No. 14-136

IN THE

Supreme Court of the United States

SALLY HOWE SMITH, in her official capacity as Court Clerk for Tulsa County, State of Oklahoma,

Petitioner,

v.

MARY BISHOP and SHARON BALDWIN,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Whether a state may deny same-sex couples the right to marry consistent with the Fourteenth Amendment's guarantees of due process and equal protection.

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INTRODUCTION

The Framers of the Fourteenth Amendment "knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress." *Lawrence v. Texas*, 539 U.S. 558, 579 (2003). The same Congress, for example, that proposed the Fourteenth Amendment also passed laws segregating schools. *See Carr v. Corning*, 182 F.2d 14, 18 (D.C. Cir. 1950). But this Court, nearly a century later, unanimously held that such segregation is antithetical to the guarantee of equal protection. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Bolling v. Sharpe*, 347 U.S. 497 (1954). State laws prohibiting interracial marriage also permeated the legal landscape for over one hundred years following passage of the Fourteenth Amendment. Yet this Court, when finally confronted with the issue, again unanimously concluded that such laws are unconstitutional. *Loving v. Virginia*, 388 U.S. 1 (1967). Likewise, state laws for most of our history "sought to prohibit nonprocreative sexual activity," based in part on societal voices "condemn[ing] homosexual conduct as immoral." *Lawrence*, 539 U.S. at 568, 571. But this Court has recently made clear that the Constitution forbids laws criminalizing intimate sexual conduct between persons of the same sex, *id.* at 578-79, or excluding same-sex couples from the federal definition of marriage, *United States v. Windsor*, 133 S. Ct. 2675, 2693, 2695 (2013).

The time has come for this Court to decide whether state laws denying same-sex couples the right to marry should be discarded into the same "ash heap of history." *Whitewood v. Wolf*, 992 F. Supp. 2d

410, 431 (M.D. Pa. 2014). And this case is a clean and beneficial vehicle for doing so. It was the first case in the country filed to challenge the spate of anti-gay-marriage laws enacted in 2004. This case also lacks any alternative claims or procedural glitches that could prevent this Court from reaching and resolving the fundamental question whether states may deny same-sex couples the right to marry.

Even if this Court grants a petition from another state, it should also grant plenary review here. When this Court has heard other similarly momentous cases, it has frequently granted multiple petitions. Such action may be especially appropriate here. The question presented affects individuals and states across the country. Yet each state has its own story – and its own state interests supposedly at stake. Furthermore, no single case can present a foolproof vehicle for resolving whether states may deny same-sex couples the right to marry. As this Court no doubt recalls from *Windsor* and *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), litigation concerning same-sex marriage can present thorny procedural issues. And on a more mundane level, facts essential to this Court's jurisdiction can – despite the best expectations of all concerned – evaporate on a moment's notice. In light of the extraordinarily pressing need to resolve this controversy as expeditiously as possible, this Court should not take the chance that it might need to hit the reset button between now and the end of the Term, thereby prolonging the legal limbo of hundreds of thousands of committed couples and families across the Nation.

STATEMENT

A. Factual and Legal Background

1. Historically, marriage in Oklahoma has been an inclusive civil institution. Since statehood in 1907, Oklahoma has defined marriage to be "a personal relation arising out [of] a civil contract," which simply requires "the consent of parties legally competent of contracting and entering into it." Okla. Gen. Stat. ch. 31, § 3249 (1908). That definition remains unchanged. *See* Okla. Stat. tit. 43, § 1; Robert Spector, *Oklahoma Family Law: The Handbook* (2013). And no Oklahoma law or judicial decision, from statehood to the present day, has ever conditioned marriage on the intent or capacity to beget children or raise them.

Oklahoma also has long deemed almost all adults "legally competent" to marry – the only exceptions, as in other states, being adults (age 18 or over) who (1) lack the mental capacity to enter into a marriage contract, (2) are related too closely by blood, or (3) are already married. *See Ross v. Ross*, 54 P.2d 611, 615 (Okla. 1936) (mental capacity); Okla. Const. art. 1, § 2 (polygamy); Okla. Stat. tit. 43, § 2 (consanguinity); *id.* § 3 (age).

Oklahoma has barred only two classes of otherwise legally competent adults from marrying: "any person of African descent . . . to any person not of African descent," Okla. Gen. Stat. ch. 31, § 3260 (1908), and couples of the same sex. This Court's decision in *Loving* abrogated the former restriction. *See Dick v. Reaves*, 434 P.2d 295, 298 (Okla. 1967). The latter restriction is the subject of this case.

2. Respondents Mary Bishop and Sharon Baldwin have lived as a family in Broken Arrow, Oklahoma, in a committed, continuous relationship for over fifteen years. Ms. Bishop is a sixth-generation Oklahoman whose great-great-great grandparents settled in the territory before statehood, and Ms. Baldwin is a fourth-generation Oklahoman whose great-grandparents and grandmother came to the state in a covered wagon. Both were raised and educated in Oklahoma, and both have worked since the 1990s as editors for the state's second-largest newspaper, the Tulsa World.

In 2000, Ms. Bishop and Ms. Baldwin exchanged vows in a church commitment ceremony. Nevertheless, because of their conviction that marriage is "an institution to be respected," and that it is "the only status that will signify the equality of their relationship" with those of married couples, Ms. Bishop and Ms. Baldwin have also "deeply desire[d]" to join in marriage. CA10 Aplt. App. 108.

3. On November 2, 2004, Oklahoma voters passed State Question 711 ("SQ 711") – publicly known as the "Marriage Protection Amendment" – by a margin of 1,075,216 to 347,303. (The measure had qualified for the ballot by passing the Oklahoma House 92 to 4 and the Oklahoma Senate 38 to 7.) SQ 711 amended the Oklahoma Constitution to add the following provisions:

> "Marriage" Defined – Construction of law and Constitution – Recognition of out-of-state marriages – Penalty
>
> A. Marriage in this state shall consist only of the union of one man and one woman. Neither this Constitution nor any other

> provision of law shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.
>
> B. A marriage between persons of the same gender performed in another state shall not be recognized as valid and binding in this state as of the date of the marriage.
>
> C. Any person knowingly issuing a marriage license in violation of this section shall be guilty of a misdemeanor.

Okla. Const. art. 2, § 35.

The Marriage Protection Amendment was part of a wave of state constitutional amendments adopted in the wake of *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003), which held that civil marriage could not be denied to same-sex couples consistent with the guarantees of due process and equal protection afforded to "all individuals" under the Massachusetts Constitution. *Id.* at 948, 961; *see* Jane S. Schacter, *Courts and the Politics of Backlash: Marriage Equality Litigation, Then and Now*, 82 S. Cal. L. Rev. 1153, 1188-89 (2009).

Even before SQ 711 became law, Oklahoma already had statutory provisions specifically barring same-sex marriage.[1] But as the Oklahoma Senate

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[1] Section 3(A) of Title 43 of the Oklahoma Statutes provided that "[a]ny unmarried person who is at least eighteen (18) years of age and not otherwise disqualified is capable of contracting and consenting to marriage *with a person of the opposite sex*." Okla. Stat. tit. 43, § 3(A) (emphasis added). The italicized language was added in 1975 following *Baker v. Nelson*, 191

explained in an official press release upon passage of the legislation to place SQ 711 on the ballot, proponents of the measure believed it necessary to "provide constitutional protections to traditional marriage to combat efforts by liberals and activist judges seeking to redefine marriage by allowing same-sex unions." Pet. App. 156a-157a. The author of the initiative further explained: "It is one thing to tolerate the homosexual lifestyle and another to legitimize it through marriage." *Id.* 160a; *see also id.* 168a-170a (collecting numerous similar quotations from author and other legislators).

4. The impact of SQ 711 on same-sex couples and their families is stark and often extreme. As the foundation of domestic relations law, marriage in Oklahoma gives rise to a host of rights and responsibilities, including mutual obligations of respect, fidelity, and financial support;[2] ownership of

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N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972). *See* 1975 Okla. Sess. Laws ch. 39, § 1. Section 3.1 of Title 43 also provided that "[a] marriage between persons *of the same gender* performed in another state shall not be recognized as valid and binding in this state as of the date of the marriage." Okla. Stat. tit. 43, § 3.1 (emphasis added). Enacted in 1996, this provision was part of a wave of federal and state laws (the federal Defense of Marriage Act ("DOMA"), 110 Stat. 2419, and state "mini-DOMAs") responding to the Hawaii Supreme Court's decision in *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1996), that the denial of marriage licenses to same-sex couples was sex-based discrimination subject to strict scrutiny under the state constitution. *See* 1996 Okla. Sess. Laws ch. 131, § 9; Schacter, 82 S. Cal. L. Rev. at 1185-86. As a matter of state law, SQ 711 replaced these statutory provisions upon its enactment. *See* Pet. App. 4a, 9a-16a; Pet. 30-31.

[2] *See* Okla. Stat. tit. 43, §§ 201, 202.

marital property[3] and the presumption that property acquired during marriage is such property;[4] inheritance and intestacy protections for a spouse[5] or child of the deceased;[6] parental rights[7] and protections against their termination;[8] alimony[9] and child support;[10] and child custody[11] and visitation rights.[12] Furthermore, as this Court observed in *Windsor*, over 1,000 federal laws and numerous federal regulations turn on marital status. *See* 133 S. Ct. at 2690, 2694-95. Finally, respondents and other same-sex couples in Oklahoma cannot attain a status for their relationship that universally represents "at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family." *Goodridge*, 798 N.E.2d at 954.

B. Procedural History

1. The day after voters approved SQ 711, respondents and an Oklahoma couple who later

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[3] *See id.* §121.

[4] *See Manhart v. Manhart*, 725 P.2d 1234, 1240 (Okla. 1986).

[5] *See* Okla. Stat. tit. 84, §§ 44, 213.

[6] *See id.* §§ 131, 132, 134, 173, 213.

[7] *See Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

[8] *See* Okla. Stat. tit. 10A, §§ 1-4-901 to 1-4-909.

[9] *See* Okla. Stat. tit. 43, §§ 121, 134.

[10] *See id.* § 112.

[11] *See id.* § 112.5.

[12] *See id.* § 111.1.

married in California, Susan Barton and Gay Phillips, filed suit, challenging on equal protection and due process grounds SQ 711's ban on marriage by same-sex couples and ban on recognition of out-of-state same-sex marriages.[13] The plaintiffs originally named the Governor and Attorney General of Oklahoma as defendants. But the Tenth Circuit held they were improper defendants because they had "no specific duty to enforce" SQ 711. *Bishop v. Oklahoma ex rel. Edmondson*, 333 Fed. App'x 361, 365 (10th Cir. 2009) (unpublished). Marriage licensing and recognition in Oklahoma, the Tenth Circuit held, fall "within the administration of the judiciary." *Id.*

Meanwhile, respondents sought a marriage license from petitioner Sally Howe Smith, court clerk for Tulsa County. They were "legally competent" to marry in every respect but one: they are both women. Accordingly, petitioner denied respondents a marriage license.

Respondents then filed an amended complaint, naming petitioner in her official capacity as defendant. Given petitioner's duties to issue and record marriage licenses and her refusal to issue one to respondents, petitioner did not dispute respondents' standing to challenge the marriage ban, and the district court "independently satisfied itself that standing and other jurisdictional requirements

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[13] The plaintiffs also challenged certain provisions of the federal Defense of Marriage Act, but those claims have since been dismissed and are not relevant here. *See* Pet. App. 9a.

are satisfied" with respect to that challenge. Pet. App. 134a-136a.[14]

On the merits, after concluding that this Court's summary dismissal in *Baker v. Nelson*, 409 U.S. 810 (1972), is not binding precedent, Pet. App. 140a, the district court determined that the marriage ban embodied "a classic, class-based equal protection case in which a line was purposefully drawn between two groups of Oklahoma citizens." *Id.* 160a. Viewing "the intentional discrimination occurring against same-sex couples" as "sexual-orientation discrimination," the district court applied rational basis review as required by Tenth Circuit precedent. *Id.* 164a-166a (citing *Price-Cornelison v. Brooks*, 524 F.3d 1103 (10th Cir. 2008)). The district court discredited each post-hoc justification offered by petitioner for the marriage ban – "encouraging responsible procreation," "steering naturally procreative relationships" into marriage, promoting "optimal child-rearing," and preventing any "negative impact" on marriage – finding these goals "so attenuated" from the exclusion of same-sex couples from marriage as to "well exceed[]" the limits of rationality. *Id.* 171a-186a.

Indeed, examining the uncontroverted evidence presented by respondents on summary judgment, the district court concluded that the proponents of SQ

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[14] At the same time, the district court agreed with petitioner that her duties as court clerk do not include the recognition of out-of-state marriages, and therefore dismissed the Barton couple's non-recognition claim for lack of standing. Pet. App. 131a-134a. That ruling, affirmed by the Tenth Circuit, *id.* 22a-47a, is not before this Court.

711 – "[j]ust like federal legislators" with respect to DOMA – promoted the marriage ban "as upholding one specific moral view of marriage." Pet. App. 168a. The district court further found, "as a matter of law, that moral disapproval of same-sex marriage" served as a justification for passing SQ 711. *Id.* 170a. But because "moral disapproval of homosexuals as a class, or same-sex marriage as a practice, is not a permissible justification for a law" under the district court's reading of *Lawrence*, *id.*, the district court struck down SQ 711's marriage ban as "at bottom, an arbitrary exclusion based upon the majority's disapproval of the defined class." *Id.* 184a.

Concluding that the marriage ban violates the equal protection "at the very heart of our legal system," Pet. App. 186a, the district court did not rule on respondents' claim that SQ 711 also denies due process. It did note, however, that if the marriage ban "does burden a fundamental right, it certainly would not withstand any degree of heightened scrutiny." *Id.* 161a n.33.

The district court permanently enjoined the marriage ban, but "[i]n accordance with" this Court's stay in *Herbert v. Kitchen*, 134 S. Ct. 893 (2014), stayed its injunction pending appeal. Pet. App. 186a-187a.

2. The Tenth Circuit affirmed. Relying in part on its decision in the companion case of *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014), the majority held in relevant part that (1) *Baker v. Nelson* "has been undermined by doctrinal developments" and therefore "is not controlling," Pet. App. 17a, 19a; (2) respondents "seek to exercise the fundamental right to marry," *id.* 17a; and (3) the marriage ban "fail[s] to

satisfy the narrow tailoring requirement of the applicable strict scrutiny test," and thus denies respondents the fundamental right to marry in violation of both due process and equal protection. *Id.*

While joining the majority opinion in full, Judge Holmes sought in a lengthy concurrence "to clarify" his view of "the relationship between animus doctrine and same-sex marriage laws." Pet. App. 57a. After canvassing this Court's equal protection cases, Judge Holmes concluded that "a law falls prey to animus only where there is structural evidence that it is aberrational," either because (1) "it targets the rights of a minority in a dangerously expansive and *novel* fashion," *id.* 72a (citing *Romer v. Evans*, 517 U.S. 620, 631-35 (1996) (emphasis added)); or (2) "it strays from the historical territory of the lawmaking sovereign just to *eliminate* privileges that a group would otherwise receive." *Id.* (citing *Windsor*, 133 S. Ct. at 2689-95 (emphasis added)). Judge Holmes determined that "both considerations cut strongly against a finding of animus." *Id.* 73a.

Because Judge Holmes confined this Court's "animus doctrine" to equal protection cases, his concurrence – unlike the district court's opinion – omitted any discussion of this Court's landmark decision in *Lawrence*. Indeed, Judge Holmes' animus taxonomy did not even include laws that *perpetuate* historical discrimination based on "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral." *Lawrence*, 539 U.S. at 577 (citation omitted).

Judge Kelly dissented. He reasoned that "gender complementarity" is "fundamental" to the right to

marry, and that the marriage ban is subject to, and survives, rational basis review. Pet. App. 95a-96a.

REASONS FOR GRANTING THE WRIT

In *United States v. Windsor*, this Court invalidated the Defense of Marriage Act's exclusion of same-sex couples from the federal definition of marriage as violative of "basic due process and equal protection principles," and admonished that state marriage laws also "must respect the constitutional rights of persons." 133 S. Ct. at 2691, 2693. Since *Windsor*, every federal court to have considered the issue (over twenty thus far) has concluded that states may no more deprive same-sex couples of marriage than they may deny interracial couples the exercise of that fundamental right.[15] These decisions are

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[15] *See Bostic v. Schaefer*, ___ F.3d ___, 2014 WL 3702493 (4th Cir. July 28, 2014) (affirming *Bostic v. Rainey*, 970 F. Supp. 2d 456 (E.D. Va. 2014)); *Bishop v. Smith*, ___ F.3d ___, 2014 WL 3537847 (10th Cir. July 18, 2014) (affirming *Bishop v. United States ex rel. Holder*, 962 F. Supp. 2d 1252 (N.D. Okla. 2014)); *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014) (affirming *Kitchen v. Herbert*, 961 F. Supp. 2d 1181 (D. Utah 2013)); *Brenner v. Scott*, ___ F. Supp. 2d ___, 2014 WL 4113100 (N.D. Fla. Aug. 21, 2014); *Burns v. Hickenlooper*, No. 14-cv-01817-RM-KLM, 2014 WL 3634834 (D. Colo. July 23, 2014); *Love v. Beshear*, 989 F. Supp. 2d 536 (W.D. Ky. 2014); *Baskin v. Bogan*, ___ F. Supp. 2d ___, 2014 WL 2884868 (S.D. Ind. June 25, 2014); *Wolf v. Walker*, 986 F. Supp. 2d 982 (W.D. Wis. 2014); *Whitewood v. Wolf*, 992 F. Supp. 2d 410 (M.D. Pa. 2014); *Geiger v. Kitzhaber*, ___ F. Supp. 2d ___, 2014 WL 2054264 (D. Or. May 19, 2014); *Latta v. Otter*, ___ F. Supp. 2d ___, 2014 WL 1909999 (D. Idaho May 13, 2014); *Henry v. Himes*, ___ F. Supp. 2d ___, 2014 WL 1418395 (S.D. Ohio Apr. 14, 2014); *DeBoer v. Snyder*, 973 F. Supp. 2d 757 (E.D. Mich. 2014); *Tanco v. Haslam*, ___ F. Supp. 2d ___, 2014 WL 997525 (M.D. Tenn. Mar. 14, 2014); *De*

correct. This Court's precedents protect the right to marry "for all individuals," *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978), and have stricken laws rendering gays and lesbians "unequal to everyone else," *Romer*, 517 U.S. at 635, particularly with respect to "personal decisions relating to marriage" and other "intimate choices." *Lawrence*, 539 U.S. at 574, 578 (citation omitted).

Respondents nevertheless urge this Court to grant the writ in this case. The question presented is enormously important and should be resolved – once and for all – as expeditiously as possible. Respondents, in fact, have been fighting for nearly a decade for such a resolution. They now wish to see the matter through, and their case provides a clean and beneficial vehicle for doing so.

I. This Court Should Resolve The Question Presented Here And Now.

The question whether a state may forbid same-sex couples from marrying is immensely important to the hundreds of thousands of same-sex couples across the country. Every day, state laws enacted specifically to bar these couples from marrying deny them and their families "the emotional, social, and financial benefits that opposite-sex couples realize upon marriage." *Bostic v. Schaefer*, ___ F.3d ___, 2014 WL 3702493, at *5 (4th Cir. July 28, 2014).

Leon v. Perry, 975 F. Supp. 2d 632 (W.D. Tex. 2014); *Lee v. Orr*, No. 13-cv-8719, 2014 WL 683680 (N.D. Ill. Feb. 21, 2014); *Bourke v. Beshear*, ___ F. Supp. 2d ___, 2014 WL 556729 (W.D. Ky. Feb. 12, 2014); *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968 (S.D. Ohio 2013).

Such laws also deny these couples and their families the more intangible, but no less critical, "equal dignity" of marriage. *Windsor*, 133 S. Ct. at 2693. It, therefore, is not really a question of *whether* this Court should resolve the question presented, but only of *when.*

The time is now. In most of the states where these laws have been declared invalid, injunctions have been stayed pending appeal or this Court's disposition on certiorari. Such is the case here as well. Pet. App. 186a-187a. As a result, even respondents and numerous other same-sex couples who have vindicated their fundamental right to marry currently live in legal limbo, remaining unable to exercise that right. And if certiorari were denied and the stay lifted without an accompanying decision from this Court on the merits, respondents and other same-sex couples would marry under a cloud of legal uncertainty, not knowing whether – or when – their marriages would survive a future ruling by this Court.

II. This Case Is A Clean And Beneficial Vehicle For Deciding The Question Presented.

Several petitions are pending that present questions involving the constitutionality of state laws forbidding same-sex couples from marrying. For the reasons that follow, this case presents a particularly fitting vehicle for resolving the central issue whether such laws violate the Fourteenth Amendment. At the very least, this Court should grant certiorari in this case in conjunction with any other petition it grants on the subject.

A. This Court Could Use This Case Alone To Decide Whether A State May Deny Same-Sex Couples The Right To Marry.

Two aspects of this case make it very well suited to enabling this Court to resolve whether the Fourteenth Amendment allows a state to deny same-sex couples the right to marry.

1. This case presents an adverse and unmuddled dispute between challengers of a marriage ban and a proper state official presenting a unitary state defense. Petitioner in this case has consistently and vigorously opposed respondents' challenge. So have the other state officials who are petitioner's superiors. The district attorney of Tulsa County – the type of law enforcement official who typically represents states in this Court – is co-counsel for petitioner. The State of Oklahoma joined an amicus brief in the court of appeals defending the constitutionality of SQ 711, *see* Pet. 32, and has advised respondents that it plans to do so again here. There accordingly promises to be no doubt or complication concerning the State's position in this litigation.

2. This case presents a single issue: whether the Fourteenth Amendment permits a state to deny same-sex couples the right to marry. The parties, therefore, will focus all of their energy on that question.

Some of the plaintiffs from the Utah and Virginia cases, by contrast, raise another claim. They have argued (and presumably will continue to argue) that even if the Fourteenth Amendment does not require states to allow same-sex couples to marry, comity principles – including the "place of celebration" rule –

preclude states from refusing to recognize same-sex marriages validly performed in other states. No court of appeals has yet addressed that "recognition" argument – and, especially when it comes to potentially complicated constitutional issues, this Court is ordinarily "a court of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). If this Court would prefer at this stage to consider only whether the Fourteenth Amendment requires states to allow same-sex marriage, this Court may appreciate the full and focused briefing and argument on that issue that this case would facilitate.

B. At The Very Least, This Court Should Grant Certiorari In This Case Along With Any Other It Grants On The Subject.

Even if this Court grants a petition from Utah or Virginia, it should grant this petition as well. This is so for two overarching reasons.

1. The overwhelming importance of the question presented provides reason alone to grant multiple cases, just as this Court has done numerous times in the past. In *Brown v. Board of Education*, 347 U.S. 483 (1954), for instance, this Court granted certiorari in four cases from four different states – South Carolina, Kansas, Virginia, and Delaware. *Id.* at 486 & n.1. Justice Clark later explained: "We felt it was much better to have representative cases from different parts of the country, and so we consolidated them." Richard Kluger, Simple Justice 540 (1977). As a commentator elaborated:

> This consolidated case approach was meant to give the impression to those who would find the ultimate decision – be it to overrule segregation or not – unpalatable, that the Court was considering a fair cross-section of cases in a comprehensive and deliberate manner. . . . Thus, before the first words of the opinion had been committed to paper, the Supreme Court had attempted to pave the way for acceptance of its eventual decision, whatever it might be, by giving the appearance of impartiality and thoroughness.

Robert A. Prentice, *Supreme Court Rhetoric*, 25 Ariz. L. Rev. 85, 105-06 (1983); *see also* Loren Miller, The Petitioners: The Story of the Supreme Court of the United States and the Negro 345 (1966) ("The state cases all presented the issue of the application of the equal-protection-of-law clause of the Fourteenth Amendment, and the Court could have reached and decided that question in any one of them, but the wide geographical range gave the anticipated decision a national flavor.").

Brown is by no means an anomaly in this respect. In the case now known simply as *Miranda v. Arizona*, 384 U.S. 436 (1966), this Court actually granted and decided separate cases from Arizona, California, and New York, allowing it to hear law enforcement perspectives from a variety of jurisdictions. More recently, in *Miller v. Alabama*, 132 S. Ct. 2455 (2012), this Court granted cases from Alabama and Arkansas to decide whether states run afoul of the Eighth Amendment by imposing mandatory life in prison without the possibility of parole for juvenile

offenders. And just last Term, this Court granted and consolidated two cases in order to decide whether federal regulations requiring closely held corporations to provide insurance covering certain forms of contraceptives violated the Religious Freedom Restoration Act. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (decided together with *Conestoga Wood Specialties Corp. v. Burwell*). This Court also granted the petitions in *Riley v. California* and *United States v. Wurie* to decide "a common question" involving the Fourth Amendment's applicability to cellphones. *Riley v. California*, 134 S. Ct. 2473, 2480 (2014).

In this case, this Court's deliberative process – and the stature of its eventual decision – may likewise benefit from dealing with more than just one case from one state. None of the three states from which petitions involving same-sex marriage bans have emerged has a history and perspective on the issue exactly like the others. To explore just one axis of divergence, the Virginia Attorney General touts Virginia's broad denial of rights to same-sex couples, while at the same time denouncing his state's laws as undeserving of defense from the state's highest law enforcement officer. Pet. for Cert. at 33-34, 39, *Rainey v. Bostic*, No. 14-153. Utah officials have consistently defended that state's ban on same-sex marriages. But some 1,300 such marriages were nevertheless performed earlier this year, before the district court ruling invalidating its ban in that state's litigation was stayed by this Court – a development that might play some role in evaluating purported state interests in prohibiting such marriages or recognizing existing ones. *See Herbert v. Kitchen*, 134 S. Ct. 893 (2014).

Oklahoma, for its part, has remained unambiguously and steadfastly opposed to same-sex marriage, and no such marriages have ever been performed in the State. Pet. App. 55a, 187a. Furthermore, Oklahoma's condemnation of same-sex couples is even more sweeping than Virginia's. Oklahoma is the only one of the three states before this Court that specifically makes it a crime – and a crime at the *constitutional* level at that – to issue a same-sex marriage license. *See* Okla. Const. art. 2, § 35(C). The Oklahoma Governor feels so strongly on the subject that she recently refused, even after the *Windsor* decision, to allow the Oklahoma National Guard to process benefits for Guard members' same-sex spouses on state property – an action that forced some individuals to travel considerable distances to federal military installations to obtain their federally guaranteed dispensations.[16]

Indeed, should this Court wish to approach the question presented through the lens of this Court's "animus" jurisprudence, the robust legislative and public record from Oklahoma regarding same-sex marriage would make this case especially amenable to doing so. In *Windsor*, this Court's five-Justice majority found it critical, if not decisive, that DOMA's purpose "was to promote an 'interest in protecting the

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[16] *See* Richard A. Oppel, Jr., *Texas and 5 Other States Resist Processing Benefits for Gay Couples*, N.Y. Times, Nov. 10, 2013; Russell Mills, *Fallin: OK Will No Longer Process Benefits For National Guard Couples*, KRMG News, Nov. 20, 2013 (defending this position on the basis of SQ 711), http://www.krmg.com/news/news/local/fallin-ok-will-no-longer-process-benefits-national/nbydX/?__federated=1.

traditional moral teachings reflected in heterosexual-only marriage laws.'" 133 S. Ct. at 2693 (citation omitted). This "improper animus or purpose" – reflected even in "the title of the Act" – demeaned couples, "whose moral and sexual choices the Constitution protects." *Id.* at 2493-94; *see also Lawrence v. Texas*, 539 U.S. 558, 577 (2003) (majoritarian morality "is not a sufficient reason for upholding a law prohibiting [a] practice" (citation omitted)); *id.* at 583 (O'Connor, J., concurring) ("Moral disapproval of a group cannot be a legitimate government interest.").

So too here. The primary purpose of SQ 711 – originally titled the Marriage Protection Amendment – is to "promot[e] . . . one specific moral view of marriage." Pet. App. 168a. As one legislator explained in a typical remark: "This is a Bible Belt state . . . . Most people don't want that sort of thing here. . . . Gay people might call it discrimination, but I call it upholding morality." *Id.* 168a-169a; *see also id.* 168a-170a (collecting numerous similar quotations from draftsperson of SQ 711 and other proponents). The district court consequently held "as a matter of law" that "moral disapproval of same-sex marriage" motivated the passage of SQ 711. *Id.* 170a.[17]

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[17] To the extent Judge Holmes sought to distance himself from the district court's animus analysis, *see* Pet. App. 57a-84a, his separate opinion only deepens the need for this Court to weigh in on the subject. The lower courts are divided over when animus is present and whether moral disapproval constitutes animus. *See id.* 56a-57a (contrasting marriage equality decisions that have not relied on animus with those that "have taken a different tack and suggested that similar laws may

None of this is to say that these divergences or others among the three states necessarily render any one of these cases the optimal vehicle for resolving the question presented; it is too soon to know how all of the variations may ultimately play out in merits briefing and oral argument. The point at this juncture is that having different states – and their different stories – before the Court would enlarge this Court's outlook and enhance its options.

This Court may wish, for example, to hear one hour of oral argument as to whether some form of enhanced scrutiny applies to laws such as SQ 711 and another hour on the supposition that rational-basis review applies – much as this Court proceeded last Term in *Riley* and *Wurie*, where the second hour of argument in the latter case allowed the Court to explore arguments that could have led to a comparatively narrower ruling. Alternatively, if this Court wishes to bring before it the issue whether states at least must recognize marriages validly

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suffer from unconstitutional animus"); *compare, e.g.*, *Obergefell*, 962 F. Supp. 2d. at 996 (finding "pure animus" in the absence of state justifications "not related to the impermissible expression of disapproval of same-sex married couples"), *with Kitchen*, 961 F. Supp. 2d at 1208-09 (refusing, "in the absence of more explicit guidance" from this Court, to find animus based on "moral views that same-sex couples are immoral and inferior to opposite-sex couples"); *see also* Susannah W. Pollvogt, *Unconstitutional Animus*, 81 Fordham L. Rev. 887, 890, 890-91 (2012) (noting rising confusion and need for this Court's guidance over "what exactly counts as evidence of animus" and "whether moral disapproval and unconstitutional animus [are] really the same thing"). This case presents an excellent opportunity to offer further guidance on the issue.

performed in other jurisdictions, this Court may wish to couple this case with another presenting that secondary issue. Such a coupling would resemble this Court's approach last Term in *Hobby Lobby* and *Conestoga Wood*. There, counsel in *Hobby Lobby* concentrated exclusively on the legal theory on which the courts of appeals thus far had focused, while granting *Conestoga Wood* allowed the Court to receive argument on a second legal theory involving the Free Exercise Clause. Given the stakes involved here, extra briefing and argument along these lines, or possibly others, warrant serious contemplation.

2. Granting multiple cases would also protect against any procedural difficulties that may arise. As this Court is well aware, the issue of standing has been a bugaboo in same-sex marriage cases, causing it to dismiss one such case and four Justices to vote for dismissal in another. *See Hollingsworth*, 133 S. Ct. at 2659; *Windsor*, 133 S. Ct. at 2697-2705 (Scalia, J., dissenting) (advocating full dismissal); *id.* at 2711 (Alito, J., dissenting) (advocating partial dismissal). This Court and others also have sometimes struggled to determine "the proper official" to speak on behalf of the people of a state, especially when different officials have taken different positions. *Graddick v. Newman*, 453 U.S. 928, 934 (1981) (Powell, J., in chambers); *see also, e.g.*, *Louisiana ex rel. Guste v. Roemer*, 949 F.2d 145, 150 (5th Cir. 1991).

Each of the three cases now before the Court is configured somewhat differently. In this case, a court clerk required directly to administer Oklahoma law is petitioner, with full backing from other state officials. In the Utah case, no clerk is among the petitioners; instead, the Governor and Attorney General seek

reversal of the Tenth Circuit's decision in their capacities as supervisors of county and district officers. *Herbert v. Kitchen*, No. 14-124. In the Virginia case, advocacy on the defense side of the case has splintered. A registrar of vital records seeks review of the Fourth Circuit's decision but – speaking through the Attorney General – seeks an affirmance rather than a reversal. *Rainey v. Bostic*, No. 14-153. Meanwhile, a court clerk who supports the state's ban, speaking through private counsel, has filed a petition for certiorari, *Schaefer v. Bostic*, No. 14-___, and another such clerk, speaking through different private counsel, promises to seek review of the Fourth Circuit's decision, *see* Application to Stay Mandate Pending Appeal, *McQuigg v. Bostic*, No. 14A196. Given all of these permutations, this may be a situation in which a belt-and-suspenders approach – that is, granting multiple cases – is the most prudent course. *Cf. Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 328-34 (1999) (granting multiple petitions in case where standing was questionable); *INS v. Chadha*, 462 U.S. 919, 929-44 (1983) (same where justiciability was questionable for various reasons).

Even apart from any procedural complexities these cases may present, the sheer importance of resolving the question presented without undue delay may counsel towards granting multiple petitions. In its petition for certiorari in *United States v. Booker*, 543 U.S. 220 (2005), involving the constitutionality of the Federal Sentencing Guidelines, the government suggested that this Court grant plenary review not only in that case but also in a second case, *United States v. Fanfan*, No. 04-105. The government suggested that simultaneous grants would "assure

that the Court has a vehicle in which to reach and resolve the vitally important questions presented" by "protect[ing] against any possibility that later impediments to review in one or the other case might prevent timely resolution of the issues." Pet. for Cert. at 24-25, *United States v. Booker*, 543 U.S. 220 (2005) (No. 04-104). This Court granted both petitions, set the cases for argument in tandem, and decided both cases together on the merits. Less than two years later, in November of 2006, the Court confronted a follow-up issue nearly as important as *Booker* itself (concerning the implementation of its remedy), and granted a single case to resolve it. *See Claiborne v. United States*, 549 U.S. 1016 (2006). The Court then had to dismiss the case in June because the petitioner unexpectedly died, 551 U.S. 87 (2007) (per curiam), delaying an opinion on the issue for six more months, *see Gall v. United States*, 552 U.S. 38, 40-41 (2007).

It should hardly need saying that, so far as petitioners know, no one has any reason to believe that any comparable misfortune could occur here. But the fact remains that justiciability in these lawsuits depends upon couples professing the desire to marry – and, perhaps, on the presence or views of certain kinds of defendants. This Court should not take a chance that any one case will unexpectedly go sideways, and thereby deprive this Court of the ability to issue a timely decision on the merits.

III. The Court Of Appeals Correctly Held That The Fourteenth Amendment Prohibits States From Denying Same-Sex Couples The Right To Marry.

The judgment of the Tenth Circuit should be affirmed. Like countless other Americans, respondents are a loving, committed couple who seek to attain the "dignity and status" of "immense import" that marriage confers. *Windsor*, 133 S. Ct. at 2692. Yet SQ 711 denies them the freedom to marry based on impermissible "moral disapproval." Pet. App. 170a. Petitioners also advance various post-hoc justifications related to same-sex couples' supposed lack of "natural" procreativity, Pet. 29, which are as ill-fitting as they are unfitting as state interests. This case, therefore, offers this Court many jurisprudential options for reviewing – and repudiating – the marriage ban at issue. This Court could apply strict scrutiny to SQ 711 for denying respondents and other same-sex couples the fundamental right to marry; heightened scrutiny for discriminating on the basis of sexual orientation; or intermediate scrutiny for discriminating on the basis of gender. But in the end, the marriage ban cannot survive any level of review, not even rational-basis scrutiny.

A. Enhanced Scrutiny Applies To State Laws Denying Same-Sex Couples The Right To Marry.

1. *The fundamental right to marry.* Denying a fundamental right to a class triggers strict scrutiny as a matter of due process, *Reno v. Flores*, 507 U.S. 292, 302 (1993), and equal protection, *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982). The Tenth Circuit correctly held (Pet. App. 17a) that SQ 711 denies gays and lesbians the fundamental right to marry.

Petitioner argues that this holding is "incompatible" with this Court's instruction in *Washington v. Glucksberg*, 521 U.S. 702 (1997), to define fundamental rights with precision. Pet. 24. But in upholding the "fundamental freedom" to marry, *Loving*, 388 U.S. at 12, this Court has never narrowed its universality by recasting it as a more limited "right to interracial marriage" (*cf. Loving*), "right to inmate marriage" (*cf. Turner v. Safley*, 482 U.S. 78 (1987)), or – to use Petitioner's term – "right to 'man-woman marriage.'" To the contrary, as this Court has recognized, the right to marry is a cherished freedom "for all individuals." *Zablocki*, 434 U.S. at 384.

Indeed, petitioner's contention that respondents seek a new "right to marry a person of the same sex" (Pet. 24) exemplifies a "failure to appreciate the extent of the liberty at stake," *Lawrence*, 539 U.S. at 567, reminiscent of *Bowers v. Hardwick*, 478 U.S. 186 (1986). While it is true that the possibility of same-sex couples marrying had not occurred to many until recent decades, this Court at pivotal moments in this Nation's history has rightly embraced "new insight" that even the most entrenched tradition of exclusion

may mask "an injustice . . . not earlier known or understood." *Windsor*, 133 S. Ct. at 2689; *see, e.g.*, *Lawrence*, 539 U.S. at 577-78 (observing that "neither history nor tradition could save a law prohibiting miscegenation from constitutional attack" (citation omitted)); *Brown*, 347 U.S. at 494-95 (overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896)). Affirming the freedom to marry of all Americans regardless of gender would not uproot that fundamental right, but rather would enable its realization.

2. *Sexual orientation discrimination.* For the reasons amply set forth by the Second Circuit,[18] the Ninth Circuit,[19] and the Solicitor General,[20] heightened scrutiny should apply to laws that single out gays and lesbians for discriminatory treatment. *See also* Aplee. CA10 Br. at 21-24, 31-41. At the very least, the form of scrutiny this Court employed in *Windsor* should apply. *See Windsor*, 133 S. Ct. at 2706 (Scalia, J., dissenting) (observing that "the Court certainly d[id] not *apply* anything that resembles" the "deferential framework" of rational basis review to DOMA's refusal to recognize same-sex marriages); *supra* at 20-21 (explaining why *Windsor*'s skepticism concerning DOMA applies here as well).

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[18] *See Windsor v. United States*, 699 F.3d 169, 181-85 (2d Cir. 2012).

[19] *See SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 480-84 (9th Cir. 2014).

[20] *See* Brief for the United States on the Merits Questions at 22-36, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307).

"The benefit denied by [laws forbidding same-sex marriage] – the status of civil marriage for same-sex couples – is so 'closely correlated with being homosexual' as to make it apparent the law is targeted at gay and lesbian people as a class." *Varnum v. Brien*, 763 N.W.2d 862, 885 (Iowa 2009) (quoting *Lawrence*, 539 U.S. at 583 (O'Connor, J., concurring)).

3. *Gender discrimination.* Discriminating on the basis of gender triggers intermediate scrutiny. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 531, 533 (1996). SQ 711 defines the two parties to a marriage on the basis of gender – "only" "one man" and "one woman." Okla. Const. art. 2, § 35(A). This Court could view this as a gender classification – no less so than a law dictating that two job positions must go "only" to "one man" and "one woman." Petitioner's vigorous defense of SQ 711 as "a gendered (man-woman) institution" (Pet. 1) exposes this classification for what it is.

Petitioner has argued that SQ 711 does not classify on the basis of gender because "any man or woman may marry a person of the opposite sex." Aplt. CA10 Br. at 42. But the suggestion that a gender-based restriction on whom *both* males and females may marry somehow cancels out rather than doubles the classification is in serious tension with this Court's precedent. *See Loving*, 388 U.S. at 8 ("reject[ing] the notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations").

B. State Laws Banning Same-Sex Marriage Fail Every Level Of Review.

In the end, no matter what level of scrutiny this Court applies to SQ 711, the law is unconstitutional. Of the four justifications she proffered below, petitioner now concentrates on two: "to steer naturally procreative relationships into enduring unions," and "to connect children to both their mother and their father." Pet. 29. As the district court's opinion demonstrates, each of these supposed justifications "well exceeds" even the limits of rationality. Pet. App. 178a.

As to the first goal, it would require "nothing short of a titanic surrender to the implausible," *City of Erie v. Pap's A. M.*, 529 U.S. 277, 323 (2000) (Stevens, J., dissenting), to suppose that barring devoted same-sex couples such as respondents from marrying would make their opposite-sex counterparts more inclined to marry – or, conversely, that allowing same-sex couples to marry would make opposite-sex couples less inclined to marry. This certainly has not been the experience of states where same-sex couples have enjoyed the freedom to marry, where marriage rates generally have increased, and marriage rates of opposite-sex couples have held steady or risen. *See* CA10 Brief of Massachusetts et al. as Amici Curiae at 22-23. In any case, if the State were truly concerned with incentivizing marriage for only couples who are in "naturally procreative relationships," petitioner has not offered a plausible explanation for the substantial underinclusivity and arbitrariness of allowing the infertile, the elderly, and every other class of heterosexual couples to marry regardless of procreative ability or intent. *See City of Cleburne v.*

Cleburne Living Ctr., 473 U.S. 432, 446 (1985) (denying government benefit to only one class among many similarly situated with respect to asserted government interest is "arbitrary" and "irrational").

As to the second asserted goal of "connect[ing] children to both their mother and their father," the underlying premise that biological parents make "optimal" parents (Pet. App. 178a) has been roundly refuted by decades of widespread scientific consensus that children fare as well with same-sex parents. *See DeBoer v. Snyder*, 973 F. Supp. 2d 757, 770-71 (E.D. Mich. 2014) (canvassing the "overwhelming weight of the scientific evidence" contradicting the "optimal" parenting premise); *see also* CA10 Brief of American Psychological Ass'n et al. as Amicus Curiae at 17-23 (same); CA10 Brief of American Sociological Ass'n at 8-14 (same).

In any case, Oklahoma law is – again – fatally underinclusive as well as overinclusive with respect to that purported goal. SQ 711 denies marriage to one type of couple based on assumptions about the inability of gay and lesbian parents "to provide an 'optimal' child-rearing environment," Pet. App. 182a, while allowing virtually every other type of couple to marry regardless of such considerations, including (to name a few) drug users, physical abusers, and sex offenders. Additionally, as the Tenth Circuit observed, "Oklahoma has barred all same-sex couples, regardless of whether they will adopt, bear, or otherwise raise children, from the benefits of marriage," while allowing opposite-sex couples to marry who only wish to adopt or can only beget children by assisted means. *Id.* 21a. Putting aside whether a state can bar an entire class of individuals

from marriage based on their protected liberty to beget or raise children in the manner of their choosing, *see Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972), Oklahoma's classification is "so discontinuous with the reasons offered for it" that it cannot pass rational basis review. *Romer*, 517 U.S. at 632.

By contrast, the marriage ban inflicts harm in real, tangible, and substantial ways upon members of the very class the state purports to protect. Over 1,200 same-sex households in Oklahoma reported raising their own children in the 2010 census. *See* Pet. App. 176a. SQ 711 denies these children the critical array of legal protections and financial benefits that come with married parents, and undermines their ability "to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Windsor*, 133 S. Ct. at 2694.

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Public support for marriage equality for gay and lesbian Americans is rising dramatically – a fact that might tempt this Court to put off its consideration of this issue as the democratic march toward equality moves forward.[21] But this Court should not defer final resolution of the question presented in this case. It is a bedrock principle of our constitutional system

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[21] *See* Justin McCarthy, *Same-Sex Marriage Support Reaches New High at 55%*, Gallup Politics (May 21, 2014); However, opposition to same-sex marriage remains persistent in some states, including Oklahoma. *See* Curtis Killman, *Opposition Strong to Gay Marriage, According to Poll*, Tulsa World (June 30, 2014).

that "fundamental rights may not be submitted to vote; they depend on the outcome of no elections." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). It is, therefore, both proper and vital for this Court to decide whether the Fourteenth Amendment secures gay and lesbian Americans the freedom to marry on equal terms with other citizens. Each day this principle remains in doubt, our Nation fails to live up to its founding charter.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 27, 2014