No. 14-50196

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CLEOPATRA DELEON, NICOLE DIMETMAN, VICTOR HOLMES, and MARK PHARISS,
Plaintiffs-Appellees,

v.

RICK PERRY, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF TEXAS; GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS TEXAS ATTORNEY GENERAL; AND DAVID LAKEY, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE TEXAS DEPARTMENT OF STATE HEALTH SERVICES,
Defendants-Appellants.

On Appeal from the United States District Court for the Western District of Texas, No. 5:13-CV-982 (Hon. Orlando L. Garcia)

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

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rules 26.1, 28.2.1, and 29.2, the undersigned counsel of record for amicus curiae Gay & Lesbian Advocates & Defenders (GLAD) states that GLAD is a nonprofit corporation with no parent, subsidiary, or stock held by any person or entity, including any publicly held company; and certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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INTEREST OF AMICUS CURIAE[1]

Founded in 1978, Gay & Lesbian Advocates & Defenders (GLAD) is a public interest legal organization dedicated to ending discrimination based on sexual orientation, HIV status, and gender identity and expression. GLAD has litigated widely in both State and federal courts in all areas of law in order to protect civil rights. Of particular relevance, GLAD recently litigated successful challenges to Section 3 of the Defense of Marriage Act (DOMA). *Massachusetts v. HHS*, 682 F.3d 1 (1st Cir. 2012), *cert. denied*, 133 S. Ct. 2887 (2013); *Pedersen v. OPM*, 881 F. Supp. 2d 294 (D. Conn. 2012), *cert. denied*, 133 S. Ct. 2888 (2013).

SUMMARY OF THE ARGUMENT

Since the Supreme Court decided *United States v. Windsor*, 133 S. Ct. 2675 (2013), every federal court of appeals (and all the federal district courts but one) to address whether a State's laws banning the solemnization or recognition of marriages of same-sex couples violate the Equal Protection Clause has held that they do. One question put to those courts—and to this Court in this case—is whether a State's refusal to solemnize or recognize marriages of same-sex couples

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[1] No counsel for a party authored this brief in whole or in part, and no one other than amicus, its members, or its counsel made any monetary contribution toward the brief's preparation or submission. All parties to this appeal have consented to this brief's filing. *See* Joint Consent by All Parties to the Filing of Amicus Curiae Briefs (June 25, 2014).

is rationally related to a legitimate government purpose. The answer is no. Such a targeted denigration of same-sex couples violates the Equal Protection Clause under rational-basis review. That conclusion warrants affirmance here.[2]

As the Supreme Court recognized in striking down DOMA in *Windsor*, excluding gay and lesbian couples from the rights and responsibilities that flow from civil marriage serves no legitimate government purpose. Instead, it "impose[s] a disadvantage, a separate status, and so a stigma" upon same-sex couples. *Windsor*, 133 S. Ct. at 2693. *Windsor* was entirely consistent with the Supreme Court's prior rational-basis cases. Those cases instruct that courts must ensure that legislation meaningfully furthers a legitimate State interest, and that such inquiry should be more searching when the legislation targets a historically disadvantaged group, affects important personal interests, or deviates from historic State practices in a particular field. Moreover, those cases teach that a State's justifications for the challenged legislation must be viewed skeptically when its enactment history suggests animus toward the affected group or that the proffered justifications do not match the classification drawn.

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[2] Although GLAD believes heightened scrutiny is the appropriate standard of review for classifications based on sexual orientation, that question need not be conclusively resolved here because, as the district court found, Texas's multiple bans fail even rational-basis review. *De Leon v. Perry*, 975 F. Supp. 2d 632, 653 (W.D. Tex. 2014).

Just as each of these considerations was applicable to DOMA in *Windsor*, each applies here and requires invalidation of Texas's marriage bans.

ARGUMENT

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

The Equal Protection Clause requires that any classifications in the law be made "'without respect to persons.'" *Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591, 602 (2008). The fundamental command of the Equal Protection Clause is that people "'under like circumstances and conditions'" should be "'treated alike.'" *Id.* This is the Clause's direction in every case, regardless of the level of scrutiny ultimately employed to test a particular law's justification. *Cunningham v. Beavers*, 858 F.2d 269, 272-273 (5th Cir. 1988).

"[W]hile rational basis review is indulgent and respectful, it is not meant to be 'toothless.'" *Windsor v. United States*, 699 F.3d 169, 180 (2d Cir. 2012), *aff'd*, 133 S. Ct. 2675 (2013); *see Greater Hous. Small Taxicab Co. Owners Ass'n v. City of Hous.*, 660 F.3d 235, 239 (5th Cir. 2011) ("A 'necessary corollary to and implication of rationality as a test is that there will be situations where proffered reasons are not rational.'"). To the contrary, it requires that (1) legislation be enacted for a legitimate purpose, and not out of prejudice, fear, animus, or moral disapproval of a particular group, and (2) the means chosen be sufficiently and

plausibly related to the legitimate purpose, as well as proportional to the burdens imposed.

Most laws will pass muster under this standard, but "deference in matters of policy cannot … become abdication in matters of law." *National Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2579 (2012). The purported justifications for Texas's marriage bans lack any rational connection to a legitimate legislative goal; accordingly, Texas's decision to specifically disqualify same-sex couples from the institution of civil marriage is invalid.

A. Rational-Basis Review Varies Depending On Context

The application of rational-basis review is neither wooden nor mechanical. The nature and scope of the inquiry may depend on the context of the classification, and circumstances may warrant a more in-depth look at the legislature's purpose and the claimed fit between that purpose and the classification. *See, e.g.*, *Windsor*, 699 F.3d at 180. These circumstances include whether the group targeted by the classification has traditionally been subject to discrimination, whether important personal interests are at stake, and whether the classification reflects a departure from past practices. Where present, these circumstances may undermine the usual expectation that classifications are being drawn in good faith, for genuine purposes, and not arbitrarily or to penalize a disfavored group. *Massachusetts v. HHS*, 682 F.3d 1, 11 (1st Cir. 2012); *cf. Vance*

v. Bradley, 440 U.S. 93, 97 (1979) (rational-basis review is deferential "absent some reason to infer antipathy").

When a classification targets a historically disadvantaged group, the Supreme Court has applied "a more searching form of rational basis review." *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring in judgment); *see City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 453 n.6 (1985) (Stevens, J., concurring) (courts must exercise special "vigilan[ce] in evaluating the rationality of any classification involving a group that has been subjected to a 'tradition of disfavor'"). It was pivotal to the Supreme Court's rational-basis review that gay people in *Romer v. Evans*, 517 U.S. 620, 634-635 (1996), "'hippies'" in *USDA v. Moreno*, 413 U.S. 528, 534 (1973), and persons with mental disabilities in *Cleburne*, 473 U.S. at 448, had been the subject of prejudice or disdain. The Supreme Court recognized that the challenged measures might well have been motivated by disapproval of or negative stereotypes about those groups, and it therefore closely assessed potential explanations for each measure.

The Supreme Court's rational-basis cases also consider the nature of the interests affected by the classification. Even where fundamental rights are not implicated, laws that burden personal and family choices command closer attention. *Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring in judgment). In

Eisenstadt v. Baird, 405 U.S. 438 (1972), for example, the Supreme Court's analysis was informed by the fact that the challenged law regulated intimate affairs—in that case, access to contraception. Accordingly, *Eisenstadt* carefully considered how the law operated in practice as well its preferential treatment of married couples and concluded that the law's real purpose was not the one proffered by the State. *Id*. at 447-453. In *Windsor*, the Court's reasoning turned on the fact that the challenged law affected family arrangements implicating "personhood and dignity." 133 S. Ct. at 2696. The Court could identify no interest that could rebut its conclusion that the "principal purpose and the necessary effect" of DOMA was to "demean" married same-sex couples. *Id*. at 2695; *cf. M.L.B. v. S.L.J.*, 519 U.S. 102, 116-117 (1996) (applying "close consideration" to a burden upon "[c]hoices about marriage, family life, and the upbringing of children").

The scope of review is also informed by whether the legislative act represents a departure from prior acts in the same policy-making domain. For example, *Romer*'s rational-basis analysis was mindful of the fact that the Colorado constitutional amendment at issue was "unprecedented" and of "'an unusual character.'" 517 U.S. at 633; *see also Windsor*, 133 S. Ct. at 2693. Among other things, State classifications that "singl[e] out a certain class of citizens for disfavored legal status or general hardships" warrant careful examination. *Romer*, 517 U.S. at 633.

1. In this context, rational-basis review is robust

These factors all require a more searching review of Texas's bans on same-sex couples marrying and on recognition of those couples' lawful out-of-State marriages.

First, it is beyond cavil that gay people have historically been mistreated and disadvantaged. *Lawrence*, 539 U.S. at 571 ("[F]or centuries there have been powerful voices to condemn homosexual conduct as immoral."); *see also SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 485-486 (9th Cir. 2014).

Second, marriage has been "recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men," *Loving v. Virginia*, 388 U.S. 1, 12 (1967), and implicates a profound and "intimate relationship between two people," *Windsor*, 133 S. Ct. at 2692, reflecting a "personal bond that is more enduring," *Lawrence*, 539 U.S. at 567.

Third, Texas's marriage bans are anomalous in the context of its general marriage policies. Texas's bans impose sweeping and targeted disadvantages on a particular group of persons that are grossly out of proportion to the ways in which Texas effectuates its other public policies about marriage. Unlike Texas's statutes concerning marriages of those who are already married or consanguineous, *see* Tex. Fam. Code Ann. §§ 6.201, 6.202, Texas's multiple and general bans concerning the marriages of same-sex couples are enshrined in Texas's several

statutes *and* constitution, Tex. Fam. Code Ann. §§ 2.001(b), 6.204; Tex. Const. art. I, § 32(a), (b). They forbid marriage, civil unions, "any legal status identical or similar to marriage," and any arrangement that "grants … legal protections, benefits, or responsibilities granted to the spouses of a marriage." *Id.* Moreover, they forbid recognizing a marriage validly solemnized elsewhere or giving effect to any "public act, record, or judicial proceeding" from another state that recognizes marriage between same-sex couples. *Id.*

The contrast between Texas's regulation of multiple-person or consanguineous marriages, on the one hand, and its bans on same-sex couples' marriages and recognition thereof, on the other, aligns the marriage bans with past marriage restrictions invalidated by the Supreme Court, such as historic race-based marriage bans. *Loving*, 388 U.S. at 4-7 & nn.3-10, 11-12 (bans against interracial marriages consisted of numerous and sweeping statutory burdens upon the couples). Indeed, rather than simply "cho[osing] the traditional view" of marriage regulation (Tex. Br. 11), the bans manifest a class-based hostility born of animosity toward the disadvantaged class. The sheer breadth of the "disfavored legal status" and "general hardships" imposed by Texas's bans requires careful judicial examination. *Romer*, 517 U.S. at 633.

These contextual factors, applied in this case, inform the core equal protection inquiry: whether a government has singled out a class of citizens in

order to disadvantage them. *Romer*, 517 U.S. at 633. Where the above-described factors are present, as here, they suggest that the "purpose and practical effect" of a law are impermissibly "to impose a disadvantage, a separate status, and so a stigma" upon the citizens of a particular class. *Windsor*, 133 S. Ct. at 2693.

2. The arguments for more deferential review made by Texas and its amici are meritless

Despite the factors described above, Texas and its amici incorrectly argue that this Court should be particularly deferential in reviewing its marriage bans. Texas first defends its laws with general allusions to legislative deference, but no case law supports the idea that "legislative deference" overrides the Equal Protection Clause. For example, Texas relies (Br. 7, 13, 17) on broad statements about the deferential nature of rational-basis review from *FCC v. Beach Communications, Inc.*, 508 U.S. 307 (1993). But *Beach* involved a challenge to a legislative "[d]efin[ition] [of] the class of persons subject to a regulatory requirement," which is an "unavoidable component[]" of *economic regulatory* legislation. *Id.* at 315-316. In such a context, there is generally little danger that a State is morally disapproving of whole categories of citizens, and therefore little reason for skepticism about its justification. *See Armour v. City of Indianapolis*, 132 S. Ct. 2073, 2080 (2012); *St. Joseph Abbey v. Castille*, 712 F.3d 215, 221 (5th Cir.), *cert. denied*, 134 S. Ct. 423 (2013). By contrast, Texas's decisions here

disqualify an entire swath of persons from a civil institution of fundamental societal importance—with highly stigmatizing consequences.

Likewise, Texas's generalizations (Br. 4-7, 10-11, 16-17) about federalism and democracy are off-target. Although citizens and their representatives assuredly have wide berth in legislating, "[a] citizen's constitutional [equal protection] rights can hardly be infringed simply because a majority of the people choose that it be." *Lucas v. Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713, 736-737 (1964); *Romer*, 517 U.S. at 635 (striking down a Colorado constitutional amendment that "inflict[ed] on [gays and lesbians] immediate, continuing, and real injuries"). Texas warns of the dangers of judicial overreach, citing (Br. 37) a string of Supreme Court cases overturning various federal and state laws. But those cases only emphasize that courts must and do, when necessary, strike down laws that trespass the bounds of the Constitution. *Board of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 365 (2001) ("[I]t is the responsibility of this Court, not Congress, to define the substance of constitutional guarantees.").

Similarly, Texas's amici overread the plurality opinion in *Schuette v. Coalition To Defend Affirmative Action*, 134 S. Ct. 1623 (2014). *See* Scholars of Federalism & Judicial Restraint Amicus Br. 14-15; Louisiana Amicus Br. 16-19; Marriage Law Foundation Amicus Br. 24-25. Texas's marriage bans, unlike the law in *Schuette*, do not merely involve the "sensitive issue" of whether to preclude

preferential treatment for a minority, 134 S. Ct. at 1638; instead, they impose unequal, *injurious* treatment upon that minority. The *Schuette* opinion emphasizes that "the Constitution requires redress by the courts" when "hurt or injury is inflicted on" a minority by the "command of laws or other state action." *Id.* at 1626. That is the case here, where the challenged bans "place[] same-sex couples in an unstable position of being in a second-tier marriage," "demean[] the couple, whose moral and sexual choices the Constitution protects," and "humiliate[] … children now being raised by same-sex couples." *Windsor*, 133 S. Ct. at 2694. Moreover, *Schuette* confirms that the simple fact that voters directly enacted a State constitutional amendment does not insulate it from constitutional scrutiny. 134 S. Ct. at 1631-1632.

B. Rational-Basis Review Requires That The Law Have A *Legitimate* Purpose

Under rational-basis review, the court must first determine whether the challenged classification was imposed for a *legitimate* purpose. A State's failure to articulate a legitimate justification for the law is fatal under any standard of review. Thus, even applying rational-basis review, a court should not unquestioningly accept a State's representation about the classification's purpose. *See Eisenstadt*, 405 U.S. at 452 (a "statute's superficial earmarks as a health measure" could not cloak its purpose); *St. Joseph Abbey*, 712 F.3d at 226 (noting, in invalidating a regulation, that rational-basis review "does not demand judicial blindness to the

history of a challenged rule or the context of its adoption nor does it require courts to accept nonsensical explanations for regulation").

As the Supreme Court has recognized, "some objectives … are not legitimate state interests." *Cleburne*, 473 U.S. at 446-447. Disfavoring a particular group of individuals might be a consequence of a government policy, but it cannot be its object. "The Constitution's guarantee of equality 'must at the very least mean that a bare [governmental] desire to harm a politically unpopular group cannot' justify disparate treatment of that group." *Windsor*, 133 S. Ct. at 2693 (quoting *Moreno*, 413 U.S. at 534-535). The equal protection guarantee prohibits not only classifications based on "negative attitudes," "fear," or "irrational prejudice," *Cleburne*, 473 U.S. at 448, 450, but also those based on "indifference," "insecurity," "insensitivity," or "some instinctive mechanism to guard against people who appear to be different in some respects from ourselves," *Garrett*, 531 U.S. at 374-375 (Kennedy, J., concurring); *see also id.* at 375 ("malicious ill will" is not necessary to invalidate a classification).

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

(Kennedy, J., concurring) (government action "intended to favor a particular private party" or "intended to injure a particular class of private parties" fails rational-basis review); *St. Joseph Abbey*, 712 F.3d at 222-223 (decrying "favoritism" as illegitimate under the Equal Protection Clause).

The Supreme Court has repeatedly confirmed that laws that target gays and lesbians for exclusion from benefits or the imposition of burdens on account of their sexual orientation cannot survive review. In *Romer*, the Court considered a Colorado constitutional amendment that prohibited local legislation that would protect citizens from discrimination on account of their sexual orientation. The local legislation was meant, in the Court's view, to ensure gay people's right to participate in "transactions and endeavors that constitute ordinary civic life." *Romer*, 517 U.S. at 631. The Court reasoned that the amendment, by precluding laws meant to provide that modicum of civil rights, "classifie[d] homosexuals … to make them unequal to everyone else." *Id.* at 635. *Lawrence* followed *Romer*, affirming that all adults share an equal liberty to exercise their private, consensual sexual intimacy. 539 U.S. at 564, 574-575. Most recently, in *Windsor*, the Court invalidated DOMA, which sought to differentiate marriages of same-sex and heterosexual couples, because "no legitimate purpose overcomes the purpose and effect to disparage and to injure" the "personhood and dignity" of same-sex couples. 133 S. Ct. at 2696.

These decisions are unified by a common instruction: Because denying gay people the same opportunities and freedoms that other citizens enjoy impermissibly demeans them, laws that disfavor gay people and their relationships—or that privilege heterosexual people and their relationships—cannot survive even rational-basis review.

C. Rational-Basis Review Requires A Meaningful Connection Between The State's Classification And Its Asserted Goals

The second step of rational-basis review requires assessing the rationality of the connection between the challenged classification and the goals it purportedly serves. "[E]ven in the ordinary equal protection case calling for the most deferential of standards, [the Court] insist[s] on knowing the relation between the classification adopted and the object to be attained." *Romer*, 517 U.S. at 632; *see also Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004) ("[A] state violates the Equal Protection Clause if it disadvantages homosexuals for reasons lacking any rational relationship to legitimate governmental aims."). It is this "search for the link between classification and objective" that "gives substance to the Equal Protection Clause." *Romer*, 517 U.S. at 632. "By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, [the court] ensure[s] that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Id.* at 633; s*ee also Heller v. Doe*, 509 U.S. 312, 321 (1993) ("[E]ven the standard of rationality … must find some footing in the

realities of the subject addressed by the legislation."); *New York State Club Ass'n v. City of N.Y.*, 487 U.S. 1, 17 (1988) (classification lacks a rational basis where "the asserted grounds for the legislative classification lack any reasonable support in fact").

In evaluating this connection, the Supreme Court considers the proportionality between the classification and the legislative end. If a classification has sweeping or particularly profound consequences—like the marriage bans at issue in this case—a more forceful justification is required. The State constitutional amendment in *Romer*, for example, "identifie[d] persons by a single trait and then denie[d] them protection across the board," disqualifying them from seeking protection from the State legislature or State courts. 517 U.S. at 633. Given the amendment's scope, the Court found that there could be no explanation for it other than a desire to disadvantage gay people. *Id*. at 634-635.

Courts will also find a lack of the required relationship between the classification and a legitimate justification where the justification offered suggests the unfavorable treatment should extend to a wider class of persons, but the measure exclusively burdens the disfavored group. In *Cleburne*, the city cited residential density concerns to defend an ordinance requiring a special-use permit for a group home for people with mental disabilities. 473 U.S. at 449-450. The Court was skeptical because no similar permit was required for other group living

arrangements causing the same density issues. *Id.* at 447. Likewise in *Eisenstadt*, although unmarried persons were prohibited certain contraceptives, married couples could obtain them "without regard to their intended use" and without regard to the claimed purpose of deterring all persons from "engaging in illicit sexual relations." 405 U.S. at 449.

The rational-relationship requirement is not met by mere speculation about factual circumstances under which the law might advance some legitimate purpose. While the Supreme Court affords leeway for legislators to make reasonable predictions and judgments about unknown facts, it does not permit States to invent facts, or declare them by fiat, in order to justify a law that would otherwise appear impermissible. *See Heller*, 509 U.S. at 321 (rationale "must find some footing in the realities of the subject addressed by the legislation"); *Romer*, 517 U.S. at 632-633 (classification must be "grounded in a sufficient factual context for [the court] to ascertain some relation between the classification and the purpose it serve[s]"); *St. Joseph Abbey*, 712 F.3d at 223 (striking a regulation because "a hypothetical rationale, even post hoc, cannot be fantasy"). Thus, in *Heller*, where the Supreme Court considered Kentucky's differentiation between mental retardation and mental illness for purposes of civil confinement, the State was not permitted simply to speculate that mental retardation is more likely to manifest itself earlier, and is easier to diagnose, than mental illness. Instead, the Court relied upon

several diagnostic manuals and journals to determine for itself that Kentucky had legislated based on reasonably conceivable facts rather than stereotypes or misunderstandings. *Heller*, 509 U.S. at 321-325; *see also St. Joseph Abbey*, 712 F.3d at 223-227 (analyzing the proffered rationales for an economic regulation against research results published by the Federal Trade Commission).

In contrast, the Supreme Court has regularly disregarded unsupported and implausible factual assertions that have been offered in defense of discriminatory legislation. *See Moreno*, 413 U.S. at 534-536 (rejecting government's claim as "wholly unsubstantiated"); *Cleburne*, 473 U.S. at 448-450 (rejecting selective application of government's concerns as being "unsubstantiated by factors which are properly cognizable"). Stated otherwise, the Court has rejected some classifications because the fit between them and their purported goals was "attenuated" or "irrational." *Cleburne*, 473 U.S. at 446; *Moreno*, 413 U.S. at 532-533; *see also, e.g.*, *Eisenstadt*, 405 U.S. at 448-452.

II. TEXAS'S MARRIAGE BANS LACK A RATIONAL BASIS

A. Texas's Marriage Bans Are Not Rationally Related To Protecting Tradition, Democracy, Or Religious Freedom

Texas's and its amici's argument (*e.g.*, Tex. Br. 11; Hawkins & Carroll Amicus Br. 3-9; Alvare Amicus Br. 18-29; Marriage Law Foundation Amicus Br. 3-12) that excluding same-sex couples from marriage is constitutional because it is "traditional" is wide of the mark. First, Texas's statutory scheme goes far beyond

merely defining marriage in a "traditional" manner. Texas law singles out same-sex couples' marriages for special prohibition, including in its constitution; declares an entire class of marriages already validly solemnized in other States to be unworthy of recognition; voids any arrangement that "grants … legal protections, benefits, or responsibilities granted to the spouses of a marriage," Tex. Fam. Code Ann. § 6.204(a)(2); and purports to refuse recognition to any "public act, record, or judicial proceeding" from another state that recognizes marriage between same-sex couples, *see supra* pp. 7-8. Such thoroughgoing disqualifications indicate that the impulse behind the marriage bans is not reinforcement of a historic treatment of marriage, but anti-gay animus.

Second, reflexive reliance on "tradition" or "value judgments" is insufficient to justify Texas's multiple marriage bans. Tex. Br. 9. No matter how traditional the practice of heterosexual marriage, a law forbidding recognition or legal status for marriages of same-sex couples must still be scrutinized for rationality. *Heller*, 509 U.S. at 326. And those laws cannot be upheld based simply on a tradition of moral disapproval of same-sex couples or their relationships. *Lawrence*, 539 U.S. at 577 ("'[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.'"). In *Windsor*, for example, the Supreme Court treated the expressed legislative desires to "'defend the institution of traditional

heterosexual marriage'" and to "'better comport[] with traditional … morality'" and "'protect[] the traditional moral teachings'" as evidence that DOMA was designed to "interfere[] with the equal dignity of same-sex marriages." 133 S. Ct. at 2693 (quoting H.R. Rep. No. 104-664, at 12-13, 16 (1996)).

Nor can Texas justify its marriage bans by repeated invocations of democracy and federalism. That a law or constitutional amendment is passed by the citizens of a state does not excuse it from compliance with the Equal Protection Clause. *See Lucas*, 377 U.S. at 736-737. As the district court found, Texas's bans cause "humiliation and discriminatory treatment," as well as other concrete harms, thereby violating the Equal Protection Clause. *De Leon v. Perry*, 975 F. Supp. 2d 632, 646 (W.D. Tex. 2014); *see also Reitman v. Mulkey*, 387 U.S. 369, 376 (1967) (striking down a California constitutional amendment that "authorize[d] private racial discriminations" and effectively "authorized and constitutionalized the private right to discriminate"); *Romer*, 517 U.S. at 635 (striking down a Colorado constitutional amendment that "inflict[ed] on [gays and lesbians] immediate, continuing, and real injuries").

Moreover, contrary to Texas's claim (Br. 2), nothing about the structure of its marriage bans suggests that the State has any true interest in "allow[ing the] debate … to continue among voters and within democratically elected legislatures," or in achieving a finely calibrated "balancing [of] competing societal

interests" (Becket Amicus Br. 2). Texas has enacted "an absolute ban, unlimited in time, on [the recognition of] same-sex marriage in the state constitution," which tends to foreclose any incremental policymaking by the legislature or the electorate on the issue. *Perry v. Brown*, 671 F.3d 1052, 1090 (9th Cir. 2012), *vacated for lack of jurisdiction*, 133 S. Ct. 2652 (2013).

Finally, invocation of religious values cannot rescue the bans. *See, e.g.*, *DeLeon*, 975 F. Supp. 2d at 643 (noting that Texas governor Rick Perry signed the proposed constitutional amendment banning marriage between same-sex couples at Calvary Christian Academy, although the governor's signature on a proposed constitutional amendment is not necessary); N.C. Values Coalition Amicus Br. 25-26 (arguing that opposite-sex marriage is "infused with deep religious significance"). Advancing a particular religion's views is not a legitimate government purpose. *See Windsor*, 133 S. Ct. at 2693 (noting, disapprovingly, the legislative statement that DOMA's view on marriage "'better comports with traditional (especially Judeo-Christian) morality'").

While opposing marriages of same-sex couples and the recognition thereof may reflect one strand of religious belief, several religious traditions and many religious adherents support same-sex couples joining in marriage and the recognition of those marriages. *See, e.g.*, Bishops of the Episcopal Church in Ohio Amicus Br. 3, 10-21, *Henry v. Himes*, No. 14-3464 (6th Cir. July 15, 2014); Anti-

Defamation League Amicus Br. 20-21, *Henry*, No. 14-3464 (6th Cir. July 15, 2014). Indeed, several religious groups have argued for allowing government marriage licenses for same-sex couples, explaining that the First Amendment permits religious bodies to have their own definitions of marriage. *See, e.g.*, Bishops of the Episcopal Church in Ohio Br., 21-25; American Jewish Committee Amicus Br. 27, *Perry v. Hollingsworth*, No. 12-144 (U.S. Feb. 28, 2013). And advancing one faith's preferred conception of marriage (by coercively denying access to the civil institution of marriage to same-sex couples) is not a legitimate State interest. *See, e.g., Town of Greece v. Galloway*, 134 S. Ct. 1811, 1817-1823 (2014) (purpose of government action cannot be "'to proselytize or advance any one, or to disparage any other, faith or belief,'" or "to promote a preferred system of belief or code of moral behavior").

B. Texas's Marriage Bans Are Not Rationally Related To Encouraging Responsible Procreation

Texas (Br. 11-12) and its amici (Hawkins & Carroll Amicus Br. 16-28; Alvare Amicus Br. 4-11; Marriage Law Foundation Amicus Br. 7-11; Tex. Values Amicus Br. 12-23; Texas Eagle Forum Amicus Br. 9-14; Indiana Amicus Br. 15-20) argue that Texas's marriage bans are designed to encourage responsible procreation, ensure that children receive stable care from their biological parents, and to provide incentives for men in particular to marry and raise their children. In fact, the bans are not rationally related to any of those putative purposes.

First, Texas and its amici ignore that many same-sex couples already have children and wish to raise them in a stable family environment. The U.S. Census estimates that, as of 2010, more than 9000 same-sex "householder[s]" in Texas resided with their "own children under 18 years" of age. U.S. Census Bureau, *Same-Sex Unmarried Partner or Spouse Households by Sex of Householder by Presence of Own Children: 2010 Census and 2010 American Community Survey*, http://www.census.gov/hhes/samesex/files/supp-table-AFF.xls (last visited Sept. 14, 2014). Plaintiffs-Appellees in these appeals illustrate the point: Cleopatra DeLeon and Nicole Dimetman have been raising their child in a "loving, stable" relationship of more than a decade. *De Leon*, 975 F. Supp. 2d at 640.

By denying marriage and its recognition to these same-sex couples, the challenged bans undercut the very stability for children that Texas extols. And Texas's decision to bar recognition of marriages that were already solemnized is particularly inconsistent with stability for the affected families. They effectively "eras[e] … Plaintiffs' already-established marital and family relations," sowing confusion and undermining Plaintiffs' "long-term plans for how they will organize their finances, property, and family lives." *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 979 (S.D. Ohio 2013).

The distinction Texas's marriage bans draw—whose marriages may be permitted and/or whose pre-existing marriages may be recognized—bears no

rational relation to the proffered justification, which focuses on the having and raising of children. *See Eisenstadt*, 405 U.S. at 448-449. Texas and its amici suggest same-sex couples do not need marriage because they face no risk of unplanned pregnancy. Br. 12. This fails for several reasons. *See Baskin v. Bogan*, __ F.3d __, 2014 WL 4359059, at *3 (7th Cir. Sept. 4, 2014) ("[T]he only rationale that the states put forth with any conviction—that same-sex couples and their children don't *need* marriage because same-sex couples can't *produce* children, intended or unintended—is so full of holes that it cannot be taken seriously.").

Most importantly, Texas gives no value to the benefits, including stability, that children already being raised by same-sex couples would receive from marriage. Texas's bans "humiliate[] … thousands of children now being raised by same-sex couples" by "mak[ing] it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Windsor*, 133 S. Ct. at 2694.

The focus on unplanned pregnancy ignores that Texas does not preclude marriage recognition for other couples who do not face the prospect of an unplanned pregnancy, such as older or infertile couples. This undercuts Texas's

claim that its laws were designed to promote procreation within marriage by opposite-sex couples and demonstrates that the bans are not rationally related to that purpose. *See Garrett*, 531 U.S. at 366 n.4; *Eisenstadt*, 405 U.S. at 449; *Cleburne*, 473 U.S. at 447, 449-450; *see also Bostic v. Schaefer*, __ F.3d __, 2014 WL 3702493, at *14 (4th Cir. July 28, 2014) ("underinclusivity" of Virginia's marriage bans with respect to the State's asserted goals, like the law at issue in *Cleburne*, evinced irrational prejudice); *Baskin*, 2014 WL 4359059, at *8.

Texas fails to explain these inconsistencies and lack of rational fit between its bans and asserted purposes. Texas claims (Br. 6-7) that it need not justify the exclusion of same-sex couples from marriage, but only the *inclusion* of opposite-sex couples—or, alternatively stated, that the State may "reserve its subsidies" for opposite-sex couples only (Br. 14). That proposition, for which Texas relies primarily on *Heller*, 509 U.S. at 321, and *Dandridge v. Williams*, 397 U.S. 471 (1970), is legally and factually insufficient. First, *Heller* is also clear that a law "must find some footing in the realities of the subject addressed by the legislation." 509 U.S. at 322. Second, *Dandridge* is inapposite: It approved a state's funding choices given the state's "finite [financial] resources" and where there was no suggestion that animus had motivated funding decisions. Here, by contrast, there is no issue of "finite resources"; contrary to amicus Texas Eagle Forum's unexplained contention, there is no reason that granting same-sex couples long-

sought access to the institution of marriage would "lower[] the value of the benefit … for those who already enjoy it." Texas Eagle Forum Br. 12; *see Kitchen v. Herbert*, 755 F.3d 1193, 1223-1224 (10th Cir. 2014). Moreover, the history and sheer breadth of Texas's marriage bans shows that their design is in fact to exclude same-sex couples. *See supra* pp. 7-8. Only same-sex couples are targeted, even though other classes (including infertile or older heterosexual couples) similarly threaten or fail to promote the asserted State interest in procreation. *Bostic*, 2014 WL 3702493, at *14 ("underinclusivity" can evince irrational prejudice (citing *Cleburne*, 473 U.S. at 447-450)); *see also Baskin*, 2014 WL 4359059, at *8-9.

Affording marriage to non-procreating opposite-sex couples, but not same-sex couples, is not rationally related to the State's proffered justifications. Texas argues (Br. 14) that affording marriage to infertile couples "channel[s] both spouses' sexuality" into the infertile marital relationship rather than a fertile relationship one partner might have elsewhere. *See also* George Amicus Br. 27-29. But this only reinforces that Texas permits marriage based on couple's wish to solemnize an intimate bond, not the couple's plan to have children—a fact that undercuts Texas's claim to a procreation-focused view of marriage. And Texas's argument, which rests on the proposition that often at least one spouse is fertile (Br. 14), cannot be reconciled with the fact that Texas does not bar marriages where both spouses are past the age of fertility. *See Baskin*, 2014 WL 4359059, at

*9 (noting that Indiana's similar combination of laws demonstrates that "[t]he state must think marriage valuable for something other than just procreation—that even non-procreative couples benefit from marriage").

Texas also argues that "[b]y recognizing and encouraging the lifelong commitment between a man and a woman—even when they do not produce offspring—the State encourages others who *will* procreate to enter into the marriage relationship" (Br. 13), but this is similarly flawed. Texas never explains why *same-sex* couples cannot model that behavior. *See Bostic*, 2014 WL 3702493, at *14 ("We see no reason why committed same-sex couples cannot serve as similar role models."). Moreover, if, as Texas claims, its interest is in encouraging responsible procreation, it fails to explain why opposite-sex couples who cannot or do not wish to have or raise children would "encourage others who *will* procreate" to marry as Texas describes (Br. 13), let alone to a greater degree than same-sex couples who have and raise children.

Texas additionally contends that its marriage bans are rationally related to an interest in ensuring that children are raised by their biological parents, and its amici argue that children suffer when conceived through assisted reproduction or raised by non-biological parents. Tex. Values Amicus Br. 13-20; Alvare Amicus Br. 20; Tex. Eagle Forum Amicus Br. 9-14. But Texas's laws permit heterosexual couples a variety of parenting arrangements, such as adoption, Tex. Fam. Code

Ann. § 162.001, or sperm or egg donation, *id.* § 160.702, which contemplate that children will be raised by persons who are not their biological parents. Texas's lack of concern as to whether heterosexual couples raise only their biological children demonstrates that biological child-rearing is neither rationally related to, nor the true motivation for, the marriage bans. *See Cleburne*, 473 U.S. at 447, 449-450; *Eisenstadt*, 405 U.S. at 448-449; *Bostic*, 2014 WL 3702493, at *14 (comparing Virginia's marriage bans' "underinclusivity" to that of the irrationally prejudicial law in *Cleburne*).

Regardless, the focus on unplanned pregnancy, "natural" procreation, and "biological" parenting cannot be rationally related to Texas's marriage bans because "it is wholly illogical to believe that state recognition of the love and commitment between same-sex couples will alter the most intimate and personal decisions of opposite-sex couples." *Kitchen*, 755 F.3d at 1223. The focus also seeks to "single[] out the one unbridgeable difference between same-sex and opposite-sex couples, and transform[] that difference into the essence of legal marriage." *Goodridge v. Department of Pub. Health*, 798 N.E.2d 941, 962 (Mass. 2003). This "impermissibly 'identifies persons by a single trait and then denies them protection across the board.'" *Id.* (quoting *Romer*, 517 U.S. at 633). *Windsor*, by contrast, described marriage as "a far-reaching legal

acknowledgement of the intimate relationship between two people," 133 S. Ct. at 2692, not by reference to any reproductive purpose or potential for accident.

To the extent that sources cited by Texas's amici (*e.g.*, Alvare Amicus Br. 16) even mention marriage and its relationship to children or reproduction, those sources only underscore the importance of stable relationships to children's welfare, but do not indicate that children raised by two parents—let alone a married couple—experience worse outcomes if the parents are of the same sex. *See* American Sociological Ass'n Amicus Br. 2-5, 13-19, 22-29, *Henry*, No. 14-3464 (6th Cir. June 16, 2014). The sources themselves suggest that marriage of same-sex couples and recognition thereof would "improve, not impair, the wellbeing of children raised by currently unmarried same-sex parents," by fostering stability and financial security for them. *Id.* Amici's unsupported assertions to the contrary are at odds with decades of other research into children of same-sex couples. *See id.* 2-3, 5-13.

Texas's amici also argue that the State's marriage bans promote child welfare by ensuring that children are raised by parents of two different sexes, whether or not biologically related to the children. Tex. Values Amicus Br. 15-20; Tex. Eagle Forum Amicus Br. 11; Liberty Counsel Amicus Br. 16-19. But there is no reason to surmise that children raised in stable homes fare worse with two parents of the same sex than with parents of two sexes. Moreover, banning

marriage based on assumptions of sex-differentiated parenting in individual couples cannot be rationally related to a legitimate State interest because it is based on sex stereotypes, which the Supreme Court has long held are constitutionally suspect. *Craig v. Boren*, 429 U.S. 190, 198 (1976); *United States v. Virginia*, 518 U.S. 515, 541-542 (1996); *see also Nevada Dep't of Hum. Res. v. Hibbs*, 538 U.S. 721, 736 (2003). Similarly, amici's arguments that marriage between same-sex couples will "diminish the likelihood of men, even married men, being responsible fathers or being fathers at all" because "men will be more likely to seek to establish their adult identities through other means, such as career and financial success" is pure impermissible sex stereotyping. Hawkins & Carroll Amicus Br. 23-25; *see also* Tex. Values Amicus Br. 18-20.

Finally, Texas's amici (Hawkins & Carroll Amicus Br. 9-16) invoke the specter of the negative effects of no-fault divorce to argue that the marriage bans promote societal interests. But no-fault *divorce* is not at all comparable to *marriage*, as it expands the availability of divorce and its destabilizing effect. Plaintiffs here seek only to expand the availability of marriage and its stabilizing effect on families.

* * *

Given the utter mismatch between Texas's bans and the asserted purposes, and the illegitimacy of many of Texas's asserted purposes, the inevitable inference

is that the bans were "born of animosity toward" gay and lesbian couples. *Romer*, 517 U.S. at 634. The Equal Protection Clause forbids such class-based discrimination to be given the sanction of law under any standard of review.

CONCLUSION

For the foregoing reasons, the Court should affirm the district court's judgment.

Respectfully submitted.

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September 16, 2014

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of September, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Paul R.Q. Wolfson
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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that this brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 32(a)(7)(B) and 29(d).

1. In compliance with Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6), the brief has been prepared in proportionally spaced Times New Roman font with 14-point type using Microsoft Word 2010.

2. Exclusive of the exempted portions of the brief, as provided in Federal Rule of Appellate Procedure 32(a)(7)(B) and Fifth Circuit Rule 32.2, the brief contains 6,722 words. As permitted by Federal Rule of Appellate Procedure 32(a)(7)(C), I have relied upon the word count feature of Microsoft Word 2010 in preparing this certificate.

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