No. 14-124

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

BRIEF OF *AMICUS CURIAE* 35 COMPARATIVE LAW SCHOLARS IN SUPPORT OF GARY R. HERBERT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF UTAH

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INTEREST OF *AMICI CURIAE*

This brief *amicus curiae* on behalf of the individuals listed in the appendix is respectfully submitted pursuant to Supreme Court Rule 37.1.[*] The individuals listed are prominent academic experts in international and comparative law and have joined to share their broad international experience concerning same-sex marriage and religious freedom.

SUMMARY OF THE ARGUMENT

This Court should grant Utah's petition for certiorari and reverse the decision below because the decision below conflicts with this Court's prior decisions. The decision below also reflects the erroneous belief that same-sex marriage should be resolved by courts as a matter of constitutional law. It places the Tenth Circuit well outside the mainstream of courts around the world, which have rejected that very position.

While a number of jurisdictions in recent years have accepted same-sex marriage in the United States

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[*] Pursuant to Supreme Court Rule 37(3)(a), all parties have consented to the filing of this brief. Pursuant to Rule 37(6), *amici* affirm that no counsel for a party authored the brief in whole or in part and no person other than the *amici* or their counsel made a monetary contribution to this brief, except that Family Watch International ("FWI"), a 501(c)(3) nonprofit educational organization with representatives in over 170 countries, has paid the costs of printing and serving this brief. Basing its advocacy on social science data, FWI works to promote the family as the fundamental unit of society and to protect marriage, life, religious freedom and parental rights and the best policy outcomes for men, women and children, and thus society.

and abroad,[1] the majority of states as matter of constitutional law or state legislation do not do so, which accords with the overwhelming weight of international authority, which continues to reserve the formal institution of "marriage" to opposite-sex couples. This international authority includes a majority of liberal western democracies with established traditions of concern for the rights of gays and lesbians. Even in recent years, many of these jurisdictions have concluded that there are sound public policy reasons for supporting same-sex couples through legal mechanisms other than same-sex marriage. The weight of authority also confirms that differences among various national, state and federal jurisdictions are fully compatible with international norms. One legal solution need not fit all.

The accumulated wisdom reflected in these widespread judgments is based not on irrationality, ignorance, or animus toward gays and lesbians but on considered reasoning about the nature of the institution of marriage and the fundamental role it plays in societies around the world. This is not to say that foreign law and practice can or should determine the meaning of U.S. Constitutional guarantees. But even in a world where opinions are changing, the vast experience in other countries,[2] as in most of our own states, confirms that much more than irrationality, ignorance, or rank prejudice is involved. International

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[1] The actual number of these jurisdictions, while growing, remains surprisingly small. Only three foreign jurisdictions have mandated same sex marriage by judicial decision, and in two of those cases, the ultimate legal resolution was left to the legislative branch. *See infra* note 4.

[2] *See infra* note 5.

experience counsels respect for the reasons that have undergirded marriage institutions for centuries.

International practice also confirms the wisdom of allowing legislative flexibility in the pace and structure of legal reform. The vast majority of foreign jurisdictions have concluded that decisions on the culturally sensitive issues of marriage and marriage-like rights for same-sex couples should be reached through democratic processes based on careful policy making and compromise that carefully addresses religious liberty concerns of those objecting to same-sex marriage on religious grounds. National and international courts have overwhelmingly refused to short-circuit the democratic process in this area. Only one foreign jurisdiction, Brazil, has imposed same-sex marriage exclusively by judicial mandate.

I. The Tenth Circuit's Decision is Out of Step with the Overwhelming Weight of International Opinion, Which Rejects Same-Sex Marriage

While international legal opinion is not determinative of whether a particular U.S. practice is constitutional, this Court has "acknowledge[d that] the overwhelming weight of international opinion," can "provide respected and significant confirmation" of the Court's conclusions.[3] Further, and more broadly, when making the judicial determination of whether there is a sufficient basis for legislative definitions of marriage, the weight of world reasoning and practice can hardly be ignored.

At the outset, it is important to recognize that the vast majority of nations define marriage as solely the

[3] *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

union of man and woman. Only sixteen non-U.S. jurisdictions currently recognize same-sex unions as marriages.[4] *All* of the rest retain the understanding of marriage as the union of a man and a woman. That

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[4] Same-sex unions are permitted to have the designation of marriage in sixteen foreign states. Argentina (Ley No. 26.618, 22 July 2010 (CXVIII) B.O. 31.949); Belgium (Civil Code Article 143); Brazil (Resolution 175 of Brazil's National Judicial Council of May 14, 2013), implementing decisions of the Supreme Federal Court (ADI 4277/DF and ADPF 132/RJ, May 4, 2011) and the Superior Tribunal of Justice of October 25, 2011 (R.E. 1.183.378–RS (2010/0036663-8); Canada (Bill C-38 (2005)); Denmark (Lov nr. 532 af 12 June 2012 Gældende); France LOI n° 2013-404 du 17 mai 2013 ouvrant le mariage aux couples de personnes de même sexe.) (18 May 2013); Iceland (Iceland Doc. 836-485th matter (2010)); Netherlands (Law of 21 December 2000 in *Staatsblad* 2001 no. 9); New Zealand (Marriage (Definition of Marriage) Amendment Act 2013 (13/20)); Norway (Besler. O. nr. 91 (2007-2008)); Portugal (Lei No. 9/2010); South Africa (Civil Union Act 17 of 2006); Spain (Ley 13 of 1 July 2005); Sweden (Svensk författningssamling 2011:891); United Kingdom (England and Wales, Scotland pending), (Marriage (Same Sex Couples) Act 2013 (c.30) (Royal Assent on 17 July 2013)); and Uruguay (Se Dictan normas relativas al matrimonio igualitario Ley No. 19.075) (May 3, 2013)) have all legalized same-sex marriage. Luxembourg has passed legislation which will recognize same-sex marriages beginning January 1, 2015, which will then bring the count to 17 jurisdictions recognizing same-sex marriage. Memorial A nº 125 de 2014 at http://www.legilux.public.lu/leg/a/archives/2014/0125/a125.pdf (Lux.).

Canada and South Africa—only two of the sixteen—have both enacted laws giving marriage status to same-sex couples following court order. *See Halpern v. Canada* (Att'y Gen.), [2003] 65 O.R. 3d 161 (Can. Ont. C.A.); *Hendricks v. Quebec*, [2002] R.J.Q. 2506 (Can. Que.); *Barbeau v. British Columbia* (Att'y Gen.), [2003] 12. B.C.L.R. 4th 1 (Can. B.C.); *Minister of Home Affairs v. Fourie*, 2006 (3) BCLR 355 (CC).

Brazil is the only country to have instituted same-sex marriage directly by court mandate alone. *See infra* note 58.

is, taking the 193 member states of the United Nations as the reference point, twelve times more countries disallow same-sex marriage than allow it. Additionally, more nations have adopted constitutional provisions defining marriage as the union of a husband and wife than have recognized any form of same-sex union.[5]

A smaller number of jurisdictions have sought to give recognition to same-sex relationships and provide them with legal incidents associated with marriage.[6] In doing so, a few have redefined marriage to include same-sex couples.[7] But nearly half of the countries recognizing same-sex unions have crafted compromises that stop short of changing the definition of marriage or even providing all marriage incidents to same-sex couples.[8]

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[5] Lynn D. Wardle, *Who Decides? The Federal Architecture of DOMA and Comparative Marriage Recognition* 4 CAL. WEST. INT'L. L. J. 143, 186-187 note 251 (2010)(listing 35 such nations).

[6] *See infra* note 8.

[7] *See supra* note 4.

[8] Andorra (Qualificada de les unions estables de parella [Termed Stable Unions of Partners] 17 BOPA No. 25 (Law 4/2005)), Australia (Family Law Act 1975 sec. 60EA), Austria (Eingetragene Partnerschaft-Gesetz (EPG) Act of 30 December 2009), Ecuador (Constitucion de 2008 art. 68), Finland (Lag 950 of 28 Sept. 2001 Amended by Lag 59 of 4 Feb 2005), Germany (Gesetz zur Beendigung der Diskriminierung Gleichgeschlechtlicher Gemeinschaften: Lebenspartnerschaften [Act to End Discrimination Against Same-Sex Unions: Civil Partnerships], 2001 BGBl. No. 9 S. 266 (2001), as amended by Gesetz zur Überarbeitung des Lebenspartnerschaftsrechts [Law on the Revision of Civil Partnership Law], 2004 BGBl. No. 29 S. 3996 (2004)), Hungary (2009, evi IV., § 685 Polgári törvénykönyv (Registered Partnership Act in the Civil Code)); Ireland (Civil Partnership and Certain Rights and Obligations of Cohabitants

While developments in the United States in support of same-sex marriage have been moving somewhat more rapidly, especially since this Court's decision in *U.S. v. Windsor*, 133 S.Ct. 2675 (2013), it is still the case that only a minority of U.S. jurisdictions have accepted same-sex marriage; nearly three-fifths have constitutions mandating heterosexual marriage; and only six have had same-sex marriage imposed by the highest court in their jurisdiction.[9]

A. International Precedent Confirms that Same-Sex Marriage is not necessary to Provide Legal Protections for Same-Sex Couples

International practice confirms that providing legal protections for same-sex couples or sexual orientation rights does not always entail uniform access to the traditional forms of marriage. For example, less than two months ago, the European Court of Human Rights stated that "it cannot be said that there exists any European consensus on allowing same-sex

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Act (2010)), Liechtenstein (Lebenspartnerschaftsgesetz (2011)), Luxembourg (Loi du 9 juillet 2004 relative aux effets légaux de certains partenariats), Slovenia (Zakon o registraciji istospolne partnerske skupnosti [Act on Registered Partnerships] (2009)), Switzerland (Loi fédérale sur le partenariat enregistré entre personnes du même sexe [LSP] [Federal Law on registered partnerships between persons of the same sex] June 18, 2004, Nbr. 210, art. 95).

[9] *Strauss v. Horton*, 107 P.3d 48, 68, 199 (Cal. 2009); *Kerrigan v. Commissioner of Public Health*, 957 A.2d 407 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003); *Garden State Equality v. Dow*, 82 A.3d 336 (N.J. Super. Ct. 2013); *Griego v. Oliver*, 316 P.3d 865 (N.M. 2013).

marriage."[10] Only ten countries of the forty-seven in the Council of Europe permit same-sex marriage,[11] and a similar number of European nations have chosen instead to extend legal recognition to same-sex unions while retaining the virtually universal understanding of marriage as the union of a husband and wife.[12]

The European Court of Human Rights has rejected the claim that same-sex marriage is required by the European Convention for the Protection of Human Rights and Fundamental Freedoms and explicitly held that the failure to redefine marriage does not constitute unlawful sexual orientation discrimination.[13] Even while holding that "differences based on sexual orientation require particularly serious reasons by way of justification," the European Court rejected the claim of discrimination because "a wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy."[14] The court also held that Austria could make its own determinations about the specific incidents of marriage extended to same-sex couples

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[10] *Hämäläinen v. Finland,* App. No. 37359/09 (ECtHR, 16 July 2014), para. 74.

[11] *See supra* note 4 (Belgium, Denmark, France, Iceland, Norway, Portugal, Spain, Sweden, the Netherlands and the United Kingdom).

[12] *See supra* note 8.

[13] *Schalk and Kopf v. Austria*, App. No. 30141/04 (ECtHR, 24 June 2010); *see also Gas and Dubois v. France*, App. No. 25951/07 (ECtHR, 15 March 2012) ¶66 (rejecting a claim for extending rights of marriage to a same-sex couple in the adoption context).

[14] *Id.* at ¶97.

even if they did not create precise equality with those accorded married couples.[15]

In Spain, one of the first countries to statutorily recognize same-sex marriages, the Constitutional Court explicitly declared in 2012 that "the Spanish legislator . . . had various available choices to grant legal recognition to the situation of same-sex couples."[16] Even though the Spanish Constitutional Court had previously held that "there is no constitutional right to the establishment of a union between persons of the same sex, in contrast with marriage between man and woman, which is a constitutional right . . . Public authorities may grant a privileged treatment to the union between man and woman in comparison with a homosexual union. This does not exclude that the legislator can establish a balanced system in which same-sex partners benefit from full rights and advantages of marriage."[17]

Other countries have taken the same approach. For example, since 2003, Austria has granted same-sex cohabiting couples the same legal incidents accorded to opposite-sex cohabiting couples.[18] In 2009, Austria created a registered partnership status through which same-sex couples can access many of the incidents of marriage, though others related to children, such as adoption and access to in vitro fertilization, are not

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[15] *Id*. at ¶108.

[16] Constitutional Court judgment STC 198/2012, 6 November 2012, *fundamento jurídico* nº 7-10.

[17] Constitutional Court decision ATC 222/1994, 11 July 1994, *fundamento jurídico* nº 2.

[18] *Karner v. Austria*, App. No. 40016/98 (ECtHR, 24 July 2003).

available.[19] The Czech Republic enacted registered partnership legislation for same-sex couples in 2006, providing registered couples with some limited incidents of marriage related chiefly to decision-making on behalf of the other party.[20] In 2002, Finland created a registered partnership status with significant marriage incidents extended to same-sex couples.[21]

Other European countries have similarly distinguished between same-sex unions and marriage. Ireland approved a Civil Registration Act in 2004 which specifically provides that "there is an impediment to marriage if . . . both parties are of the same-sex."[22] In 2010, however, the Irish government created a civil partnership status for same-sex couples, allowing registrants to access some marriage incidents.[23] Slovenia enacted a registered partnership law in 2005 to provide gay and lesbian couples incidents of marriage related to property, support obligations and inheritance.[24]

Australia also has laws providing some marriage incidents to same-sex couples while retaining the husband-wife definition of marriage. The Parliament

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[19] Eingetragene Partnerschaft-Gesetz [EPG] Bundesgesetzblatt [BGBl] no. 135/2009 (Austria).

[20] Act no. 115/2006 Coll. on Registered Partnership (Czech Republic).

[21] Laki rekisteröidystä parisuhteesta 950/2001 of 9 November 2001 (Finland).

[22] Civil Registration Act 2004 (Act No. 3/2004) (Ireland).

[23] Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 (Act No. 24/2010) (Ireland).

[24] Zakon o registraciji istospolne partnerske skupnosti (Slovenia).

of Australia enacted specific legislation in 2004 defining marriage as "the union of a man and a woman to the exclusion of all others, voluntarily entered into for life" and prohibiting recognition of same-sex marriages contracted in other jurisdictions.[25] Separately, Parliament has amended various laws to ensure same-sex cohabiting couples and opposite-sex cohabiting couples are treated alike.[26]

Germany and Hungary grant constitutional protection to marriage as the union of a husband and wife while providing marriage-related benefits to same-sex couples. Germany's Constitution specifies that marriage shall enjoy the special protection of the state.[27] The Federal Constitutional Court has interpreted this provision to refer to "the union of a man and a woman."[28] In 2001, Germany's legislature created a legal status for "life partnerships" that offered many marriage incidents to same-sex couples (though not joint adoption).[29] In 2004, parliament

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[25] Marriage Amendment Act 2004 (Cth) §§ 1, 3 (Australia).

[26] Australia Government Attorney-General's Department, *Same Sex Reforms: Overview of the Australian Government's same-sex law reforms*, at http://www.ag.gov.au/RightsAndProtections/HumanRights/Pages/Samesexreforms.aspx.

[27] Grundgesetz für die Bundesrepublik Deutschland [GG], 23 May 1949, Bundesgesetzblatt [BGBl.] VI (Germany).

[28] The German Federal Constitutional Court has construed Article 6 of the German Basic Law, which protects marriage, to refer to "the union of a man and a woman." Civil Partnership Case, 105 BverfGE 313 (2002), citing an earlier decision of February 28, 1980.

[29] Gesetz über die Eingetragene Lebenspartnerschaft [LpartG] [Life Partnership Act] 16 February 2001, Bundesgesetzblatt [BGBl] I, 266 (Germany).

amended the law to allow for stepparent-like adoptions of one partner's biological child by the other partner.[30] Hungary's marriage amendment is more explicit; in 2009 it provided for a legal status separate from marriage, which provides most marriage incidents to registered partners, though not joint adoption or access to artificial insemination.[31]

B. International Norms Support the Conclusion that the Tenth Circuit Erred in not Recognizing a Legitimate Policy Basis for Opposite-Gender Marriage Laws

Courts and legislative bodies in a number of nations and regional organizations such as the Council of Europe have had to address claims for same-sex marriage. These nations' constitutions and decisions make clear that retaining the understanding of marriage as the union of husband and wife can be motivated and justified by important social considerations unrelated to invidious discrimination.

The most significant and widespread reasoning in support of retaining the male-female definition of marriage focuses on the importance of protecting the institution of marriage because of its significance for procreation and nurturing children.

In numerous countries—including those whose constitutions implicitly or explicitly define marriage as a relationship between one man and one woman—family, children and parenting are all linked in the

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[30] Gesetz zur Überarbeitung des Lebenspartnerschaftsrechts, 20 December 2004, Bundesgesetzblatt [BGBl] I, 69 (Germany).

[31] 2009, evi IV., § 685 Polgári törvénykönyv (Registered Partnership Act in the Civil Code)(Hung.).

constitutional text. Examples include Belarus, Bolivia, Hungary, Germany, Latvia, Lithuania, Paraguay, Poland, Suriname, and Ukraine.[32] The German constitution states, for instance, that "[m]arriage and family shall enjoy the special protection of the state" and that "the care and upbringing of children is the natural right of parents."[33] The German Constitutional Court has held that these provisions "guarantee the essential structure of marriage."[34] Even while upholding the right of the legislature to create same-sex civil partnerships, the German Constitutional Court has ruled that "part of the content of marriage, as it has stood the test of time . . . is that it is the union of one man with one woman to form a permanent partnership . . ."[35] The constitutional protection of marriage means that "marriage alone, like the family, enjoy constitutional protection as an institution. No other way of life . . . merits this protection. Marriage cannot be abolished nor can its essential structural principles be altered without an amendment to the constitution."[36] The Court emphasized that marriage is not only a "sphere of freedom" but also a "social

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[32] Constitution of the Republic of Belarus art. 32; Constitution of the Republic of Latvia art. 110; Constitution of the Republic of Lithuania art. 38; Grundgesetz für die Bundesrepublik Deutschland [GG], 23 May 1949, BGB1. VI (Germany); Fundamental Law of Hungary Art. L (2011); República de Paraguay Constitución Política art. 52; Constitution of the Republic of Poland art. 18; Constitution of Suriname art. 35; Constitution of Ukraine art. 51.

[33] Grundgesetz für die Bundesrepublik Deutschland [GG], 23 May 1949, BGBl. VI (Germany).

[34] Civil Partnership Case, 105 BVerfGE 313 (2002) [Germany].

[35] *Id*.

[36] *Id*. at 609.

institution" and that the "structural principles that characterize marriage give it the form and exclusivity in which it enjoys constitutional protection as an institution."[37]

Other countries' parliaments or constitutional courts have specifically identified the realities of procreation and children as important state interests in retaining marriage as a heterosexual union. Examples include the parliaments of UK, Ireland, and Australia and constitutional courts of France, Italy, and Ireland.[38]

In 2011, the French Constitutional Council held "that the difference in situation between couples of the same sex and couples composed of a man and a woman can warrant a difference in treatment in regards to the rule of family law."[39] It understood that this difference in situation between same-sex and opposite-sex couples was in "direct relation to the purpose of the [French marriage] law,"[40] permitting the tribunal to reject the equality claims of two women who sought a marriage license.

Earlier, in a 2005 case assessing the validity of a marriage license issued to a same-sex couple, the French Court of Appeal in Bordeaux rejected the notion that failure to issue licenses to same-sex

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[37] *Id.* at 609-10.

[38] *See infra* notes 39-48 and accompanying text.

[39] *Mrs. Corinne C. et al.*, Decision No. 2010-92 QPC, French Constitutional Council, 28 January 2011, ¶10 as quoted in William C. Duncan, *Why French Law Rejects a Right to Gay Marriage: An Analysis of Authorities*, 2 INT'L. J. JURISPRUDENCE FAM. 215, 223 (2011)

[40] *Id.*

couples is unlawful discrimination.[41] It reasoned that Marriage is "a social platform for a family" and same-sex couples "that nature did not create potentially fruitful are therefore not implicated in this institution" so "their legal treatment is different because their situation is not analogous."[42]

In a 2006 report of the Mission of Inquiry on the Family and the Rights of Children, a French parliamentary commission also relied on the significance of procreation to marriage. It rejected the idea of marriage as no more than a "contractual recognition of a couple's love. It is a demanding framework with rights and obligations designed to welcome the child and provide for his or her harmonious development."[43] The Mission of Inquiry concluded that it "is not possible to consider marriage and filiation separately, since the two entities are closely related, marriage being built around children."[44] The fact that same-sex couples sometimes raise children was not dispositive for the commission "since children conceived in that way require a third party donor, if not a surrogate . . . same-sex couples are

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[41] *Arrêt de la cour d'appel de Bordeaux*, 6e ch., 19 April 2005, 04/04683, *appeal dismissed*, Cass. 1e civ., ar. 3, 2007, 05-16.627, Decision No. 511, as quoted in Duncan, 2 INT'L. J. JURISPRUDENCE FAM. at 220.

[42] *Id*.

[43] *French National Assembly, Report Submitted on Behalf of the Mission of Inquiry on the Family Rights of Children*, No. 2832 (January 25, 2006), available at http://www.vtmarriage.org/resources/france_report_on_thefamily.pdf

[44] *Id*. at 68.

objectively not in the same situation as heterosexual couples."[45]

Similarly, the Constitutional Court of Italy upheld the constitutionality of that nation's marriage laws in a 2010 decision that also relied on an understanding of the potential procreative nature of marriage.[46] The court noted that Article 29 of the Italian Constitution provides recognition to marriage and the family, and then Article 30 makes provision for the protection of children. The court explained the significance of this fact: "it is not by chance that, after addressing marriage, the Constitution considered it necessary to deal with the protection of children." The court explained that "the legislation itself does not result in unreasonable discrimination, since homosexual unions cannot be regarded as homogenous with marriage."[47]

An Australian Senate Committee report from 2009 recommended rejection of a bill to create same-sex marriage in part, on submissions to the Committee that "argued in favour of preserving the narrower and common definition on the basis of 'natural procreation' and on the potential effect of same-sex parenting on children."[48] Parliament rejected same-sex marriage then and in 2012, where the key speech in opposition in the Senate argued "marriage is . . . ultimately about the next generation and its socialisation, with the

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[45] *Id*.

[46] *Judgment No. 138 of 2010*, Corte costituzionale (Italy).

[47] *Id*. at 27.

[48] Australia Senate Legal and Constitutional Affairs Legislation Committee Report, *Marriage Equality Amendment Bill 2009* (November 2009).

benefit of having, if at all possible, mother and father role models."[49]

Ireland's High Court rejected a claim for same-sex marriage after hearing extensive evidence on the potential effects of same-sex marriage for child well-being. In rejecting the claim for recognition of same-sex marriage, the court held: "Until such time as the state of knowledge as to the welfare of children is more advanced, it seems to me that the State is entitled to adopt a cautious approach to changing the capacity to marry albeit there is no evidence of any adverse impact on welfare."[50]

II. The Decision Below is Out of Step with International and Supranational Bodies, Which Have Refused to Judicially Mandate Same-Sex Marriage

A. International Tribunals Have Not Judicially Imposed Same-Sex Marriage

International tribunals have consistently been unwilling to impose same-sex marriage through judicial interpretation of international human rights norms, instead deferring these sensitive questions to legislatures, which have increased flexibility and democratic legitimacy. The European Court of Human Rights and the United Nations Human Rights Committee have both rejected the notion that same-sex marriage is a constitutional or human right. Similarly, the French Constitutional Court, the

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[49] Australia Senate, Marriage Amendment Bill (No. 2) 2012, Speech, September 18, 2012 (Senator Eric Abetz). Peter Westmore, *Australian People Win on Marriage,* News Weekly (13 October 2012).

[50] *Zappone v. Revenue Commissioners*, [2006] IEHC 404 (Ireland High Court 2006), p. 130.

Italian Constitutional Court, the German Federal Constitutional Court, the Spanish Constitutional Court, and the Constitutional Tribunal of Chile have rejected constitutional claims for same-sex marriage.[51]

Particularly notable is the repeated refusal of the European Court of Human Rights to mandate availability of same-sex marriage, since it has been supportive of sexual orientation claims in many other settings.[52] As recently as July 2014, in *Hämäläinen v. Finland*,[53] the European Court's Grand Chamber declined to recognize a fundamental right to same-sex

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[51] Sentencia del Tribunal Constitucional Chileno, Rol N*1881-10-INA, del 3 de noviembre de 2011 (Chile); *Mrs. Corinne C. et al.*, Decision No. 2010-92 QPC, Constitutional Council, 28 January 2011 (France); Entscheidungen des Bundesverfassungsgerichts [BverfGE] 28 February 1980, 53, 245; Civil Partnership Case, 105 [BVerfGE] 313 (2002) (Germany), *Judgment No. 138 of 2010*, Corte costituzionale (Italy); Constitutional Court decision ATC 222/1994, 11 July 1994; *fundamento jurídico* nº 2, reaffirmed by Constitutional Court judgment STC 198/2012, 6 November 2012, *fundamento jurídico* nº 10 (Spain); *Joslin v. New Zealand*, Comm. No. 902/1999, U.N. Doc. CCPR/C/75/D/902/1999 (U.N. Hum. Rts. Cmte. 2002).

[52] *See*, *e.g.*, *Dudgeon v. the United Kingdom,* App. No. 7525/76 (ECtHR, 22 October 1981) (barring prohibition of homosexual activity by consenting adults); *Lustig-Prean and Beckett v. the United Kingdom,* App. Nos. 31417/96 and 32377/96 (ECtHR, 27 September 1999) (extensive investigation into lives of homosexual military officials violated privacy rights); *Salgueiro da Silva Mouta v. Portugal*, App. No. 33290/96 (ECtHR, 21 December 1999) (holding that sexual orientation discrimination falls under Article 14's general ban on discrimination); *A.D.T. v. the United Kingdom*, App. No. 35765/97 (ECtHR, 31 July 2000) (states may not ban private taping of homosexual acts); *E.B. v. France*, App. No. 43546/02 (ECtHR, 22 January 2008) (sexual orientation discrimination in application of adoption law violates Article 14's nondiscrimination ban).

[53] App. No. 37359/09 (ECtHR, 16 July 2014) ¶74

marriage. It recognized that "it cannot be said that there exists any European consensus on allowing same-sex marriages" and, accordingly, "[i]n the absence of a European consensus and taking into account that the case at stake undoubtedly raises sensitive moral or ethical issues, the Court considers that the margin of appreciation to be afforded to the respondent State must still be a wide one."[54]

Hämäläinen addressed a challenge to Finnish law, which required that an individual undergoing a gender change transform her marriage into a civil partnership. The Court characterized Article 12 of the European Convention, which contains an explicit right to marry phrased in general terms, as "enshrin[ing] the traditional concept of marriage as being between a man and a woman." It further held: "[w]hile it is true that some Contracting States have extended marriage to same-sex partners, Article 12 cannot be construed as imposing an obligation on the Contracting States to grant access to marriage to same-sex couples."[55]

The United Nations Human Rights Committee, the official treaty body charged with interpreting the International Covenant on Civil and Political Rights, has similarly held that the Covenant created a treaty obligation "to recognize as marriage only the union between a man and a woman wishing to marry each other" and that a "mere refusal to provide for marriage between homosexual couples" did not breach the Covenant.[56]

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[54] *Id.* at ¶75.

[55] *Id*. at ¶96.

[56] *Joslin v. New Zealand*, Comm. No. 902/1999, U.N. Doc. CCPR/C/75/D/902/1999 (U.N. Hum. Rts. Cmte. 2002).

B. Foreign Courts Defer to Legislatures to Regulate Same-Sex Unions

Because of the sensitivity of the religious, moral and social issues involved with same-sex marriage, courts around the world have overwhelmingly deferred to legislative prerogatives in structuring their nation's legal responses in this important domain. Only in Brazil[57] and a minority of jurisdictions that have approved same-sex marriage in the United States have judicial institutions struck down traditional rules governing marriage without leaving ultimate resolution of these divisive issues to democratic processes. Even in Brazil, judicial decision of this issue was embodied in a judicial resolution that is subordinate to and can be adjusted by passage of ordinary legislation.[58]

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[57] *See supra* note 4.

[58] The ultimate Brazilian decision ordering nationwide recognition of same-sex marriage is embodied in Resolution 175 of the National Judicial Council (CNJ) of May 14, 2013. Previously, both Brazil's Supreme Federal Tribunal (STF) and its Superior Tribunal of Justice (STJ) had handed down decisions authorizing same-sex marriage. Decision of Supreme Federal Tribunal of May 4, 2011 (ADI 4277/DF and ADPF 132/RJ) (holding that distinctions in the legal treatment of stable unions of same-sex couples vis-a-vis traditional marriage were unconstitutional); STJ Decision of October 25, 2011 (R.E. 1.183.378–RS (2010/0036663-8)) (holding that two women can be legally married, and were not restricted to the status of a civil union). In response to inconsistent application of these decisions around the country, Resolution 175 was adopted to require uniform implementation of the earlier decisions. While Resolution 175 has binding effect and can standardize conduct throughout Brazil's judicial system, it has lower legal status than a law passed by the National Congress, which thus retains some flexibility in terms of how ultimate legislation in this field can be structured.

In part, this deference to the legislative branch reflects axiomatic concerns of democratic legitimacy and respect for constitutional separation of powers that have long been foundational in the United States. This Court has indicated that the doctrine of judicial restraint "requires us to exercise the utmost care whenever we are asked to break new ground" in the contentious area of substantive due process.[59] It has emphasized that democratic, respectful, rational deliberation on sensitive issues "is impeded, not advanced, by court decrees based on the proposition that the public cannot have the requisite repose to discuss certain issues."[60] These concerns have special force in the domain of family law and marriage, which has long been left to legislation not only in American states, but in virtually every legal system of the world.

Deference also reflects the difficulty in the context of a particular case to address and balance the full range of issues ultimately involved. It is now widely recognized that recognition of same-sex marriage raises a host of potential issues, ranging across virtually every legal field and including public accommodation laws, anti-discrimination laws, housing laws, and employment regulation, to name only a few of the most obvious areas. Leading experts have noted the importance of finding nuanced compromises that will afford maximal respect to the dignity and freedom of all concerned.[61] In dealing with

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[59] *Collins v. City of Harker Heights, Texas,* 503 U.S. 115, 125 (1992).

[60] *Schuette v. Bamn*, 572 U.S. __ (2014).

[61] *See*, *e.g.*, Douglas Laycock, *Afterword*, in Douglas Laycock, Anthony R. Picarello, Jr., and Robin Fretwell Wilson (eds.), SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING

the complex range of issues involved, the legislative branch is also more in touch with the concerns of the entire populace, and is in a better (and more legitimate) position to gather and assess the full range of relevant policy considerations.

Resolution of same-sex marriage and adoption questions also inevitably raise profound questions of religion and morality. While courts can delineate basic principles for protecting the religious freedom of individuals and institutions that inevitably arise, legislatures can often craft exemptions and protections that optimize respect for all the interests concerned. This explains why the European Court of Human Rights, despite deep commitment to sexual orientation rights, has recognized the importance of affording member states of the Council of Europe broad discretion in this area.[62]

Finally, resolving these often highly contested issues on the basis of abstract norms risks perpetuating conflicts and preventing normal political processes of compromise and adjustment that can often find better solutions for all. As this Court has noted, "[b]y extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action."[63] Scholars from a range of perspectives recognize the importance of leaving room for the give and take of democratic processes in this area, recognizing that optimal solutions for all may emerge from such processes. As Dean Martha Minnow

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CONFLICTS (2008); Marc Stern, *Same-Sex Marriage and the Churches*, in Laycock, Picarello and Wilson, *supra.*

[62] *See supra* text accompanying notes 13-17, 53-55.

[63] *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

has noted, "Accommodation and negotiation can identify practical solutions where abstract principles sometimes cannot—and, in the meantime, build mutual trust."[64]

With these considerations in mind, it is not surprising that courts have consistently shown great deference to legislative decision making in this domain. Thus, while the European Court of Human Rights is very sympathetic to same-sex issues, it has rejected the claim that the European Convention required member nations to create uniform same-sex marriage rules: "the Court observes that marriage has deep-rooted social and cultural connotations which may differ largely from one society to another. The Court reiterated that it must not rush to substitute its own judgment in place of the national authorities, who are best placed to assess and respond to the needs of society."[65]

National courts concur. The Spanish Constitutional Court explicitly declared in 2012 that "the concrete constitutional configuration [of marriage] is deferred to the legislator."[66] The Italian Constitutional Court similarly concluded that "it is for Parliament to determine—exercising its full discretion—the form of guarantee and recognition for [same-sex cohabiting relationships]."[67] In rejecting a challenge to the country's civil partnership law, Germany's Federal Constitutional Court also stated that for the

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[64] Martha Minnow, *Should Religious Groups Be Exempt from Civil Rights Laws*, 48 B.C. L. Rev. 781, 849 (2007).

[65] *See Schalk and Kopf, supra* note 13, at ¶62.

[66] Constitutional Court judgment STC 198/2012, 6 November 2012, *fundamento jurídico* nº 7.

[67] *Judgment No. 138 of 2010*, Corte costituzionale (Italy) at 25.

legislature "it is not forbidden in general to establish new opportunities for couples of opposite sex or for other relationships . . . But there is no constitutional command to create such opportunities."[68] The French Constitutional Council has also held that it is not the prerogative of the court "to substitute its appreciation to that of the legislator in considering, in this manner, the difference in situation" between same and opposite-sex couples.[69]

As noted above,[70] of the sixteen countries that have redefined marriage to include same-sex couples, thirteen have done so without the involvement of judicial bodies relying on constitutional or human rights provisions. Even in Canada and South Africa, where courts provided the initial impetus for the acceptance of same-sex marriage, adoption of same-sex marriage was ultimately referred to the legislative branch or involved significant legislative input. Brazil stands alone as the only country in which a judicial tribunal has imposed nationwide same-sex marriage without legislative intervention.[71]

The vast majority of countries that now permit same-sex marriage did so not as a matter of court order but through legislative action. Further, most nations that do recognize some form of same-sex union do not give them the designation of marriage. That

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[68] Entscheidungen des Bundesverfassungsgerichts [BVerfGE] [Federal Constitutional Court] July 17, 2002, 1 BvF 1/01, ¶111.

[69] *Mrs. Corinne C. et al.*, Decision No. 2010-92 QPC, French Constitutional Council, 28 January 2011, ¶10, as quoted in Duncan, *supra* note 39.

[70] *See supra* note 4.

[71] Superior Tribunal of Justice–R.E. 1.183.378-RS (2010/0036663-8).

approach necessarily requires legislative engagement. Our experience in countries around the world is that respect for legislative processes in resolving same-sex marriage, rather than short-circuiting them through judicial intervention, pays dividends for everyone in the long run.

Certiorari should be granted and the decision below should be reversed because the Tenth Circuit erred, taking the Tenth Circuit out of step with international precedent, in finding a right to same-sex marriage and failing to defer to the people of Utah and their elected representatives.

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APPENDIX

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