NO. 14-136

IN THE
Supreme Court of the United States

SALLY HOWE SMITH, IN HER OFFICIAL CAPACITY AS COURT CLERK FOR TULSA COUNTY, STATE OF OKLAHOMA,

Petitioner,

v.

MARY BISHOP, ET AL.,

Respondents.

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

REPLY BRIEF FOR PETITIONER

JOHN DAVID LUTON
TULSA COUNTY DISTRICT ATTORNEY'S OFFICE
500 South Denver Avenue
Suite 900
Tulsa, OK 74103
(918) 596-4814

DAVID A. CORTMAN
BYRON J. BABIONE
Counsel of Record
DAVID AUSTIN R. NIMOCKS
JAMES A. CAMPBELL
KENNETH J. CONNELLY
KELLIE M. FIEDOREK
J. CALEB DALTON
ALLIANCE DEFENDING FREEDOM
15100 North 90th Street
Scottsdale, AZ 85260
(480) 444-0020
bbabione@alliancedefendingfreedom.org

Counsel for Petitioner

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INTRODUCTION

Throughout the history of civilization, marriage's universally defining feature has been the uniting of man and woman. That timeless conception of marriage has been society's best means of connecting children to both their mother and their father. For centuries, marriage (so understood) has served to forestall the ills that all too often result when society separates sex, procreation, and childrearing. It has provided stability where there might otherwise be disorder. Marriage has served society well.

Recently, however, some States have changed marriage's universally defining feature in their laws. No one knows for sure what the long-term effects of this fundamental change might be. But many reasonable people of good will are legitimately concerned about transforming marriage into an institution that no longer has any intrinsic definitional connection to its animating social purposes of regulating naturally procreative relationships and connecting children to both their mother and their father. They worry that such a transformation will impede marriage's ability to serve society as it has so well in the past.

The lower courts, however, have discarded the views of these people, thwarted the public debate on the future of marriage, and prohibited our Nation's political channels from addressing this issue. Only this Court can stop this shift of marriage policy from the People and the States to the federal judiciary. Only this Court can restore the People's freedom to

decide this society-shaping question for themselves and their communities.

Petitioner and Respondents agree that now is the time to settle this widely litigated issue of great importance and that this case provides a clean and focused vehicle for doing so. *See* Pet. at 11-20, 30-33; Resp'ts Br. at 13-16. Corroborating this, thirty-two States—fifteen that currently recognize marriages between same-sex couples, and seventeen that retain the man-woman definition—support Petitioner's request for review. *See* Amicus Br. of Colorado et al. at 3-15; Amicus Br. of Massachusetts et al. at 1. Such widespread consensus confirms that this Court should grant review in this case.

ARGUMENT

I. This Case Is a Good Vehicle for Resolving the Important Question Presented.

Petitioner agrees with Respondents that this "case provides a clean and beneficial vehicle" for deciding whether the Fourteenth Amendment forbids the States from defining marriage as the union of a man and a woman. Resp'ts Br. at 13. This case isolates the core question whether a State must redefine marriage *by issuing marriage licenses* to same-sex couples. It does not present the additional question whether a State must *recognize* marriage licenses that same-sex couples have received from other jurisdictions. The recognition question, which generally rises or falls on the same analysis that controls the licensing issue, adds little (if anything) to the constitutional calculus. Respondents thus correctly

observe that the recognition question is a "secondary issue," *id.* at 21-22, one that the courts of appeals have not separately engaged, *id.* at 16.

During oral argument in a similar marriage case, Judge Sutton of the Sixth Circuit recently explained the primacy of the licensing issue over the recognition question:

> Isn't the first question whether a State can decide for its own purposes, its own citizens, whether to [license] same-sex marriage? And if it decides it's not going to do that, for now, and if the U.S. Constitution . . . permits that choice, . . . it seems really odd to me that [the State] can be told, "Okay, even though you can make that choice for your own citizen, if someone comes from another State, that public-policy choice doesn't bind you." . . . And vice versa, . . . if the State . . . under the Fourteenth Amendment must [license] same-sex marriages within its State, then of course, it follows, [the plaintiffs] win the recognition point.

Audio of Oral Argument at 29:23-30:13, *Obergefell v. Himes*, No. 14-3057 (6th Cir. Aug. 6, 2014), *available at* http://www.ca6.uscourts.gov/internet/court_audio/aud1.php.[1] The absence of the recognition question, then, ensures that this Court's review of the States' authority to define marriage will not be needlessly encumbered by ancillary matters.

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[1] This citation is to the audio recording downloaded from the referenced website.

If, however, "this Court wishes to bring before it the issue whether states . . . must recognize [same-sex] marriages validly performed in other jurisdictions," Petitioner agrees with Respondents that this Court should "couple this case with another presenting that secondary issue." Resp'ts Br. at 21-22.

II. The Decision Below Incorrectly Held that the Fourteenth Amendment Forbids Oklahoma from Maintaining Its Man-Woman Marriage Definition.

The Fourteenth Amendment does not require the States to eliminate the man-woman marriage definition. The court below erred in so holding.

A. Heightened Scrutiny Does Not Apply to Respondents' Claims.

Rational-basis review applies to Respondents' claims. Each course that they chart to reach heightened scrutiny—(1) invoking the fundamental right to marry, (2) raising a sexual-orientation equal-protection claim, (3) relying on *United States v. Windsor*, 133 S. Ct. 2675 (2013), (4) alleging illicit animus, or (5) claiming sex discrimination—leads to the conclusion that rational-basis review applies.

1. *Fundamental right to marry*. A right ranks as fundamental only if it is "deeply rooted in this Nation's history and tradition." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (internal quotation marks omitted). Given the centrality of history in this analysis, Respondents' acknowledgment that "the possibility of same-sex couples marrying

had not occurred to many until recent decades" dooms their fundamental-rights claim. Resp'ts Br. at 26. For "[t]he mere novelty of such a claim is reason enough to doubt that 'substantive due process' sustains it." *Reno v. Flores*, 507 U.S. 292, 303 (1993).

2. *Sexual-orientation equal-protection claim.* Equal-protection analysis requires a precise identification of the classification at issue. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 18-29 (1973). By defining marriage as the union of a man and a woman, diverse societies have drawn a line between man-woman couples and all other types of relationships (including same-sex couples). That classification does not distinguish based on sexual orientation; rather, it distinguishes based on the biological reality that only man-woman couples are capable of furthering marriage's interests in providing stability to naturally procreative unions and linking children to both their mother and their father. *See* Pet. at 29. Such a classification is subject only to rational-basis review. *See Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 866-67 (8th Cir. 2006) (quoting *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 441 (1985)); *Hernandez v. Robles*, 855 N.E.2d 1, 11 (N.Y. 2006) (same).

In addition to the fact that man-woman marriage laws do not distinguish based on sexual orientation, this Court applies only rational-basis review to sexual-orientation equal-protection claims. *See Romer v. Evans*, 517 U.S. 620, 631-32 (1996). Even though the federal government and the plaintiff in *Windsor* recently urged this Court to declare sexual

orientation a new quasi-suspect classification,[2] this Court did not take that unwarranted step. That reluctance was appropriate because, among other things, gays and lesbians undoubtedly "attract the attention of the lawmakers" and thus are not a "politically powerless" class. *See City of Cleburne*, 473 U.S. at 445.

3. *Windsor's analysis*. In *Windsor*, this Court premised its "careful consideration" of federal DOMA on its conclusion that the federal government had unusually "depart[ed] from [its] history and tradition of reliance on state law to define marriage." 133 S. Ct. at 2692.[3] Here, by contrast, state man-woman marriage laws neither depart from history nor exhibit any unusual characteristic. As Judge Holmes explained, those laws "formalized a definition [of marriage] that every State had employed for almost all of American history, and [they] did so in a province the States had always dominated." App. 84a. Thus, the predicate for *Windsor*'s careful consideration is absent here. *See Robicheaux v. Caldwell*, --- F. Supp. 2d ---, Nos. 13-5090, 14-97, 14-327, 2014 WL 4347099, at *3 (E.D. La. Sept. 3, 2014) (concluding that *Windsor*'s "careful consideration" is not warranted when a State defines marriage as an exercise of "its traditional authority").

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[2] *See* Brief on the Merits for Respondent Windsor at 17-32, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307); Brief for the United States on the Merits Question at 18-36, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307).

[3] Respondents assume that "the form of scrutiny this Court employed in *Windsor*" is a type of heightened review. *See* Resp'ts Br. at 27. By responding to this argument, Petitioner does not concede that assumption.

4. *Animus.* Contrary to Respondents' assertion, this case does not present a "robust legislative and public record" demonstrating that "'moral disapproval of same-sex marriage' motivated the passage of" the Marriage Amendment. Resp'ts Br. at 19-20 (quoting App. 170a). Seeking to establish the motives of the 130 legislators and more than one million citizens who voted for the Amendment, Respondents and the district court have cited merely a *few* articles referencing a *handful* of benign comments by three legislators, a local politician, and an editorial writer. That does not remotely resemble a "robust legislative and public record" of animus. As Judge Holmes correctly observed, "the few and scattered quotes" that Respondents and the district court cite "offer far too tenuous a basis to impugn the goodwill of the roughly one million Oklahomans who voted for" the Amendment. App. 73a n.8.[4]

Drawing an inapt comparison to *Windsor*, Respondents offer the Marriage Amendment's original title ("the Marriage Protection Amendment") as evidence of an allegedly improper purpose. *See* Resp'ts Br. at 19-20. But unlike the federal government,

[4] Respondents' search for voter intent in scattered statements outside the official legislative record is dubious. As Judge Holmes acknowledged, "[t]he scope of a popular poll makes it difficult, if not impossible, for a court to apprehend the 'intent' of individual voters from record evidence and, therefore, makes it improvident . . . to nullify the will of the citizenry on that basis." App. 65a n.6. Indeed, in *Romer*, this Court "did not rely on campaign literature" or statements in newspapers when "striking down the [challenged] measure"; the *Romer* Court instead "train[ed] its gaze . . . on the *structural* attributes of the amendment . . . such as its breadth and the novelty of its effects." *Id.* (Holmes, J., concurring).

which generally lacks "authority . . . on the subject of marriage" and thus has no legitimate interest in preferring one definition of marriage over another, *Windsor*, 133 S. Ct. at 2691 (internal quotation marks omitted), the State of Oklahoma has "essential authority to define the marital relation" and may legitimately act to preserve the definition that its People have chosen. *Id.* at 2692.

Respondents also claim that Oklahoma's marriage laws are particularly infirm, more so than marriage laws in other States (such as Virginia), because they declare it a "misdemeanor" for a state-court clerk to "knowingly issu[e] a marriage license" for any purpose other than uniting "one man and one woman" in matrimony. Okla. Const. art. II, § 35(A), (C). *See* Resp'ts Br. at 19. Yet this unremarkable provision, which simply affirms the State's interest in ensuring that its officials comply with the People's chosen marriage policy, is not substantively different from similar laws in other States (including Virginia). *See, e.g.*, Va. Code Ann. § 20-33 ("If any clerk of a court knowingly issue[s] a marriage license contrary to law, he shall be confined in jail not exceeding one year, and fined not exceeding $500."); Utah Code Ann. § 30-1-16 (similar); W. Va. Code § 48-2-502 (similar). Thus, Respondents' attempt to paint Oklahoma as an outlier falls flat.

5. *Sex-discrimination claim.* This Court's equal-protection cases have found impermissible sex discrimination only when a law treats members of one sex more favorably than members of the other sex. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 519 (1996) (excluding women from military college);

Miss. Univ. for Women v. Hogan, 458 U.S. 718, 733 (1982) (excluding men from attending nursing school); *Craig v. Boren*, 429 U.S. 190, 191-92 (1976) (allowing women to buy beer at a younger age than men); *Frontiero v. Richardson*, 411 U.S. 677, 678-79 (1973) (imposing a higher burden on women than men to establish spousal dependency); *Reed v. Reed*, 404 U.S. 71, 71-74 (1971) (affording an automatic preference for men over women when administering estates). Because man-woman marriage laws do not disadvantage either sex, those laws do not discriminate based on sex.

To support their sex-discrimination argument, Respondents rely on *Loving v. Virginia*, 388 U.S. 1 (1967), a race-discrimination case. *See* Resp'ts Br. at 28. But that reliance is misplaced. Although *Loving* observed that "equal application does not immunize" a racially discriminatory law from strict scrutiny, 388 U.S. at 9, this Court has not extended that principle to sex discrimination. Instead, this Court has declined to "equat[e] gender classifications" with "classifications based on race," *Virginia*, 518 U.S. at 532, because "'[t]he two sexes are not fungible,'" *id.* at 533 (quoting *Ballard v. United States*, 329 U.S. 187, 193 (1946)) (stating that "[p]hysical differences between men and women . . . are enduring").

B. Man-Woman Marriage Laws Satisfy Constitutional Review.

Marriage's social purposes include steering naturally procreative relationships into enduring unions and connecting children to both their mother and their father. It is an indisputable biological fact that

sexual relationships between persons of the same sex, unlike sexual relationships between a man and a woman, do not advance those interests. Because man-woman couples "promote[]" those compelling "governmental purpose[s]" and "the addition of [same-sex couples] would not," *Johnson v. Robison*, 415 U.S. 361, 383 (1974), man-woman marriage laws are constitutional. *See* Pet. at 28-30. Respondents attempt to change the governing constitutional analysis; they insist that the State must show that "barring" same-sex couples from marriage would further (or that "allowing" them to marry would harm) the State's interests. Resp'ts Br. at 29. But their attempt to invert the inquiry conflicts with (among other things) the constitutional principles that this Court explained in *Johnson v. Robison*. *See* Pet. at 28-29.[5]

Respondents also argue that man-woman marriage laws are constitutionally suspect because the State could more narrowly accomplish its purposes by excluding man-woman couples who lack "procreative ability or intent." Resp'ts Br. at 29. This, however, is not a feasible alternative because, as the Tenth Circuit intimated, mandating premarital fertility testing or inquiries regarding couples' procreative intentions would impinge upon constitutionally pro-

[5] Even when applying heightened scrutiny, this Court has upheld classifications based on biological differences without requiring that the classification be necessary to prevent harm to the government's interest. *See Nguyen v. INS*, 533 U.S. 53, 63 (2001) (upholding a statute that imposed stricter requirements for a foreign-born child of unwed parents to establish citizenship through a father than through a mother because "[f]athers and mothers are not similarly situated with regard to the proof of biological parenthood").

tected privacy interests. *See Kitchen v. Herbert*, 755 F.3d 1193, 1222 (10th Cir. 2014). Nor is Respondents' suggestion an effective option for the State to achieve its goals. Many man-woman couples who do not intend to have children might nevertheless experience unintended pregnancies or simply change their plans. And some man-woman couples who believe that they are infertile might discover otherwise, or they might remedy their infertility through modern medical advances. Suggesting an infeasible and ineffective governmental alternative, as Respondents have done, does not undermine the constitutionality of man-woman marriage laws.[6]

Respondents additionally assert that it is "implausible" to project that redefining marriage might contribute to adverse societal developments over time. Resp'ts Br. at 29. That claim lacks support, for the limited experiences of the States that have redefined marriage do not establish the long-term effects of that significant change. Moreover, Respondents have not even attempted to refute the reasonable concerns that Petitioner has identified about the redefinition of marriage "lead[ing] to more children being raised without their fathers." Pet. at 15-16. For that and similar reasons, the People may legitimately worry about the long-term consequences of redefining marriage and thus may choose to retain the man-woman definition. *See, e.g.*, CA10 Amicus Br. of

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[6] Many courts have adopted the reasoning explained in this paragraph. *See, e.g.*, *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065, 1113 (D. Haw. 2012); *Hernandez*, 855 N.E.2d at 11-12; *Standhardt v. Superior Court*, 77 P.3d 451, 462 (Ariz. Ct. App. 2003).

Alan J. Hawkins et al. at 16-28; CA10 Amicus Br. of Robert P. George et al. at 14-22.

CONCLUSION

For the foregoing reasons, as well as the reasons explained in the petition, this Court should grant review.

Respectfully submitted,

DAVID A. CORTMAN
BYRON J. BABIONE
Counsel of Record
DAVID AUSTIN R. NIMOCKS
JAMES A. CAMPBELL
KENNETH J. CONNELLY
KELLIE M. FIEDOREK
J. CALEB DALTON
ALLIANCE DEFENDING FREEDOM
15100 North 90th Street
Scottsdale, AZ 85260
(480) 444-0020
bbabione@alliancedefendingfreedom.org

JOHN DAVID LUTON
TULSA COUNTY DISTRICT ATTORNEY'S OFFICE
500 South Denver Avenue
Suite 900
Tulsa, OK 74103
(918) 596-4814

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