No. 14-124

IN THE
Supreme Court of the United States

GARY R. HERBERT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF UTAH, ET AL.,
Petitioners,

v.

DEREK KITCHEN, ET AL.,
Respondents.

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

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QUESTION PRESENTED

Whether a state violates the Fourteenth Amendment to the U.S. Constitution by prohibiting same-sex couples from marrying and by refusing to recognize their lawful, out-of-state marriages.

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BRIEF FOR RESPONDENTS

INTRODUCTION

This case raises the constitutional question whether a state may deny same-sex couples the freedom to marry that is of "fundamental importance for all individuals." *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978). The Tenth Circuit held that Utah's decision to prohibit same-sex couples from exercising this right violates "[o]ur commitment as Americans to the principles of liberty, due process of law, and equal protection." Pet. App. 3a. Even with this ruling, same-sex couples still cannot claim the full citizenship that comes from having their duly celebrated marriages given equal recognition and treatment under the law.

Respondents are three same-sex couples in Utah who cannot fully benefit from the freedoms the Tenth

Circuit's opinion affirms until their "right to marry and so live with pride in themselves and in their union, and in a status of equality with all other married persons" is recognized throughout the country. *United States v. Windsor*, 133 S. Ct. 2675, 2689 (2013). Until that time, Respondents and other same-sex couples face grave uncertainty about their ability to protect their relationships no matter where they live or travel. Like other Americans, individuals in same-sex relationships must care for their spouses and their children, manage their finances, navigate the healthcare system, travel or move from one state to another, and even face the loss of their spouses. But unlike other Americans, same-sex couples must do all of this without security in the legal status of their relationships. This inequality is constitutionally intolerable. Respondents therefore agree that the Court should grant Utah's petition and settle this important question.

This case presents an appropriate vehicle for the Court's review. The Tenth Circuit carefully surveyed Utah law and concluded that there is no question of standing that could impede consideration of the merits. Petitioners—Utah's Governor and Attorney General—are proper parties to speak on the state's behalf and to assert Utah's interests. They have forcefully defended Utah's marriage prohibitions and bring concrete adverseness to this suit. And Utah's law is similar to other state laws excluding same-sex couples from marriage, offering the Court an opportunity to settle the critical constitutional question presented.

Today, our nation's same-sex couples and their children live in a country where they may be denied legal recognition as a family or may find their mar-

riages invalidated simply by virtue of crossing a state line. This Court should grant the petition and hold that denying same-sex couples the fundamental freedom to marry and to have their marriages recognized violates our nation's cherished and essential constitutional guarantees.

STATEMENT

A. Respondents

Respondents are three same-sex couples in Utah who are injured by the state's refusal to permit them to marry and its denial of recognition of lawful marriages between individuals of the same sex.

1. Respondents Derek Kitchen and Moudi Sbeity met in Utah in 2009. Derek is a native Utahan, and he and Moudi have made Utah their home. They have created a life together there, including by opening and running a business in Salt Lake City. Like other committed couples who wish to marry, they desire the public recognition of their lifelong commitment and the dignity of civil marriage, as well as its responsibilities and obligations, but they were denied a marriage license when they applied in 2013. They have prepared legal documents to try to protect each other, but, as Moudi stated: "[T]hose actions still do not provide the security and legal protection that take away the risks we face as a non-married couple. In addition, those legal documents do not and cannot provide the dignity, respect, and esteem with which society and our community would view Derek's and my relationship if we were legally married." C.A. J.A. 1851 ¶ 9.

2. Respondents Laurie Wood and Kody Partridge are in a long-term, loving relationship. They are both teachers, and they own a home together in Salt

Lake City. They wish to "confirm [their] life commitment and love" through marriage, but they were denied a marriage license when they applied in 2013. Pet. App. 5a. In Kody's words, Utah has "denie[d] [her] the legal recognition of marriage and all the benefits and rights that are afforded to spouses in a legal marriage, creating risks and stigmas that none of [her] heterosexual married friends and family ever have to face." C.A. J.A. 1887-88 ¶ 15. Moreover, the couple's inability to marry has significant financial consequences because Kody is ineligible to obtain substantial benefits under Laurie's pension that are available only to married spouses. C.A. J.A. 1877 ¶ 16.

3. Respondents Karen Archer and Kate Call are Utah residents who legally married each other in Iowa in 2011. The "protection and security" of marriage are essential to them because a grave illness forced Karen into early retirement thirteen years ago. Karen and Kate need the assurance that Kate will have the right to make medical and financial decisions for Karen, including end-of-life decisions. They also wish to ensure that Kate will be able to visit Karen in the hospital and will be treated as a spouse when Karen's health fails. Finally, they wish to protect Kate's right to their joint assets and to social security benefits as a surviving spouse. C.A. J.A. 1858-60 ¶¶ 8-9; C.A. J.A. 1868-69 ¶¶ 10-11, 13. As Kate explained: "We want our marriage to be acknowledged in Utah, including because we know we have only a finite amount of time together before Karen's death. We had, and still have, no time to waste." C.A. J.A. 1868 ¶¶ 11, 13. Although the couple has drawn up legal documents attempting to protect their relationship, they fear the documents

will be subject to challenge and will not be honored, a hardship Karen already endured when her prior partner died. C.A. J.A. 1859-60 ¶ 10.

B. Utah's Marriage Prohibitions

1. In 1977, the Utah Legislature amended Utah Code Section 30-1-2 to "prohibit[] and declare[] void" marriages "between persons of the same sex." Nearly thirty years later, in response to the possibility that other states might affirm same-sex couples' freedom to marry, Utah's legislators and voters mobilized to further amend Utah's laws and state constitution to deny that right. These changes not only expressly excluded same-sex couples from marriage, but also denied them any other legal recognition or protection for their relationships. Pet. App. 108a-111a. First, the Legislature passed Utah Code Section 30-1-4.1, which provides: "Except for the relationship of marriage between a man and a woman * * *, this state will not recognize, enforce, or give legal effect to any law creating any legal status, right, benefits, or duties that are substantially equivalent to those provided under Utah law to a man and woman because they are married." Next, the Legislature passed a Joint Resolution on Marriage, which proposed a constitutional amendment providing that "[m]arriage consists only of the legal union between a man and a woman" and that "[n]o other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect." Pet. App. 109a (quoting Laws 2004, H.J.R. 25 § 1). All of these provisions became known collectively as "Amendment 3."

Amendment 3's legislative sponsors emphasized that the measure expressed moral disapproval of same-sex couples. In introducing Amendment 3 in the Utah House of Representatives, its sponsor stated:

> We should not shy away from the notion that this is, indeed, a moral question. For surely it is and we make no apologies for that. You can be compassionate and empathetic, kind and considerate without lowering standards or transforming fundamental principles upon which our society is based.

Ex. 14 to Pls.' Summ. J. Opp'n 4, *Kitchen v. Herbert*, No. 2:13-cv-217 (D. Utah Nov. 22, 2013), Dkt. 85-15 (statement of Rep. LaVar Christensen); *see also id.*, at 2 ("We have come face to face with * * * the internal struggle between right and wrong."); *id.* at 7 ("I support the resolution because I will not accept same-sex marriage as sanctified."). The bill's Senate sponsor emphasized that "we are witnessing a complete transformation of our traditional moral foundations. The thing that's really under attack is to take those moral foundation roots out of our laws." *Marriage Recognition Policy Hearing on S.B. 24*, Utah Legislature (Jan. 29, 2004), *available at* http://utahlegislature.granicus.com/MediaPlayer.php?clip_id=8461&meta_id=412392 (statement of Sen. Chris Buttars); *see also id.* ("I want to declare here on the floor that I have homosexual friends but don't accept their behavior in this behalf. No more than I have a relative that I love who is an alcoholic.").

2. Voters considered Amendment 3 on the November 2, 2004 ballot. The official Utah Voter Information Pamphlet contained an "impartial

analysis" describing the measure as "creat[ing] a classification of persons to whom the right to marry is not available," and stating:

> [T]he Amendment prohibits any other domestic union from being given the same or substantially equal legal effect as is given to a marriage between a man and a woman. Presently when a man and a woman marry, they receive certain rights, benefits, and obligations provided in the law. A married man and woman receive those rights, benefits, and obligations automatically, by operation of law and solely by virtue of being married. The Amendment prohibits a domestic union from being given those same or similar rights, benefits, and obligations.

C.A. J.A. 1835 ("Voter Pamphlet").

The legislative sponsors drafted the proponents' argument for the pamphlet, invoking the "government's strong interest in maintaining public morality, the justified preference for heterosexual marriage with its capacity to perpetuate the human race and the importance of raising children in that preferred relationship." C.A. J.A. 1836. "Here in Utah," the proponents wrote, "let us heed the warning of Lincoln and not allow others to 'blow out the moral lights around us.'" *Id.* The proponents urged that the prohibition on permitting same-sex couples from exercising their right to marry would "STRENGTHEN OUR CONSTITUTION IN DEFENSE OF MARRIAGE." C.A. J.A. 1837.

Amendment 3 passed with approximately 66% of the vote. Pet. App. 109a. It went into effect on January 1, 2005, as Article I, § 29 of the Utah Constitution. *Id.* at 109a-110a.

3. Amendment 3 not only denies same-sex couples the freedom to marry but also deprives them of countless rights, protections, and duties reserved for married spouses under the Utah Code. For example, same-sex couples may not make medical decisions for an incapacitated partner, Utah Code § 75-2a-108(1)(b); file joint tax returns, *id.* § 59-10-503(1); adopt a child, *id.* § 78B-6-117(3); serve as foster parents, Utah Admin. Code r. 501-12-6(2); claim certain pension benefits on behalf of a public-employee spouse, Utah Code § 49-12-402(3); enjoy certain protections in probate proceedings, *id.* § 75-2-202(1); or maintain a statutory cause of action for wrongful death, *id.* §§ 78B-3-105, 78B-3-106(1), 78B-3-106.5(1).

Utah also excludes same-sex couples from the duties of marriage. For example, there are no legal mechanisms for same-sex partners who have built a life and family together to pay—or be required to pay—alimony or child support if they separate. *Id.* § 30-3-5. Gay and lesbian state employees also need not disclose information about their life partners for conflict-of-interest purposes. *Id.* §§ 17-16a-6, 17-16a-7, 67-16-7, 36-11-101 *et seq.*

In short, Amendment 3 creates a wholesale exclusion of same-sex couples from the protections and responsibilities of marriage, preventing access to scores of benefits and duties, "from the mundane to the profound." *Windsor*, 133 S. Ct. at 2649.

C. Procedural History

1. In March 2013, Respondents filed suit against Petitioners, the Governor and the Attorney General of Utah, along with the Salt Lake County clerk. *Id.* at 7a. Respondents asserted that Utah's denial of

the freedom to marry violates the U.S. Constitution. Pet. Ap. 9a.

On cross-motions for summary judgment, the District Court ruled that Amendment 3 is unconstitutional and permanently enjoined its enforcement. The court observed that "the Constitution protects an individual's right to marry as an essential part of the right to liberty," *id.* at 129a; thus, Respondents were not "seek[ing] a new right to same-sex marriage," but rather wished to "exercise[e] their existing right" without state interference "on account of the sex of their chosen partner." *Id.* at 135a. The court further found that Amendment 3 discriminates on the basis of sex because "it prohibits a man from marrying another man, but does not prohibit that man from marrying a woman." *Id.* at 144a. Finally, the court determined that "the imposition of inequality was not merely the law's effect, but *its goal*," making Amendment 3 "closely resemble the type of law containing discrimination of an unusual character that the Supreme Court struck down in *Romer* [*v. Evans*, 517 U.S. 620 (1996)] and *Windsor*." Pet. App. 150a, 163a (emphasis added).

The District Court determined, however, that it need not consider whether Amendment 3 could survive heightened scrutiny because it "fails under even the most deferential level of review"—rational-basis review. *Id.* at 143a. The District Court found that Utah's asserted interests in encouraging "responsible procreation" and raising children in an "optimal environment" were insufficient because there is no rational basis to conclude that "the number of opposite-sex couples choosing to marry each other is likely to be affected in any way by the

ability of same-sex couples to marry." *Id.* at 155a. "If anything, the State's prohibition of same-sex marriage detracts from the State's goal[s]" by injuring the "roughly 3000 children * * * currently being raised by same-sex couples in Utah." *Id.* at 158a. In sum, the court concluded that Amendment 3 denies "gay and lesbian citizens their fundamental right to marry and, in so doing, demean[s] the dignity of these same-sex couples for no rational reason." *Id.* at 102a.

2. The Governor and the Attorney General appealed the District Court's order and sought a stay of the injunction pending appeal. *Id.* at 10a. The county clerk did not appeal. *Id.* at 12a. Both the District Court and the Tenth Circuit rejected the stay request. *Id.* at 10a. Utah then asked this Court to issue a stay, and this Court stayed the injunction pending the Tenth Circuit's resolution of the appeal. *Id.*; *Herbert v. Kitchen*, Order in Pending Case, No. 13A687 (U.S. Jan. 6, 2014).[1]

3. The Tenth Circuit affirmed the District Court's determination that Amendment 3 violates the Constitution.

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[1] While this case was pending in the Tenth Circuit, four same-sex couples filed a separate suit seeking recognition of their marriages, which were solemnized in Utah after the District Court issued its injunction in this case, but before this Court issued a stay. *See Evans v. Utah*, __ F. Supp. 2d __, 2014 WL 2048343 (D. Utah May 19, 2014), *appeal docketed* (10th Cir. June 5, 2014) (No. 14-460). The district court in that litigation granted a preliminary injunction preventing Utah from enforcing Amendment 3. *Id.* This Court stayed the injunction pending the Tenth Circuit's disposition of the appeal. Order, *Herbert v. Evans*, No. 14A65 (U.S. July 18, 2014).

At the outset, the court of appeals *sua sponte* considered the question of standing and found no bar to a merits determination. Pet. App. 10a. Although the county clerk had not appealed, the court found that the Governor and the Attorney General were proper defendants and appellants because Utah law vests them with authority to supervise the officials responsible for issuing marriage licenses and recognizing out-of-state marriages. *Id.* at 13a-17a. Because the Governor and the Attorney General had authority to enforce Amendment 3 and were subject to the injunction prohibiting enforcement, the court determined there was no lack of standing or any other jurisdictional or procedural impediment to review.

On the merits, the Tenth Circuit initially concluded that this Court's summary dismissal of a challenge to a state's denial of the freedom to marry in *Baker v. Nelson*, 409 U.S. 810 (1972), was "no longer binding" in light of *Lawrence v. Texas*, 539 U.S. 558 (2003) and *Windsor*. Pet. App. 20a, 26a n.3. The court next rejected Utah's argument that the fundamental right to marry is limited to opposite-sex couples. *Id.* at 28a-49a. It reasoned that "in describing the liberty interest at stake, it is impermissible to focus on the identity or class-membership of the individual exercising the right." *Id.* at 43a. Thus, "[c]onsistent with our constitutional tradition of recognizing the liberty of those previously excluded," the court "conclude[d] that [Respondents] possess a fundamental right to marry and to have their marriages recognized." *Id.* at 49a.

The Tenth Circuit accordingly assessed whether Amendment 3 was narrowly tailored to serve compelling state interests. The court assumed that

Utah's interests in encouraging reproduction, "fostering a child-centric marriage culture" and "children being raised by their biological mothers and fathers" qualified as compelling, but found that these justifications "falter[ed] * * * on the means prong of the strict scrutiny test." *Id.* at 50a-51a. As the court explained, "[t]he challenged restrictions * * * do not differentiate between procreative and non-procreative couples." *Id.* at 51a. "The elderly, those medically unable to conceive, and those who exercise their fundamental right not to have biological children are free to marry and have their out-of-state marriages recognized in Utah"; indeed, "[t]he only explicit reference to reproduction in Utah's marriage laws is a provision that allows first cousins to marry" based "on a showing of *inability* to reproduce." *Id.* at 51a-52a (emphasis in original).

The Tenth Circuit also found "an insufficient causal connection" between Amendment 3 and Utah's interests in "childbearing and optimal childrearing." *Id.* at 59a. The court deemed it "wholly illogical to believe that state recognition of the love and commitment between same-sex couples will alter the most intimate and personal decisions of opposite-sex couples." *Id.* at 60a. Nor was Utah's "goal of encouraging gendered parenting styles" narrowly tailored, given that "[t]he state does not restrict the right to marry or its recognition of marriage based on compliance with any set of parenting roles, or even parenting quality." *Id.* at 64a. Against these asserted ends, the court weighed "th[e] palpable harm" Amendment 3 "currently works against the children of same-sex couples," who are demeaned by "the message that [their] same-sex

parents are less deserving of family recognition than other parents." *Id.* at 67a.

Finally, the court found that Utah's desire to "reduc[e] the potential for civic strife" did not justify Amendment 3 because "public opposition cannot provide cover for a violation of fundamental rights." *Id.* at 69a. The Tenth Circuit did not question "the integrity or the good-faith beliefs" of Amendment 3's supporters, but it emphasized that "a majority's 'traditional[] view [of] a particular practice as immoral'" cannot justify banning the practice. *Id.* at 74a-75a (quoting *Lawrence*, 539 U.S. at 577).

Based on these determinations, the court concluded that Amendment 3 violates both the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

Judge Kelly concurred in part and dissented in part. Pet. App. 77a. He agreed that there was no lack of standing and that no other procedural or jurisdictional issues prevented a merits determination. *Id.* But he disagreed that Amendment 3 was unconstitutional. According to Judge Kelly, *Baker* "should foreclose the Plaintiffs' claims, at least in this court." *Id.* at 79a. He further objected to the majority's conclusion that same-sex couples enjoy a fundamental right to marry their chosen partners. *Id.* at 84a-90a. Judge Kelly would have applied rational-basis review and upheld Amendment 3. *Id.* at 90a-98a.

The Tenth Circuit stayed its mandate pending the disposition of Utah's petition for certiorari. *Id.* at 75a-76a. Utah filed its petition on August 5, 2014.

ARGUMENT

I. THE COURT SHOULD REVIEW THE VITAL CONSTITUTIONAL QUESTION PRESENTED, AND THIS CASE PROVIDES AN APPROPRIATE VEHICLE FOR THAT REVIEW.

While the parties disagree strongly on the merits, they are aligned on two critical points. The Court should grant Utah's petition to settle this important constitutional question, and this case presents an appropriate vehicle for that review.

A. The Importance Of The Question And The Serious Harms Caused By The Denial Of The Freedom To Marry Warrant This Court's Review.

At stake in this case is the liberty of an entire class of Americans who urgently need a ruling from this Court that they are able to marry and to have their marriages recognized on an equal basis with other citizens. In the past year, lower courts around the country have correctly recognized that state laws prohibiting same-sex couples from marrying violate the Constitution. Yet because these rulings do not apply nationwide, same-sex couples continue to experience great uncertainty and serious harms. Respondents and other same-sex couples cannot plan for their own and their children's futures secure in the knowledge that states may not strip them of legal recognition of their familial relationships when they move or travel. This legal limbo is intolerable and warrants this Court's review of the question presented.

1. In more than 30 decisions over the past year, state and federal courts have ruled that denying the right to marry to same-sex couples and withholding

recognition of their marriages unconstitutionally deprives those couples of fundamental liberty, equality, and dignity interests in violation of the Fourteenth Amendment. *See* Freedom to Marry, *Marriage Litigation*, http://www.freedomtomarry.org/litigation (last visited Aug. 27, 2014). In addition, over 70 suits are pending challenging marriage prohibitions in all states where those bars to equality still exist. *Id.* This Court has previously granted certiorari when a lower court has declared a state or local law unconstitutional, regardless of whether there is a conflict in the circuit courts. *See, e.g.*, *Armour v. City of Indianapolis*, 132 S. Ct. 2073 (2012) (reviewing equal protection challenge to city ordinance despite the absence of a conflict). The Court has deemed review particularly important when a decision casts doubt on the validity of other similar statutes. *See, e.g.*, *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 385 (2000) (finding review appropriate "given the large number of States" with comparable laws).

As more and more courts affirm that same-sex couples have a constitutional right to marry, it becomes harder to countenance the profound inequality in states that continue to deny that right to our nation's gay and lesbian citizens. This Court can and should correct that injustice.

2. The question presented is also urgent in light of the uncertainties and indignities facing Respondents and other same-sex couples—including the hundreds of same-sex couples who married in Utah after the District Court enjoined Amendment 3, *see Evans*, 2014 WL 2048343, at *1. Same-sex couples need to know whether they have the same freedom to marry and to have their marriages recognized that other

individuals enjoy, no matter where they live or travel. Until this Court resolves the issue, they will lack certainty that they can protect their most vital family relationships throughout the nation.

The children of same-sex couples, too, require a ruling from this Court to escape the harm and humiliation inflicted by laws that stigmatize and disadvantage their families. Like the federal Defense of Marriage Act ("DOMA"), state marriage prohibitions expose children of same-sex couples to grave "financial harm" and "make it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and their daily lives." *Windsor*, 133 S. Ct. at 2694-95.

Nor do these harms disappear when lower courts strike down marriage bans. Respondents and other same-sex couples in Utah cannot experience full equality until this Court makes clear that the Constitution's protection of their families does not evaporate when they cross state lines. Prolonging this uncertainty for same-sex couples and their families harms them and disserves our nation. *See id.* at 2688 (deeming review necessary when "costs, uncertainties, and alleged harm and injuries likely would continue for a time measured in years before the issue is resolved").

3. This case also affords the Court an opportunity to settle the division among lower courts regarding whether "heightened equal protection scrutiny should apply to laws that classify on the basis of sexual orientation." *Id.* at 2683-84. Some courts of appeals, often citing old circuit precedent that relied on *Bowers v. Hardwick*, 478 U.S. 186 (1986), have

held that discrimination based on sexual orientation triggers only the lowest level of constitutional review. *See, e.g.*, *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 817-18 (11th Cir. 2004); *Steffan v. Perry*, 41 F.3d 677, 684 n.3 (D.C. Cir. 1994) (en banc); *Richenberg v. Perry*, 97 F.3d 256, 260 & n.5 (8th Cir. 1996); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989); *Thomasson v. Perry*, 80 F.3d 915, 928 (4th Cir. 1996). In contrast, other circuits have subjected laws that classify based on sexual orientation to heightened scrutiny. *See, e.g.*, *Windsor v. United States*, 699 F.3d 169, 180-85 (2d. Cir. 2012), *aff'd* 133 S. Ct. 2675 (2013); *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 479-84 (9th Cir. 2014), *reh'g en banc denied*, __ F.3d __, 2014 WL 2862588 (2014); *cf. Massachusetts v. U.S. Dep't of Health and Human Servs.*, 682 F.3d 1, 9-11 (1st Cir. 2012) (applying heightened rational-basis review to laws that disadvantage gay and lesbian persons). This case offers an opportunity to resolve the division in the circuits by clarifying that discrimination based on sexual orientation warrants heightened scrutiny.

B. This Case Provides An Appropriate Vehicle To Consider The Question Presented.

This case is free of jurisdictional or procedural defects, includes as parties the state's highest-ranking officials, and concerns a state law representative of others that bar same-sex couples from marriage. This case therefore provides an appropriate vehicle to resolve the critical constitutional question presented.

1. This case does not have the jurisdictional and procedural problems that have complicated review in

the past. *See Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661-68 (2013). All parties agree that Respondents have standing to challenge Amendment 3 and that Utah's Governor and Attorney General were proper defendants in the District Court, were proper appellants in the Tenth Circuit, and are proper Petitioners here. None of the parties have argued otherwise, and the Tenth Circuit confirmed the point after conducting a careful, *sua sponte* analysis of the state-law provisions supporting standing. Pet. App. 10a-18a; *see also* Pet. App. 77a (Kelly, J., concurring in part and dissenting in part) (agreeing that no jurisdictional or procedural issues barred review).

Surveying state law, the Tenth Circuit explained that the Governor and the Attorney General have direct supervisory power over the issuance of marriage licenses and recognition of out-of-state marriages in Utah. Pet. App. 13a-17a. The Tenth Circuit found that the Governor is charged with "supervis[ing] the official conduct of all executive and ministerial officers," Pet. App. 13a & n.1—which would include the county clerks who issue marriage licenses and the state registrar of vital records who is tasked with creating and recording those licenses. *See* Utah Code §§ 67-1-1(1) & (2), §§ 26-2-24, 26-1-8; 26-2-3(e). The Attorney General, meanwhile, has authority to initiate an action to remove any county officer for "malfeasance in office" and to prosecute any county clerk who "knowingly issues a license for any prohibited marriage." *Id.* §§ 77-6-1 & -2, §§ 67-5-1(6) & (8); § 17-18a-201; § 30-1-16. In addition, the state constitution empowers the Governor and the Attorney General to oversee, advise, and direct state agencies responsible for enforcing Amendment 3.

See Utah Const. art. VII, §§ 5, 16. Finally, as the Tenth Circuit emphasized, the Governor and the Attorney General have repeatedly and without challenge exercised their powers to ensure that clerks and other state officials enforce Amendment 3. Pet. 14a-16a; *see also Evans*, 2014 WL 2048343, at *3. This Court, following its usual practice, can rely on the Tenth Circuit's sound and undisputed conclusion that Utah law grants Petitioners the authority to enforce and to defend Amendment 3. *See UNUM Life Ins. Co. of Am. v. Ward*, 526 U.S. 358, 368 (1999) ("We do not normally disturb an appeals court's judgment on an issue so heavily dependent on analysis of state law.").

"Having concluded that the Governor and Attorney General were properly made defendants below," the Tenth Circuit further held that these officials had standing to appeal without the participation of a county clerk because they were subject to the District Court's injunction prohibiting enforcement of Amendment 3. Pet. App. 17a. As the non-prevailing parties in the court of appeals, the Governor and the Attorney General likewise are proper petitioners here. *See Windsor*, 133 S. Ct. at 2688 (observing that this Court generally permits petitions only from parties who did not prevail on appeal). Because this case involves no jurisdictional or procedural complications, it provides an exceptionally clean vehicle for this Court's review of the question presented.

2. Utah's Governor and Attorney General are also particularly appropriate parties to advance the state's arguments regarding Amendment 3. As Utah's top-ranking executive and law-enforcement officials, Utah's Governor and Attorney General are

directly responsible to the electorate, whose "will and resolve" they seek to represent in this suit. Pet. 28. They 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.

Moreover, Utah's Governor and Attorney General have vigorously and consistently defended Amendment 3 since this lawsuit commenced. They were named as defendants from the outset and have fully participated throughout the litigation, including appealing every adverse decision, seeking stays to ensure Amendment 3 remains operative, and coordinating the state's response to—and eventual non-recognition of—the marriages of same-sex couples solemnized after the District Court enjoined the enforcement of Amendment 3. Accordingly, they bring "concrete adverseness which sharpens the presentation of the issues upon which the court so largely depends for illumination of difficult constitutional questions." *Windsor*, 133 S. Ct. at 2687 (internal quotation marks omitted).

The Governor and the Attorney General's strenuous and unified defense of the law has also greatly simplified the proceedings, making it unnecessary for the lower courts—and now for this Court—to permit intervenors to join the suit or to consider divided arguments by state defendants who disagree on the merits. Here, there is just one set of Petitioners and one set of Respondents, and they respectfully but fundamentally disagree on the constitutional principles governing this case.

3. Finally, because Amendment 3 is representative of other states' laws, this Court's review would settle the critical constitutional question presented.

The majority of marriage prohibitions around the country are similar to Amendment 3: They ban same-sex couples from marrying, refuse to grant same-sex couples any legal rights substantially equivalent to marriage, and refuse to recognize lawful, out-of-state marriages of same-sex couples. Congressional Research Service, *Same-Sex Marriage: Legal Issues*, RL 31994 (May 6, 2013) at 30-32 (summarizing state marriage statutes). In addition, many state prohibitions, including Utah's, were enacted in waves of laws that swept parts of the nation, first in the 1970s and then again decades later in response to judicial decisions addressing same-sex couples' freedom to marry. *See*, *e.g.*, *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003). This shared history and similarity of scope mean that this Court's ruling on Amendment 3 will provide an opportunity to resolve the question whether other states' laws are constitutional. *See New York v. Ferber*, 458 U.S. 747, 749 n.2 (1982) (reviewing constitutionality of state statute where numerous similar or identical state laws existed throughout the country).

Moreover, this case offers an opportunity to consider the constitutionality of both laws that prohibit same-sex couples from marrying and laws that deny recognition to lawful, out-of-state marriages between same-sex couples. The constitutional challenges are closely related and best considered together to provide certainty to same-sex couples regarding the legal status of their

relationships. Piecemeal review risks that litigation will drag on for years, with same-sex couples and their families unsure whether they may be stripped of legal protection for their most cherished relationships any time they cross state lines.

For all of these reasons, review is warranted, and this case offers an appropriate vehicle to consider this critical constitutional question.

II. THE TENTH CIRCUIT CORRECTLY HELD THAT AMENDMENT 3 IS UNCONSTITUTIONAL.

Although the parties agree on the importance of the question presented and the need for this Court's review, they part ways on the merits. This Court should find that Amendment 3 violates the Fourteenth Amendment.

A. Amendment 3 Denies Same-Sex Couples The Fundamental Right To Marry.

It is beyond dispute that the right to marry is a fundamental liberty guaranteed by the Constitution. Utah may not justify its denial of that liberty to same-sex couples by improperly narrowing or restricting the right's scope.

1. This Court has long recognized "the freedom of choice to marry" as among the most fundamental of rights. *Loving v. Virginia*, 388 U.S. 1, 12 (1967). Marriage is "the most important relation in life." *Maynard v. Hill*, 125 U.S. 190, 205 (1888). It is "one of the basic civil rights of man," *Loving*, 388 U.S. at 12, "a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred." *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965). Entitlement to the right does not turn on who asserts it: The "right to marry is of

fundamental importance for *all* individuals." *Zablocki*, 434 U.S. at 384 (emphasis added).

2. a. Utah nevertheless seeks to reframe the freedom Respondents seek as a quest for a "fundamental constitutional right to marry someone of the same sex," which it maintains "is *not* deeply rooted in our nation's history." Pet. 14 (citing *Washington v. Glucksberg*, 521 U.S. 702 (1997) (emphasis in original)). But like other fundamental rights, the freedom to marry is defined by the substance of the right itself, not by the identity of the persons asserting it—let alone by the identity of those historically denied the right. *See Loving*, 388 U.S. at 6 n.5 (recognizing right of people of different races to marry even though interracial marriage remained illegal in 16 states and had only recently become lawful in 14 other states); *Lawrence*, 539 U.S. at 574 ("Our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education" and gay and lesbian persons "may seek autonomy for these purposes, just as heterosexual persons do."). That gay and lesbian persons have long been deprived of their fundamental right to marry is evidence of inequality, not a "definition" of the outer bounds of the right in the first place.

b. Utah also cannot demonstrate that so-called "sexual complementariness" is a "requirement" of the right to marry. Pet. 15. The fundamental right to marry does not hinge on the ability or desire to procreate. Indeed, this Court has held that married couples have a fundamental right *not* to have children. *Griswold*, 381 U.S. at 485-486; *see also, e.g.*, *Turner v. Safley*, 482 U.S. 78, 95 (1987)

(recognizing that "important attributes of marriage," entirely apart from its link to reproduction, justify its protection as a fundamental freedom).

c. Finally, Utah's invocation of the authority "to define marriage" and its citizens' "liberty to engage in self-government," Pet. 16-17, overlooks this Court's instruction that "[s]tate laws defining and regulating marriage * * * must respect the constitutional rights of persons." *Windsor*, 133 S. Ct. at 2691. Denying same-sex couples the right to marry contravenes the Constitution's promises of liberty and equal citizenship. Majority will cannot cure that constitutional violation: "[F]undamental rights may not be submitted to vote; they depend on the outcome of no elections." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

Because Amendment 3 denies same-sex couples' fundamental freedom to marry—and the dignity, self-determination, and "status of immense import" that flow from that right, *Windsor*, 133 S. Ct. at 2692—it cannot withstand constitutional scrutiny.[2]

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[2] Utah asserts that the Tenth Circuit had no authority to consider the constitutional question in light of the summary dismissal in *Baker*. But *Baker* did not address the validity of state measures enacted expressly to exclude same-sex couples from marriage and to bar recognition of their lawful marriages performed in other states. *See Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (summary dismissal is dispositive only as to the "precise issues" presented in a case). Moreover, as the Tenth Circuit held, doctrinal developments have deprived *Baker* of any precedential force. Pet. App. 20a.

B. Amendment 3 Impermissibly Discriminates Based On Sexual Orientation And Gender.

By "creat[ing] a classification of persons to whom the right to marry is not available," Voter Pamphlet, C.A. J.A. 1835, Amendment 3 also denies same-sex couples equal protection.

1. a. Amendment 3 "instructs all" officials in Utah, "and indeed all persons with whom same-sex couples interact, including their own children," that same-sex couples' relationships—even their lawful marriages—are "less worthy than the marriages of others." *Windsor*, 133 S. Ct. at 2696. By "singl[ing] out a class of persons" based on their desire to marry an individual of the same sex in order to "disparage and to injure" them, *id.* at 2695-96, Amendment 3 discriminates on the basis of sexual orientation.

That discrimination should trigger heightened scrutiny. Indeed, every factor this Court has previously considered to determine whether a classification targets a suspect class supports that conclusion. *See, e.g.*, *Frontiero v. Richardson*, 411 U.S. 677, 684-687 (1973) (explaining that considerations include history of discrimination, whether classification is based on ability to contribute to society, whether characteristic is immutable or an integral part of an individual's identity, and whether the group lacks sufficient political power to ward off discrimination). A searching inquiry is all the more warranted given that classifications based on sexual orientation are inextricably linked to gender discrimination and affect the most important and intensely personal of life decisions. *See, e.g.*, *Windsor*, 133 S. Ct. at 2692 ("Private, consensual sexual intimacy between two

adult persons of the same sex * * * can form 'but one element in a personal bond that is more enduring.' " (quoting *Lawrence*, 539 U. S. at 567)).

b. Utah argues that heightened scrutiny is not warranted because Amendment 3 does not "classify based on [sexual] orientation," but rather only "classif[ies] based on sexual complementariness." Pet. 21. But the ability to have a child is not the line Amendment 3 draws; after all, it permits marriage between other couples who are unable or unwilling to procreate. Only same-sex couples are denied this right. Amendment 3's legislative sponsors openly acknowledged this discrimination, stating that "'sexual orientation' is not comparable to race, religion and ethnicity" for equal protection purposes. Voter Pamphlet, C.A. J.A. 1837. While the sponsors were wrong to think this sexual-orientation classification can survive equal protection review, they were correct that the law discriminates on that basis.

2. a. In addition, as Utah "concede[d]" in the District Court, "Amendment 3 involves sex-based classifications." Pet. App. 144a. For example, Utah forbids Respondent Laurie Wood from marrying her life partner for one reason alone: because she is a woman. If she were a man, there would be no such ban. Similarly, Utah refuses to recognize Respondent Karen Archer's lawful marriage in Iowa solely because she is a woman. This differential treatment constitutes an unconstitutional gender-based classification.

Moreover, as Utah freely admits, Amendment 3 rests on gender stereotypes, including the gendered expectation that a woman should marry only a man and the assumption that men and women necessarily

parent in distinctive ways. Pet. 24-25. But this Court has emphasized that stereotypes like these are impermissible: "[O]verbroad generalizations about the different talents, capacities, or preferences of males and females" cannot justify different treatment of individuals based on their sex. *United States v. Virginia*, 518 U.S. 515, 533 (1996).

b. Utah responds that Amendment 3 "do[es] not treat men and women differently" because both men and women are prohibited from marrying individuals of the same sex. Pet. 20. But this Court rebuffed a similar "neutral application" argument in *Loving* when the state contended that its anti-miscegenation law applied equally to both races: "[T]he fact of equal application does not immunize the statute from the very heavy burden of justification" the Fourteenth Amendment requires. 388 U.S. at 9.

Utah's argument also ignores the relevant inquiry under the Equal Protection Clause: whether the law treats an *individual* differently because of his or her gender. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 152-53 (1994) (Kennedy, J., concurring) (observing that the Equal Protection Clause is primarily "concern[ed] with rights of individuals, not groups"). Barring an individual's access to marriage or to recognition as a lawful spouse on the basis of gender violates the constitutional guarantee that "each person is to be judged individually and is entitled to equal justice under the law." *Plyler v. Doe*, 457 U.S. 202, 216 n. 14 (1982). From an individual's perspective, Utah's laws are not gender-neutral; from a constitutional perspective, they therefore cannot stand.

C. Amendment 3 Cannot Satisfy Any Standard Of Constitutional Scrutiny.

This Court should review Utah's justifications under heightened scrutiny. But even if rational-basis review applied, Amendment 3 would not satisfy that standard.

1. Utah confuses the inquiry by attempting to justify its decision to permit men and women to marry each other. But Amendment 3 does not *confer* rights on these couples; it *denies* rights to same-sex couples. Nothing links that denial to the provision of any benefit to opposite-sex couples. Utah claims it is not "illogical" to think that preventing same-sex couples from marrying could "alter the most intimate and personal decisions of opposite-sex couples." Pet. 27 (internal quotation marks omitted). But even rational-basis review requires "some footing in * * * realit[y]." *Heller v. Doe*, 509 U.S. 312, 321 (1993). Utah offers no plausible reason to believe that permitting same-sex couples to marry will change the attitudes, beliefs, or conduct of other couples toward marriage and parenting. Utah must have legitimate grounds to exclude same-sex couples from marriage, independent of its interest in allowing other couples to marry, but it has not offered any rational justification for Amendment 3.

2. a. Utah first claims an interest in "ensuring the well-being of offspring, planned or unplanned." Pet. 22. But excluding same-sex couples from marriage does not rationally further that goal. To the contrary, the exclusion *undermines* it: By treating same-sex relationships as unequal and unworthy of recognition, the state "humiliates" the children "now being raised by same-sex couples" in Utah, bringing

them "financial harm" by depriving their families of a host of benefits and "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." *Windsor*, 133 S. Ct. at 2694-95.

b. Utah next asserts an interest in children being raised by both a mother and a father. Pet. 24. But banning same-sex couples from marrying does not increase the number of children raised by opposite-sex parents. Thus, even if the state's gendered parenting preference qualified as legitimate, Utah offers no link between the exclusion of same-sex couples from marriage "and the object to be attained." *Romer*, 517 U.S. at 632. Utah also ignores that the children of same-sex parents exist. They will not be raised by "*a* mother and *a* father," Pet. 24, no matter how much the state demeans their parents' lifelong commitment or withholds dignity and protections from their families.

c. Finally, Utah invokes an interest in proceeding with caution. *Id.* That argument is tellingly similar to the state's contention in *Loving* that "the scientific evidence [wa]s substantially in doubt and, consequently, this Court should defer to the wisdom of the state legislature in adopting its policy of discouraging interracial marriages." 388 U.S. at 8. This Court rightly rejected that argument in 1967. It is equally unavailing today. In essence, Utah contends that because a class of persons has been deprived of a cherished and fundamental freedom in the past, the members of that class may be forced to endure deprivation for some future indefinite period. Just the opposite is true: The persistence of deeply rooted discrimination requires a remedy now.

D. Amendment 3's Selective Withholding Of Recognition And Respect For Lawful Marriages Is Unconstitutional.

In addition to being unconstitutional for the reasons described above, Utah's refusal to recognize the lawful marriages of same-sex couples violates their liberty interest in their existing marriages under the Due Process Clause of the Fourteenth Amendment. In *Windsor*, the Court affirmed that lawfully married same-sex couples have protected liberty and equality interests in their unions, just like other married couples. 133 S. Ct. at 2695; *see also Griswold*, 381 U.S. at 485 (recognizing a right to privacy in an existing marital relationship). Like DOMA, Amendment 3 unconstitutionally strips married same-sex couples of those interests.

Amendment 3 also interferes with existing marital relationships, affecting innumerable rights and benefits that "touch many aspects of married and family life, from the mundane to the profound." *Windsor*, 133 S. Ct. at 2694. Moreover, like DOMA, Amendment 3 tells same-sex "couples, and all the world, that their otherwise valid marriages are unworthy," thereby placing these couples in the "unstable position of being in a second-tier marriage." *Id.* at 2694. And, like DOMA, Utah's non-recognition law was enacted in order "to identify a subset of state-sanctioned marriages and make them unequal." *Id.* Thus, like DOMA, Utah's law cannot stand.

E. Amendment 3's Purpose And Effect Also Demonstrate Its Invalidity.

On top of all this, Amendment 3 fails under this Court's analysis in *Windsor* that a law is

unconstitutional when its "avowed purpose and practical effect * * * are to impose a disadvantage, a separate status, and so a stigma." *Windsor*, 133 S. Ct. at 2693. Like DOMA, Amendment 3 is unconstitutional because its text and history demonstrate that the infliction of inequality and denial of dignity and respect were "its essence." *Id.* at 2693.

1. To determine whether an improper motive or animus underlies a law, this Court examines its "design, purpose, and effect," including its text and "[t]he history of [its] enactment." *Id.* at 2689, 2693. Conducting that inquiry in *Windsor*, the Court concluded that DOMA did not survive constitutional scrutiny. Legislative history demonstrated that DOMA reflected moral disapproval of same-sex couples, a sentiment confirmed by the Act's title. *Id.* at 2693. And DOMA's effect was to "write[] inequality into the entire United States Code." *Id.* at 2694. It "demean[ed] [same-sex] couple[s], whose moral and sexual choices the Constitution protects." *Id.* It "humiliated" the children being raised by these couples, making it "even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Id.* In short, DOMA purposefully singled out same-sex couples with one goal: to "impose a disability" on them. *Id.* at 2695-96. The statute was invalid because "no legitimate purpose" could "overcome[] the purpose and effect to disparage and to injure." *Id.* at 2696.

2. Amendment 3 is invalid for the same reasons. Its discriminatory purpose is apparent in its design and on its face. It singles out same-sex couples and

excludes them not only from marriage, but also from "*any* legal status, right, benefits, or duties that are substantially equivalent" to marriage. Utah Code § 30-1-4.1 (emphasis added); *see Windsor*, 133 S. Ct. at 2692 ("[D]iscriminations of an unusual character especially suggest careful consideration." (quoting *Romer*, 517 U.S. at 633 (internal quotation marks omitted))). The "sheer breadth" of this law renders it "inexplicable by anything but animus toward the class it affects." *Romer*, 517 U.S. at 632.

The history and context of the provisions further demonstrate that they were motivated by moral disapproval of same-sex couples and a desire to disadvantage those who would enter—or had entered—into lawful marriages. Like many states, Utah's Legislature pursued these measures in 2004 in response to the first judicial decision in the country affirming same-sex couples' equal freedom to marry. *See Goodridge*, 798 N.E.2d 941. Utah's legislators deemed this "a moral question." Ex. 14 to Pls.' Summ. J. Opp'n 4, *Kitchen*, No. 2:13-cv-217 (D. Utah Nov. 22, 2013), Dkt. 85-15. What was "really under attack," they explained, was the desire to "take those moral foundation roots out of our laws." *Marriage Recognition Policy Hearing on S.B. 24*, Utah Legislature (Jan. 29, 2004). In the official Voter Pamphlet, the legislative sponsors trumpeted the "government's strong interest in maintaining public morality." Voter Pamphlet, C.A. J.A. 1836. They urged voters that denying same-sex couples the freedom to marry would "STRENGTHEN OUR CONSTITUTION IN DEFENSE OF MARRIAGE." *Id.* at 1837; *see also supra*, at 6-7. No less than DOMA's purpose, Amendment 3's "principal purpose [was] to impose inequality" in accordance with a

majority's conception of morality. *Windsor*, 133 S. Ct. at 2694. As with DOMA, that unequal treatment was directed at a minority seeking to exercise the same freedom to marry that the majority sought to reserve to itself.[3]

Indeed, inequality and indignity have been Amendment 3's "principal effect." *Id.* Like DOMA, Amendment 3 singles out loving and committed couples who are gay or lesbian for disfavored treatment. It prevents those couples and their families from "obtaining government healthcare benefits they would otherwise receive," "brings financial harm to children of same-sex couples," "denies or reduces benefits allowed to families upon the loss of a spouse and parent," and divests couples "of the duties and responsibilities that are an essential part of married life and that they in most cases would be honored to accept." *Id.* at 2695; *see supra*, at 8; 2014 PEHP Medical Master Policy, §§ 2.15, 3.1; Utah Code §§ 59-10-1023, 75-2-202. In short, Amendment 3, like DOMA, stigmatizes and burdens same-sex couples' lives in "visible and public ways," relegating them to second-class status. *Windsor*, 133 S. Ct. at 2694.

By prohibiting same-sex couples from exercising the fundamental freedom to marry and by denying recognition of their lawful marriages performed in

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[3] This is not to say that Amendment 3's proponents must "inevitably be treated as acting out of prejudice." Pet. 28. The Tenth Circuit did not question the proponents' good faith, but it rightly concluded that sincerity of belief does not transform moral disapproval into a legitimate government purpose. Pet. App. 74-75a.

other jurisdictions, Amendment 3 embraces discrimination "not to further a proper legislative end but to make [same-sex couples] unequal to everyone else." *Romer*, 517 U.S. at 635. It therefore violates the Fourteenth Amendment. *Id.*

CONCLUSION

For the foregoing reasons, Respondents agree that the petition should be granted.

Respectfully submitted,

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