No. 14-574

In the Supreme Court of the United States

GREGORY BOURKE, et al., and
TIMOTHY LOVE, et al.,

Petitioners

v.

STEVE BESHEAR, Governor of Kentucky
Respondent

BRIEF OF AMICI CURIAE

106 MEMBERS OF THE KENTUCKY GENERAL ASSEMBLY

IN SUPPORT OF RESPONDENT

On Petition for a Writ of Certiorari
To The United States Court of Appeals
For the Sixth Circuit

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INTEREST OF AMICI

Amici are composed of one hundred and six members of the Kentucky General Assembly listed by district in the Appendix[1]. *Amici* are composed of seventy-six of the one hundred members of the Democrat-controlled Kentucky House of Representatives and thirty of the thirty-eight members of the Republican-controlled Kentucky State Senate. As such, they represent the citizens of Kentucky in the exercise of their constitutional right to continue to recognize and legally define marriage according to long-standing history, custom, and common law, now codified as Kentucky statute, and affirmed through a constitutional amendment ratified by seventy-four and sixth-tenths percent (74.6%) of the voters.

[1]Pursuant to Rule 37.6, amici briefly state that no counsel for any party authorized the brief in whole or in part and no person or entity, other than the amici and their counsel made any monetary contribution to the preparation or submission of this brief. This brief is filed with the written consent of all parties pursuant to Rule 37.2(a).

Summary of Argument

The Commonwealth has a sovereign right to define marriage. The Court should respect the democratic process by which the citizens of Kentucky, acting collectively, have reached a consensus on the issue of same-sex marriage. Since Kentucky is permitted, but not required to legislatively "define" marriage, its having done so does not constitute a "ban on marriage" forbidden under the Fourteenth Amendment. The Commonwealth has, rather, simply codified the consensus of American and world history as to what constitutes a "marriage."

Kentucky has sufficient legitimate state interests in the definition of marriage to satisfy review under The Fourteenth Amendment. Kentucky also has a legitimate interest in the enforcement of marital responsibilities as part of social order and structure in the Commonwealth. Moreover, Kentucky has a legitimate interest in consistently regulating the public effects and stability of marriage, as well as the economic and other benefits of that institution.

The Tenth Amendment guarantees states the right to make rational distinctions concerning the marriage relationship and to make necessary policy. Under the Tenth Amendment the "people" as the states, have been accorded constitutional rights and are entitled to *all* rights not specifically granted to the federal government. Among those rights is that of deciding who, if anyone, should be given the right to marry and to receive whatever benefits and burdens (if any) that status imports. The Court cannot create

a constitutional right to same-sex marriage without violating the rights reserved to the "people" under the Tenth Amendment.

Kentucky's legitimate interests in defining marriage satisfy any standard of judicial review. The Sixth Circuit affirmed the state's constitutional right under the 10th Amendment to rationally conclude that a family environment with married opposite-sex biological parents remains the optimal social structure in which to bear children, and that the raising of children by same-sex couples, who by definition cannot be the two sole biological parents of a child and cannot provide children with a parental authority figure of each gender, presents an alternative structure for child rearing that has not yet proved itself beyond reasonable scientific dispute to be as optimal as the biologically-based marriage norm. Even today, the only thing anyone knows for sure about the long-term impact of redefining marriage is that they do not know.

Kentucky's public policy is not based on animus. It is clear that the Kentucky General Assembly did not enact the statute defining civil marriage based upon unlawful animus, since it had non-animus-based reasons for adopting the statute. In this case, the Commonwealth is neither changing course nor withdrawing privileges previously granted, nor retracting a right once accorded a class of individuals.

As a reading of the statute will show, "love" is not a prerequisite for a lawful marriage in the Commonwealth. Accordingly, the mere presence of a "loving and committed relationship" does not render all couples "similarly situated." For example, a polygamous triad who profess "love" for one another

and for each other, fails to satisfy Kentucky's definition of marriage. Thus, Kentucky's definition of marriage is neither constitutionally irrational nor indicative of animus, but rather is legitimate, and is presumed to be constitutional.

ARGUMENT

INTRODUCTION

Black's Law Dictionary defines marriage as a "[l]egal union of one man and one woman as husband and wife . . . the legal status, condition, or relation of one man and one woman united in law for life, or until divorced, for the discharge to each other and the community of the duties legally incumbent on those *whose association is founded on the distinction of sex.*" (emphasis added)

The Kentucky Court of Appeals has affirmed this definition of marriage according to common usage for the citizens of the Commonwealth citing Black's Law Dictionary, and also quoting Webster's New International Dictionary as follows:

> A state of being married, or being united to a person or persons of the opposite sex as husband or wife; also, the mutual relation of husband and wife; wedlock; abstractly, the institution whereby men and women are joined in a special kind of social and legal dependence, for the purpose of founding and maintaining a family.

Jones v. Hallahan, 501 S.W.2d. 588, 589 (Ky. App. 1973); *citing* WEBSTER'S NEW INTERNATIONAL DICTIONARY, SECOND EDITION (1934).

The *Hallahan* court considered a question of first impression: whether two individuals of the same sex could lawfully marry in Kentucky. After examining the historical definition of marriage as well as the custom of marriage "long before the state commenced to issue licenses for that purpose," the court concluded

that the two women before the court "are prevented from marrying, not by the statutes of Kentucky or the refusal of the County Court Clerk of Jefferson County to issue them a license, but rather by their own incapability of entering into a marriage as that term is defined." *Id*. The court, in a unanimous opinion, held: "[W]e find no constitutional sanction or protection of the right of marriage between persons of the same sex." *Hallahan,* 501 S.W.2d. at 590.

The *Hallahan* court also quoted the definition of marriage set out in The Century Dictionary and Encyclopedia: "The legal union of a man with a woman for life; the state or condition of being married; the legal relation of spouses to each other; wedlock; the formal declaration or contract by which a man and a woman join in wedlock*." Hallahan,* 501 S.W.2d. at 589; *citing,* W. Whitney and B. Smith, The Century Dictionary and Cyclopedia)(1891).

In 1998, the Kentucky General Assembly codified this longstanding definition of marriage in Ky. Rev. Stat. 402.005: "As used and recognized in the law of the Commonwealth, 'marriage' refers only to the civil status, condition, or relation of one (1) man and one (1) woman united in law for life, for the discharge to each other and the community of the duties legally incumbent upon those whose association is founded on the distinction of sex."

In 2004, the voters of the Commonwealth affirmed this definition of marriage by ratifying an amendment to the Kentucky Constitution by an overwhelming margin (74.6%). That Amendment provides: "Only a marriage between one man and one woman shall be valid or recognized as a marriage in Kentucky." Kentucky Constitution, § 233A.

The history of the social and legal status of

marriage in Kentucky clearly demonstrates that Kentucky does not seek to create new rights, or to take away any existing rights guaranteed to those residing in the Commonwealth. Rather, Kentucky, like many other states, simply seeks to uphold and affirm its longstanding and enduring rule of law – fixed, uniform, and universal – based upon unchanging public policy as determined by the people.

1. The Commonwealth's Sovereign Right To Define Marriage

The Constitution of the United States does not mention, much less attempt to regulate, marriage in any way. The Constitution of the Commonwealth of Kentucky, on the other hand, specifically defines marriage as a union between one man and one woman.

As the Kentucky Court of Appeals has recently acknowledged: "It is axiomatic that states have absolute jurisdiction over the regulation of the institution of marriage." *Pinkhasov v. Petocz,* 331 S.W.3d. 285, 291 (Ky. App. 2011), citing*, Rowley v. Lampe*, 331 S.W.2d. 887 (Ky. 1960), overruled on other grounds by *Peterson v. Shake*, Ky., 120 S.W.3d. 707, 711 (2003), and LOUISE E. GRAHAM & JAMES E. KELLER, KENTUCKY PRACTICE-DOMESTIC RELATIONS LAW § 3.1 (2010)(Marriage-State Ability to Regulate).

As authority for this assertion, the *Pinkhasov* court cited the language of the former Kentucky Court of Appeals in *Rowley*: "The rights and obligations of a marriage do not depend upon an agreement between the parties but upon the law of the domiciliary state, because the institution is one of society which is regulated by public authority." *Pinkhasov*, at 291-92, *citing Rowley*, at 890. The *Rowley* court, in turn, cited *Maynard v. Hill,* 125 U.S. 190 (1888), in which

this Court had stated: "Marriage, as creating the most important relation in life, as having more to do with morals and civilization of a people than any other institution, has always been subject to the control of the legislature. That body prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effects upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution." *Maynard v. Hill,* 125 U.S. at 205.

Therefore, the Constitution of the United States does not allow the destruction or redefinition of marriage in Kentucky by judicial fiat, in opposition to recognized and codified public policy and legislative action, and an amendment of the Commonwealth's Constitution by plebiscite of the Commonwealth's citizens. Lest it be argued that *Maynard* is an older case, and may not represent the current state of the law, this principle is supported by the more recent acknowledgment of this Court that: "The definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the 'protection of offspring, property interests, and the enforcement of marital responsibilities.'" *United States v. Windsor*, 133 S.Ct. 2675 (2013).

Indeed, this Court, like Kentucky's courts, has also relied upon longstanding history to affirm: "[T]he states, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce . . . [and] the Constitution delegated no authority to the Government of the United States on the subject of marriage and divorce." *Haddock v. Haddock,* 201 U.S. 562, 575 (1906), overruled on other grounds by *Williams v. State of North Carolina,* 317

U.S. 287 (1942); see also, *In re Burrus*, 136 U.S. 586, 593-94 (1890)("The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States"); *cf. United States v. Windsor*, 133 S.Ct., at 2688 (Scalia, J., dissenting)("we have no power under the Constitution to invalidate this democratically adopted legislation.") It is clear, therefore, from this Court's own precedent, that it may not usurp authority over marriage, but that such authority has always been and is reserved exclusively to the states.

This principle is clearly acknowledged in *Windsor* where this Court stated: "The dynamics of state government in the federal system are to allow the formation of consensus respecting the way the members of a discrete community treat each other in their daily contact and constant interaction with each other." *Windsor*, 133 S.Ct. at 2692. The *Windsor* Court's prohibition against the federal government interfering with a state's right to re-define marriage (through the Defense of Marriage Act) likewise prohibits federal interference with Kentucky's right to retain its existing definition of marriage.

Therefore, based upon its own recent precedent, this Court should now respect the democratic process by which the citizens of the Commonwealth, acting collectively, have reached a consensus on this societal issue. For this Court now to overrule that determination would negate centuries of jurisprudential precedent for reasons wholly lacking any support in law. Indeed, as the Court affirmed, in declining to consider this issue in *Baker v. Nelson*, 409 U.S. 810 (1972), the question of same-sex marriage has no place in this Court "for want of a substantial federal question." *Baker v. Nelson*, 409 U.S. 810 (1972).

2. Kentucky's Definition Of Marriage Does Not Violate The Fourteenth Amendment To The United States Constitution

Petitioners' repeated characterization of the aforementioned legislation as "Kentucky's marriage ban," has no basis in either law or fact. *Amici* respectfully insist that since Kentucky is permitted, but not required to legislatively "define" marriage, its having done so does not constitute a "ban on marriage." The Commonwealth has, rather, simply adopted the consensus of American and world history as to what constitutes a "marriage." Indeed, despite their use of contorted language and inconsistent argument, Petitioners seem to agree with this historical view. They speak, for example, of the "nuclear family," Petitioner's Brief, at 4, and the "legal foundation for forming a family and rearing children," Petitioner's Brief, at 19, as constituting both laudable goals and public policy for the legal institution of marriage.

Amici submit that Kentucky's codification of those historical views and consensus simply affirms its public policy. The Constitution does not require that states define marriage. Although some states have recently chosen to do so and have expanded the common law definition, Kentucky has chosen to retain its existing definition of marriage.

That definition only treats differently those who are *not similarly situated*, on the basis of consanguinity, consent, or biology. *Amici* insist that Kentucky's definition of "marriage" does not treat *equals* differently, and therefore is not discriminatory. "Discrimination" is a legal term of art; the Equal Protection Clause only prohibits states from treating *similarly* situated people differently, without some legitimate basis.

Black's Law Dictionary defines "discrimination" in a constitutional sense as conferring "particular privileges on a class arbitrarily selected from a large number of persons, all of whom stand in the same relation to the privileges granted and between whom and those not favored no reasonable distinction can be found." BLACK'S LAW DICTIONARY 420 (5th ed. 1979). Otherwise stated, "discrimination" is "[a] failure to treat all persons equally *where no reasonable distinction* can be found between those favored and those not favored." *Id*. (emphasis supplied)

Laws defining and regulating marriage may and do distinguish on a number of bases including age, consent, biological sex, and consanguinity. Simply continuing to adhere to the long established common law definition of marriage is neither unlawful, objectionable, irrational nor unreasonable; and it certainly does not "ban" something that did not, and cannot, exist under Kentucky law.

Petitioners find scant support for their position, in either *Lawrence v. Texas,* 539 U.S. 558 (2003), or *Griswold v. Connecticut*, 381 U.S. 479 (1965), since neither of those holdings supports an "evolving" view of discrimination which would include marriage. In both of those cases, the Court afforded constitutional protection, under the Ninth Amendment, for intimacy in *private* relationships, behind closed doors. Both *Griswold* and *Lawrence* dealt with governmental intrusion in a *private aspect* of relationships. They in no way support an extension of additional rights to same-sex couples. The instant Petitioners demand, not just that certain *private behaviors* be permitted, but rather that the Court require states to accord *legal status* to a relationship which has never been recognized as such in the Commonwealth's history.

> Indeed, this Court recently stated:
>
> 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 woman in lawful marriage. 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.

The Court further observed "The limitation of lawful marriage to heterosexual couples . . . for centuries had been deemed both necessary and fundamental." *Id.*

Other courts have similarly noted that the recognition of homosexual relationships as "same-sex marriage" is of recent origin. "The concept of same-sex marriage was unknown in our distant past, and is novel in our recent history, because the universally understood definition of marriage has been the legal or religious union of a man and a woman." *In re Marriage Cases*, 183 P.3d. 384, 460 (Calif. 2008)(Baxter, J., concurring in part and dissenting in part)

Petitioners insist that the right to marry has been a long-standing and central part of liberty in America. Petitioners have evidently failed to note that many of the cases upon which they rely sanction that principle based upon the understanding that "marriage" was a union between a man and a woman.

3. Kentucky Has Sufficient Legitimate State Interests In The Definition Of Marriage To Satisfy Review Under The Fourteenth Amendment

The history of marriage in this country does not support recognition of same-sex marriage as a fundamental right. As the Court recognized in *San Antonio School District v. Rodriquez*, 411 U.S. 1 (1973): "It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws." 411 U.S. at 33. Because this Court has not recognized the claim of same-sex marriage as involving either a fundamental right or a suspect class, Kentucky's policy and practical reasons for defining marriage as a union between one man and one woman is subject only to a rational basis review.

This Court has long recognized that a state has wide latitude in the area of social legislation; and even when faced with an equal protection claim "the Constitution presumes that even improvident decisions will eventually be rectified by the democratic process." *City of Cleburne, Texas v. Cleburne Living Center, Inc*., 473 U.S. 432, 440 (1985). Such was the cogent analysis of the Sixth Circuit Court of Appeals, recognizing "the deference owed the democratic process," and that a poll of a panel of judges should not take the place of that process. *DeBoer v. Snyder*, 772 F.3d. 388, 407, 408, 415, 416 (6th Cir. 2014).

The Sixth Circuit, relying upon precedent from this Court, acknowledged: "[t]he signature feature of rational basis review is that governments will not be placed in the dock for doing too much or for doing too little in addressing a policy question." *DeBoer v. Snyder*, 772 F.3d. at 405, citing *Dandridge v. Williams,* 397 U.S. 471, 486-87 (1970). *Amici* submit that this

is an appropriately low bar, and affords deference to states like Kentucky whose legislatures have codified that public policy based on history and custom and consistent with common law. As this Court has recently affirmed, such long-standing usage is persuasive for constitutional interpretation. *Town of Greece v. Galloway*, 134 S.Ct. 1811, 1818-20 (2014); *NLRB v. Noel Canning,* 134 S.Ct. 2550, 2559-60 (2014).

The citizens of Kentucky, acting both directly and through their elected representatives, have defined "marriage" as a union between one man and one woman. This definition is based upon considerations of public policy, which include promoting domestic stability and ensuring the proper maintenance and education of children. Indeed, the education of children and child-rearing by both of the child's biological parents is both an important and legitimate purpose of marriage in the Commonwealth.

Kentucky also has a legitimate interest in the enforcement of marital responsibilities as part of social order and structure in the Commonwealth. Moreover, Kentucky has a legitimate interest in consistently regulating the public effects and stability of marriage, as well as the economic and other benefits of that institution. Petitioner's interest, by contrast, is private, subjective, and based solely on the personal desires of a single group of persons.

4. The Tenth Amendment Guarantees States The Right To Make Rational Distinctions Concerning The Marriage Relationship And To Make Necessary Policy

In a number of recent decisions this Court has recognized a constitutional right for adults to make free sexual and cohabitation choices, both heterosexual

and homosexual. Individuals also have the right to obtain religious sanction for unions not recognized by state civil marriage laws; but there is no general federal constitutional right to the government benefits bestowed by state civil marriage laws. Indeed, the states are not even required to adopt civil marriage laws.

Civil marriage laws are adopted for a limited purpose, namely, authorizing the grant of state benefits for certain types of unions. Otherwise stated, they afford to persons in qualifying relationships what the framers of the Constitution referred to as "privileges and immunities," U.S. Const. Art. IV, § 2, i.e., those benefits bestowed by government on some individuals to the exclusion of others.

Historically, the "privileges and immunities" of civil marriage have been accorded only to social unions complying with certain requirements. With some variations, state laws have required that the union be (1) of a man and a woman, (2) who undergo certain procedures in advance, (3) obtain a valid license, (4) have consented, (5) are above a certain age, (6) are not married to anyone else, (7) are not too closely related to each other, and (8) meet certain other requirements of ceremony and/or cohabitation. States typically have excluded from special benefits all other groupings—including, but not limited to, same-sex marriages, polygamous marriages, polyandric marriages, other plural clusters, designated intra-family unions (e.g., brother/sister and uncle/niece), marriages by minors, and unions that are unlicensed, or that otherwise fail to meet the states' requirements.

A grant of special privileges to one group, while excluding others, violates the Equal Protection Clause of the Fourteenth Amendment unless the state can

show a legitimate public reason for its decision. The showing required varies depending on the type of case. However, a State need not always apply all its laws or all its services equally to anyone, resident or nonresident, who may request it so to do. *Canadian Northern R. Co. v. Eggen,* 252 U.S. 553 (1920); cf. *Sosna v. Iowa*, 419 U.S. 393 (1975); *Shapiro v. Thompson*, 394 U.S. 618 (1969). The Supreme Court is extremely tolerant of government distinctions among economic classes. By contrast, in social-issue cases such as same-sex marriage, the Court sets more exacting standards. It is clear that for constitutional purposes, statutes defining historic marriage meet those exacting criteria. This is because of the overwhelming evidence of social benefit deriving from heterosexual unions. Such evidence arises both from empirical studies, and also from practical experience gathered over the course of several millennia.

Petitioners seek the extension of the "privileges and immunities" of civil marriage to other groupings; *amici* submit that this is a much tougher case to make since the supporting sociological and scientific data is much weaker. *Amici* further insist that in the case of same-sex marriage, the supposed "evidence" of social benefit is scant, highly politicized, and not sufficient to require that states recognize such unions. A*mici* also submit that under Equal Protection jurisprudence, the dispositive issue is not whether the evidence requires that states such as Kentucky recognize same-sex marriage; the question is rather whether the evidence requires those states to grant same-sex couples "privileges and immunities" that many other 'unions' do not receive.

As noted above, the Constitution affords no citizen of any gender or orientation a constitutional

right to marriage. Since the regulation of marriage is not mentioned, it is not a power which has been delegated to the federal government. Because the framers chose not to address the issue, *amici* submit that the inquiry ends there, and that the Constitution's silence requires judicial inaction. The Constitution is rigid in its respect for federalism. Its framework of powers requires overwhelming popular support in order to effect changes. So difficult is the task of amending the Constitution that it has occurred only twenty-seven times in the nation's history.

Amici respectfully submit that, under the Constitution, this Court's mandate is to determine the constitutionality of laws. *Marbury v. Madison,* 5 U.S. 137 (1803). The Constitution does not empower this Court to create new rights. In considering constitutional questions, the Court should first look to the document itself, rather than its own speculation as to what the framers may have intended. The document itself should be the primary, even the exclusive, source. To resolve constitutional questions, the Court need only apply accepted principles of statutory interpretation. One such principle is to avoid reading into a statute language which the drafters did not include, such as "marriage" or "gay marriage." *Keegan v. U.S.,* 325 U.S. 478 (1945). Another principle of statutory interpretation mandates that when determining the meaning of a statute, a Court must adopt the plain meaning of the words. Of course, if the words do not even occur, then the Court need not accord them any meaning.

As the Court has noted in *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997):

> Our first step in interpreting a statute is to determine whether the language at issue

> has a plain and unambiguous meaning with regard to the particular dispute in the case. Our inquiry must cease if the statutory language is unambiguous and the 'statutory scheme is coherent and consistent'.

519 U.S. at 340 See also, *Carcieri v. Salazar,* 555 U.S. 379 (2009); quoting *United States v. Ron Pair Enterprises, Inc.,* 489 U.S. 235, 240 (1989); *Connecticut Nat. Bank v. Germain,* 503 U.S. 249, 253-254 (1992). "[P]lain meaning is examined by looking at the language and design of the statute as a whole." *Accord, Lockhart v. Napolitano*, 573 F.3d. 251 (6th Cir. 2009).

Finally, to ascertain the meaning of a word, a court must consider the entire statute to determine if its interpretation is internally consistent. " . . .[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available." *Nixon v. Missouri Mun. League,* 541 U.S. 125 (2004); *Griffin v. Oceanic Contractors, Inc.,* 458 U.S. 564, 575 (1982).

In making this determination, a court must consider the fundamental design of our federal Constitution, and the nature of federalism. The judicial creation of a hitherto unknown right of same-sex marriage ignores the Constitution, eviscerates the Tenth Amendment, and amounts to judicially amending the Constitution. Such judicial arrogation of power defies all principles of statutory interpretation and construction. To recognize a constitutional right to same-sex marriage, the Court must first ignore the Tenth Amendment which provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States

respectively, or to the people." U.S. Const. amend. X.

The "people," consequently, as well as the states, have been accorded constitutional rights. They are entitled to *all* rights not specifically granted to the federal government. *See*, U.S. Const. amend. X. Among those rights is that of deciding who, if anyone, should be given the right to marry and to receive whatever benefits and burdens (if any) that status imports. See *Williams v. North Carolina,* 317 U.S. 287, 298 (1942). The Court cannot create a constitutional right to same-sex marriage without violating the rights reserved to the "people" under the Tenth Amendment.

Petitioners assert and would have this Court hold that after one hundred and forty-eight years, the Fourteenth Amendment now gives rise to a hitherto unrecognized right to same-sex marriage. So doing transmutes the Fourteenth Amendment's guarantee of "equal protection of the laws" into an affirmative right to equality of outcomes under every law. Petitioners' argument clearly implies that the Fourteenth Amendment affords the federal government the right, and perhaps a duty, to enforce social change. Petitioners appear to regard the Constitution not merely as a "living document," but as an agent for change by which courts may simply discard and create rights as they deem fit.

Under Petitioners' view, the Fourteenth Amendment would supersede the remainder of the document, authorizing legislation by judicial fiat and ignoring the separation of powers. Petitioners would have this Court hold that those who adopted the Fourteenth Amendment anticipated the emergence of same-sex marriage nearly one hundred and fifty years in the future. Such a distorted interpretation of our founding document betrays a basic misunderstanding

of the role of the separation of powers in our federal system.

Emerging societal values cause changes in areas ranging from marriage to taxes; however, when attitudes change, our Constitution authorizes the people to make laws that reflect their moral choices. This self-governance is the hallmark of civil society and is achieved by the people's elected representatives rather than by a judicial panel. Replacing political choice with judicial fiat not only runs afoul of the Constitution, but would fundamentally transform our system of government. As this Court has previously observed,

> The action of the state must be held valid unless clearly arbitrary, capricious or unreasonable. 'The legislature, being familiar with local conditions, is, primarily, the judge of the necessity of such enactments. The mere fact that a court may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference.'

New State Ice Co. v. Liebman, 285 U.S. 262, 285 (1932), *quoting McLean v. Arkansas,* 211 U.S. 539, 547 (1909).

Statutory changes are brought about through a vote of the people rather than being dictated by an oligarchy with little regard for our founding documents. Contrary to the assertions of the Petitioners, our Constitution permits laws regarding marriage to differ between the several states. Indeed, the Tenth Amendment contemplates just such divergence among state laws. *Haddock v. Haddock,* 201 U.S. 562, 575 (1906), overruled on other grounds by *Williams v. State*

of North Carolina, 317 U.S. 287 (1942).

Amici submit that application of the rule set out in *Windsor* is instructive of the case at bar. *Windsor* affirms the right of states to determine how "marriage" is defined, and denies federal courts the authority to override a state's determination concerning what types of "marriage" it will recognize. In *Windsor*, the State of New York had chosen to recognize same-sex unions, and thus to extend the benefits of heterosexual marriage to same-sex couples. The *Windsor* Court upheld the rights of states to make their own marriage determinations and rejected federal interference.

The Court noted: "The recognition of civil marriages is central to state domestic relations law applicable to its residents and citizens." *Windsor*, 133 S.Ct. 2691 quoting *Williams v. North Carolina,* 317 U.S. 287, 298 (1942)("Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders"). The right to define marriage is but one facet of a state's broader authority to regulate domestic relations within its borders with respect to the "[p]rotection of offspring, property interests, and the enforcement of marital responsibilities." *Id*.

This Court declared more than a century ago, "[T]he states, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce . . . [and] the Constitution delegated no authority to the Government of the United States on the subject of marriage and divorce." *Haddock v. Haddock,* 201 U. S. 562, 575 (1906). The *Windsor* Court merely affirmed this principle, *i.e.,* that the people of a state have the right to define marriage as they see fit, absent some superseding federal right.

Indeed, under *Windsor*, the Constitution *prevents*

federal intrusion upon the rights of the people under the Tenth Amendment, unless a constitutional right is implicated. As Petitioners have demonstrated no such right, a*mici* submit that the Kentucky definition of civil marriage must be upheld.

5. Kentucky's Legitimate Interests In Defining Marriage Satisfy Any Standard Of Judicial Review

In light of the foregoing, Kentucky has not merely a legitimate, but indeed a compelling governmental interest and legal basis for holding its long-established historic definition of marriage. Consequently, Kentucky's choice should not be "subject to courtroom fact finding and may be based upon rational speculation unsupported by evidence or empirical data." *FCC v. Beach Communications, Inc.,* 508 U.S. 307, 315 (1993).

In this regard, as the Eleventh Circuit has observed, courts can:

> rationally conclude that a family environment with married opposite-sex parents remains the optimal social structure in which to bear children, and that the raising of children by same-sex couples, who by definition cannot be the two sole biological parents of a child and cannot provide children with a parental authority figure of each gender, presents an alternative structure for child rearing that has not yet proved itself beyond reasonable scientific dispute to be as optimal as the biologically based marriage norm.

Lofton v. Sec. of Department of Children & Family

Services, 358 F.3d. 804, 825, n.26 (11th Cir. 2004)

The Sixth Circuit, therefore, correctly held that the General Assembly's legitimate basis for adhering to its established definition of marriage is in no way diminished by the changing tides of public opinion.

> [A] State might wish to wait and see before changing a norm that our society (like all others) has accepted for centuries. That is not preserving tradition for its own sake. No one here claims that the States' original definition of marriage was unconstitutional when enacted. The plaintiffs' claim is that the States have acted irrationally in standing by the historic definition in the face of changing social mores. Yet one of the key insights of federalism is that it permits laboratories of experimentation – accent on the plural – allowing one State to innovate one way, another State another, and a third State to assess the trial and error over time.

DeBoer, 772 F.3d. at 406.

This Sixth Circuit further stated:

> A State still assessing how this [re-defining marriage] has worked, whether in 2004 or 2014, is not showing irrationality, just a sense of stability and an interest in seeing how the new definition has worked elsewhere. Even today, the only thing anyone knows for sure about the long-term impact of redefining marriage is that they do not know.

Id.

This statement by the Sixth Circuit represents the better view, and should be affirmed.

6. Kentucky's Public Policy is Not Based on Animus

Petitioners assert that the General Assembly is motivated by animus against same-sex couples. *Amici,* the legislators against whom the charge is made, categorically deny that such is the case. The Commonwealth's adherence to its consistent and time-honored definition of marriage in no way demonstrates the presence of "unconstitutional animus," when presented with a novel claim. *Windsor,* 133 S.Ct. at 2689, 2694-95, 2696, 2707-08; *see also Romer v. Evans*, 517 U.S. 620, 636 (1996)(Scalia, J., dissenting).

As Chief Justice Roberts observed in *Windsor*: "snippets of legislative history" or a banal title of legislation, without something more, does not provide convincing evidence that an act's "principal purpose was to codify malice, and that it furthered no legitimate government interests." Accordingly, he urged caution against tarring "the political branches with the brush of bigotry." *Windsor*, 133 S.Ct. at 2696.

Courts do not ordinarily consider legislators' subjective intent in determining the constitutionality of a law. *See, Palmer v. Thompson,* 403 U.S. 217, 224 (1971)(discussing the "hazards of declaring a law unconstitutional because of the motivations of its sponsors"). In a line of cases, beginning with *United States Department of Agriculture v. Moreno,* 413 U.S. 528 (1973), this Court has created an exception to that general rule through a doctrine that has become known as the "animus," or more aptly titled, the "anti-animus," doctrine. Dale Carpenter, *Windsor Products: Equal Protection From Animus*, 2013 SUP.CT.REV. 183, 204-215 (2013). Upon rational basis review, the party challenging a classification under the Equal Protection

Clause normally has the burden "to negative 'any reasonably conceivable state of facts that could provide a rational basis for the classification.'" *Bd. of Trustees v. Garrett,* 531 U.S. 356, 367 (2001)(quoting *Heller v. Doe,* 509 U.S. 312 (1993).

In applying the animus doctrine, this Court has sought to determine, on a rational basis standard of review, whether there is a legislative motive which appears to be based on irrational prejudice. The standard from these cases has been variously referred to as "heightened rational-basis review," "rational basis with bite," "rational basis with teeth," and "rational basis plus." *Bishop v. Smith*, 760 F.3d. 1070, 1099 (10th Cir. 2014)(Holmes, J., concurring) (citations omitted).

The first case to apply the animus doctrine was *United States Department of Agriculture v. Moreno,* 413 U.S. at 528. That case arose when Congress enacted a law providing that the distribution of food stamps should be determined on a household basis, and defined "household" as including only groups of related individuals. *See*, 413 U.S. at 529-30. This Court found that the term "household" had been limited to related individuals "to prevent so called 'hippies' and 'hippie communes' from participating in the food stamp program." 413 U.S. at 535.

In invalidating the "household" classification, this Court held:

> If the constitutional conception of equal protection of the laws means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest. As a result, a purpose to discriminate against hippies cannot, in and of itself and

> without reference to some independent considerations in the public interest, justify the [classification].

413 U.S. at 534-35.

The Court again addressed the animus doctrine in *City of Cleburne v. Cleburne Living Center,* 473 U.S. at 432. The city of Cleburne, Texas, had refused to issue a group home for mentally disabled individuals the special use permit required to operate such a home. 473 U.S. at 435. The Court held that the mentally disabled are neither a suspect nor a quasi-suspect class, that would require a heightened standard of review. 473 U.S. at 442-47.

Despite applying rational basis review, this Court invalidated the zoning ordinance that required homes for the mentally disabled to obtain a special use permit, holding that the permit requirement appeared "to rest on an irrational prejudice against the mentally retarded." 473 U.S. at 450.

In *Romer v. Evans,* this Court invalidated a Colorado statute that repealed any ordinance or law prohibiting discrimination against homosexuals. 517 U.S. at 620. The Court held that, in "the ordinary case, a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous," and that, "[b]y requiring that the classification bear a rational relationship to an independent and legitimate legislative end, [courts] ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." 517 U.S. at 632-33. Quoting *Moreno,* the Court held: "that a bare desire to harm a politically unpopular group cannot constitute a legitimate governmental interest," and that the

Colorado law lacked any legitimate governmental purpose. 517 U.S. at 634-35 (quoting *United States Department of Agriculture v. Moreno*, 413 U.S at 534) (internal quotation marks omitted).

In *United States v. Windsor,* this Court invalidated § 3 of the Defense of Marriage Act, 1 U.S.C. § 7, 28 U.S.C. § 1738C ("DOMA"). Section 3 of that Act defined marriage as a legal union between one man and one woman. 133 S.Ct. at 2683. This Court noted that: "[i]n determining whether a law is motivated by an improper animus or purpose, discriminations of an unusual character especially require careful consideration." 133 S.Ct. at 2693 (citations and internal quotation marks omitted). The Court noted that DOMA's purpose was to "identify a subset of state-sanctioned marriages and make them unequal," in effect, treating lawful same-sex marriages as "second-class marriages." 133 S.Ct. at 2693-94.

In his concurring opinion in *Bishop v. Smith,* Judge Holmes set out the correct interpretation of the animus doctrine. 760 F.3d. at 1096 (Holmes, J., concurring). The Tenth Circuit, in an opinion written by Judge Lucero, invalidated an Oklahoma law that prohibited issuing marriage licenses to same-sex couples. 760 F.3d. at 1074. Judge Lucero, writing for the court, concluded that the Oklahoma law denied "a fundamental right to all same-sex couples who seek to marry or to have their marriages recognized." 760 F.3d. at 1081.

Neither the district court nor Judge Lucero decided the case on animus grounds. 760 F.3d. at 1096. In fact, Judge Lucero did not address the animus doctrine. 760 F.3d. at 1074-96. Judge Holmes wrote separately, but stated that he fully agreed with Judge Lucero's conclusion and reasoning, including the

decision not to apply the animus doctrine. 760 F.3d. at 1096-97. Judge Holmes' concurring opinion focused on the contours of the animus doctrine, and explained why it did not apply in that case. *Id.,* at 1097.

Judge Holmes noted that the "hallmark of animus jurisprudence is its focus on actual legislative *motive*." *Id.,* at 1099 (emphasis in original). He asserted that an unlawful motive "could be viewed as falling somewhere on a continuum of hostility toward a particular group." *Id.,* at 1099. "On the weaker end of the continuum, a legislative motive may be to simply exclude a particular group from one's community for no reason other than an 'irrational prejudice' harbored against that group." *Id.,* at 1100 (*quoting, City of Cleburne v. Cleburne Living Ctr.,* 473 U.S., at 450)

"On the more extreme end of the continuum, the legislative motive that implicates the animus doctrine may manifest itself in a more aggressive form—specifically, a 'desire to harm a politically unpopular group.'" *Id.,* at 1100 (quoting *Moreno,* 413 U.S., at 534)(emphasis omitted). Judge Holmes stated that, in determining whether a law had been enacted based on unlawful animus, a court should "explore challenged laws for signs that they are, as a *structural* matter, aberrational in a way that advantages some and disadvantages others." *Id.,* at 1100 (emphasis in original). Citing *Romer* and *Windsor,* Judge Holmes identified two structural aberrations for which courts should look. "Two types of structural aberration are especially germane here: (1) laws that impose wide-ranging and novel deprivations upon the disfavored group; and (2) laws that stray from the historical territory of the lawmaking sovereign just to eliminate privileges that a group would otherwise receive." *Id.,* at 1100. He concluded that, once animus has been

detected, a court must invalidate the law. *Id.,* at 1103.

When a litigant presents a colorable claim of animus, the judicial inquiry searches for these clues. Once the clues have been gathered, if animus is detected, the law falls. Even under rational basis review, the most forgiving of equal-protection standards, a law must still have a legitimate purpose. A legislative motive qualifying as animus is never a legitimate purpose. As a result, once animus has been detected, the inquiry ends: the law is unconstitutional. *Id.,* at 1103. However, as the Tenth Circuit had previously indicated, the animus doctrine applied *only after* a court had determined that there is *no conceivable purpose* for passing a law other than an unlawful animus. *Powers v. Harris,* 379 F.3d. 1208, 1224 (10th Cir. 2004).

Applying the foregoing analysis to the facts of the case at bar, it is clear that the Kentucky General Assembly did not enact the statute defining civil marriage based upon unlawful animus, since it had non-animus-based reasons for adopting the statute.

Moreover, Petitioners' reliance upon a suggestion of animus in *Windsor* is not dispositive here since, unlike the instant case, the *Windsor* Court was concerned about the federal government's *retraction of rights* that had been granted to same-sex couples in those states which recognized such marriages. In this case, the Commonwealth is neither changing course nor withdrawing privileges previously granted, nor retracting a right once accorded a class of individuals.

Those unable to marry in Kentucky, notwithstanding a personal desire to do so, include individuals who have not yet attained their majority, and individuals within a certain degree of consanguinity. The fact that such laws may conflict

with these individuals' personal desires in no way suggests that Kentucky harbors animosity toward such individuals, has deemed them "unworthy," or has relegated them to second-class status.

Additionally, as a reading of the statute will show, "love" is not a prerequisite for a lawful marriage in the Commonwealth. Accordingly, the mere presence of a "loving and committed relationship" does not render all couples "similarly situated." For example, a polygamous triad who profess "love" for one another and for each other, fails to satisfy Kentucky's definition of marriage. As the Sixth Circuit correctly noted:

> There is no reason to think that three or four adults, whether gay, bisexual, or straight, lack the capacity to share love, affection, and commitment, or for that matter lack the capacity to be capable (and more plentiful) parents. If it is constitutionally irrational to stand by the man-woman definition of marriage, it must be constitutionally irrational to stand by the monogamous definition of marriage.

DeBoer, 772 F.3d. at 407.

For these reasons, Kentucky's definition of marriage is neither constitutionally irrational nor indicative of animus, but rather is legitimate, and is presumed to be constitutional. Petitioners have the burden of proving otherwise and simply cannot "negative every conceivable basis which might support it." *Heller v. Doe*, 509 U.S. 312, 320 (1993). The term "marriage" has been clearly defined in the Commonwealth of Kentucky, first by judicial decision in 1973 in *Hallahan,* by its legislature in 1998, by overwhelming vote of its people in 2004, and most

recently by the Respondent in this action. This Court, therefore, ought not overturn the long-standing and well-founded public policy of Kentucky.

CONCLUSION

The Kentucky Supreme Court stated, in *S.J.L.S. v. T.L.S.,* 265 S.W.3d. 804 (Ky. App. 2008): "It is not this or any court's role to judge whether the Legislature's prohibition of same-sex marriage, or common law marriage, or bigamous marriage, or polygamous marriage, is morally defensible or socially enlightened."

As Justice Kennedy observed before a Senate panel on Monday, March 23, 2015, "It is not novel or new for justices to be concerned that they are making so many decisions that affect a democracy, and we think a responsible, efficient, responsive legislative and executive branch…will alleviate some of that pressure." The sweeping decisions of the Court caused the USA TODAY Supreme Court reporter to exclaim, ". . . neither the executive nor legislative branch of government has held a candle to the increased clout of the Supreme Court." Richard Wolf, *On a Roll, High Court Reigns Supreme,* USA TODAY (March 26, 2015) at 2B. Defining marriage is constitutionally and historically under the domain of the states. Amici respectfully request that the Kentucky General Assembly be unfettered in fulfilling its legislative responsibility to uphold the historic definition of marriage in the Commonwealth. The Court, therefore, should affirm the decision of the U.S. Court of Appeals for the Sixth Circuit.

Respectfully submitted,
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APPENDIX

APPENDIX
LIST OF *AMICI CURIAE*
MEMBERS OF THE GENERAL ASSEMBLY

MEMBERS OF THE KENTUCKY SENATE

SENATE LEADERSHIP:
Robert Stivers II, President
Kentucky Senate District 25

David Givens, President Pro Tem
Kentucky Senate District 9

Damon Thayer, Majority Floor Leader
Kentucky Senate District 17

Dan Seum, Majority Caucus Chairman
Kentucky Senate District 38

Jimmy Higdon, Majority Whip
Kentucky Senate District 14

Ray Jones II, Minority Floor Leader
Kentucky Senate District 31

Julian Carroll, Minority Whip
Kentucky Senate District 7

SENATORS:
Ralph Alvarado
Kentucky Senate District 28

Joe Bowen
Kentucky Senate District 8

Tom Buford
Kentucky Senate District 22

Jared Carpenter
Kentucky Senate District 34

Danny Carroll
Kentucky Senate District 2

C.B. Embry, Jr.
Kentucky Senate District 6

Carroll Gibson
Kentucky Senate District 5

Chris Girdler
Kentucky Senate District 15

Ernie Harris
Kentucky Senate District 26

Paul Hornback
Kentucky Senate District 20

Stan Humphries
Kentucky Senate District 1

Christian McDaniel
Kentucky Senate District 23

Dennis Parrett
Kentucky Senate District 10

Dorsey Ridley
Kentucky Senate District 4

Albert Robinson
Kentucky Senate District 21

John Schickel
Kentucky Senate District 11

Brandon Smith
Kentucky Senate District 30

Johnny Ray Turner
Kentucky Senate District 29

Robin Webb
Kentucky Senate District 18

Steve West
Kentucky Senate District 27

Whitney Westerfield
Kentucky Senate District 3

Mike Wilson
Kentucky Senate District 32

Max Wise
Kentucky Senate District 16

MEMBERS OF THE KENTUCKY HOUSE OF REPRESENTATIVES

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Greg Stumbo, Speaker of the House
House District 95

Jody Richards, Speaker of the House Pro Tem
House District 20

Rocky Adkins, Majority Floor Leader
House District 99

Johnny Bell, Majority Whip
House District 23

Jeff Hoover, Minority Floor Leader
House District 83

Stan Lee, Minority Caucus Leadership
House District 45

Jim DeCesare, Minority Whip
House District 17

REPRESENTATIVES:
Lynn Bechler
House District 4

Robert Benvenuti III
House District 88

Kevin D. Bratcher
House District 29

Regina Bunch
House District 82

John Carney
House District 51

Larry Clark
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Hubert Collins
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Kenny Imes
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House District 67

Thomas Kerr
House District 64

Kim King
House District 55

Martha Jane King
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Adam Koenig
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Brian Linder
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Donna Mayfield
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Tom McKee
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Marie Rader
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Diane St. Onge
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House District 84

Jim Stewart III
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Wilson Stone
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Tommy Thompson
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James Tipton
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Tommy Turner
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Gerald Watkins
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House District 79

Addia Wuchner
House District 66

Jill York
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