* JUDICIAL WATCH, INC. IN SUPPORT OF PETITIONERS

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Dated: September 4, 2014

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Judicial Watch, Inc. ("Judicial Watch") is a non-partisan educational foundation that seeks to promote transparency, integrity, and accountability in government and fidelity to the rule of law. Judicial Watch regularly files *amicus curiae* briefs as a means to advance its public interest mission and has appeared as *amicus curiae* in this Court on a number of occasions.

Judicial Watch believes that the decision by the U.S. Court of Appeals for the Tenth Circuit ("Tenth Circuit") raises important issues of constitutional law which should be heard by this Court. In particular, this *amicus* is concerned that the Tenth Circuit's ruling imposes unconstitutional limits on the right of the people to self-governance and harms American democracy. Among the harms are: a dangerous distortion of constitutional jurisprudence; an unlawful expansion of the powers of the federal judiciary; and an anti-democratic limitation on the people's right to democratic self-governance through popular initiative and referendum. For these and other reasons, Judicial Watch urges the Court to grant the Petition for a Writ of Certiorari.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* Judicial Watch states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than Judicial Watch and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing of this brief; letters reflecting this blanket consent have been filed with the Clerk.

SUMMARY OF ARGUMENT

In finding that no rational policy reason could support Amendment 3, the Tenth Circuit redefined marriage in a way that subjects any denial of a marriage license in Utah to strict constitutional scrutiny. Utah's citizens have spoken loudly that they do not view marriage as granting social status (or government benefits) to committed adults, but instead view marriage as encouraging biological parents to raise their own offspring together. The Tenth Circuit should have respected this democratically-elected definition of marriage, and Amendment 3 should have been subject to rational basis review, which it easily passes. By redefining Amendment 3 as a law that privileges opposite-sex couples rather than encourages certain of them to be more responsible parents, the Tenth Circuit has denied Utah citizens their fundamental right to democratic self-governance.

REASONS FOR GRANTING THE PETITION

I. THE TENTH CIRCUIT UNLAWFULLY REDEFINES UTAH AMENDMENT 3 IN ORDER TO APPLY STRICT SCRUTINY

The Tenth Circuit erred in finding that same-sex marriage is a fundamental right. *Kitchen v. Herbert*, Case No. 13-4178, 10th Cir. Slip. Opinion June 25, 2014 ("Slip Op.") at 22-42. Fundamental rights (such as the right to travel) are not necessarily enumerated in the Bill of Rights, but nonetheless are "deeply rooted in this Nation's history and tradition"

and "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). The only way the Tenth Circuit was able to reach its decision overturning Amendment 3 was to tell Utah citizens that marriage has only one lawful purpose – the happiness and dignity of committed adult couples. Slip Op. at 33. If Utah's citizens had voted for this definition of marriage, the Tenth Circuit's ruling may have been correct. But as others have noted and discussed at length, there are two models of marriage and those models are fundamentally different. *Windsor*, 133 S. Ct. 2675, 2718 (2013) (Alito, J., dissenting).

The Tenth Circuit justified its decision by imposing its own policy preference – the "adult happiness and dignity" model of marriage – on Utah's citizens. By contrast, Utah's citizens voted in favor of the "responsible procreation" model of marriage. They chose to define marriage as an institution that encourages adults who conceive or intend to conceive children together to raise their children together and to remain committed to each other and their children.

Based on this rational policy preference, it is wholly irrelevant whether same-sex couples are as equally equipped or skilled as opposite-sex couples in the tasks of raising children. Amendment 3 treats marriage not as a mere bestowal of social recognition or government benefits on committed couples. If that were the case, there would be no particular reason to limit marriage by consanguinity or number. Rather, Amendment 3 places children and

child rearing at the center of the institution of marriage. It encourages adults who conceive or intend to conceive children together to raise the next generation of citizens as committed couples, even (and especially) when one of the adults might prefer to abandon both the child and the mate.

It is eminently rational to limit such a policy choice to the class of people most in need of encouragement: male–female couples. No other pairing can biologically reproduce, even when not intending to do so. The "responsible procreation" model of marriage seeks to bind a mother and father together and to their offspring, thus encouraging parents to use their own resources to raise their own offspring according to their own wishes and values.[2] This encouragement is particularly necessary when children are conceived unintentionally. It gives unwilling parents a "nudge" towards prosocial, cooperative behavior.

Our Constitution does not mandate the selection of one marriage model over another, so Utah's citizens were free to choose the child-centered, "responsible procreation" model. The Tenth Circuit was wrong to elevate the "adult happiness and dignity" model of marriage to the status of a constitutional mandate by treating marriage as a fundamental right of every couple regardless of

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[2] William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND (Clarendon Press 1765-1769), available at: http://www.lonang.com/exlibris/blackstone/bla-116.htm ("[T]he establishment of marriage in all civilized states is built on this natural obligation of the father to provide for his children …").

biology. The Tenth Circuit's decision conflicts with this Court's ruling in *Windsor*, which held that laws which reserve marriage to opposite-sex couples are subject to rational basis review. *U.S. v. Windsor*, 133 S. Ct. at 2693 citing *Department of Agriculture v. Moreno*, 413 U.S. 528 (1973); *see also Windsor*, 133 S. Ct. at 2706 (Scalia, J. dissenting).

II. RATIONAL BASIS REVIEW APPLIES, AND UTAH AMENDMENT 3 SATISFIES IT

There is a marked difference between encouragement and recognition, and this difference highlights the rational basis behind Utah citizens' preferred definition of marriage. The "responsible procreation" model is at least rational, and the choice must, therefore, be left to the people of Utah. *FCC v. Beach Comm's, Inc.*, 508 U.S. 307, 313 (1993).

Same-sex marriage advocates might point out that many opposite-sex couples marry without any intention of conceiving or raising children. However, the fact that opposite-sex couples *sometimes* marry without the intention to have children does not undermine the rational basis for differentiating between opposite-sex and same-sex couples. "A classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality." *Heller v. Doe*, 509 U.S. 312, 321 (1993) (internal citation omitted). Limiting marriage to opposite-sex couples promotes the governmental purpose of encouraging the two natural parents of children whose conception was unplanned to enter into a

stable relationship that would be best for those children's upbringing. The inclusion of same-sex relationships would not promote such a purpose. "When, as in this case, the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not, we cannot say that the statute's classification of beneficiaries and nonbeneficiaries is invidiously discriminatory." *Johnson v. Robison*, 415 U.S. 361, 383 (1974).

Laws reviewed for rational bases are not required to achieve their goals with precision. "[T]he legislature must be allowed leeway to approach a perceived problem incrementally." *FCC*, 508 U.S. at 316; *see also Heller v. Doe*, 509 U.S. 312, 321 (1993). Accordingly, Utah's citizens may opt for a practical, bright-line distinction between couples who can procreate and couples who cannot in order to increase the chances of responsible procreation, *even if* their legislative goal could be achieved in other ways. "The problems of government are practical ones and may justify, if they do not require, rough accommodations – illogical, it may be, and unscientific." *Heller v. Doe*, 509 U.S. 312, 321 (1993) (internal citation omitted). As this Court has explained:

> But the Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all. It is enough that the State's action be rationally based and free from invidious discrimination… Conflicting claims of morality and

> intelligence are raised by opponents and proponents of almost every measure….

Dandridge v. Williams, 397 U.S. 471, 486-487 (1970) (internal citation omitted).

While the detractors of Utah's Amendment 3 might argue that the purpose of responsible procreation might be better achieved by increasing the child support obligations of parents who conceive without marrying, or by restricting the availability of divorce, such arguments are irrelevant to the amendment's constitutionality. The people of Utah have the right to decide for themselves whether to restrict or liberalize their marriage laws – or not.

III. DEMOCRATIC DECISION-MAKING MUST BE PROTECTED FROM JUDICIAL OVERREACH

Finally, the Court should accept review to ensure that the people's right to make laws and engage in direct democracy is protected from those who would seek to reserve lawmaking to the judiciary. The right of Utah's citizens to make the laws that governing them is paramount:

> In the end, what the Court fails to grasp or accept is the basic premise of the initiative process. And it is this. The essence of democracy is that the right to make law rests in the people and flows to the government, not the other way around.

Hollingsworth v. Perry, 133 S. Ct. 2652, 2675 (2013) (Kennedy, J. dissenting).

Finding a new, fundamental right to same-sex marriage conflicts with this longstanding and undeniably important, fundamental right – the people's right to self-governance. Utah's citizens voted for Amendment 3 by nearly a two-thirds majority. Slip Op. at 6-7. The sponsors of the ballot initiative that led to Amendment 3's adoption argued that the amendment was necessary to protect Utah's interests in "perpetuat[ing] the human race" and "the importance of raising children ...." *Id.* at 7. At the same time, Amendment 3's sponsors explicitly disavowed "intolerance, hatred, or bigotry" in advocating for the amendment's passage. *Id.* at 6.

Particularly in light of the documented absence of animus on the part of Utah's voters, the Tenth Circuit's opinion robs these citizens of their fundamental right to self-governance on the issue of marriage, an issue that is being hotly debated across the country. If the Tenth Circuit's ruling is not reversed by this Court, the right of citizens to debate and define their democracy will be greatly diminished. As this Court recently observed:

> The respondents in this case insist that a difficult question of public policy must be taken from the reach of the voters, and thus removed from the realm of public discussion, dialogue, and debate in an election campaign.... It is demeaning to the democratic process to presume that the

> voters are not capable of deciding an issue of this sensitivity on decent and rational grounds. … The idea of democracy is that it can, and must, mature. Freedom embraces the right, indeed the duty, to engage in a rational, civic discourse in order to determine how best to form a consensus to shape the destiny of the Nation and its people.

Schuette v. Coalition to Defend Affirmative Action, 134 S. Ct. 1623, 1637 (2014).

CONCLUSION

No one has a constitutional right to obtain a Utah marriage license on whatever terms they choose. *Baker v. Nelson*, 409 U.S. 810 (1972) (dismissing a same-sex marriage appeal "for want of a substantial federal question."); *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971) ("The due process clause of the Fourteenth Amendment is not a charter for restructuring [state regulation of marriage] by judicial legislation."). Utah's voters chose a rational model for their state's marriage law and the Tenth Circuit's ruling overturning that choice was an unlawful usurpation of their legitimate policy choice. This Court should grant the Petition to review the Tenth Circuit's ruling.

Respectfully submitted,

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September 4, 2014