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

VALERIA TANCO, et al.,
Petitioners,

v.

WILLIAM EDWARD "BILL" HASLAM,
GOVERNOR OF TENNESSEE, et al.,
Respondents.

APRIL DEBOER, et al.,
Petitioners,

v.

RICK SNYDER, GOVERNOR OF MICHIGAN, et al.,
Respondents.

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 FOR AMICUS CURIAE TRI VALLEY LAW, P.C. IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Amicus will address only the first question presented by these cases:

Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

Tri Valley Law, a Professional Corporation ("Tri Valley Law"), respectfully submits this amicus curiae brief in support of Respondents.

INTERESTS OF AMICUS CURIAE[1]

Tri Valley Law is a law firm with a practice that focuses, in part, on constitutional law advocacy. As Tri Valley Law advises clients on the effects of federalism on individual and states' rights, Tri Valley Law has an interest in matters that clarify the current status of the federalist system in the United States.

SUMMARY OF ARGUMENT

> *I think it's doubtful that [this Court ruling in favor of the Petitioners] wouldn't be accepted. The change in peoples' attitudes on [same sex marriage] has been enormous.*

This prediction, nay, purported *a priori* justification, for this Court ruling in favor of Petitioners was

[1] All parties have consented to the filing of this brief either in writing or by blanket consent letter. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae made a monetary contribution to its preparation or submission.

made by Justice Ginsburg in an interview on February 11, 2015.[2]

The truth is that the peoples' attitudes have not changed "enormously" in favor of same sex marriage. The enormous change has taken place almost exclusively in the minds of the unelected judiciary.

Amicus understands that this case will elicit a forest of briefs arguing every nuance of the facts and law. This brief assumes that between this Court's own collective knowledge and the arguments provided by other amici, there will be no need for further elucidation on the fundamental legal issues involved in this case.[3] Instead, this brief focuses on data that lay bare

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[2] Greg Stohr and Matthew A. Winkler, *Ruth Bader Ginsburg Thinks Americans Are Ready for Gay Marriage*, Bloomberg-Business, Feb. 12, 2015, available at http://www.bloomberg.com/news/articles/2015-02-12/ginsburg-says-u-s-ready-to-accept-ruling-approving-gay-marriage-i61z6gq2.

[3] For example, in an amicus curiae brief supporting Petitioners in this case, it was said that this Court has the obligation to "say what the law is" and on that basis, eliminate centuries of law that established the traditional and primary rights of the states to regulate marriage. *See* Brief of Bay Area Lawyers For Individual Freedom, et al. as Amicus Curiae in support of Petitioners at 6, Nos. 14-556, 14-562, 14-571 & 14-574 (Mar. 5, 2015) (*citing Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)). The difference between saying what the law ***is***, and saying what the law ***should be***, is one that amicus Bay Area Lawyers For Individual Freedom want this Court to ignore. It is the exclusive duty of the Legislative branch to say what the law ***should be***. This Court is vested only with the power "'to say what the law is,' not the power to change it." *James M. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 549 (1991) (Scalia, J., concurring).

the false claim that same sex marriage has widespread societal acceptance.

While amicus will not go so far as to insinuate that this case has already been decided in the minds of a majority of Justices, it must be acknowledged that based on public statements made by certain Justices (such as the statement that introduces this Summary) and the reading of judicial tea leaves by other Justices in recent cases leading up to this case, such as by Justice Scalia in *U.S. v. Windsor*, 133 S. Ct. 2675 (2013), (Scalia, J., dissenting), this case is before this Court because a majority of Justices have staked out ideological ground in support of a decision in favor of Petitioners.

It may be that the only thing capable of changing the outcome of this case, other than the arrival of a Delorean with a functioning flux capacitor,[4] would be a brief of such persuasive brilliance and factual depth that a majority of this Court would find no alternative other than a ruling in favor of Respondents.

Here is that brief.

Amicus takes no position on the question of the recognition of state licensed same sex marriages at the federal level. That question is one that has effectively

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[4] Amicus refers to the fictional time-travel device featured in the Back to the Future movie series (Universal Pictures 1985). The reference is intended to convey the degree of remoteness that the Justices who have expressed a desire to impose same sex marriage on the states will change their minds.

been resolved in *Windsor*. Likewise, amicus takes no position on the wisdom of any state providing legal recognition of same sex marriages. Amicus does, however, caution this Court that a ruling that eviscerates the rights of citizens and their respective states to make state-level decisions on the legal status of same sex marriages would, as Justice Ginsburg cautioned in *Burwell v. Hobby Lobby Stores, Inc.*, result in this Court "[venturing] into a minefield"[5] with its ruling. If this Court were to find in favor of Petitioners the result would reduce Justice Ginsburg's minefield to a relative field of romping puppies.

The instant case will decide the rights of the people, their elected representatives and their respective states to exercise fundamental aspects of self-governance. Were this Court to rule in favor of Petitioners, the result would be the systematic disenfranchisement of the rights of people *qua* citizens of their states and a mortal blow to the founding principles of federalism and republicanism. Worse, such a decision would be based on an entirely fallacious presumption that there has been an enormous change in state-level opinions on same sex marriage.

[5] *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. ___ (2014) slip op. 35 (Ginsburg, J., dissenting).

ARGUMENT

(a) The data prove that the people overwhelmingly do not approve of same sex marriage licensing.

At the date of this brief, licenses for same sex marriages could be lawfully issued in 37 states and the District of Columbia.[6] While this represents a supermajority of states in the union, the means by which same sex marriage licenses became issuable can be divided into two unique and exclusive buckets.

In the first bucket are states, either through their legislatures or by voter initiatives or referendums, which acted on their own to authorize the issuance of same sex marriage licenses. In such cases, the population of the states, either directly (in the case of an initiative or referendum) or indirectly (in the case of action by the legislature elected by the people) took affirmative action to implement the necessary legal apparatus to allow for the issuance of same sex marriage licenses. This was the path taken in 11 of the 37 states that license same sex marriage.

While it may be that state voter initiatives and referendums are at odds with the foundational principles of a representative system and traditional concerns with majoritarianism, the system is at least democratic. This Court should also note that if

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[6] Missouri is excluded, as same sex marriage licenses are only issued at the county level, rather than across the entire state.

majoritarianism is problematic in the context of minority rights, so is a situation where five unelected individuals put their judgment ahead of that of millions of people they serve. Indeed, our republican system and federalism, wherein each state protects those interests it finds worthy of protection, and not a Judiciary with a veto power, were seen as the remedy for the potential ills of majoritarianism. *See* The Federalist No. 10 (James Madison) ("The influence of factious leaders may kindle a flame within their particular States, but will be unable to spread a general conflagration through the other States . . . In the extent and proper structure of the Union, therefore, we behold a Republican remedy for the diseases most incident to Republican Government."). Federalism, not judicial usurpation of the political process, was always seen as the counterbalance to majoritarianism.

In the second bucket are states that, notwithstanding legislative or direct voter action to prohibit same sex marriages, have been compelled to issue same sex marriage licenses by virtue of judicial order. In other words, even though the voters and/or legislature of a state deemed same sex marriage to be anathema to the principles under which that state operates, a court ruled that the denial of same sex marriage licenses violated overriding legal principles.

This has been the case in 26 of the 37 states that license same sex marriages.[7]

Put simply, in a supermajority of those states that license same sex marriages, it was courts, not voters or their representatives, who imposed licensing of same sex marriages.

In fact, in a supermajority of the 26 states licensing same sex marriage pursuant to court order, the court orders were in direct contravention of voter initiative or referendum action explicitly rejecting the licensing of same sex marriages.[8]

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[7] The states with court-ordered licensing of same sex marriages are Alabama, Alaska, Arizona, California, Colorado, Connecticut, Florida, Idaho, Indiana, Iowa, Kansas, Massachusetts, Montana, New Jersey, New Mexico, Nevada, North Carolina, Oklahoma, Oregon, Pennsylvania, South Carolina, Utah, Virginia, West Virginia, Wisconsin and Wyoming. *See* Freedom to Marry website at http://www.freedomtomarry.org/pages/where-state-laws-stand. *See also,* ProCon.org website, Gay Marriage page, available at http://gaymarriage.procon.org/view.resource.php?resourceID=004857.

[8] In 17 of the 26 states, the voters of each respective state had directly approved, via referendum or initiative, laws or state constitutional amendments that excluded same sex marriages from the definition of marriage in that state. Those states and the year in which the voters acted are Alabama (2006), Alaska (1998), Arizona (2008), California (2008), Colorado (2006), Florida (2008), Idaho (2006), Kansas (2005), Montana (2004), Nevada (2002), North Carolina (2012), Oklahoma (2004), Oregon (2004), South Carolina (2006), Utah (2004), Virginia (2006) and Wisconsin (2006). Additionally, an amendment to the state constitution of Indiana to exclude same sex marriages from the definition of marriage was in the process of being put to voters for ratification until the ruling in *Baskin v. Bogan*, 766 F.3d 648 (7th Cir.

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As a further data point, only three states (Maine, Maryland and Washington) have approved the licensing of same sex marriages pursuant to a direct vote of state citizens, compared to a total of 30 states where state voters affirmatively and directly voted to reject same sex marriage (consisting of the 17 states where voters directly rejected licensing of same sex marriages prior to judicial intervention and the 13 states where same sex marriage is still either not licensed or pending the outcome of litigation).[9]

This bears repeating: voters in 30 of the 50 states have affirmatively rejected the licensing of same sex marriage. This isn't just majoritarianism, it is supermajoritarianism. And it provides compelling evidence whether Americans believe that same sex marriage should be licensed in the same manner as opposite sex marriage.[10]

2014), *cert. denied*, 135 S. Ct. 316 (2014). *See* Freedom to Marry website, *supra* note 7, at "Where State Laws Stand" page.

[9] *Id*. The 13 other states where voter approved same sex marriage bans are still in effect or pending the outcome of litigation are Arkansas, Georgia, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Nebraska, North Dakota, Ohio, South Dakota, Tennessee and Texas. *See* Freedom to Marry website, *supra* note 7, at http://www.freedomtomarry.org/states/.

[10] The dilemma in this case is whether the meaning of marriage has evolved from its traditional definition covering opposite sex couples only. Amicus has great respect for the Brief of Amici Curiae Cato Institute, William N. Eskridge Jr. and Steven Calabresi in support of Petitioners, Nos. 14-556, 14-562, 14-571 & 14-574 (Mar. 6, 2015), which provides the quintessential review of class based regulations and concludes that " . . . the

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So while Justice Ginsburg may want it to be the case that a ruling in favor of Petitioners would be in keeping with the values of an overwhelming number of Americans, the facts belie her hopes.

California's experience with same sex marriage licensing is particularly illustrative of the true state of the enduring divide among attitudes on same sex marriage.

(b) California as an example to refute the claims that the people have embraced same sex marriage.

California, in addition to being a state well known for its liberal population, has a long history of restricting the licensing and recognition of marriage to opposite sex unions. The first formal act was legislation in 1977 that defined marriage as only between a man and a woman.[11]

Fourteenth Amendment requires states to issue marriage licenses to same sex couples only if they give them to everyone else." *Id*. at 34. This is precisely the problem with subsuming same sex marriages under the definition of marriage. States do not currently "give [marriage licenses] to everyone else." Most states will not give marriage licenses to close relatives or to couples where one individual is already married to a third person. *See, e.g.*, Cal. Penal Code § 281-285 (prohibiting bigamy and incestuous marriages). The definition of marriage is quite narrow in states and excludes any number of couplings that have never been considered legal marriages.

[11] Cal. Stats. 1977, ch. 339, § 1. *See also*, *Perry v. Brown*, 671 F.3d 1052, 1065 (9th Cir. 2012).

Under California law, while legislative acts can be altered by subsequent legislatures or voter initiatives, voter initiatives can only be altered by subsequent initiatives. Thus, in 2000, to allow the people of California to give greater permanence to the effects of the 1977 legislative act, Proposition 22, a voter initiative that reiterated the definition of marriage as solely the union between opposite sex couples, was approved by California's voters.[12]

Only after a small group of San Francisco activists challenged the 2000 initiative and persuaded the California Supreme Court to overrule the will of the voters in early 2008 was same sex marriage permitted, albeit briefly, in California.[13]

In response to this judicial intervention, California voters were presented with Proposition 8 in late 2008.

Proposition 8 was a voter initiative to amend the state of California's constitution so that the only marriages recognized by the state of California would be marriages between a man and a woman. The amendment was approved by over 52% of those casting votes in the election (a margin of victory representing approximately 600,000 California voters).[14] In the election

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[12] Codified at Cal. Fam. Code § 308.5.

[13] *Perry, supra* note 11, at 1068.

[14] *See* California Secretary of State 2008 election website at http://www.sos.ca.gov/elections/sov/2008-general/maps/returns/props/

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deciding Proposition 8, over 79% of California's registered voters participated, a rate that was higher than any other statewide general election in the prior 32 years. By any standard, the voter participation rate demonstrably established that Proposition 8 was the clear will of the state's voters.[15]

California's voters thereby rejected a judicial veto of their legislature and amended the state's constitution to once again affirm that only marriages between men and women would be recognized in California.

In the brief 143-day window of time between the California Supreme Court's action and the voters' approval of Proposition 8, approximately 18,000 same sex couples were issued marriage licenses in California.[16]

Proposition 8 was quickly challenged by activists. In a ruling that was not supported by precedent of any nature,[17] the District Court, and then the 9th

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prop-8.htm for data on the number of votes cast and the margin of victory for Proposition 8.

[15] *See* California Secretary of State Statement of Vote, November 4, 2008 General Election at 4, available at http://elections.cdn.sos.ca.gov/sov/2008-general/sov_complete.pdf. Prior to the 2008 election's 79.42% participation rate there had not been a participation rate in excess of 79% since the 1976 election's participation rate of 81.53%. The next highest participation rate was 77.24% in the 1980 election. *Id*.

[16] *Perry*, *supra* note 11, at 1089.

[17] Further to the point on the lack of precedent for recognizing a right to same sex marriage, Justice Ginsburg's dissent in the recent case of *Burwell v. Hobby Lobby Stores, Inc.* provides

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Circuit found Proposition 8 to be violative of the Equal Protection Clause.

The intervention of the federal courts in the definition of marriage, a topic acknowledged as the province of states, rather than the federal government, was unwarranted and unprecedented.

Whatever was happening in California prior to the *Perry* decision, it was the state and federal judiciary, in contravention of the clear and repeated choice of the people, who provided same sex couples the right to marry.

Thus, one would have to suspend disbelief (or, perhaps, not even be sentient) to find, as the *Perry* court did, that the people of California weren't rationally interested in proceeding cautiously with regard to recognizing same sex marriages. In fact, the people of California were quite clearly opposed to recognizing

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interesting context. In *Hobby Lobby Stores, Inc.,* Justice Ginsburg excoriated the Court's majority for what she saw as an unprecedented expansion of the term "person" to include corporations for purposes of the First Amendment's Free Exercise Clause. In her dissent, Justice Ginsburg argued that "the absence of such precedent is just what one would expect, for the exercise of religion is characteristic of natural persons, not artificial legal entities." *Hobby Lobby Stores, Inc.* slip op. at 14 (Ginsburg, J., dissenting). In the context of finding precedent for the right to same sex marriage, one could easily paraphrase Justice Ginsburg to say that "the absence of such precedent is just what one would expect, for the exercise of the right to marry is characteristic of opposite sex persons, not same sex persons."

same sex marriage. The California courts, however, had an opposite point of view.

With Proposition 8, over seven million California voters, representing a clear majority of those voting in an election with an historically high voter participation rate, reacted to the invalidation of an existing law by an insular group of four judges by reaffirming their desire to deny recognition of same sex marriages.[18] This Court, in its decision in *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), effectively gave its imprimatur to the "judge as ultimate arbiter of fundamental rights and wrongs" and encouraged the disenfranchisement of states and their respective citizens.

It is time for this wrong to be corrected.

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[18] As a matter of disclosure, counsel for amicus is a California resident and voted against Proposition 8. Notwithstanding counsel for amicus' belief that same sex residents of his state should have the right to be issued marriage licenses, unlike some judges, such as the dissenting Circuit Judge in *DeBoer v. Snyder*, 973 F. Supp. 2d 757 (E.D. Mich.), *reversed*, 772 F.3d 388 (6th Cir.) (Daughtrey, J., dissenting), counsel for amicus understands that neither lawyers nor judges have the authority to apply their own beliefs to determine what are " . . . fundamental wrongs left excused by a majority of the electorate . . . " and then remedy them in direct contravention of the will of tens, perhaps hundreds, of millions of state voters.

(c) The Future of Federalism

This case is ultimately about the fate of federalism in the United States. There is no need for a recitation of the meaning and importance of federalism, as this Court recently provided an exceedingly concise and relevant discussion of federalism in the context of same sex marriage.

Amicus refers, of course, to Justice Scalia's prescient dissent in *U.S. v. Windsor*, 133 S. Ct. 2675 (2013) (Scalia, J., dissenting).[19]

As this Court has previously noted, one of the fundamental elements of the federalist system is that it allows individual states " . . . if its citizens choose, [to] serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 252, 311 (1932) (Brandeis, J., dissenting). As Circuit Judge Sutton so eloquently explained in *DeBoer*, this Court has never before held that same sex marriage is an area that is not subject to the state laboratory element of federalism; indeed, matters relating to marriage have heretofore been the province of state, not federal, regulation.

How can it be that five people possess greater insight into the underpinnings of liberty than do tens of millions of citizens across a supermajority of

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[19] *See also*, Brief of Federalism Scholars, as Amicus Curiae, *United States v. Windsor*, No. 12-307 (2013).

states? In too many ways, such a reservation of power to a select few is reminiscent of a monarchy, or, worse, a soft despotism. What role is left for the people when the Judiciary simply creates new fundamental rights that defy the considered voice of the people and their elected representatives?

If this Court is prepared to unilaterally consign the federalist system to the ash heap of history,[20] a systemic alteration that this Court has no authority to implement, the ramifications will be as significant as they are unpredictable and unintended.

This Court will be in a position of having to explain how voter approved state prohibitions on one unenumerated, unrecognized right (same sex marriage) constitute a violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment, yet enumerated Constitutional rights are not befitting the same protections and, in fact, state or local regulations on such rights can be so pervasive as

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[20] While the phrase "ash heap of history" has been used in a number of circumstances in modern times, this reference is taken from the opinion in *Whitewood v. Wolf*, 992 F. Supp. 2d 410 (M.D. Pa. 2014), where District Judge Jones substituted his personal beliefs for that of the duly elected representatives of the millions of citizens of Pennsylvania and discarded Pennsylvania prohibition on the issuance of same sex marriage licenses to the "ash heap of history." In fact, what Judge Jones was sending to the ash heap of history was the federalist system, as well as the founding principle of this nation that it is state voters, not the unelected federal judiciary, who have the final say in what marriage (and other) laws are to be.

to prohibit the right from being exercised in a meaningful way.

The most obvious example is the Second Amendment right to keep and bear arms. One day, this Court will have to explain how sweeping restrictions on every aspect of firearms ownership and use can be upheld yet traditional and long-standing regulations on marriage cannot be tolerated in any form or in any jurisdiction. In the wake of this Court's decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008) (finding an individual right to keep and bear arms) a number of state and local governments imposed draconian restrictions on firearms, claiming that the restrictions were reasonable and common sense, and did not infringe the core right protected by the Second Amendment. *See*, *e.g.*, Marc A. Greendorfer, *And the Ban Played On: The "Public Safety" Threat to Individual Rights*, available at http://papers.ssrn.com/abstract=2426704 (examining post-*Heller* lower court decisions to demonstrate the extent to which *Heller* was used to impose even greater infringements on the Second Amendment right). Much of the justification for recognizing a right to same sex marriage in the instant case rests on the claim that same sex couples have children that are harmed by the denial of marriage licenses. *See* Brief of Scholars of the Constitutional Rights of Children in support of Petitioners, Nos. 14-556, 14-562, 14-571 & 14-574 (Mar. 5, 2015). If this Court rules in favor of Petitioners, will it subsequently allow "reasonable, common sense" regulation of same sex marriage that restricts it to

only those same sex couples that have children, since the core right protected by the decision in this case revolves around children?

Allowing a handful of individuals who constitute an unelected judiciary to engage in an unprecedented expansion of fundamental rights simply serves to undermine what should be the most fundamental of all rights retained by people who consent to be governed: suffrage.

If this Court bases its decision on a rational basis review it will be left with a predicament of existential import. Deeming the choice of a majority of voters in a majority of states to be without a rational basis would put into question the foundational principles of the republican system.

And while this Court does have the power to determine that same sex marriage is a fundamental right that is protected by heightened scrutiny, such a decision would have to be viewed from the perspective of future cases. To wit, how would this Court justify creating a new fundamental right, which is supposed to represent the mores and traditions of the people and affirm the concept of ordered liberty, where the people have, through their votes, overwhelmingly rejected the idea that the purported right satisfies those conditions?[21] The creation of such a right would not

[21] Where a purported right is not enumerated in the Bill of Rights, the traditional test to determine whether it is fundamental is an examination of the right in light of the " . . . Nation's

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represent liberty; it would represent judicial tyranny, and as such would be inapposite to this Court's precedent and purpose.

CONCLUSION

The constitutional federal republic, the form of government responsible for this nation's long history of exceptionalism, is on the road to extinction. We have an Executive branch led by a President who believes his powers are nigh unlimited, a Legislature that is loathe to use its enumerated powers to check the Executive and a Judiciary that makes, rather than interprets, law and has declared itself supreme over the will and desires of the people. Fundamental, enumerated rights are eviscerated by "reasonable, common sense" limitations while new rights are handed out to politically active constituencies as tribute for their fealty. The citizens, to many an observer, believe that they exist at the pleasure of the three branches of government.

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history and tradition," and whether it is " . . . '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, 721 (1997) (internal citations omitted). What is beyond question in this case is that same sex marriage is not rooted in this nation's history and tradition. It may well be that the nation will one day embrace same sex marriage, but this Court does not create fundamental rights based on speculation. When a supermajority of states, rather than a supermajority of courts, embrace same sex marriage, then, and only then, can it be considered a fundamental right.

This case is a referendum on federalism, disguised as a moot question of the power of the federal government to regulate marriage. Never before has this Court found same sex marriage to be a fundamental right protected by any provision of the Constitution, not even as a penumbra or emanation.[22] Unless this Court is willing to defy the will of voters in a majority of states and announce the creation of a new fundamental right or suspect classification, there is no basis for the Court to allow for the continued judicial infringement of the inherent rights of the states and their respective citizens to experiment with solutions to social problems, such as the status of same sex couples who desire to have their relationship recognized under law.

The framers of our Constitution anticipated that society would change over time and provided two ways to deal with that change, both residing in Article V of the Constitution. The people, through their representatives in Congress or the legislatures of the states, can call for a convention to amend the Constitution and add the right to same sex marriage to the Bill of Rights. These are the exclusive methods

[22] Even counsel for Petitioners implicitly acknowledge the fact that they are asking this Court to create a new classification for heightened scrutiny under relevant Constitutional principles to protect purported marriage rights of same sex couples. *See* Brief for Petitioners at 37, *Bourke v. Beshear*, No. 14-574 (Feb. 27, 2015) ("All that remains is the Sixth Circuit's observation that this Court 'has never held' – at least not expressly – 'that legislative classifications based on sexual orientation receive heightened review.' True enough.").

for effecting the type of change that Petitioners call for. The Judiciary simply does not have the authority to add or subtract from the Bill of Rights, the Fourteenth Amendment or any other provision of the Constitution, either directly or indirectly. Nothing in *Marbury* or its progeny can change this fundamental proposition. If the Judiciary is complicit in allowing special interests to undermine the constitutional republic, the people ultimately will act accordingly to protect their rights and interests in government.

It is a truism that history repeats itself. An omnipotent and unresponsive governing body stripping constituent entities of their fundamental right to basic self-governance is not without precedent in this land. It would be wise for this Court to recall the consequence of that event: It was the prelude to the states declaring their independence from an overzealous and unresponsive regime.[23]

Respectfully submitted,

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[23] "For suspending our own Legislatures and declaring themselves invested with power to legislate for us in all cases whatsoever." The Declaration of Independence para. 3 (U.S. 1776).