Nos. 14-124 and 14-136

In the

Supreme Court of the United States

NO. 14-124

GARY R. HERBERT, GOVERNOR, *et al.*, *Petitioners*,
v.
DEREK KITCHEN, *et al., Respondents.*

NO. 14-136

SALLY HOWE SMITH, COUNTY CLERK, *Petitioner*,
v.
MARY BISHOP, *et al.*, *Respondents.*

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

BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS.

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QUESTIONS PRESENTED

1. Whether the federal Constitution prohibits the people of a State from retaining the long-standing and biologically rooted definition of marriage as a union of one man and one women, when the procreative function that inheres in such relationships makes such unions fundamental different from same-sex relationships in ways directly relevant to the State's interest in the institution of marriage?

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INTEREST OF AMICUS CURIAE[1]

Amicus Curiae Center for Constitutional Jurisprudence was established in 1999 as the public interest law firm of the Claremont Institute, the stated mission of which is to "restore the principles of the American Founding to their rightful and preeminent authority in our national life." The Center advances that mission through strategic litigation and the filing of *amicus curiae* briefs in cases of constitutional significance, including cases such as this in which the very right of the sovereign people to retain the centuries-old definition of marriage as a cornerstone of civil society is at stake. The Center has previously appeared as *amicus curiae* before this Court and other courts in cases involving the constitutionality of the long-standing, natural definition of marriage as a union of one man and one woman, including *United States v. Windsor*, 133 S. Ct. 2675 (2013), and *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013). It also serves as counsel for Appellant/Intervenor National Organization for Marriage, Inc. in *Geiger v. Kitzhaber*, No. 14-35427 (9th Cir., Aug. 27, 2014).

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court. Counsel of record for all parties received notice at least 10 days prior to the due date of the *Amicus Curiae*'s intention to file in support of certiorari. Pursuant to Rule 37.6, *Amicus Curiae* affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

INTRODUCTION

Until quite recently, "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." *United States v. Windsor*, 133 S. Ct. 2675, 2689 (2013). This historical understanding is rooted in the very nature of men and women, whose biological complementarity allows the formation of unions that are uniquely capable of generating new human life. Crafted around that core purpose, the institution of marriage provides immense benefits to society, to parents, and particularly to the children that result from their union because it channels the consequences of procreative sexual activity toward ends that are beneficial rather than harmful to society.

That fundamental institutional role has repeatedly been recognized by this Court. "Marriage is one of the 'basic civil rights of man,'" this Court held in *Loving v. Virginia*, because it is "fundamental to our very existence and survival." *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (citing *Skinner v. State of Oklahoma*, 316 U.S. 535, 541 (1942)). That statement is only true because of the unique procreative ability of male/female unions, and it is what makes marriage "one of the cornerstones of our civilized society." *Meltzer v. C. Buck LeCraw & Co.*, 402 U.S. 936, 957 (1971) (Black, J., dissenting from denial of certiorari). Indeed, this Court noted more than a century ago that "the union for life of one man and one woman" is "the sure foundation of all that is stable and noble in our civilization," *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885), and more recently noted that "[m]arriage and procreation are fundamental to the very existence and survival of the race." *Skinner*, 316 U.S., at 541.

A large majority of the States continue to adhere to this historical, biologically-rooted definition of marriage, not out of some senseless devotion to antiquity but as the result of a considered policy judgment. Indeed, the long-standing view of marriage is viewed as such a core issue of public policy that many States have taken the step in recent years of constitutionalizing their definition of marriage to prevent definitional experimentation in other states (imposed by the courts in all but a few cases) from altering their own marriage policies. See *Defining Marriage: State Defense of Marriage Laws and Same-Sex Marriage*, Nat'l Conference of State Legislatures (July 28, 2014), http://www.ncsl.org/research/human-services/same-sex-marriage-overview.aspx.

These state constitutional enactments are in line with a long history of judicial recognition in those states of the societal importance of marriage as an institution founded on the unique biological complementarity of men and women. Shortly after California became a State, for example, its Supreme Court recognized that "[t]he first purpose of matrimony, by the laws of nature and society, is procreation." *Baker v. Baker*, 13 Cal. 87, 103 (1859). A century later, the same court recognized that "the institution of marriage" serves "the public interest" because it "channels biological drives that might otherwise become socially destructive" and "it ensures the care and education of children in a stable environment." *DeBurgh v. DeBurgh*, 250 P.2d 598, 601 (Cal. 1952). And a half century after that, on the eve of the Proposition 8 political fight, the California Court of Appeal recognized that "the sexual, procreative, [and] child-rearing aspects of

marriage" go "to the very essence of the marriage relation." *In re Marriage of Ramirez*, 81 Cal. Rptr. 3d 180, 184-85 (Cal. Ct. App. 2008).

Utah's courts have likewise recognized that "marriage is the institution established by society for the procreation and rearing of children." *Swayne v. L.D.S. Soc. Servs.*, 761 P.2d 932, 940 (Utah Ct. App. 1988), *aff'd*, 795 P.2d 637 (Utah 1990). So, too, Oklahoma's. *See, e.g., Kitchens v. State*, 140 P. 619 (Okla. 1914) (describing the importance of laws that "preserve and promote the institution of marriage, upon which the best interests and indeed the existence of society depend"); *Atkeson v. Sovereign Camp, W.O.W.*, 216 P. 467, 469-70 (Okla. 1923) (describing marriage as "an institution in which the state is vitally concerned, being the foundation of the family and society"). And in a decision subsequently ratified by this Court, the Minnesota Supreme Court, recognizing that "[t]he institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis," held that "[t]he due process clause of the Fourteenth Amendment is not a charter for restructuring [the institution of marriage] by judicial legislation." *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971), *appeal dismissed for want of a substantial federal question*, 409 U.S. 810 (1972).

These cases are not anomalies but carry forward a long and rich historical and philosophical tradition. Henri de Bracton wrote in his thirteenth-century treatise that from the *jus gentium*, or "law of nations," comes "the union of man and woman, entered into by the mutual consent of both, which is called marriage" and also "the procreation and rearing of children." 2

BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 27 (circa 1250, first printed 1569) (G. Woodbine ed., S. Thorne transl., 1968). William Blackstone described the relationship of "husband and wife" as "founded in nature, but modified by civil society: the one directing man to continue and multiply his species, the other prescribing the manner in which that natural impulse must be confined and regulated." 1 WILLIAM BLACKSTONE, COMMENTARIES *410. He then described the relationship of "parent and child" as being "consequential to that of marriage, being its principal end and design." *Id.* And John Locke, whose influence on the American constitutional order is perhaps unsurpassed, described the purpose of marriage, "the end of the conjunction between male and female," as "being not barely procreation, but the continuation of the species." JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT §§ 78, 79 (1690).

When this Court invalidated Section 3 of the federal Defense of Marriage Act two terms ago in *United States v. Windsor*, it elaborated at length on the fact that, historically, States have been the primary determiners of marriage policy in this country. "'[R]egulation of domestic relations' is 'an area that has long been regarded as a virtually exclusive province of the States,'" this Court noted. *Windsor*, 133 S. Ct., at 2691 (2013) (quoting *Sosna v. Iowa*, 419 U.S. 393, 404 (1975)). Indeed, this Court recognized that "[t]he 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." *Id.* (quoting *In re Burrus*, 136 U.S. 586, 593–594 (1890)).

Despite this strong language, a dozen federal district courts[2] and two circuit courts[3] believe they have found hidden between the lines of this Court's *Windsor* decision hints of a contrary view, one that not only renders unconstitutional those long-standing fundamental policy judgments of the States but that implicitly overrules this Court's forty-year-old summary disposition in *Baker v.* Nelson, 409 U.S. 810 (1972). *See, e.g., Kitchen,* 755 F.3d, at 1229 (asserting that its holding that there is a fundamental right to same-sex marriage, subjecting Utah's law to strict scrutiny, was derived "in large measure" from *Windsor*); *but see Robicheaux v. Caldwell*, No. 13-5090, Slip. Op. at 10 (E.D. La., September 3, 2014) (describing Plaintiffs' argument that *Windsor* required heightened scrutiny as "intellectual anarchy"). This, despite this Court's

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[2] *Brenner v. Scott*, 4:14CV107-RH/CAS, 2014 WL 4113100 (N.D. Fla. Aug. 21, 2014); *Burns v. Hickenlooper*, No. 14-1817, 2014 WL 3634834 (D. Colo. July 23, 2014); *Love v. Beshear*, 989 F.Supp.2d 536 (W.D. Ky. July 1, 2014); *Baskin v. Bogan*, Nos. 14-355, 14-404 & 14-406, 2014 WL 2884868 (S.D. Ind. June 25, 2014); *Wolf v. Walker*, No. 14-64, 2014 WL 2693963 (W.D. Wis. June 6, 2014); *Whitewood v. Wolf*, 992 F.Supp.2d 410 (M.D. Pa. May 20, 2014); *Geiger v. Kitzhaber*, 994 F.Supp.2d 1128 (D. Or. May 19, 2014); *Latta v. Otter*, No. 13-482, 2014 WL 1909999 (D. Idaho May 13, 2014); *DeBoer v. Snyder*, 973 F. Supp. 2d 757 (E.D. Mich. March 21, 2014); *Tanco v. Haslam*, No. 13-1159, 2014 WL 997525 (M.D. Tenn. March 14, 2014); *De Leon v. Perry*, 975 F. Supp. 2d 632 (W.D. Tex. Feb. 26, 2014); *Lee v. Orr*, No. 13-8719, 2014 WL 683680 (N.D. Ill. Feb. 21, 2014); *McGee v. Cole*, 993 F.Supp.2d 639 (S.D. W. Va. Jan. 29, 2014).

[3] *Bostic v. Schaefer*, Nos. 14-1167, 14-1169 & 14-1173, 2014 WL 3702493 (4th Cir. July 28, 2014); *Bishop v. Smith*, Nos. 14-5003 & 14-5006, 2014 WL 3537847 (10th Cir. July 18, 2014); *Kitchen v. Hebert*, 755 F.3d 1193, 1203 (10th Cir. June 25, 2014).

admonition that "the lower courts are bound by summary decisions by this Court 'until such time as [this] Court informs (them) that (they) are not.'" *Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975) (quoting *Doe v. Hodgson*, 478 F.2d 537, 539 (2nd Cir. 1973)); *see also Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) ("[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions").

The lower courts' failure to follow this Court's binding precedent is only one of the concerns that have arisen in the hotly contentious marriage litigation pending around the nation. With increasing frequency, we are seeing elected officials abdicate their duties to defend statutes and even constitutional provisions enacted by the governing authority in their states, resulting in suits in which parties on both sides of the case sought (and obtained) the same outcome. *See, e.g., Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 928 (N.D. Cal. 2010), *aff'd sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *vacated and remanded sub nom. Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013); *Geiger*, 994 F.Supp.2d at 1147-48; *Bostic v. Rainey*, 970 F.Supp.2d 456, 461 (E.D. Va. 2014), *aff'd sub nom. Bostic v. Schaefer*, 14-1167, 2014 WL 3702493 (4th Cir. July 28, 2014), *petition for cert. filed sub nom. Rainey v. Bostic*, No. 14-153 (U.S. Aug. 8, 2014); *Whitewood* v. *Wolf*, 992 F.Supp.2d 410 (M.D. Pa. 2014), No. 1:13-cv-01861 (M.D. Pa. Jul 09, 2013) (Attorney General refused to defend, and other state officials declined to appeal adverse judgment); *Darby v. Orr*, No. 2012-CH-19718 (Ill. Cir. Ct. May 30, 2012)

(Attorney General refused to defend); *Sevcik v. Sandoval*, 911 F.Supp.2d 996 (D. Nev. 2012) (Attorney General withdrew defense after prevailing in District Court); *Geiger* v. *Kitzhaber*, 994 F.Supp.2d 1128, 1133-34 (D. Or. 2014) (Attorney General filed "opposition" to motion for summary judgment agreeing with plaintiffs' contention that Oregon law was unconstitutional); *Bourke v. Beshear*, No. 3:13-cv-00750, 2014 WL 556729 (W.D. Ky. Feb. 12, 2014) (Attorney General withdrew defense and declined to file appeal). One district court judge even described the phenomena as presenting "something akin to a friendly tennis match rather than a contested and robust proceeding between adversaries." *Geiger*, 994 F.Supp.2d at 1134.

In some of those cases, the nominal defendants have made concessions of fact and law that no reasonable attorney would make, thus skewing the outcome and depriving the courts of the "concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Windsor,* 133 S.Ct., at 2680 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). For example, then-Attorney General Jerry Brown, a named defendant in the California marriage litigation, "admitted" virtually all of what should have been contested material allegations of fact and law in his answer to the complaint, unequivocally asserting that California's Proposition 8 "cannot be squared with guarantees of the Fourteenth Amendment." *See, e.g.,* Motion to Realign at 3-5, *Perry*, 704 F.Supp.2d 921 (No. 09–2292, Dkt. #216). In *Bostic,* the Virginia Attorney General switched sides midway through the case, advising the court that he would not only "not defend the constitutionality" of Virginia's marriage

laws, "but will argue for their being declared unconstitutional." Notice of Change in Legal Position at 1, *Bostic*, 970 F.Supp.2d 456 (No. 2:13-cv-00395, Dkt. #96). And in *Geiger*, the Attorney General of Oregon refused to defend both aspects of Oregon's marriage law, refused even to enforce the ban on recognition of out-of-state marriages, and filed a "response" to Plaintiffs' motions for summary judgment that agreed fully with the Plaintiffs' positions. The Attorney General even filed a Notice of Supplemental Authority seeking *to counter* the arguments that were being advanced by government defendants in other jurisdictions in defense of similar state laws and leveling a gratuitous and unsubstantiated charge that Oregon's marriage constitutional amendment was "unquestionably passed" by the million plus Oregonians who voted for it "to discriminate [invidiously] against a group of citizens on the basis of their sexual orientation." State Defs.' Notice of Supp. Auth. at 4, *Geiger*, 994 F.Supp.2d 1128 (No. 13-01834, Dkt. #108).

Moreover, instead of default judgments limited to the actual plaintiffs in the case—the appropriately limited remedy that typically issues in circumstances of "friendly," undefended suits, *see* Fed. R. Civ. P. 55—we have seen the courts issue broad injunctions that have been deemed binding even on other officials not party to the litigation. *See, e.g.*, Letter from California State Registrar to County Clerks (June 26, 2013) (directing all county clerks to begin issuing marriage licenses to same-sex couples), available at http://gov.ca.gov/docs/Letter_to_County_Officials.pdf.

This agenda-driven state of affairs is intolerable, bordering on lawless. It is the very spectacle of which

this Court warned when, in *Windsor*, it raised a cautionary note about the "difficulties [that] would ensue if [elected officials' failure to defend statutes] were a common practice in ordinary cases." *Windsor,* 133 S. Ct. at 2688.

Happily, of the three petitions for certiorari currently pending before this Court, two do not suffer from such collusive concerns. For the reasons set out below, this Court should grant the petitions in both the Utah and Oklahoma cases, Nos. 14-124 and 14-136. But it should hold the petition in No. 14-153 filed by the state defendants in Virginia, who are urging that the judgment against them by the Fourth Circuit *be affirmed*. If this Court reaffirms its decision in *Baker v. Nelson* and thus upholds the marriage laws of Utah and Oklahoma, as we strongly contend it should, it should then grant, vacate, and remand the Virginia petition with instruction to the Fourth Circuit to reverse its decision invalidating Virginia's similar marriage law.[4]

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[4] Alternatively, if the Court decides to grant the petition filed by the Virginia state officials as well as those filed by officials in Utah and Oklahoma, it should pose an additional question in that case, namely, at what point the rules of professional ethics are violated when attorneys representing a state make concessions of law and fact that undermine the defense of a state constitutional provision and thereby take a position in the litigation harmful to that of their client, the people of the state who adopted the constitutional provision at issue.

REASONS FOR GRANTING THE WRIT

I. The Decisions Below Altering the Definition of Marriage Are Monumentally Important and Contravene Established Precedent of this Court.

By way of the federal court actions from Utah and Oklahoma at issue here, plaintiffs seek to dramatically change both the definition and the purpose of marriage. They claim that for the States of Utah and Oklahoma, respectively, to decline to redefine the institution of marriage so that it encompasses same-sex couples is a violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The judgments below accepting those claims not only fail to respect fundamental policy choices made by the democratic process in the States, *cf. Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623, 1637 (2014) (plurality opinion), but contravene established precedent of this Court.

A. This Court Has Never Recognized that the Right to Redefine Marriage to Encompass Same-Sex Relationships is Fundamental, And Has Cautioned Against the Judicial Creation of New "Fundamental" Rights.

In both the Utah and Oklahoma cases, the Court below held that the States' respective marriage laws violated the substantive guarantees of the Due Process Clause. But it reached that decision only after concluding that the right to marry which has long recognized by this Court could be redefined to encompass same-sex relationships that, admittedly, formed no part of the history and traditions that gave rise to this Court's treatment of marriage as a fundamental right.

Indeed, although the court below declined to follow it, this Court's decision in *Baker v. Nelson*, issued a few years after this Court firmly established the right to marry as a fundamental right in *Loving v. Virginia*, necessarily rejected the claim accepted by the Court below.

This is no mere semantic distinction that evolutionary processes have moved beyond. Rather, in *Loving*, this Court recognized that "Marriage is one of the 'basic civil rights of man,'" because it is "fundamental to our very existence and survival." *Loving*, 388 U.S., at 12 (citing *Skinner*, 316 U.S., at 541). Absent the unique procreative ability of a man-woman union, it is hard to sustain the claim that other adult relationships are similarly "fundamental to our very existence and survival." The claim at issue here, therefore, is not a simple extension of a right already recognized. It is, rather, an entirely new right, aimed at a different purpose altogether.

The constitutional analysis that governs, therefore, is this Court's decision in *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997), not *Loving v. Virginia.* And in *Glucksberg*, this Court made clear that, in order to prevent the Due Process Clause from being "subtly transformed into the policy preferences of the Members of this Court," the substantive due process analysis has two limiting features. *Glucksberg*, 521 U.S., at 720. First, the claimed fundamental right must be, "objectively, 'deeply rooted in this Nation's history and tradition.'" *Id.*, 521 U.S., at 720-21 (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977), and *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)). Second, that determination requires "a 'careful de-

scription' of the asserted fundamental liberty interest." *Id.* (quoting, *e.g.*, *Reno v. Flores*, 507 U.S. 292, 302 (1993)). These are "crucial 'guideposts for responsible decisionmaking … that direct and restrain [the judiciary's] exposition of the Due Process Clause." *Id.* (quoting *Collins v. City of Harker Heights, Tx.*, 503 U.S. 115, 125 (1992)).

In determining that the claimed right to marry asserted by Plaintiffs in these cases was the same right to marry that has long been recognized as fundamental in our nation's history and traditions, the court below failed to give a "careful description" of the right asserted, as required by *Glucksberg*. The result is not a "subtle" transfer of policy-making authority from the people to the court, but a broadside against democratic self-governance. This Court has never taken such a step, and in fact declined to do so when first asked forty years ago.

B. Equal Protection Analysis Is Only Triggered If People Who Are "Similarly Situated" Are Treated Differently.

The Court below also held that the Utah and Oklahoma marriage laws also violated the Equal Protection Clause because the classification inherent in the one-man/one-woman definition of marriage impinged on a fundamental right by failing to afford same-sex couples the same right to marry has is enjoyed by heterosexual couples.

Yet, as this Court has frequently recognized, "[t]he Equal Protection Clause … is essentially a direction that all persons *similarly situated* should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Ctr.*,

473 U.S. 432, 439 (1985) (emphasis added). "The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Plyler v. Doe,* 457 U.S. 202, 216 (1982).

Accordingly, the issue is whether same-sex and opposite-sex relationships are similarly situated. This is a "threshold" inquiry, for the Equal Protection clause is not even triggered if the relationships are not similarly situated. *See, e.g.*, *Keevan v. Smith*, 100 F.3d 644, 648 (8th Cir. 1996).

Moreover, the issue is not whether the relationships might be similarly situated in some respect, but whether they are similarly situated in ways relevant "to the purpose that the challenged laws purportedly intended to serve." *Cleburne*, 473 U.S. at 454 (Stevens, J., joined by Burger, C.J., concurring).

The Tenth Circuit below erroneously emphasized the ways in which same-sex and opposite-sex relationships *are* similarly situated rather than the ways they *are not* similarly situated. The "importance of marriage is based in great measure on 'personal aspects' including the 'expression[] of emotional support and public commitment," noted the court, aspects of relationships that are shared by same-sex and opposite-sex couples alike. *Kitchen*, 755 F.3d, at 1212. Similarly, the court below noted that this Court "has repeatedly referenced the raising of children—rather than just their creation—as a key factor in the inviolability of marital and family choices," *Kitchen,* 755 F.3d, at 1214 (citing, *e.g.*, *Carey v. Population Servs. Int'l*, 431 U.S. 678, 685 (1977)), concluding that "childrearing, a liberty closely related to the right to

marry, is one exercised by same-sex and opposite-sex couples alike," *id.*

That was error of the first magnitude. If marriage was only about the relationships adults form among themselves, it might well violate Equal Protection not to recognize as marriage any adult relationship seeking the recognition. But marriage is and always has been about much more than the self-fulfillment of adult relationships. Because the institution of marriage is the principal manner in which society structures the critically important function of *procreation* as well as the rearing of children, it has long been recognized as "one of the cornerstones of our civilized society," *Meltzer*, 402 U.S. at 957 (Black, J., dissenting from denial of cert.), "fundamental to our very existence and survival," *Loving*, 388 U.S., at 12 (citing *Skinner*, 316 U.S., at 541). Same-sex and opposite-sex couples are simply *not* similarly situated with respect to at least that fundamental purpose.

That is undoubtedly why experts offered by *Plaintiffs*' in another recent marriage case have admitted that redefining marriage to include same-sex couples would profoundly alter the institution of marriage. Trial Tr. at 268, *Perry*, 704 F. Supp. 2d 921 (No. 09–2292) (testimony of Harvard Professor Nancy Cott). And why Yale Law Professor William Eskridge has noted that "enlarging the concept to embrace same-sex couples would necessarily transform [the institution of marriage] into something new." William N. Eskridge, Jr. & Darren R. Spedale, Gay Marriage: For Better or for Worse? What We've Learned from the Evidence 19 (2006). In short, "[s]ame-sex marriage is a breathtakingly subversive idea." E. J. Graff, Retying the Knott, The Nation at 12 (June 24, 1996). If it

ever "becomes legal, [the] venerable institution [of marriage] will ever after stand for sexual choice, for cutting the link between sex and diapers." *Id*.

The stakes of these cases involve more than just factual error correction, however. If the Tenth and Fourth Circuit's decisions are allowed to stand, the very definition and purpose of marriage will necessarily be altered. Redefining marriage to encompass same-sex relationships "will introduce an implicit revolt against the institution into its very heart." Ellen Willis, *"Can Marriage Be Saved? A Forum*, The Nation at 16-17 (June 24, 1996). Indeed, same-sex marriage is "the most recent development in the deinstitutionalization of marriage," the "weakening of the social norms that define people's behavior in . . . marriage." Andrew J. Cherlin, *The Deinstitutionalization of American Marriage*, 66 J. Marriage & Fam. 848, 850 (2004).

C. Fundamentally, The Issue Here is Who Makes The Policy Judgment About the Purpose of Marriage, The People, or the Courts?

When the California Supreme Court considered the initial state constitutional challenge to California's Proposition 8, it recognized that "the principal issue before [it] concerns the scope of *the right of the people, under the provisions of the California Constitution, to change or alter the state Constitution itself* through the initiative process so as to incorporate such a limitation as an explicit section of the state Constitution." *Strauss v. Horton*, 207 P.3d 48, 60 (Cal. 2009) (emphasis in original). Because the *federal* Equal Protection analysis requires, as a threshold

matter, an inquiry into the purpose served by a classification in order to ascertain whether different groups of people are similarly situated, a similar issue pertains here. What is the scope of the right of the people under the federal constitution to make basic policy judgments about the purposes served and to be served by society's fundamental institutions, when that definition of purpose will determine whether the groups on opposite sides of the resulting classification are "similarly situated"?

Recognizing that such policy judgments are quintessentially the stuff of the democratic political process, Justice Baxter criticized the California Supreme Court majority for engaging in "legal jujitsu," "abruptly forestall[ing] that process and substitute[ing], by judicial fiat, its own social policy views for those expressed by the People themselves." *In re Marriage Cases*, 43 Cal. 4th at 863-64 (Baxter, J., concurring and dissenting).

The lower courts here did exactly the same thing when presented with this *federal* constitutional challenge. By minimizing the importance of the historical connection between marriage and the unique procreative abilities of male/female unions, they substituted its views about that threshold policy judgment for that of the more than one and a half million voters from Utah and Oklahoma who, in voting to reaffirm marriage as a union of one man and one woman, necessarily determined that the historic purpose still mattered.

Whether the courts or the people are responsible for determining the purpose that will be pursued in assessing whether different groups are "similarly situated" is an issue that this Court has not squarely

confronted, and yet it is critically important to the constitutional analysis.

II. The Tenth Circuit Has Intervened in a Heated Political and Policy Dispute, An Arena Where Judicial Authority Is At Its Lowest Ebb.

This Court is acutely aware of the dangers that flow from judicial interference in policy disputes, particularly hotly contested ones. One such attempt, a century and a half ago, led directly to the Civil War, the bloodiest war in our nation's history. Another has so polarized our nation's politics for almost a half-century now that respected commentators legal scholars from both ends of the ideological spectrum have noted the democracy-destructive consequences. The author of *Roe v. Wade*, 410 U.S. 113 (1973), "did more inadvertent damage to our democracy than any other 20th-century American," wrote David Brooks in the New York Times, for example. "When he and his Supreme Court colleagues issued the *Roe v. Wade* decision, they set off a cycle of political viciousness and counter-viciousness that has poisoned public life ever since." David Brooks, *Roe's Birth, and Death*, N.Y. Times, at A23 (Apr. 21, 2005).

On the other end of the political spectrum, Professor Cass Sunstein has noted that "the decision may well have created the Moral Majority, helped defeat the equal rights amendment, and undermined the women's movement by spurring opposition and demobilizing potential adherents." Cass Sunstein, *Three Civil Rights Fallacies*, 79 Calif. L. Rev. 751, 766 (1991). And Professor William Eskridge has written about the political "distrust" that has arisen since the

decision because it "essentially declared a winner in one of the most difficult and divisive public law debates of American history" and allowed no recourse to the political process. William N. Eskridge, Jr., Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics, 114 Yale L.J. 1279, 1312 (2005).

The Tenth Circuit's decision below threatens to drag this Court, and the country, into another such quagmire. If the Constitution's commands clearly so require, then it would be the "painful duty" of this Court to say so. *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819). But absent that clear command, self-inflicted wound is the more apt description.

There are powerful democratic forces at play on both sides of this policy dispute. As a result, there is little prospect that those forces can be cabined by a decision from the Tenth Circuit, or any Court, invalidating on anything less than clear constitutional command the results of that political process. This is simply not going to be a case where judicial negation of democratically chosen policy is going to yield full and quiet acceptance of the judicially-imposed rule.

In short, unless there is a "persuasive basis in our Constitution or our jurisprudence to justify such a cataclysmic transformation of th[e] venerable institution" of marriage, *In re Marriage Cases*, 183 P.3d, at 459 (Baxter, J., concurring and dissenting), the courts should not countermand the policy judgments of the people. *See Schuette*, 134 S. Ct., at 1637. The Tenth Circuit having done so, only review and reversal by

this Court can restore the democratic process playing field on which the contentious political policy dispute at issue here must be allowed to work itself out.

III. Uncontroverted Absence of Malice and Vigorous Defense By State and County Officials Make These Cases Appropriate Vehicles for Resolving The Important Constitutional Questions Presented.

The lower courts' foray into this hotly contentious policy dispute is ground enough for this Court to grant review, if history's lesson about the likely consequences is to be heeded and those consequences avoided. But two other aspects of these particular cases make them perfect vehicles for resolving the significant constitutional issues at stake.

First, as the lower courts found, the people of Utah and Oklahoma did not reaffirm their long-standing definition of marriage out of malice toward homosexuals. Instead, the Court in the Utah case specifically acknowledged "the integrity [and] good-faith beliefs of those who supported" Utah's marriage amendment. *Kitchen,* 755 F.3d, at 1229*; see also Bishop v. Smith*, 14-5003, 2014 WL 3537847, *21 (10th Cir. July 18, 2014) (Holmes, J., concurring) (explaining "why the district court [in the Oklahoma case] made the correct decision in declining to rely upon the animus doctrine"). This Court can therefore address the constitutional questions presented here cleanly, without the complicating collateral animus issue from *Romer v. Evans*, 517 U.S. 620 (1996). Indeed, the absence of malice finding by the courts below makes these cases an even better vehicle than *Hollingsworth*, because the decisions below are not colored by inappropriate

concessions of stigma and animus that were made by the nominal defendants before the district court in that case.

Second, unlike in *Bostic* (the pending Virginia case), or *Hollingsworth* (the prior case from California considered by the court but dismissed for lack of jurisdiction), there is no complicating concern about jurisdiction or lack of adversariness that arises when the government officials responsible for enforcing and defending their state's laws not only decline to defend but actively join the challenge to those laws' constitutionality. In both of the cases here, appropriate government officials are vigorously defending their State's marriage laws.

In the Utah case, the Governor and Attorney General of the State are named defendants and remain active participants in the litigation. As the Tenth Circuit correctly recognized, both have statutory authority under Utah law over the enforcement of Utah's marriage laws and supervisory authority over local officials with ministerial duties in the issuance of marriage licenses. *Kitchen*, 755 F.3d, at 1202-05.

In the Oklahama case, a court clerk was named as a defendant in an amended complaint after a prior ruling from the Tenth Circuit held that the state executive officials originally named were not proper defendants because, under Oklahoma law, the issuance of marriage licenses was a judicial function performed by court clerks, officers of the court, rather than by executive branch officials. *Bishop v. Oklahoma*, 333 F. App'x 361, 365 (10th Cir. 2009) (unpublished). That court clerk, like the state officials in the Utah case, remains an active participant in the litigation, vigorously defending Oklahoma's marriage laws.

In sum, both cases—the *Herbert* case from Utah, No. 14-124, and the *Smith* case from Oklahoma, No. 14-136—are appropriate vehicles for addressing the constitutionality of state marriage laws, and both are better vehicles than *Bostic* because neither suffers from the lack of adversarialness that arose in *Bostic* when the Attorney General of Virginia changed positions and began attacking instead of defending Virginia's marriage laws.

Moreover, by granting both cases, this Court can also use the fact that State executive officials are appropriate defendants in the one, while a county judicial clerk is the appropriate defendant in the other, to clarify the extent to which state law remains relevant, post-*Hollingsworth*, to the question of federal court jurisdiction. Marriage cases have recently been decided in Pennsylvania, where a county clerk with clear duties under Pennsylvania law for the issuance of marriage licenses has been denied intervention for lack of a protectable interest and Article III standing, and in Oregon, where associational standing has been denied to an organization that counts among its members a county clerk with similar duties under Oregon law. *See* Order Denying Motion to Intervene, *Whitewood v. Wolf*, (M.D. Pa. June 18, 2014) (No. 1-13-cv-01861, Dkt. #156), *summarily aff'd and appeal dismissed, Whitewood v. Wolf*, No. 14-3048, Dkt. # 31 (3rd Cir., July 3, 2014), *pet'n for rehearing and rehearing en banc denied*, Dkt # 36 (3rd Cir., Aug. 4, 2014); Order Denying Motion to Intervene *Geiger v. Kitzhaber*, 994 F.Supp.2d 1128 (D. Ore. May 14, 2014) (No. 6:13-cv-01834-MC, Dkt. #114), *appeal dismissed for lack of standing*, No. 14-35427 (9th Cir. Aug. 27, 2014). In both cases, the circuit courts relied heavily on what appears to be an overly stingy reading of this Court's

jurisdictional decision in *Hollingsworth*, so added clarity on the scope of that decision would certainly be of benefit to the people in those states who found their policy judgments on marriage go undefended.

CONCLUSION

The petitions for writ of certiorari should be *granted* for consideration of the important constitutional questions they present. The parallel petition in *Bostic* filed by state officials who refused to defend that State's marriage laws and who seek from this Court an *affirmance* of the decision below, should be held pending resolution of these cases from the Tenth Circuit.

Respectfully submitted,

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