UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DEREK KITCHEN, et al.,
Plaintiffs-Appellees,

v.

GARY R. HERBERT, et al.,
Defendants-Appellants.

On Appeal from the United States District Court for the District of Utah,
Civil Case No. 2:13-CV-00217-RJS (Hon. Robert J. Shelby)

SUSAN G. BARTON, et al.,
Plaintiffs-Appellees/Cross-Appellants,

and MARY BISHOP, et al.,
Plaintiffs-Appellees,

v.

SALLY HOWE SMITH, in her official capacity as
Court Clerk for Tulsa County, State of Oklahoma,
Defendant-Appellant/Cross-Appellee.

On Appeal from the United States District Court for the Northern District of
Oklahoma, Civil Case No. 4:04-CV-00848-TCK-TLW (Hon. Terence C. Kern)

BRIEF OF AMICUS CURIAE GAY & LESBIAN ADVOCATES & DEFENDERS IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae Gay & Lesbian Advocates & Defenders (GLAD) states that it is a non-profit corporation with no parent, subsidiary, or stock held by any person or entity, including any publicly held company.

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INTEREST OF AMICUS CURIAE

Founded in 1978, Gay & Lesbian Advocates & Defenders (GLAD) is a public interest legal organization dedicated to ending discrimination based on sexual orientation, HIV status, and gender identity and expression.[1] GLAD has litigated widely in both state and federal courts in all areas of law in order to protect and advance civil rights. Of particular relevance, GLAD recently litigated successful challenges to Section 3 of the federal Defense of Marriage Act. *See Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1 (1st Cir. 2012), *cert. denied*, 133 S. Ct. 2887 (2013); *Pedersen v. OPM*, 881 F. Supp. 2d 294 (D. Conn. 2012), *petitions for cert. before judgment denied*, 133 S. Ct. 288 (2013).

[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than amicus, its members, or its counsel made any monetary contribution toward the preparation or submission of this brief. All parties have consented to the filing of this brief. *See* Joint Notice of Consent to File Brief of Amicus Curiae, *Kitchen v. Herbert*, No. 13-4178 (Jan. 24, 2014); Joint Notice of Consent to Filing of Amicus Curiae Briefs, *Bishop v. Smith*, Nos. 14-5003 & 14-5006 (Jan. 30, 2014).

SUMMARY OF ARGUMENT

The district courts below had no difficulty concluding that the Oklahoma and Utah bans on same-sex couples marrying violated the Equal Protection Clause under rational-basis review. The States now appeal, urging that rational-basis review requires reversal because courts must defer to State decisions in matters of domestic relations. This Court should reject this truncated and erroneous understanding of rational-basis review. The State marriage bans fail to articulate an independent and legitimate end served by the bans and fail to point to a rational relationship between the bans and the States' purported aims. Because the State marriage bans fail these elements of rational-basis review, they violate the Equal Protection Clause.

As the Supreme Court recognized in striking down the Defense of Marriage Act in *United States v. Windsor*, 133 S. Ct. 2675 (2013), excluding gay and lesbian couples from the rights and responsibilities that flow from civil marriage serves no legitimate government purpose. Instead, it "impose[s] a disadvantage, a separate status, and so a stigma" on same-sex couples, *id.* at 2693, and "humiliates … thousands of children now being raised by same-sex couples" by interfering with their ability to "understand the integrity and closeness of their own family and its concord with other families in their community," *id.* at 2694. *Windsor* followed ineluctably from the Supreme Court's prior rational-basis cases.

Utah's and Oklahoma's marriage bans share many of the characteristics of laws the Supreme Court has invalidated under rational-basis review in *Windsor* and other cases. The marriage bans target a historically disadvantaged group, affect important personal interests, and depart from past State marriage regulations by categorically excluding a class of people from all the benefits and responsibilities of marriage. Moreover, these laws were accompanied by statements that suggest animus toward same-sex couples and disapproval of their right to form families—statements that undermine the credibility of other justifications the States now put forward. And those proffered justifications have substantial gaps—they apply equally to some heterosexual couples, whom the marriage bans do not regulate, amount to little more than discredited stereotypes about the inappropriateness of child-rearing by same-sex couples, and bear no logical nexus to excluding same-sex couples from marriage.

The district court judgments should be affirmed.

ARGUMENT

I. RATIONAL-BASIS REVIEW IS A MEANINGFUL CHECK ON STATE AUTHORITY

As this Court recently emphasized, "the Equal Protection Clause is a more particular and profound recognition of the essential and radical equality of all human beings. It seeks to ensure that any classifications the law makes are made 'without respect to persons[.]'" *SECSYS, LLC v. Vigil*, 666 F.3d 678, 684 (10th

Cir. 2012). The fundamental command of the Equal Protection Clause is that "like cases are treated alike." *Id.* This is the aim "[i]n any case … and whatever the applicable standard of review." *Id.* at 687.

"[W]hile rational basis review is indulgent and respectful, it is not meant to be 'toothless.'" *Windsor v. United States*, 699 F.3d 169, 180 (2d Cir. 2012) (quoting *Schweiker v. Wilson*, 450 U.S. 221, 234 (1981)), *aff'd*, 133 S. Ct. 2675 (2013). To the contrary, it requires that (1) legislation be enacted for a legitimate purpose, and not out of prejudice, fear, animus, or moral disapproval of a particular group, and (2) the means chosen be sufficiently and plausibly related to the legitimate purpose, as well as proportional to the burdens imposed.

Amicus recognizes that many laws will pass muster under this standard. But the marriage restrictions imposed by Utah and Oklahoma—lacking any rational connection to a legitimate legislative goal—do not.[2] Because "deference in matters of policy cannot … become abdication in matters of law," *National Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2579 (2012), the States' decision to disqualify classes of their citizens from civil marriage is invalid.

[2] Although amicus believes that "heightened scrutiny" is the appropriate standard of review for sexual-orientation classifications, that question need not be conclusively resolved here because, as the district courts found, the marriage bans fail rational-basis scrutiny.

A. Rational-Basis Review Varies Depending On Context

The application of rational-basis review is neither wooden nor mechanical. The nature and scope of the inquiry depend on the context of the classification, and several circumstances may warrant a more in-depth look at the legislature's purpose and the claimed fit between that purpose and the classification. *See, e.g.*, *Windsor*, 699 F.3d at 180 ("rational basis analysis can vary by context"). These circumstances include whether the group targeted by the classification is traditionally disliked, whether important personal interests are at stake, and whether the classification departs from past practices. Where these circumstances are present, the usual expectations that classifications are being drawn in good faith, for genuine purposes, and not arbitrarily or to penalize a disfavored group are weakened. *See Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 11 (1st Cir. 2012) ("Judges and commentators have noted that the usually deferential 'rational basis' test has been applied with greater rigor … [where] courts have had reason to be concerned about possible discrimination.").

Moreover, when a classification targets historically disadvantaged groups, the Supreme Court has applied "a more searching form of rational basis review." *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring in the judgment); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 453 n.6 (1985) (Stevens, J., concurring) (courts must exercise special "vigilan[ce] in evaluating

the rationality of any classification involving a group that has been subject to a 'tradition of disfavor'"). The Supreme Court did not ignore, in exercising rational-basis review, that gay people in *Romer v. Evans*, 517 U.S. 620, 634 (1996), "hippies" in *United States Dep't of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973), and persons with mental disabilities in *Cleburne* were held in disdain or misunderstood. Instead, the Supreme Court recognized that dislike of those groups might well be the precise motivation for the challenged measures, and responded by closely assessing potential alternative explanations for each measure before reaching "the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Romer*, 517 U.S. at 634.

The Supreme Court's rational-basis cases also consider the nature of the interests affected by the classification. Even where fundamental rights are not implicated, laws that burden personal and family choices command closer attention. *Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring in the judgment) (collecting cases in which the Court closely evaluated classifications disadvantaging important "personal relationships"). In *Eisenstadt v. Baird*, 405 U.S. 438 (1972), the Supreme Court's analysis was informed by the fact that the challenged laws regulated intimate affairs—access to family-planning contraception. Accordingly, *Eisenstadt* carefully considered how the law operated in practice as well its preferential treatment of married couples and concluded that

the law's real purpose was not the one proffered by the State. *Id*. at 447-453. In *Windsor*, the Court's reasoning turned on the fact that the challenged law affected family arrangements implicating "personhood and dignity." 133 S. Ct. at 2696. The Court could identify no interest that could rebut the "principal purpose and necessary effect" of the federal Defense of Marriage Act (DOMA) to "demean" married same-sex couples. *Id*. at 2695; *cf. M.L.B. v. S.L.J.*, 519 U.S. 102, 120, 116 (1996) (applying "close consideration" to a burden upon "choices about marriage, family life, and the upbringing of children [which] are among associational rights this Court has ranked as 'of basic importance in our society'").

Finally, the scope of review is also informed by whether the legislative action is meaningfully different from prior legislative acts. For example, *Romer*'s rational-basis analysis was mindful of the fact that the state constitutional amendment at issue was "unprecedented" and of "an unusual character." 517 U.S. at 633; *see also Windsor*, 133 S. Ct. at 2693.

All these factors urge a more searching inquiry in reviewing the Utah and Oklahoma marriage bans. First, *Lawrence* recognized that gay people have historically been mistreated and disadvantaged. *See* 539 U.S. at 571 ("[F]or centuries there have been powerful voices to condemn homosexual conduct as immoral."); *see also SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471,

485-486 (9th Cir. 2014) (acknowledging the history of discrimination against gay people).

Second, the States' bans impose burdens upon marriage, which has been "recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *cf. Johnson v. Pomeroy*, 294 F. App'x 397, 403 (10th Cir. 2008) ("a direct and substantial burden on the freedom to marry … should be strictly scrutinized").

Finally, the marriage bans are anomalous in their scope and severity. These bans prohibit marriage for same-sex couples and declare them "void," Utah Code § 30-1-2; forbid the State from creating a "substantially equivalent" legal status or benefits for same-sex couples, *id.* § 30-1-4.1; Utah Const. art. 1, § 29, Laws 2004, H.J.R. 25 § 1; *and* refuse any and all recognition to same-sex marriages solemnized out of state, Okla. Stat. tit. 43, § 3.1; Utah Code § 30-1-4.1. The bars are thus uncharacteristic of even traditional marriage regulation insofar as they depart from the rule of *lex loci celebrationis* generally followed in both States, *see* Utah Code § 30-1-4; *cf.* Okla. Stat. tit. 43, § 2, and insulate the prohibitions from court review, by imposing constitutional bars to seeking court recognition of state constitutional equality rights as to marriage or other legal protections. The severity and breadth of these marriage burdens, and their specific targeting of a set of disliked couples or individuals, aligns them with past marriage restrictions

invalidated by the Supreme Court. *E.g.*, *Loving*, 388 U.S. at 3-6, 11-12 (interracial marriage ban); *Turner v. Safley*, 482 U.S. 78, 96-99 (1987) (inmate marriage ban failed even the "reasonable relationship test"). Indeed, the marriage bans uniquely burden citizens in these States from resorting to their State legislatures or courts for policy changes. *See Romer*, 517 U.S. at 633 ("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 is itself a denial of equal protection of the laws in the most literal sense."). In sum, the sheer breadth of the marriage bans also requires careful judicial examination.

Because rational-basis review is a context-dependent inquiry, the States' generalizations about legislative deference are inapposite. For example, Utah relies (Br. 46) on the Supreme Court's statement in *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992), that rational-basis review is satisfied "so long as there is a plausible policy reason for the classification." But *Nordlinger* was a tax case, in which "[t]he standard is especially deferential" because "in structuring internal taxation schemes the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation." *Id.* Oklahoma relies (Br. 44-45, 66-67) on similar statements in *FCC v. Beach Communications, Inc.*, 508 U.S. 307 (1993), and *Turner Broadcasting Systems, Inc. v. FCC*, 520 U.S. 180 (1997). As *Beach Communications* explains, these sorts of challenges to

legislative "defin[itions] [of] the class of persons subject to a regulatory requirement" are an "unavoidable component[]" of *economic regulatory* legislation, where there is little danger that a State is morally disapproving of whole categories of citizens, and therefore little reason for skepticism about its justification. 508 U.S. at 315-316. By contrast, the State decisions here disqualify an entire swath of persons from a civil institution of fundamental importance to our society—with highly stigmatizing social consequences.

B. Rational-Basis Review Requires A Legitimate Legislative Purpose

Under rational-basis review, the court must first determine whether the challenged classification was imposed for a *legitimate* purpose. A State's failure to articulate a legitimate and rational justification for the law is fatal under any standard of review. *See Heller v. Doe*, 509 U.S. 312, 321 (1993) ("[E]ven the standard of rationality … must find some footing in the realities of the subject addressed by the legislation."); *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 17 (1988) (classification lacks a rational basis where "the asserted grounds for the legislative classification lack any reasonable support in fact"). Thus, a court may not unquestioningly accept the State's representation about the classification's purpose. *See Eisenstadt*, 405 U.S. at 452 (a "statute's superficial earmarks as a health measure" could not cloak its purpose). Nor may "a court …

be content merely to contrive some rational basis for a challenged classification." *Martin v. Bergland*, 639 F.2d 647, 650 (10th Cir. 1981).

As the Supreme Court has recognized, "[s]ome objectives … are not legitimate state interests," *Cleburne*, 473 U.S. at 432. Disfavoring a particular group of individuals might be the consequence of a government policy, but it cannot be its object. "The Constitution's guarantee of equality 'must at the very least mean that a bare [governmental] desire to harm a politically unpopular group cannot' justify disparate treatment of that group." *Windsor*, 133 S. Ct. at 2693 (quoting *Moreno*, 413 U.S. at 534-535). The equal protection guarantee prohibits classifications based on "negative attitudes," *Cleburne*, 473 U.S. at 448; "fear," *id.*; "irrational prejudice," *id.* at 450; or "some instinctive mechanism to guard against people who appear to be different in some respects from ourselves," *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring).

Likewise, legislative classifications that "identif[y] persons by a single trait," *Romer*, 517 U.S. at 633, and treat them as "not as worthy or deserving as others," *Cleburne*, 473 U.S. at 440, violate the individual's right to equal protection. And the desire to *favor* one set of individuals is just as invalid as the desire to *disfavor* the opposite set. *See Kelo v. City of New London*, 545 U.S. 469, 491 (2005) (Kennedy, J., concurring) (government action must be struck under rational-basis

review whether it is "intended to favor a particular private party" or "clearly intended to injure a particular class of private parties"); *Zobel v. Williams*, 457 U.S. 55, 63-64 (1982) (rejecting under rational-basis review a state dividend distribution plan giving preferential treatment to long-term residents, because such favoritism was not a legitimate purpose).

In the last seventeen years, the Supreme Court has invalidated three laws that either withheld benefits from or imposed burdens on gays and lesbians specifically on account of their sexual orientation. *Romer* invalidated a constitutional amendment that singled out for unfavorable treatment laws that would protect people on account of their sexual orientation, which had effectively denied them the right to participate in "transactions and endeavors that constitute ordinary civic life." 517 U.S. at 631. *Romer* reasoned that the amendment "classifie[d] homosexuals … to make them unequal to everyone else." *Id.* at 635. *Lawrence* followed *Romer*, prohibiting the States from criminalizing same-sex sexual activity, and affirming that all adults share an equal liberty to exercise their private, consensual sexual intimacy. *See Lawrence*, 539 U.S. at 564, 574. Most recently, *Windsor* invalidated DOMA, which sought to differentiate same-sex and opposite-sex couples, because "no legitimate purpose overcomes the purpose and effect to disparage and to injure" same-sex couples whose "personhood and dignity" is protected. 133 S. Ct. at 2696.

The import of these decisions is clear: denying gay people the same opportunities and freedoms as other citizens impermissibly demeans them. Disfavoring gay people—or privileging heterosexual people—is simply not a legitimate government purpose.

C. The Fit Prong of Rational-Basis Review Requires A Meaningful Connection Between The Challenged Classification And The Asserted Legislative Goals

The second step of rational-basis review requires assessing the rationality of the connection between the legislature's classification and the goals the legislation purportedly serves. "Even in the ordinary equal protection case calling for the most deferential of standards, [the Court] insist[s] on knowing the relation between the classification adopted and the object to be attained." *Romer*, 517 U.S. at 632. It is this "search for the link between classification and objective" that "gives substance to the Equal Protection Clause." *Id.* "By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, [the court] ensure[s] that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Id.*

In evaluating "fit," the Supreme Court considers the proportionality between the legislative classification and the legislative end. If a classification has sweeping or particularly profound consequences—like the marriage bans at issue in these cases—then the Court is likely to require a more forceful justification.

The state constitutional amendment in *Romer*, for example, "identifie[d] persons by a single trait and then denie[d] them protections across the board," disqualifying them from seeking protection from the State legislature or State courts. 517 U.S. at 633-634. Given the scope of the measure, the Court found that there could be no explanation for the measure other than a desire to disadvantage gay people. *Id*. at 634-635.

Courts will also find a lack of fit where the justification the State offers suggests the unfavorable treatment should extend to a wider class of persons, but the measure exclusively burdens the disliked group. In *Cleburne*, the city cited concerns about residential density to defend a zoning ordinance requiring a special-use permit for a group home for people with mental disabilities. 473 U.S. at 449-450. The Court was skeptical because no similar permit was required for other group living arrangements causing the same density issues. *Id.* at 447. Likewise in *Eisenstadt*, although unmarried persons were prohibited certain contraceptives, married couples could obtain them "without regard to their intended use" and without regard to the claimed purpose of deterring all persons from "engaging in illicit sexual relations." 405 U.S. at 449.

The rational relationship requirement is not met by mere hypotheses about factual circumstances under which the law might advance some legitimate purpose. While the Supreme Court provides leeway for legislators to make reasonable

predictions and judgments about unknown facts, it does not permit States to invent facts, or declare them by fiat, in order to justify a law that would otherwise appear impermissible. *See Heller*, 509 U.S. at 321 (the rationale "must find some footing in the realities of the subject addressed by the legislation"); *Romer*, 517 U.S. at 632-633 (the classification must be "grounded in a sufficient factual context for [the court] to ascertain some relation between the classification and the purpose it serve[s]"). Thus, in *Heller*, where the Supreme Court considered Kentucky's differentiation between mental retardation and mental illness for purposes of civil confinement, the State was not permitted to simply speculate that mental retardation is more likely to manifest itself earlier, and be easier to diagnose, than mental illness. Instead, the Supreme Court relied upon a number of diagnostic manuals and journals to determine for itself that Kentucky had legislated based on reasonably conceivable facts rather than stereotypes or misunderstandings. *See* 509 U.S. at 321-325.

In contrast, the Supreme Court has regularly disregarded unsupported and implausible factual assertions that have been offered in defense of discriminatory legislation. *See Moreno*, 413 U.S. at 534-536 (carefully scrutinizing and rejecting as "wholly unsubstantiated" the government's claim that households of unrelated persons are "relatively unstable" and more likely to include individuals who commit fraud); *Cleburne*, 473 U.S. at 448-450 (selective application of density-

related concerns only to persons with mental disabilities reflected "negative attitudes, or fear, unsubstantiated by factors which are properly cognizable"); *cf. SECSYS*, 666 F.3d at 686 (equal protection permits "the law … [to] take cognizance of *meaningful* distinctions between individuals").

Stated otherwise, in searching for a nexus between a claimed interest and a classification, the Supreme Court has found the fit between some classifications and their purported goals to be simply too "attenuated" or "irrational." *See, e.g.*, *Cleburne*, 473 U.S. at 447; *Moreno*, 413 U.S. at 535-536; *Eisenstadt*, 405 U.S. at 448-449. For similar reasons, in *Copelin-Brown v. New Mexico State Personnel Office*, this Court invalidated an administrative procedure denying disabled employees post-termination hearings; although the State *asserted* that the challenged regulation "eased administrative burdens"—which if true would be a legitimate interest—it had nonetheless "fail[ed] to present any facts showing that" the regulation in fact did so. 399 F.3d 1248, 1255 (10th Cir. 2005).

II. THE MARRIAGE BANS LACK A RATIONAL BASIS

None of the States' proffered rationales is sufficient to sustain the marriage bans. The asserted rationales are either illegitimate goals, not meaningfully advanced by the marriage bans, or both.

The States focus extensively on how biological parenting is purportedly an optimal child-rearing arrangement (Utah Br. 70; Okla. Br. 72-75), but the Court

need not even engage with that question, as both States fail to explain how the marriage bans increase the rate of children being raised by both biological parents. As set forth below, the States allow marriage without assessing the partners' procreative capacity or inclination, facilitate parenting apart from biological ties, and require all parents—regardless of marital status—to support their children. Moreover, there is no reason to think that allowing same-sex couples to marry would cause *heterosexual* couples to enter into *same-sex* relationships instead.

The States' protestations that excluding same-sex couples from marriage is "traditional" or "historic" (Utah Br. 11, 22, 24, 25, 73; Okla. Br. 35-36 & n.7, 69) are unavailing. Indeed, the States' laws depart from tradition by refusing to recognize marriages validly performed elsewhere. What purports to be passive neutrality and tradition in the face of a divisive social issue is in fact active disapproval of the right of gays and lesbians to form families. And even if heterosexual marriage has an "[a]ncient lineage" (Utah Br. 7, 65 n.28; Okla. Br. 26), the States' laws forbidding recognition or legal status for marriages of same-sex couples must still be scrutinized for rationality. *Heller*, 509 U.S. at 326. They cannot be upheld simply on a tradition of moral disapproval of same-sex couples. *Lawrence*, 539 U.S. at 577; *see Moreno*, 413 U.S. at 533 (purpose to exclude "hippies," a "politically unpopular group," from federal program is not legitimate).

Given the poor fit between the marriage bans and their purported justifications, the inevitable conclusion is that the States' marriage bans were "born of animosity toward" same-sex couples. *Romer*, 517 U.S. at 634. The constitutional amendments—like the Colorado amendment at issue in *Romer*—were designed to do more than decline to extend protections to same-sex couples; rather, they were designed to make it more difficult for a class of individuals "to seek aid from the government," *id.* at 633, 624, by eliminating their recourse to State courts for State constitutional decisions that would reject the inequality imposed. *See* Utah S.B. 24 (Drafts) at 1 (Jan. 26. 2004); Okla. Br. 6-7, 35-36.

A. The Desire To Preserve A Child-Rearing Marriage Culture

The marriage bans do not advance the States' asserted desire to preserve a conception of marriage as designed to protect the interests of children. Utah Br. 51-62; Okla. Br. 46-55, 66, 72-73, 75-76. The States freely permit different-sex marriages in which the spouses do not bear or raise children or even wish to do so, while prohibiting same-sex couples who are raising children (or wish to do so) from marrying. *See Garrett*, 531 U.S. at 366 n.4 (law fails rational-basis review where its "purported justifications" make no sense in light of how "similarly situated" groups are treated); *Eisenstadt*, 405 U.S. at 449 (law had too "marginal" a relation to the proffered objective because it did not regulate other activity that could be expected to hinder that objective).

Moreover, neither State explains how banning marriages between same-sex partners *who already have children* and who wish to raise them in a stable family environment could be rationally connected to the goal of promoting marriages focused upon child-rearing. Although the States' adoption laws tend to exclude same-sex couples, Utah Code § 78B-6-117(3); Okla. Stat. tit. 10, § 7503-1.1(3), many same-sex couples have had children by other means, such as out-of-State adoption, assisted reproduction, or conception by one of the partners. *See Kitchen v. Herbert*, __ F. Supp. 2d __, 2013 WL 6697874, at *26 (D. Utah Dec. 20, 2013). In fact, the U.S. Census estimates that as of 2010, there were 1,280 same-sex "households" in Oklahoma, and nearly 790 in Utah, who reported having "their own children under 18 years of age residing in their household."[3]

The States' decision not to ban marriages between heterosexual partners who cannot have children or do not wish to, such as older or infertile couples, further undermines the claim that the marriage bans ensure a marriage culture focused on child-rearing. *See Cleburne*, 473 U.S. at 448, 450 (rejecting city ordinance under rational-basis review that did not regulate other group homes posing the same density concerns). Where the States show concern for children by

[3] U.S. Census 2010 and 2010 American Community Survey, *Same-Sex Unmarried Partner or Spouse Households by Sex of Householder by Presence of Own Children*, *available at* http://www.census.gov/hhes/samesex/files/supp-table-AFF.xls (last visited Mar. 3, 2014).

imposing and enforcing parental responsibilities, they do so without regard to the parents' marital status. *See, e.g.*, Utah Code § 78B-12-105 (imposing child-support obligations on each parent "regardless of the[ir] marital status"); Okla. Stat. tit. 21, § 852 (imposing penalties on "any parent" for child-support failures). The marriage bans thus have only a "marginal relation to the proffered objective" of protecting children's interests, *Eisenstadt*, 405 U.S. at 448-449, and interfere with the interest in stability for children already being raised by same-sex couples.

The States' assumption (Utah Br. 57; Okla. Br. 78) that "husband-wife couples" will sacrifice their personal desires for their children, but that couples in "genderless marriage[s]" will not, is utterly speculative—so much so that its only explanation is irrational prejudice. The assumption reduces to a stereotype that gay people are more likely than others to have poor character, to act on selfish motives, or to be unable to form lasting relationships. *See Moreno*, 413 U.S. at 534-535 (dismissing explanations as being "wholly unsubstantiated"); *Cleburne*, 473 U.S. at 449-450 (inferring that the ordinance "rest[ed] on an irrational prejudice").[4] To

[4] The States' other statutes further show their purpose to stigmatize and disapprove of gay people and same-sex relationships. Utah's education laws restrict instruction about homosexuality and prohibit the "advocacy of homosexuality" in schools, Utah Code § 53A-13-101(1)(c)(iii)(A); designate Gay-Straight Alliances as "noncurricular," *id.* § 53A-11-1206(1)(b)(iii), thereby requiring parental consent for membership, *id.* § 53A-11-1210; and permit school administrators to ban any club "involving human sexuality," *id.* § 53A-11-1206(1)(b)(iii). Oklahoma requires AIDS-prevention education to "specifically teach" that "engaging in homosexual activity" is "primarily responsible" for

the contrary, the Supreme Court in *Lawrence* explained that "intimate conduct" between same-sex partners "can be but one element in a personal bond that is more enduring." 539 U.S. at 567.

In addition, the States' bans disserve children's interests because they deny to children raised by same-sex partners that "enduring" marital bond that helps strengthen the family unit. The States' differentiation of certain families from others "humiliate[s] [the] children now being raised by same-sex couples," by "mak[ing] 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.

B. The Desire To Have Children Raised By Their Biological Parents

The States assert a desire to preserve "a family structure based on the biological connection between parents and their natural children" (Utah Br. 63; *see* Okla. Br. 49-52), but the connection between that goal and the marriage bans is likewise too attenuated and unsubstantiated to satisfy even rational-basis review.

The distinction the marriage bans have drawn—who can *marry*—bears no rational relation to the States' asserted justification—who should *raise children*. *See Eisenstadt*, 405 U.S. at 448-449 (finding no rational basis where classification has only "marginal relation to the proffered objective"). Much of the States'

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contact with the AIDS virus and that such activity must be avoided to prevent the virus' spread. Okla. Stat. tit. 70, § 11-103.3(D).

evidence says nothing about marriage, and focuses instead on parenting arrangements. *See*, *e.g.*, Utah Br. 67 (comparing "three groups of young adults: those who were conceived by sperm donors, those adopted as infants, and those raised by their biological parents."); Okla. Br. 52 (focusing on "[y]oung adults conceived through sperm donation").

Oklahoma and other States attempt to link the marriage bans to parenting by suggesting that same-sex couples do not need marriage because they face no risk of unplanned pregnancy. *See* Okla. Br. 46-49, 57-58; Indiana et al. Amicus Br. 18-19. But this ignores the many same-sex couples who already have children (*see supra* p. 19 & n.3), for whom the stability of marriage and its consequent benefits are vital. The States' focus on unplanned pregnancy and "natural" procreation "singles out the one unbridgeable difference between same-sex and opposite-sex couples, and transforms that difference into the essence of legal marriage," in a manner that "impermissibly 'identifies persons by a single trait and then denies them protection across the board.'" *Goodridge v. Department of Pub. Health*, 798 N.E.2d 941, 962 (Mass. 2003) (quoting *Romer*, 517 U.S. at 633).

The States' marriage laws, moreover, are ill-structured to address unplanned pregnancies: the privileges of marriage are not reserved for couples who plan to have children or who experience an unplanned pregnancy. The States do not even attempt to prevent other couples who do not face the prospect of an unplanned

pregnancy, such as older or infertile couples, from marrying. *See Garrett*, 531 U.S. at 366 n.4; *Eisenstadt*, 405 U.S. at 449. Oklahoma acknowledges as much, and attempts to explain its gaps in reasoning by resorting to a "social expectation that man-woman couples in sexual relationships should marry," whether infertile or not. Okla. Br. 61. But that is a conclusory assertion, not a rational basis; it unlawfully treats same-sex couples as "not as worthy or deserving as other" couples who do not face the risk of unplanned pregnancies. *Cleburne*, 473 U.S. at 440.

To the extent the States' evidence says anything about marriage and its relationship to child-rearing, it only underscores the importance of *stable* family arrangements, such as marriage, to children's welfare. *See, e.g.*, Utah Br. 66 n.30, 68; Okla. Br. 48, 50-51 & n.9, 53; *see also* Indiana et al. Amicus Br. 16. But that evidence in no way suggests that children raised by a couple, let alone a *married couple*, experience worse outcomes if the couple is of the same sex. [5]

[5] The Regnerus study (Utah Br. 64 n.26, 66-67 n.32; Okla. Br. 84) similarly errs. Among other defects, it compares apples to oranges by contrasting, on the one hand, intact families including *still-married* biological parents with, on the other hand, families in which a parent has had a same-sex relationship *of any length or stability*. It is also discredited by documented and serious methodological flaws, and offers conclusions strikingly at odds with decades of other research into children raised by same-sex couples. *See* American Sociological Association Amicus Br. 14-15, 24-30.

The States' claim of motivation to have children raised by their biological parents is undermined by other State laws permitting heterosexual couples the very parenting arrangements that the States argue the marriage bans are intended to avoid. *See* Utah Code § 78B-15-702 (envisioning sperm donation by someone other than a legal "parent"); *id.* § 78B-6-117(2) (permitting adoption); Okla. Stat. tit. 10, § 7503-1.1(3) (same); *id.* § 551 (authorizing artificial insemination). The States' lack of concern for these situations demonstrates that biological child-rearing is not the true motivation for the marriage bans. *See Eisenstadt*, 405 U.S. at 448-449; *Cleburne*, 473 U.S. at 447, 449-50.

Moreover, the States implicitly presume that, if marriage is banned for same-sex couples, then those individuals will end their relationships, begin *heterosexual* relationships, and then marry and raise children. That assumption is unfounded and bizarre. *See Massachusetts*, 682 F.3d at 14-15 ("Certainly, the denial of [marital benefits] will not affect the gender choices of those seeking marriage."). To the extent evidence on this self-evident point were necessary, the record is clear: Plaintiffs Bishop and Baldwin affirmed that the marriage bans do not make them more likely to marry an opposite-sex partner. *See* Joint Bishop & Baldwin Aff. ¶ 14.

The other underlying assumption behind this justification—that same-sex marriages will upset heterosexual marriages—is equally flawed. Nothing supports

any causal link between a marriage ban and favorable statistics on the longevity of heterosexual marriage.[6] All evidence suggests that marriages of same-sex couples do not affect heterosexual marriage rates or divorce. *See 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 … or otherwise affect the stability of opposite-sex marriage.").

C. The Desire To Promote Sex-Specific Parenting

The States relatedly maintain that the marriage bans ensure that children are raised by parents of different sexes, which the States deem advantageous in light of alleged inherent differences in how men and women parent children. *See, e.g.*, Utah Br. 63 ("This biological advantage is further enhanced by the unique, gender-based contributions that fathers and mothers make to their children's wellbeing."); *id.* at 64; Okla. Br. 53-54 ("[M]en and women bring different gifts to the parenting enterprise.").

This justification, which again focuses on *parenting*, is too far removed from the *marriage* bans. And the States offer no evidence, or even reason to surmise, that children raised in stable homes with parents of two sexes fare better than

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[6] Utah (Br. 70) fails to connect the marriage bans to the State's percentage of births to unwed mothers. Allowing same-sex couples to marry would, if anything, decrease that percentage, because—as various States contend (Indiana et al. Amicus Br. 19)—same-sex couples become parents only intentionally. Oklahoma's reliance on divorce rates after its no-fault divorce law is a red herring (Br. 69-72); no-fault divorce law expands the availability of *divorce*, not marriage.

children raised in stable homes with two parents of one sex. Utah concedes (Br. 64 n.27) that its expert on gender-based parenting later changed position to support marriage for same-sex couples, and the studies comparing single-parent homes to stable married homes offer no evidence on the relevant comparison—homes based on a stable heterosexual marriage versus homes based on a stable same-sex relationship (Utah Br. 64 n.26 (citing studies regarding single-mother homes)).[7]

More importantly, the proffered justification is not a *legitimate* State interest because it is based on sex stereotypes. Sex stereotyping and "archaic and overbroad" generalizations about gender roles, *Craig v. Boren*, 429 U.S. 190, 198 (1976), are a well-recognized form of constitutionally impermissible sex discrimination. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 541-542 (1996) (government "may not exclude qualified individuals based on 'fixed notions concerning the roles and abilities of males and females.'"). "The hallmark of a stereotypical sex-based classification … is … whether it 'relie[s] upon the simplistic, outdated assumption that gender could be used as a proxy for other, more germane bases of classification.'" *Nguyen v. INS*, 533 U.S. 53, 90 (2001) (O'Connor, J., dissenting) (alteration in original; internal quotation marks omitted)

[7] The sources cited by Oklahoma (Br. 50-51, 53) and amici Regnerus et al. (Br. 4-12) regarding gender-differentiated parenting likewise do not address its effects on children raised in homes of same-sex couples. *See* American Sociological Association Amicus Br. 20-24.

(quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 726 (1982)). The Supreme Court has already indicated that classifications based on sex stereotypes about parental roles are constitutionally suspect. *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003) (noting the prevalence of impermissible sex stereotyping about women's roles "when they are mothers or mothers to be").

D. Utah's Desire To Avoid Low Birthrates

Utah asserts (Br. 82) that the marriage bans protect its interest in "ensuring adequate reproduction."

But the State provides no basis to conclude that the marriage bans in any way affect birthrates or could be rationally predicted to do so. In fact, Utah acknowledges (Br. 86) that its demographic statistics "obviously do not prove a causal link between same-sex marriage and declining birthrates." Whether or not such low birthrate statistics provide "cause for concern" (*id.*), the relationship between the marriage bans and the asserted goal "is so attenuated as to render the [bans] arbitrary or irrational." *Cleburne*, 473 U.S. at 447; *see also Copelin-Brown*, 399 F.3d at 1255 (regulation failed rational-basis review where the State "fail[ed] to present any *facts showing* that the regulation in question *eased*" administrative burdens (emphases added)).

Ultimately, Utah only asserts (Br. 87), without citation, that sending the messages that "natural reproduction is healthy, desirable and highly valued" and

that "it is good to make the sacrifices necessary to have children" fosters reproduction. But the focus on "natural reproduction" stigmatizes and discourages assisted reproduction and would thereby tend to *decrease* birthrates. Moreover, even if these messages could, paradoxically, encourage reproduction, the State has not demonstrated that its marriage bans effectively communicate these messages, particularly since the State permits heterosexual marriages in which natural reproduction is not an option. The poor fit and resulting implausibility of this justification leaves no other conclusion but that it is a pretext for impermissible legislative motives.

E. Utah's Desire To Avoid Religious Conflict

Utah also argues (Br. 91-93) that its marriage definition corresponds to the understanding "of the vast majority of faith communities" and suggests that "redefining marriage … would create the potential for religion-related strife." But Utah overlooks that marriage for same-sex couples is *supported* by several faith traditions.[8] Indeed, Utah admits (Br. 91 n.59) that five of the twenty-five largest faith communities in the State "officially accept same-sex unions as theologically permissible for their members," and that 20% of Utah's population claims no

[8] The sources that Utah quotes (Br. 94 n.63) filed an amicus brief in the Supreme Court arguing *in favor of* allowing government marriage licenses for same-sex couples, recognizing that the First Amendment permits religious bodies to have their own definitions of marriage. *See, e.g.*, Brief Amicus Curiae of the American Jewish Committee at 27, *Hollingsworth v. Perry*, 133 S. Ct. 2662 (2013) (No. 12-144), 2013 WL 4737187.

religious affiliation. If anything, Utah's marriage ban privileges the views of one set of faiths regarding permissible marriage over that of other faiths, *increasing* "the potential for religion-related strife" (Utah Br. 93). And privileging one faith's preferred conception of marriage is not a *legitimate* State interest. *See*, *e.g.*, *County of Allegheny v. ACLU*, 492 U.S. 573, 593 (1989) ("[G]overnmental endorsement [doctrine] precludes government from … attempting to convey a message that … a particular religious belief is favored or preferred."); *Windsor*, 133 S. Ct. at 2693 (noting, disapprovingly, the legislative statement that DOMA expressed a view on marriage that "better comports with traditional (especially Judeo-Christian) morality"). Finally, the State lacks the authority to deprive citizens of their right to participate in a civil institution merely because some other citizens might take offense. *Cf. Palmore v. Sidoti*, 466 U.S. 429, 433-434 (1984) (ruling that avoidance of "conflict" over interracial marriage and child-rearing due to private prejudice was no basis for a child-custody determination, and therefore rejecting divestment of custody from a mother in an interracial couple).

CONCLUSION

For the foregoing reasons, amici curiae respectfully support affirmance of the district courts' judgments.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i).

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March 4, 2014

CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2014, I filed and served the foregoing Brief of Amicus Curiae Gay & Lesbian Advocates & Defenders in Support of Plaintiffs-Appellees and Affirmance by submitting a digital copy through the appellate CM/ECF system; and (in addition to service on registered ECF users through the CM/ECF system) causing one copy to be sent by first-class mail to the following:

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Pursuant to this Court's General Order of March 18, 2009, I hereby certify the following:

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