No. 14-_____

IN THE

Supreme Court of the United States

GARY R. HERBERT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF UTAH, AND SEAN D. REYES, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF UTAH,
Petitioners,

v.

DEREK KITCHEN, MOUDI SBEITY, KAREN ARCHER, KATE CALL, LAURIE WOOD, AND KODY PARTRIDGE, INDIVIDUALLY,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

GENE C. SCHAERR
JOHN J. BURSCH
Counsel of Record
Special Asst. Attorneys General
PARKER DOUGLAS
Utah Federal Solicitor
STANFORD E. PURSER
Assistant Attorney General
350 North State St., Suite 230
Salt Lake City, Utah 84114
(801) 366-0260
jbursch@utah.gov

Counsel for Petitioners

QUESTION PRESENTED

Whether the Fourteenth Amendment to the United States Constitution prohibits a state from defining or recognizing marriage only as the legal union between a man and a woman.

PARTIES TO THE PROCEEDING

Petitioners are Gary R. Herbert, in his official capacity as Governor of Utah, and Sean D. Reyes, in his official capacity as Attorney General of Utah. Respondents are Derek Kitchen, Moudi Sbeity, Karen Archer, Kate Call, Laurie Wood, and Kody Partridge. The only party to the proceeding not listed in the caption is defendant Sherrie Swensen, in her official capacity as Clerk of Salt Lake County, who did not appeal the district court ruling.

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The opinion of the United States Court of Appeals for the Tenth Circuit, App. 1a–99a, is reported at __ F.3d __, 2014 WL 2868044. The opinion of the United States District Court for the District of Utah, App. 100a–167a, is reported at 961 F. Supp. 2d 1181.

JURISDICTION

The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1343(3). The Tenth Circuit had appellate jurisdiction under 28 U.S.C. § 1291 and filed its opinion on June 25, 2014. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provide, in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article I, § 29 of the Utah Constitution provides:

> (1) Marriage consists only of the legal union between a man and a woman.
>
> (2) No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect.

Title 30, Chapter 1, § 2 of Utah's Code (§ 30-1-2) provides, in relevant part:

> The following marriages are prohibited and declared void: (1) when there is a husband or wife living, from whom the person marrying has not been divorced; (2) when the male or female is under 18 years of age unless consent is obtained as provided in Section 30-1-9; (3) . . . when the male or female is under 16 years of age . . . ; (4) between a divorced person and any person other than the one from whom the divorce decree was secured until the divorce decree becomes absolute . . . ; and (5) between persons of the same sex.

Title 30, Chapter 1, § 4.1 of Utah's Code (§ 30-1-4.1) provides, in relevant part:

> (1)(a) It is the policy of this state to recognize as marriage only the legal union of a man and a woman as provided in this chapter.
>
> (b) Except for the relationship of marriage between a man and a woman recognized pursuant to this chapter, this state will not recognize, enforce, or give legal effect to any law creating any legal status, rights, benefits, or duties that are substantially equivalent to those provided under Utah law to a man and a woman because they are married.
>
> (2) Nothing in Subsection (1) impairs any contract or other rights, benefits, or duties that are enforceable independently of this section.

INTRODUCTION

This case presents an immensely important question: whether the United States Constitution compels states to adopt a single marriage policy that every individual is allowed "to marry the person of their choice." App. 9a. The Tenth Circuit said yes and struck down Utah's definition—statutorily enacted and adopted into the Utah Constitution by two-thirds of voters in a statewide referendum—that marriage is only between a man and a woman. That ruling deprives Utah citizens of the "fundamental right" to "act through a lawful electoral process," *Schuette* v. *BAMN*, 134 S. Ct. 1623, 1637 (2014) (plurality), and ignores that the Constitution says nothing about how states must define marriage. For several reasons, Utah's petition should be granted.

First, the Tenth Circuit held that there is a fundamental right to marry someone of the same sex. But that conclusion is inconsistent with *United States* v. *Windsor*, 133 S. Ct. 2675 (2013); renders meaningless *Washington* v. *Glucksberg*, 521 U.S. 702 (1997); conflicts with *Baker* v. *Nelson*, 191 N.W.2d 185 (Minn. 1971), which this Court declined to review; and, as applied to Utah via the Equal Protection Clause, conflicts with *Citizens for Equal Protection* v. *Bruning*, 455 F.3d 859 (8th Cir. 2006).

As this Court held in *Glucksberg*, fundamental rights must be deeply rooted in our legal tradition. 521 U.S. at 722. In *Windsor*, this Court affirmed that the "limitation of lawful marriage to heterosexual couples . . . for centuries had been deemed both necessary and fundamental." 133 S. Ct. at 2689. Certiorari is necessary so this Court can affirm that it meant what it said in *Windsor*, and that *Glucksberg* remains controlling.

Second, the panel majority's decision contravenes this Court's own decision in *Baker* v. *Nelson*, 409 U.S. 810 (1972). There, plaintiffs asserted that Minnesota's denial of a marriage license "deprive[d] [them] of their liberty to marry and of their property without due process of law under the Fourteenth Amendment" and "violate[d] their rights under the equal protection clause of the Fourteenth Amendment." Jurisdictional Statement at 3, *Baker* v. *Nelson,* No. 71-1027. The Minnesota Supreme Court disagreed, and this Court summarily dismissed the appeal "for want of a substantial federal question." 409 U.S. at 810. That dismissal "prevent[s] lower courts from coming to opposite conclusions." *Mandel* v. *Bradley*, 432 U.S. 173, 176 (1977). And *Windsor* did not authorize lower courts to disregard *Baker*.

Third, this case is the ideal vehicle to resolve the question presented. Unlike *Hollingsworth* v. *Perry*, 133 S. Ct. 2652 (2013), this matter has no standing or other jurisdictional issues. Utah's Governor, Attorney General, and a majority of legislators are united in defending Utah's marriage laws. And notably, both the district court and the Tenth Circuit correctly rejected any suggestion that Utah's laws are based on animus, thereby maintaining only the pure legal question presented for this Court.

Finally, as *Baker* shows, the issue presented has been "percolating" for 40 years. Dozens of cases are challenging State marriage laws, and erratic use of stays has created legal chaos. It comes down to this: thousands of couples are unconstitutionally being denied the right to marry, or millions of voters are being disenfranchised of their vote to define marriage. Either way, the Court's review is necessary, and this case is the right vehicle to do so.

STATEMENT

I. Competing views of marriage

People have many different understandings of the marriage institution. But there are two predominant and competing visions that have been advanced in state referenda across the country.

Those who favor redefining marriage as the union of any two or more persons see the institution primarily from an adult-centered perspective. From that view, marriage's primary purpose is to endorse and legitimize the love and commitment between persons. *Windsor,* 133 S. Ct. at 2718 (Alito, J., dissenting) (describing competing visions). The adult-centric view holds that because the love of a same-sex couple is just as good as that of an opposite-sex couple ("love is love"), the government's refusal to recognize that love as a marriage is discrimination.

Those who wish to retain the opposite-sex marriage model believe the government has no legitimate interest in formally recognizing mere loving relationships, whether opposite-sex or same-sex. Their marriage view is biologically based, primarily child-centered, and has a conjugal meaning, *id.*, with a primary purpose of uniting every child to his or her biological mother and father whenever possible, and by *a* mother and father when not possible.

The difference in these views is not that one side promotes equality, justice, and tolerance, while the other endorses inequality, injustice, and intolerance. Rather, it is a difference in understanding about what the marriage institution *is*—or ought to be. People can disagree. But the question for this Court is not which view is better; it is whether the Constitution compels states to adopt either definition.

II. Utah citizens vote to retain their marriage definition.

The Constitution does not dictate a particular vision of marriage that all states must follow. To the contrary, this Court has emphasized for more than a century 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.'" *Windsor*, 133 S. Ct. at 2691 (quoting *In re Burrus*, 136 U.S. 586, 593–94 (1890)).

Accordingly, Utah has long exercised its power to define marriage. To become a state, Utah had to adopt an "irrevocable" constitutional provision that "forever prohibited" polygamous marriages and made adherence to monogamous marriage (understood to be between one man and one woman) the only alternative. Utah Const. art. III. Utah law has never recognized any other kind of relationship as a marriage. *E.g.*, Utah Code § 68-3-1 (adopting common law of England as the law of Utah in 1898, which included the definition of marriage as "the voluntary union for life of one man and one woman, to the exclusion of all others." *Hyde* v. *Hyde* [L.R.] 1 P. & D. 130 (1866) (Lord Penzance)); Utah Code § 30-1-2(5) (enacted in 1977 and prohibiting marriages "[b]etween persons of the same sex").

At least since the 1970s, same-sex couples have been challenging state marriage laws like Utah's. See, *e.g.*, *Baker*, *supra*. The frequency of suits alleging violations of state constitutions began to increase in the 1990s. And these challenges garnered national attention with the decision striking down Massachusetts' marriage definition in 2003. *Goodridge* v. *Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

The next year, the Utah Legislature enacted a "Marriage recognition policy" that made clear the State retained its marriage definition as between one man and one woman, while at the same time protecting the right of any couple—including same-sex couples—to order their relationships through enforceable private contracts. Utah Code § 30-1-4.1. The Legislature also placed on the ballot a proposal to add Article 1, § 29, to the State's constitution, a provision that similarly retained the State's marriage definition. Utah voters approved that proposal by a nearly 2-1 margin, 65.9% to 34.1%.

Utah has many other laws promoting the child-centered vision of marriage described above. *E.g.*, Utah Code § 30-1-30 (encouraging counseling before certain couples secure a marriage license); *id.* § 62A-4a-201(1)(c) (emphasizing that it is in a child's best interest to be raised by her or his natural parents); *id.* § 62A-4a-103(2)(b) (requiring the Utah Division of Child and Family Services to "protect the integrity of the family"); *id.* § 78B-6-117(3) (prohibiting adoption by a single adult cohabitating in a relationship that is not a marriage under Utah law); *id.* § 30-3-18 (imposing a 90-day waiting period before a court may hold divorce hearings); *id.* § 30-3-11.3 (requiring parents to attend a course about their children's needs before obtaining a divorce). Such laws reveal that marriage for Utah is "not primarily about adult needs for official recognition and support, but about the well-being of children . . . ." *Hernandez* v. *Robles*, 805 N.Y.S.2d 354, 360 (App. Div. 2005), aff'd 855 N.E.2d 1 (N.Y. 2006). In this legal climate, Utah has the nation's lowest percentage of cohabitating couples, lowest percentage of births to unwed mothers, and lowest abortion rate.

III. District court proceedings

Plaintiffs are three same-sex couples. Two desired to get married in Utah but could not under Utah law. The third received a marriage license in Iowa and wanted Utah to recognize it. The couples sued Utah's Governor and Attorney General and the Salt Lake County Clerk, challenging Article 1, § 29 and Utah's marriage statutes under the Due Process and Equal Protection Clauses.

On cross-motions for summary judgment, the district court first determined that *Baker* "is no longer controlling" because two dissenting Justices in *Windsor* "foresaw" that the *Windsor* decision "would precede" lawsuits challenging state marriage laws. App. 118a–119a. On the merits, the court concluded Plaintiffs had "a fundamental right to marry that protects their choice of a same-sex partner." App. 140a. In articulating this right's scope, the district court embraced the adult-centric view of marriage, i.e., as a "public commitment to form an exclusive relationship and create a family with a partner with whom the person shares an intimate and sustaining emotional bond." App. 135a. The court also decided it did not have to follow the fundamental-rights analysis in *Glucksberg* because this Court did not apply it in *Loving* v. *Virginia*, App. 135a, a curious observation given that *Loving* was decided 30 years before *Glucksberg*.

The district court also determined that Utah's marriage laws treated the sexes unequally. App. 143a–145a. But the court concluded that those laws failed even rational-basis review. App. 152a–164a. After the court and Tenth Circuit declined to stay the district court's injunction, this Court entered a stay. *Herbert* v. *Kitchen*, No. 13A687.

IV. Tenth Circuit decision

Following this Court's grant of the stay, the Tenth Circuit issued a 2-1 decision affirming the district court. The panel majority began by holding that Plaintiffs had standing, and Utah's Governor and Attorney General were proper defendants and appellants. App. 10a–18a. The majority then held that this Court's decision in *Baker* was undermined by *Lawrence* v. *Texas*, 539 U.S. 558, 567 (2003) (striking down a state criminal anti-sodomy law), and *Windsor*, App. 18a–25a, paving the way for the majority to undertake a merits review of Plaintiffs' constitutional claims.

Like the district court, the majority concluded that there is a fundamental right to marry a person of the same sex. App. 75a. The majority reasoned that this Court's marriage precedents demonstrate that the Constitution embraces the adult-centric view of marriage, a vision based on "personal aspects," including the "expression[ ] of emotional support and public commitment," and personal choice. App. 35a (internal quotation marks omitted). The majority further held that under both the Due Process and Equal Protection Clauses of the Fourteenth Amendment, the fact that Utah's marriage laws "impinge[ ]" on this fundamental right triggers strict scrutiny. App. 49a–50a (internal quotation marks omitted). The majority expressly declined to address whether those laws "might be subject to heightened scrutiny on any alternative basis," App. 60a n.11, such as Plaintiffs' equal-protection arguments based on sex and sexual-orientation discrimination.

Applying strict scrutiny, the majority assumed Utah had compelling rationales for retaining its marriage definition. App. 51a. Yet the majority held that Utah's laws were not narrowly tailored to fit those rationales, App. 51a–71a, and therefore that Utah could not deny marriage licenses or recognition "based solely upon the sex of the persons in the marriage union." App. 4a. The principal basis for that conclusion was because Utah's marriage laws "do not differentiate between procreative and non-procreative couples." App. 51a.

In dissent, Judge Kelly disagreed that the Tenth Circuit could disregard *Baker*, and he concluded that there is no fundamental right to marry someone of the same sex. App. 77a. Because the Constitution is silent on the issue of marriage, the power to define marriage belongs to the states. App. 78a (citing *Windsor*, 133 S. Ct. at 2691–92).

In reaching that conclusion, Judge Kelly relied on this Court's observation that marriage has been universally understood for centuries to require two opposite-sex persons. App. 85a–86a (citing *Windsor*, 133 S. Ct. at 2689). Thus, "this case is better understood as an effort to *extend* marriage to persons of the same gender by *redefining* marriage," App. 86a (emphasis added), and *Windsor*, *Lawrence*, and *Romer* v. *Evans*, 517 U.S. 620 (1996), do not say anything to the contrary. App. 87a–89a.

As for Plaintiffs' alternative equal-protection arguments, Judge Kelly recognized that Utah's laws do not treat the sexes differently, and that the Tenth Circuit has already rejected heightened scrutiny based on sexual orientation. App. 83a–84a. So rational-basis review should have applied. App. 77a–90a.

Judge Kelly concluded that Utah's laws had at least three rational justifications: (1) encouraging responsible procreation given the exclusive ability of opposite-sex couples to create new life; (2) fostering effective parenting to benefit those children; and (3) proceeding with caution before redefining an institution that has long served society. App. 77a, 90a–98a. "It is biologically undeniable," he observed, "that opposite-gender marriage has a procreative potential that same-gender marriage lacks. The inherent differences between the biological sexes are permissible legislative considerations, and indeed distinguish gender from those classifications that warrant strict scrutiny." App. 93a. And while "the constant refrain in these cases has been that the States' justifications are not advanced by excluding same-gender couples from marriage[,] that is a matter of opinion [and] any 'improvement' on the classification should be left to the state political process." App. 96a. Moreover, comity also dictated that Utah need not recognize other state marriage definitions. App. 97a–98a.

Meanwhile in Utah, several couples filed a new suit seeking a federal-court injunction requiring Utah to recognize marriage licenses issued in the gap between the district court's injunctive order and this Court's stay of that injunction. After the district court and Tenth Circuit issued stays of only limited duration, and also declined Utah's request for a stay pending the outcome of this litigation, this Court granted a stay in the collateral litigation as well. *Herbert* v. *Evans*, No. 14A65.

REASONS FOR GRANTING THE PETITION

I. The question presented warrants immediate review.

A. The decision below raises issues of immense constitutional and societal importance.

The issue presented in this case—whether the Fourteenth Amendment requires all States to adopt Plaintiffs' proposed marriage definition—is of enormous importance. This Court so recognized by granting the petition in *Hollingsworth* v. *Perry*, No. 12-144. And by issuing Utah a stay both here and in *Evans*, the Court has twice concluded that there is at least "a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari," and "a fair prospect that a majority of the Court will vote to reverse the judgment below." *Hollingsworth* v. *Perry*, 558 U.S. 183, 190 (2010) (per curiam); see also *I.N.S.* v. *Legalization of Assistance Project of Los Angeles Cnty. Fed'n of Labor,* 510 U.S. 1301, 1303 (1993) (O'Connor, J., in chambers).

In the meantime, the need for this Court's resolution of the issue presented has grown exponentially. In addition to Utah, litigants currently seek to invalidate the marriage laws of Alabama, Alaska, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Virginia, West Virginia, Wisconsin, Wyoming, and Puerto Rico. There are no other modern examples where litigants have brought such similar challenges to so many state laws—including constitutional provisions approved by millions of voters.

This Court admonished lower courts that its *Windsor* holding was "confined to those lawful marriages" recognized by states which had changed their marriage definition. 133 S. Ct. at 2696; accord *id.* (Roberts, C.J., dissenting) ("The Court does not have before it, and the logic of its opinion does not decide, the distinct question whether the States, in the exercise of their 'historical and essential authority to define the marriage relation,' may continue to utilize the traditional definition of marriage.") (internal citation omitted). But that has not stopped lower courts—including the panel majority here—from construing *Windsor* as holding that the Constitution *does* dictate to the states how marriage must be defined, and that voters have no say. *E.g.*, App. 24a–25a, 37a–38a, 43a–46a.

Moreover, because district courts in Utah, Arkansas, Colorado, Indiana, and Michigan declined to stay their rulings pending appeal, hundreds of marriage licenses were issued to same-sex couples until higher courts could maintain the status quo. Consequently, there is an entirely new category of collateral litigation seeking to determine the legality of those licenses. This development places state officials in the tenuous position of having to violate their state constitutions or face possible contempt, the dilemma Petitioners here faced in *Evans* until this Court issued a stay. Equally important, the recipients of those marriage licenses (and others who would like to obtain marriage licenses if courts require states to redefine longstanding marriage laws) have been left in legal limbo.

In sum, a vast cloud covers this entire area of the law, and only this Court can lift it. This case provides an ideal vehicle to do just that.

B. The Tenth Circuit's decision conflicts in principle with *Glucksberg*, *Windsor*, and *Schuette*, and conflicts directly with *Baker*.

Certiorari is also warranted based on the Tenth Circuit's reasoning in recognizing a fundamental constitutional right to marry someone of the same sex. App. 75a. That ruling is at odds with this Court's precedents, both in the way the Tenth Circuit analyzed the "right" at issue, and in that court's failure to defer to the democratic process.

1. A fundamental-rights analysis has two steps. *Washington* v. *Glucksberg*, 521 U.S. 702 (1997). The first is "a careful description of the asserted fundamental liberty interest," and the second is to determine whether the asserted interest is so "deeply rooted in this Nation's history and tradition" and the "conscience of our people" as to be "implicit in the concept of ordered liberty." *Id.* at 720–21 (quotations and citations omitted).

The Tenth Circuit described the right at issue as "'the freedom of choice to marry.'" App. 30a (quoting *Loving* v. *Virginia*, 388 U.S. 1 (1967)). But if the Tenth Circuit really means that a person's "choice" is the only marriage limit, then virtually every line historically drawn around marriage must fail. The right to marry whomever one chooses would thus override not only a limitation based on sexual complementariness, but also the usual blanket limitations based on age, consanguinity, consent, or number of participants. Such a version of the marriage right is *not* deeply rooted in our nation's history and is belied by our contemporary laws—not to mention the prerequisite for Utah's becoming a state in the first instance, see Utah Const. art. III.

On the other hand, if the Tenth Circuit meant to recognize only a fundamental right to marry someone of the same sex, that theory cannot be reconciled with *Windsor*. There, this Court described the sexual complementariness requirement itself as a fundamental part of marriage: "The *limitation* of lawful marriage to heterosexual couples . . . for centuries had been deemed both necessary and *fundamental*." 133 S. Ct. at 2689 (emphasis added); accord *id.* ("For marriage between a man and 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."). Unless *Windsor* greatly erred in its historical analysis that sexual complementariness has long been considered essential to the marriage definition, it is not possible to say there is a fundamental right to marry someone of the same sex under the rule of *Glucksberg*. *Id.* ("[U]ntil recent years, many citizens had not even considered the possibility that two person of the same sex might aspire to [marry].").

History demonstrates the shallowness of the roots anchoring the Tenth Circuit's purported new "right." Until 2000, no country in the world recognized marriage between persons of the same sex. And neither did any state until 2003. To the contrary, as recently as 2004, voters in 13 out of 13 states holding public referenda all amended their constitutions to retain the same definition of marriage as Utah. These facts rebut any contention that the right to marry someone of the same sex has the kind of "deep roots" that have been the hallmark of every fundamental right this Court has ever recognized.

2. The Tenth Circuit's holding is also at odds with *Glucksberg* and *Windsor* in a second important way. The whole reason rights must be "deeply rooted" is "to rein in" the necessarily "subjective elements" of substantive-due-process review, *Glucksberg*, 521 U.S. at 722, so that rights will be recognized through the democratic process rather than be foisted on the public by federal courts. See *id.* at 723 (rejecting assisted suicide as a fundamental right because doing so would "reverse centuries of legal doctrine and practice, and strike down the considered policy choice of almost every State"). And for almost 150 years, this Court has consistently recognized that state citizens, not federal courts, have the power to define marriage. *Pennoyer* v. *Neff*, 95 U.S. 714, 734–35 (1877) ("The State . . . has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created . . . ."); *Haddock* v. *Haddock*, 201 U.S. 562, 575 (1906), overruled on other grounds, *Williams* v. *North Carolina*, 317 U.S. 287 (1942) ("No one denies that the states, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce."); *Loving*, 388 U.S. at 7 ("marriage is a social relation subject to the State's police power").

Windsor reaffirmed this precedent: "By history and tradition the definition and regulation of marriage . . . has been treated as being within the authority and realm of the separate States." 133 S. Ct. at 2689–90; accord *id.* at 2691. In fact, *Windsor* highlighted that DOMA was an "unusual deviation from the usual tradition of recognizing *and accepting* state definitions of marriage," and conflicted with "the *unquestioned* authority of the States" over marriage. *Id.* at 2693 (emphasis added).

The Tenth Circuit's response, echoing *Windsor*, is that state laws retaining the marriage definition deny "dignity" to same-sex couples and their children. App. 24a–25a. But the dignity of which *Windsor* spoke was not that bestowed by a federal court; it was the dignity bestowed by *the States*, acting through the democratic process. 133 S. Ct. at 2693 ("a dignity conferred by the States in the exercise of their sovereign power"); *id.* ("the congressional purpose [in DOMA § 3 was] to influence or interfere with state sovereign choices about who may be married"); *id.* at 2694 (recognizing that DOMA § 3 affected "state-sanctioned marriages" that "the State has sought to dignify"); *id.* at 2696 ("a status the State finds to be dignified and proper"); *id.* ("those whom the State, by its marriage laws, sought to protect in personhood and dignity."). In sum, the wisdom of *Windsor* is the respect due to *state* choices about how to define marriage.

Respecting the dignity of individuals in a democracy is not limited to preserving liberty to engage in private conduct, *e.g.*, *Lawrence* v. *Texas*, 539 U.S. 558, 578 (2003), but also includes their liberty to engage in self-government, *Burson* v. *Freeman*, 504 U.S. 191, 214 (1992) (Kennedy, J., concurring) ("Voting is one of the most fundamental and cherished liberties in our democratic system of government."). And the *latter* fundamental right is the one this Court most recently reaffirmed in *Schuette*: "It is demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds." 134 S. Ct. at 1637; accord *id.* at 1636–37 (noting the fundamental right to participate in the democratic process).

Of course the people's authority to govern is subject to certain "constitutional guarantees." *Windsor*, 133 S. Ct. at 2692. These include the prohibition against racial discrimination. *Loving*, 388 U.S. at 12. But in the absence of a fundamental right or classifications involving a protected class, voters need only have a rational basis for their votes to retain the marriage definition. And as explained below, they undeniably did.

3. Contrary to the Tenth Circuit's analysis, there is nothing inconsistent between this Court's invalidation of racially discriminatory, anti-miscegenation laws in *Loving* and holding that a state has the right to retain its child-centered laws regarding marriage. It is a biological fact that the creation of new life requires a man and a woman; conversely, race has nothing at all to do with the creation of life. The racial restrictions in *Loving* that carried criminal penalties thus represented an attempt to artificially, excessively, and forcibly restrict the marriage definition, while the Tenth Circuit expanded it. That explains why, after the Minnesota Supreme Court upheld Minnesota's marriage laws in *Baker*, this Court would summarily dismiss a challenge to that decision for want of a substantial federal question, less than five years after deciding *Loving*.[1]

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[1] *Loving*'s lack of relevance to the issues presented here could not have been lost on Justice Marshall, whose nomination President Johnson purposely announced on June 13, 1967, the day after *Loving* was decided, and who sat on the *Baker* Court, along with Justices Douglas, Brennan, Stewart and White, all who had participated in the *Loving* decision. It is with this institutional history in mind that the Court should consider the significance of *Baker*'s summary dismissal after *Loving*.

For these reasons, the legal issues here and in *Loving* are not comparable. The Court should reject the Tenth Circuit's willingness to enshrine in the Constitution a rule that each sovereign state must always and everywhere define marriage as the freedom to choose any partner, for whatever reason.

4. The Tenth Circuit's decision also conflicts with *Baker*. The *Baker* plaintiffs asserted "that the right to marry without regard to the sex of the parties is a fundamental right of all persons and that restricting marriage to only couples of the opposite sex is irrational." *Baker*, 191 N.W.2d at 186. The Minnesota Supreme Court disagreed, and this Court summarily dismissed the appeal "for want of a substantial federal question." 409 U.S. at 810. That dismissal "prevent[s] lower courts from coming to opposite conclusions," *Mandel*, 432 U.S. at 176, absent some new doctrinal development. *Hicks* v. *Miranda*, 422 U.S. 332, 344 (1975).

The Tenth Circuit panel majority said that two of this Court's cases had superseded *Baker*. App. 20a. The first was *Lawrence* v. *Texas*, 539 U.S. 558 (2003), which struck down state laws criminalizing sodomy. App. 20a. But *Lawrence* involved the very different question of the government's authority to regulate private, consensual sexual conduct (via criminal penalty), not the issue of whether a state's citizens have the authority to define marriage. *Id.* at 578 (this case "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter."). The second case was *Windsor*. But as noted above, *Windsor* affirmed *Baker*'s point that states have the authority to define marriage. 133 S. Ct. at 2693. Because *Baker* is still good law, the Tenth Circuit was bound by it.

5. Finally, the Tenth Circuit's equal-protection analysis conflicts with *Bruning*, where the Eighth Circuit assumed that there is no fundamental right to marry someone of the same sex. 455 F.3d at 866–69. Review is necessary to establish circuit uniformity and to settle this divisive legal issue.

C. Utah's marriage laws pass muster under any standard of review.

Based on its fundamental-rights analysis, the Tenth Circuit applied strict scrutiny to Utah's marriage laws, rather than rational-basis review, with respect to both Plaintiffs' due-process and equal-protection claims. App. 50a ("plaintiffs will prevail on their due process and equal protection claims unless appellants can show that [Utah's marriage laws] survive[ ] strict scrutiny."). That decision cannot be reconciled with this Court's precedents. And the Tenth Circuit's conclusion is wrong because Utah's marriage laws satisfy not only rational-basis review but also strict scrutiny.

1. To begin, there is no equal-protection ground for departing from rational-basis review. As noted above, the only basis for the Tenth Circuit's ruling—recognition of a fundamental right, App. 75a—was incorrect. And as Judge Kelly explained, Plaintiffs' other equal-protection arguments also fail. A claim of discrimination based on sex requires that "members of one sex are exposed to disadvantageous terms or conditions . . . to which members of the other sex are not exposed." *Oncale* v. *Sundowner Offshore Servs.*, 523 U.S. 75, 80 (1998). But here, it is indisputable that Utah's marriage laws do not treat men and women differently. So Plaintiffs cannot show that either sex—as a class—is disadvantaged by Utah's marriage laws. App. 83a–84a (Kelly, J., dissenting).

Utah's laws do not discriminate based on sexual orientation, either. That is because Utah's laws do not classify based on orientation; they classify based on sexual complementariness. It remains a biological fact that the creation of new life requires both a mother and a father. Accordingly, no other type of coupling is biologically similar for purposes of equal-protection analysis.

2. That brings the analysis back to rational-basis review which, like the stringent fundamental-rights analysis this Court articulated in *Glucksberg*, affirms the vital principle of democratic self-government.

Rational-basis review is extremely deferential to voters. Courts may not second-guess legislative factfinding. *Heller* v. *Doe*, 509 U.S. 312, 320 (1993) (a state "has no obligation to produce evidence to sustain the rationality of a statutory classification"). Courts must presume that a challenged law is valid, *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985), and a state is not required to prove that the law's objective will be fulfilled, see *F.C.C.* v. *Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993). Similarly, there is no least-restrictive-means component to such review, *Heller*, 509 U.S. at 321, and a law "based on rational speculation unsupported by evidence or empirical data" is sufficient, *Beach*, 508 U.S. at 315. A classification must be sustained as rational when "the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not." *Johnson* v. *Robison*, 415 U.S. 361, 383 (1974). In sum, the fact that reasonable minds can differ proves rationality.

The initial consideration in deciding whether Utah's marriage laws are rational is to ask what the State's interest in marriage is. To be sure, love, or emotional connection, is an important aspect of adult relationships. But love alone cannot logically serve as a state interest. Many relationships demonstrate love and commitment (*e.g.*, a person who lays down her life for a friend), yet no government passes laws about what it takes to enter into or end a friendship. Indeed, if marriage, like friendships or other similar relationships, were only about an emotional connection, it would be unclear what interest (other than moral approval) the state could possibly have. That is why loving a person does not create a right to marry that person. Under traditional conceptions of marriage, a man cannot marry a woman who is already married, and a woman who loves two men cannot marry them both.

A state's interest in marriage thus springs from a distinctive characteristic of opposite-sex relationships: the couple's sexual union can create new life. James Q. Wilson, *The Marriage Problem* 41 (2002) ("Marriage is a socially arranged solution for the problem of getting people to stay together and care for children that the mere desire for children, and the sex that makes children possible, does not solve."). And this distinguishing feature gives rise to a number of rational (indeed, compelling) reasons for retaining Utah's marriage definition.

First, a state has a compelling interest in ensuring the well-being of offspring, planned or unplanned. *Palmore* v. *Sidoti*, 466 U.S. 429, 433 (1984) ("The State, of course, has a duty of the highest order to protect the interests of minor children, particularly those of tender years.");

Stanley v. *Illinois*, 405 U.S. 645, 652 (1972) (a State has "legitimate interests, well within the power of the State to implement[,]" in protecting the moral, emotional, mental, and physical welfare of children).

State marriage benefits and status "encourage unmarried parents to marry and married parents to remain so." App. 95a (Kelly, J., dissenting). And because "[f]ar more opposite-[sex] couples will produce and care for children than same-gender couples and perpetuation of the species depends upon procreation," *id.*, it is rational to retain the marriage requirement of opposite-sex couples. Accord generally *Bostic* v. *Schaefer*, __ F.3d __, 2014 WL 3702493, at *27–28 (4th Cir. July 28, 2014) (Niemeyer, J., dissenting) (noting these same state interests).

The counter is that not every opposite-sex couple desires or is able to create children, and that many same-sex couples are parents from adoption or assisted reproduction. But under rational-basis review, it is legally irrelevant that Utah's marriage definition may be over- or under-inclusive. *Robison*, 415 U.S. at 383. Accord, *e.g.*, *Vance* v. *Bradley*, 440 U.S. 93, 108–09 (1979) ("Even if [a] classification . . . is to some extent both underinclusive and overinclusive, . . . it is nevertheless the rule that in [rational basis review] perfection is by no means required.") (internal quotation marks omitted); *Armour* v. *City of Indianapolis*, 132 S. Ct. 2073, 2083 (2012) ("the Constitution does not require the [State] to draw the perfect line nor even to draw a line superior to some other line it might have drawn. It requires only that the line actually drawn be a rational line.").

And federal courts "will not overturn such [classifications] unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the [classifications] were irrational." *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 84 (2000) (citation and quotation marks omitted). So the question is not whether same- and opposite-sex couples are similarly situated with respect to adoption or artificial reproduction. The question is whether they are similarly situated with respect to sexual interaction. Biology answers that question no.

Second, it is far from irrational to think that it is advantageous for a child to know and be raised by her biological mother and father when possible, and by *a* mother and *a* father when that is not possible. Indeed, it is Plaintiffs' burden to show that it is irrational—*irrational*—to think that a child benefits from being raised by both a mom and a dad.

Plaintiffs prevail only if everyone agrees that there is no difference in the way men and women parent their children. But even social-science experts cannot agree on that proposition. And the Tenth Circuit's opinion incorrectly presumes that everyone should and must conclude that moms and dads are interchangeable and independently dispensable.

Third, a rational voter might be concerned about altering a foundational building block of society before more is known about such a change's effect. "At present, no one—including social scientists, philosophers, and historians—can predict with any certainty what the long-term ramifications of wide-spread acceptance of same-sex marriage will be." *Windsor*, 133 S. Ct. at 2716 (Alito, J., dissenting).

Because laws shape culture, a court order that requires every state to rewrite its marriage definition to reflect the view that marriage is more about adult emotions than rearing and raising children will likely exacerbate the belief—already accepted by more than half of young adults—that it is no big deal to have a child outside marriage.[2] Such a belief leads naturally to more out-of-wedlock births, a result that is undeniably harmful to children and society generally. Yet that is one very real possible consequence (among others) of redefining marriage.

Based on these reasons, many courts have held that recognizing marriage only as the legal union of a man and a woman is not irrational. *E.g.*, *Bruning*, 455 F.3d at 867–68; *Hernandez* v. *Robles*, 855 N.E.2d 1, 7 (N.Y. 2006) (plurality); *Sevcik* v. *Sandoval*, 911 F. Supp. 2d 996, 1015–16 (D. Nev. 2012); *Jackson* v. *Abercrombie*, 884 F. Supp. 2d 1065, 1111–14 (D. Haw. 2012); *Standhardt* v. *Superior Court*, 77 P.3d 451, 461–65 (Ariz. Ct. App. 2003); *Dean* v. *Dist. of Columbia*, 653 A.2d 307, 363 (D.C. 1995) (Steadman, A.J., concurring); *Morrison* v. *Sadler*, 821 N.E.2d 15, 23–31 (Ind. Ct. App. 2005); *Conaway* v. *Deane*, 932 A.2d 571, 630–34 (Md. 2007); *Baker*, 191 N.W.2d at 186–87; *In re Marriage of J.B. & H.B.*, 326 S.W.3d 654, 677–78 (Tex. App. 2010) (review granted); *Anderson* v. *King County*, 138 P.3d 963, 982–83 (Wash. 2006) (plurality).

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[2] http://pewresearch.org/files/old-assets/social/pdf/Marriage.pdf.

Even under a heightened- or strict-scrutiny review standard, Utah's laws pass muster. The Tenth Circuit correctly assumed that Utah had compelling justifications for retaining its definition of marriage, including "fostering a child-centric marriage culture that encourages parents to subordinate their own interests to the needs of their children" and "children being raised by their biological mothers and fathers—or at least by a married mother and father—in a stable home." App. 50a–51a. But the panel majority erred in holding that Utah's marriage laws are impermissibly over-inclusive and have "an insufficient causal connection to the State's articulated goals." App. 51a–54a, 59a–63a.

To begin, this Court has made clear that "[s]trict scrutiny is not 'strict in theory, but fatal in fact.'" *Grutter* v. *Bollinger*, 539 U.S. 306, 326 (2003). A state law's classification need not be perfectly tailored, merely "narrowly tailored." *Id.* And when courts conduct this analysis, "[c]ontext matters." *Id.* at 327.

Regarding over-inclusiveness, Utah in this context has no material alternatives. If Utah tested and inquired of every couple applying for a marriage license of that couple's ability and intent to have children, the regime would raise serious constitutional problems. See *Griswold* v. *Connecticut*, 381 U.S. 479, 485–86 (1965). And even when an opposite-sex couple is unable to or does not want to have children, their marriage has an important normative function that is more crucial than ever at a time when teenagers see no problem with out-of-wedlock children.

Regarding causation, the panel majority was wrong when it said that "it is wholly illogical to believe" that redefining marriage "will alter the most intimate and personal decisions of opposite-sex couples." App. 60a. The possible danger of replacing a child-centered, conjugal view of marriage with an emotion-based, adult-centered view is that the change will further confuse society about marriage's nature and purpose, which logically would have the inevitable—possibly irreversible—effect of weakening or mutating the institution to the detriment of children. It was not illogical for Utah voters to recognize that distinct possibility. And if time proves the concern ill-founded, voters can change their minds. That give-and-take is the genius of our democratic process, yet it is unavailable if the definition of marriage is federalized by the courts.

In other words, the greatest risk of redefining marriage is not that this Court will be faced in the future with demands for legal recognition of polygamous unions, time-limited unions, or non-exclusive unions—though those risks are all real. The greatest danger is that the societal understanding of marriage as an institution designed primarily to connect children to their biological parents and to ensure child welfare (as opposed to primarily promoting adult happiness) will be diminished or lost. Even if Utah's marriage vision is not always attained because of death, divorce, infertility, and the like, it does not mean the model is failing to convey that understanding or having the desired effect of connecting children to their biological mothers and fathers—or *a* mom and dad.

3. There is a final risk that results not from changing the definition of marriage *per se*, but from that change being court-ordered rather than citizen-initiated. When the courts define marriage as a matter of constitutional law, those who continue to hold a different view of marriage—for religious or non-religious reasons—will inevitably be treated as acting out of prejudice, no matter the legitimacy of that different view, as recent court rulings have demonstrated in a variety of contexts. There is great value in allowing the democratic process to take its course rather than stifling the discussion and settling the debate by undemocratic judicial action.

In sum, the Tenth Circuit's decision runs the very real risk of irreversible damage to the marriage institution as well as the diverse, democratic experimentation and debate over how to define the marriage institution. The Constitution, magisterially limited in scope, was purposely designed *not* to answer all social questions. Indeed, the Constitution addresses limited subjects because it prescribes and proscribes a limited federal government.

One such limitation is that the Constitution does not address how the States must define marriage. In a system of limited federal government, see generally *National Fed'n of Indep. Bus.* v. *Sebelius*, 132 S. Ct. 2566, 2577 (2012), courts should not be reading a marriage definition into constitutional silence. To do so encourages citizens to look to courts for political change, rather than to themselves and their representative democratic processes, weakening the democratic will and resolve of the People.

II. This case is the ideal vehicle for resolving the question presented.

As noted above, there are dozens of cases that raise the question whether the Constitution dictates a single marriage definition. The Court should use Utah's case to resolve the question presented.

First, the Court is already familiar with this case as a result of two previous stay proceedings.

Second, Utah's Governor, Attorney General, and a majority of legislators are united in defending Utah's marriage laws and have done so vigorously since the outset of this litigation—in substantial part because they believe those laws have played an important role in maintaining Utah's low rates of cohabitation, births to unwed mothers, and abortions. (The Tenth Circuit majority wrongly suggested Utah was "tepid" in defending the "parenting theory" underlying Utah's laws. App. 66a. But Utah has never backpedaled from its view and does not now.)

Third, both lower courts concluded that Utah's laws were not based on animus. App. 74a–75a, 151a. So this Court can focus on the pure legal question rather than being distracted by unique circumstances of other cases where animus was found. See, *e.g.*, *Bostic*, __ F.3d __, 2014 WL 3702493, at *5 (accepting plaintiffs' alleged "stigmatic injuries").

Fourth, the fundamental-rights analysis conducted by both lower courts highlights what is really at stake here: a clash between two competing visions of what marriage *is*. Both courts were unusually clear in embracing the adult-centric concept as the basis for their holdings that the fundamental right to marriage includes the right to marry someone of the same sex. App. 31a–37a, 120a–129a, 134a.

Fifth, this case involves claims brought both by same-sex couples seeking a marriage license in Utah and a same-sex couple seeking Utah's recognition of a license issued in another state. If this Court ultimately vindicates Utah's right to retain its marriage definition, the Court will also be in a position to reject the recognition claim under the Fourteenth Amendment or Full Faith and Credit Clause.

This Court has already recognized that "the Full Faith and Credit Clause does not require a State to apply another State's law in violation of its own legitimate public policy." *Nevada* v. *Hall*, 440 U.S. 410, 422 (1979). To the contrary, "the very nature of the federal union of states . . . precludes resort to the full faith and credit clause as the means for compelling a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate." *Pacific Emp'rs Ins. Co.* v. *Indus. Accident Comm'n*, 306 U.S. 493, 501 (1939).

Thus, if Utah prevails here, the Court will have necessarily concluded that Utah is "competent" to define marriage. And forcing Utah—or any other state—to recognize another state's marriage license in violation of Utah's Constitution would improperly compel Utah to "substitute" the marriage laws of another state for Utah's own laws. Accordingly, this Court's resolution of the question presented can mark the end of marriage litigation in all respects.

Sixth, unlike *Hollingsworth* v. *Perry*, 133 S. Ct. 2652 (2013), standing and like issues will not prevent this Court from deciding the question presented. As the Tenth Circuit recognized, the Governor and Attorney General are appropriate parties to defend Utah's laws, and Plaintiffs are appropriate parties to challenge them.

Seventh, there is no need to let the issue percolate even more. The arguments for and against retaining the definition of marriage are well known, and but for standing, the issue would have been decided in *Hollingsworth*. In addition, the United States Attorney General has already said that the federal government will support the plaintiffs when this Court next hears a case regarding the States' authority to define marriage.[3]

Finally, the advocates on both sides of Utah's litigation are experienced and capable. And the harm in waiting is significant, regardless of which side prevails. Either thousands of couples are being denied their constitutional right to marry, or millions of voters are being disenfranchised of their fundamental right to retain the definition of marriage that has existed since before the People ratified the United States Constitution. This Court should grant the petition and answer, once and for all, the important question presented.

* * *

[3] http://abcnews.go.com/ThisWeek/doj-set-fight-gay-marriage-bans-supreme-court/story?id=24537941.

Promoting marriage as an institution designed to honor every child's fundamental right to know and be raised by a mother and father does not ban any other type of relationship. But rewriting the Constitution to impose the Tenth Circuit's marriage definition on every single State has consequences. It communicates that the marriage institution is more about adults than children. It teaches that mothers and fathers are interchangeable and therefore expendable. And it instills an incentive that citizens seeking social change should use the courts, rather than the democratic process, to achieve it. For all these reasons, the Court should grant Utah's petition and reverse the Tenth Circuit.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

GENE C. SCHAERR
JOHN J. BURSCH
Counsel of Record
Special Assistant Attorneys General
PARKER DOUGLAS
Utah Federal Solicitor
STANFORD E. PURSER
Assistant Attorney General
350 North State Street
Suite 230
Salt Lake City, Utah 84114
(801) 366-0260
jbursch@utah.gov

Counsel for Petitioners

AUGUST 2014

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PUBLISH **UNITED STATES COURT OF APPEALS** **TENTH CIRCUIT**	**FILED** **United States Court of Appeals** **Tenth Circuit** **June 25, 2014** **Elisabeth A. Shumaker**

DEREK KITCHEN; MOUDI SBEITY; KAREN ARCHER; KATE CALL; LAURIE WOOD; KODY PARTRIDGE, individually, Plaintiffs - Appellees, v. GARY R. HERBERT, in his official capacity as Governor of Utah; SEAN REYES, in his official capacity as Attorney General of Utah, Defendants - Appellants, and SHERRIE SWENSEN, in her official capacity as Clerk of Salt Lake County, Defendant.	No. 13-4178

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
(D.C. No. 2:13-CV-00217-RJS)

Gene C. Schaerr, Special Assistant Attorney General, Salt Lake City, Utah (Brian L. Tarbet, Chief Deputy Attorney General, Parker Douglas, Chief of Staff and General Counsel, Stanford E. Purser, and Philip S. Lott, Assistant Utah Attorneys General, Salt Lake City, Utah, and John J. Bursch, Warner Norcross & Judd LLP, Grand Rapids, Michigan, and Monte N. Stewart, Boise, Idaho, with him on the briefs), for Defendants– Appellants.

Peggy A. Tomsic, Magleby & Greenwood PC, Salt Lake City, Utah (James E. Magleby and Jennifer Fraser Parrish, Magleby & Greenwood PC, Salt Lake City, Utah, and Kathryn D. Kendell, Shannon P. Minter, David C. Codell, National Center for Lesbian Rights, San Francisco, California, with her on the brief), for Plaintiffs–Appellees.*

* The names of all amicus curiae parties are contained in Appendix A to this Opinion.

Before **KELLY**, **LUCERO**, and **HOLMES**, Circuit Judges.

LUCERO, Circuit Judge.

Our commitment as Americans to the principles of liberty, due process of law, and equal protection of the laws is made live by our adherence to the Constitution of the United States of America. Historical challenges to these principles ultimately culminated in the adoption of the Fourteenth Amendment nearly one-and-a-half centuries ago. This Amendment extends the guarantees of due process and equal protection to every person in every State of the Union. Those very principles are at issue yet again in this marriage equality appeal brought to us by the Governor and Attorney General of the State of Utah from an adverse ruling of the district court.

We are told that because they felt threatened by state-court opinions allowing same-sex marriage, Utah legislators and—by legislature-initiated action—the citizens of the State of Utah amended their statutes and state constitution in 2004 to ensure that the State "will not recognize, enforce, or give legal effect to any law" that provides "substantially equivalent" benefits to a marriage between two persons of the same sex as are allowed for two persons of the opposite sex. Utah Code § 30-1-4.1. These laws were also intended to assure non-recognition irrespective of how such a domestic union

might be denominated, or where it may have been performed. Id. Plaintiffs challenged the constitutionality of these laws and the district court agreed with their position. Under 28 U.S.C. § 1291, we entertain the appeal of that ruling.

Our Circuit has not previously considered the validity of same-sex marriage bans. When the seed of that question was initially presented to the United States Supreme Court in 1972, the Court did not consider the matter of such substantial moment as to present a justiciable federal question. Baker v. Nelson, 409 U.S. 810 (1972) (per curiam). Since that date, the seed has grown, however. Last year the Court entertained the federal aspect of the issue in striking down § 3 of the Defense of Marriage Act ("DOMA"), United States v. Windsor, 133 S. Ct. 2675 (2013), yet left open the question presented to us now in full bloom: May a State of the Union constitutionally deny a citizen the benefit or protection of the laws of the State based solely upon the sex of the person that citizen chooses to marry?

Having heard and carefully considered the argument of the litigants, we conclude that, consistent with the United States Constitution, the State of Utah may not do so. We hold that the Fourteenth Amendment protects the fundamental right to marry, establish a family, raise children, and enjoy the full protection of a state's marital laws. A state may not deny the issuance of a marriage license to two persons, or refuse to recognize their marriage, based solely upon the sex of the persons in the marriage union. For the reasons stated in this opinion, we affirm.

I

Utah residents Derek Kitchen and Moudi Sbeity have been in a loving, committed relationship for several years. The couple lives together in Salt Lake City, where they jointly own and operate a business. Kitchen declares that Sbeity "is the man with whom I have fallen in love, the man I want to marry, and the man with whom I want to spend the rest of my life." In March 2013, Kitchen and Sbeity applied for a marriage license from the Salt Lake County Clerk's office, but were denied because they are both men. Being excluded from the institution of marriage has caused Kitchen and Sbeity to undertake a burdensome process of drawing up wills and other legal documents to enable them to make important decisions for each other. Even with these protections, however, the couple cannot access various benefits of marriage, including the ability to file joint state tax returns and hold marital property. Sbeity also states that the legal documents the couple have obtained "do not and cannot provide the dignity, respect, and esteem" of marriage. The inability to "dignify [his] relationship" through marriage, Kitchen explains, communicates to him that his relationship with Sbeity is unworthy of "respect, equal treatment, and social recognition."

Laurie Wood and Kody Partridge are also Utah residents who wish to "confirm [their] life commitment and love" through marriage. They applied for a marriage license from the Salt Lake County Clerk's office in March 2013, but were denied because they are both women. This denial

made Wood "feel like a second class citizen." The couple's inability to marry carries financial consequences. Because Partridge will be unable to obtain benefits under Wood's pension, the couple has procured additional life insurance policies. Partridge states that she and Wood face "risks and stigmas that none of [her] heterosexual married friends and family ever have to face." She points to the example of her parents, who were married for fifty-five years, observing that her father never had to worry about his ability to be present or make medical decisions when his wife became terminally ill. Wood hopes that marriage to Partridge will allow "both society and our families [to] recognize the life commitment and love we feel for each other."

Karen Archer and Kate Call are also Utah residents in a loving, committed relationship. Archer, who suffers from chronic health problems, fears that the legal documents the couple has prepared will be subject to challenge if she passes away. Her past experience surviving other partners informs this fear. Although the documents she prepared in a prior relationship served their purpose when her former partner passed, Archer was ineligible to receive her partner's military pension benefits. Seeking the security enjoyed by other married couples, Archer and Call travelled to Iowa in July 2011, where they were wed. Because they could not be married in their home state, financial constraints dictated a modest wedding unattended by family and friends. "Despite the inconvenience and sad pragmatism of our Iowa marriage," Call explains, "we needed whatever protections and security we could get for our

relationship" because of Archer's failing health. However, Utah does not recognize Archer and Call's marriage.

In March 2013, Kitchen, Sbeity, Wood, Partridge, Archer, and Call filed suit against the Governor and Attorney General of Utah and the Clerk of Salt Lake County (all in their official capacities). Plaintiffs challenged three provisions of Utah law relating to same-sex marriage. Utah Code § 30-1-2(5) includes among the marriages that are "prohibited and declared void" those "between persons of the same sex." Id. In 2004, the Utah Legislature passed § 30-1-4.1, which provides:

> (1)(a) It is the policy of this state to recognize as marriage only the legal union of a man and a woman as provided in this chapter.
>
> (b) Except for the relationship of marriage between a man and a woman recognized pursuant to this chapter, this state will not recognize, enforce, or give legal effect to any law creating any legal status, rights, benefits, or duties that are substantially equivalent to those provided under Utah law to a man and a woman because they are married.
>
> (2) Nothing in Subsection (1) impairs any contract or other rights, benefits, or duties that are enforceable independently of this section.

Id. The Legislature also referred a proposed constitutional amendment, known as Amendment 3, to Utah's voters. It states:

> (1) Marriage consists only of the legal union between a man and a woman.
>
> (2) No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect.

Utah Const. art. I, § 29; see Laws 2004, H.J.R. 25 § 1.

The State's official voter pamphlet described rulings by courts in other states striking down statutory prohibitions on same-sex marriage as inconsistent with state constitutional provisions. In the "arguments for" section, written by a state representative and a state senator, the proponents argued that the Amendment was necessary to protect against a similar state-court ruling. They posited that the proposed amendment would not "promote intolerance, hatred, or bigotry" but would instead "preserve[an] historic understanding of marriage" rooted in "government's strong interest in maintaining public morality, the justified preference for heterosexual marriage with its capacity to perpetuate the human race and the importance of raising children in that preferred relationship." Opponents of the amendment argued that it "singles out one specific group—people who are our relatives, neighbors, and co-workers—to deny them hundreds of rights and protections that other Utahns enjoy."

Amendment 3 passed with approximately 66% of the vote and became § 29 of Article I of the Utah Constitution. This opinion will refer to both of the foregoing statutes, along with the constitutional amendment, collectively as "Amendment 3."

Plaintiffs allege that Amendment 3 violates their right to due process under the Fourteenth Amendment by depriving them of the fundamental liberty to marry the person of their choice and to have such a marriage recognized. They also claim that Amendment 3 violates the Equal Protection Clause of the Fourteenth Amendment. Plaintiffs asserted their claims under 42 U.S.C. § 1983, seeking both a declaratory judgment that Amendment 3 is unconstitutional and an injunction prohibiting its enforcement.

On cross motions for summary judgment, the district court ruled in favor of the plaintiffs. It concluded that "[a]ll citizens, regardless of their sexual identity, have a fundamental right to liberty, and this right protects an individual's ability to marry and the intimate choices a person makes about marriage and family." Kitchen v. Herbert, 961 F. Supp. 2d 1181, 1204 (D. Utah 2013). The court further held that Amendment 3 denied plaintiffs equal protection because it classified based on sex and sexual orientation without a rational basis. Id. at 1206-07, 1210-15. It declared Amendment 3 unconstitutional and permanently enjoined enforcement of the challenged provisions. Id. at 1216.

Utah's Governor and Attorney General filed a timely notice of appeal and moved to stay the district court's decision. Both the district court and this court denied a stay. The Supreme Court, however, granted a stay of the district court's injunction pending final disposition of the appeal by this court.

II

We first consider the issue of standing, although it was not raised by the parties. See Dias v. City & Cnty. of Denver, 567 F.3d 1169, 1176 (10th Cir. 2009) ("[S]tanding is a component of this court's jurisdiction, and we are obliged to consider it sua sponte to ensure the existence of an Article III case or controversy."). To possess Article III standing, a plaintiff must "establish (1) that he or she has suffered an injury in fact; (2) that the injury is fairly traceable to the challenged action of the defendant; and[] (3) that it is likely that the injury will be redressed by a favorable decision." Awad v. Ziriax, 670 F.3d 1111, 1120 (10th Cir. 2012) (quotations omitted).

Plaintiffs suing public officials can satisfy the causation and redressability requirements of standing by demonstrating "a meaningful nexus" between the defendant and the asserted injury. Bronson v. Swensen, 500 F.3d 1099, 1111-12 (10th Cir. 2007). "[T]he causation element of standing requires the named defendants to possess authority to enforce the complained-of provision," id. at 1110, and "[t]he redressability prong is not met when a plaintiff seeks relief against a defendant with no

power to enforce a challenged statute," id. at 1111. "Whether the Defendants have enforcement authority is related to whether, under Ex parte Young, they are proper state officials for suit." Cressman v. Thompson, 719 F.3d 1139, 1146 n.8 (10th Cir. 2013) (citation omitted). Under Ex parte Young, a state defendant sued in his official capacity must "have some connection with the enforcement" of a challenged provision. 209 U.S. 123, 157 (1908). "An officer need not have a special connection to the allegedly unconstitutional statute; rather, he need only have a particular duty to enforce the statute in question and a demonstrated willingness to exercise that duty." Chamber of Commerce of the U.S. v. Edmondson, 594 F.3d 742, 760 (10th Cir. 2010) (quotation omitted); see also Finstuen v. Crutcher, 496 F.3d 1139, 1151 (10th Cir. 2007) ("So long as there is [some] connection [with enforcement of the act], it is not necessary that the officer's enforcement duties be noted in the act." (quotation omitted)).

We have no doubt that at least four of the plaintiffs possessed standing to sue the Salt Lake County Clerk based on their inability to obtain marriage licenses from the Clerk's office. Plaintiffs have identified several harms that flow from this denial, including financial injury. See Nova Health Sys. v. Gandy, 416 F.3d 1149, 1155 (10th Cir. 2005) (economic loss may constitute injury-in-fact). Because county clerks are responsible under Utah law for issuing marriage licenses and recording marriage certificates, Utah Code §§ 30-1-7(1) & 30-1-12(1), these plaintiffs' injuries were caused by the Clerk's office and would be cured by an injunction prohibiting the enforcement of Amendment 3.

Accordingly, the Salt Lake County Clerk possessed the requisite nexus to plaintiffs' injuries.

The Salt Lake County Clerk, however, has not appealed from the district court's order. We must therefore consider whether the Governor and Attorney General are proper appellants absent the County Clerk. See Hollingsworth v. Perry, 133 S. Ct. 2652, 2661 (2013) ("[S]tanding must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance." (quotation omitted)). In Bishop v. Oklahoma ex rel. Edmondson, 333 F. App'x 361 (10th Cir. 2009) (unpublished), we held that Oklahoma's Governor and Attorney General were not proper defendants in a challenge to that state's prohibition on same-sex marriage. Id. at 365. Because of the legal and factual differences between that case and this one, we reach the opposite conclusion as to Utah's Governor and Attorney General.

Our holding in Bishop turned on the conclusion that marriage licensing and recognition in Oklahoma were "within the administration of the judiciary." Id. The district court clerk charged with various duties related to marriage "'is judicial personnel and is an arm of the court . . . subject to the control of the Supreme Court and the supervisory control that it has passed down to the Administrative District Judge in the clerk's administrative district.'" Id. (quoting Speight v. Presley, 203 P.3d 173, 177 (Okla. 2008) (additional internal quotation omitted)). Accordingly, we concluded that "the executive branch of Oklahoma's

government has no authority to issue a marriage license or record a marriage." Id.

In Utah, marriage licenses are issued not by court clerks but by county clerks. See Utah Code §§ 17-20-4 (listing duties of county clerks) & 17-53-101 (providing for election of county clerks). The Governor and Attorney General have explicitly taken the position in this litigation that they "have ample authority to ensure that" the Salt Lake County Clerk "return[s] to her former practice of limiting marriage licenses to man-woman couples in compliance with Utah law." This assertion is supported by the Utah Code. The Governor is statutorily charged with "supervis[ing] the official conduct of all executive and ministerial officers"[1] and "see[ing] that all offices are filled and the duties thereof performed." § 67-1-1(1) & (2). In addition, he "may require the attorney general to aid any county attorney or district attorney in the discharge of his duties." § 67-1-1(7). Utah law allows an action for the removal of a county officer for "malfeasance in office" to be brought by a "county attorney, or district attorney for the county in which the officer was elected or appointed, or by the attorney general." §§ 77-6-1 & -2.

The Attorney General is required to "exercise supervisory powers over the district and county attorneys of the state in all matters pertaining to the duties of their offices" and "when required by the

[1] In her answer, the Salt Lake County Clerk stated that her duties are "purely ministerial," and that the "State of Utah controls the content of the form application to be completed by those seeking marriage licenses in the State of Utah."

public service or directed by the governor, assist any county, district, or city attorney in the discharge of his duties." § 67-5-1(6) & (8). A clerk who "knowingly issues a license for any prohibited marriage is guilty of a class A misdemeanor." § 30-1-16. Such charges would be filed by a county or district attorney under the supervision of the Attorney General. See § 17-18a-201 (district and county attorneys act as public prosecutors). And the Governor could order the Attorney General to assist in such prosecution. § 67-1-1(7).

The Governor and Attorney General have also demonstrated a "willingness to exercise" their duty to ensure clerks and other state officials enforce Amendment 3. Chamber of Commerce, 594 F.3d at 760 (quotation omitted). The record shows that the Governor coordinated state agencies' response to the district court's order, informing his cabinet:

> For those agencies that now face conflicting laws either in statute or administrative rule, you should consult with the Assistant Attorney Generals assigned to your agency on the best course to resolve those conflicts. You should also advise your analyst in [the Governor's Office of Management and Budget] of the plans for addressing the conflicting laws.
>
> Where no conflicting laws exist you should conduct business in compliance with the federal judge's ruling until such time that the current district court decision is addressed by the 10th Circuit Court.

Thus, state agencies with responsibility for the recognition of out-of-state marriages are being directed by the Governor in consultation with the Attorney General. These officials' authority over such agencies is confirmed by Utah law. For example, Plaintiffs Archer and Call, who were married in Iowa, specifically seek to file joint Utah tax returns. Although the Utah State Tax Commission is charged in the first instance with the duty "to administer and supervise the tax laws of the state," Utah Code § 59-1-210(5), the Attorney General in his constitutional role as "the legal adviser of the State officers," Utah Const. art. VII, § 16, is required by statute to offer his "opinion in writing . . . to any state officer, board, or commission," Utah Code § 67-5-1(7). The Attorney General considers his opinions to the Utah State Tax Commission, even informal ones, to be "authoritative for the purposes" of the Commission "with respect to the specific questions presented." Applicability of Sales & Use Tax to Transfer of Motor Vehicle from a Partner to a P'ship, Op. Utah Att'y Gen. 86-13 (1987), 1987 Utah AG LEXIS 15, at *22. The Attorney General is empowered to direct the Tax Commission to recognize Archer and Call's Iowa wedding, and the Commission would be legally obligated to follow that instruction and accept a joint tax return. Accordingly, Archer and Call had standing to sue the Attorney General for the injuries caused by Amendment 3's non-recognition provisions. See generally Coll v. First Am. Title Ins. Co., 642 F.3d 876, 892 (10th Cir. 2011) ("Plaintiffs must have standing to seek each form of relief in each claim." (quotation omitted)).

The same is true with respect to the Governor. Utah's "executive power" is "vested in the Governor." Utah Const. art. VII, § 5. In the exercise of that power, the Governor appoints the state's tax commissioners and has the power to initiate proceedings to remove them from office. Utah Code § 59-1-201. Shortly after the Governor sent the above-quoted message to state agencies, the Tax Commission issued a Tax Notice stating that "[s]ame-sex couples who are eligible to file a joint federal income tax return and who elect to file jointly, may also file a joint 2013 Utah Individual Income Tax return." Utah State Tax Commission, Individual Income Tax Returns for Same-Sex Couples for Tax Year 2013 (Jan. 15, 2014) (available at http://tax.utah.gov/notice/2014-01-15.pdf). The Tax Notice refers to the district court's injunction, noting that a stay of that order had not been granted as of December 31, 2013. Id. Thus, one of the injuries explicitly cited by plaintiffs Archer and Call has been at least temporarily redressed by the district court's decision and actions taken in response to it by the Governor after consultation with the Attorney General.

We conclude that the Governor's and the Attorney General's actual exercise of supervisory power and their authority to compel compliance from county clerks and other officials provide the requisite nexus between them and Amendment 3. Although "it does not suffice if the injury complained of is the result of the independent action of some third party not before the court, that does not exclude injury produced by determinative or coercive effect upon the action of someone else." Bennett v. Spear, 520 U.S.

154, 169 (1997) (quotation, alteration, and emphasis omitted). And a state official is a proper defendant if he is "responsible for general supervision of the administration by the local . . . officials" of a challenged provision. Papasan v. Allain, 478 U.S. 265, 282 n.14 (1986) (quotation omitted). This is so even if the state officials are "not specifically empowered to ensure compliance with the statute at issue," if they "clearly have assisted or currently assist in giving effect to the law." Prairie Band Potawatomi Nation v. Wagnon, 476 F.3d 818, 828 (10th Cir. 2007) (footnote omitted).

Having concluded that the Governor and Attorney General were properly made defendants below, we hold that they have standing to appeal the district court's decision without participation of the Salt Lake County Clerk. See Finstuen, 496 F.3d at 1151 ("Nothing in Ex Parte Young requires that any appeal of a lower court's judgment involve all named state defendants."). As unsuccessful parties below, both appellants were "injured by the judgment sought to be reviewed." Parr v. United States, 351 U.S. 513, 516 (1956); see also Concorde Res., Inc. v. Woosley (In re Woosley), 855 F.2d 687, 688 (10th Cir. 1988) ("Ordinarily, only a litigant who is a party below and who is aggrieved by the judgment or order may appeal." (quotation and emphasis omitted)). Both the Governor and the Attorney General are subject to the district court's injunction prohibiting them from enforcing Amendment 3. See Kitchen, 961 F. Supp. 2d at 1216; cf. Hollingsworth, 133 S. Ct. at 2662 (concluding appellants lacked standing to appeal because "the District Court had not ordered [the

intervenors] to do or refrain from doing anything"). We thus conclude that standing issues do not prevent us from considering this appeal.

III

In 1972, the Supreme Court summarily "dismissed for want of substantial federal question" an appeal from the Minnesota Supreme Court upholding a ban on same-sex marriage. Baker, 409 U.S. 810. The state court considered "whether a marriage of two persons of the same sex is authorized by state statutes and, if not, whether state authorization is constitutionally compelled." Baker v. Nelson, 191 N.W.2d 185, 185 (Minn. 1971). It concluded that the statute used the term "marriage" as "one of common usage, meaning the state of union between persons of the opposite sex." Id. at 185-86. The state court further reasoned 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" and that "[t]he due process clause of the Fourteenth Amendment is not a charter for restructuring [the institution of marriage] by judicial legislation." Id. at 186. As to the Equal Protection Clause, the court ruled that "[t]here is no irrational or invidious discrimination" because "in commonsense and in a constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex." Id. at 187.

The Supreme Court has held that "summary dismissals are, of course, to be taken as rulings on

the merits, in the sense that they rejected the specific challenges presented in the statement of jurisdiction and left undisturbed the judgment appealed from." Washington v. Confederated Bands & Tribes of Yakima Indian Nation, 439 U.S. 463, 477 n.20 (1979) (quotation and citation omitted). Summary dismissals

> do not, however, have the same precedential value here as does an opinion of this Court after briefing and oral argument on the merits. A summary dismissal of an appeal represents no more than a view that the judgment appealed from was correct as to those federal questions raised and necessary to the decision. It does not, as we have continued to stress, necessarily reflect our agreement with the opinion of the court whose judgment is appealed.

Id. (citations omitted); see Neely v. Newton, 149 F.3d 1074, 1079 (10th Cir. 1998) ("The Supreme Court has cautioned that for purposes of determining the binding effect of a summary action, the action should not be interpreted as adopting the rationale of the lower court, but rather as affirming only the judgment of that court."). "Summary affirmances and dismissals for want of a substantial federal question without doubt reject the specific challenges presented in the statement of jurisdiction." Mandel v. Bradley, 432 U.S. 173, 176 (1977). And "[t]hey do prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions." Id. "[I]f the Court has branded a question as unsubstantial, it

remains so except when doctrinal developments indicate otherwise." Hicks v. Miranda, 422 U.S. 332, 344 (1975) (quotation omitted).[2] The district court concluded that "doctrinal developments" had superseded Baker. Kitchen, 961 F. Supp. 2d at 1194-95. We agree.

Two landmark decisions by the Supreme Court have undermined the notion that the question presented in Baker is insubstantial. Baker was decided before the Supreme Court held that "intimate conduct with another person . . . can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice." Lawrence v. Texas, 539 U.S. 558, 567 (2003). The decision in Baker also pre-dates the Court's opinion in Windsor. Several courts held prior to Windsor that Baker controlled the same-sex marriage question. See, e.g., Massachusetts v. U.S. Dep't of Health & Human Servs., 682 F.3d 1, 8 (1st Cir. 2012) ("Baker does not resolve our own case

[2] Utah argues that "doctrinal developments" are insufficient to undermine a summary disposition, asserting that the Court overruled Hicks in Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989), in stating that "[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." Id. at 484; see also Conover v. Aetna U.S. Healthcare, Inc., 320 F.3d 1076, 1078 n.2 (10th Cir. 2003) ("[T]he Supreme Court instructed us to avoid concluding its more recent cases have, by implication, overruled an earlier precedent." (quotation omitted)). But both of these cases dealt with opinions on the merits. We do not read them as overruling the doctrinal developments rule as to summary dispositions.

but it does limit the arguments to ones that do not presume or rest on a constitutional right to same-sex marriage."); Donaldson v. State, 292 P.3d 364, 371 n.5 (Mont. 2012) ("The U.S. Supreme Court's action in Baker has been described as binding precedent." (citations omitted)). However, since Windsor was decided, nearly every federal court to have considered the issue—including the district court below—has ruled that Baker does not control. See Wolf v. Walker, No. 14-cv-64-bbc, 2014 U.S. Dist. LEXIS 77125, at *10-18 (W.D. Wis. June 6, 2014); Whitewood v. Wolf, No. 1:13-cv-1861, 2014 U.S. Dist. LEXIS 68771, at *14-18 (M.D. Pa. May 20, 2014); Geiger v. Kitzhaber, Nos. 6:13-cv-01834-MC & 6:13-cv02256-MC, 2014 U.S. Dist. LEXIS 68171, at *7 n.1 (D. Or. May 19, 2014); Latta v. Otter, No. 1:13-cv-00482-CWD, 2014 U.S. Dist. LEXIS 66417, at *28 (D. Idaho May 13, 2014); DeBoer v. Snyder, No. 12-CV-10285, 2014 U.S. Dist. LEXIS 37274, at *46 n.6 (E.D. Mich. Mar. 21, 2014); De Leon v. Perry, No. SA-13-CA-00982-OLG, 2014 U.S. Dist. LEXIS 26236, at *28-29 (W.D. Tex. Feb. 26, 2014); Bostic v. Rainey, 970 F. Supp. 2d 456, 470 (E.D. Va. 2014); McGee v. Cole, No. 3:13-24068, 2014 U.S. Dist. LEXIS 10864, at *32 (S.D.W. Va. Jan. 29, 2014); Bishop v. United States ex rel. Holder, 962 F. Supp. 2d 1252, 1277 (N.D. Okla. 2014); Kitchen, 961 F. Supp. 2d at 1195. But see Merritt v. Att'y Gen., No. 13-215-BAJ-SCR, 2013 U.S. Dist. LEXIS 163235, at *2 (M.D. La. Oct. 2, 2013), magistrate judge report adopted by 2013 U.S. Dist. LEXIS 162583 (M.D. La. Nov. 13, 2013) (citing Baker as controlling in dismissing pro se complaint, but not considering whether doctrinal developments had undermined Baker).

We acknowledge that the question presented in Windsor is not identical to the question before us. DOMA interfered with New York's decision "that same-sex couples should have the right to marry and so live with pride in themselves and their union and in a status of equality with all other married persons," a decision designed to "correct what its citizens and elected representatives perceived to be an injustice that they had not earlier known or understood." Windsor, 133 S. Ct. at 2689. The "State used its historic and essential authority to define the marital relation in this way," and "its role and its power in making the decision enhanced the recognition, dignity, and protection of the class in their own community." Id. at 2692. Because DOMA used this "state-defined class for the opposite purpose—to impose restrictions and disabilities," the Court framed the dispositive question as "whether the resulting injury and indignity is a deprivation of an essential part of the liberty protected by the Fifth Amendment." Id. Although it is true that Windsor resolved tension between a state law permitting same-sex marriage and a federal non-recognition provision, the Court's description of the issue indicates that its holding was not solely based on the scope of federal versus state powers.

Appellants stress the presence of these federalism concerns in Windsor, which, as the Chief Justice noted in dissent, "come into play on the other side of the board in . . . cases about the constitutionality of state" bans on same-sex marriage. Id. at 2697 (Roberts, C.J., dissenting). The Windsor majority stated repeatedly that the

regulation of marriage has traditionally been a state function. See id. at 2691 ("State laws defining and regulating marriage, of course, must respect the constitutional rights of persons, but, subject to those guarantees, regulation of domestic relations is an area that has long been regarded as a virtually exclusive province of the States." (quotation and citation omitted)); id. ("The states, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce . . . ." (quotation and alterations omitted)); id. ("Consistent with this allocation of authority, the Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations."). Appellants urge us to conclude that the "principles of federalism that Windsor would later reaffirm" require us to adhere to the Court's summary affirmance in Baker.

However, the Windsor Court also explained that the federal government "in enacting discrete statutes, can make determinations that bear on marital rights and privileges." Id. at 2690. For example, Congress can preempt state marriage laws dealing with insurance proceeds in a federal program, reject sham marriages for immigration purposes even if the marriage is valid under state law, and recognize common-law marriage for the purpose of establishing income-based Social Security benefit eligibility regardless of state law. Id. The Windsor Court concluded it was "unnecessary to decide whether" DOMA "is a violation of the Constitution because it disrupts the federal balance." Id. at 2692.

Rather than relying on federalism principles, the Court framed the question presented as whether the "injury and indignity" caused by DOMA "is a deprivation of an essential part of the liberty protected by the Fifth Amendment." Id. And the Court answered that question in the affirmative:

> The liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws. While the Fifth Amendment itself withdraws from Government the power to degrade or demean in the way this law does, the equal protection guarantee of the Fourteenth Amendment makes that Fifth Amendment right all the more specific and all the better understood and preserved.

Id. at 2695 (citations omitted).

"The history of DOMA's enactment and its own text," the Court concluded, "demonstrate that interference with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power, was more than an incidental effect of the federal statute. It was its essence." Id. at 2693. DOMA "impose[d] a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages . . . ." Id. The statute "undermine[d] both the public and private significance of state-sanctioned same-sex marriages" by telling "those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition." Id. at 2694. And it

"humiliate[d] tens of thousands of children now being raised by same-sex couples" by making "it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." Id. Because DOMA's "differentiation demeans [same-sex] couple[s], whose moral and sexual choices the Constitution protects, see Lawrence, 539 U.S. 558, and whose relationship[s] the State has sought to dignify," the Court held that the statute violated the Fifth Amendment. Windsor, 133 S. Ct. at 2694-95.

The Windsor majority expressly cabined its holding to state-recognized marriages, id. at 2696, and is thus not directly controlling. But the similarity between the claims at issue in Windsor and those asserted by the plaintiffs in this case cannot be ignored. This is particularly true with respect to plaintiffs Archer and Call, who seek recognition by Utah of a marriage that is valid in the state where it was performed. More generally, all six plaintiffs seek equal dignity for their marital aspirations. All claim that the state's differential treatment of them as compared to opposite-sex couples demeans and undermines their relationships and their personal autonomy. Although reasonable judges may disagree on the merits of the same-sex marriage question, we think it is clear that doctrinal developments foreclose the conclusion that the issue is, as Baker determined, wholly insubstantial.[3]

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[3] Some have suggested that Baker implicates a court's subject matter jurisdiction. See, e.g., Bostic, 970 F. Supp. 2d at 469 ("Defendants here contend that because the Supreme Court found a substantial federal question lacking in Baker,

IV

We turn now to the merits of the issue before us. We must first decide whether the liberty interest protected in this case includes the right to marry, and whether that right is limited, as appellants contend, to those who would wed a person of the opposite sex.

The district court granted summary judgment in favor of the plaintiffs. We review a grant of summary judgment de novo. Hobbs ex rel. Hobbs v. Zenderman, 579 F.3d 1171, 1179 (10th Cir. 2009). A party is entitled to summary judgment only if, viewing the evidence in the light most favorable to the non-moving party, the movant is entitled to judgment as a matter of law. Id.; see Fed. R. Civ. P. 56(a).

"We review the decision to grant a permanent injunction for abuse of discretion." FTC v. Accusearch Inc., 570 F.3d 1187, 1201 (10th Cir. 2009). To obtain a permanent injunction, a plaintiff must show: "(1) actual success on the merits; (2) irreparable harm

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this Court is precluded from exercising jurisdiction."). Given our conclusion that subsequent doctrinal developments have rendered Baker no longer binding, such an assertion necessarily fails. We further note that because plaintiffs have filed plausible federal constitutional claims pursuant to 42 U.S.C. § 1983, which specifically allows such claims to be filed in federal court, they have presented a federal question sufficient to confer subject matter jurisdiction. See Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 312 (2005) (28 U.S.C. § 1331 "is invoked by and large by plaintiffs pleading a cause of action created by federal law (e.g., claims under 42 U.S.C. § 1983)").

unless the injunction is issued; (3) the threatened injury outweighs the harm that the injunction may cause the opposing party; and (4) the injunction, if issued, will not adversely affect the public interest." Sw. Stainless, LP v. Sappington, 582 F.3d 1176, 1191 (10th Cir. 2009). Because appellants have challenged only the merits aspect of the district court's decision, we do not consider the remaining factors. See Bronson, 500 F.3d at 1104 ("[T]he omission of an issue in an opening brief generally forfeits appellate consideration of that issue.").

A

"[A]ll fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States." Planned Parenthood v. Casey, 505 U.S. 833, 846-47 (1992) (quotation omitted). The doctrine of substantive due process extends protections to fundamental rights "in addition to the specific freedoms protected by the Bill of Rights." Washington v. Glucksberg, 521 U.S. 702, 720 (1997); see also Casey, 505 U.S. at 848 ("Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects."). To qualify as "fundamental," a right must be "objectively, deeply rooted in this Nation's history and tradition . . . and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [it] were sacrificed." Glucksberg, 521 U.S. at 720-21 (quotations omitted).

1

There can be little doubt that the right to marry is a fundamental liberty. The marital relationship is

> older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects.

Griswold v. Connecticut, 381 U.S. 479, 486 (1965). The Court has long recognized that marriage is "the most important relation in life." Maynard v. Hill, 125 U.S. 190, 205 (1888). "Without doubt," the liberty protected by the Fourteenth Amendment includes the freedom "to marry, establish a home[,] and bring up children." Meyer v. Nebraska, 262 U.S. 390, 399 (1923); see also Loving v. Virginia, 388 U.S. 1, 12 (1967) ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.").

Appellants contend that these precedents and others establish only that opposite-sex marriage is a fundamental right. They highlight the Court's admonition to undertake a "careful description of the asserted fundamental liberty interest." Glucksberg, 521 U.S. at 721 (quotation omitted). "This approach tends to rein in the subjective

elements that are necessarily present in due-process judicial review." Id.; see also Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992) (courts must exercise "utmost care" and be "reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended"). A right to same-sex marriage cannot be deeply rooted in our tradition, appellants argue, because "until recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage." Windsor, 133 S. Ct. at 2689; see also id. at 2715 (Alito, J., dissenting) ("In this country, no State permitted same-sex marriage until the Massachusetts Supreme Judicial Court held in 2003 that limiting marriage to opposite-sex couples violated the State Constitution.").

But "the right to marry is of fundamental importance for all individuals." Zablocki v. Redhail, 434 U.S. 374, 384 (1978). In numerous cases, the Court has discussed the right to marry at a broader level of generality than would be consistent with appellants' argument. The Loving Court concluded that a state statute voiding marriages between white and non-white participants violated the Due Process Clause. 388 U.S. at 4 n.3, 12.

> Marriage is one of the basic civil rights of man, fundamental to our very existence and survival. To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes,

> classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State.

Id. at 12 (quotation and citation omitted).

As the Court later explained, "[m]arriage is mentioned nowhere in the Bill of Rights and interracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause in Loving v. Virginia." Casey, 505 U.S. at 847-48 (citation omitted); see also Lawrence, 539 U.S. at 577-78 ("[N]either history nor tradition could save a law prohibiting miscegenation from constitutional attack." (quotation omitted)). Thus the question as stated in Loving, and as characterized in subsequent opinions, was not whether there is a deeply rooted tradition of interracial marriage, or whether interracial marriage is implicit in the concept of ordered liberty; the right at issue was "the freedom of choice to marry." Loving, 388 U.S. at 12.

Similarly, Zablocki considered an equal protection challenge to a state law barring individuals in

arrearage of child support obligations from marrying. Because "the right to marry is of fundamental importance" and "the classification at issue . . . significantly interfere[d] with the exercise of that right," the Court determined that "critical examination of the state interests advanced in support of the classification [wa]s required." Zablocki, 434 U.S. at 383 (quotation omitted). It cautioned that not "every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed." Id. at 386. But the statute at issue was impermissible because it constituted a "serious intrusion into [the] freedom of choice in an area in which we have held such freedom to be fundamental" and could not "be upheld unless it [wa]s supported by sufficiently important state interests and [wa]s closely tailored to effectuate only those interests." Id. at 387, 388. The right at issue was characterized as the right to marry, not as the right of child-support debtors to marry.

2

It is true that both Loving and Zablocki involved opposite-sex couples. Such pairings, appellants remind us, may be naturally procreative—a potentially meaningful consideration given that the Court has previously discussed marriage and procreation together. See Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541 (1942) ("Marriage and procreation are fundamental

to the very existence and survival of the race."); Carey v. Population Servs. Int'l, 431 U.S. 678, 684-85 (1977) ("[I]t it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions relating to marriage, procreation, contraception, family relationships, and child rearing and education. The decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices." (quotation omitted)).

But the Court has also described the fundamental right to marry as separate from the right to procreate, including in Glucksberg itself, the case upon which appellants' fundamental-right argument turns. See Glucksberg, 521 U.S. at 720 (describing Loving as a right-to-marry case and Skinner as a right-to-procreate case); accord M.L.B. v. S.L.J., 519 U.S. 102, 116 (1996) (same). Appellants' contention that the right to marriage is fundamental because of its procreative potential is also undercut by Turner v. Safley, 482 U.S. 78 (1987).

In Turner, the Court invalidated a prison rule barring inmates from marrying unless a prison superintendent found compelling reasons for the marriage. Id. at 81-82. "[G]enerally only a pregnancy or the birth of an illegitimate child would be considered a compelling reason." Id. at 82. Thus, the challenged rule operated to bar inmates who had not procreated from marrying. The Court began its analysis of the marriage restriction by dismissing the argument that "the rule does not deprive prisoners of a constitutionally protected right" even though

"the decision to marry is a fundamental right" because "a different rule should obtain in a prison forum." Id. at 94-95 (quotation and ellipses omitted). Despite the "substantial restrictions [imposed] as a result of incarceration," the Court concluded, inmates could not be denied the fundamental right of marriage simply because of their imprisonment. Id. at 95. The right at issue was never framed as "inmate marriage"; the Court simply asked whether the fact of incarceration made it impossible for inmates to benefit from the "important attributes of marriage." Id.; see Latta, 2014 U.S. Dist. LEXIS 66417, at *37 ("Loving was no more about the 'right to interracial marriage' than Turner was about the 'prisoner's right to marry' or Zablocki was about the 'dead-beat dad's right to marry.' Even in cases with such vastly different facts, the Supreme Court has consistently upheld the right to marry, as opposed to a sub-right tied to the facts of the case."); Obergefell v. Wymyslo, 962 F. Supp. 2d 968, 982 n.10 (S.D. Ohio 2013) ("In individual cases regarding parties to potential marriages with a wide variety of characteristics, the Supreme Court consistently describes a general 'fundamental right to marry' rather than 'the right to interracial marriage,' 'the right to inmate marriage,' or 'the right of people owing child support to marry.'").

The Turner Court's description of the "important attributes of marriage [that] remain . . . after taking into account the limitations imposed by prison life," 482 U.S. at 95, is relevant to the case at bar:

> First, inmate marriages, like others, are expressions of emotional support and public commitment. These elements are an important and significant aspect of the marital relationship. In addition, many religions recognize marriage as having spiritual significance; for some inmates and their spouses, therefore, the commitment of marriage may be an exercise of religious faith as well as an expression of personal dedication. Third, most inmates eventually will be released by parole or commutation, and therefore most inmate marriages are formed in the expectation that they ultimately will be fully consummated. Finally, marital status often is a pre-condition to the receipt of government benefits (e.g., Social Security benefits), property rights (e.g., tenancy by the entirety, inheritance rights), and other, less tangible benefits (e.g., legitimation of children born out of wedlock). These incidents of marriage, like the religious and personal aspects of the marriage commitment, are unaffected by the fact of confinement or the pursuit of legitimate corrections goals.

Id. at 95-96. The Court ruled that "these remaining elements are sufficient to form a constitutionally protected marital relationship in the prison context" even under the "reasonable relationship test" applicable to prison regulations. Id. at 96-97.[4]

[4] The Court distinguished its prior summary affirmance of Johnson v. Rockefeller, 365 F. Supp. 377 (S.D.N.Y. 1973), which upheld a prohibition on marriage for inmates serving a life

As the Turner opinion highlights, the importance of marriage is based in great measure on "personal aspects" including the "expression[] of emotional support and public commitment." Id. at 95-96. This conclusion is consistent with the Court's other pronouncements on the freedom to marry, which focus on the freedom to choose one's spouse. See Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-40 (1974) ("This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."); see also Hodgson v.

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sentence. Turner, 482 U.S. at 96; see Butler v. Wilson, 415 U.S. 953 (1974) (per curiam) (summary affirmance). Appellants argue that this distinction shows that only those individuals who can procreate have a fundamental right to marry, but the Turner Court did not rely on procreation in distinguishing the summary affirmance in Butler, holding instead that "importantly, denial of the right was part of the punishment for crime" and citing a concurrence for the proposition that the "asserted governmental interest of punishing crime [was] sufficiently important to justify deprivation of [the] right." 482 U.S. at 96. We acknowledge that the three-judge panel in Johnson did mention the impossibility of a life-incarcerated prisoner participating in the "begetting and raising of children," which is described (along with "cohabitation" and "sexual intercourse") as among "the aspects of marriage which make it one of the basic civil rights of man." 365 F. Supp. at 380. But "[b]ecause a summary affirmance is an affirmance of the judgment only, the rationale of the affirmance may not be gleaned solely from the opinion below." Turner, 482 U.S. at 96 (quotation omitted). We thus cannot read the summary affirmance in Butler as standing for the proposition that procreation is an essential aspect of the marriage relationship.

Minnesota, 497 U.S. 417, 435 (1990) (plurality opinion)[5] ("[T]he regulation of constitutionally protected decisions, such as where a person shall reside or whom he or she shall marry, must be predicated on legitimate state concerns other than disagreement with the choice the individual has made."); Roberts v. U.S. Jaycees, 468 U.S. 609, 620 (1984) ("[T]he Constitution undoubtedly imposes constraints on the State's power to control the selection of one's spouse . . . ."); Carey, 431 U.S. at 684-85 ("[A]mong the decisions that an individual may make without unjustified government interference are personal decisions relating to marriage . . . ." (quotation omitted)). The Turner Court also highlighted the role of marriage in allowing its participants to gain access to legal and financial benefits they would otherwise be denied. 482 U.S. at 96.

We must reject appellants' efforts to downplay the importance of the personal elements inherent in the institution of marriage, which they contend are "not the principal interests the State pursues by regulating marriage." Rather than being "[m]utually exclusive" of the procreative potential of marriage, these freedoms—to choose one's spouse, to decide whether to conceive or adopt a child, to publicly proclaim an enduring commitment to remain together through thick and thin—reinforce the childrearing family structure. Further, such freedoms support the dignity of each person, a factor

[5] Hodgson was a splintered decision. Justice Stevens delivered the opinion of the Court as to certain portions of his writing, but the quotation that follows is from a section joined only by Justice Brennan.

emphasized by the Windsor Court. See 133 S. Ct. at 2692 ("The State's decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import."); id. (New York's "decision enhanced the recognition, dignity, and protection of the class"); id. ("By its recognition of the validity of same-sex marriages performed in other jurisdictions and then by authorizing same-sex unions and same-sex marriages, New York sought to give further protection and dignity to that bond."); id. (plaintiff's relationship was "deemed by the State worthy of dignity in the community equal with all other marriages").

Of course, the Windsor decision dealt with federal recognition of marriages performed under state law. But with respect to plaintiffs Archer and Call, who were married in Iowa and whose marriage Utah will not recognize under Amendment 3, the analogy to Windsor is particularly apt. Amendment 3's non-recognition provision, like DOMA,

> contrives to deprive some couples married under the laws of [another] State, but not other couples, of both rights and responsibilities. . . . By this dynamic [Amendment 3] undermines both the public and private significance of state-sanctioned same-sex marriages; for it tells those couples, and all the world, that their otherwise valid marriages are unworthy of [Utah's] recognition. . . . The differentiation demeans the couple, whose moral and sexual choices the Constitution protects.

Id. at 2694.

In light of Windsor, we agree with the multiple district courts that have held that the fundamental right to marry necessarily includes the right to remain married. See Latta, 2014 U.S. Dist. LEXIS 66417, at *40 ("Idaho's Marriage Laws render the Plaintiff couples legal strangers, stripping them of the choice to marry or remain married in the state they call home. Therefore, Idaho's Marriage Laws impermissibly infringe on Plaintiffs' fundamental right to marry."); Henry v. Himes, No. 1:14-cv-129, 2014 U.S. Dist. LEXIS 51211, at *22 (S.D. Ohio Apr. 14, 2014) ("There are a number of fundamental rights and/or liberty interests protected by the Due Process clause that are implicated by the marriage recognition ban, including the right to marry, the right to remain married, and the right to parental autonomy." (footnote omitted)); De Leon, 2014 U.S. Dist. LEXIS 26236, at *66 ("[B]y declaring existing, lawful same-sex marriages void and denying married couples the rights, responsibilities, and benefits of marriage, Texas denies same-sex couples who have been married in other states their due process."); Obergefell, 962 F. Supp. 2d at 978 ("The right to remain married is . . . properly recognized as one that is a fundamental liberty interest appropriately protected by the Due Process Clause of the United States Constitution.").[6]

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[6] Appellants contend that § 2 of DOMA forecloses any challenge to the non-recognition provisions of Amendment 3. However, they raise this issue only in a footnote and in conclusory fashion. See In re C.W. Mining Co., 740 F.3d 548, 564 (10th Cir. 2014) ("[A]rguments raised in a perfunctory

And although we acknowledge that state recognition serves to "enhance[]" the interests at stake, Windsor, 133 S. Ct. at 2692, surely a great deal of the dignity of same-sex relationships inheres in the loving bonds between those who seek to marry and the personal autonomy of making such choices. As the Court held in Lawrence, several years before discussing the state recognition issues present in Windsor,

> adults may choose to enter upon [an intimate] relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.

539 U.S. at 567.

Appellants' assertion that the right to marry is fundamental because it is linked to procreation is further undermined by the fact that individuals have

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manner, such as in a footnote, are waived." (quotation and emphasis omitted)). Because we conclude that marriage is a fundamental right and the state's arguments for restricting it to opposite-sex couples fail strict scrutiny, appellants' arguments regarding § 2 of DOMA also fail on the merits. Congress cannot authorize a state to violate the Fourteenth Amendment. See Graham v. Richardson, 403 U.S. 365, 382 (1971) ("Congress does not have the power to authorize the individual States to violate the Equal Protection Clause.").

a fundamental right to choose against reproduction. "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (emphasis omitted); see also Griswold, 381 U.S. at 485-86 (recognizing right of married individuals to use contraception).

The Court has repeatedly referenced the raising of children—rather than just their creation—as a key factor in the inviolability of marital and familial choices. See, e.g., Carey, 431 U.S. at 685 ("child rearing and education" decisions protected from "unjustified government interference" (quotation omitted)); Moore v. City of East Cleveland, 431 U.S. 494, 505 (1977) (plurality opinion) ("[d]ecisions concerning child rearing" have been "recognized as entitled to constitutional protection"); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925) (discussing "the liberty of parents and guardians to direct the upbringing and education of children under their control"); Meyer, 262 U.S. at 399 (liberty protected by the Due Process Clause includes right "to marry, establish a home[,] and bring up children"). Although cohabitating same-sex couples are prohibited from jointly adopting children under Utah law as a result of the same-sex marriage ban, Utah Code § 78B-6-117(3), the record shows that nearly 3,000 Utah children are being raised by same-sex couples. Thus childrearing, a liberty closely related to the right to

marry, is one exercised by same-sex and opposite-sex couples alike, as well as by single individuals.[7]

Children of same-sex couples may lack a biological connection to at least one parent, but "biological relationships are not [the] exclusive determina[nt] of the existence of a family." Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 843 (1977). "[T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in promoting a way of life through the instruction of children." Id. at 844 (quotation omitted); see also Utah Code § 78B-6-139 (granting adoptive parents all rights and duties of biological parents). As the Court in Windsor held, restrictions on same-sex marriage "humiliate[] tens of thousands of children now being raised by same-sex couples" and "make[] it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." 133 S. Ct. at 2694. Such statutes "bring[] financial harm to children of same-sex couples . . . raise[] the cost of health care for families by taxing health benefits provided by employers to their workers' same-sex spouses" and "den[y] or reduce[] benefits allowed to

[7] Utah also permits adoption by unmarried, non-cohabitating individuals if "it is in the best interests of the child to place the child with a single person." Utah Code § 78B-6-117(4)(e). But any person who is cohabitating "in a relationship that is not a legally valid and binding marriage under the laws of this state," § 78B-6-117(3), may not adopt a child, with no explicit exception for the child's best interest.

families upon the loss of a spouse and parent, benefits that are an integral part of family security." Id. at 2695. These laws deny to the children of same-sex couples the recognition essential to stability, predictability, and dignity. Read literally, they prohibit the grant or recognition of any rights to such a family and discourage those children from being recognized as members of a family by their peers.

Appellants urge us to conclude that a court cannot determine whether there is a right to marriage without first defining the institution. They also say that the term "marriage" by its nature excludes same-sex couples. Glucksberg requires us to develop a "careful description of the asserted fundamental liberty interest," relying on "[o]ur Nation's history, legal traditions, and practices [to] provide the crucial guideposts for responsible decisionmaking." 521 U.S. at 721 (quotation omitted). But we cannot conclude that the fundamental liberty interest in this case is limited to the right to marry a person of the opposite sex. As we have discussed, the Supreme Court has traditionally described the right to marry in broad terms independent of the persons exercising it. The Court's other substantive due process cases similarly eschew a discussion of the right-holder in defining the scope of the right. In Glucksberg, for example, the Court framed the question presented as "whether the 'liberty' specially protected in the Due Process Clause includes a right to commit suicide which itself includes a right to assistance in doing so." 521 U.S. at 723 (footnote omitted). The Court's formulation implicitly rejected respondents'

framing of the claimed liberty as exercised by a specific class of persons: "Whether the Fourteenth Amendment's guarantee of liberty protects the decision of a mentally competent, terminally ill adult to bring about impending death in a certain, humane, and dignified manner." Br. of Resp't at i, Glucksberg, 521 U.S. 702 (No. 96-110) (emphasis added).

Prior to the Windsor decision, several courts concluded that the well-established right to marry eo ipso cannot be exercised by those who would choose a spouse of the same sex. See, e.g., Jackson v. Abercrombie, 884 F. Supp. 2d 1065, 1094-98 (D. Haw. 2012) ("[T]he right at issue here is an asserted new right to same-sex marriage."); Andersen v. King Cnty., 138 P.3d 963, 979 (Wash. 2006) (en banc) ("Plaintiffs have not established that at this time the fundamental right to marry includes the right to marry a person of the same sex."); Hernandez v. Robles, 855 N.E.2d 1, 10 (N.Y. 2006) ("[B]y defining marriage as it has, the New York Legislature has not restricted the exercise of a fundamental right."). We nonetheless agree with plaintiffs that in describing the liberty interest at stake, it is impermissible to focus on the identity or class-membership of the individual exercising the right. See De Leon, 2014 U.S. Dist. LEXIS 26236, at *58-59 (a state "cannot define marriage in a way that denies its citizens the freedom of personal choice in deciding whom to marry, nor may it deny the same status and dignity to each citizen's decision" (quotations omitted)). "Simply put, fundamental rights are fundamental rights. They are not defined in terms of who is entitled to exercise

them." Hernandez, 855 N.E.2d at 24 (Kaye, C.J., dissenting); see also Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 972-73 (Mass. 2003) (Greaney, J., concurring) ("To define the institution of marriage by the characteristics of those to whom it always has been accessible, in order to justify the exclusion of those to whom it never has been accessible, is conclusory and bypasses the core question . . . ."). Plaintiffs seek to enter into legally recognized marriages, with all the concomitant rights and responsibilities enshrined in Utah law. They desire not to redefine the institution but to participate in it.

Appellants' assertion that plaintiffs are excluded from the institution of marriage by definition is wholly circular. Nothing logically or physically precludes same-sex couples from marrying, as is amply demonstrated by the fact that many states now permit such marriages. See Bostic, 970 F. Supp. 2d at 473 ("Gay and lesbian individuals share the same capacity as heterosexual individuals to form, preserve and celebrate loving, intimate and lasting relationships."). Appellants' reliance on the modifier "definitional" does not serve a meaningful function in this context. To claim that marriage, by definition, excludes certain couples is simply to insist that those couples may not marry because they have historically been denied the right to do so. One might just as easily have argued that interracial couples are by definition excluded from the institution of marriage. But "neither history nor tradition could save a law prohibiting miscegenation from constitutional attack." Lawrence, 539 U.S. at 577-78 (quotation

omitted); see also Williams v. Illinois, 399 U.S. 235, 239 (1970) ("[N]either the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack . . . ."); In re Marriage Cases, 183 P.3d 384, 451 (Cal. 2008) ("[E]ven the most familiar and generally accepted of social practices and traditions often mask an unfairness and inequality that frequently is not recognized or appreciated by those not directly harmed by those practices or traditions."), superseded by constitutional amendment as stated in Strauss v. Horton, 207 P.3d 48, 59 (Cal. 2009).

Our conclusion that we are not required to defer to Utah's characterization of its ban on same-sex marriage as a "definition" is reinforced by the Court's opinion in Windsor. Section 3 of DOMA, which the Court invalidated, "amend[ed] the Dictionary Act . . . of the United States Code to provide a federal definition of 'marriage' and 'spouse.'" Windsor, 133 S. Ct. at 2683. In relevant part, the statute read: "'[T]he word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.'" Id. (quoting 1 U.S.C. § 7). Appellants repeatedly assert that Amendment 3 simply defines marriage, at one point contrasting "the traditional definition of marriage" with "the anti-miscegenation laws invalidated in Loving." They contend that "Utah's marriage laws merely define marriage within its borders." The Court's holding in Windsor demonstrates that a provision labeled a "definition" is not immune from constitutional scrutiny. We see

no reason to allow Utah's invocation of its power to "define the marital relation," Windsor, 133 S. Ct. at 2692, to become "a talisman, by whose magic power the whole fabric which the law had erected . . . is at once dissolved," Bank of the U.S. v. Dandridge, 25 U.S. (12 Wheat.) 64, 113 (1827) (Marshall, C.J., dissenting).

Whether a state has good reason to exclude individuals from the marital relationship based on a specific characteristic certainly comes into play in determining if the classification survives the appropriate level of scrutiny. Even when a fundamental right is impinged, "[s]trict scrutiny is not 'strict in theory, but fatal in fact.'" Grutter v. Bollinger, 539 U.S. 306, 326 (2003) (quoting Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 237 (1995)). But the challenged classification cannot itself define the scope of the right at issue. The judiciary's "obligation is to define the liberty of all." Casey, 505 U.S. at 850. Although courts may be tempted "to suppose that the Due Process Clause protects only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified . . . . such a view would be inconsistent with our law." Id. at 847 (citation omitted). "A prime part of the history of our Constitution . . . is the story of the extension of constitutional rights and protections to people once ignored or excluded." United States v. Virginia, 518 U.S. 515, 557 (1996).

3

The Supreme Court's sexual orientation jurisprudence further precludes us from defining the fundamental right at issue in the manner sought by the appellants. In Lawrence, the Court struck down as violative of due process a statute that prohibited sexual conduct between individuals of the same sex. The Court reversed Bowers v. Hardwick, 478 U.S. 186 (1986), which in upholding a similar statute had framed the question as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time." Id. at 190. The Lawrence Court held that this framing "fail[ed] to appreciate the extent of the liberty at stake" and "misapprehended the claim of liberty there presented to it." 539 U.S. at 567.

The Court acknowledged that "for centuries there have been powerful voices to condemn homosexual conduct as immoral," but held that its obligation was "to define the liberty of all, not to mandate our own moral code." Id. at 571 (quotation omitted). "[B]efore 1961 all 50 States had outlawed sodomy," yet "[h]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry." Id. at 572 (quotation omitted). The Court firmly rejected Bowers' characterization of the liberty at issue: "To say that the issue in Bowers was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said

marriage is simply about the right to have sexual intercourse." Id. at 567.

The Court's rejection of the manner in which Bowers described the liberty interest involved is applicable to the framing of the issue before us. There was clearly no history of a protected right to "homosexual sodomy," just as there is no lengthy tradition of same-sex marriage. But the Lawrence opinion indicates that the approach urged by appellants is too narrow. Just as it was improper to ask whether there is a right to engage in homosexual sex, we do not ask whether there is a right to participate in same-sex marriage.[8]

We must also note that Lawrence itself alluded to marriage, stating that "our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education." 539 U.S. at 574. The Court quoted Casey's holding that matters "involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment" and ruled that "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do." Lawrence, 539 U.S. at 574 (quotation omitted).

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[8] In Seegmiller v. Laverkin City, 528 F.3d 762 (10th Cir. 2008), we concluded that Lawrence did not announce a fundamental right "to engage in private sexual conduct." Id. at 771. As explained above, however, Lawrence did expressly reject Bowers' narrow, class-based framing of the liberty interest at issue.

The drafters of the Fifth and Fourteenth Amendments "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. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom." Id. at 579. A generation ago, recognition of the fundamental right to marry as applying to persons of the same sex might have been unimaginable. A generation ago, the declaration by gay and lesbian couples of what may have been in their hearts would have had to remain unspoken. Not until contemporary times have laws stigmatizing or even criminalizing gay men and women been felled, allowing their relationships to surface to an open society. As the district court eloquently explained, "it is not the Constitution that has changed, but the knowledge of what it means to be gay or lesbian." Kitchen, 961 F. Supp. 2d at 1203. Consistent with our constitutional tradition of recognizing the liberty of those previously excluded, we conclude that plaintiffs possess a fundamental right to marry and to have their marriages recognized.

B

The Due Process Clause "forbids the government to infringe certain fundamental liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." Reno v. Flores, 507 U.S. 292, 302 (1993) (quotation and emphasis omitted). By the same token, if a classification "impinge[s]

upon the exercise of a fundamental right," the Equal Protection Clause requires "the State to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest." Plyler v. Doe, 457 U.S. 202, 216-17 (quotation omitted). Having persuaded us that the right to marry is a fundamental liberty, plaintiffs will prevail on their due process and equal protection claims unless appellants can show that Amendment 3 survives strict scrutiny.

A provision subject to strict scrutiny "cannot rest upon a generalized assertion as to the classification's relevance to its goals." Richmond v. J.A. Croson Co., 488 U.S. 469, 500 (1989). "The purpose of the narrow tailoring requirement is to ensure that the means chosen fit the compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate." Grutter, 539 U.S. at 333 (quotation omitted). Only "the most exact connection between justification and classification" survives. Gratz v. Bollinger, 539 U.S. 244, 270 (2003) (quotation omitted).

Appellants advance four justifications for Amendment 3. They contend it furthers the state's interests in: (1) "fostering a child-centric marriage culture that encourages parents to subordinate their own interests to the needs of their children"; (2) "children being raised by their biological mothers and fathers—or at least by a married mother and father—in a stable home"; (3) "ensuring adequate reproduction"; and (4) "accommodating religious freedom and reducing the potential for civic strife."

1

We will assume that the first three rationales asserted by appellants are compelling. These justifications falter, however, on the means prong of the strict scrutiny test. Each rests on a link between marriage and procreation. Appellants contend that Utah has "steadfastly sought to reserve unique social recognition for man-woman marriage so as to guide as many procreative couples as possible into the optimal, conjugal childrearing model"; that "children suffer when procreation and childrearing occur outside stable man-woman marriages"; and that "[b]y providing special privileges and status to couples that are uniquely capable of producing offspring without biological assistance from third parties, the State sends a clear if subtle message to all of its citizens that natural reproduction is healthy, desirable and highly valued." (Emphasis omitted.) The common thread running through each of appellants' first three arguments is the claim that allowing same-sex couples to marry "would break the critical conceptual link between marriage and procreation."

The challenged restrictions on the right to marry and on recognition of otherwise valid marriages, however, do not differentiate between procreative and non-procreative couples. Instead, Utah citizens may choose a spouse of the opposite sex regardless of the pairing's procreative capacity. The elderly, those medically unable to conceive, and those who exercise their fundamental right not to have biological children are free to marry and have their out-of-state marriages recognized in Utah,

apparently without breaking the "conceptual link between marriage and procreation." The only explicit reference to reproduction in Utah's marriage law is a provision that allows first cousins to marry if "both parties are 65 years of age or older; or . . . if both parties are 55 years of age or older, upon a finding by the district court . . . that either party is unable to reproduce." Utah Code § 30-1-1(2). This statute thus extends marriage rights to certain couples based on a showing of inability to reproduce.[9]

Such a mismatch between the class identified by a challenged law and the characteristic allegedly relevant to the state's interest is precisely the type of imprecision prohibited by heightened scrutiny. See Shaw v. Hunt, 517 U.S. 899, 908 (1996) ("The means chosen to accomplish the State's asserted purpose must be specifically and narrowly framed to accomplish that purpose." (quotation and alteration omitted)). Utah's ban on polygamy, for example, is justified by arguments against polygamy. See Utah Const. art. III ("[P]olygamous or plural marriages are forever prohibited."); see also Potter v. Murray City, 760 F.2d 1065, 1070 (10th Cir. 1985) (concluding that "the State is justified, by a compelling interest, in upholding and enforcing its ban on plural marriage" based on its "commitment to a system of domestic relations based exclusively upon the practice of monogamy" which is "inextricably woven into the fabric of our society" and "the bedrock upon which our culture is built"

[9] We do not express any view on the constitutionality of this provision. Instead, we note the inconsistency between the message sent by this statute and the message appellants claim the same-sex marriage ban conveys.

(quotation omitted)). Similarly, barring minors from marriage may be justified based on arguments specific to minors as a class. See Utah Code § 30-1-9 (minors may not marry absent parental consent); see also Ginsberg v. New York, 390 U.S. 629, 638 (1968) ("[E]ven where there is an invasion of protected freedoms the power of the state to control the conduct of children reaches beyond the scope of its authority over adults." (quotation omitted)); Lee v. Gaufin, 867 P.2d 572, 578 (Utah 1993) ("[Minors'] legal incapacity is based on fundamental differences between adults and minors with respect to their physical, intellectual, psychological, and judgmental maturity."). But appellants fail to advance any argument against same-sex marriage that is based specifically on its alleged intrinsic ills.

Instead of explaining why same-sex marriage qua same-sex marriage is undesirable, each of the appellants' justifications rests fundamentally on a sleight of hand in which same-sex marriage is used as a proxy for a different characteristic shared by both same-sex and some opposite-sex couples. Same-sex marriage must be banned, appellants argue, because same-sex couples are not naturally procreative. But the state permits many other types of non-procreative couples to wed. See Lawrence, 539 U.S. at 605 (Scalia, J., dissenting) ("[W]hat justification could there possibly be for denying the benefits of marriage to homosexual couples . . . ? Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry."). Same-sex marriage cannot be allowed, appellants assert, because it is better for children to be raised

by biological parents. Yet adoptive parents, who have the full panoply of rights and duties of biological parents, are free to marry. See Utah Code § 78B-6-139 (adoptive parents have same rights and duties). As are opposite-sex couples who choose assisted reproduction. See §§ 78B-15-701 to 707 (providing rules for parental rights in cases of assisted reproduction); §§ 78B-15-801 to 809 (providing rules governing gestational agreements).

Several recent district court decisions have rejected nearly identical state attempts to justify same-sex marriage bans based on procreative concerns. See Geiger, 2014 U.S. Dist. LEXIS 68171, at *43 ("Procreative potential is not a marriage prerequisite."); Latta, 2014 U.S. Dist. LEXIS 66417, at *68 ("Idaho does not condition marriage licenses or marital benefits on heterosexual couples' ability or desire to have children. No heterosexual couple would be denied the right to marry for failure to demonstrate the intent to procreate."); DeBoer, 2014 U.S. Dist. LEXIS 37274, at *37 ("The prerequisites for obtaining a marriage license under Michigan law do not include the ability to have children . . . ."); De Leon, 2014 U.S. Dist. LEXIS 26236, at *44 ("This procreation rationale threatens the legitimacy of marriages involving post-menopausal women, infertile individuals, and individuals who choose to refrain from procreating."); Bostic, 970 F. Supp. 2d. at 478-79 ("The 'for-the-children' rationale also fails because it would threaten the legitimacy of marriages involving post-menopausal women, infertile individuals, and individuals who choose to refrain from procreating.").

The Supreme Court has similarly eschewed such means-ends mismatches. For example, in Bernal v. Fainter, 467 U.S. 216 (1984), the Court concluded that a Texas statute prohibiting resident aliens from becoming notaries failed strict scrutiny. Id. at 227-28. The state argued that the provision was justified by the state's interest in licensing notaries familiar with state law. Id. at 227. But the Court rejected the state's attempt to justify a classification based on alienage with an explanation based on knowledge:

> [I]f the State's concern with ensuring a notary's familiarity with state law were truly compelling, one would expect the State to give some sort of test actually measuring a person's familiarity with the law. The State, however, administers no such test. To become a notary public in Texas, one is merely required to fill out an application that lists one's name and address and that answers four questions pertaining to one's age, citizenship, residency, and criminal record . . . .

Id. (footnote and quotation omitted). Just as a state cannot justify an alienage classification by reference to a separate characteristic such as familiarity with state law, appellants cannot assert procreative potential as a basis to deny marriage rights to same-sex couples. Under strict scrutiny, the state must justify the specific means it has chosen rather than relying on some other characteristic that correlates loosely with the actual restriction at issue.

Utah law sanctions many marriages that share the characteristic—inability to procreate—ostensibly targeted by Amendment 3. The absence of narrow tailoring is often revealed by such under-inclusiveness. In Zablocki, the state attempted to defend its prohibition on marriage by child-support debtors on the ground that the statute "prevent[ed] the applicants from incurring new support obligations." 434 U.S. at 390. "But the challenged provisions," the Court explained, "are grossly underinclusive with respect to this purpose, since they do not limit in any way new financial commitments by the applicant other than those arising out of the contemplated marriage." Id. Similarly, in Eisenstadt, the Court rejected the argument that unmarried individuals might be prohibited from using contraceptives based on the view that contraception is immoral. See 405 U.S. at 452-54. The Court held that "the State could not, consistently with the Equal Protection Clause, outlaw distribution to unmarried but not to married persons. In each case the evil, as perceived by the State, would be identical, and the underinclusion would be invidious." Id. at 454; see also Jimenez v. Weinberger, 417 U.S. 628, 637 (1974) (provision of Social Security Act allowing certain illegitimate children benefits under limited circumstances held impermissibly "underinclusive in that it conclusively excludes some illegitimates in appellants' subclass who are, in fact, dependent upon their disabled parent" (quotation omitted)).

A state may not impinge upon the exercise of a fundamental right as to some, but not all, of the

individuals who share a characteristic urged to be relevant.

> The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.

Eisenstadt, 405 U.S. at 454 (quoting Ry. Express Agency v. New York, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring)).

A hypothetical state law restricting the institution of marriage to only those who are able and willing to procreate would plainly raise its own constitutional concerns. See id. at 453 ("If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." (emphasis omitted)). That question is not before us, and we do not address it. We merely observe that a state may not satisfy the narrow tailoring requirement by pointing to a trait shared by those on both sides of a challenged classification.

Appellants suggest that banning all non-procreative individuals from marrying would be impracticable. But "the fact that the implementation of a program capable of providing individualized consideration might present administrative challenges does not render constitutional an otherwise problematic system." Gratz, 539 U.S. at 275 (quotation omitted). And the appellants provide no explanation for Utah Code § 30-1-1(2), which specifically allows a subset of non-procreative couples to marry. Such a law is irreconcilable with appellants' arguments regarding Utah's interest in marriage and procreation.

Among the myriad types of non-procreative couples, only those Utahns who seek to marry a partner of the same sex are categorically excluded from the institution of marriage. Only same-sex couples, appellants claim, need to be excluded to further the state's interest in communicating the link between unassisted biological procreation and marriage. As between non-procreative opposite-sex couples and same-sex couples, we can discern no meaningful distinction with respect to appellants' interest in fostering biological reproduction within marriages.

The Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985). Extending the benefits and protections of a civil society to some but not all similarly situated families violates this critical guarantee.

2

Appellants argue that procreative couples must be channeled into committed relationships in order to promote the State's interests in childbearing and optimal childrearing. This argument fails because the prohibition on same-sex marriage has an insufficient causal connection to the State's articulated goals.

It is urged upon us that permitting same-sex couples to marry would have far-reaching and drastic consequences for Utah's opposite-sex couples. Appellants contend that the recognition of same-sex marriage would result in a parade of horribles, causing: "parents to raise their existing biological children without the other biological parent" (emphasis omitted); "couples conceiving children without the stability that marriage would otherwise bring"; "a substantial decline in the public's interest in marriage"; "adults to [forgo] or severely limit the number of their children based on concerns for their own convenience"; and "a busy or irresponsible parent to believe it's appropriate to sacrifice his child's welfare to his own needs for independence, free time, etc."

In some instances, courts "must accord substantial deference to the predictive judgments" of legislative authorities. Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 195 (1997) ("Turner II") (quotation omitted).[10] "Sound policymaking often

[10] It appears that the only cases in which the Supreme Court has deferred to the predictions of legislators in evaluating the constitutionality of their enactments have

requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable." Turner I, 512 U.S. at 622. But even under more relaxed forms of scrutiny, a challenged classification "must find some footing in the realities of the subject addressed by the legislation" based on a "reasonably conceivable state of facts." Heller v. Doe ex rel. Doe, 509 U.S. 312, 320, 321 (1993) (quotation omitted).[11]

We emphatically agree with the numerous cases decided since Windsor that it is wholly illogical to believe that state recognition of the love and commitment between same-sex couples will alter the most intimate and personal decisions of opposite-sex couples. As the district court held, "[t]here is no reason to believe that Amendment 3 has any effect on the choices of couples to have or raise children, whether they are opposite-sex couples

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involved, at most, intermediate scrutiny. See City of Erie v. Pap's A.M., 529 U.S. 277, 289 (2000) (plurality opinion) (applying the "less stringent standard . . . for evaluating restrictions on symbolic speech" (quotation omitted)); Turner II, 520 U.S. at 213; Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 662 (1994) ("Turner I") (plurality opinion). These cases also consider circumstances in which lawmaking authorities made factual findings regarding the feared risks before they promulgated the challenged laws, see Erie, 529 U.S. at 297; Turner II, 520 U.S. at 191-225. Appellants have not directed us to any such findings.

[11] Because we conclude that marriage is a fundamental right, we do not consider whether Amendment 3 passes muster under rational basis review. Similarly, we do not address whether Amendment 3 might be subject to heightened scrutiny on any alternative basis.

or same-sex couples." Kitchen, 961 F. Supp. 2d at 1212. This was the first of several federal court decisions reaching the same conclusion. See Geiger, 2014 U.S. Dist. LEXIS 68171, at *43 ("[A]ny governmental interest in responsible procreation is not advanced by denying marriage to gay a[nd] lesbian couples. There is no logical nexus between the interest and the exclusion."); DeBoer, 2014 U.S. Dist. LEXIS 37274, at *40 ("Nor does prohibiting same-sex marriage increase the number of heterosexual marriages or the number of children raised by heterosexual parents."); De Leon, 2014 U.S. Dist. LEXIS 26236, at *42-43 ("Defendants have failed to establish how recognizing a same-sex marriage can influence, if at all, whether heterosexual couples will marry, or how other individuals will raise their families."); Bostic, 970 F. Supp. 2d at 478 ("[R]ecognizing a gay individual's fundamental right to marry can in no way influence whether other individuals will marry, or how other individuals will raise families."); Bishop, 962 F. Supp. 2d at 1291 ("Marriage is incentivized for naturally procreative couples to precisely the same extent regardless of whether same-sex couples (or other non-procreative couples) are included.").

Appellants liken the recognition of same-sex marriage to another change in marriage law, arguing that there is "a compelling parallel between the unintended consequences of no-fault divorce, which harmed children by weakening marriage and fatherhood, and the harms that will likely result" from permitting same-sex couples to marry. We cannot accept appellants' claim that allowing same-sex couples to marry is analogous to a law that

permits married couples to divorce. The former causes an increase in the number of married individuals, whereas the latter decreases the number of marriages in a state. See Wolf, 2014 U.S. Dist. LEXIS 77125, at *117 ("[T]he no-fault divorce rules that defendants cite actually undermine their argument by showing that [the state] already supports an 'adult-centric' notion of marriage to some extent by allowing easy divorce even when the couple has children." (emphasis omitted)).

Setting aside the implausibility of the comparison, we observe that Utah has adopted precisely the no-fault divorce regime that appellants decry in their briefing. See Thronson v. Thronson, 810 P.2d 428, 431 n.3 (Utah Ct. App. 1991) ("Utah added 'irreconcilable differences' to its list of nine fault-based grounds [for divorce] in 1987."); Haumont v. Haumont, 793 P.2d 421, 427 (Utah Ct. App. 1990) (irreconcilable differences subsection "is intended to be a no-fault provision"); see also Utah Code § 30-3-1(3)(h) (current location of irreconcilable differences provision). Utah's adoption of one provision that it considers problematic with respect to the communicative function of marriage (no-fault divorce), but not another (same-sex marriage), undermines its claim that Amendment 3 is narrowly tailored to its desired ends. Through its no-fault divorce statute, Utah allows a spouse—the bedrock component of the marital unit—to leave his family whenever he wants and for whatever reason moves him. It is difficult to imagine how the State's refusal to recognize same-sex marriage undercuts in any meaningful way a state message of support for marital constancy

given its adoption of a divorce policy that conveys a message of indifference to marital longevity.

A state's interest in developing and sustaining committed relationships between childbearing couples is simply not connected to its recognition of same-sex marriages. Regardless of whether some individuals are denied the right to choose their spouse, the same set of duties, responsibilities, and benefits set forth under Utah law apply to those naturally procreative pairings touted by appellants. We cannot imagine a scenario under which recognizing same-sex marriages would affect the decision of a member of an opposite-sex couple to have a child, to marry or stay married to a partner, or to make personal sacrifices for a child. We agree with the district court that such decisions, among "the most intimate and personal . . . a person may make in a lifetime, choices central to personal dignity and autonomy," Casey, 505 U.S. at 851, are unrelated to the government's treatment of same-sex marriage. See Kitchen, 961 F. Supp. 2d at 1212. To the extent that they are related, the relation exists because the State of Utah has chosen to burden the ability of one class of citizens to make such intimate and personal choices. See Utah Code § 78B-6-117(3) (prohibiting adoption by "a person who is cohabitating in a relationship that is not a legally valid and binding marriage under the laws of the state" and thus forcing same-sex couples to choose between adoption and marriage).

3

Appellants also argue that Utah's ban on same-sex marriage is justified by gendered parenting preferences. They contend that even for families that are not biologically connected, the state has an interest in limiting marriage to opposite-sex couples because "men and women parent children differently."

But a prohibition on same-sex marriage is not narrowly tailored toward the goal of encouraging gendered parenting styles. The state does not restrict the right to marry or its recognition of marriage based on compliance with any set of parenting roles, or even parenting quality. See Latta, 2014 U.S. Dist. LEXIS 66417, at *68 ("Idaho does not withhold marriage licenses from heterosexual couples who might be, or are, non-optimal parents."); DeBoer, 2014 U.S. Dist. LEXIS 37274, at *37 ("The prerequisites for obtaining a marriage license under Michigan law do not include . . . a requirement to raise [children] in any particular family structure, or the prospect of achieving certain 'outcomes' for children."); Bishop, 962 F. Supp. 2d at 1295 ("With respect to marriage licenses, the State has already opened the courthouse doors to opposite-sex couples without any moral, procreative, parenting, or fidelity requirements."). Instead, every same-sex couple, regardless of parenting style, is barred from marriage and every opposite-sex couple, irrespective of parenting style, is permitted to marry.

The state's child custody regime also belies adherence to a rigidly gendered view of parents'

abilities. See § 30-3-10(1)(a) ("In determining any form of custody, including a change in custody, the court shall consider the best interests of the child without preference for either the mother or father solely because of the biological sex of the parent ...."). As with appellants' asserted procreation rationale, we are offered no coherent explanation for the state's decision to impose disabilities upon only one sub-class of those sharing a claimed deficiency.

The Supreme Court has previously rejected state attempts to classify parents with such a broad brush. In Stanley v. Illinois, 405 U.S. 645 (1972), the Court considered the validity of a state law that made children of unwed parents wards of the state upon death of the mother. Id. at 646. The state defended this provision by asserting that "unmarried fathers can reasonably be presumed to be unqualified to raise their children." Id. at 653. "But all unmarried fathers are not in this category; some are wholly suited to have custody of their children." Id. at 654. Just as the state law at issue in Stanley "needlessly risk[ed] running roughshod over the important interests of both parent and child," id. at 657, Amendment 3 cannot be justified by the impermissibly overbroad assumption that any opposite-sex couple is preferable to any same-sex couple. Cf. Skinner, 316 U.S. at 545 ("A law which condemns, without hearing, all the individuals of a class to so harsh a measure as the present because some or even many merit condemnation, is lacking in the first principles of due process.").

Appellants have retreated from any categorical conclusions regarding the quality of same-sex parenting. Although they presented to the district court voluminous scholarship addressing various parenting issues, they now take the position that the social science is unsettled. See Rule 28(j) Letter at 2, No. 13-4178 (10th Cir., filed Apr. 9, 2014) (acknowledging that appellants' main scientific authority on this issue "cannot be viewed as conclusively establishing that raising a child in a same-sex household produces outcomes that are inferior to those produced by man-woman parenting arrangements"). At oral argument, counsel for appellants stated that "the bottom line" regarding the consequences of same-sex parenting "is that the science is inconclusive."

Although we assume that the State's asserted interest in biological parenting is compelling, this assumption does not require us to accept appellants' related arguments on faith. We cannot embrace the contention that children raised by opposite-sex parents fare better than children raised by same-sex parents—to the extent appellants continue to press it—in light of their representations to this court. Appellants' only reasoning in this regard is that there might be advantages in one parenting arrangement that are lacking in the other. On strict scrutiny, an argument based only on pure speculation and conjecture cannot carry the day. See Wisconsin v. Yoder, 406 U.S. 205, 224 (1972) (striking down state action on strict scrutiny where the argument for the interest was "highly speculative" and had "no specific evidence" to support it). Appellants' tepid defense of their parenting theory further highlights

the looseness of the fit between the State's chosen means and appellants' asserted end.

Against the State's claim of uncertainty we must weigh the harm Amendment 3 currently works against the children of same-sex couples. See Obergefell, 962 F. Supp. 2d at 995 (same-sex marriage bans "harm[] the children of same-sex couples who are denied the protection and stability of having parents who are legally married"). If appellants cannot tell us with any degree of confidence that they believe opposite-sex parenting produces better outcomes on the whole—and they evidently cannot—they fail to justify this palpable harm that the Supreme Court has unequivocally condemned. The Windsor majority, stressing the same detrimental impacts of DOMA, explained that the refusal to recognize same-sex marriages brings "financial harm to children of same-sex couples" and makes "it even more difficult for the children [of same-sex couples] to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." 133 S. Ct. at 2694, 2695.

Windsor thus indicates that same-sex marriage restrictions communicate to children the message that same-sex parents are less deserving of family recognition than other parents. See id. at 2696 ("DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others."). Appellants rely heavily on their predictions that Amendment 3 will encourage adults to make

various decisions that benefit society. But regardless of the signals the law sends to adults, Amendment 3, like DOMA, conveys a harmful message to the children of same-sex couples. These collateral consequences further suggest that the fit between the means and the end is insufficient to survive strict scrutiny. See Latta, 2014 U.S. Dist. LEXIS 66417, at *74 (same-sex marriage bans are "dramatically underinclusive" because they deny "resources to children whose parents happen to be homosexual"); De Leon, 2014 U.S. Dist. LEXIS 26236, at *42 ("[F]ar from encouraging a stable environment for childrearing, [same sex marriage bans] den[y] children of same-sex parents the protections and stability they would enjoy if their parents could marry."); Bostic, 970 F. Supp. 2d at 478 ("[N]eedlessly stigmatizing and humiliating children who are being raised by the loving couples targeted by Virginia's Marriage Laws betrays [the state's interest in child welfare].").[12]

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[12] We also note, with respect to the first three rationales asserted by appellants, that the same arguments were submitted to the Court in Windsor Bipartisan Legal Advisory Group ("BLAG") in that case argued that DOMA was justified based on the "link between procreation and marriage." Initial Br. for BLAG at 44, Windsor, 133 S. Ct. 2675 (No. 12-307). BLAG also argued that refusing to recognize same-sex marriage "offers special encouragement and support for relationships that can result in mothers and fathers jointly raising their biological children" and that "biological differentiation in the roles of mothers and fathers makes it rational to encourage situations in which children have one of each." Id. at 48.

Justice Alito's dissent in Windsor relied on these arguments. 133 S. Ct. at 2718 (Alito, J., dissenting) (asserting that states are free to support the "'traditional' or 'conjugal' view" of "marriage as an intrinsically opposite-sex

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Appellants' fourth and final justification for Amendment 3, "accommodating religious freedom and reducing the potential for civic strife," fails for reasons independent of the foregoing. Appellants contend that a prohibition on same-sex marriage "is essential to preserving social harmony in the State" and that allowing same-sex couples to marry "would create the potential for religion-related strife."

Even assuming that appellants are correct in predicting that some substantial degree of discord will follow state recognition of same-sex marriage, the Supreme Court has repeatedly held that public opposition cannot provide cover for a violation of fundamental rights. See, e.g., Palmer v. Thompson, 403 U.S. 217, 226 (1971) ("Citizens may not be compelled to forgo their constitutional rights because officials fear public hostility . . . ."). In Watson v. City of Memphis, 373 U.S. 526 (1963), for example, the Court rejected a city's claim that "community confusion and turmoil" permitted it to delay desegregation of its public parks. Id. at 535. And in Cleburne, the Court held that negative attitudes toward the class at issue (intellectually impaired individuals) "are not permissible bases for treating a home for the mentally retarded differently." 473 U.S.

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institution … created for the purpose of channeling heterosexual intercourse into a structure that supports child rearing"). The majority did not mention these justifications, but concluded that "DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution." Id. at 2695.

at 448. "It is plain that the electorate as a whole, whether by referendum or otherwise, could not order city action violative of the Equal Protection Clause, and the city may not avoid the strictures of that Clause by deferring to the wishes or objections of some fraction of the body politic." Id. (quotation omitted).

Appellants acknowledge that a state may not "invoke concerns about religious freedom or religion-related social strife as a basis for denying rights otherwise guaranteed by the Constitution." But they argue that the social and religious strife argument qualifies as legitimate because a fundamental right is not at issue in this case. Because we have rejected appellants' contention on this point, their fourth justification necessarily fails.

We also emphasize, as did the district court, that today's decision relates solely to civil marriage. See Kitchen, 961 F. Supp. 2d at 1214 ("[T]he court notes that its decision does not mandate any change for religious institutions, which may continue to express their own moral viewpoints and define their own traditions about marriage."). Plaintiffs must be accorded the same legal status presently granted to married couples, but religious institutions remain as free as they always have been to practice their sacraments and traditions as they see fit. We respect the views advanced by members of various religious communities and their discussions of the theological history of marriage. And we continue to recognize the right of the various religions to define marriage according to their moral, historical, and ethical precepts. Our opinion does not intrude into

that domain or the exercise of religious principles in this arena. The right of an officiant to perform or decline to perform a religious ceremony is unaffected by today's ruling. See Griego v. Oliver, 316 P.3d 865, 871 (N.M. 2013) ("Our holding [that same-sex marriage is required by the state constitution] will not interfere with the religious freedom of religious organizations or clergy because (1) no religious organization will have to change its policies to accommodate same-gender couples, and (2) no religious clergy will be required to solemnize a marriage in contravention of his or her religious beliefs."); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 475 (Conn. 2008) ("Religious freedom will not be jeopardized by the marriage of same sex couples because religious organizations that oppose same sex marriage as irreconcilable with their beliefs will not be required to perform same sex marriages or otherwise to condone same sex marriage or relations."); In re Marriage Cases, 183 P.3d at 451-52 ("[A]ffording same-sex couples the opportunity to obtain the designation of marriage will not impinge upon the religious freedom of any religious organization, official, or any other person; no religion will be required to change its religious policies or practices with regard to same-sex couples, and no religious officiant will be required to solemnize a marriage in contravention of his or her religious beliefs.").[13]

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[13] Although appellants suggest that religious institutions might be subject to hypothetical lawsuits under various scenarios, such lawsuits would be a function of antidiscrimination law, not legal recognition of same-sex marriage.

C

Appellants raise a number of prudential concerns in addition to the four legal justifications discussed above. They stress the value of democratic decision-making and the benefits of federalism in allowing states to serve as laboratories for the rules concerning marriage. As a matter of policy, it might well be preferable to allow the national debate on same-sex marriage to play out through legislative and democratic channels. Some will no doubt view today's decision as "robbing the winners of an honest victory, and the losers of the peace that comes from a fair defeat." Windsor, 133 S. Ct. at 2711 (Scalia, J., dissenting).

But the judiciary is not empowered to pick and choose the timing of its decisions. "It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants." Pierson v. Ray, 386 U.S. 547, 554 (1967). Plaintiffs in this case have convinced us that Amendment 3 violates their fundamental right to marry and to have their marriages recognized. We may not deny them relief based on a mere preference that their arguments be settled elsewhere. Nor may we defer to majority will in dealing with matters so central to personal autonomy. The protection and exercise of fundamental rights are not matters for opinion polls or the ballot box. "One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on

the outcome of no elections." W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

Similarly, the experimental value of federalism cannot overcome plaintiffs' rights to due process and equal protection. Despite Windsor's emphasis on state authority over marriage, the Court repeatedly tempered its pronouncements with the caveat that "[s]tate laws defining and regulating marriage, of course, must respect the constitutional rights of persons." 133 S. Ct. at 2691; see also id. at 2692 ("[T]he incidents, benefits, and obligations of marriage are uniform for all married couples within each State, though they may vary, subject to constitutional guarantees, from one State to the next."); id. ("The States' interest in defining and regulating the marital relation, subject to constitutional guarantees, stems from the understanding that marriage is more than a routine classification for purposes of certain statutory benefits."). Our federalist structure is designed to "secure[] to citizens the liberties that derive from the diffusion of sovereign power" rather than to limit fundamental freedoms. New York v. United States, 505 U.S. 144, 181 (1992) (quotation omitted).

Appellants also suggest that today's ruling will place courts on a slippery slope towards recognizing other forms of currently prohibited marriages. Although we have no occasion to weigh in on the validity of laws not challenged in this case, same-sex marriage prohibitions differ in at least one key respect from the types of marriages the appellants identify: Unlike polygamous or incestuous marriages,

the Supreme Court has explicitly extended constitutional protection to intimate same-sex relationships, see Lawrence, 539 U.S. at 567, and to the public manifestations of those relationships, Windsor, 133 S. Ct. at 2695. Our holding that plaintiffs seek to exercise a fundamental right turns in large measure on this jurisprudential foundation that does not exist as to the hypothetical challenges identified by appellants.

Another slippery-slope argument brought forward by appellants is that federal constitutional protection for same-sex marriage might lead to the "wholesale 'privatization'" of marriage through the "enactment of a civil-union regime for all couples, with religious and other organizations being free to offer the title of 'marriage' as they see fit." But they provide no authority for the proposition that an unconstitutional restriction on access to an institution can be saved by the possibility that its privileges—or the name attached to them—could be withdrawn from everyone. If a state were entitled to defend the deprivation of fundamental rights in this way, it might always make the same threat.

Lastly, appellants express concern that a ruling in plaintiffs' favor will unnecessarily brand those who oppose same-sex marriage as intolerant. We in no way endorse such a view and actively discourage any such reading of today's opinion. Although a majority's "traditional[] view[of] a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice," Lawrence, 539 U.S. at 577 (quoting Bowers, 478

U.S. at 216 (Stevens, J., dissenting)), for many individuals, religious precepts concerning intimate choices constitute "profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives," id. at 571. Courts do not sit in judgment of the hearts and minds of the citizenry. Our conclusion that plaintiffs possess a fundamental right to marry and to have their marriages recognized in no way impugns the integrity or the good-faith beliefs of those who supported Amendment 3. See Wolf, 2014 U.S. Dist. LEXIS 77125, at *4-5 ("In reaching [the] decision [that a same-sex marriage ban is unconstitutional, there is no need] to disparage the legislators and citizens who voted in good conscience for the marriage amendment.").

V

In summary, we hold that under the Due Process and Equal Protection Clauses of the United States Constitution, those who wish to marry a person of the same sex are entitled to exercise the same fundamental right as is recognized for persons who wish to marry a person of the opposite sex, and that Amendment 3 and similar statutory enactments do not withstand constitutional scrutiny. We **AFFIRM** the judgment of the district court.

In consideration of the Supreme Court's decision to stay the district court's injunction pending the appeal to our circuit, we conclude it is appropriate to **STAY** our mandate pending the disposition of any

subsequently filed petition for writ of certiorari.[14] See Fed. R. App. P. 41(d)(2) (allowing circuit courts to stay their mandates pending the completion of certiorari proceedings); Massachusetts v. U.S. Dep't of Health & Human Servs., 682 F.3d at 17 (declaring DOMA § 3 unconstitutional and staying the mandate in the same opinion); Natural Res. Def. Council, Inc. v. Winter, 518 F.3d 704, 705 (9th Cir. 2008) (issuing a stay sua sponte); see also Latta v. Otter, No. 14-35420, Order, at 2 (9th Cir. May 20, 2014) (unpublished) (relying on the Supreme Court's Kitchen order to stay a district court injunction against a same-sex marriage ban); DeBoer v. Snyder, No. 14- 1341, Order, at 1 (6th Cir. Mar. 25, 2014) (unpublished) (same).[15]

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[14] If no petition for certiorari is filed, we would lift the stay and issue our mandate when the deadline for filing the petition lapses. See Perry v. Brown, 681 F.3d 1065, 1066-67 (9th Cir. 2012) (per curiam). If a petition for certiorari is filed and denied, we would lift the stay and issue the mandate. See Stafford v. Ward, 60 F.3d 668, 671 (10th Cir. 1995). And if a petition for certiorari is filed and granted, the stay will remain in effect until the Supreme Court resolves the dispute. See id. at 670.

[15] The Supreme Court recently denied without explanation a motion to stay a district court's order enjoining the enforcement of a state's same-sex marriage ban. See Nat'l Org. for Marriage v. Geiger, No. 13A1173, 2014 U.S. LEXIS 3990 (June 4, 2014). We note that in that case the named defendants declined to defend the challenged laws before the district court. Geiger, 2014 U.S. Dist. LEXIS 68171, at *10. A third party, whose motion to intervene in the district court had been denied, sought a stay from the Supreme Court. As a result, the Court may have denied a stay in Geiger for lack of a proper party requesting one. Thus, Geiger does not clearly indicate that the Court no longer wishes to preserve the status quo regarding same-sex marriage in Utah.

It is so ordered.

No. 13-4178, Kitchen, et al. v. Herbert, et al.

KELLY, Circuit Judge, concurring in part and dissenting in part.

I concur with the court's result that Plaintiffs have standing to challenge the provisions at issue,[1] that the Salt Lake County Clerk, Governor, and Attorney General were proper Defendants, and that the appeal may proceed despite the absence of the Salt Lake County Clerk. I disagree with this court's conclusions that (1) Baker v. Nelson, 409 U.S. 810 (1972), need not be followed and that (2) the liberty guaranteed by the Fourteenth Amendment includes a fundamental right which requires Utah to extend marriage to same-gender couples and recognize same-gender marriages from other states. Because I conclude that there is no such fundamental right, it is unnecessary to consider whether Utah's justifications for retaining its repeatedly-enacted concept of marriage pass heightened scrutiny. In my view, the provisions should be analyzed under traditional equal protection analysis and upheld as rationally related to (1) responsible procreation, (2) effective parenting, and (3) the desire to proceed cautiously in this evolving area.

"Same-sex marriage presents a highly emotional and important question of public policy—but not a

[1] Utah Const. art. I, § 29 and Utah Code §§ 30-1-2(5) (enacted in 1977), 30-1-4.1.

difficult question of constitutional law," at least when it comes to the States' right to enact laws preserving or altering the traditional composition of marriage. See United States v. Windsor, 133 S. Ct. 2675, 2714 (2013) (Alito, J., dissenting). The Constitution is silent on the regulation of marriage; accordingly, that power is reserved to the States, albeit consistent with federal constitutional guarantees. See Windsor, 133 S. Ct. at 2691-92. And while the Court has recognized a fundamental right to marriage, every decision vindicating that right has involved two persons of the opposite gender. Indeed, the Court has been less than solicitious of plural marriages or polygamy.

If the States are the laboratories of democracy, requiring every state to recognize same-gender unions—contrary to the views of its electorate and representatives—turns the notion of a limited national government on its head. See Bond v. United States, 131 S. Ct. 2355, 2364 (2011) (explaining that federalism allows for state responses instead of relying upon the eventuality of a federal policy). Marriage is an important social institution commonly understood to protect this and future generations. That states sincerely differ about the best way to do this (including whether to extend marriage to same-gender couples) is inevitable. See id.; Utah Code. §§ 30-1-1, -2. And given the recent advent of same-gender marriage, Windsor, 133 S. Ct. at 2689, it is hardly remarkable that a state might codify what was once implicit. For the following reasons, I respectfully dissent.

A. Baker v. Nelson

The starting point for a claim that same-gender marriage is required by the Constitution must be the Constitution. Because the Constitution does not speak to the issue of same-gender marriage—or marriage at all—the next step is to review the Supreme Court's decisions on the issue. And on the question presented here, the Supreme Court has already spoken. In Baker v. Nelson, the Court dismissed an appeal asking whether the Constitution forces a state to recognize same-gender marriage "for want of a substantial federal question." 409 U.S. 810 (1972). That dismissal should foreclose the Plaintiffs' claims, at least in this court.

The petitioners in Baker argued that Minnesota's marriage scheme violated due process and equal protection. Jurisdictional Statement, No. 71-1027, at 3-19 (Oct. Term 1972). The Minnesota Supreme Court unambiguously rejected the notion that same-gender marriage was a fundamental right, interpreting Loving v. Virginia as resting upon the Constitution's prohibition of race discrimination. Baker v. Nelson, 191 N.W.2d 185, 187 (Minn. 1971). Absent irrational or invidious discrimination, a "theoretically imperfect" marriage classification does not offend equal protection or due process under the Fourteenth Amendment. Id. The import of Baker to this case is clear: neither due process nor equal protection bar states from defining marriage as between one man and one woman, or require states to extend marriage to same-gender couples.

A summary dismissal is a merits determination and a lower federal court should not come to an opposite conclusion on the issues presented. Mandel v. Bradley, 432 U.S. 173, 176 (1977) (per curiam). The district court relied upon a statement in Hicks v. Miranda that a question remains unsubstantial unless "doctrinal developments" may suggest otherwise. 422 U.S. 332, 344 (1975). On this point, Miranda held that a summary dismissal could not be disregarded. Id. at 344-45. Were there any doubt, the "doctrinal developments" exception was followed by a statement that summary decisions are binding on lower courts until the Court notifies otherwise. Id.

The rule is clear: if a Supreme Court case is directly on point, a lower federal court should rely on it so the Supreme Court may exercise "the prerogative of overruling its own decisions." Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989). The Supreme Court is certainly free to re-examine its precedents, but it discourages lower courts from concluding it has overruled earlier precedent by implication. Agostini v. Felton, 521 U.S. 203, 237 (1997) (reaffirming Rodriguez de Quijas). The majority construes the unequivocal statement in Rodriguez de Quijas (and presumably Agostini) as inapplicable because it appeared in a merits disposition and accordingly did not "overrule" the "doctrinal developments rule" as to summary dispositions. But that is just another way of stating that a summary disposition is not a merits disposition, which is patently incorrect. Though the Supreme Court may not accord Baker the same deference as an opinion after briefing and argument, it is nonetheless precedential for this

court. Caban v. Mohammed, 441 U.S. 380, 390 n.9 (1979). Summary dismissals are merits rulings as to those questions raised in the jurisdictional statement. Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463, 476 n.20 (1979).

Plaintiffs argue that Baker did not address the precise issues here because "[t]he judgment affirmed in Baker addressed whether same-sex couples were denied equal protection and due process by Minnesota's marriage statute—a measure that did not indicate on its face whether same-sex couples could marry and that had not been enacted for the express purpose of excluding same-sex couples from marriage." Aplee. Br. 23. They further argue that Utah's non-recognition of Plaintiffs Archer and Call's Iowa marriage distinguishes this case from Baker. Neither reason is persuasive. The fact remains that the Minnesota Supreme Court interpreted the state statute (at the time) to not require same-gender marriage and decided largely the same federal constitutional questions presented here. To the extent there is no right to same-gender marriage emanating from the Fourteenth Amendment, a state should not be compelled to recognize it. See Utah Code § 30-1-4(1) (declining to recognize foreign same-gender marriages).

Regardless, subsequent doctrinal developments have not undermined the Court's traditional deference to the States in the field of domestic relations. To be sure, the district court concluded otherwise based upon the following Supreme Court developments: (1) gender becoming a quasi-suspect

class, Craig v. Boren, 429 U.S. 190 (1976); Frontiero v. Richardson, 411 U.S. 677 (1973), (2) invalidation of a state law repealing and barring sexual-orientation protection, Romer v. Evans, 517 U.S. 620 (1996), (3) invalidation of a statute that proscribed same-gender sexual relations insofar as private conduct among consenting adults, Lawrence v. Texas, 539 U.S. 558 (2003), (4) declaring the Defense of Marriage Act's ("DOMA") definition of "marriage" and "spouse" to exclude same-gender marriages as violative of Fifth Amendment due process and equal protection principles, United States v. Windsor, 133 S. Ct. 2675 (2013). Kitchen v. Herbert, 961 F. Supp. 2d 1181, 1194-95 (D. Utah 2013). This court relies on Lawrence and Windsor as justification for not deferring to Baker. As discussed below, none of these developments can override our obligation to follow (rather than lead) on the issue of whether a state is required to extend marriage to same-gender couples. At best, the developments relied upon are ambiguous and certainly do not compel the conclusion that the Supreme Court will interpret the Fourteenth Amendment to require every state to extend marriage to same-gender couples, regardless of contrary state law. See Massachusetts. v. U.S. Dep't of Health & Human Servs., 682 F.3d 1, 8 (1st Cir. 2012) (rejecting the idea that Romer or Lawrence require states to permit same-gender marriage and that the Supreme Court has repudiated Baker).

Because I have not persuaded the panel, I proceed to analyze the remaining issues.

B. Equal Protection–Gender Discrimination

Plaintiffs argue that defining marriage to exclude same-gender unions is based upon gender stereotyping where "the law presumed women to be legally, socially, and financially dependent upon men." Aplee. Br. at 55-63. But this case involves no disparate treatment based upon gender that might invite intermediate scrutiny. See Craig, 429 U.S. at 197 (such scrutiny requires that the law be substantially related to furthering important governmental interests). Utah's constitutional and statutory provisions, Utah Const. art. I, § 29 and Utah Code §§ 30-1-2(5), 30-1-4.1, enacted in 1977 and 2004, simply define marriage as the legal union of a man and a woman and do not recognize any other domestic union, i.e., same-gender marriage. They apply to same-gender male couples and same-gender female couples alike.

Disparate treatment of men and women as a class is an essential element of an equal protection, gender discrimination claim. See United States v. Virginia, 518 U.S. 515, 519-20 (1996) (women excluded from attending VMI); Miss. Univ for Women v. Hogan, 458 U.S. 718, 719-23 (1982) (men excluded from attending nursing school); Craig, 429 U.S. at 191-92 (women allowed to buy beer at younger age than men); Frontiero, 411 U.S. at 678-79 (women seeking military benefits required to demonstrate the spouse's economic dependency, but not requiring the same of men); Reed v. Reed, 404 U.S. 72-73 (1971) (automatic preference for men over women for estate administration). Plaintiffs cannot show that

either gender *as a class* is disadvantaged by the Utah provisions defining marriage.

C. Equal Protection–Sexual Orientation

Plaintiffs argue that defining marriage to exclude same-gender unions is a form of sexual orientation discrimination triggering heightened scrutiny. Aplee. Br. at 48-55. The Supreme Court has yet to decide the level of scrutiny attendant to classifications based upon sexual orientation, see Windsor, 133 S. Ct. at 2683-84, but this court has rejected heightened scrutiny, see Price-Cornelison v. Brooks, 524 F.3d 1103, 1113 n.9 (10th Cir. 2008); Walmer v. U.S. Dep't of Defense, 52 F.3d 851, 854 (10th Cir. 1995); Jantz v. Muci, 976 F.2d 623, 630 (10th Cir. 1992). Although Plaintiffs argue that our precedent does not justify such a position, one panel of this court may not overrule another absent superseding en banc review or a Supreme Court decision invalidating our precedent. Rezaq v. Nalley, 677 F.3d 1001, 1012 n.5 (10th Cir. 2012). Neither has occurred here.

D. Due Process–Fundamental Right

The Plaintiffs contend that they are not relying upon a fundamental right to same-gender marriage, but instead a fundamental right to marriage simpliciter. Aplee. Br. at 16, 33-39. They contend that freedom to marry is self-defining and without reference to those who assert it or have been excluded from it. Id. at 34. Of course, the difficulty with this is that marriage does not exist in a vacuum; it is a public institution, and states have

the right to regulate it. That right necessarily encompasses the right to limit marriage and decline to recognize marriages which would be prohibited; were the rule as the Plaintiffs contend, that marriage is a freestanding right, Utah's prohibition on bigamy would be an invalid restriction, see Utah Const. art. III; see also Utah Code §§ 30-1-2(1) (bigamy), 30-1-4(1) (non-recognition of such marriages solemnized elsewhere), 76-7-101 (criminalizing bigamy), 76-7-101.5 (criminalizing child bigamy). That proposition has been soundly rejected. Reynolds, 98 U.S. at 166-67; Bronson v. Swensen, 500 F.3d 1099, 1105-1106 (10th Cir. 2007); see also Paris Adult Theatre I v. Slaton, 413 U.S. 49, 68 n.15 (1973). Likewise, were marriage a freestanding right without reference to the parties, Utah would be hard-pressed to prohibit marriages for minors under 15 and impose conditions for other minors. Utah Code §§ 30-1-2(3), 30-1-9.

As noted, the Court has recognized a fundamental right to marriage protected by substantive due process. Turner, 482 U.S. at 94; Zablocki, 434 U.S. at 384-86; Loving, 388 U.S. at 12. As such, restrictions on the right are subject to strict scrutiny: they must be narrowly tailored to further compelling state interests. Zablocki, 434 U.S. at 388; Loving, 388 U.S. at 11-12. But it is a stretch to cast those cases in support of a fundamental right to same-gender marriage.

Here's why. First, same-gender marriage is a very recent phenomenon; for centuries "marriage" has been universally understood to require two persons of opposite gender. Windsor, 133 S. Ct. at

2689. Indeed, this case is better understood as an effort to extend marriage to persons of the same gender by redefining marriage. Second, nothing suggests that the term "marriage" as used in those cases had any meaning other than what was commonly understood for centuries. Courts do not decide what is not before them. That the Court did not refer to a "right to interracial marriage," or a "right to inmate marriage" cannot obscure what was decided; the Supreme Court announced a right with objective meaning and contours. Third, given the ephemeral nature of substantive due process, recognition of fundamental rights requires a right deeply rooted in United States history and tradition, and a careful and precise definition of the right at issue. Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997). Thus, contrary to Plaintiffs' contention, Aplee. Br. at 34 n.5, it is entirely appropriate for the State to characterize the right sought as one of "same-gender marriage" and focus attention on its recent development. Perhaps someday same-gender marriage will become part of this country's history and tradition, but that is not a choice this court should make.

Much of this court's opinion is dedicated to finding otherwise by separating marriage from procreation and expounding on how other substantive due process and privacy concepts, including personal autonomy, dignity, family relationships, reproductive rights, and the like, are the antecedents and complements of same-gender marriage. But we should be reluctant to announce a fundamental right by implication. Not only is that beyond our power, it is completely arbitrary and

impractical; as in this case, a state should be allowed to adopt change if desired and implement it. As these proceedings demonstrate, the State has a much better handle on what statutory and administrative provisions are involved, and what is necessary to implement change, than we do.

Nothing in the Court's trilogy of cases, Romer, Lawrence, or Windsor, points to a different result. Though the cases may afford constitutional protection for certain "moral and sexual choices" of same gender couples, Windsor, 133 S. Ct. at 2694, they simply have not created a fundamental right to same-gender marriage, let alone heightened scrutiny for any provision which may be implicated. Romer is an equal protection case invalidating a Colorado constitutional provision which effected a "[s]weeping and comprehensive change" in the law by permanently withdrawing and barring anti-discrimination protections against this particular group. 517 U.S. at 627; see Price-Cornelison, 524 F.3d at 1113 n.9 (noting that Romer used a rational basis test). Lawrence also is an equal protection case that invalidated a Texas statute proscribing only same-gender sexual contact, no matter whether private and consensual, because the provision furthered no legitimate state interest. 539 U.S. at 578; id. at 581-83 (O'Connor, J., concurring); Seegmiller v. LaVerkin City, 528 F.3d 762, 771 (10th Cir. 2008) (noting that Lawrence did not announce a fundamental right to private, consensual sexual activity as it was decided on rational basis review).

Plaintiffs suggest that Lawrence should frame the inquiry as a right to marry rather than a right

to same-gender marriage. To be sure, the Court recognized that criminalizing private, consensual conduct for one group interfered with personal autonomy, but the Court expressly disclaimed entering the same-gender union fray. See Lawrence, 539 U.S. at 578; id. at 585 (O'Connor, J., concurring) (noting that "preserving the traditional institution of marriage" would be a legitimate state interest beyond moral disapproval). Moreover, as discussed above, numerous restrictions are already imposed on marriage. It cannot be evaluated devoid of context.

While Windsor is the only Supreme Court case concerning same-gender marriage, it simply did not decide the issue of state prohibitions on same-gender marriages; instead, it concentrated on same-gender marriages already authorized by state law. Windsor, 133 S. Ct. at 2696. It certainly did not require every state to extend marriage to same-gender couples, regardless of the contrary views of the electorate and their representatives. After Windsor, a state remains free (consistent with federal law and comity) to not recognize such marriages. 28 U.S.C. § 1738C. Windsor protected valid same-gender, state law marriages based on federalism concerns, as well as Fifth Amendment due process and implied equal protection concerns. Id. at 2695. As in Lawrence, the Court employed an equal protection construct in determining that "no legitimate purpose" could justify DOMA's unequal treatment of same-gender marriages already authorized by state law. Id. at 2693, 2696. Given an unusual federal intrusion into state authority, the Court analyzed the nature, purpose, and effect of the federal law,

alert for discrimination of "unusual character." Id. at 2693.

Windsor did not create a fundamental right to same-gender marriage. To the contrary, Windsor recognized the authority of the States to redefine marriage and stressed the need for popular consensus in making such change. Id. at 2692. Consistent with federalism, state policies concerning domestic relations and marriage will vary. Id. at 2691. Traditionally, the federal government has deferred to those policies, including the definition of marriage. Id. at 2691, 2693. Courts should follow suit.

Plaintiffs argue that Windsor dictates the outcome here because we need only look to the purpose and effect of the Utah constitutional amendment defining marriage and not recognizing any other union. But this case does not involve interference with traditional state prerogatives so it is questionable whether such a directive from Windsor applies. If it does, Plaintiffs draw only one conclusion: the provision is designed to impose inequality on same-gender couples and their children. Aplt. Br. at 39-48. But DOMA is an outlier. It was unique in not deferring to the States' power to define marriage and instead interfering with the legal effect (or "equal dignity") of those marriages. In this case, Utah seeks to preserve the status quo and the right of the people to decide this issue.

Not surprisingly, the district court resisted a finding of animus. Kitchen, 961 F. Supp. 2d at 1209.

That was undoubtedly correct. The Plaintiffs' one-sided formulation ignores the obvious and real concern that this issue generates both on the merits and procedurally. Nearly everyone is or has been affected from birth by the presence or absence of marriage. In any event, this record hardly reflects "a bare . . . desire to harm a politically unpopular group." U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534-35 (1973). In addition to statements for and against, the Utah legislature's impartial analysis discussed federal constitutional implications. Aplt. App. at 34-48. The power of judicial review is strong medicine, and we should be reluctant to invalidate state constitutional or legislative enactments based upon motive. Rather, it is only an evident and "inevitable unconstitutional effect" that warrants such treatment. United States v. O'Brien, 391 U.S. 367, 385 (1968).

E Equal Protection–Rational Basis

Plaintiffs contend and the district court so found that the provisions cannot be sustained under rational basis review. Kitchen, 961 F. Supp. 2d at 1210-15. The State offered several rationales including (1) encouraging responsible procreation given the unique ability of opposite-gender couples to conceive, (2) effective parenting to benefit the offspring, and (3) proceeding with caution insofar as altering and expanding the definition of marriage. The district court rejected these rationales based on a lack of evidence and/or a lack of a rational

connection between excluding same-gender couples from marriage and the asserted justification.[2]

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[2] On appeal, the State offers a different formulation: (1) "fostering a child-centric marriage culture that encourages parents to subordinate their own interests to the needs of their children," (2) children being raised by their biological mothers and fathers—or at least by a married mother and father—in a stable home, (3) "ensuring adequate reproduction by parents willing and able to provide a high-quality home environment for their children," and (4) accommodating religious freedom and reducing the potential for civic strife." Aplt. Br. at iii. Notwithstanding its endorsement of many similar (though more general) values in the substantive due process discussion, this court is only willing to assume (apparently without deciding) that the first three are compelling.

Be that as it may, Plaintiffs correctly point out that the fourth argument was not raised in the district court. Aplee. Br. at 81 n.26. The State responds that the district court "discussed and rejected this argument in its decision," but the court merely made an offhand comment that religious freedom would be furthered by allowing churches to perform same-gender weddings (if they so choose). Aplee. Reply Br. at 41 n.19 (citing Kitchen, 961 F. Supp. 2d at 1214). The State also argues that rational basis review is not confined to "'explanations of the statute's rationality that may be offered by the litigants or other courts.'" Id. (quoting Kadrmas v. Dickinson Pub. Schs., 487 U.S. 450, 463 (1988)). That may be, but the State as a litigant is offering an explanation that was not preserved. Finally, the State argues that appellate courts may address a waived issue in the public interest or to avoid manifest injustice. Id. We normally conduct appellate review based upon arguments raised in the district court. For those that were not, absent a full plain error argument in the opening brief, we consider such arguments waived. See Richison v. Ernest Grp., Inc., 634 F.3d 1123, 1131 (10th Cir. 2011) ("[T]he failure to argue for plain error and its application on appeal[ ]surely marks the end of the road for an argument for reversal not first presented to the district court.").

Equal protection "is essentially a direction that all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439 (1985). Given the provisions in this case, we should look at the definition of marriage and the exclusion of same-gender couples and inquire whether "the classification . . . is rationally related to a legitimate state interest." Id. at 440.

To the extent the district court thought that the State had any obligation to produce evidence, surely it was incorrect. Vance v. Bradley, 440 U.S. 93, 110-11 (1979). Though the State is not precluded from relying upon evidence, rational basis analysis is a legal inquiry. See Id. at 111-112; see also United States R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 175-77, 179 (1980). The district court seems to have misunderstood the essence of rational basis review: extreme deference, the hallmark of judicial restraint. United States v. Alvarez, 132 S. Ct. 2537, 2552 (2012) (Breyer, J., concurring); Fed. Commc'n Comm'n v. Beach Commc'ns, 508 U.S. 307, 314 (1993). The State could rely upon any plausible reason and contend that the classification might arguably advance that reason. Armour v. City of Indianapolis, 132 S. Ct. 2073, 2080-81 (2012). Plaintiffs had the burden of refuting all plausible reasons for the challenged amendment and statutes. See Vance, 440 U.S. at 111.

Whether a reason actually motivated the electorate or the legislature is irrelevant; neither is required to state its reason for a choice. See Fritz, 449 U.S. at 179. Legislative choices involve line-

drawing, and the fact that such line-drawing may result in some inequity is not determinative. See Heller v. Doe, 509 U.S. 312, 321 (1993). Accordingly, an enactment may be over-inclusive and/or under-inclusive yet still have a rational basis. The fact that the classification could be improved or is ill-advised is not enough to invalidate it; the political process is responsible for remedying perceived problems. City of Cleburne, 473 U.S. at 440 ("The Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.").

Judged against these standards, Utah should prevail on a rational basis analysis. Plaintiffs have not overcome their "heavy burden" of demonstrating that the provisions are "arbitrary and irrational," that no electorate or legislature could reasonably believe the underlying legislative facts to be true. See Kadrmas v. Dickinson Pub. Schs., 487 U.S. 450, 463, 465 (1988). It is biologically undeniable that opposite-gender marriage has a procreative potential that same-gender marriage lacks. The inherent differences between the biological sexes are permissible legislative considerations, and indeed distinguish gender from those classifications that warrant strict scrutiny. See United States v. Virginia, 518 U.S. 515, 533 (1996). In Nguyen v. I.N.S., for example, the Court upheld a legislative scheme imposing more onerous burdens on unwed fathers than unwed mothers to prove the citizenship of their foreign-born children because of the opportunity for mothers to develop a relationship with their child at childbirth. 533 U.S. 53, 56-59 (2001). The Court recognized important

government interests in ensuring both a biological relationship between the citizen and the child and an opportunity to develop a meaningful parent-child relationship. Id. at 62-65. The Court stressed the government's critically important "interest in ensuring some opportunity for a tie between citizen father and foreign born child" as a proxy for the opportunity for connection childbirth affords the mother. Id. at 66. Nguyen suggests that when it comes to procreation, gender can be considered and that biological relationships are significant interests.

Nor is the State precluded from considering procreation in regulating marriage. Merely because the Court has discussed marriage as a fundamental right apart from procreation or other rights including contraception, child rearing, and education does not suggest that the link between marriage and procreation may not be considered when the State regulates marriage. The Court's listing of various rights from time to time is intended to be illustrative of cases upholding a right of privacy, ensuring that certain personal decisions might be made "without unjustified government interference." Carey v. Population Servs. Int'l, 431 U.S. 678, 684-85 (1977). Indeed, it is difficult to separate marriage from procreation considering the State's interest in regulating both. Even in Turner, where the Court discussed marriage as a fundamental right for inmates based upon other advantages of marriage, the Court explained that "most inmate marriages are formed in the expectation that they will ultimately be fully consummated" and mentioned the advantage of "legitimation of children born out of wedlock." 482

U.S. at 96. It goes without saying that there are procreative and personal dimensions of marriage, but a state may place greater emphasis on one or the other as it regulates marriage without violating the Fourteenth Amendment.[3]

It is also undeniable that the State has an important interest in ensuring the wellbeing of resulting offspring, be they planned or unplanned. To that end, the State can offer marriage and its benefits to encourage unmarried parents to marry and married parents to remain so. Thus, the State could seek to limit the marriage benefit to opposite-gender couples completely apart from history and tradition. Far more opposite-gender couples will produce and care for children than same-gender couples and perpetuation of the species depends upon procreation. Consistent with the greatest good for the greatest number, the State could rationally and sincerely believe that children are best raised by two parents of opposite gender (including their biological parents) and that the present arrangement provides the best incentive for that outcome. Accordingly, the State could seek to preserve the clarity of what marriage represents and not extend it.

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[3] These permissible considerations easily distinguish this case from Loving v. Virginia, upon which Plaintiffs rely. As opposed to the Court-approved interests furthered by the regulations here, the miscegenation law invalidated in Loving was based "upon distinctions drawn according to race," and the law furthered only the patently impermissible pursuit of invidious discrimination (maintaining White Supremacy). 388 U.S. at 11-12. The Court has always considered racial classifications as different than those based upon gender, or any other consideration.

Of course, other states may disagree. And it is always possible to argue that there are exceptions. But on this issue we should defer. To be sure, the constant refrain in these cases has been that the States' justifications are not advanced by excluding same-gender couples from marriage. But that is a matter of opinion; any "improvement" on the classification should be left to the state political process.

At the very least, same-gender marriage is a new social phenomenon with unknown outcomes and the State could choose to exercise caution. Utah's justifications for not extending marriage to include same-gender couples are not irrefutable. But they don't need to be; they need only be based upon "any reasonably conceivable state of facts." Beach Commc'ns, 508 U.S. at 313. In conducting this analysis, we must defer to the predictive judgments of the electorate and the legislature and those judgments need not be based upon complete, empirical evidence. See Turner Broadcasting System, Inc. v. Fed. Commc'n Comm'n, 512 U.S. 622, 665-66 (1994).

No matter how many times we are reminded that (1) procreative ability and effective parenting are not prerequisites to opposite-gender marriage (exclusion of same-gender couples is under-inclusive), (2) it is doubtful that the behavior of opposite-gender couples is affected by same-gender marriage (lack of evidence), (3) the evidence is equivocal concerning the effects of gender diversity on parenting (lack of evidence) and (4) the present scheme disadvantages

the children of same-gender couples (exclusion is over-inclusive),[4] the State's classification does not need to be perfect. It can be under-inclusive and over-inclusive and need only arguably serve the justifications urged by the State. It arguably does.

That the Constitution does not compel the State to recognize same-gender marriages within its own borders demonstrates a fortiori that it need not recognize those solemnized without. Unlike the federal government in Windsor, a state has the "historic and essential authority to define the marital relation" as applied to its residents and citizens. Windsor, 133 S. Ct. at 2691-92. To that end, Utah has the authority to decline to recognize valid marriages from other states that are inconsistent with its public policy choices. See In re Vetas' Estate, 170 P.2d 183, 187 (Utah 1946) (declining to recognize foreign common law marriage when such marriages were not recognized by Utah) (superseded by statute as stated in Whyte v. Blair, 885 P.2d 791, 793 (Utah 1994)). To conclude otherwise would nationalize the

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[4] The Court's conclusion that children raised by same-gender couples are somehow stigmatized, see Windsor, 133 S. Ct. at 2694, seems overwrought when one considers that 40.7% of children are now born out of wedlock. See Center for Disease Control and Prevention, FastStats Homepage, available at http://www.cdc.gov/nchs/fastats/unmarried-childbearing.htm (last visited June 24, 2014). Of course, there are numerous alternative family arrangements that exist to care for these children. We should be hesitant to suggest stigma where substantial numbers of children are raised in such environments. Moreover, it is pure speculation that every two-parent household, regardless of gender, desires marriage. See Schuette v. Coalition to Defend Affirmative Action, 134 S. Ct. 1623, 1634 (2014) (plurality opinion) (cautioning against assuming that members of the same group think alike and share the same views).

regulation of marriage, thereby forcing each state "to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate." Baker by Thomas v. Gen. Motors Corp., 522 U.S. 222, 232 (1998). Such a result runs in direct contravention of the law of comity between states and its uncontroversial corollary that marriage laws necessarily vary from state to state. Windsor, 133 S. Ct. at 2691.

The State has satisfied its burden on rational basis review. One only need consider the reams of sociological evidence urged by the parties and the scores of amicus briefs on either side to know that the State's position is (at the very least) arguable. It most certainly is not arbitrary, irrational, or based upon legislative facts that no electorate or legislature could conceivably believe. Though the Plaintiffs would weigh the interests of the State differently and discount the procreation, child-rearing, and caution rationales, that prerogative belongs to the electorate and their representatives. Or as the Court recently stated:

> The respondents in this case insist that a difficult question of public policy must be taken from the reach of the voters, and thus removed from the realm of public discussion, dialogue, and debate in an election campaign. Quite in addition to the serious First Amendment implications of that position with respect to any particular election, it is inconsistent with the underlying premises of a responsible, functioning democracy.

Schuette v. Coalition to Defend Affirmative Action, 134 S. Ct. 1623, 1637 (2014) (plurality opinion). We should resist the temptation to become philosopher-kings, imposing our views under the guise of constitutional interpretation of the Fourteenth Amendment.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH CENTRAL DIVISION

DEREK KITCHEN, MOUDI SBEITY, KAREN ARCHER, KATE CALL, LAURIE WOOD and KODY PARTRIDGE, all individually, Plaintiffs, vs. GARY R. HERBERT, in his official capacity as Governor of Utah; JOHN SWALLOW, in his official capacity as Attorney General of Utah; and SHERRIE SWENSEN, in her official capacity as Clerk of Salt Lake County, Defendants.	MEMORANDUM DECISION AND ORDER Case No.: 2:13-cv-217

The Plaintiffs in this lawsuit are three gay and lesbian couples who wish to marry, but are currently unable to do so because the Utah Constitution prohibits same-sex marriage. The Plaintiffs argue that this prohibition infringes their rights to due process and equal protection under the Fourteenth Amendment of the United States Constitution. The

State of Utah defends its laws and maintains that a state has the right to define marriage according to the judgment of its citizens. Both parties have submitted motions for summary judgment.

The court agrees with Utah that regulation of marriage has traditionally been the province of the states, and remains so today. But any regulation adopted by a state, whether related to marriage or any other interest, must comply with the Constitution of the United States. The issue the court must address in this case is therefore not who should define marriage, but the narrow question of whether Utah's current definition of marriage is permissible under the Constitution.

Few questions are as politically charged in the current climate. This observation is especially true where, as here, the state electorate has taken democratic action to participate in a popular referendum on this issue. It is only under exceptional circumstances that a court interferes with such action. But the legal issues presented in this lawsuit do not depend on whether Utah's laws were the result of its legislature or a referendum, or whether the laws passed by the widest or smallest of margins. The question presented here depends instead on the Constitution itself, and on the interpretation of that document contained in binding precedent from the Supreme Court and the Tenth Circuit Court of Appeals.

Applying the law as it is required to do, the court holds that Utah's prohibition on same-sex marriage conflicts with the United States

Constitution's guarantees of equal protection and due process under the law. The State's current laws deny its gay and lesbian citizens their fundamental right to marry and, in so doing, demean the dignity of these same-sex couples for no rational reason. Accordingly, the court finds that these laws are unconstitutional.

BACKGROUND

I The Plaintiffs

The three couples in this lawsuit either desire to be married in Utah or are already legally married elsewhere and wish to have their marriage recognized in Utah. The court summarizes below the relevant facts from the affidavits that the couples filed in support of their Motion for Summary Judgment.

A. Derek Kitchen and Moudi Sbeity

Derek Kitchen is a twenty-five-year-old man who was raised in Utah and obtained a B.A. in political science from the University of Utah. Moudi Sbeity is also twenty-five years old and was born in Houston, Texas. He grew up in Lebanon, but left that country in 2006 during the war between Lebanon and Israel. Moudi came to Logan, Utah, where he received a B.S. in economics from Utah State University. He is currently enrolled in a Master's program in economics at the University of Utah.

Derek testifies that he knew he was gay from a young age, but that he did not come out publicly to his friends and family for several years while he

struggled to define his identity. Moudi also knew he was gay when he was young and came out to his mother when he was sixteen. Moudi's mother took him to a psychiatrist because she thought he was confused, but the psychiatrist told her that there was nothing wrong with Moudi. After that visit, Moudi's mother found it easier to accept Moudi's identity, and Moudi began telling his other friends and family members. Moudi testifies that he was careful about whom he told because he was concerned that he might expose his mother to ridicule.

Derek and Moudi met each other in 2009 and fell in love shortly after meeting. After dating for eighteen months, the two moved in together in Salt Lake City. Derek and Moudi run a business called "Laziz" that they jointly started. Laziz produces and sells Middle Eastern spreads such as hummus, muhammara, and toum to Utah businesses like Harmon's and the Avenues Bistro. Having maintained a committed relationship for over four years, Derek and Moudi desire to marry each other. They were denied a marriage license from the Salt Lake County Clerk's office in March 2013.

B. Karen Archer and Kate Call

Karen Archer was born in Maryland in 1946, but spent most of her life in Boulder, Colorado. She received a B.A. and an M.D. from the University of Texas, after which she completed her residency in OB/GYN at the Pennsylvania State University. She worked as a doctor until 2001, when she retired after developing two serious illnesses. Karen experienced a number of hardships due to her sexual identity.

Karen came out to her parents when she was twenty-six years old, but her parents believed that her sexual orientation was an abnormality and never accepted this aspect of Karen's identity. Karen was one of thirteen women in a medical school class of 350, and she recalls that her male classmates often referred to the female students as "dykes." Karen also testifies that she was once present at a gay bar when it was raided by the police, who assaulted the bar patrons with their batons.

Kate Call is sixty years old and spent her earliest years in Wisconsin and Mexico, where her parents were mission presidents for the Church of Jesus Christ of Latter-day Saints. When she was eight years old, Kate moved to Provo, Utah, where her father worked as a professor at Brigham Young University. Kate received her B.A. from BYU in 1974. While she was in college, she dated several men and was even engaged twice. Although she hoped that she would begin to feel a more intimate connection if she committed herself to marriage, she broke off both engagements because she never developed any physical attraction to her fiancés. Kate began to realize that she was a lesbian, a feeling that continued to develop while she was serving a mission in Argentina. She wrote a letter sharing these feelings to her mission president, who, without Kate's consent, faxed Kate's message to church authorities and her parents. Kate's family was sad and puzzled at first, but ultimately told her that they loved her unconditionally.

During her professional life, Kate owned a number of businesses. In 2000, she bought a sheep

ranch in San Juan County and moved there with D., her partner at the time. Kate worked seasonally for the National Park Service and D. found a job at the Youth Detention facility in Blanding. But when rumors surfaced that D. was a lesbian, D.'s boss told her that she needed to move away from Kate's ranch if she wished to keep her job. While Kate was helping D. move, someone from D.'s work saw Kate's vehicle at D.'s new trailer. That person reported the sighting to D.'s boss, and D. was fired. Several weeks later, Kate's supervisor also told her that her services were no longer needed. Kate never found out why she was let go, but she surmises that her supervisor may have been pressured by D.'s boss, who was one of her supervisor's mentors. Kate and D. moved back to the Wasatch Front, and Kate was eventually forced to sell the ranch. Kate testifies that she and D. split up as a result of the difficult challenges they had faced, and Kate eventually moved to Moab.

Karen and Kate met online through a dating website and were immediately attracted to each other when they first met in person. Karen moved from Colorado to Utah, and the couple now lives in Wallsburg. The two are both concerned about how they will support each other in the event that one of them passes away, a consideration that is especially urgent in light of Karen's illness. Karen has had difficult experiences with the legal aspects of protecting a same-sex union in the past. Before meeting Kate, Karen had two partners who passed away while she was with them. While partnered to a woman named Diana, Karen had to pay an attorney approximately one thousand dollars to draw up a

large number of legal documents to guarantee certain rights: emergency contacts, visitation rights, power of attorney for medical and financial decisions, medical directives, living wills, insurance beneficiaries, and last wills and testaments. Despite these documents, Karen was unable to receive Diana's military pension when Diana died in 2005.

Karen and Kate have drawn up similar legal papers, but they are concerned that these papers may be subject to challenges because they are not legally recognized as a couple in Utah. In an attempt to protect themselves further, Karen and Kate flew to Iowa to be wed in a city courthouse. Because of the cost of the plane tickets, the couple was not able to have friends and family attend, and the pair had their suitcases by their side when they said, "I do." Kate testifies that the pragmatism of their Iowa wedding was born out of the necessity of providing whatever security they could for their relationship. Under current law, Utah does not recognize their marriage performed in Iowa.

C. Laurie Wood and Kody Partridge

Laurie Wood has lived in Utah since she was three years old. She grew up in American Fork, received a B.A. from the University of Utah, and received her Master's degree from BYU. She spent over eleven years teaching in the public school system in Utah County and is now employed by Utah Valley University. She teaches undergraduate courses as an Associate Professor of English in the English and Literature Department, and also works as the Concurrent Enrollment

Coordinator supervising high school instructors who teach as UVU adjuncts in high schools across Utah County. She has served on the Board of Directors for the American Civil Liberties Union for fifteen years and co-founded the non-profit Women's Redrock Music Festival in 2006. Laurie was not open about her sexual identity while she was a public school teacher because she believed she would be fired if she said anything. She came out when she was hired at UVU. While she dated men in high school and college, she never felt comfortable or authentic in her relationships until she began dating women.

Kody Partridge is forty-seven years old and moved to Utah from Montana in 1984 to attend BYU. She received her B.A. in Spanish and humanities and later obtained a Master's degree in English. She earned a teaching certificate in 1998 and began teaching at Butler Middle School in Salt Lake County. She realized that she was a lesbian while she was in college, and her family eventually came to accept her identity. She did not feel she could be open about her identity at work because of the worry that her job would be at risk. While she was teaching at Butler, Kody recalls that the story of Wendy Weaver was often in the news. Ms. Weaver was a teacher and coach at a Utah public school who was fired because she was a lesbian. Kody also became aware that the pension she was building in Utah Retirement Systems as a result of her teaching career could not be inherited by a life partner. Given these concerns, Kody applied and was accepted for a position in the English department at Rowland Hall-St. Mark's, a private school that provides benefits for the same-sex partners of its faculty

members. Kody volunteers with the Utah AIDS Foundation and has traveled with her students to New Orleans four times after Hurricane Katrina to help build homes with Habitat for Humanity.

Laurie and Kody met and fell in love in 2010. Besides the fact that they are both English teachers, the two share an interest in books and gardening and have the same long-term goals for their committed relationship. They wish to marry, but were denied a marriage license from the Salt Lake County Clerk's office in March 2013.

II. History of Amendment 3

The Utah laws that are at issue in this lawsuit include two statutory prohibitions on same-sex unions and an amendment to the Utah Constitution. The court discusses the history of these laws in the context of the ongoing national debate surrounding same-sex marriage.

In 1977, the Utah legislature amended Section 30-1-2 of the Utah Code to state that marriages "between persons of the same sex" were "prohibited and declared void." In 2004, the Utah legislature passed Section 30-1-4.1 of the Utah Code, which provides:

> (1) (a) It is the policy of this state to recognize as marriage only the legal union of a man and a woman as provided in this chapter.

> (b) Except for the relationship of marriage between a man and a woman recognized pursuant to this chapter, this state will not recognize, enforce, or give legal effect to any law creating any legal status, rights, benefits, or duties that are substantially equivalent to those provided under Utah law to a man and woman because they are married.

In the 2004 General Session, the Utah legislature also passed a Joint Resolution on Marriage, which directed the Lieutenant Governor to submit the following proposed amendment to the Utah Constitution to the voters of Utah:

> (1) Marriage consists only of the legal union between a man and a woman.
>
> (2) No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect.

Laws 2004, H.J.R. 25 § 1. The proposed amendment, which became known as Amendment 3, was placed on the ballot for the general election on November 2, 2004. Amendment 3 passed with the support of approximately 66% of the voters. The language in Amendment 3 was then amended to the Utah

Constitution as Article I, § 29, which went into effect on January 1, 2005.[5]

These developments were influenced by a number of events occurring nationally. In 1993, the Hawaii Supreme Court found that the State of Hawaii's refusal to grant same-sex couples marriage licenses was discriminatory. *Baehr v. Lewin*, 852 P.2d 44, 59 (Haw. 1993).[6]

And in 1999, the Vermont Supreme Court held that the State of Vermont was required to offer all the benefits of marriage to same-sex couples. *Baker v. Vermont*, 744 A.2d 864, 886-87 (Vt. 1999).[7] Two court cases in 2003 immediately preceded Utah's

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[5] Unless noted otherwise, the court will refer to Amendment 3 in this opinion to mean both the Utah constitutional amendment and the Utah statutory provisions that prohibit same-sex marriage.

[6] The Hawaii Supreme Court remanded the case to the trial court to determine if the state could show that its marriage statute was narrowly drawn to further compelling state interests. *Baehr*, 852 P.2d at 68. The trial court ruled that the government failed to make this showing. *Baehr v. Miike*, No. 91-1394 WL 694235, at *22 (Haw. Cir. Ct. Dec. 3, 1996). The Trial court's decision was rendered moot after Hawaii passed a constitutional amendment that granted the Hawaii legislature the ability to reserve marriage for opposite-sex couples. Recently, the legislature reversed course and legalized same-sex marriage. Same-sex couples began marrying in Hawaii on December 2, 2013.

[7] The Vermont legislature complied with this mandate by creating a new legal status called a "civil union." The legislature later permitted same-sex marriage through a statute that went into effect on September 1, 2009.

decision to amend its Constitution. First, the United States Supreme Court ruled that the Due Process Clause of the Fourteenth Amendment protected the sexual relations of gay men and lesbians. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). Second, the Supreme Court of Massachusetts ruled that the Massachusetts Constitution protected the right of same-sex couples to marry. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003).

Since 2003, every other state has either legalized same-sex marriage[8] or, like Utah, passed a constitutional amendment or other legislation to prohibit same-sex unions. During the past two decades, the federal government has also been involved in the same-sex marriage debate. In 1996, Congress passed the Defense of Marriage Act (DOMA), which allowed states to refuse to recognize same-sex marriages granted in other states and barred federal recognition of same-sex unions for the purposes of federal law. Act of Sept. 21, 1996, Pub. L. 104-199, 110 Stat. 2419. In 2013, the Supreme Court held that Section 3 of DOMA was unconstitutional.[9] *Windsor v. United States*, 133 S. Ct. 2675, 2696 (2013).

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[8] Six states have legalized same-sex marriage through court decisions (California, Connecticut, Iowa, Massachusetts, New Jersey, New Mexico); eight states have passed same-sex marriage legislation (Delaware, Hawaii, Illinois, Minnesota, New Hampshire, New York, Rhode Island, Vermont); and three states have legalized same-sex marriage through a popular vote (Maine, Maryland, Washington). Same-sex marriage is also legal in Washington, D.C.

[9] As discussed below, Section 3 defined marriage as the union between a man and a woman for purposes of federal law.

The Supreme Court also considered an appeal from a case involving California's Proposition 8. After the California Supreme Court held that the California Constitution recognized same-sex marriage, *In re Marriage Cases*, 183 P.3d 384, 453 (Cal. 2008), California voters passed Proposition 8, which amended California's Constitution to prohibit same-sex marriage. The Honorable Vaughn Walker, a federal district judge, determined that Proposition 8 violated the guarantees of equal protection and due process under the United States Constitution. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1003 (N.D. Cal. 2010). Applying different reasoning, the Ninth Circuit Court of Appeals affirmed Judge Walker's holding that Proposition 8 was unconstitutional. *Perry v. Brown*, 671 F.3d 1052, 1095 (9th Cir. 2012). This issue was appealed to the Supreme Court, but the Court did not address the merits of the question presented. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2668 (2013). Instead, the Court found that the proponents of Proposition 8 did not have standing to appeal Judge Walker's decision after California officials refused to defend the law. *Id.* Consequently, the Supreme Court vacated the Ninth Circuit's opinion for lack of jurisdiction. *Id.* A number of lawsuits, including the suit currently pending before this court, have been filed across the country to address the question that the Supreme Court left unanswered in the California case. The court turns to that question now.

The Court did not consider a challenge to Section 2, which allows states to refuse to recognize same-sex marriages validly performed in other states. *See* 28 U.S.C. § 1738C.

ANALYSIS

I. Standard of Review

The court grants summary judgment when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The court "view[s] the evidence and make[s] all reasonable inferences in the light most favorable to the nonmoving party." *N. Natural Gas Co. v. Nash Oil & Gas, Inc.*, 526 F.3d 626, 629 (10thCir. 2008).

II. Effect of the Supreme Court's Decision in *United States v. Windsor*

The court begins its analysis by determining the effect of the Supreme Court's recent decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013). In *Windsor*, the Court considered the constitutionality of Section 3 of DOMA, which defined marriage as the "legal union between one man and one woman as husband and wife" for the purposes of federal law. 1 U.S.C. § 7 (2012). A majority of the Court found that this statute was unconstitutional because it violated the Fifth Amendment of the United States Constitution. *Windsor*, 133 S. Ct. at 2696.

Both parties argue that the reasoning in *Windsor* requires judgment in their favor. The State focuses on the portions of the *Windsor* opinion that emphasize federalism, as well as the Court's acknowledgment of the State's "historic and essential authority to define the marital relation." *Id.* at 2692; *see also id.* at 2691 ("[S]ubject to

[constitutional] guarantees, 'regulation of domestic relations' is 'an area that has long been regarded as a virtually exclusive province of the States.'" (quoting *Sosna v. Iowa*, 419 U.S. 393, 404 (1975))). The State interprets *Windsor* to stand for the proposition that DOMA was unconstitutional because the statute departed from the federal government's "history and tradition of reliance on state law to define marriage." *Id.* at 2692. Just as the federal government cannot choose to disregard a state's decision to recognize same-sex marriage, Utah asserts that the federal government cannot intrude upon a state's decision *not* to recognize same-sex marriage. In other words, Utah believes that it is up to each individual state to decide whether two persons of the same sex may "occupy the same status and dignity as that of a man and woman in lawful marriage." *Id.* at 2689.

The Plaintiffs disagree with this interpretation and point out that the *Windsor* Court did not base its decision on the Tenth Amendment.[10] Instead, the Court grounded its holding in the Due Process Clause of the Fifth Amendment, which protects an individual's right to liberty. *Id.* at 2695 ("DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution."). The Court found that DOMA violated the Fifth Amendment because the statute "place[d] same-sex couples in an unstable position of

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[10] The Tenth Amendment makes explicit the division between federal and state power: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

being in a second-tier marriage," a differentiation that "demean[ed] the couple, whose moral and sexual choices the Constitution protects[.]" *Id.* at 2694. The Plaintiffs argue that for the same reasons the Fifth Amendment prohibits the federal government from differentiating between same-sex and opposite-sex couples, the Fourteenth Amendment prohibits state governments from making this distinction.

Both parties present compelling arguments, and the protection of states' rights and individual rights are both weighty concerns. In *Windsor*, these interests were allied against the ability of the federal government to disregard a state law that protected individual rights. Here, these interests directly oppose each other. The *Windsor* court did not resolve this conflict in the context of state-law prohibitions of same-sex marriage. *See id.* at 2696 (Roberts, C.J., dissenting) ("The Court does not have before it . . . the distinct question whether the States . . . may continue to utilize the traditional definition of marriage."). But the Supreme Court has considered analogous questions that involve the tension between these two values in other cases. *See, e.g.*, *Loving v. Virginia*, 388 U.S. 1 (1967) (balancing the state's right to regulate marriage against the individual's right to equal protection and due process under the law). In these cases, the Court has held that the Fourteenth Amendment requires that individual rights take precedence over states' rights where these two interests are in conflict. *See id.* at 7 (holding that a state's power to regulate marriage is limited by the Fourteenth Amendment).

The Constitution's protection of the individual rights of gay and lesbian citizens is equally dispositive whether this protection requires a court to respect a state law, as in *Windsor*, or strike down a state law, as the Plaintiffs ask the court to do here. In his dissenting opinion, the Honorable Antonin Scalia recognized that this result was the logical outcome of the Court's ruling in *Windsor*:

> In my opinion, however, the view that *this* Court will take of state prohibition of same-sex marriage is indicated beyond mistaking by today's opinion. As I have said, the real rationale of today's opinion . . . is that DOMA is motivated by "bare . . . desire to harm" couples in same-sex marriages. How easy it is, indeed how inevitable, to reach the same conclusion with regard to state laws denying same-sex couples marital status.

133 S. Ct. at 2709 (citations and internal quotation marks omitted). The court agrees with Justice Scalia's interpretation of *Windsor* and finds that the important federalism concerns at issue here are nevertheless insufficient to save a state-law prohibition that denies the Plaintiffs their rights to due process and equal protection under the law.

III. *Baker v. Nelson* Is No Longer Controlling Precedent

In 1971, two men from Minnesota brought a lawsuit in state court arguing that Minnesota was constitutionally required to allow them to marry. *Baker v. Nelson*, 191 N.W.2d 185, 187 (Minn. 1971).

The Minnesota Supreme Court found that Minnesota's restriction of marriage to opposite-sex couples did not violate either the Equal Protection Clause or the Due Process Clause of the Fourteenth Amendment. *Id.* at 186-87. On appeal, the United States Supreme Court summarily dismissed the case "for want of a substantial federal question." *Baker v. Nelson*, 409 U.S. 810, 810 (1972).

Utah argues that the Court's summary dismissal in *Baker* is binding on this court and that the present lawsuit should therefore be dismissed for lack of a substantial federal question. But the Supreme Court has stated that a summary dismissal is not binding "when doctrinal developments indicate otherwise." *Hicks v. Miranda*, 422 U.S. 332, 344 (1975).

Here, several doctrinal developments in the Court's analysis of both the Equal Protection Clause and the Due Process Clause as they apply to gay men and lesbians demonstrate that the Court's summary dismissal in *Baker* has little if any precedential effect today. Not only was *Baker* decided before the Supreme Court held that sex is a quasi-suspect classification, *see Craig v. Boren*, 429 U.S. 190, 197 (1976); *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973) (plurality op.), but also before the Court recognized that the Constitution protects individuals from discrimination on the basis of sexual orientation. *See Romer v. Evans*, 517 U.S. 620, 635-36 (1996). Moreover, *Baker* was decided before the Supreme Court held in *Lawrence v. Texas* that it was unconstitutional for a state to "demean

[the] existence [of gay men and lesbians] or control their destiny by making their private sexual conduct a crime." 539 U.S. 558, 578 (2003). As discussed below, the Supreme Court's decision in *Lawrence* removes a justification that states could formerly cite as a reason to prohibit same-sex marriage.

The State points out that, despite the doctrinal developments in these cases and others, a number of courts have found that *Baker* survives as controlling precedent and therefore precludes consideration of the issues in this lawsuit. *See, e.g.*, *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 8 (1st Cir. 2012) (holding that *Baker* "limit[s] the arguments to ones that do not presume to rest on a constitutional right to same-sex marriage."); *Sevcik v. Sandoval*, 911 F. Supp. 2d 996, 1002-03 (D. Nev. 2012) (ruling that *Baker* barred the plaintiffs' equal protection claim). Other courts disagree and have decided substantially similar issues without consideration of *Baker*. *See, e.g.*, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (ruling that California's prohibition of same-sex marriage violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment). In any event, all of these cases were decided before the Supreme Court issued its opinion in *Windsor*.

As discussed above, the Court's decision in *Windsor* does not answer the question presented here, but its reasoning is nevertheless highly relevant and is therefore a significant doctrinal development. Importantly, the *Windsor* Court foresaw that its ruling would precede a number of

lawsuits in state and lower federal courts raising the question of a state's ability to prohibit same-sex marriage, a fact that was noted by two dissenting justices. The Honorable John Roberts wrote that the Court "may in the future have to resolve challenges to state marriage definitions affecting same-sex couples." *Windsor*, 133 S. Ct. at 2697 (Roberts, C.J., dissenting). And Justice Scalia even recommended how this court should interpret the *Windsor* decision when presented with the question that is now before it: "I do not mean to suggest disagreement . . . that lower federal courts and state courts can distinguish today's case when the issue before them is state denial of marital status to same-sex couples." *Id.* at 2709 (Scalia, J., dissenting). It is also notable that while the Court declined to reach the merits in *Perry v. Hollingsworth* because the petitioners lacked standing to pursue the appeal, the Court did not dismiss the case outright for lack of a substantial federal question. *See* 133 S. Ct. 2652 (2013). Given the Supreme Court's disposition of both *Windsor* and *Perry*, the court finds that there is no longer any doubt that the issue currently before the court in this lawsuit presents a substantial question of federal law.

As a result, *Baker v. Nelson* is no longer controlling precedent and the court proceeds to address the merits of the question presented here.

IV. Amendment 3 Violates the Plaintiffs' Due Process Rights

The State of Utah contends that what is at stake in this lawsuit is the State's right to define marriage free from federal interference. The Plaintiffs counter that what is really at issue is an individual's ability to protect his or her fundamental rights from unreasonable interference by the state government. As discussed above, the parties have defined the two important principles that are in tension in this matter. While Utah exercises the "unquestioned authority" to regulate and define marriage, *Windsor*, 133 S. Ct. at 2693, it must nevertheless do so in a way that does not infringe the constitutional rights of its citizens. *See id.* at 2692 (noting that the "incidents, benefits, and obligations of marriage" may vary from state to state but are still "subject to constitutional guarantees"). As a result, the court's role is not to define marriage, an exercise that would be improper given the states' primary authority in this realm. Instead, the court's analysis is restricted to a determination of what individual rights are protected by the Constitution. The court must then decide whether the State's definition and regulation of marriage impermissibly infringes those rights.

The Constitution guarantees that all citizens have certain fundamental rights. These rights vest in every person over whom the Constitution has authority and, because they are so important, an individual's fundamental rights "may not be submitted to vote; they depend on the outcome of no elections." *W. Va. State Bd. of Educ. v. Barnette*,

319 U.S. 624, 638 (1943). When the Constitution was first ratified, these rights were specifically articulated in the Bill of Rights and protected an individual from certain actions of the federal government. After the nation's wrenching experience in the Civil War, the people adopted the Fourteenth Amendment, which holds: "No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Supreme Court has held that the Due Process Clause of the Fourteenth Amendment applies to "matters of substantive law as well as to matters of procedure. Thus all fundamental rights comprised within the term liberty are protected by the Federal constitution from invasion by the States." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992) (quoting *Whitney v. California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring)).

The most familiar of an individual's substantive liberties are those recognized by the Bill of Rights, and the Supreme Court has held that the Due Process Clause of the Fourteenth Amendment incorporates most portions of the Bill of Rights against the States. *See, e.g.*, *Duncan v. Louisiana*, 391 U.S. 145, 147-48 (1968) (discussing incorporation of certain rights from the First, Fourth, Fifth, and Sixth Amendments); *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3050 (2010) (incorporating the Second Amendment). In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,

the Supreme Court recognized the authority of an argument first made by the Honorable John Marshall Harlan II that the Due Process Clause also protects a number of unenumerated rights from unreasonable invasion by the State:

> [T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This "liberty" is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgement.

Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting from dismissal on jurisdictional grounds), *quoted in Casey*, 505 U.S. at 848-49.

A. Supreme Court Cases Protecting Marriage as a Fundamental Right

The right to marry is an example of a fundamental right that is not mentioned explicitly in

the text of the Constitution but is nevertheless protected by the guarantee of liberty under the Due Process Clause. The Supreme Court has long emphasized that the right to marry is of fundamental importance. In *Maynard v. Hill*, the Court characterized marriage as "the most important relation in life" and as "the foundation of the family and society, without which there would be neither civilization nor progress." 125 U.S. 190, 205, 211 (1888). In *Meyer v. Nebraska*, the Court recognized that the right "to marry, establish a home and bring up children" is a central part of the liberty protected by the Due Process Clause. 262 U.S. 390, 399 (1923). And in *Skinner v. Oklahoma ex rel. Williamson*, the Court ruled that marriage is "one of the basic civil rights of man." 316 U.S. 535, 541 (1942).

In more recent cases, the Court has held that the right to marry implicates additional rights that are protected by the Fourteenth Amendment. For instance, the Court's decision in *Griswold v. Connecticut*, in which the Court struck down a Connecticut law that prohibited the use of contraceptives, established that the right to marry is intertwined with an individual's right of privacy. The Court observed:

> We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not

> causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

381 U.S. 479, 486 (1965). And in *M.L.B. v. S.L.J.*, the Court described marriage as an associational right: "Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked 'of basic importance in our society,' rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." 519 U.S. 102, 116 (1996) (citation omitted).

The Supreme Court has consistently held that a person must be free to make personal decisions related to marriage without unjustified government interference. *See, e.g.*, *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974) ("This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684-85 (1977) ("[I]t is clear that among the decisions that an individual may make without unjustified government interference are personal decisions relating to marriage, procreation, contraception, family relationships, and child rearing and education." (citations and internal quotation marks omitted)); *Hodgson v. Minnesota*, 497 U.S. 417, 435 (1990) ("But the regulation of constitutionally protected decisions, such as where a person shall reside or whom he or she shall marry,

must be predicated on legitimate state concerns other than disagreement with the choice the individual has made."). In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court emphasized the high degree of constitutional protection afforded to an individual's personal choices about marriage and other intimate decisions:

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

Casey, 505 U.S. at 851.

Given the importance of marriage as a fundamental right and its relation to an individual's rights to liberty, privacy, and association, the Supreme Court has not hesitated to invalidate state laws pertaining to marriage whenever such a law intrudes on an individual's protected realm of liberty. Most famously, the Court struck down Virginia's law against interracial marriage in *Loving v. Virginia*, 388 U.S. 1, 12 (1967). The Court found that Virginia's anti-miscegenation statute violated both the Equal Protection Clause and the Due Process Clause of the Fourteenth

Amendment. *Id.* The Court has since noted that *Loving* was correctly decided, even though mixed-race marriages had previously been illegal in many states[11] and, moreover, were not specifically protected from government interference at the time the Fourteenth Amendment was ratified: "Marriage is mentioned nowhere in the Bill of Rights and interracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause in *Loving v. Virginia*." *Casey*, 505 U.S. at 847-48; *see also Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 992 (N.D. Cal. 2010) ("[T]he Court recognized that race restrictions, despite their historical prevalence, stood in stark contrast to the concepts of liberty and choice inherent in the right to marry.").

In addition to the anti-miscegenation laws the Supreme Court struck down in *Loving*, the Supreme Court has held that other state regulations affecting marriage are unconstitutional where these laws infringe on an individual's access to marriage. In *Zablocki v. Redhail*, the Court considered a Wisconsin statute that required any Wisconsin resident who had children that were not currently in the resident's custody to obtain a court order before the resident was permitted to marry. 434 U.S. 374, 375 (1978). The statute mandated that the court should not grant permission to marry unless the

[11] In 1948, the California Supreme Court became the first court in the twentieth century to strike down an anti-miscegenation statute. *Perez v. Sharp*, 198 P.2d 17 (Cal. 1948); *see also Loving*, 388 U.S. at 6 n.5.

resident proved that he was in compliance with any support obligation for his out-of-custody children, and could also show that any children covered by such a support order "[were] not then and [were] not likely thereafter to become public charges." *Id.* (quoting Wis. Stat. § 245.10 (1973)). The Court found that, while the State had a legitimate and substantial interest in the welfare of children in Wisconsin, the statute was nevertheless unconstitutional because it was not "closely tailored to effectuate only those interests" and "unnecessarily impinge[d] on the right to marry[.]" *Id.* at 388. The Court distinguished the statute at issue from reasonable state regulations related to marriage that would not require any heightened review:

> By reaffirming the fundamental character of the right to marry, we do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed.

Id. at 386. As the Honorable John Paul Stevens noted in his concurring opinion, "A classification based on marital status is fundamentally different from a classification which determines who may lawfully enter into the marriage relationship." *Id.* at 403-04 (Stevens, J., concurring).

In *Turner v. Safley*, the Court struck down a Missouri regulation that prohibited inmates from marrying unless the prison superintendent approved of the marriage. 482 U.S. 78, 99-100 (1987). The Court held that inmates retained their fundamental right to marry even though they had a reduced expectation of liberty in prison. *Id.* at 96. The Court emphasized the many attributes of marriage that prisoners could enjoy even if they were not able to have sexual relations:

> First, inmate marriages, like others, are expressions of emotional support and public commitment. These elements are an important and significant aspect of the marital relationship. In addition, many religions recognize marriage as having spiritual significance; for some inmates and their spouses, therefore, the commitment of marriage may be an exercise of religious faith as well as an expression of personal dedication. Third, most inmates eventually will be released by parole or commutation, and therefore most inmate marriages are formed in the expectation that they ultimately will be fully consummated. Finally, marital status often is a precondition to the receipt of government benefits (*e.g.*, Social Security benefits), property rights (*e.g.*, tenancy by the entirety, inheritance rights), and other, less tangible benefits (*e.g.*, legitimation of children born out of wedlock). These incidents of marriage, like the religious and personal aspects of the marriage commitment, are unaffected by the

> fact of confinement or the pursuit of legitimate corrections goals.

Id. at 95-96.

These cases demonstrate that the Constitution protects an individual's right to marry as an essential part of the right to liberty. The right to marry is intertwined with the rights to privacy and intimate association, and an individual's choices related to marriage are protected because they are integral to a person's dignity and autonomy. While states have the authority to regulate marriage, the Supreme Court has struck down several state regulations that impermissibly burdened an individual's ability to exercise the right to marry. With these general observations in mind, the court turns to the specific question of Utah's ability to prohibit same-sex marriage.

B. Application of the Court's Jurisprudence to Amendment 3

The State does not dispute, nor could it, that the Plaintiffs possess the fundamental right to marry that the Supreme Court has protected in the cases cited above. Like all fundamental rights, the right to marry vests in every American citizen. *See Zablocki*, 434 U.S. at 384 ("Although *Loving* arose in the context of racial discrimination, prior and subsequent decisions of this Court confirm that the right to marry is of fundamental importance for all individuals."). The State asserts that Amendment 3 does not abridge the Plaintiffs' fundamental right to marry because the Plaintiffs are still at liberty to

marry a person of the opposite sex. But this purported liberty is an illusion. The right to marry is not simply the right to become a married person by signing a contract with someone of the opposite sex. If marriages were planned and arranged by the State, for example, these marriages would violate a person's right to marry because such arrangements would infringe an individual's rights to privacy, dignity, and intimate association. A person's choices about marriage implicate the heart of the right to liberty that is protected by the Fourteenth Amendment. *See Casey*, 505 U.S. at 851. The State's argument disregards these numerous associated rights because the State focuses on the outward manifestations of the right to marry, and not the inner attributes of marriage that form the core justifications for why the Constitution protects this fundamental human right.

Moreover, the State fails to dispute any of the facts that demonstrate why the Plaintiffs' asserted right to marry someone of the opposite sex is meaningless. The State accepts without contest the Plaintiffs' testimony that they cannot develop the type of intimate bond necessary to sustain a marriage with a person of the opposite sex. The Plaintiffs have not come to this realization lightly, and their recognition of their identity has often risked their family relationships and work opportunities. For instance, Kody and Laurie both worried that they would lose their jobs as English teachers if they were open about their sexual identity. Kate's previous partner did lose her job because she was a lesbian, and Kate may have been let go from her position with the National Park

Service for the same reason. Karen's family never accepted her identity, and Moudi testified that he remained cautious about openly discussing his sexuality because he feared that his mother might be ridiculed. The Plaintiffs' testimony supports their assertions that their sexual orientation is an inherent characteristic of their identities.

Forty years ago, these assertions would not have been accepted by a court without dispute. In 1973, the American Psychiatric Association still defined homosexuality as a mental disorder in the Diagnostic and Statistical Manual of Mental Disorders (DSM-II), and leading experts believed that homosexuality was simply a lifestyle choice. With the increased visibility of gay men and lesbians in the past few decades, a wealth of new knowledge about sexuality has upended these previous beliefs. Today, the State does not dispute the Plaintiffs' testimony that they have never been able to develop feelings of deep intimacy for a person of the opposite sex, and the State presents no argument or evidence to suggest that the Plaintiffs could change their identity if they desired to do so. Given these undisputed facts, it is clear that if the Plaintiffs are not allowed to marry a partner of the same sex, the Plaintiffs will be forced to remain unmarried. The effect of Amendment 3 is therefore that it denies gay and lesbian citizens of Utah the ability to exercise one of their constitutionally protected rights. The State's prohibition of the Plaintiffs' right to choose a same-sex marriage partner renders their fundamental right to marry as meaningless as if the State recognized the Plaintiffs' right to bear arms but not their right to buy bullets.

While admitting that its prohibition of same-sex marriage harms the Plaintiffs, the State argues that the court's characterization of Amendment 3 is incorrect for three reasons: (1) the Plaintiffs are not qualified to enter into a marriage relationship; (2) the Plaintiffs are seeking a new right, not access to an existing right; and (3) history and tradition have not recognized a right to marry a person of the same sex. The court addresses each of these arguments in turn.

1. *The Plaintiffs Are Qualified to Marry*

First, the State contends that same-sex partners do not possess the qualifications to enter into a marriage relationship and are therefore excluded from this right as a definitional matter. As in other states, the purposes of marriage in Utah include "the state recognition and approval of a couple's choice to live with each other, to remain committed to one another and to form a household based on their own feelings about one another[,] and to join in an economic partnership and support one another and any dependents." *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 961 (N.D. Cal. 2010). There is no dispute that the Plaintiffs are able to form a committed relationship with one person to the exclusion of all others. There is also no dispute that the Plaintiffs are capable of raising children within this framework if they choose to do so. The State even salutes "[t]he worthy efforts of same-sex couples to rear children." (Defs.' Mem. in Opp'n, at 46 n.7, Dkt. 84.) Nevertheless, the State maintains that same-sex couples are distinct from

opposite-sex couples because they are not able to naturally reproduce with each other. The State points to Supreme Court cases that have linked the importance of marriage to its relationship to procreation. *See, e.g.*, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) ("Marriage and procreation are fundamental to the very existence and survival of the race.").

The court does not find the State's argument compelling because, however persuasive the ability to procreate might be in the context of a particular religious perspective, it is not a defining characteristic of conjugal relationships from a legal and constitutional point of view. The State's position demeans the dignity not just of same-sex couples, but of the many opposite-sex couples who are unable to reproduce or who choose not to have children. Under the State's reasoning, a post-menopausal woman or infertile man does not have a fundamental right to marry because she or he does not have the capacity to procreate. This proposition is irreconcilable with the right to liberty that the Constitution guarantees to all citizens.

At oral argument, the State attempted to distinguish post-menopausal women from gay men and lesbians by arguing that older women were more likely to find themselves in the position of caring for a grandchild or other relative. But the State fails to recognize that many same-sex couples are also in the position of raising a child, perhaps through adoption or surrogacy. The court sees no support for the State's suggestion that same-sex couples are interested only in a "consent-based"

approach to marriage, in which marriage focuses on the strong emotional attachment and sexual attraction of the two partners involved. *See Windsor*, 133 S. Ct. at 2718 (Alito, J., dissenting). Like opposite-sex couples, same-sex couples may decide to marry partly or primarily for the benefits and support that marriage can provide to the children the couple is raising or plans to raise. Same-sex couples are just as capable of providing support for future generations as opposite-sex couples, grandparents, or other caregivers. And there is no difference between same-sex couples who choose not to have children and those opposite-sex couples who exercise their constitutionally protected right not to procreate. *See Griswold v. Connecticut*, 381 U.S. 479 (1965).

In any event, the State's argument also neglects to consider the number of additional important attributes of marriage that exist besides procreation. As noted above, the Supreme Court has discussed those attributes in the context of marriages between inmates. *Turner v. Safley*, 482 U.S. 78, 95-96 (1987). While the Supreme Court noted that some inmates might one day be able to consummate their marriages when they were released, the Court found that marriage was important irrespective of its relationship to procreation because it was an expression of emotional support and public commitment, it was spiritually significant, and it provided access to important legal and government benefits. *Id.* These attributes of marriage are as applicable to same-sex couples as they are to opposite-sex couples.

2. *The Plaintiffs Seek Access to an Existing Right*

The State's second argument is that the Plaintiffs are really seeking a new right, not access to an existing right. To establish a new fundamental right, the court must determine that the right is "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if [it] were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (citations omitted). Because same-sex marriage has only recently been allowed by a number of states, the State argues that an individual's right to marry someone of the same sex cannot be a fundamental right. But the Supreme Court did not adopt this line of reasoning in the analogous case of *Loving v. Virginia*, 388 U.S. 1 (1967). Instead of declaring a new right to interracial marriage, the Court held that individuals could not be restricted from exercising their existing right to marry on account of the race of their chosen partner. *Id.* at 12. Similarly, the Plaintiffs here do not seek a new right to same-sex marriage, but instead ask the court to hold that the State cannot prohibit them from exercising their existing right to marry on account of the sex of their chosen partner.

The alleged right to same-sex marriage that the State claims the Plaintiffs are seeking is simply the same right that is currently enjoyed by heterosexual individuals: the right to make a public commitment to form an exclusive relationship and create a family with a partner with whom the person shares an intimate and sustaining emotional bond. This

right is deeply rooted in the nation's history and implicit in the concept of ordered liberty because it protects an individual's ability to make deeply personal choices about love and family free from government interference. And, as discussed above, this right is enjoyed by all individuals. If the right to same-sex marriage were a new right, then it should make new protections and benefits available to all citizens. But heterosexual individuals are as likely to exercise their purported right to same-sex marriage as gay men and lesbians are to exercise their purported right to opposite-sex marriage. Both same-sex and opposite-sex marriage are therefore simply manifestations of one right—the right to marry—applied to people with different sexual identities.

While it was assumed until recently that a person could only share an intimate emotional bond and develop a family with a person of the opposite sex, the realization that this assumption is false does not change the underlying right. It merely changes the result when the court applies that right to the facts before it. Applying that right to these Plaintiffs, the court finds that the Constitution protects their right to marry a person of the same sex to the same degree that the Constitution protects the right of heterosexual individuals to marry a person of the opposite sex.

Because the right to marry has already been established as a fundamental right, the court finds that the *Glucksberg* analysis is inapplicable here. The Plaintiffs are seeking access to an existing right, not the declaration of a new right.

3. *Tradition and History Are Insufficient Reasons to Deny Fundamental Rights to an Individual.*

Finally, the State contends that the fundamental right to marriage cannot encompass the right to marry someone of the same sex because this right has never been interpreted to have this meaning in the past. The court is not persuaded by the State's argument. The Constitution is not so rigid that it always mandates the same outcome even when its principles operate on a new set of facts that were previously unknown:

> Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They 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. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

Lawrence v. Texas, 539 U.S. 558, 578-79 (2003). Here, it is not the Constitution that has changed, but the knowledge of what it means to be gay or lesbian. The court cannot ignore the fact that the Plaintiffs are able to develop a committed, intimate

relationship with a person of the same sex but not with a person of the opposite sex. The court, and the State, must adapt to this changed understanding.

C. Summary of Due Process Analysis

The Fourteenth Amendment protects the liberty rights of all citizens, and none of the State's arguments presents a compelling reason why the scope of that right should be greater for heterosexual individuals than it is for gay and lesbian individuals. If, as is clear from the Supreme Court cases discussing the right to marry, a heterosexual person's choices about intimate association and family life are protected from unreasonable government interference in the marital context, then a gay or lesbian person also enjoys these same protections.

The court's holding is supported, even required, by the Supreme Court's recent opinion concerning the scope of protection that the Fourteenth Amendment provides to gay and lesbian citizens. In *Lawrence v. Texas*, the Court overruled its previous decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), and held that the Due Process Clause protected an individual's right to have sexual relations with a partner of the same sex. 539 U.S. at 578. The Court ruled: "The Texas [sodomy] statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual." *Id.* While the Court stated that its opinion did not address "whether the government must give formal recognition to any relationship that homosexual persons seek to enter," *id.*, the

Court confirmed that "our laws and tradition afford constitutional protection to personal decisions relating to *marriage*, procreation, contraception, family relationships, child rearing, and education" and held that "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do." *Id.* at 574 (emphasis added). The court therefore agrees with the portion of Justice Scalia's dissenting opinion in *Lawrence* in which Justice Scalia stated that the Court's reasoning logically extends to protect an individual's right to marry a person of the same sex:

> Today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned. If moral disapprobation of homosexual conduct is "no legitimate state interest" for purposes of proscribing that conduct, . . . what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising "the liberty protected by the Constitution"?

Id. at 604-05 (Scalia, J., dissenting) (citations omitted).

The Supreme Court's decision in *Lawrence* removed the only ground—moral disapproval—on which the State could have at one time relied to distinguish the rights of gay and lesbian individuals from the rights of heterosexual individuals. The only other distinction the State has attempted to

make is its argument that same-sex couples are not able to naturally reproduce with each other. But, of course, neither can thousands of opposite-sex couples in Utah. As a result, there is no legitimate reason that the rights of gay and lesbian individuals are any different from those of other people. All citizens, regardless of their sexual identity, have a fundamental right to liberty, and this right protects an individual's ability to marry and the intimate choices a person makes about marriage and family.

The court therefore finds that the Plaintiffs have a fundamental right to marry that protects their choice of a same-sex partner.

D. Amendment 3 Does Not Survive Strict Scrutiny

The court's determination that the fundamental right to marry encompasses the Plaintiffs' right to marry a person of the same sex is not the end of the court's analysis. The State may pass a law that restricts a person's fundamental rights provided that the law is "narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 302 (1993). For instance, a state may permissibly regulate the age at which a person may be married because the state has a compelling interest in protecting children against abuse and coercion. Similarly, a state need not allow an individual to marry if that person is mentally incapable of forming the requisite consent, or if that prohibition is part of the punishment for a prisoner serving a life sentence. *See Butler v. Wilson*, 415 U.S. 953 (1974) (summarily affirming decision to uphold a

state law that prohibited prisoners incarcerated for life from marrying).

The court finds no reason that the Plaintiffs are comparable to children, the mentally incapable, or life prisoners. Instead, the Plaintiffs are ordinary citizens—business owners, teachers, and doctors—who wish to marry the persons they love. As discussed below, the State of Utah has not demonstrated a rational, much less a compelling, reason why the Plaintiffs should be denied their right to marry. Consequently, the court finds that Amendment 3 violates the Plaintiffs' due process rights under the Fourteenth Amendment.

V. Amendment 3 Violates the Plaintiffs' Right to Equal Protection

The Equal Protection Clause of the Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of its laws." U.S. Const. amend. XIV, § 1. The Constitution "neither knows nor tolerates classes among citizens." *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). But the guarantee of equal protection coexists with the practical necessity that most legislation must classify for some purpose or another. *See Romer v. Evans*, 517 U.S. 620, 631 (1996).

To determine whether a piece of legislation violates the Equal Protection Clause, the court first looks to see whether the challenged law implicates a fundamental right. "When a statutory classification significantly interferes with the

exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." *Zablocki*, 434 U.S. at 388; *see also Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966) ("We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined."). Here, the court finds that Amendment 3 interferes with the exercise of the Plaintiffs' fundamental right to marry. As discussed above, Amendment 3 is therefore unconstitutional because the State has not shown that the law is narrowly tailored to meet a compelling governmental interest. But even if the court disregarded the impact of Amendment 3 on the Plaintiffs' fundamental rights, the law would still fail for the reasons discussed below.

The Plaintiffs argue that Amendment 3 discriminates against them on the basis of their sex and sexual identity in violation of the Equal Protection Clause. When a state regulation adversely affects members of a certain class, but does not significantly interfere with the fundamental rights of the individuals in that class, courts first determine how closely they should scrutinize the challenged regulation. Courts must not simply defer to the State's judgment when there is reason to suspect "prejudice against discrete and insular minorities . . . which tends seriously to curtail the operation of those political processes ordinarily relied upon to protect minorities[.]" *United States v.*

Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938).

To decide whether a challenged state law impermissibly discriminates against members of a class in violation of the Equal Protection Clause, the Supreme Court has developed varying tiers of scrutiny that courts apply depending on what class of citizens is affected. "Classifications based on race or national origin" are considered highly suspect and "are given the most exacting scrutiny." *Clark v. Jeter*, 486 U.S. 456, 461 (1988). On the other end of the spectrum, courts must uphold a legislative classification that does not target a suspect class "so long as it bears a rational relation to some legitimate end." *Romer*, 517 U.S. at 631. "Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy." *Clark*, 486 U.S. at 461. Classifications receiving this intermediate level of scrutiny are quasi-suspect classifications that can be sustained only if they are "substantially related to an important governmental objective." *Id.*

A. Heightened Scrutiny

The Plaintiffs assert three theories why the court should apply some form of heightened scrutiny to this case. While the court discusses each of these theories below, it finds that it need not apply heightened scrutiny here because Amendment 3 fails under even the most deferential level of review.

1. *Sex Discrimination*

The Plaintiffs argue that the court should apply heightened scrutiny to Amendment 3 because it discriminates on the basis of an individual's sex. As noted above, classifications based on sex can be sustained only where the government demonstrates that they are "substantially related" to an "important governmental objective[.]" *United States v. Virginia*, 518 U.S. 515, 533 (1996) (citation omitted); *Concrete Works v. City of Denver*, 36 F.3d 1513, 1519 (10th Cir. 1994) ("Gender-based classifications . . . are evaluated under the intermediate scrutiny rubric").

The State concedes that Amendment 3 involves sex-based classifications because it prohibits a man from marrying another man, but does not prohibit that man from marrying a woman. Nevertheless, the State argues that Amendment 3 does not discriminate on the basis of sex because its prohibition against same-sex marriage applies equally to both men and women. The Supreme Court rejected an analogous argument in *Loving v. Virginia*, 388 U.S. 1, 8-9 (1967). In *Loving*, Virginia argued that its anti-miscegenation laws did not discriminate based on race because the prohibition against mixed-race marriage applied equally to both white and black citizens. *Id.* at 7-8. The Court found that "the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race." *Id.* at 9. Applying the same logic, the court finds that the fact of equal

application to both men and women does not immunize Utah's Amendment 3 from the heightened burden of justification that the Fourteenth Amendment requires of state laws drawn according to sex.

But because the court finds that Amendment 3 fails rational basis review, it need not analyze why Utah is also unable to satisfy the more rigorous standard of demonstrating an "exceedingly persuasive" justification for its prohibition against same-sex marriage. *Virginia*, 518 U.S. at 533.

2. *Sexual Orientation as a Suspect Class*

The Plaintiffs assert that, even if Amendment 3 does not discriminate on the basis of sex, it is undisputed that the law discriminates on the basis of a person's sexual orientation. The Plaintiffs maintain that gay men and lesbians as a class exhibit the "traditional indicia" that indicate they are especially at risk of discrimination. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973). The Plaintiffs therefore urge the court to hold that sexual orientation should be considered at least a quasi-suspect class, a holding which would require the court to apply heightened scrutiny to its analysis of Amendment 3.

The court declines to address the Plaintiffs' argument because it finds that it is bound by the Tenth Circuit's discussion of this issue. In *Price-Cornelison v. Brooks*, the Tenth Circuit considered a claim that an undersheriff refused to enforce a

protective order because the domestic violence victim was a lesbian. 524 F.3d 1103, 1105 (2008). The court held that the plaintiff's claim did not "implicate a protected class, which would warrant heightened scrutiny." *Id.* at 1113. In a footnote, the court supported its statement with a number of citations to cases from the Tenth Circuit and other Courts of Appeal. *See id.* at 1113 n.9.

The American Civil Liberties Union submitted an amicus brief arguing that the Tenth Circuit had no occasion to decide whether heightened scrutiny would be appropriate in *Price-Cornelison* because the court found that the discrimination at issue did not survive even rational basis review. *Id.* at 1114. As a result, the ACLU contends that the Tenth Circuit's statement was dicta and not binding. The court is not persuaded by the ACLU's argument. Even if the Tenth Circuit did not need to reach this question, the court's extensive footnote in *Price-Cornelison* clearly indicates that the Tenth Circuit currently applies only rational basis review to classifications based on sexual orientation. Unless the Supreme Court or the Tenth Circuit hold differently, the court continues to follow this approach.

3. *Animus*

The Plaintiffs contend that Amendment 3 is based on animus against gay and lesbian individuals and that the court should therefore apply a heightened level of scrutiny to the law. As discussed below, there is some support for the Plaintiffs' argument in the Supreme Court opinions of *Romer*

v. Evans, 517 U.S. 620 (1996) and *United States v. Windsor*, 133 S. Ct. 2675 (2013). But because the Supreme Court has not yet delineated the contours of such an approach, this court will continue to apply the standard rational basis test.

In *Romer*, the Supreme Court considered an amendment to the Colorado Constitution that prohibited any department or agency of the State of Colorado or any Colorado municipality from adopting any law or regulation that would protect gay men, lesbians, or bisexuals from discrimination. 517 U.S. at 624. The amendment not only prevented future attempts to establish these protections, but also repealed ordinances that had already been adopted by the cities of Denver, Boulder, and Aspen. *Id.* at 623-24. The Supreme Court held that the amendment was unconstitutional because it violated the Equal Protection Clause. *Id.* at 635. While the Court cited the rational basis test, the Court also stated that the Colorado law "confound[ed] this normal process of judicial review." *Id.* at 633. The Court then held that the law had no rational relation to a legitimate end for two reasons. First, the Court ruled that it was not "within our constitutional tradition" to enact a law "declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government[.]" *Id.* Second, the Court held that "laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Id.* at 634. The Court's analysis focused more on the purpose and effect of the Colorado amendment than on a consideration of the

purported legitimate interests the State asserted in support of its law.

The Supreme Court's opinion in *Windsor* is similar. The Court did not analyze the legitimate interests cited by DOMA's defenders as would be typical in a rational basis review. *See Windsor*, 133 S. Ct. at 2707 (Scalia, J., dissenting) ("[The majority] makes only a passing mention of the 'arguments put forward' by the Act's defenders, and does not even trouble to paraphrase or describe them."). Instead, the Court focused on the "design, purpose, and effect of DOMA," *id.* at 2689, and held that the law's "avowed purpose and practical effect" was "to impose a disadvantage, a separate status, and so a stigma" on same-sex couples that a state had permitted to wed. *Id.* at 2693. Because DOMA's "principal purpose" was "to impose inequality," *id.* at 2694, the Court ruled that the law deprived legally wed same-sex couples of "an essential part of the liberty protected by the Fifth Amendment." *Id.* at 2692.

In both *Romer* and *Windsor*, the Court cited the following statement from *Louisville Gas & Elec. Co. v. Coleman*: "Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision." 277 U.S. 32, 37-38 (1928), *quoted in Romer*, 517 U.S. at 633. Indeed, the *Windsor* Court held that "discriminations of an unusual character especially *require* careful consideration." 133 S. Ct. at 2693 (emphasis added) (citation omitted). The Court's emphasis on discriminations of an unusual character suggests

that, when presented with an equal protection challenge, courts should first analyze the law's design, purpose, and effect to determine whether the law is subject to "careful consideration." If the principal purpose or effect of a law is to impose inequality, a court need not even consider whether the class of citizens that the law effects requires heightened scrutiny or a rational basis approach. Such laws are "not within our constitutional tradition," *Romer*, 517 U.S. at 633, and violate the Equal Protection Clause regardless of the class of citizens that bears the disabilities imposed by the law. If, on the other hand, the law merely distributes benefits unevenly, then the law is subject to heightened scrutiny only if the disadvantages imposed by that law are borne by a class of people that has a history of oppression and political powerlessness.

While this analysis appears to follow the Supreme Court's reasoning in *Romer* and *Windsor*, the court is wary of adopting such an approach here in the absence of more explicit guidance. For instance, the Supreme Court has not elaborated how a court should determine whether a law imposes a discrimination of an unusual character. There are a number of reasons why Amendment 3 is similar to both DOMA and the Colorado amendment that the Supreme Court struck down in *Windsor* and *Romer*. First, the avowed purpose and practical effect of Amendment 3 is to deny the responsibilities and benefits of marriage to same-sex couples, which is another way of saying that the law imposes inequality. Indeed, Amendment 3 went beyond denying gay and lesbian individuals the

right to marry and held that no domestic union could be given the same or substantially equivalent legal effect as marriage. This wording suggests that the imposition of inequality was not merely the law's effect, but its goal.

Second, Amendment 3 has an unusual character when viewed within the historical context in which it was passed. Even though Utah already had statutory provisions that restricted marriage to opposite-sex couples, the State nevertheless passed a constitutional amendment to codify this prohibition. This action is only logical when viewed against the developments in Massachusetts, whose Supreme Court held in 2003 that the Massachusetts Constitution required the recognition of same-sex marriages. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003). The Utah legislature believed that a constitutional amendment was necessary to maintain Utah's ban on same-sex marriage because of the possibility that a Utah court would adopt reasoning similar to the Massachusetts Supreme Court and hold that the Utah Constitution already protected an individual's right to marry a same-sex partner. Amendment 3 thereby preemptively denied rights to gay and lesbian citizens of Utah that they may have already had under the Utah Constitution.

But there are also reasons why Amendment 3 may be distinguishable from the laws the Supreme Court has previously held to be discriminations of an unusual character. Most notably, the Court has not articulated to what extent such a discrimination must be motivated by a "bare . . . desire to harm a

politically unpopular group." *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973). The Plaintiffs argue that Amendment 3 was motivated by animus and urge the court to consider the statements in the Voter Information Pamphlet that was provided to Utah voters. The Pamphlet includes arguments made by Amendment 3's proponents that the amendment was necessary to "maintain[] public morality" and to ensure the continuation of "the ideal relationship where men, women and children thrive best." (Utah Voter Information Pamphlet to General Election on Nov. 2, 2004, at 36, Dkt. 32-2.) The Plaintiffs submit that these statements demonstrate that Amendment 3 was adopted to further privately held moral views that same-sex couples are immoral and inferior to opposite-sex couples.

While the Plaintiffs argue that many Utah citizens voted for Amendment 3 out of a dislike of gay and lesbian individuals, the court finds that it is impossible to determine what was in the mind of each individual voter. Some citizens may have voted for Amendment 3 purely out of a belief that the amendment would protect the benefits of opposite-sex marriage. Of course, good intentions do not save a law if the law bears no rational connection to its stated legitimate interests, but this analysis is the test the court applies when it follows the Supreme Court's rational basis jurisprudence. It is unclear how a mix of animus and good intentions affects the determination of whether a law imposes a discrimination of such unusual character that it requires the court to give it careful consideration.

In any event, the theory of heightened scrutiny that the Plaintiffs advocate is not necessary to the court's determination of Amendment 3's constitutionality. The court has already held that Amendment 3 burdens the Plaintiffs' fundamental right to marriage and is therefore subject to strict scrutiny. And, as discussed below, the court finds that Amendment 3 bears no rational relationship to any legitimate state interests and therefore fails rational basis review. It may be that some laws neither burden a fundamental right nor target a suspect class, but nevertheless impose a discrimination of such unusual character that a court must review a challenge to such a law with careful consideration. But the court's analysis here does not hinge on that type of heightened review. The court therefore proceeds to apply the well-settled rational basis test to Amendment 3.

B. Rational Basis Review

When a law creates a classification but does not target a suspect class or burden a fundamental right, the court presumes the law is valid and will uphold it so long as it rationally relates to some legitimate governmental purpose. *See Heller v. Doe*, 509 U.S. 312, 319 (1993). The court defers to the judgment of the legislature or the judgment of the people who have spoken through a referendum if there is at least a debatable question whether the underlying basis for the classification is rational. *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981). But even under the most deferential standard of review, the court must still "insist on knowing the relation between the classification

adopted and the object to be obtained." *Romer v. Evans*, 517 U.S. 620, 632 (1996); *Lyng v. Int'l Union*, 485 U.S. 360, 375 ("[L]egislative enactments must implicate legitimate goals, and the means chosen by the legislature must bear a rational relationship to those goals."). This search for a rational relationship "ensure[s] that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Romer*, 517 U.S. at 633. As a result, a law must do more than disadvantage or otherwise harm a particular group to survive rational basis review. *See U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

The State emphasizes that the court must accept any legislative generalizations, "even when there is an imperfect fit between means and ends." *Heller*, 509 U.S. at 321. The court will uphold a classification provided "the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not." *Johnson v. Robison*, 415 U.S. 361, 383 (1974). Based on this principle, the State argues that its extension of marriage benefits to opposite-sex couples promotes certain governmental interests such as responsible procreation and optimal child-rearing that would not be furthered if marriage benefits were extended to same-sex couples. But the State poses the wrong question. The court's focus is not on whether extending marriage benefits to heterosexual couples serves a legitimate governmental interest. No one disputes that marriage benefits serve not just legitimate, but compelling governmental interests, which is why the Constitution provides such protection to an

individual's fundamental right to marry. Instead, courts are required to determine whether there is a rational connection between the challenged statute and a legitimate state interest. Here, the challenged statute does not grant marriage benefits to opposite-sex couples. The effect of Amendment 3 is only to disallow same-sex couples from gaining access to these benefits. The court must therefore analyze whether the State's interests in responsible procreation and optimal child-rearing are furthered by prohibiting same-sex couples from marrying.

This focus on a rational connection between the State's legitimate interests and the State's exclusion of a group from benefits is well-supported in a number of Supreme Court decisions. For instance, the Court held in *Johnson v. Robinson* that the rational basis test was satisfied by a congressional decision to exclude conscientious objectors from receiving veterans' tax benefits because their lives had not been disrupted to the same extent as the lives of active service veterans. 415 U.S. at 381-82. *See also City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448-50 (1985) (examining the city's interest in denying housing for people with developmental disabilities, not in continuing to allow residence for others); *Moreno*, 413 U.S. at 535-38 (testing the federal government's interest in excluding unrelated households from food stamp benefits, not in maintaining food stamps for related households); *Eisenstadt v. Baird*, 405 U.S. 438, 448-53 (1972) (requiring a state interest in the exclusion of unmarried couples from lawful access to

contraception, not merely an interest in continuing to allow married couples access); *Loving v. Virginia*, 388 U.S. 1, 9-12 (1967) (examining whether Virginia's exclusion of interracial couples from marriage violated equal protection principles independent of Virginia's interest in providing marriage to same-race couples).

For the reasons stated below, the court finds that the legitimate government interests that Utah cites are not rationally related to Utah's prohibition of same-sex marriage.

1. *Responsible Procreation*

The State argues that the exclusion of same-sex couples from marriage is justified based on an interest in promoting responsible procreation within marriage. According to the State, "[t]raditional marriage with its accompanying governmental benefits provides an incentive for opposite-sex couples to commit together to form [] a stable family in which their planned, and especially unplanned, biological children may be raised." (Defs.' Mot. Summ. J., at 28, Dkt. 33.) The Plaintiffs do not dispute the State's assertion, but question how disallowing same-sex marriage has any effect on the percentage of opposite-sex couples that have children within a marriage. The State has presented no evidence that the number of opposite-sex couples choosing to marry each other is likely to be affected in any way by the ability of same-sex couples to marry. Indeed, it defies reason to conclude that allowing same-sex couples to marry will diminish the example that married opposite-sex couples set

for their unmarried counterparts. Both opposite-sex and same-sex couples model the formation of committed, exclusive relationships, and both establish families based on mutual love and support. If there is any connection between same-sex marriage and responsible procreation, the relationship is likely to be the opposite of what the State suggests. Because Amendment 3 does not currently permit same-sex couples to engage in sexual activity within a marriage, the State reinforces a norm that sexual activity may take place outside the marriage relationship.

As a result, any relationship between Amendment 3 and the State's interest in responsible procreation "is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne*, 473 U.S. at 446; *see also Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 972 (N.D. Cal. 2010) ("Permitting same-sex couples to marry will not affect the number of opposite-sex couples who marry, divorce, cohabit, have children outside of marriage or otherwise affect the stability of opposite-sex marriage."). Accordingly, the court finds no rational connection between Amendment 3 and the state's interest in encouraging its citizens to engage in responsible procreation.

2. *Optimal Child-Rearing*

The State also asserts that prohibiting same-sex couples from marrying "promotes the ideal that children born within a state-sanctioned marriage will be raised by both a mother and father in a stable family unit." (Defs.' Mot. Summ. J., at 33,

Dkt. 33.) Utah contends that the "gold standard" for family life is an intact, biological, married family. (*Id.* at 34.) By providing incentives for only opposite-sex marriage, Utah asserts that more children will be raised in this ideal setting. The Plaintiffs dispute the State's argument that children do better when raised by opposite-sex parents than by same-sex parents. The Plaintiffs claim that the State's position is demeaning not only to children of same-sex parents, but also to adopted children of opposite-sex parents, children of single parents, and other children living in families that do not meet the State's "gold standard." Both parties have cited numerous authorities to support their positions. To the extent the parties have created a factual dispute about the optimal environment for children, the court cannot resolve this dispute on motions for summary judgment. But the court need not engage in this debate because the State's argument is unpersuasive for another reason. Once again, the State fails to demonstrate any rational link between its prohibition of same-sex marriage and its goal of having more children raised in the family structure the State wishes to promote.

There is no reason to believe that Amendment 3 has any effect on the choices of couples to have or raise children, whether they are opposite-sex couples or same-sex couples. The State has presented no evidence that Amendment 3 furthers or restricts the ability of gay men and lesbians to adopt children, to have children through surrogacy or artificial insemination, or to take care of children that are biologically their own whom they may have had with an opposite-sex partner. Similarly, the State has

presented no evidence that opposite-sex couples will base their decisions about having children on the ability of same-sex couples to marry. To the extent the State wishes to see more children in opposite-sex families, its goals are tied to laws concerning adoption and surrogacy, not marriage.

If anything, the State's prohibition of same-sex marriage detracts from the State's goal of promoting optimal environments for children. The State does not contest the Plaintiffs' assertion that roughly 3,000 children are currently being raised by same-sex couples in Utah. (Patterson Decl. ¶ 40, Dkt. 85.) These children are also worthy of the State's protection, yet Amendment 3 harms them for the same reasons that the Supreme Court found that DOMA harmed the children of same-sex couples. Amendment 3 "humiliates [] thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children 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. Amendment 3 "also brings financial harm to children of same-sex couples," *id.* at 2695, because it denies the families of these children a panoply of benefits that the State and the federal government offer to families who are legally wed. Finally, Utah's prohibition of same-sex marriage further injures the children of both opposite-sex and same-sex couples who themselves are gay or lesbian, and who will grow up with the knowledge that the State does not believe they are as capable of creating a family as their heterosexual friends.

For these reasons, Amendment 3 does not make it any more likely that children will be raised by opposite-sex parents. As a result, the court finds that there is no rational connection between Utah's prohibition of same-sex marriage and its goal of fostering an ideal family environment for a child.

3. *Proceeding with Caution*

The State contends that it has a legitimate interest in proceeding with caution when considering expanding marriage to encompass same-sex couples. But the State is not able to cite any evidence to justify its fears. The State's argument is analogous to the City of Cleburne's position in *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985). In that case, the City was concerned about issuing a permit for a home for the developmentally disadvantaged because of the fears of the property owners near the facility. *Id.* at 448. The Supreme Court held that "mere negative attitudes, or fear, . . . are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like." *Id.* The State can plead an interest in proceeding with caution in almost any setting. If the court were to accept the State's argument here, it would turn the rational basis analysis into a toothless and perfunctory review.

In any event, the only evidence that either party submitted concerning the effect of same-sex marriage suggests that the State's fears are unfounded. In an amicus brief submitted to the

Ninth Circuit Court of Appeals by the District of Columbia and fourteen states that currently permit same-sex marriage, the states assert that the implementation of same-sex unions in their jurisdictions has not resulted in any decrease in opposite-sex marriage rates, any increase in divorce rates, or any increase in the number of nonmarital births. (Brief of State Amici in *Sevcik v. Sandoval*, at 24-28, Ex. 13 to Pls.' Mem. in Opp'n, Dkt. 85-14.) In addition, the process of allowing same-sex marriage is straightforward and requires no change to state tax, divorce, or inheritance laws.

For these reasons, the court finds that proceeding with caution is not a legitimate state interest sufficient to survive rational basis review.

4. *Preserving the Traditional Definition of Marriage*

As noted in the court's discussion of fundamental rights, the State argues that preserving the traditional definition of marriage is itself a legitimate state interest. But tradition alone cannot form a rational basis for a law. *Williams v. Illinois*, 399 U.S. 235, 239 (1970) ("[N]either the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack"); *see also Heller v. Doe*, 509 U.S. 312, 326 (1993) ("Ancient lineage of a legal concept does not give it immunity from attack for lacking a rational basis.").

The traditional view of marriage has in the past included certain views about race and gender roles that were insufficient to uphold laws based on these views. *See Lawrence v. Texas*, 539 U.S. 558, 577-78 (2003) ("[N]either history nor tradition could save a law prohibiting miscegenation from constitutional attack") (citation omitted); *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 733-35 (2003) (finding that government action based on stereotypes about women's greater suitability or inclination to assume primary childcare responsibility was unconstitutional). And, as Justice Scalia has noted in dissent, "'preserving the traditional institution of marriage' is just a kinder way of describing the State's *moral disapproval* of same-sex couples." *Lawrence*, 539 U.S. at 601 (Scalia, J., dissenting). While "[p]rivate biases may be outside the reach of the law, . . . the law cannot, directly or indirectly, give them effect" at the expense of a disfavored group's constitutional rights. *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

Although the State did not directly present an argument based on religious freedom, the court notes that its decision does not mandate any change for religious institutions, which may continue to express their own moral viewpoints and define their own traditions about marriage. If anything, the recognition of same-sex marriage expands religious freedom because some churches that have congregations in Utah desire to perform same-sex wedding ceremonies but are currently unable to do so. *See* Brief of Amici Curiae Bishops et al., at 8-15, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307) (arguing that the inherent dignity of lesbian

and gay individuals informs the theology of numerous religious beliefs, including the Unitarian Universalist Church and the United Church of Christ). By recognizing the right to marry a partner of the same sex, the State allows these groups the freedom to practice their religious beliefs without mandating that other groups must adopt similar practices.

For these reasons, the court finds that the State's interest in preserving its traditional definition of marriage is not sufficient to survive rational basis review.

C. Summary of Rational Basis Analysis

In its briefing and at oral argument, the State was unable to articulate a specific connection between its prohibition of same-sex marriage and any of its stated legitimate interests. At most, the State asserted: "We just simply don't know." (Hr'g Tr., at 94, 97, Dec. 4, 2013, Dkt. 88.) This argument is not persuasive. The State's position appears to be based on an assumption that the availability of same-sex marriage will somehow cause opposite-sex couples to forego marriage. But the State has not presented any evidence that heterosexual individuals will be any less inclined to enter into an opposite-sex marriage simply because their gay and lesbian fellow citizens are able to enter into a same-sex union. Similarly, the State has not shown any effect of the availability of same-sex marriage on the number of children raised by either opposite-sex or same-sex partners.

In contrast to the State's speculative concerns, the harm experienced by same-sex couples in Utah as a result of their inability to marry is undisputed. To apply the Supreme Court's reasoning in *Windsor*, Amendment 3 "tells those couples, and all the world, that their otherwise valid [relationships] are unworthy of [state] recognition. This places same-sex couples in an unstable position of being in a second-tier [relationship]. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects." *Windsor*, 133 S. Ct. at 2694; *see also id.* at 2710 (Scalia, J., dissenting) (suggesting that the majority's reasoning could be applied to the state-law context in precisely this way). And while Amendment 3 does not offer any additional protection to children being raised by opposite-sex couples, it demeans the children of same-sex couples who are told that their families are less worthy of protection than other families.

The Plaintiffs have presented a number of compelling arguments demonstrating that the court should be more skeptical of Amendment 3 than of typical legislation. The law differentiates on the basis of sex and closely resembles the type of law containing discrimination of an unusual character that the Supreme Court struck down in *Romer* and *Windsor*. But even without applying heightened scrutiny to Amendment 3, the court finds that the law discriminates on the basis of sexual identity without a rational reason to do so. Because Amendment 3 fails even rational basis review, the court finds that Utah's prohibition on same-sex

marriage violates the Plaintiffs' right to equal protection under the law.

VI. Utah's Duty to Recognize a Marriage Validly Performed in Another State

Plaintiffs Karen Archer and Kate Call contend that their rights to due process and equal protection are further infringed by the State's refusal to recognize their marriage that was validly performed in Iowa. The court's disposition of the other issues in this lawsuit renders this question moot. Utah's current laws violate the rights of same-sex couples who were married elsewhere not because they discriminate against a subsection of same-sex couples in Utah who were validly married in another state, but because they discriminate against all same-sex couples in Utah.

CONCLUSION

In 1966, attorneys for the State of Virginia made the following arguments to the Supreme Court in support of Virginia's law prohibiting interracial marriage: (1) "The Virginia statutes here under attack reflects [sic] a policy which has obtained in this Commonwealth for over two centuries and which still obtains in seventeen states"; (2) "Inasmuch as we have already noted the higher rate of divorce among the intermarried, is it not proper to ask, 'Shall we then add to the number of children who become the victims of their intermarried parents?'"; (3) "[I]ntermarriage constitutes a threat to society"; and (4) "[U]nder the Constitution the regulation and control of marital and family relationships are

reserved to the States." Brief for Respondents at 47-52, *Loving v. Virginia*, 388 U.S. 1 (1967), 1967 WL 113931. These contentions are almost identical to the assertions made by the State of Utah in support of Utah's laws prohibiting same-sex marriage. For the reasons discussed above, the court finds these arguments as unpersuasive as the Supreme Court found them fifty years ago. Anti-miscegenation laws in Virginia and elsewhere were designed to, and did, deprive a targeted minority of the full measure of human dignity and liberty by denying them the freedom to marry the partner of their choice. Utah's Amendment 3 achieves the same result.

Rather than protecting or supporting the families of opposite-sex couples, Amendment 3 perpetuates inequality by holding that the families and relationships of same-sex couples are not now, nor ever will be, worthy of recognition. Amendment 3 does not thereby elevate the status of opposite-sex marriage; it merely demeans the dignity of same-sex couples. And while the State cites an interest in protecting traditional marriage, it protects that interest by denying one of the most traditional aspects of marriage to thousands of its citizens: the right to form a family that is strengthened by a partnership based on love, intimacy, and shared responsibilities. The Plaintiffs' desire to publicly declare their vows of commitment and support to each other is a testament to the strength of marriage in society, not a sign that, by opening its doors to all individuals, it is in danger of collapse.

The State of Utah has provided no evidence that opposite-sex marriage will be affected in any way by same-sex marriage. In the absence of such evidence, the State's unsupported fears and speculations are insufficient to justify the State's refusal to dignify the family relationships of its gay and lesbian citizens. Moreover, the Constitution protects the Plaintiffs' fundamental rights, which include the right to marry and the right to have that marriage recognized by their government. These rights would be meaningless if the Constitution did not also prevent the government from interfering with the intensely personal choices an individual makes when that person decides to make a solemn commitment to another human being. The Constitution therefore protects the choice of one's partner for all citizens, regardless of their sexual identity.

ORDER

The court GRANTS the Plaintiffs' Motion for Summary Judgment (Dkt. 32) and DENIES the Defendants' Motion for Summary Judgment (Dkt. 33). The court hereby declares that Amendment 3 is unconstitutional because it denies the Plaintiffs their rights to due process and equal protection under the Fourteenth Amendment of the United States Constitution. The court hereby enjoins the State from enforcing Sections 30-1-2 and 30-1-4.1 of the Utah Code and Article I, § 29 of the Utah Constitution to the extent these laws prohibit a person from marrying another person of the same sex.

SO ORDERED this 20th day of December, 2013.

BY THE COURT:

/s/ Robert J. Shelby
ROBERT J. SHELBY
United States District Judge

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT	**FILED** **United States Court of Appeals Tenth Circuit** **June 25, 2014** **Elisabeth A. Shumaker**

DEREK KITCHEN; MOUDI SBEITY; KAREN ARCHER; KATE CALL; LAURIE WOOD; KODY PARTRIDGE, individually, Plaintiffs - Appellees, v. GARY R. HERBERT, in his official capacity as Governor of Utah; SEAN REYES, in his official capacity as Attorney General of Utah, Defendants - Appellants, And SHERRIE SWENSEN, in her official capacity as Clerk of Salt Lake County, Defendant.	No. 13-4178 (D.C. No. 2:13-CV-00217-RJS)

JUDGMENT

Before **KELLY**, **LUCERO**, and **HOLMES**, Circuit Judges.

This case originated in the District of Utah and was argued by counsel.

The judgment of that court is affirmed.

Entered for the Court

/s/ Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk