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

BRIEF OF *AMICI CURIAE* EIGHTY UTAH STATE LEGISLATORS IN SUPPORT OF PETITIONER

ROBERT T. SMITH*
1977 Regal Stream Cove
Salt Lake City, UT 84121
801-949-5381
theronsmith1@gmail.com
*Counsel of Record

Counsel for Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution

Statutes

Miscellaneous

INTEREST OF *AMICI CURIAE*

This Brief of Amici Curiae in support of the petitioners is respectfully submitted pursuant to Supreme Court Rule 37.[1] Amici are eighty members of the Utah Legislature, constituting nearly 80% of that body.[2] In 2004, the constitutionally required two-thirds majority of this body adopted the state constitutional marriage amendment ratified by approximately 66% of voters later that same year. We are sincerely dedicated to representing and protecting the interests of all Utah citizens. We especially feel a profound duty to the children of the State, derived from deep historical roots and experience that confirm that children are substantially benefited and best served by public endorsement and recognition of marriage as the legal union between a man and a woman as husband and wife. This promotes and protects a child's bond with his or her biological parents bound together as a married mother and father. When this is not possible, the State definition of marriage maximizes the likelihood that a child will be raised by a married mother and father. The laws of the State of Utah are consistently designed to further this compelling interest.

That these laws benefit Utah's children is no mere conjecture. Utah has the "lowest percentage of

---

[1] Pursuant to Supreme Court Rule 37(3)(a), all parties have consented to the filing of this brief. Pursuant to Rule 37(6), Amici affirm that no counsel for a party authored the brief in whole or in part and no person other than the Amici or its counsel made a monetary contribution to this brief.

[2] Amici Utah Legislators are listed in the Appendix.

unwed births" in the nation, is highest "among states in the percentage of children being raised by both parents from birth until age 17," and "Utah children, even in the lowest-income households, have one of the highest rates of upward mobility." Brief of Appellants at 70-71, Kitchen v. Herbert, 755 F.3d 1193 (10th Cir. 2014) No. 13-4178. Because the Tenth Circuit's decision would seriously jeopardize the positive outcomes flowing from the State's endorsement of the male-female definition of marriage Amici respectfully request that the Court grant Utah's petition for certiorari and reverse the decision of the Circuit Court of Appeals for the Tenth Circuit.

INTRODUCTION AND SUMMARY OF ARGUMENT

The question presented in this case, while deeply personal and at the heart of public debate, is at its most basic level a question about who decides what marriage is and what marriage policy will be. Since our Nation's founding the States have retained plenary authority over marriage policy. The Tenth Circuit rules otherwise.

In its decision below, the Tenth Circuit held that the Federal Constitution now requires States to recognize a new concept of same-sex marriage as a fundamental right. *Kitchen v. Herbert*, 755 F.3d 1193, 1208-1218 (10th Cir. 2014). Accordingly, the court struck down Utah's constitutional and statutory definitions of marriage as the union of one man and one woman. However, in doing so the Tenth Circuit has attempted to take away both the "fundamental right" of voters and elected civil servants to "act through a lawful electoral process," *Schuette v. BAMN*, 134 S. Ct. 1623, 1637 (2014) (plurality), to set marriage policy. To avoid this result, and for the following reasons, Utah's petition should be granted and the Tenth Circuit judgment reversed.

First, the State of Utah has the sovereign right to decide domestic relations laws. "'[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.'" *United States v. Windsor*, 133 S. Ct. 2675, 2691 (quoting *In re*

Burrus, 136 U.S. 586, 593–94 (1890)). See also, *Maynard v. Hill*, 125 U.S. 190, 205 (1888). In this instance the voice of the people in a statewide election voted to amend the State Constitution to protect the traditional definition of marriage. Utah Const. art. I, §29. Previously, as elected representatives of the people, the Utah Legislature had passed similar marriage laws. See Utah Code §§30-1-4.1, 30-1-2(5). These sovereign actions are reserved to the States because "the Constitution delegated no authority to the Government of the United States on the subject of marriage and divorce." *Windsor*, 133 S.Ct. at 2691 (quoting *Haddock v. Haddock*, 201 U.S. 562, 575 (1906)).

Secondly, allowing the Tenth Circuit to redefine marriage would upend the State's carefully crafted statutory scheme designed to reinforce the male-female definition of marriage which we believe is most supportive of the State's greatest asset: our children. The Tenth Circuit did not have before it the whole of Utah's domestic relations laws and should not "sit as a super-legislature to judge the wisdom or desirability of legislative policy determinations." *Williams v. Pryor*, 240 F.3d 944, 949 (11th Cir. 2001) (quoting *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976)). States define marriage because "[t]he definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations." *Windsor*, 133 S.Ct. at 2691.

Third, the Tenth Circuit did not adequately consider the consequences of its decision for Utah's prohibitions of polygamous and incestuous marriages. If the choice of marriage partners is an

unlimited fundamental right, *Kitchen*, 755, F.3d at 1215, and if that marriage choice cannot be denied even when a majority believes that choice to be "immoral," 755 F.3d at 1217 (quoting *Lawrence v. Texas*, 593 U.S. 558, 571 (2003)), then the fundamental rights analysis applied by the Tenth Circuit will apply with even greater force to consenting adults desiring polygamous marriage or marriage between at least some close relatives. The prohibition of those marriages has always been grounded in morality. Without a moral justification, courts will be obliged to remove existing marriage prohibitions as the U.S. District Court did last month in Utah. See *Brown v. Herbert*, 2014 WL 4249865 (D.Utah Aug. 27, 2014).

Accordingly, this Court should grant certiorari and reverse the Tenth Circuit's judgment below.

ARGUMENT

I. Amici and The People of Utah Have Properly Fulfilled Their Responsibility in Our Federal System to Adopt Domestic Relations Laws That Will Benefit the State's Citizens, Especially Its Children.

In our constitutional system, Amici acting as state legislators have sovereign responsibility for matters of domestic relations and feel a strong obligation to enact laws for the benefit and protection of the State's children.

A. The State of Utah Has Plenary Responsibility for Its Domestic Relations Laws

As the Supreme Court explained last term: "By history and tradition the definition and regulation of marriage . . . has been treated as being within the authority and realm of the separate States." *Windsor*, 133 S.Ct. at 2689-2690. The Court noted "[t]he recognition of civil marriages is central to state domestic relations law applicable to its residents and citizens." *Windsor*, 133 S.Ct. at 2691. Further, "[t]he definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the '[p]rotection of offspring, property interests, and the enforcement of marital responsibilities.'" *Windsor*, 133 S.Ct. at 2691 (quoting *Williams v. North Carolina*, 317 U.S. 287, 298 (1942)). As a result, it is a "long established precept that the incidents, benefits, and obligations of marriage . . . may vary, subject to constitutional guarantees, from one State to the next." *Windsor*, 133 S.Ct. at 2692. Such constitutional guarantees have always related exclusively to marriage between men and women. See *Turner v. Safley*, 482 U.S. 78 (1987); *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Loving v. Virginia*, 388 U.S. 1 (1967). The State of Utah has exercised its plenary power over domestic relations law by upholding marriage as the union between a man and a woman.

B. Amici and the People of Utah have Spoken with Considered Judgment in Establishing its Sovereign State Definition of Marriage

Through its elected representatives and through the direct vote of the people, the State of Utah has overwhelmingly and repeatedly reaffirmed that marriage should be defined as the union of one man and one woman. In 1977 the Utah Legislature amended its marriage law to make it clear that marriage is limited to one man and one woman. See Utah Code §30-1-2. Approximately 30 years later the Utah Legislature again amended its marriage law to make it clear that same-sex marriages performed outside the State are not recognized. See Utah Code §30-1-4.1. The year after the Massachusetts high court determined that its State constitution overrode Massachusetts' statutory definition of marriage, see *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass 2003), the Utah Legislature proposed a constitutional amendment to reinforce Utah's longstanding marriage policy.

The Utah Legislature passed the proposed marriage amendment by the required two-thirds majority and the citizens of the State ratified the constitutional amendment with approximately 66% of the direct vote. During the same session the Legislature enacted a narrowly tailored statutory marriage amendment that provided that "any contract or other rights, benefits, or duties that are enforceable independently" of marriage are respected. Utah Code §30-1-4.1(2). This thorough

and open legislative process should also be respected by this Court as a clear manifestation of the sovereign will of the State of Utah.

When the State of New York amended its law to permit same-sex marriage the vote was contentious and close.[3] Nevertheless, this Court respected the outcome of that contest because "New York's actions were a proper exercise of its sovereign authority," *Windsor*, 133 S.Ct. at 2689, and because the process allowed "the formation of consensus" among the electorate. *Id.* at 2692. Previously, this Court has cautioned against "extending constitutional protection to an asserted right or liberty interest" because, once established, "the matter [is placed] outside the arena of public debate and legislative action." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

The principles of state sovereignty and consensus apply equally to the Legislature and the people of this State. Utah's consensus continues with nearly 80% of the current Utah Legislature joining as Amici in this brief.

---

[3] See Nicholas Confessore and Michael Barbaro, *New York Allows Same-Sex Marriage, Becoming Largest State to Pass Law*, NYTimes (June 24, 2011), available at http://www.nytimes.com/2011/06/25/nyregion/gay-marriage-approved-by-new-york-senate.html?pagewanted=all&_r=0.

II. Redefining Marriage Would Upend Utah's Domestic Relations Laws Prioritizing Children's Opportunity to be Raised by a Married Mother and Father.

In pursuance of its constitutional responsibility to craft domestic relations law, the Utah Legislature has followed sound public policy to prioritize the opportunity of children to be raised, whenever possible, by a married mother and father. This recurring and pervasive policy is reflected throughout Utah's domestic relations laws.

In contrast, the Tenth Circuit's proposed redefinition of marriage would put the integrity of Utah's child-oriented domestic relations structure, along with its long-established benefits, at substantial risk. Numerous statutory provisions would be impacted because marriage relationships are at the heart of a sovereign State's plenary authority to promote the general welfare of its people.[4]

Utah's marriage amendment and related statutes are part of a wide range of state laws rooted in history and experience and designed to endorse and encourage each child's opportunity to be reared by a married mother and father. Preserving these rationally related—indeed compelling—policies is the proper exercise of the State's plenary authority over marriage. See *Lofton v. Sec'y of the Dep't of*

[4] A simple word search of the terms "marriage," "child," "parent," "mother" and "father" reveals hundreds of separate code sections.

Children & Family Servs., 358 F.3d 804 (11th Cir. 2004); *Hernandez v. Robles*, 7 N.Y.3d 338, 356, 360-61 (N.Y. 2006). These policies infuse the laws of the State on a broad range of topics.

A. Birth and Adoption

Utah's domestic relations laws support a child's bond to his or her married parents. Utah law provides that, in addition to adoption or parentage determinations, a child who has been "legitimized by the subsequent marriage of his natural parents" can request a supplementary birth certificate (Utah Code §26-2-10), signaling the State's recognition of the importance of the child's bond to married parents.

The vital link between marriage and children is underscored by a prohibition of premarital agreements that purport to affect the "right of a child to support." Utah Code §30-8-4. Marital responsibilities for children can thus not be avoided by contract.

When a child cannot be reared by his or her own mother and father, the State consistently seeks to provide the opportunity for the child to be reared by a married mother and father. Thus, the state adoption statute "specifically finds that it is not in a child's best interest to be adopted by a person or persons who are cohabiting in a relationship that is not a legally valid and binding marriage under the laws of this state." Utah Code §78B-6-102(1) & (4). The statutory direction of who may adopt provides affirmatively for adoption by married couples: "A child may be adopted by: (a) adults who are legally married to each other in accordance with the laws of

this state." Utah Code §78B-6-117(2). By contrast, it specifies: "A child may not be adopted by a person who is cohabiting in a relationship that is not a legally valid and binding marriage under the laws of this state." *Id.* at (3).

Similar requirements apply to children in state custody. "In order to provide a child who is in the custody of the division with the most beneficial family structure, when a child in the custody of the division is placed for adoption, the division or child-placing agency shall place the child with a man and a woman who are married to each other" unless "there are no qualified married couples." *Id.* at (4). The State will "not place a child for adoption, either temporarily or permanently, with any individual or individuals who do not qualify for adoptive placement pursuant to" these provisions. Utah Code §62A-4a-607(1)(b).

When a child is in state protective custody and foster parents or other applications for adoption are under consideration, Utah law provides that it is the public policy of the State to "[place] an adoptable child with a married couple whenever possible." Utah Code §78B-6-132. The most recent annual report of the Division of Child and Family Services indicates 87.3% of children placed for adoption from foster care were placed with married couples.[5]

---

[5] Utah's Division of Child and Family Services, *Annual Report 2013*, available at http://dcfs.utah.gov/pdf/reports/annual%20report%202013.pdf.

The State's adoption law clearly favors placing children in a home with a married mother and father except when compelling interests require otherwise.

B. Legal Parenthood

The status of legal parenthood is statutorily linked to marriage in order to favor childrearing by a married mother and father. Utah's Uniform Parentage Act provides: "A man is presumed to be the father of a child if: he and the mother of the child are married to each other and the child is born during the marriage" or within 300 days of the end of the marriage. Utah Code §78B-15-204(1). The importance of this policy is underscored by the fact that this result will obtain even if "he and the mother of the child married each other in apparent compliance with law, even if the attempted marriage is or could be declared invalid." *Id.* at (1)(c). This presumption can only be challenged by the mother or presumed father and in the former circumstance, she has the burden of proving "that it would be in the best interests of the child to disestablish the parent-child relationship." Utah Code §78B-16-607.

In the circumstances where a child is conceived as the result of an extramarital sexual relationship, the legal policies in Utah law "that govern whether an individual has standing to challenge a presumption of paternity" include "'preserving the stability of the marriage.'" *Pearson v. Pearson*, 182 P.3d 353, 355 (Utah 2008) (quoting *In re J.W.F.*, 799 P.2d 710, 713 (Utah 1990)). This policy "extends not only to the preservation of spousal unity, but also to the preservation of parent-child relationships

created by the marriage." *Pearson*, 182 P.3d at 355-56. Thus, the Utah Supreme Court has "emphasized the importance of preserving family harmony between spouses as a policy consideration for favoring legitimacy. Favoring legitimacy also promotes family harmony between parents and children by protecting and preserving these crucial relationships." *Pearson*, 182 P.3d at 356-57.

Similarly, the husband of the mother of a child born as the result of assisted reproduction is the father of the child unless he does not consent and contests paternity within two years. Utah Code §78B-15-703 & 705. The husband of a gestational mother, in addition to the mother herself, must relinquish parental rights and the "intended parents shall be married, and both spouses must be parties to the gestational agreement." Utah Code §78B-15-801.

These paternity laws ensure children will have the stability of a married mother-father relationship in all but the most unusual circumstances.

C. Education

Curriculum in Utah public schools that touches on human sexuality stresses "the importance of abstinence from all sexual activity before marriage and fidelity after marriage" and may not include "the advocacy of sexual activity outside of marriage." Utah Code §53A-13-101. This same emphasis is required in educational programs related to control of communicable diseases. Utah Code §26-6-3. Thus, instruction by the State underscores the message that sexual relationships between men and women

ought to occur only within marriage. This ensures that children who might result from such relationships will be more likely to be born into families with a married mother and father.

D. Premarital Counseling

The State has an explicit policy of marital stability by encouraging "premarital counseling prior to securing a marriage license by persons under 19 years of age and by persons who have been previously divorced." Utah Code §30-1-30. This policy is administered by a "master plan" administered by "counseling boards" as established under law. See Utah Code §30-1-31 et seq. The purpose of these laws is to encourage strong marriages so that children are more likely to be born and raised by a married mother and father.

E. Utah Marriage Commission

The Legislature has also created the Utah Marriage Commission with a mission to:

> [P]romote coalitions and collaborative efforts to uphold and encourage a strong and healthy culture of strong and lasting marriages and stable families; contribute to greater awareness of the importance of marriage and leading to reduced divorce and unwed parenthood in the State; promote public policies that support marriage; promote programs and activities that educate individuals and couples on how to achieve strong, successful, and lasting marriages . . .; actively promote measures designed to maintain and strengthen marriage, family, and

> the relationships between husband and wife and parents and children.

Utah Code §62A-1-120.

The Commission has an online presence (http://strongermarriage.org/) with a wide range of information for couples on topics such as relationships, communication, children, aging, enhancing marriage, conflict management, etc. addressed to those married, engaged and dating. It has published *The Utah Marriage Handbook* and *Should I Try to Work It Out? A Guidebook for Individuals and Couples at the Crossroads of Divorce.* The Commission sponsors and promotes a wide range of classes for couples all over the State (the current calendar for September 2014 lists twenty one classes in eight counties). Again, the objective is to maximize the likelihood that children will be raised by a mother and father in a stable marital relationship.

F. Utah Division of Child and Family Services

Utah law consistently promotes the preservation of ties between children and natural parents. A statutory purpose of the Utah Division of Child and Family Services is to "provide preventive services and family preservation services in an effort to protect the child from the trauma of separation from his family, protect the integrity of the family, and the constitutional rights of parents." Utah Code §62A-4a-103. The law requires case workers of the Division to be trained in "the importance of maintaining the parent-child relationship whenever

possible." Utah Code §62A-4a-107. The State's fundamental policy includes this statement:

> It is in the best interest and welfare of a child to be raised under the care and supervision of the child's natural parents. A child's need for a normal family life in a permanent home, and for positive, nurturing family relationships is usually best met by the child's natural parents.

Utah Code §62A-4a-201.

The Division will "when possible and appropriate, without danger to the child's welfare, make reasonable efforts to prevent or eliminate the need for removal of a child from the child's home prior to placement in substitute care." Utah Code §62A-4a-203.

G. Utah Juvenile Court System

The Utah Juvenile Court system's statutory purpose includes a mandate to "act in the best interests of the minor in all cases and preserve and strengthen family ties." Utah Code §78A-6-102. The Juvenile Court Act further specifies that "the termination of family ties by the state may only be done for compelling reasons" and recognizes "the right of the child to be reared by the child's natural parents." Utah Code §78A-6-503. The State also disfavors elimination of a mother and father from a child's life or diluting a parent's relationship with a child through the misapplication of legal doctrines such as in loco parentis, or concepts like de facto parent or "psychological parent." *Jones v. Barlow*, 154 P.3d 808 (Utah 2007).

Under these statutory enactments, children in Utah will experience the benefits of being raised by their own mother and father except in those rare cases where a parent's unfitness may pose danger to the child. Even in that unfortunate circumstance, State law is designed to maximize the likelihood that the child is raised by a mother and a father in a loving, stable family relationship.

H. Divorce

Given the importance of marriage to the well being of children, before a divorce is granted in Utah, a 90-day waiting period is imposed before a court may hold divorce hearings. Utah Code §30-3-18. The couple must also attend a mandatory course "designed to educate and sensitize divorcing parties to their children's needs both during and after the divorce process." Utah Code §30-3-11.2. As a group of scholars note, "Utah is the only state in the United States that has mandated an additional 'divorce orientation education' component, which seriously raises the issue of reconciliation, to its mandated DPE [Divorcing Parents Education] program."[6]

When divorce does occur Utah statutes provide that "it is in the best interests of the child to have both parents actively involved in parenting the child." Utah Code §30-3-32. In determining custody awards, the courts are directed to consider the "past conduct and demonstrated moral standards of each of the parties" and "which parent is most likely to act

---

[6] Tamara A. Fackrell, et al., *How Effective are Court Affiliated Divorcing Parents Education Programs? A Meta-Analytic Study*, 49 Family Court Review 107, 116 (2011).

in the best interest of the child, including allowing the child frequent and continuing contact with the noncustodial parent" and "whether each parent is capable of encouraging and accepting a positive relationship between the child and the other parent, including the sharing of love, affection, and contact between the child and the other parent." Utah Code §30-3-10 & Utah Code §30-3-10.2. "[J]oint legal custody is a rebuttable presumption." Utah Code §30-3-10. These provisions are designed to ensure that children will benefit to the fullest extent possible from continuing contact with both their mother and father even when those individuals are no longer married to one another.

I. Responses to the Tenth Circuit's Asserted Inconsistencies in State Laws on Family Relations

In its decision, the Tenth Circuit raised concerns about perceived inconsistencies between some Utah domestic relations laws and the State's desire to retain the male-female definition of marriage. None of the Tenth Circuit's concerns, however, negate the State's right to define marriage.

The first so-called inconsistency is that the State's interest in maintaining the tie between marriage and procreation is undermined because "the elderly, those medically unable to conceive, and those who exercise their fundamental right not to have biological children are free to marry and have their out-of-state marriages recognized in Utah." *Kitchen*, 755 F.3d at 1219 (10th Cir. 2014). Further, the court also cited a provision "allow[ing] first

cousins to marry if 'both parties are 65 years of age or older; or . . . if both parties are 55 years of age or older, [and] either party is unable to reproduce.' Utah Code § 30-1-1(2)." *Id.*

A statute of this nature is not unique to Utah and has no bearing on the current question before this Court. Currently 19 states and the District of Columbia allow first cousins to marry while 20 states prohibit the practice and 6 states (including Utah) allow it under certain circumstances.[7] This is not a settled area of law and Utah's law falls squarely in the middle of the debate.

The purpose of this law is to avoid complications that more commonly occur when close relatives procreate.[8] The statute's primary function is, once again, to protect children and families. That the State allows infertile male and female couples to marry, including first cousins, does not undermine the State's consistent policy of promoting the relationship between a child and his or her mother and father. The issue of first cousins is merely a matter of historical consanguinity and the bounds of

---

[7] See Annulment and Prohibited Marriage, WestLaw (2014) at: https://a.next.westlaw.com/Link/Document/Blob/I9c5aa53f5b5411de9b8c850332338889.pdf?targetType=surveys-stat-pdf&originationContext=document&transitionType=DocumentImage&uniqueId=7649b092-4bdb-4a1e-88e5-0b6957adfc5e&contextData=(sc.Category).

[8] See Jo Adetunji, *First Cousin Marriage Doubles Risk of Birth Defects in Children*, The Conversation, July 4, 2013, available at, http://theconversation.com/first-cousin-marriage-doubles-risk-of-birth-defects-in-children-15779.

incestuous marriage determinations. The fact that the State allows some infertile men and women, including first cousins, to marry does not undermine the State's consistent policy of promoting the need for each child to be raised by a mother and a father.

The second asserted inconsistency noted by the Tenth Circuit is between Utah's laws allowing so-called "no-fault" divorce[9] and its goal of promoting stable marriages and families. "It is difficult to imagine how the State's refusal to recognize same-sex marriage undercuts in any meaningful way a state message of support for marital constancy given its adoption of a divorce policy that conveys a message of indifference to marital longevity." *Kitchen*, 755 F.3d at 80.

The Tenth Circuit's assertion is an extreme mischaracterization of Utah's divorce laws and an egregious misrepresentation of Utah's position on the importance of marital longevity. No-fault divorce is not unique to Utah as such divorces are allowed in all 50 states and the District of Columbia. Nor does the availability of divorce mean that the State is indifferent to marital longevity. As discussed above, Utah has some of the most stringent requirements for those seeking divorce, whatever the reason. These include mandatory divorce counseling and a 90 waiting period. Utah Code §30-3-18. Further, fault is an explicit factor in determining a child's custody in divorce proceedings and the State has a presumption in favor of joint custody to foster the

[9] See Utah Code §30-3-1-3(h) allowing "irreconcilable differences of the marriage" as grounds for divorce.

continuing relationship of the child with both parents following divorce.[10] Thus, even in Utah's divorce laws, the underlying theme is, as always, the protection and well being of children and their continuing tie to their parents.

The result of Utah's cautious divorce policies are among the best in the Nation. A 2003 survey found that while 21% of the adult population in the United States is divorced, in Utah only 18% of the State's adults are divorced.[11] Likewise, a 2008 Pew Research report indicated that only 8% of men and 10% of women in Utah are divorced compared to the national average of 9% of men and 12% of women.[12] Contrary to the Tenth Circuit's negative assertions, Utah's strong divorce laws help protect children and their families and are consistent with the State's goals of connecting children to their biological mothers and fathers or at least a mom and dad.

---

[10] See discussion, supra, at Section II. A.

[11] Governor's Commission on Marriage, *Marriage in Utah: 2003 Baseline Statewide Survey on Marriage and Divorce* (2003), available at http://strongermarriage.org/files/uploads/Divorce/UtahMarriage-2.pdf.

[12] Pew Research Foundation, *Marriage and Divorce: A 50-State Tour,* (Oct. 15, 2009), available at http://www.pewsocialtrends.org/2009/10/15/marriages-and-divorce-a-50-state-tour/.

III. The Tenth Circuit's Fundamental Rights Analysis Would Improperly Justify Polygamous and Incestuous Marriages

The Tenth Circuit's fundamental rights analysis abandons all standards of morality in marriage laws, which would then improperly justify forced state endorsement of polygamous and adult incestuous marriage throughout the United States. Even though raised by the State in its opening brief, Brief of Appellants at 71, *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014) No. 13-4178, and at oral argument,[13] the Tenth Circuit dismissed consideration of polygamy summarily asserting that its inherent ills justify "Utah's ban on polygamy." See *Kitchen,* 755 F.3d at 1219. Yet in support of these alleged ills, the court merely cites Utah's constitutional prohibition of polygamy, *Id.* at 1219-1220, and asserts that monogamy is "inextricably woven into the fabric of society," *Id.* at 1220. These assertions, however, are similar to the ones the Tenth Circuit rejects in this case. If Utah's Constitution serves as adequate support for Utah's ban on polygamy then why is Utah's constitutional ban on same-sex marriage inadequate? Further, if polygamy may be rejected because it is not "inextricably woven into the fabric of society," then

[13] Oral Argument, *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014) (No. 13-4178), available at https://www.ca10.uscourts.gov/clerk/news/oral-argument-audio-recording-13-4178-kitchen-v-herbert.

why doesn't the Tenth Circuit reject same-sex marriage for the same reason?

This Court has distinguished between protecting individuals in their private intimate relationships and requiring public endorsement of those relationships. See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). See also, *Id.* at 585 (O'Connor, J., concurring). Yet the Tenth Circuit's fundamental rights analysis ignores this important distinction, rejecting moral standards as an important and continuing condition to State endorsement of marriage relationships. In Utah these standards reflect the State's considered judgment regarding what is best for the nurture and upbringing of children.

This understanding has always been at the root of the prohibition of marriages lawfully considered immoral. With respect to polygamy this Court has noted that "polygamous practices have long been branded immoral in the law." *Cleveland v. U.S.*, 329 U.S. 14, 16 (1946). Utah, like other States, has always prohibited polygamous marriages, Utah Code §30-1-2(1), and marriages between close relatives Utah Code §§30-1-1, 30-1-4(2), and considers bigamy, Utah Code §76-7-101, and incest, Utah Code §76-7-102, to be serious crimes.

The moral imperative against polygamy was considered so significant that in *Reynolds v. U.S.*, 98 U.S. 145, 164 (1878), this Court upheld a challenge to criminal bigamy on the basis that polygamous marriage was "odious" to Western civilization and "an offense against society." *Id.* at 164. Flowing from these concerns polygamy is "forever prohibited" by

Utah's Enabling Act. Act of July 16, 1894, ch. 138 § 3, 28 Stat. 107, 108.

Prohibitions against incestuous marriage are also a product of such proper moral standards. See *Ghassemi v. Ghassemi*, 998 S.2d 731 (La. Ct.App. 2008).

While support for these prohibitions is still widely shared, this support rests primarily upon a legislative judgment about what is acceptable in civilized society. Yet Respondents rely on the Tenth Circuit's fundamental rights analysis to strenuously argue against any continuing moral considerations in marriage.

Respondents assert that Utah's prohibition of same-sex marriage was improperly motivated, in part, by a desire to uphold deeply rooted historical traditions and norms with long established moral standards. They cite statements of some Amici and other supporters of Utah's marriage amendment for the unremarkable proposition that the definition of marriage contains moral considerations. See Brief for Respondents at 6-7, *Herbert v. Kitchen,* petition for cert. filed, No. 14-124. Respondents object to these considerations explaining that while the "Tenth Circuit did not question 'the integrity or good-faith beliefs' of Amendment 3's supporters," the Tenth Circuit emphasized that 'a majority's 'traditional[] view [of] a particular practice as immoral' cannot justify banning the practice." Brief for Respondents at 13 (quoting *Lawrence v. Texas*, 539 U.S. at 577) (changes in original). Even if this assertion applied to private consensual relationships, it is wholly inappropriate as applied to

state endorsement of marriage, which in Utah is based on the moral principle that whenever possible a child be raised by his or her two biological parents or, when impossible, by a mother and father in a loving family.

Sustaining the Tenth Circuit's hostility to moral standards would effectively eliminate the basis upon which adult polygamy, incestuous and other polyandrous marriages have long been prohibited. If, as the Tenth Circuit held, the choice of marriage partners is a fundamental right, *Kitchen*, 755 F.3d at 1218, that cannot be denied because a majority believes the choice to be "immoral," 755 F.3d at 1217 (quoting *Lawrence v. Texas*, 593 U.S. 558, 571, 577 (2003)), then little basis would exist on which to prohibit consenting adults from consummating consensual adult polygamous marriages or marriages between at least some close adult relatives.

This concern is real to our State. The U.S. District Court of Utah recently rejected a portion of the State's longstanding prohibition on polygamy. See *Brown v. Herbert*, 2014 WL 4249865 (D. Utah Aug. 27, 2014). Thus, unless moral judgments regarding marriage are still valid, subject to established constitutional guarantees concerning male-female marriage, then it is difficult to see how polygamy, incestuous or other polyandrous marriages can remain prohibited.

In highlighting these concerns Amici strenuously reaffirm their genuine respect and compassion for all individuals. As determined by both the Tenth Circuit and the District Court decisions below, see *Kitchen*

v. Herbert, 755 F.3d 1193, 1229 (10th Cir. 2014); *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1209 (D. Utah 2013), Utah's decision not to adopt same-sex marriage is not motivated by animus and individuals are free to engage in private sexual conduct as they choose. However, Amici feel strongly that the interests of Utah's children are best served by continued adherence to deeply rooted marriage laws that encourage raising children in a home with both biological parents, or when that is not possible, by a mother and a father. This ideal is not always perfectly realized but Amici strongly contend that continued adherence to long established laws protecting and furthering this ideal are in the best interest of our children and that this interest is an appropriate moral choice to preserve the optimum family environment in which to conceive and nurture the next generation.

While other States need not accept Utah's sovereign domestic policy judgments, neither should Utah be compelled to follow or be bound by the judgments of other States. Nor should Utah's moral judgments regarding the best interests of its children be superseded by newly discovered fundamental rights. This Court recognizes that States' marriage policies may differ, see *Windsor*, 133 S.Ct. at 2696, precisely because marriage has "more to do with morals and civilization of a people than any other institution" and therefore "has always been subject to the control of the legislature." *Maynard v. Hill*, 125 U.S. 190, 205 211-213 (1888). Accordingly, this Court should not abandon its longstanding determination that State standards

undergird marriage as a "sacred" institution upon which the very existence and survival of society rests. See *Zablocki v. Redhail*, 434 U.S. 374, 383-84 (1978); *Maynard*, 125 U.S. at 211-213.

CONCLUSION

When the Legislature adopted and the people of the State ratified Utah's marriage amendment, they retained and secured in their state Constitution a legal understanding of marriage that had prevailed throughout the history of the State and which Amici believe is essential for future generations. This understanding is properly reflected throughout State laws and is essential to the perpetuation of an ordered society.

For the foregoing reasons we respectfully request that this Court grant the State's petition of certiorari and reverse the decision below of the Tenth Circuit.

Respectfully Submitted.

ROBERT T. SMITH*
1977 Regal Stream Cove
Salt Lake City, UT 84121
801-949-5381
theronsmith1@gmail.com
*Counsel of Record

SEPTEMBER, 2014

APPENDIX

APPENDIX

Utah State Senators

Stuart J. Adams	(Dist. 22)
Curtis S. Bramble	(Dist. 16)
Allen M. Christensen	(Dist. 19)
Margaret Dayton	(Dist. 15)
Wayne A. Harper	(Dist. 6)
Deidre M. Henderson	(Dist. 7)
Lyle W. Hillyard	(Dist. 25)
David P. Hinkins	(Dist. 27)
Scott K. Jenkins	(Dist. 20)
Peter C. Knudson	(Dist. 17)
Mark B. Madsen	(Dist. 13)
Wayne L. Niederhauser (Senate President)	(Dist. 9)
Ralph Okerlund	(Dist. 24)
Aaron Osmond	(Dist. 10)
Stuart C. Reid	(Dist. 18)
Howard A. Stephenson	(Dist. 11)
Jerry W. Stevenson	(Dist. 21)
Daniel W. Thatcher	(Dist. 12)
John L. Valentine	(Dist. 14)
Kevin T. Van Tassell	(Dist. 26)
Evan J. Vickers	(Dist. 28)
Todd Weiler	(Dist. 23)

(22 of 29 current Utah State Senators)

APPENDIX (Cont.)

Utah State Representatives

Jacob L. Anderegg	(Dist. 6)
Jerry B. Anderson	(Dist. 69)
Stewart Barlow	(Dist. 17)
Roger E. Barrus	(Dist. 18)
Jim Bird	(Dist. 42)
Melvin R. Brown	(Dist. 53)
LaVar Christensen	(Dist. 32)
Kay J. Christofferson	(Dist. 56)
Rich Cunningham	(Dist. 50)
Brad L. Dee	(Dist. 11)
Jack R. Draxler	(Dist. 3)
James A. Dunnigan	(Dist. 39)
Rebecca P. Edwards	(Dist. 20)
Steve Eliason	(Dist. 45)
Justin Fawson	(Dist. 7)
Gage Froerer	(Dist. 8)
Francis Gibson	(Dist. 65)
Brian Greene	(Dist. 57)
Richard A. Greenwood	(Dist. 12)
Keith Grover	(Dist. 61)
Stephen G. Handy	(Dist. 16)
Gregory H. Hughes	(Dist. 51)
Eric K. Hutchings	(Dist. 38)
Don L. Ipson	(Dist. 75)
Ken Ivory	(Dist. 47)
Michael S. Kennedy	(Dist. 27)
John Knotwell	(Dist. 52)
Bradley G. Last	(Dist. 71)
Dana L. Layton	(Dist. 60)
David E. Lifferth	(Dist. 2)
Rebecca D. Lockhart (Speaker)	(Dist. 64)
John G. Mathis	(Dist. 55)
Daniel McCay	(Dist. 41)

Kay L. McIff	(Dist. 70)
Mike K. McKell	(Dist. 66)
Ronda Rudd Menlove	(Dist. 1)
Merrill F. Nelson	(Dist. 68)
Jim Nielson	(Dist. 19)
Michael E. Noel	(Dist. 73)
Curtis Oda	(Dist. 14)
Lee B. Perry	(Dist. 29)
Jeremy A. Peterson	(Dist. 9)
Val L. Peterson	(Dist. 59)
Dixon M. Pitcher	(Dist. 10)
Kraig Powell	(Dist. 54)
Paul Ray	(Dist. 13)
Edward H. Redd	(Dist. 4)
Marc K. Roberts	(Dist. 67)
Douglas V. Sagers	(Dist. 21)
Dean Sanpei	(Dist. 63)
V. Lowry Snow	(Dist. 74)
Robert M. Spendlove	(Dist. 49)
Jon E. Stanard	(Dist. 62)
Keven J. Stratton	(Dist. 48)
Earl D. Tanner	(Dist. 43)
R. Curt Webb	(Dist. 5)
John R. Westwood	(Dist. 72)
Brad R. Wilson	(Dist. 15)

(58 of 75 current Utah State Representatives)