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

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

Respondents agree that the question presented—whether the Fourteenth Amendment prohibits a state from defining or recognizing marriage only as the legal union between a man and a woman—is of immense national importance and warrants this Court's immediate review. Br. in Opp. 15; accord Amici Br. of Colo. and 16 States; Amici Br. of Mass. and 14 States. Respondents also agree that there are no standing or other impediments to the Court's resolution of that question, and that this case is an excellent vehicle. As noted by religious organizations representing more than 100 million Americans, "Utah's case presents the best vehicle for definitively resolving all important same-sex marriage issues." Amici Br. of U.S. Conf. of Catholic Bishops, et al., 11–12 n.3. This petition should be granted.

REPLY ARGUMENT

I. This case is the best available vehicle for resolving the question presented.

First, this case involves Utah elected officials with plenary supervisory authority over county clerks, Pet. App. 10a–18a, vigorously defending their State's marriage laws as parties in this Court. As Respondents note, "Utah's Governor and Attorney General are . . . particularly appropriate parties to advance the state's arguments." Br. in Opp. 19. "As Utah's top-ranking executive and law-enforcement officials," the Governor and Attorney General "are best positioned to articulate the state's interest, unlike ministerial state actors with no independent authority to speak on the state's behalf or duty to represent all of its residents." *Id.* at 20; compare *Smith* v. *Bishop*, No. 14-136 (petitioner is the court clerk of a single Oklahoma county).

Moreover, because "Utah's Governor and Attorney General have vigorously and consistently defended [Utah law] since this lawsuit commenced," Br. in Opp. 20, granting Utah's petition will make it "unnecessary" for this Court "to permit intervenors to join the suit or to consider divided arguments by state defendants who disagree on the merits." *Id.* at 20. Compare *Rainey* v. *Bostic*, Nos. 14-153, 14-225, and 14-251 (Virginia's Governor and Attorney General ask this Court to invalidate Virginia's constitution and statutes each refused to defend below).

Second, Utah's "Amendment 3 is representative of other states' laws." Br. in Opp. 21. Review of Utah's law will therefore allow this Court to "settle the critical constitutional question presented." *Id.*; compare *Bostic*, No. 14-153, Br. in Opp. 28 (rather than being representative of other state laws, "Virginia's Marriage Prohibition is among the most onerous and far-reaching in the Nation" because it voids contractual arrangements entered into by same-sex couples marrying in other States; Utah's law preserves contractual rights). That is why many other decisions invalidating state marriage laws rely on the district court's decision in this case.

Third, this case offers an opportunity to review a state constitution and statutes that define marriage as only between a man and a woman *and* recognize only those marriages from couples in other states. Br. in Opp. 21. Resolution of the issue will thus mark the end of marriage litigation. Pet. 30; compare *Bishop*, No. 14-136, Br. in Opp. 15 (acknowledging Oklahoma case does not include recognition question). If this Court does not resolve the necessarily related recognition question, further litigation and uncertainty are assured.

Fourth, "[t]his case does not have the jurisdictional and procedural problems that have complicated review in the past." Br. in Opp. 17–18. Petitioners and Respondents have standing and are all proper parties, as the Tenth Circuit confirmed after carefully analyzing Utah law. *Id.* at 18. "Because this case involves no jurisdictional or procedural complications, it provides an exceptionally clean vehicle for this Court's review of the question presented." *Id.* at 19.

And fifth, both lower courts concluded correctly that Utah's laws were not based on animus. Pet. App. 74a–75a, 151a; accord Pet. App. 89a–90a (Kelly, J., concurring in part and dissenting in part); see also *infra* p. 9. As a result, this Court can focus on the pure legal question presented without the distraction of an animus issue.

Notably, Utah's petition is supported by an *amici* brief filed by five religious organizations—the United States Conference of Catholic Bishops, the National Association of Evangelicals, the Ethics & Religious Liberty Commission (the moral concerns and public policy entity of the Southern Baptist Convention), The Church of Jesus Christ of Latter-day Saints, and the Lutheran Church-Missouri Synod—that collectively "represent[ ] the faith communities of more than 100 million Americans." Amici Br. of U.S. Conf. of Catholic Bishops, et al., 2. These organizations urge the Court to grant review quickly and decide the question presented. *Id.* at 3–4. They also view Utah's petition as "the best vehicle for resolving the question presented." *Id.* at 11.

In addition to reiterating Utah's vehicle points, these organizations observe that the Tenth Circuit addressed Utah's contention that its laws avoid conflict with religious liberty. *Id.* at 12. As a result, "Utah's petition [alone] provides an opportunity to address whether avoiding religious conflicts and church-state entanglements is a sufficiently weighty reason, alone or combined with other interests, to warrant allowing States to retain" their marriage definitions. *Id.* at 14. So this case is not only a comprehensive vehicle, but "the best vehicle for definitively resolving all important same-sex marriage issues." *Id.* at 11–12 n.3.

II. The Tenth Circuit's ruling is erroneous and should be reversed.

1. Respondents echo the Tenth Circuit's mistake that this case is about "the freedom of choice to marry." Br. in Opp. 22–23. If a person's choice is the only marriage limit, then virtually every line that the People have drawn around marriage must fall. That "right" would override not only a limit based on sexual complementariness, but limitations based on age, consanguinity, and number of participants. Pet. 14. The right would also necessarily include non-exclusive marriages (polyamory) as well as those of only limited duration, such as a five-year marriage with a renewal option. It cannot be said that such a view of the marriage "right" is deeply rooted in our nation's history; to the contrary, this view has no roots at all, and it contradicts the general notion that the Due Process Clause was designed to prevent the government from *interfering* with private conduct, rather than to create an "affirmative right to government aid." *DeShaney* v. *Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 195–96 (1989).

2. Respondents criticize Utah for tying marriage to sexual complementariness. Br. in Opp. 23–24. What Respondents fail to recognize is that a couple's natural ability to create new life is the primary interest that a government *has* for regulating marriage. Pet. 22. The government has no interest in recognizing or affirming love and emotional commitment in the abstract. *Id.;* accord Amici Br. of Professor Robert P. George, et al., 4–12. That is why this Court in *Windsor*, in discussing sexual complementariness, described it as a "limitation" that "for centuries has been deemed both necessary *and fundamental*." *United States* v. *Windsor*, 133 S. Ct. 2675, 2689 (2013) (emphasis added).

3. Respondents say that the democratic process cannot override "the Constitution's promises of liberty and equal citizenship." Br. in Opp. 24. But that argument assumes that Utah's laws have violated the U.S. Constitution. They have not. As noted above and explained at great length in the petition, there is no fundamental right to marry someone of the same sex. And Respondents' collateral constitutional arguments are likewise without merit.

a. Utah's marriage laws do not discriminate based on sexual orientation. Contra Br. in Opp. 25–26. Rather, these laws turn on the biological reality that only opposite-sex couples have the natural capacity to create new life. Pet. 21. Indeed, there are many problems with trying to elevate sexual

orientation into a suspect class, and virtually every circuit has rejected requests to do so.[1]

b. Utah's marriage laws also do not discriminate based on sex. Contrary to Respondents' arguments, Br. in Opp. 26–27, Utah never conceded sex discrimination in the district court, C.A. J.A. 147, 1980–81, and Utah's laws do not create a regime where "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). It may be true that the Equal Protection Clause is "primarily concerned with rights of individuals not groups." Br. in Opp. 27 (quotation omitted). But under *Oncale*, constitutional violations are still measured in differing treatment for women and men. 523 U.S. at 80. Utah's laws satisfy that standard.

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[1] *E.g.*, *Davis* v. *Prison Health Servs.*, 679 F.3d 433, 438 (6th Cir. 2012); *Cook* v. *Gates*, 528 F.3d 42, 61–62 (1st Cir. 2008); *Price-Cornelison* v. *Brooks*, 524 F.3d 1103, 1113 (10th Cir. 2008); *Citizens for Equal Prot.* v. *Bruning*, 455 F.3d 859, 866–67 (8th Cir. 2006); *Johnson* v. *Johnson*, 385 F.3d 503, 532 (5th Cir. 2004); *Lofton* v. *Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2004); *Thomasson* v. *Perry*, 80 F.3d 915, 927–28 (4th Cir. 1996); *High Tech Gays* v. *Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 573–74 (9th Cir. 1990); *Ben-Shalom* v. *Marsh*, 881 F.2d 454, 464 (7th Cir. 1989); *Woodward* v. *United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989); *Padula* v. *Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987); but see *Smithkline Beecham Corp. v. Abbott Labs*, 740 F.3d 471 (9th Cir. 2014); *Baskin* v. *Bogan*, __ F.3d __, 2014 WL 4359059 (7th Cir. Sept. 4, 2014) (suggesting that sexual orientation might be a protected class).

Suffice it to say that Utah has numerous compelling reasons for retaining the marriage definition that has existed since before Utah's statehood, reasons that satisfy not only rational-basis review but also strict scrutiny. See Pet. 21–28; contra Br. in Opp. 28–29. Respondents say that Utah has "no plausible reason to believe that allowing same-sex couples to marry will change the attitudes, beliefs, or conduct of other couples toward marriage and parenting." Br. in Opp. 28. But that is neither the relevant inquiry, nor Utah's burden. See, *e.g.*, *Johnson* v. *Robison*, 451 U.S. 361, 383 (1974).

Equally important, as Utah will explain in detail at the merits stage, redefining the marriage institution without regard to its long-understood basis in sexual complementariness does more than widen the pool of eligible couples; it changes the institution to the detriment of society and its children. *E.g.*, *Murphy* v. *Ramsey*, 114 U.S. 15, 45 (1885) ("certainly, no legislation can be supposed more . . . necessary in the founding of a free, self-governing commonwealth . . . than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman"). It is far from irrational to think that such a monumental change to society's most important institution might have consequences. See, *e.g.* Pet. 21–28; Amici Br. of Historians, et al., 18–24 (risk of declining fertility); Amici Br. of Professor Robert P. George, et al., 7–10 (risk of added dignitary harm to children of unmarried heterosexual parents).

4. With respect to recognition, Utah's laws are not comparable to DOMA § 3. Contra Br. in Opp. 30. The fundamental flaw in DOMA § 3 was its interference with the dignity conferred by *the States* in recognizing marriages that the federal government refused to acknowledge. 133 S. Ct. at 2693, 2694, 2696. In contrast, this Court has already explained 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); accord, *e.g., Pacific Emp'rs Ins. Co.* v. *Indus. Accident Comm'n*, 306 U.S. 493, 501 (1939). Respondents do not at all acknowledge these precedents.

5. Finally, Respondents challenge the conclusion of both lower courts, see Pet. App. 74a–75a; 151a; accord Pet. App. 89a–90a (Kelly, J., concurring in part and dissenting in part), that Utah's marriage laws do not reflect animus. Br. in Opp. 30–34. That argument is foreclosed and simply wrong.

Under the well-established "two-court rule," this Court will not revisit factual conclusions adopted by both lower courts. *E.g., Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949), *adhered to on reh'g*, 339 U.S. 605 (1950); *United States* v. *Doe*, 465 U.S. 605, 614 (1984); *Comcast Corp.* v. *Behrend*, 133 S. Ct. 1426, 1439–40 (2013) (Ginsburg, J., dissenting). Given the parties' cross-motions for summary judgment, both lower courts necessarily concluded here that there was not even a material dispute of fact with respect to animus. As a result, there is no ground for this Court to address that fact-specific inquiry. See also Amici Br. of U.S. Conf. of Catholic Bishops, et al., 12; Amici Br. of Professor Steven Calabresi, et al., 4.

In contrast, the *Bostic* district court concluded that the justifications offered in court for Virginia's marriage amendment were not the real reasons for the enactment, but instead that "[t]he goal . . . of this legislation is to deprive Virginia's gay and lesbian citizens of the opportunity" to marry. *Bostic* v. *Rainey*, 970 F. Supp. 2d 456, 482 (E.D. Va. 2014). And in *Bishop* (notwithstanding Judge Holmes' disclaimer in his concurrence), the district court essentially found that the amendment was an act of "intentional discrimination" against same-sex couples, *Bishop* v. *United States ex rel. Holder*, 962 F. Supp. 2d 1252, 1281–85 (N.D. Okla. 2014), that was not justified by any "upright" purpose, *id.* at 1281. See also *Baskin* v. *Bogan*, __ F.3d __, 2014 WL 4359059, at *13 (7th Cir. Sept. 4, 2014) (suggesting Indiana's law was motivated by "animus against same-sex marriage"). These findings foreclose application of the "two-court" rule in those cases and create a risk the Court would need to address animus if it granted one of these petitions.

On the merits, a court cannot infer animus on the part of hundreds of thousands of voters based on isolated statements from legislative proponents of a ballot measure. *Bishop* v. *Smith*, __ F.3d __, 2014 WL 3537847, at *21–30 (10th Cir. July 18, 2014) (Holmes, J., concurring). And even as to Utah's legislative proponents, the laws at issue here were *not* based on "moral disapproval of same-sex couples." Br. in Opp. 32. The laws reflect a reasonable belief that children and society are best served when kids are reared, where possible, by their own two married biological parents and, where that is impossible, by a married mom and a dad. See, *e.g.,* Amici Br. of Eighty Utah Legislators 24–26. That belief has nothing to do with animus.

* * *

The Tenth Circuit decision below places the United States out of step with the vast majority of nations; only 16 out of 193 currently allow same-sex unions as marriages. Amici Br. of 36 Comparative Law Scholars 3–16. More important, the decision is at odds with supra-national and constitutional courts around the world—such as the United Nations Human Rights Committee and the European Court of Human Rights—which have consistently ruled that political branches, not the courts, must decide how to define marriage. *Id.* at 16–24. Utah respectfully requests that the Court grant the petition, reverse the Tenth Circuit, and reaffirm state authority to define marriage.

CONCLUSION

For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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