No. 14-571

# In the Supreme Court of the United States

APRIL DEBOER, *et al.*,
*Petitioners,*

v.

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

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

## BRIEF OF *AMICUS CURIAE* MICHIGAN CATHOLIC CONFERENCE IN SUPPORT OF RESPONDENTS

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## QUESTION PRESENTED

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

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## INTEREST OF AMICUS CURIAE

The Michigan Catholic Conference serves as the official voice of the Catholic Church in Michigan on matters of public policy. Its mission is to promote a social order that respects the dignity of all persons and to serve the common good in accordance with the teachings of the Catholic Church. Its board of directors includes the active bishops of Michigan's seven Catholic dioceses. The Church teaches that the well-being of an individual and the family is intimately linked to a marriage between one man and one woman. The Michigan Marriage Amendment, rooted in history and secular in nature, is consistent with such teachings. Thus, the Michigan Catholic Conference supports the Michigan Marriage Amendment, which it believes is beneficial to families, children, and society.[1]

## SUMMARY OF ARGUMENT

Marriage is not purely a human institution. It was created in the beginning by God as the intimate union of one man and one woman in "one flesh."[2]

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[1] Pursuant to Rule 37.3, all Petitioners consented to the filing of this brief and a letter noting consent is on file with the Clerk. Blanket consent from Respondents in all cases is noted in the communications on file with the Clerk. No counsel for a party authored this brief in whole or in part. No person or entity, other than amicus curiae, made a monetary contribution to the preparation or submission of the brief.

[2] *Matthew* 19:4-5 (New American Bible, Revised Edition) ("Have you not read that from the beginning the Creator 'made them male and female' and said, 'For this reason a man shall

The vocation to marriage is written in the very nature of man and woman and it is in this union that marriage's supreme gift is realized. Marriage – the foundation of family and society – serves life.

Civil marriage laws followed God's plan. Until recently it was universally understood that marriage is the biological union of man and woman as nature intended. Michigan has defined marriage as the union of one man and one woman throughout its history as was its prerogative.[3] In 2004, Michigan's citizens confirmed that marriage can only exist between one man and one woman. MICH. CONST. of 1963, art. I, § 25 (2004) ("To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose."). In doing so, Michigan's citizens did not vote to ban same-sex marriage. They voted to not

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leave his father and mother and be joined to his wife, and the two shall become one flesh?'").

[3] It is the province of the States to define marriage and to delineate the incidents of that legally recognized institution. U.S. CONST. amend. X; *U.S. v. Windsor*, 133 S. Ct. 2675, 2680 (2013) ("By history and tradition the definition and regulation of marriage has been treated as being within the authority and realm of the separate States."); *Pennoyer v. Neff*, 95 U.S. 714, 734-735 (1877), *overruled in part by Shaffer v. Heitner*, 433 U.S. 186 (1977) ("The State . . . has [an] absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved.").

permit the redefinition of marriage. They voted that marriage will retain its biological requirement of a male-female union rooted in nature, not just tradition. This ancient understanding reflects the undeniable fact that only such a union offers the possibility of procreation. Such procreative possibilities fulfill a societal purpose and alone justify elevating marriage over all other intimate relationships.

Marriage so defined is the foundation of family and society and essential to the survival of our species. Michigan's Marriage Amendment is therefore unassailable from constitutional attack for "no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth . . . than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony." *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885).

## ARGUMENT

### I. Marriage – Unique for a Reason

Marriage is not purely a civil institution. It is rooted in nature and, to the believers, authored by God. Marriage has common and permanent characteristics. It unites two persons and through this union creates life. "By its very nature the institution of marriage and married love is ordered to the procreation and education of the offspring and it

is in them that it finds its crowning glory." Catechism of the Catholic Church ¶ 1652.

The People of Michigan decided that only the union of male and female, ordered as it is to procreation and the upbringing of offspring, constitutes a marriage. MICH. CONST. of 1963, art. I, § 25. Michigan's reaffirmation[4] of the centuries old understanding of marriage offends neither nature nor the Constitution. The decision to honor and burden only this potentially procreative union imposes no discrimination, but recognizes that male and female are in nature complementary to each other and that their union is essential to the propagation of our species.

The basis of our government is religion and it cannot be denied that "[t]he history of man is inseparable from the history of religion." *Engel v. Vitale*, 370 U.S. 421, 434 (1962); *see also Sch. Dist. Of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 213 (1963) (noting "that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him"). Holy Scripture teaches that man and woman were created for each other. In the beginning, God recognized that man should not be alone. *Genesis* 2:18 (New American Bible, Revised Edition). He

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[4] As the Sixth Circuit noted, Michigan "has defined marriage as a relationship between a man and a woman since its territorial days." *DeBoer v. Snyder*, 772 F.3d 388, 396 (6th Cir. 2014), quoting An Act Regulating Marriages § 1 (1820), in 1 *Laws of the Territory of Michigan*, 646, 646 (1871).

created woman as man's equal and directed man to leave his father and mother and cling to his wife, in "one body." *Genesis* 2:24 (New American Bible, Revised Edition). God said to them, "be fertile and multiply; fill the earth and subdue it." *Genesis* 1:28 (New American Bible, Revised Edition). God's joinder of man and woman in marriage, exemplary as it is, inspired the secular law governing marriage.[5]

The understanding of marriage as the union of one man and one woman has been shared by many different societies. *DeBoer v. Snyder*, 772 F.3d 388, 396 (6th Cir. 2014) ("So widely shared, the tradition until recently had been adopted by all governments and major religions of the world."). Christians, Jews, and Muslims share the understanding of marriage as the union of man and woman, a belief shared by "ancient Greek and Roman thinkers untouched by these religions." Ryan T. Anderson, *Marriage: What It Is, Why It Matters, and the Consequences of Redefining It*, Backgrounder No. 2775 THE HERITAGE FOUNDATION 3 (2013). "Far from having been intended to exclude same-sex relationships, marriage as the union of husband and wife arose in many places, over several centuries, in which same-sex marriage was nowhere on the radar." *Id.*; *see also* Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40, 41 (1918) (opining that "some form of

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[5] *See e.g.*, *In re Miller's Estate*, 239 Mich. 455, 457; 214 N.W. 429 (1927) (noting that one of the exceptions to the general rule of law that a marriage, valid when contracted, is valid everywhere, is if the marriage is "deemed contrary to the law of nature as generally recognized in Christian countries . . . ").

permanent association between the sexes" was considered, among other things, a necessary element in any civilized society). Christ raised the unity of husband and wife in marriage to the dignity of a sacrament,[6] and this Court raised it to a fundamental right. This answers the question why marriage is elevated over all other unions – it has procreative possibilities.

The procreative possibility of marriage explains its enduring significance in every society. Aristotle wrote that, "[i]n the first place, there must be a union of those who cannot exist without each other; namely, of male and female[.]" Aristotle, Book I of *Politics*. This union is formed so that "the race may continue" because mankind has "a natural desire to leave behind them an image of themselves[.]" *Id.* Marriage serves this purpose. It brings together the unique complementarity of the sexes, as they were made in the beginning, for the purpose of generating life.

The marital union, founded in nature, is nevertheless governed by civil society. Nature directs "man to continue and multiply his species" and civil society prescribes "the manner in which that natural impulse must be confined and

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[6] *See* Catechism of the Catholic Church ¶ 1601 ("The matrimonial covenant, by which a man and a woman establish themselves a partnership of the whole of life, is by its nature ordered toward the good of the spouses and the procreation and education of offspring; this covenant between baptized persons has been raised by Christ the Lord to the dignity of a sacrament.").

regulated." 1 WILLIAM BLACKSTONE, COMMENTARIES *126-127.

Civil society confines and regulates the marital union with due regard to its natural objects. For a marriage to be complete, it was historically required to be consummated. *See Turner v. Safely*, 482 U.S. 78, 96 (1987) (discussing in the context of a prisoner's fundamental right to marry that "most inmates will eventually be released by parole or commutation, and therefore most inmate marriages are formed in the expectation that they will ultimately be fully consummated")[7]; *Graham v. Graham*, 33 F. Supp. 936, 938 (E.D. Mich. 1940) (holding that the law is well settled that the failure to consummate the marriage through sexual intercourse renders the marriage void); *see also Millar v. Millar*, 175 Cal. 797, 802; 167 P. 394, 396 (1917) ("The obligation of the relation in this behalf is such . . . as to be essential to the very existence of the marriage relation, a proposition as to which there appears to be no dissent in the authorities.") (citations and internal quotation marks omitted); and RESTATEMENT OF LAW OF CONTRACTS § 587 (1932). The civil law of marriage, consistent with Catholic

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[7] In *Turner*, this Court recognized a prisoner's fundamental right to marry but noted its prior ruling in *Butler v. Wilson*, 415 U.S. 953 (1974), summarily affirming *Johnson v. Rockefeller*, 365 F. Supp. 377 (S.D.N.Y. 1973), was not to the contrary. *Turner*, 482 U.S. at 96. *Johnson* held that there was no due process or equal protection violation if a state denied a prisoner sentenced to life imprisonment the right to marry. The cases can be reconciled only by considering the significance of consummation as a marital requirement.

teaching, required a conjugal act – exclusive to husband and wife – that is ordered by its very nature towards procreation.[8]

Civil law has also been mindful to ensure not only that a procreative act occurs, but also with whom that potentially procreative act occurs. The laws are replete with such examples. For example, in Michigan, a woman is prohibited from marrying her father, brother, grandfather, son, grandson, or cousin of the first degree. *See* MICH. COMP. LAWS § 551.4. The restriction as to whom one may marry in this regard is defensible because of genetic aberrations offspring may face if a child is conceived through a procreative act. *See United States Survey on Domestic Partnerships*, 22 J. AM. ACAD. MATRIM. LAW. 125, 136 (2009) ("The state also, with consanguinity requirements, wants to ensure that those who decide to have children will not bear children with someone closely related to them, to guard against birth defects that could occur in the aggregate.").

It follows that marriage, then, far from being a purely adult-centric institution premised on mutual affection and commitment, is ordered by its very nature towards the procreation of offspring and their upbringing. That civil law elevates this institution is hardly surprising. Marriage, it has been said, is the primary unit of society. It serves as a mechanism to legitimate, provide for, and educate children, a

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[8] Canon Law is in accord. *See* Can. 1061 § 1.

paramount concern of society.[9] As Roscoe Pound explained almost a century ago, "in modern social conditions there are the social interests in the family as a social institution, in the protection of dependent persons, and in the rearing and training of sound and well-bred citizens for the future." Roscoe Pound, *Interests in Domestic Relations*, 14 MICH. L. REV. 177, 196 (1916).

Marriage provides an irreplaceable benefit to society: "Evidence of the protective effects and positive advantages (social, economic, developmental, etc.) for children being raised by married, biological parents (and the potential disadvantages to children raised in alternative family forms) is extensive and well-established."[10] Through marriage, society seeks

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[9] NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 695 (1st ed. 1828) (stating that marriage was instituted "for the purpose of preventing the promiscuous intercourse of the sexes, promoting domestic felicity, and for securing the maintenance and education of our children").

[10] Lynn D. Wardle, *Marriage, "Magic Bullets," and Medical Decision-Making: Contemporary Reflections on Themes in the Scholarship of Professor Marygold S. Melli*, 29 WIS. J.L. GEND. & SOC'Y 87, 92 (2014); Donald P. Sullins, *Emotional Problems among Children with Same-Sex Parents: Difference by Definition*, 7(2) BRIT. J. EDUC. SOC'Y & BEHAV. SCI. (2015) (concluding based on data from the U.S. National Health Interview Survey that the optimum environment for child well-being is common biological parenting); and A. Dean Byrd, *Gender Complementarity and Child-rearing: Where Tradition and Science Agree*, 6 J.L. FAM. STUD. 213, 214 (2004) ("There is no fact that has been established by social science literature more convincingly than the following: all variables considered, children are best served when reared in a home with a married mother and father.").

to ensure that children will be raised by their biological parents in a stable environment that is advantageous to their development.[11]

Marriage is unique for a reason. "Although social theorists . . . have proposed alternative child-rearing arrangements, none has proven as enduring as the marital family structure, nor has the accumulated wisdom of several millennia of human experience discovered a superior model." *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 820 (11th Cir. 2004). Marriage's uniqueness fulfills a societal purpose and alone justifies elevating it over all other intimate relationships. It is on this foundation that the constitutional inquiry begins and should end.

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[11] Paula Y. Goodwin et al., *Marriage and Cohabitation in the United States: A Statistical Portrait Based on Cycle 6 (2002) of the National Survey of Family Growth*, NATIONAL CENTER FOR HEALTH STATISTICS, VITAL HEALTH STAT. 23(28) 4 (2010), *available at* http://www.cdc.gov.nchs/data/series/sr_23/sr23_028.pdf ("Research also indicates that marriage is positively associated with the health and well-being of children."); and INST. FOR AMERICAN VALUES & INST. FOR MARRIAGE AND PUB. POL'Y, MARRIAGE AND THE LAW: A STATEMENT OF PRINCIPLES 7 (2006); *see also* Kristin Anderson Moore et al., *Marriage from a Child's Perspective: How Does Family Structure Affect Children, and What Can We Do About It?* CHILD TRENDS RESEARCH BRIEF, at 6 (2002) ("Research clearly demonstrates that family structure matters for children, and the family structure that helps children the most is a family headed by two biological parents in a low-conflict marriage. Children in single-parent families, children born to unmarried mothers, and children in stepfamilies or cohabitation relationships face higher risks of poor outcomes than do children in intact families headed by two biological parents.").

## II. The Fourteenth Amendment

State law "regulating marriage, of course, must respect the constitutional rights of persons." *Windsor*, 133 S. Ct. at 2691. Thus, the question before the Court is whether the decision by Michigan and other states to retain the centuries old definition of marriage violates the Fourteenth Amendment. It does not. Neither the due process clause nor the equal protection clause requires a state to redefine marriage as nothing more than a committed relationship between any two individuals.

### A. Marriage is a fundamental right because of its procreative possibilities

Marriage is considered a fundamental right. *Loving v. Virginia*, 388 U.S. 1, 12 (1967). But, the fundamental right to "marriage" – the right that is "objectively, deeply rooted in this Nation's history and tradition"[12] – is the right to traditional marriage between one man and one woman. It is traditional marriage that is "so rooted in the traditions and conscience of our people as to be ranked as fundamental"[13] and it is traditional marriage that is so "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if [it was]

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[12] *Washington v. Glucksberg*, 521 U.S. 702, 703 (1997) (internal quotation marks and citation omitted).

[13] *Snyder v. Commonwealth of Massachusetts*, 291 U.S. 97, 105 (1934), *overruled in part by Malloy v. Hogan*, 378 U.S. 1 (1964).

sacrificed."[14] The reason that traditional marriage, and only traditional marriage, is a fundamental right is because of its natural, procreative significance. If marriage lacked its procreative possibilities, the right to enter into the marital relationship would not be considered fundamental.

In defining the fundamental right to marry, this Court has emphasized its procreative consequences. *Loving* recognized that marriage, one of the "basic civil rights of man," is "fundamental to our very existence and survival."[15] For its holding, the Court relied on *Skinner v. Oklahoma*[16] and *Maynard v. Hill*.[17] *Skinner* held that "[m]arriage and procreation are fundamental to the very existence and survival of the race."[18] *Maynard* characterized marriage as "the most important relation in life" because it is the "foundation of the family and of society, without which there would be neither civilization nor progress."[19] More directly, this Court described marriage as "intimate to the degree of being sacred" and an "association for [a] noble purpose." *Griswold v. Connecticut*, 381 U.S. 479, 486

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[14] *Palko v. Connecticut*, 302 U.S. 319, 326 (1937), *overruled on other grounds by Benton v. Maryland*, 395 U.S. 784 (1969).

[15] *Loving*, 388 U.S. at 12 (citation and internal quotation marks omitted).

[16] 316 U.S. 535 (1942).

[17] 125 U.S. 190 (1888).

[18] 316 U.S. at 541.

[19] 125 U.S. at 211.

(1965). The sacred intimacy described, and the noble purpose served, is conjugal love with procreative potential.[20]

Petitioners invoke the fundamental right to marry but they ignore the origin and meaning of that right. Same-sex marriage is simply not rooted in the traditions and conscience of our people so as to be considered fundamental. *Windsor*, 133 S. Ct. at 2689 ("It seems fair to conclude that, until recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and a woman in lawful marriage."); *Hernandez v. Robles*, 7 N.Y.3d 338, 361; 855 N.E.2d 1, 8 (2006) ("Until a few decades ago, it was an accepted truth for almost everyone who ever lived, in any society, in which marriage existed, that there could be marriages only between participants of different sex."). Indeed, no state in the Union recognized same-sex marriage until the four justices of the Massachusetts Supreme Judicial Court in 2003 held that limiting marriage to males and females violated that state's Constitution. *See Goodridge v. Dep't. of Public Health*, 440 Mass. 309; 798 N.E.2d 941 (2003). Petitioners' argument that the fundamental right to marry includes the right to marry someone of the same-sex untethers "marriage" from its natural

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[20] Because *Griswold* dealt with contraception, its observations on intimacy necessarily concerned heterosexual intercourse within marriage – "a bilateral loyalty." *Griswold*, 381 U.S. at 487.

procreative significance and gives it a new, but never fully explained, meaning.

This Court's caselaw has only recognized a fundamental right to marry someone of the opposite sex. *See Loving*, *supra*; *Maynard*, *supra*; and *Skinner*, *supra*. And while *Loving* classified the right to marriage generally, as opposed to interracial marriage specifically, *Loving* plainly was referring to "marriage" as it was then-defined and historically understood.[21] Even if *Loving* left room for doubt as to whether the Court was referring only to traditional marriage, any doubt was removed by the Court's summary affirmance in *Baker*, which rejected the argument that same-sex marriage was guaranteed by the Constitution just five years after *Loving*. *See Baker v. Nelson*, 291 Minn. 310, 315; 191 N.W.2d 185 (1971), *summarily aff'd*, 409 U.S. 810 (1972), (holding that "in commonsense and in a constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex").[22]

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[21] *See Kitchen v. Herbert*, 755 F.3d 1193, 1234 (10th Cir. 2014) (Kelly, J., concurring in part and dissenting in part) ("[N]othing suggests that the term 'marriage' as used in [the Supreme Court's marriage] cases had any meaning other than what was commonly understood for centuries. Courts do not decide what is not before them. That the Court did not refer to a 'right to interracial marriage,' or a 'right to inmate marriage' cannot obscure what was decided; the Supreme Court announced a right with objective meaning and contours.").

[22] *See also DeBoer*, 772 F.3d at 412 ("No doubt, many people, many States, even some dictionaries, now define marriage in a

Petitioners also argue that the fundamental right to marry is based on the freedom to choose one's spouse, which is "as essential to the happiness, autonomy, privacy and liberty of gay people and same-sex couples as it is to other Americans . . . ."[23] The argument begs the question while disregarding the procreative significance of marriage – the sacred intimacy and noble biological purpose that elevates it to a fundamental right.

The fundamental right to marry is not founded on the respect accorded private decisions of consenting persons. The government has no interest in regulating purely private noncriminal decisions or conduct. *See Lawrence v. Texas*, 539 U.S. 558, 578 (2003) ("[Petitioners] right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the Government."). In addition, "there is a difference between the individual interest in marriage and the social or public interests in marriage. Although legal marriage also secures individual interest, it is a public institution enacted for the benefit of society." *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065, 1109 (D. Haw., 2012). Petitioners advance a newly

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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.").

[23] *DeBoer* Pet'rs' Br. 57.

considered perspective on marriage that emphasizes the private relations of adults, in which the government has no interest. Traditional marriage, on the other hand, has significant consequences for society, i.e., offspring, that merit its promotion and regulation by government.

Interests in personal happiness, autonomy, or individual liberty do not compel the constitutional redefinition of marriage. These components of human dignity are protected by the Constitution without respect to marital status. *See Griswold v. Connecticut*, 381 U.S. 479 (1965) and *Eisenstadt v. Baird*, 405 U.S. 438 (1972). If concerns about personal autonomy were sufficient to create a fundamental right to same-sex "marriage," marriage laws based on age and consanguinity would assuredly fail. So too would laws that prohibit bigamous or plural marriages. *Cf. Reynolds v. United States*, 98 U.S. 145, 165 (1878) (upholding criminal conviction for polygamy and noting that "there never has been a time in any State of the Union when polygamy has not been an offence against society, cognizable by the civil courts and punishable with more or less severity"). At the same time, many divorce laws would fail as the state's intervention in that decision would infringe upon the happiness, autonomy, privacy, and liberty of persons. *See Boddie v. Connecticut*, 401 U.S. 371, 376 (1971) ("Even where all substantive requirements are concededly met, we know of no instance where two consenting adults may divorce and mutually liberate themselves from the constraints of legal obligations that go with marriage, and more fundamentally the

prohibition against remarriage, without invoking the State's judicial machinery.").

Marriage, then, gains favor and distinction as a fundamental right for its procreative significance.[24] Long ago, this Court said that upon marriage "society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal." *Reynolds*, 98 U.S. at 165. The same holds true today. This societal interest also justifies state intervention in marital relations and this Court's decision to elevate marriage to a fundamental right. Because the fundamental right to marriage is inextricably linked to procreation, there simply is no fundamental right to marry someone of the same-sex.[25]

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[24] *Ex parte State ex rel. Alabama Policy Institute*, No. 1140460, 2015 WL 892752 (Ala. Sup. Ct. Mar. 3, 2015), at *34 (The court held that the characteristic of marriage that makes it so fundamental as to warrant constitutional protection is its natural procreative possibilities. "Men and women complement each other biologically and socially. Perhaps even more obvious, the sexual union between men and women (often) produces children.").

[25] As a consequence, the Michigan Marriage Amendment is subject only to rational basis review, which is discussed *infra* Part II.B.

### B. Michigan's recognition of only the naturally procreative unions advances the legitimate state interest of ensuring the well-being of our children

Michigan's choice to retain the traditional definition of marriage does not violate the equal protection clause. This Court's equal protection clause jurisprudence has "consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways." *Reed v. Reed*, 404 U.S. 71, 75 (1971). Classifications drawn, however, "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *F.S. Royster Guano Co. v. Commonwealth of Virginia*, 253 U.S. 412, 415 (1920). Petitioners' claims do not involve a fundamental right[26] and sexual orientation is neither a suspect class nor a quasi-suspect class. *See Romer v. Evans*, 517 U.S. 620 (1996) (applying rational basis) and *Windsor*, 133 S. Ct. at 2706 (Scalia, J., dissenting) (noting that the Court applied rational basis review to the provisions of DOMA restricting marriage to a man and a woman). Thus, plaintiffs' claims are reviewed under the rational basis test.

Under rational basis review, "[t]he general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the

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[26] *See* discussion *supra* Part II.A.

statute is rationally related to a legitimate state interest. When social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude, and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic process." *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 440 (1985) (citations omitted).

The traditional definition of marriage recognizes its enduring biological origins, that the complementarity of the sexes, when united, promotes life. If the law elevates marriage because it offers the possibility of procreation, and the class of persons entitled to marry includes only those persons who can naturally procreate, the classification withstands constitutional scrutiny. *Johnson v. Robison*, 415 U.S. 361, 383 (1974) ("When, as in this case, the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not, we cannot say that the statute's classification of beneficiaries and nonbeneficiaries is invidiously discriminatory."); *Cleburne*, 473 U.S. at 441 (holding that under rational basis review, "where individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement," a state's decision to act on those differences does not run afoul of the equal protection clause).

States' decisions to recognize, benefit, and burden only the naturally procreative union serves legitimate state interests. "One starts from the premise that governments got into the business of

defining marriage, and remain in the business of defining marriage, not to regulate love but to regulate sex, most especially the intended and unintended effects of male-female intercourse." *DeBoer*, 772 F.3d at 404. Michigan encourages, supports, and protects this institution as a matter of public policy "in order to promote, among other goals, the stability and welfare of society and its children." MICH. COMP. LAWS § 551.1. Sex "creates problems of large social importance. Protection of offspring, property interests, and the enforcement of martial responsibilities are but a few of [the] commanding problems in the field of domestic relations with which the state must deal." *Williams v. State of N. Carolina*, 317 U.S. 287, 298 (1942). It is not hard to envision problems that can result without state regulation of the natural effects of male-female intercourse.[27] States regulate opposite-sex marriage to ensure domestic tranquility, for example, by legitimizing children,[28] ensuring domestic support

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[27] *See DeBoer*, 772 F.3d at 404 ("May men and women follow their procreative urges wherever they take them? Who is responsible for the children that result? How many mates may an individual have? How does one decide which set of mates is responsible for which set of children?").

[28] *See* MICH. COMP. LAWS § 700.2114(1)(a) ("If a child is born or conceived during a marriage, both spouses are presumed to be the natural parents of the child for purposes of intestate succession."); *see also* MICH. COMP. LAWS § 552.29 (providing that the "legitimacy of all children begotten before the commencement of any action under [Michigan's divorce] act shall be presumed until the contrary be shown").

and prohibiting neglect.[29] In this way, marriage laws advance an overriding societal goal – the well-being of our children:

> The State has an important interest in ensuring the well-being of resulting offspring, be they planned or unplanned. To that end, the State can offer marriage and its benefits to encourage unmarried parents to marry and married parents to remain so. Thus, the State could seek to limit the marriage benefit to opposite-gender couples completely apart from history and tradition. Far more opposite-gender couples will produce and care for children than same-gender couples and perpetuation of the species depends upon procreation. Consistent with the greatest good for the greatest number, the State could rationally and sincerely believe that children are best raised by two parents of opposite gender (including their biological parents) and that the present arrangement provides the best incentive for that outcome. Accordingly, the State could seek to

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[29] MICH. COMP. LAWS § 552.16 ("Upon annulling a marriage or entering a judgment of divorce or separate maintenance, the court may enter the orders it considers just and proper concerning the care, custody, and . . . support of a minor child of the parties.").

> preserve the clarity of what marriage represents and not extend it.[30]

Adoption and assisted reproductive technologies make it possible for same-sex couples to participate in child-rearing, but heterosexual unions will always be the primary source of human life. Marriage unites a child with his biological parents, a mother and father who each contribute uniquely to the child's upbringing. *See Lehr v. Robertson*, 463 U.S. 248, 262 (1983) ("The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development."). Families of same-sex couples created by assisted reproductive technologies or adoptions deliberately prevent a child from having the most fundamental of human bonds with *both* biological parents.

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[30] *Kitchen*, 755 F.3d at 1238-1239 (Kelly, J., concurring in part and dissenting in part); *see also* Bruce C. Hafen, *The Constitutional Status of Marriage*, 81 MICH. L. REV. 463, 470 (1983) ("[R]egulation of marital status has always been a fundamental element in helping human society induce the behavior needed for social as well as individual survival."); and BERTRAND RUSSELL, MARRIAGE AND MORALS 156 (Liveright ed., 1970) ("[I]t is through children alone that sexual relations become of importance to society, and worthy to be taken cognizance of by a legal institution.").

The decision to reaffirm the traditional definition of marriage is not motivated by animus or ill-will towards homosexuals. Rather, it represents a policy choice by the people of Michigan that marriage between one man and one woman is in the best interests of both "our society and for future generations of children." *See* MICH. CONST. of 1963, art. I, § 25. The choice is not unusual or unprecedented. *Cf. Romer*, 517 U.S. at 633 ("Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision."). The institution of marriage as the primary unit of society has endured. To attribute Michigan's decision to reaffirm this institution as motivated by animus or ill-will, this Court "would have to reverse centuries of legal doctrine and practice, and strike down the considered policy choice of almost every State." *See Washington*, 521 U.S. at 723. That the law has long treated the classes as distinct suggests that there is a commonsense distinction between traditional marriage and all other relationships. *Heller v. Doe*, 509 U.S. 312, 327 (1993).

Moreover, to attribute the people's rational choice in protecting and promoting this institution, which by its nature is ordered towards our survival, to the mere disapproval or animus towards homosexuality is to disregard the people's collective wisdom that traditional marriage is for the public good. It also ignores the fact that traditional marriage, which dates back thousands of years, arose independently of any claimed discrimination. Indeed, "[i]t 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." *DeBoer*, 772 F3.d at 409, quoting *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1637 (2014) (plurality opinion by Kennedy, J.).[31]

Nor is the classification overbroad because it includes some persons who may not be able to procreate, such as the elderly or infertile. "[C]ourts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends." *Heller*, 509 U.S. at 321. Marriage, by its nature, is open to fertility and the gift of life. Same-sex marriage, by definition, is not. "The broad legislative classification must be judged by reference to characteristics typical of the affected classes rather than by focusing on selected, atypical examples." *Califano v. Jobst*, 434 U.S. 47, 55 (1977).

## III. The Democratic Process

Proponents of same-sex marriage make much of the fact that same-sex couples are equally capable of raising children and providing stable

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[31] *See also* H.L.A. Hart, THE CONCEPT OF LAW, 196 (Oxford Univ. Press 2nd ed. 1994) ("Men are not devils dominated by a wish to exterminate each other, and the demonstration that, given only the modest aim of survival, the basic rules of law and morals are necessities, must not be identified with the false view that men are predominantly selfish and have no disinterested interest in the survival and welfare of their fellows.").

environments. But that is not the issue in this case. *See Heller*, 509 U.S. at 321 ("A classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality.") (citations and internal quotation marks omitted). Nor is this the proper forum for making such arguments. Perceived social inequities must be resolved through the democratic process:

> The idea of democracy is that it can, and must, mature. Freedom embraces the right, indeed the duty, to engage in a rational, civic discourse in order to determine how best to form a consensus to shape the destiny of the Nation and its people. These First Amendment dynamics would be disserved if this Court were to say that the question here at issue is beyond the capacity of the voters to debate and then to determine.

*Schuette*, 134 S. Ct. at 1637.[32]

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[32] *Accord Schalk and Kopf v. Austria*, 53 Eur. Ct. H.R. 20, ¶ 62 (2010) (The court, in connection with its decision that the European Convention for the Protection of Human Rights and Fundamental Freedoms does not require member states to grant same-sex couples access to marriage, observing "that marriage has deep-rooted social and cultural connotations which may differ largely from one society to another. The Court reiterates that it must not rush to substitute its own judgment in place of that of the national authorities, who are best placed to assess and respond to the needs of society . . . .").

Since the founding of our Nation, States have exclusively governed and bestowed rights, privileges, and duties on family relationships. *Windsor*, 133 S. Ct. at 2680 ("By history and tradition the definition and regulation of marriage has been treated as being within the authority and realm of the separate States."). "The State, representing the collective expression of moral aspirations, has an undeniable interest in ensuring that its rules of domestic relations reflect the widely held values of its people." *Zablocki v. Redhail*, 434 U.S. 374, 399 (1978) (Powell, J., concurring). States' attitudes towards same-sex marriages have evolved, but no consensus has been reached.[33] Eleven states explicitly redefined their marriage laws to permit same-sex couples to marry.[34] Other states have retained marriage's biological requirement.[35] Prominently, these states have made their decisions – decisions that are within the exclusive realm of the States – through the democratic process, a process that, as was intended

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[33] Similarly, no consensus has been reached among European countries. In Europe, only 11 countries permit same-sex couples to marry. *See* Legal Recognition of Same-Sex Relationships, http://www.samesexrelationshipguide.com (last visited March 31, 2015).

[34] *See* 13 DEL. CODE § 101; HAW. REV. STAT. § 572-1; 750 ILL. COMP. STAT. 5/201; ME. REV. STAT. tit. 19-A, § 650-A; MD. CODE ANN., Family Law §§ 2-201, 2-202; MINN. STAT. § 517.02; N.H. REV. STAT. ANN. § 457:1-a; N.Y. DOMESTIC RELATIONS LAW §10-a; R.I. GEN. LAWS § 15-1-1; VT. STAT. ANN. tit. 15, § 8; and WASH. REV. CODE § 26.04.010.

[35] *See*, *e.g.*, MICH. COMP. LAWS § 551.1; KY. REV. STAT. ANN. § 402.005; TENN. CODE ANN. § 36-3-113; and OHIO REV. CODE ANN. § 3101.01.

by the Framers of our Constitution, allows the people to debate and decide.

Through the power of constitutional initiative reserved to the people, MICH. CONST. of 1963, art. XII, § 2, Michigan voters reaffirmed the traditional view of marriage and its biological requirement. MICH. CONST. of 1963, art. I, § 25. This traditional view is ordered towards our survival as a species, a state, and a nation. And this traditional view promotes stability and the upbringing of children. The traditional marital relationship has its roots in antiquity, in the founding of our nation, and, until recently, was considered unique in every state in the Union and every country in the world. To disregard Michigan's law under the auspice of the Fourteenth Amendment would be "to reverse centuries of legal doctrine and practice, and strike down the considered policy choice of almost every State." *Washington*, 521 U.S. at 723; *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922) ("The Fourteenth Amendment, itself a historical product, did not destroy history for the States and substitute mechanical compartments of law all exactly alike. If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it . . . .").

Moreover, to cast aside the collective wisdom of the people would be to cast aside democracy itself. "In the federal system States 'respond through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times.'" *Schuette*, 134 S. Ct. at 1636, quoting *Bond v.*

*United States*, 131 S. Ct. 2355, 2364 (2011). The People of Michigan enacted the Marriage Amendment through the democratic process. That process was open to discussion, debate, principled argument, and most importantly, a vote. In the end, the People retained the traditional definition of marriage and its biological requirements; their reasoning is hardly surprising as all human generations proceed from this natural union.

## CONCLUSION

Marriage – the intimate association of male and female as nature intended – is unique because of its procreative capabilities. It is this union that family and society depends upon for our survival and development as a species. The People of Michigan have reaffirmed this union for its intrinsic value and that decision should not be disturbed.

Respectfully submitted,

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