Nos. 14-556, 14-562, 14-571, 14-574

# In the Supreme Court of the United States

JAMES OBERGEFELL, *et al.*, *Petitioners*,
v.
RICHARD HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH, *et al.*, *Respondents*.

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VALERIA TANCO, *et al.*, *Petitioners*,
v.
BILL HASLAM, GOVERNOR OF TENNESSEE, *et al.*, *Respondents*.

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APRIL DEBOER, *et al.*, *Petitioners*,
v.
RICK SNYDER, GOVERNOR OF MICHIGAN, *et al.*, *Respondents*.

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GREGORY BOURKE, *et al.*, *Petitioners*,
v.
STEVE BESHEAR, GOVERNOR OF KENTUCKY, *et al.*, *Respondents*.

*On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit*

**Brief of *Amici Curiae* North Carolina Values Coalition; Liberty, Life, and Law Foundation; The Chaplain Alliance for Religious Liberty; Christian Family Coalition; and Traditional Values Coalition in Support of Respondents**

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## IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

*Amici Curiae* respectfully urge this Court to affirm the Sixth Circuit decision.

The North Carolina Values Coalition ("NCVC") is a North Carolina nonprofit corporation established to preserve and promote faith, family, and freedom by working in various arenas of public policy to protect marriage and religious liberty. NCVC spearheaded the ballot initiative in 2012 to amend North Carolina's Constitution to protect the time-honored definition of marriage (one man and one woman). The Marriage Amendment passed by a vote of 61% to 39% after a total of 1,317,178 citizens voted for the Amendment. NCVC's Executive Director, Tami L. Fitzgerald, served as Chairwoman of Vote FOR Marriage NC, the referendum committee that worked to pass the Amendment.

Liberty, Life, and Law Foundation ("LLLF") is a North Carolina nonprofit corporation established to defend religious liberty, sanctity of human life, conscience, family, and other moral principles. LLLF founder and legal counsel, Deborah J. Dewart, is the author of a book, *Death of a Christian Nation*, and many *amicus curiae* briefs in this Court.

The Chaplain Alliance for Religious Liberty ("CALL") is an association of endorsing agencies that

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[1] The parties have consented to the filing of this brief. *Amici curiae* certify that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amici*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

exists to ensure that chaplains and those they serve can exercise their constitutionally protected freedoms of religion and conscience without fear of reprisal. CALL currently has 35 endorsing agency members and speaks on behalf of over 2,700 chaplains, which represents about half of the chaplains serving our armed forces.

Christian Family Coalition ("CFC") is a Florida organization established to empower families at the grassroots level and give them a voice in government. CFC informs and educates citizens about candidates and pending legislation, trains Christian leaders, and defends the legal rights of Christians.

Traditional Values Coalition ("TVC") is a grassroots lobby organization that educates and speaks on behalf of over 43,000 churches nationwide on issues of pro-family concern. TVC has been a leading voice in the halls of Congress for over thirty years, defending the Judeo-Christian worldview that created and preserved our nation and our prosperity for well over two centuries. Those values include religious liberty and protecting traditional marriage and family as the cornerstone of society.

*Amici* have an interest in this case because the issues are a matter of national urgency and the result will impact the citizens of every state. *Amici* are concerned about the rights of state voters and the First Amendment liberties of citizens who do not support the redefinition of marriage, including military chaplains and the troops they serve.

## INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case is not about the right to marry a person of the same sex, or equal protection for a fundamental right. It is not about *who* may marry, but *what* marriage is.

When courts mandate marriage redefinition, they disenfranchise the people, shatter the foundations of government, and threaten liberties of speech, thought, and religion. Moreover, no court, legislature, or voter initiative can alter the nature of reality.

## ARGUMENT

### I. MARRIAGE REDEFINITION ADVOCATES PRESUPPOSE THE DEFINITION THEY SEEK TO ESTABLISH.

Words matter. Abraham Lincoln, discussing the scope of his war powers, "liken[ed] the case to that of the boy who, when asked how many legs his calf would have if he called its tail a leg, replied, 'Five,' to which the prompt response was made that *calling* the tail a leg would not *make* it a leg." *Reminiscences of Abraham Lincoln By Distinguished Men of His Time* (Allen Thorndike Rice ed., New York: Harper & Brothers Publishers, 1909) (Classic Reprint 2012) (1853-1889), 62.

Calling a triangle a "circle" does not make it so. Redefining "water" as a combination of hydrogen and nitrogen does not alter its composition. Calling a same-sex relationship "marriage" does not make it so. These are word games. Respondents' goal is not "marriage equality" but marriage *redefinition*. One dissenting

Connecticut judge critiqued "the majority's unsupported *assumptions* that the essence of marriage is a loving, committed relationship between two adults and that the sole reason that marriage has been limited to one man and one woman is society's moral disapproval of or irrational animus toward gay persons." *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 515-516 (Conn. 2008) (Zarella, J., dissenting). This simple observation lies buried under a heap of eloquent sounding arguments resting on the same "unsupported assumptions."

The states that retain the time-honored definition of marriage are not "exclud[ing] a group from exercising a right simply by manipulating a definition." *Wolf v. Walker*, 986 F. Supp.2d 982, 1004 (W.D. Wisc. June 6, 2014). *Amici* do not argue that "the definition of marriage should remain the same for the definition's sake." *Geiger v. Kitzhaber*, 994 F. Supp. 2d 1128, 1142 (D. Or. May 19, 2014), quoting *Golinski v. Off. of Pers. Mgmt.*, 824 F. Supp. 2d 968, 998 (N.D. Cal. 2012). It is Respondents who "manipulate a definition" using intrinsically illogical arguments.

Logic matters. Court rulings—especially those with such major legal and social repercussions—should be internally consistent. Recent marriage rulings resemble the incongruity between President Obama's Father's Day Proclamation ("there is no substitute for a father's presence, care, and support")[2] and his refusal to defend the Defense of Marriage Act—ensuring the permanent severance of many father-child

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[2] http://www.whitehouse.gov/the-press-office/2014/06/13/presidential-proclamation-fathers-day-2014.

relationships. *United States v. Windsor*, 133 S. Ct. 2675, 2684 (2013) ("the President . . . instructed the Department [of Justice] not to defend the statute in *Windsor*").

### A. Fundamental Rights Arguments Presuppose Marriage Redefinition.

Federal courts often concede state authority to define marriage. *See, e.g., DeLeon v. Perry*, 975 F. Supp. 2d 632, 657 (W.D. Texas 2014) ("Texas has the 'unquestioned authority' to regulate and *define marriage*") (emphasis added). But these courts undertake the very role they decline. *DeLeon* casually dismissed the contention that an injunction for plaintiffs "would effectively change the legal definition of marriage in Texas, rewriting over 150 years of Texas law." *Id.* at 665. That is exactly what it would do.

In order to determine whether a state has impermissibly infringed a constitutional right, the court must *define* that right. Courts have been skipping this step, holding that state laws "unconstitutionally deny consenting adult same-sex couples their fundamental right to marry in violation of the Due Process Clause and the Equal Protection Clause"—without first defining marriage. *Jernigan v. Crane*, 2014 U.S. Dist. LEXIS 165898, *53-54 (E.D. Ark. Nov. 25, 2014). Some courts adopt an emotional definition to fit the desired result—"the right to make a public commitment to form an exclusive relationship and create a family with a partner with whom the person shares an intimate and sustaining emotional bond." *Bostic v. Rainey*, 970 F. Supp. 2d 456, 472 (E.D. Va. 2014); *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1202 (D. Utah 2013). *Kitchen*, taking its cue from

*Planned Parenthood v. Casey,* 505 U.S. 833, 851 (1992), asserted that "[a] person's choices about marriage implicate the heart of the right to liberty that is protected by the Fourteenth Amendment." *Id.* at 1200. These choices do implicate liberty, but *Casey* never equates that liberty with a license to redefine marriage.

Recent federal rulings evade the crucial threshold issue of whether marriage already encompasses same-sex relationships, and if not, whether challengers may compel a court to redefine it. The Tenth Circuit cited a string of cases holding the right to marry does *not* include same-sex unions—then discarded them like a string of broken pearls and "nonetheless agree[d] with Plaintiffs that in defining the liberty interest at stake, it is impermissible to focus on the identity or class-membership of the individual exercising the right." *Kitchen v. Herbert*, 755 F.3d 1193, 1215 (10th Cir. 2014).

### B. Equal Protection Arguments Presuppose Marriage Redefinition.

*Bostic* criticized Virginia's marriage laws because they "limit the fundamental right to marry to only those Virginia citizens willing to choose a member of the opposite gender for a spouse." *Bostic*, 970 F. Supp. 2d at 472. Marriage laws in Indiana and Wisconsin allegedly "discriminate" against same-sex couples. *Baskin v. Bogan*, 766 F.3d 648, 658 (7th Cir. 2014). These pronouncements conceal the underlying presupposition that "marriage" has already been redefined to mean something it has never meant.

Legal terms demand clear, consistent definitions—not cleverly disguised alteration

midstream. The Sixth Circuit understood this basic principle: "Many precedents gauging individual rights and national power, leading to all manner of outcomes, confirm the import of original meaning in legal debates." *DeBoer v. Snyder*, 772 F.3d 388, 403 (6th Cir. 2014) (collecting cases). No one contends that those who adopted the Fourteenth Amendment understood it to mandate marriage redefinition. *Id*.

Logical errors abound. One state supreme court announced that "[d]enying same-gender couples the right to marry…violates the equality demanded by the Equal Protection Clause of the New Mexico Constitution," then decreed marriage redefinition in the *remedies* section: "'[C]ivil marriage' shall be construed to mean the voluntary union of two persons to the exclusion of all others." *Griego v. Oliver*, 316 P.3d 865, 889 (N.M. 2013). *The court essentially had to redefine marriage in order to redefine marriage*. Similarly, to conclude that Oklahoma violated equal protection through "an arbitrary exclusion based upon the majority's disapproval," another court had to bypass the argument that it was "rational for Oklahoma voters to believe that *fundamentally redefining marriage* could have a severe and negative impact on the institution as a whole." *Bishop v. United States ex rel. Holder*, 962 F. Supp. 2d 1252, 1294 (N.D. Okla. 2014) (emphasis added). The court implicitly redefined marriage as a "loving, committed, enduring relationship" between any two persons. *Id*. at 1295. That newly minted definition has no roots in American history or jurisprudence and cannot be presupposed in these crucial rulings.

## II. FUNDAMENTAL RIGHTS ARGUMENTS FAIL.

Many courts agree that the "right to marry" is fundamental, but as the Sixth Circuit observes:

> [S]omething can be fundamentally important without being a fundamental right under the Constitution. Otherwise, state regulations of many deeply important subjects—from education to healthcare to living conditions to decisions about when to die—would be subject to unforgiving review. They are not.

*DeBoer*, 772 F.3d at 411. The right Respondents assert is a counterfeit that is neither "deeply rooted in this Nation's history and tradition" nor "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720-721 (1997).

> "The institution of marriage . . . is more deeply founded than the asserted contemporary concept of marriage and societal interests for which petitioners contend. The due process clause . . . is not a charter for restructuring it by judicial legislation."

*DeBoer*, 772 F.3d at 400, quoting *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971).

Courts obscure this point, claiming that *Loving, Zablocki*, and *Turner* do not define the right in terms of "interracial marriage," or the rights of persons owing child support, or the right to marry while in prison. *See, e.g., Rosenbrahn v. Daugaard*, 2015 U.S. Dist.

LEXIS 4018, *22-23 (D. S.D. Jan. 12, 2015); *Brenner v. Scott*, 999 F. Supp. 2d 1278, 1287-88 (N.D. Fla.). Yet case law consistently presupposes the union of male and female:

- *Griswold v. Connecticut*, 381 U.S. 479, 485-486 (1965) (striking down law against contraceptives)
- *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978), quoting *Loving v. Virginia*, 388 U.S. 1, 12 (1967) ("Marriage is one of the basic civil rights of man, fundamental to our very existence and survival.")
- *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) ("Marriage and procreation are fundamental to the very existence and survival of the race.")
- *Turner v. Safley*, 482 U.S. 78, 96 (1987) ("[M]ost inmate marriages are formed in the expectation that they ultimately will be fully consummated.")

Same-sex couples have no use for contraceptives (*Griswold*) and are unnecessary to human survival (*Zablocki, Loving, Skinner*). *Turner's* rationale lacks coherence unless the Court presupposed the union of male and female. The Indiana district court cited an early state case holding that "the presumption in favor of matrimony is one of the strongest known to law." *Baskin v. Bogan*, 12 F. Supp. 3d 1144, 1151 (S.D. Ind. 2014), quoting *Teter v. Teter*, 101 Ind. 129, 131-32 (Ind. 1885). *Teter* involved two half-brothers disputing the validity of their mother's second marriage—to a *man*. No competing definition was on the horizon.

Nations around the world affirm the time-honored definition of marriage:

> We declare that the family, a universal community based on the *marital union of a man and a woman*, is the bedrock of society, the strength of our nations, and the hope of humanity. As the ultimate foundation of every civilization known to history, the family is the proven bulwark of liberty and the key to development, prosperity, and peace.

World Family Declaration, endorsed by 120 countries (emphasis added).[3] Even a commentator who favors extending legal benefits to same-sex couples (but not the word "marriage") acknowledges that:

> *The social institution of marriage predates our legal system by millennia*. Although legal rights conferred and obligations imposed by civil marriage have changed over the centuries, *sexuality remains the vital core*....

Daniel Dunson, *A Right to a Word? The Interplay of Equal Protection and Freedom of Thought in the Move to Gender-Blind Marriage*, 5 Alb. Govt. L. Rev. 552, 578 (2012) (emphasis added). Marriage is a comprehensive union of mind and body that transcends emotional bonds and requires sexual complementarity.[4]

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[3] http://worldfamilydeclaration.org/WFD (last visited 07/09/14).

[4] For a full development of this argument, see *What is Marriage? Man and Woman: A Defense* (Girgis, Anderson, and George, New York: Encounter Books, 2012).

Moreover, *Lawrence* did not involve formal recognition of same-sex relationships. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). On the contrary:

> Texas cannot assert any legitimate state interest here, such as national security or *preserving the traditional institution of marriage*. Unlike the moral disapproval of same-sex relations—the asserted state interest in this case—*other reasons exist to promote the institution of marriage* beyond mere moral disapproval of an excluded group.

*Id*. at 585 (emphasis added).

This Court has repeatedly signaled caution about announcing new fundamental rights, thus placing matters beyond the reach of public debate and legislation. Courts must "exercise the utmost care...lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the members of this Court." *Washington v. Glucksberg*, 521 U.S. at 720, citing *Moore v. City of East Cleveland,* 431 U.S. 494, 502 (1977). The Sixth Circuit wisely exercised judicial restraint:

> A dose of humility makes us hesitant to condemn as unconstitutionally irrational a view of marriage shared not long ago by every society in the world, shared by most, if not all, of our ancestors, and shared still today by a significant number of the States.

*DeBoer*, 772 F.3d at 404.

### A. Respondents' Proposed Redefinition Of Marriage Is Not Deeply Rooted In American History Or Tradition.

Courts must ditch decades of precedent to squeeze Respondents' claims into *Glucksberg's* framework. Respondents allegedly seek the "fundamental right to marry"—but must *first* redefine marriage to launch their arguments.

*Glucksberg* relied on tradition and moral disapproval—factors courts now glibly cast aside. The Idaho district court trips over itself discussing *Glucksberg*, which "followed directly from the unbroken pattern of state laws and legal traditions disapproving suicide and assisted suicide." *Latta v. Otter*, 19 F. Supp. 3d 1054, 1071 (D. Id.), *aff'd*, 2014 U.S. App. LEXIS 19620 (9th Cir. 2014). *Latta* short-circuits history, stating it is "not aware of a similarly pervasive policy against marriage" (*id.*) while ignoring the "pervasive policy" upholding opposite-sex marriage and condemning (even criminalizing) homosexual acts. *Latta* discards Idaho's marriage laws because "their history demonstrates that moral disapproval of homosexuality was an underlying, animating factor" (*id.* at 1080)—the same sort of moral disapproval *Glucksberg* deemed relevant to *uphold* the law.

A Wisconsin court tossed *Glucksberg* because it "involved the question whether a right to engage in certain conduct (refuse medical treatment) should be expanded to include a right to engage in different conduct (commit suicide)" whereas "[i]n this case, the conduct at issue is exactly the same as that already protected: getting married." *Wolf v. Walker*, 986 F. Supp.2d at 1002. No, it is not. *Wolf* presupposes

marriage redefinition and, with its dismissal of *Glucksberg*, essentially erases the "deeply rooted" criteria for fundamental rights.

The marital union of male and female is "deeply rooted" not only in American history but in world history. But case law overwhelmingly confirms that Respondents' novel redefinition of marriage is a recent development that does not share these roots:

> The everyday meaning of "marriage" is "the legal union of a man and woman as husband and wife," Black's Law Dictionary 986 (7th ed. 1999), and the plaintiffs do not argue that the term "marriage" has ever had a different meaning under Massachusetts law.

*Goodridge v. Dep't of Pub. Health,* 798 N.E.2d 941, 952 (Mass. 2003), citing *Milford v. Worcester*, 7 Mass. 48, 52 (1810); *Commonwealth v. Knowlton*, 2 Mass. 530, 535 (1807) (Massachusetts common law derives from English common law except as otherwise altered by state statutes or Constitution). A multitude of courts agree: *Jones v. Hallahan*, 501 S.W.2d 588, 589 (Ky. 1973); *Baehr v. Lewin*, 852 P.2d 44, 57 (Haw. 1993); *Standhardt v. Superior Court ex rel. Cty. of Maricopa*, 77 P.3d 451, 460 (Ariz. Ct. App. 2003); *Morrison v. Sadler*, 821 N.E.2d 15, 35 (Ind. Ct. App. 2005); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1306 (M.D. Fla. 2005); *Hernandez v. Robles*, 855 N.E.2d 1, 9 (N.Y. 2006); *Andersen v. King Cnty.*, 138 P.3d 963, 990 (Wash. 2006); *Conaway v. Deane*, 932 A.2d 571, 635 (Md. 2007); *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065, 1094-98 (D. Haw. 2012); *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 977 (S.D. Ohio 2013).

Most of these state cases predate *Windsor*, but admittedly the "language in *Windsor* indicates that same-sex marriage may be a 'new' right, rather than one subsumed within the Court's prior 'right to marry' cases." *Bishop*, 962 F. Supp. 2d at 1286 n. 33, quoting *Windsor*:

> For marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization. . . .

*Windsor*, 133 S. Ct. at 2689.

Words and definitions matter. "[W]hether or not the right in question is deemed fundamental turns in large part upon how the right is defined." *Bishop*, 962 F. Supp. 2d at *1286 n. 33. *Bishop* declined to determine whether Okla. Const. art. 2, § 35 burdened the same-sex couple's "fundamental right to marry a person of their choice," recognizing the potential impact on other restrictions. *Id*. The Tenth Circuit glossed over that glitch, arguing that Utah's ban on plural marriage is justified because monogamy is "inextricably woven into the fabric of our society...the bedrock upon which our culture is built"—neglecting to mention that the monogamy historically woven into American fabric presumes a union of male and female. *Kitchen*, 755 F.3d at 1219-20.

### B. There Is No Fundamental Right To Redefine Marriage.

Judicially imposed marriage redefinition has cataclysmic implications, as even some advocates admit:

> A court's insistence that the legal recognition of same-sex couples be designated "marriage" imposes an intellectual and social view that may not be held by a majority of citizens within its jurisdiction, and does so through the creation of not simply "a brand-new 'constitutional right'" but a disquieting new breed—a "right" to a *word*, an unprecedented notion having inauspicious potential for regulating speech and thought.

Dunson, *A Right to a Word?*, 5 Alb. Govt. L. Rev. at 599-600. The ominous First Amendment implications "impact countervailing liberty interests, which have been virtually ignored by proponents of court-ordered gender-blind marriage." *Id*. at 555.

## III. EQUAL PROTECTION ARGUMENTS FAIL.

Slavery was made plausible by *redefining* African-American persons as property rather than human beings. Similarly, courts manipulate reality when they mandate marriage redefinition:

> The purpose of language is no longer to apprehend things as they are, but to transform them into what we want them to be . . . just as when a black man was called a piece of property and used as an "article of merchandise" rather than a human being. An injustice of similar magnitude is perpetrated by naming same-sex couplings "marriage."

*Making Gay OK: How Rationalizing Homosexual Behavior is Changing* (Robert R. Reilly, Ignatius Press), 47. Such flights from reality destroy the human equality marriage redefinition proponents claim to defend.

Equal Protection arguments rely on the presumption that "marriage" already subsumes same-sex relationships. These verbal gymnastics defy law, logic, and reality. The Sixth Circuit correctly reasoned that:

> No doubt, many people, many States, even some dictionaries, now define marriage in a way that is untethered to biology. But that does not transform the fundamental-rights decision of *Loving* under the *old definition* into a constitutional right under the *new definition*. The question is whether the old reasoning applies to the new setting, not whether we can shoehorn new meanings into old words. Else, evolving-norm lexicographers would have a greater say over the meaning of the Constitution than judges.

*DeBoer*, 772 F.3d at 412 (emphasis added).

There is no constitutional right to redefine marriage. Nor is there a constitutional right to compel social approval under the rubric of equal protection, which "concerns equal rights and protections that allow people to be who they are and live as they choose, *not* equal social stature, which requires other members of the community to think of them in certain ways." Dunson, *A Right to a Word?*, 5 Alb. Govt. L. Rev. at 599.

### A. Earlier Equal Protection Cases Did Not Redefine Marriage.

In earlier cases, this Court considered issues irrelevant to the essence of marriage—race, incarceration, failure to pay child support. None

challenged the nature of the institution or did violence to its existing definition. These cases uniformly presuppose that marriage is, *by definition*, the union of one man and one woman. *Loving* struck down racial restrictions on marriage. Marriage has never been a *racial* institution. Marriage is an inherently *sexual* institution where hair color distinctions would be arbitrary, but distinctions in gender composition—the "vital core" of the institution—"are neither trivial nor superficial." Dunson, *A Right to a Word?*, 5 Alb. Govt. L. Rev. at 597. *Loving* served the Fourteenth Amendment's central purpose—"to eliminate all official state sources of invidious racial discrimination in the States." *Loving*, 388 U.S. at 10. "[R]estricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause." *Id.* at 12. Marriage redefinition turns the clock back to the days *before* the Fourteenth Amendment, when the word "person" was redefined to exclude African-Americans, thus rationalizing the politically correct practice of the day—slavery.

No one argues that a gay African-American male and gay Caucasian male could have obtained a marriage license in 1968:

> The denial of the license would have turned not on the races of the applicants but on a request to change the *definition* of marriage. Had *Loving* meant something more when it pronounced marriage a fundamental right, how could the Court hold in *Baker* five years later that gay marriage does not even raise a substantial federal question? *Loving* addressed, and rightly corrected, an unconstitutional eligibility

> requirement for marriage; it did not create a new *definition* of marriage.

*DeBoer,* 772 F.3d at 411 (emphasis added). As the Sixth Circuit noted earlier:

> In the nearly one hundred and fifty years since the Fourteenth Amendment was adopted, to our knowledge no Justice of the Supreme Court has suggested that a state statute or constitutional provision codifying the traditional definition of marriage violates the Equal Protection Clause or any other provision of the United States Constitution.

*Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 870 (8th Cir. 2006).

The same is true of *Zablocki* and *Turner*: "It strains credulity to believe that a year after each decision a gay indigent father could have required the State to grant him a marriage license for his partnership or that a gay prisoner could have required the State to permit him to marry a gay partner." *DeBoer,* 772 F.3d at 412. *Zablocki* struck down a statute that denied marriage to persons who owed delinquent child support. Restrictions on inmate marriage did not serve legitimate interests in rehabilitation and security. *Turner v. Safley*, 482 U.S. at 97-98. This Court described marriage as "the foundation of the family and of society, without which there would be neither civilization nor progress." *Zablocki v. Redhail*, 434 U.S. at 384, quoting *Maynard v. Hill*, 125 U.S. 190, 211 (1888). Civilizations have progressed for millennia without official recognition of same-sex relationships.

### B. Respondents' Approach Has No Limiting Principle.

Recent marriage cases typically involve same-sex couples who co-own property, live together, make medical decisions for one another, and assume other rights and responsibilities. *See, e.g., Brenner v. Scott*, 999 F. Supp. 2d at 1282. Courts often chastise state defendants for "defining the right to marry too narrowly" (*Rosenbrahn*, at *20) but then decree a definition so broad as to empty the term "marriage" of meaning. "To say that the *only* relationship that is procreative is the same as one that never is, or ever can be, is a leap into the void." *Making Gay OK*, at 106. Respondents' approach "would create line-drawing problems of its own." *DeBoer*, 772 F.3d at 407. It is true that "states have maintained laws on polygamy, incest, age of consent" in the years following *Loving*, *Zablocki*, and *Turner*. *Rosenbrahn*, at *23. But those cases presupposed the union of male and female. Under Respondents' reconstruction, no restrictions can stand. "Marriage" would disintegrate into the "loving, committed" relationship of any two people with no principled basis on which to find that *any* two people are not "similarly situated" with respect to marriage.[5] This nebulous definition destroys the foundation for other restrictions. "If it is constitutionally irrational to

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[5] In May 2010, a 72-year-old grandmother and her 26-year-old grandson reportedly fell in love and hired a surrogate to enable them to have a child together. This is an opposite sex union—but Respondents' redefinition leaves no foundation to deny this couple the right to marry. http://www.telegraph.co.uk/news/newstopics/howaboutthat/7662232/Grandmother-and-grandson-to-have-child-together.html.

stand by the man-woman definition of marriage, it must be constitutionally irrational to stand by the monogamous definition of marriage. Plaintiffs have no answer to the point." *DeBoer*, 772 F.3d at 407. Other factors—e.g., age, number, consanguinity—would be equally insupportable. *See id.* at 412-413. Moreover, if marriage is merely emotional attachment, it is difficult to see why the state has any interest in defining it, regulating it, or granting legal benefits.

Society values many loving relationships between two persons of the same sex, e.g., father-son, sister-sister, aunt-niece, grandfather-grandson, friend-friend. There are comparable non-marital opposite-sex relationships, e.g., father-daughter, mother-son, brother-sister. These persons may live together, co-own property, bequeath property to each other, and name one another as agents under powers of attorney for finances or health care. Two men, two women, or some other combination of unmarried persons may share a residence and appoint one another to act in emergencies. They might share responsibility for children—e.g., a grandmother may offer financial assistance or babysitting to help her single-mom daughter.

*None of this renders these relationships equivalent to marriage*—but applying Respondents' logic, any "couple" would be eligible to marry. There is no limiting principle to deny them that "right"—indeed, the deconstruction extends even further:

> Ironically, the logic behind this process of legitimization of homosexual behavior undercuts any objective standards by which we could judge the moral legitimacy of anything. This is the

> ultimate danger it poses—including to America's political foundations.

*Making Gay OK*, at 12. It might even be "discrimination" for the state to deny benefits to a couple (or group) merely because their relationship is not romantic.

Recent rulings have found traditional marriage laws irrational. *Bostic v. Schaefer,* 760 F.3d 352, 382 (4th Cir. 2014). The Indiana district court could identify only "one extremely limited difference" between same-sex and opposite-sex couples. *Baskin*, 12 F. Supp. 3d at 1162. The lower court in *Bostic* asserted that "it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse." *Bostic*, 970 F. Supp. 2d at 480 n. 14, quoting *Lawrence v. Texas*, 539 U.S. at 567. But it is hardly irrational to reserve a unique word and legal status for the complementary male-female union required for human survival—even if some couples are childless. Marriage is not *simply* about the right to have intercourse, but the *ability* to do so is a rational distinction. Humanity is a gendered species. The union of male and female differs from other two-person relationships. Not every marriage produces children, just as not every for-profit corporation actually earns a profit. That does not mean we must redefine what constitutes a corporation—or a marriage. Moreover, two persons of the same sex cannot "have" a child without involving a member of the opposite sex—thus the "families" headed by same-sex couples are broken by both definition and design. The ensuing personal and legal entanglements are what should cause grave concern for the welfare of

American's children—not the failure to stretch the definition of marriage.

## IV. COURT-ORDERED MARRIAGE REDEFINITION THREATENS CORE AMERICAN LIBERTIES.

Many recent rulings impose policy judgments on the people, contrary to admissions that the court's role is "not to impose its own political or policy judgments" on the people. *Bourke v. Beshear,* 996 F. Supp. 2d 542, 543 (W.D. Ky. 2014). This ominous development jeopardizes core freedoms of self-governance, thought, speech, and religion, and obscures the inevitable damage to Americans who cannot conscientiously endorse marriage redefinition. This Court should affirm the Sixth Circuit, which had the humility to acknowledge its limits:

> Of all the ways to resolve this question, one option is not available: a poll of the three judges on this panel, or for that matter all federal judges, about whether gay marriage is a good idea. Our judicial commissions did not come with such a sweeping grant of authority, one that would allow just three of us—just two of us in truth—to make such a vital policy call for the thirty-two million citizens who live within the four States of the Sixth Circuit: Kentucky, Michigan, Ohio, and Tennessee.

*DeBoer*, 772 F.3d at 396. The same is true for the citizens of every state in this nation.

### A. Court-Ordered Marriage Redefinition Threatens Rights Of "The People" To Govern Themselves And Set Public Policy.

After the Civil War, the Reconstruction Amendments carved out an exception to America's balance of powers because "states too could threaten individual liberty." *Shelby v. Holder*, 679 F.3d 848, 853 (D.C. Cir. 2012). These Amendments protect individual liberties, including the right to vote. *Ironically, the Fourteenth Amendment is the very provision judges now use to annul millions of votes on a matter of intense public concern and debate*.

"The [Fourteenth] [A]mendment was added to the Constitution after the Civil War for the express purpose of protecting rights against encroachment by state governments." *Brenner v. Scott*, 999 F. Supp. 2d 1278, 1286 (N.D. Fla. Aug. 21, 2014). Certain rights may not be submitted to vote. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

The Bill of Rights did not withdraw the right to set marriage policy. Judges have no right to unilaterally dictate public policy. Federal courts improperly disenfranchise millions of voters when they mandate marriage redefinition. "If a federal court denies the people suffrage over an issue long thought to be within their power, they deserve an explanation. We, for our part, cannot find one...." *DeBoer*, 772 F.3d at 402. "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." *Id*. at 409, quoting *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1637 (2014). The Tenth Circuit

admitted that "[a]s a matter of policy, it might well be preferable to allow the national debate on same-sex marriage to play out through legislative and democratic channels"—then mandated marriage redefinition. *Kitchen*, 755 F.3d at 1228.

Federalism is a critical component in the current marriage crisis. Residual state sovereignty is implicit in Art. I, § 8 and explicit in the Tenth Amendment. Federalism safeguards individual liberty, allowing states to "respond to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power." *Bond v. United States,* 131 S. Ct. 2355 (2011). The "federalist structure of joint sovereigns…increases opportunity for citizen involvement in democratic processes." *Gregory v. Ashcroft,* 501 U.S. 452, 458 (1991). Federally mandated marriage redefinition suppresses those opportunities and abridges the right of citizens to shape public policy. It also threatens to expand the reach of Congress to encroach even further on state authority over domestic relations, using its Section 5 enforcement powers. That would be a strange twist:

> How odd that one branch of the National Government (Congress) would be reprimanded for entering the fray in 2013 and two branches of the same Government (the Court and Congress) would take control of the issue a short time later.

*DeBoer*, 772 F.3d at 415. Such expansion of power destroys basic principles of federalism.

*Windsor* is often trumpeted as a call to redefine marriage. On the contrary, "[i]t takes inexplicable contortions of the mind or perhaps even willful ignorance . . . to interpret Windsor's endorsement of the state control of marriage as eliminating the state control of marriage." *Conde-Vidal v. Garcia-Padilla*, 2014 U.S. Dist. LEXIS 150487, *20 (D. P.R. 2014). As the Sixth Circuit rightly concluded:

> *Windsor* hinges on the Defense of Marriage Act's unprecedented intrusion into the States' authority over domestic relations. *Id*. at 2691-92. Before the Act's passage in 1996, the federal government had traditionally relied on state definitions of marriage instead of purporting to define marriage itself. *Id*. at 2691. That premise does not work—it runs the other way—in a case involving a challenge in federal court to state laws defining marriage.

*DeBoer*, 772 F.3d at 400-401. *Windsor* cites earlier cases supporting the states' authority to regulate marriage:

- *Sosna v. Iowa*, 419 U.S. 393, 404 (1975) ("virtually exclusive province of the States");
- *Williams v. North Carolina*, 317 U.S. 287, 298 (1942) (the definition of marriage is the foundation of the State's broader authority to regulate domestic relations);
- *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379, 383-384 (1930) ("when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and

parent and child were matters reserved to the States");

- *Haddock v. Haddock*, 201 U.S. 562, 575 (1906) ("the Constitution delegated no authority to the [federal] Government . . . on the subject of marriage and divorce").

*Windsor,* 133 S. Ct. at 2691. "DOMA, because of its reach and extent, departs from this history and tradition of reliance on state law to define marriage." *Id*. at 2692.

Despite the pro-homosexual rhetoric that peppers the opinion, *Windsor* did not mandate marriage redefinition at the state level. As one lower court put it, "DOMA's federal intrusion into state domestic policy is more 'unusual' than Oklahoma setting its own domestic policy." *Bishop*, 962 F. Supp. 2d at 1278.

Courts have created a massive judicial crisis by overturning millions of votes. "[The right to vote] is regarded as a fundamental political right, because preservative of all rights." *Yick Wo v. Hopkins,* 118 U.S. 356, 370 (1886). Judicially mandated marriage redefinition endangers key elements of America government—federalism, public policy, and core liberties of *the people*.

### B. Court-Ordered Marriage Redefinition Threatens Core First Amendment Rights—Free Speech, Thought, And Religion.

The Sixth Circuit wisely observes that: "For all of the power that comes with the authority to interpret the United States Constitution, the federal courts have

no long-lasting capacity to change what people think and believe about new social questions." *DeBoer*, 772 F.3d at 417. Moreover, it is "dangerous and demeaning to the citizenry" to assume that only the judiciary can understand the arguments. *Id*. at 418.

The many recent marriage cases are purportedly about "liberty and equality, the two cornerstones of the rights protected by the United States Constitution." *Wolf v. Walker*, 986 F.Supp.2d at 987. But "[w]hen judges start telling people what words they must use, *beware*." Dunson, *A Right to a Word?*, 5 Alb. Govt. L. Rev. at 588. Courts have "neither the constitutional power nor the moral authority" to coerce the social esteem and approval same-sex couples desire. *Id*. at 594. Such a court order "misrepresents community views and regulates speech so as to regulate thought in an effort to change those views." *Id*. at 591.

Marriage redefinition by judicial fiat "impacts countervailing liberty interests, which have been virtually ignored by proponents of court-ordered gender-blind marriage." *Id*. at 555.[6] Same-sex couples may "call themselves married," but the question here is "whether everyone else must do so as well." *Id*. at 556. The American system avoids government regulation of speech and thought. *Id*. at 586.

> If any provisions of the Constitution can be singled out as requiring unqualified attachment, they are the guaranties of the Bill of Rights and

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[6] This commentator supports legal rights and benefits for same-sex couples but acknowledges that "official recognition" threatens the liberties of others and should not be decreed by a court.

> especially that of freedom of thought contained in the First Amendment.

*Schneiderman v. United States*, 320 U.S. 118, 144 (1943).

Unlike the supposed right to redefine marriage, religious freedom is "deeply rooted" in American history and explicitly guaranteed by the Constitution. Marriage has deep religious significance for many, and religious traditions typically regulate sexual morality. Yet federal courts brush aside the religious liberty implications. The Tenth Circuit "note[d] that its decision does not mandate any change for religious institutions, which may continue to express their own moral viewpoints and define their own traditions about marriage." *Kitchen*, 755 F.3d at 1227; *see also Geiger*, 994 F. Supp. 2d 1128 at 1143; *Latta*, 19 F. Supp. 3d at 1085; *Bourke*, 996 F. Supp. 2d at 555. Many courts rebuff grave moral concerns and spurn the religious values cherished by multitudes of Americans. *Bishop*, 962 F. Supp. 2d at 1289 ("moral disapproval often stems from deeply held religious convictions" but such convictions are "not a permissible justification for a law"); *Bourke*, 996 F. Supp. 2d at 554 ("[The government] cannot impose a traditional or faith-based limitation upon a public right without a sufficient justification for it.").

If this Court mandates marriage redefinition, the resulting conundrum is nowhere more apparent than in the military. Military chaplaincies "provide for the free exercise of religion in the context of military service as guaranteed by the Constitution." Department of Defense Directive 1304.19.4.1. Congress is constitutionally obligated to provide for the religious

needs of troops who are moved to remote areas of the world where they risk sacrificing their lives and their own denominations are unavailable. *Katcoff v. Marsh*, 755 F.2d 223, 228, 234 (2d Cir. 1985). When Congress passed legislation to provide the armed forces with a military chaplaincy, it continued a practice that began even before the Constitution was ratified, and that has continued ever since. *Id*. at 225. Chaplains must be able to faithfully serve the troops within the teachings of their own faith traditions. A judicial mandate to redefine marriage—a sacred institution for many people of faith—would seriously undermine the liberty to conduct weddings, counseling sessions, and even worship services in accordance with the tenets held by many chaplains and the troops they serve. *See, e.g*., 1 Corinthians 6:9-11, Romans 1:24-32, Leviticus 18:22 (defining homosexual behavior as sin). A few intrusions on religious liberty have already surfaced in past years. *Akridge v. Wilkinson*, 178 Fed. Appx. 474 (6th Cir. 2006) (upholding a prison's retaliatory action against a volunteer chaplain who refused to allow an openly homosexual inmate to take a leadership role in chapel services). More recently, the Navy has retaliated against a decorated chaplain (Wes Modder) with an exemplary record because he expressed his biblical views in private religious counseling sessions—the very job he is there to do.[7] In other contexts, anti-discrimination mandates have spawned a multitude of legal actions,[8] and the threat will escalate

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[7] https://www.libertyinstitute.org/modderfacts (last visited 03/19/15).

[8] See, e.g., *Elane Photography v. Willock,* 309 P.3d 53 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787 (U.S., Apr. 7, 2014) (Christian

exponentially unless the political process is allowed to carve out exemptions to respect rights of conscience. The uniquely close relationship between the government and military chaplains will only intensify this divisive trend and lead to other losses of liberty. Chaplains will likely be limited in their ability to teach and counsel according to their faith, marginalizing the faith groups and service members they represent.

"Tolerance," like respect and dignity, is best traveled on a "two-way street." *DeBoer,* 772 F.3d at 410, quoting *Ward v. Polite*, 667 F.3d 727, 735 (6th Cir. 2012). It is woefully inadequate to brush aside the moral convictions and associated challenges faced by religious organizations and citizens. Some of the recent rulings barely mention the spiraling threats. But the judicial intrusion on thought and speech encroaches heavily on religion—a right that, unlike even traditional marriage, the Constitution explicitly guarantees.

## V. ALL LAWS ARE GROUNDED IN MORAL PRINCIPLES.

Echoing other recent pronouncements, a district court in Florida proclaimed that "moral disapproval, standing alone, cannot sustain a provision of this kind." *Brenner v. Scott*, 999 F. Supp. 2d at 1289. But America's founders spoke passionately about the moral and religious underpinnings of our judicial system. Benjamin Franklin forewarned:

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photographer subjected to draconian financial penalties for refusing to photograph a same-sex commitment ceremony).

> If a sparrow cannot fall to the ground without His notice, is it probable that an empire can rise without His aid? We've been assured in the sacred writing that, "Except the Lord build the house, they labor in vain that build it."

James Madison, *The Papers of James Madison*, (Henry Gilpin ed., Washington: Langtree and O'Sullivan, 1840) (Vol. II, June 28, 1787), 185.

Morality has a legitimate role in legislation:

> In a democracy, the majority routinely enacts its own moral judgments as laws. Kentucky's citizens have done so here.... It is true that the citizens have wide latitude to codify their traditional and moral values into law. In fact, until after the Civil War, states had almost complete power to do so, unless they encroached on a specific federal power.

*Bourke*, 996 F. Supp. 2d at 550, 555. *Lawrence* and *Casey* proclaim the judicial duty to define and protect "the liberty of all, not to mandate our own moral code." *Lawrence v. Texas*, 539 U.S. at 571, quoting *Casey*, 505 U.S. at 850. But that is exactly what this Court would be doing if it nullifies the moral judgment of the people. As the Sixth Circuit highlights, it is an "evolution in *society's* values, not evolution in *judges*' values," that justifies changes in the law. *DeBoer*, 772 F.3d at 416. When *Lawrence* was decided, most states no longer prohibited sodomy. *Id*.

Every law has a moral foundation and many are based on "moral disapproval." The question is *whose* morality will prevail. As the Sixth Circuit noted, "a rough sense of morality likely affected voters, with

some thinking it immoral to exclude gay couples and others thinking the opposite." *DeBoer*, 772 F.3d at 409. Even equality—a valid legal principle—is also a *moral* principle. Advocates of so-called "marriage equality" implicitly argue that it is wrong—i.e., *immoral*—to retain the time-honored definition of marriage. Ignoring that inescapable reality, courts embrace *Lawrence's* "moral code" language to cloak marriage redefinition in the facade of morality neutrality. *Griego*, at *886; *Geiger*, 994 F. Supp. 2d at 1142. Advocates of marriage redefinition celebrate this as a victory for their cause:

> Preclusion of "moral disapproval" as a permissible basis for laws aimed at homosexual conduct or homosexuals represents a victory for same-sex marriage advocates, and it forces states to demonstrate that their laws rationally further goals other than promotion of one moral view of marriage.

*Bishop*, 962 F. Supp. 2d at 1290. Yet these advocates promote "one moral view of marriage"—a view that conflicts with a majority of the American people and a tradition "measured in millennia, not centuries or decades." *DeBoer*, 772 F.3d at 396.

The American judicial system is becoming allergic to religious expression or influence in the public square, banishing moral concerns to the private fringes. In *Bostic*, the district court gave short shrift to the "faith-enriched heritage" of Virginia's marriage laws—laws admittedly "rooted in principles embodied by men of Christian faith." *Bostic*, 970 F. Supp. 2d at 464. The court shoved morality aside, contending that marriage has "evolved into a civil and secular

institution sanctioned by the Commonwealth of Virginia." *Id*. This secularization poses new threats. Over the last few decades, courts have ordered the government to exit the bedroom and respect private choices. The South Dakota district court proclaimed that "[t]he right to marriage is related to other constitutionally protected rights, such as the right to privacy." *Rosenbrahn*, at *16. But activists thrust private choices back into the public realm by demanding massive government interference with the conscience rights of those who cannot celebrate their "private" decisions. Respondents' redefinition of marriage improperly mandates social approval, imposing heavy burdens on those who disagree:

> There is no constitutionally protected right to moral or social approbation. Due process and equal protection require according each person a level of passive respect and dignity, but *not* esteem or approbation.

Dunson, *A Right to a Word?*, 5 Alb. Govt. L. Rev. at 592-593.

## VI. THE PRESERVATION OF MARRIAGE IS BASED ON BIOLOGY—NOT BIGOTRY. EVEN "THE PEOPLE" CANNOT REVISE THE NATURE OF REALITY—INCLUDING MARRIAGE.

The Sixth Circuit recognized its inability to attribute animus to millions of voters: "If assessing the motives of multimember legislatures is difficult, assessing the motives of *all* voters in a statewide initiative strains judicial competence." *DeBoer*, 772 F.3d at 409.

Certain realities are given and cannot be altered by legal action. The immutable facts of biology distinguish opposite-sex and same-sex couples in a way that no legislature or court decree can alter—any more than voters could overturn the law of gravity.

Courts protect the "inalienable rights" referenced in America's Declaration of Independence—rights that precede the state and preempt human law, rights that do not change over time. Respondents trample these rights in order to manufacture new "rights" that defy the nature of reality.

## CONCLUSION

This Court should affirm the decision of the Sixth Circuit.

Respectfully submitted,

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