No. 13-4178

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DEREK KITCHEN, *et al.*,

Plaintiffs-Appellees,

v.

GARY R. HERBERT, in his official capacity as Governor of Utah, *et al.*,

Defendants-Appellants,

and

SHERRIE SWENSEN, in her official capacity as Clerk of Salt Lake County,

Defendant.

On Appeal From the United States District Court for the District of Utah
Honorable Robert J. Shelby, No. 2:13-cv-00217-RJS

BRIEF OF PLAINTIFFS-APPELLEES DEREK KITCHEN, *et al.*

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PRIOR OR RELATED APPEALS

Bishop, et al. v. Smith, et al., Nos. 14-5003& 14-5006, has been assigned to the same panel considering the instant case.

ISSUES PRESENTED FOR REVIEW

The Utah laws at issue include two state statutes and an amendment to the Utah Constitution that bar same-sex couples from entering civil marriage, or any other legal union, and prohibit recognition of marriages or other legal unions entered into by same-sex couples in other states. *See* Utah Const. art. I, § 29 (effective 2005); Utah Code § 30-1-4.1 (effective 2004); Utah Code § 30-1-2 (effective 1977).[1] The issues presented for review are:

1. Whether Amendment 3 violates Plaintiffs' right to due process under the Fourteenth Amendment by depriving them of fundamental rights and liberty interests, including the freedom to marry.

2. Whether Amendment 3 violates Plaintiffs' right to equal protection of the law under the Fourteenth Amendment by excluding same-sex couples from marriage or any other type of official family recognition or protection on the basis of their sexual orientation and gender, or because the primary purpose and effect of Amendment 3 is to impose inequality on same-sex couples and their children.

[1] Plaintiffs use the term "Amendment 3" in this brief, unless stated otherwise, to mean both the Utah constitutional amendment and Utah statutory provisions that exclude same-sex couples from civil marriage or any other domestic union and that bar recognition of same-sex couples' existing lawful marriages.

3. Whether Amendment 3 violates the married Plaintiffs' right to due process under the Fourteenth Amendment by depriving them of their constitutionally protected liberty interests in their existing marriage.

4. Whether Amendment 3 violates the married Plaintiffs' rights to equal protection of the laws under the Fourteenth Amendment by excluding the class of legally married same-sex couples from any type of official family recognition or protection, or because the primary purpose and effect of Amendment 3 is to impose inequality on married same-sex couples and their children.

INTRODUCTION

The Plaintiffs in this case are three couples who have deep roots in Utah, who have built their lives and families there, and who have worked hard to support themselves and their communities. They wish their relationships to be accorded the same dignity, respect, and security as the relationships of married couples they know in their State. But because of Amendment 3, they are denied not only the substantial protections that flow from civil marriage, but also the common vocabulary of family life and belonging that other Utahns may take for granted. By barring Plaintiffs and other same-sex couples from marriage, Amendment 3 demeans and stigmatizes their relationships. It excludes them from what, for many, is life's most important relationship, leaving them with no way to publicly express or formalize their commitment to one another or assume "the duties and responsibilities that are an essential part of married life and that they . . . would be honored to accept." *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013).

The harms inflicted on Plaintiffs and other same-sex couples by that exclusion touch on virtually every aspect of life, from "the mundane to the profound." *Id*. at 2694. Amendment 3 denies same-sex couples the vast array of state and federal protections that enable married couples to join their lives together, care for one another in times of illness and crisis, be recognized as a surviving spouse in the event of the other partner's death, provide for one another financially, make important joint

decisions, and have their relationship acknowledged and respected by the government and third parties. No matter how deeply they care for one another or how long they have stood by one another, for better or for worse, in sickness and in health, Amendment 3 treats Plaintiffs and other same-sex couples as legal strangers to one another. It communicates to them and to all the world that their relationships are not as real, valuable, or worthy as those of opposite-sex couples; that they are worthy of no recognition at all; and that they are not, and never can be, true families. Like the federal law struck down in *Windsor*, Amendment 3's "avowed purpose and practical effect . . . are to impose a disadvantage, a separate status, and so a stigma upon" same-sex couples and their families. *Id.*

With remarkable candor, the State concedes that the express purpose of Amendment 3 is to provide "special privilege and status" to opposite-sex couples and their children, in order to send the message that they are the State's preferred families, *see* Aplt. Br. at 87, and to withhold protections from families headed by same-sex couples, in order to avoid sending the message that they "are on a par with traditional man-woman unions," *id*. at 73. The State seeks to justify the resulting stigma and injury inflicted on same-sex couples' families based on fears that treating same-sex couples equally might, hypothetically, diminish the desire of opposite-sex couples to marry and have children. But when presented with similar hypothetical arguments from those defending the Federal Defense of Marriage Act ("DOMA") in

Windsor, the Supreme Court focused on the need to protect *existing* families and *existing* children. The Court found that DOMA "humiliate[d] . . . children now being raised by same-sex couples," making it "even more difficult for 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*. at 2694, as well as causing them serious "financial harm," *id*. at 2695. The Court held that such a law, which intentionally seeks to impose inequality on a vulnerable group, "violates basic due process and equal protection principles." *Id*. at 2693. As the District Court found, Amendment 3 inflicts similar harms on the children now being raised by same-sex parents in Utah. "These children are also worthy of the State's protection, yet Amendment 3 harms them for the same reasons that the Supreme Court found that DOMA harmed the children of same-sex couples." *Kitchen v. Herbert*, No. 2:13-cv-00217-RJS, 2013 WL 6697874, at *26 (D. Utah Dec. 20, 2013).

Because Amendment 3 demeans and stigmatizes an entire class of Utah citizens without furthering any compelling, important, or even legitimate purpose, Plaintiffs ask this Court to affirm the District Court's decision that Amendment 3 violates the requirements of due process and equal protection.

STATEMENT OF THE CASE

I. THE UTAH LAWS AT ISSUE IN THIS CASE.

The full texts of the Utah laws at issue in this appeal are reproduced in the Addendum to this brief.

Each of these provisions was enacted for the express purpose of excluding same-sex couples from marriage. With the enactment of Code § 30-1-2 in 1977, Utah became one of the first states to include in its marriage statutes express language excluding same-sex couples from marriage. Those measures were enacted in a national climate in which gay and lesbian persons were portrayed in a negative light in highly charged political campaigns.

Utah enacted Code § 30-1-4.1 and Amendment 3 (Utah Const. art. I, § 29) in the context of another national wave of measures restricting the marriage rights of same-sex couples. Those measures—in Utah and other states—were reactions to rulings by the Massachusetts Supreme Judicial Court in 2003 and 2004 holding that Massachusetts could not exclude same-sex couples from marriage under the Commonwealth's constitution and that paved the way for same-sex couples to begin legally marrying in Massachusetts. *See In re Opinions of the Justices to the Senate*, 802 N.E.2d 565 (Mass. 2004); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

In 2004, the Utah Legislature enacted Utah Code § 30-1-4.1, which included a statement that it was Utah's "policy . . . to recognize as marriage only the legal union of a man and a woman" and which provided that Utah would not "recognize, enforce, or give legal effect to" any "substantially equivalent" union or rights pursuant to such a union. Utah Code § 30-1-4.1(1)(a), (1)(b) (West 2013).

The Utah Legislature also placed Amendment 3 on Utah's 2004 general election ballot as a proposed amendment to the Utah Constitution. The official ballot materials for Amendment 3 included an "IMPARTIAL ANALYSIS" prepared by Utah's Office of Legislative Research and General Counsel. Aplt. App. at 346. That analysis informed voters that "[o]ther states have statutes that, similar to Utah's, recognize marriage as a union between a man and a woman," that some of those statutes had been challenged on the grounds that they violated state constitutional rights of "other couples," and that state courts had reached different conclusions under their state constitutions. *Id.* at 347. The analysis further stated:

> Although Constitutional Amendment Number 3 resolves any potential conflict between the similar statutory provisions and the Utah Constitution, it does not eliminate potential conflict with the United States Constitution. One potential conflict is with the Equal Protection Clause. The United States Supreme Court has stated that the right to marry "is of fundamental importance," requiring "critical examination" of the state's interest in creating a classification that interferes with that right. Because the Amendment, like its statutory counterpart, creates a classification of persons to whom the right to marry is not available, that classification may be subject to challenge under the Equal Protection Clause of the United States Constitution. . . .

> The likelihood that a court would conclude that the Amendment or the similar statutory provisions violate equal protection or other provisions of the U.S. Constitution is unknown.

Id. at 347-48.

The official ballot materials for Amendment 3 included an "Argument For" enactment of Amendment 3, on behalf of two Utah legislators. *Id.* at 349. The "Argument For" began with the statement: "Vote Yes on this amendment to ensure that same sex marriage is not allowed in Utah . . . ." *Id.* The "Argument For" Amendment 3 stated that "Massachusetts recently turned its back on centuries of precedent and began issuing marriage licenses to same sex couples" because "they were ordered to do so by four judges." *Id.* The "Argument For" Amendment 3 explained that the measure would prevent a state court from "ruling like the one in Massachusetts," would "prevent[] state courts from requiring that same sex marriages from other states be recognized in Utah," and would "prevent[] the creation of marriage substitutes (like 'civil unions' or 'domestic partnerships') that sanction and give unmarried couples the same status as marriage under another name." *Id.*

The "Argument For" Amendment 3 also made reference to morality, stating: "Here in Utah, let us heed the warning of Lincoln and not allow others to 'blow out the moral lights around us.' . . . As Thomas Jefferson explained, '[i]t is rare that the public sentiment decides immorally or unwisely.'" *Id.* The ballot materials also

included a "Rebuttal to Argument Against" Amendment 3 ("Rebuttal"). That Rebuttal began by stating: "The Founders of our nation believed that the majority of Americans would always remain moral and choose wisely." *Id.* at 350. In addition, the Rebuttal included the following statements about same-sex couples: "Same sex couples have previously claimed a right of privacy. Now, they demand official public sanction (marriage) as if the laws of nature somehow no longer exist and there is no higher standard than individual sexual preference." *Id.*

The Rebuttal also included religious statements and references:

> The Declaration of Independence specifically recognizes the "Creator," "the Laws of Nature and of Nature's God," "the Supreme Judge of the World" and our "firm reliance on the protection of divine providence." President Kennedy reminded us that "the rights of man come not from the generosity of the state, but from the hand of God."

Id.

Amendment 3 received approximately 66 percent of votes cast in the general election held on November 2, 2004. *Id.* at 352.

II. PLAINTIFFS.

Plaintiffs, many of whom have lived in Utah nearly their entire lives, wish to marry (or, in the case of the married Plaintiffs, to have their marriage recognized) for the same reasons as most couples. They wish to make a public and formal commitment to the person they love, to undertake mutual obligations of caring and support, and to provide legal protections for their families. The Plaintiffs have all

been in loving and committed relationships with each other for years, and they are all active, contributing members of their communities, including a retired physician, a university professor, small business owners, and a middle school teacher. Aplt. App. at 1842-44 (Kitchen Decl. ¶¶ 2, 5, 9); 1849-50 (Sbeity Decl. ¶ 2, 5); 1857 (Archer Decl. ¶¶ 2, 4); 1865, 1867 (Call Decl. ¶¶ 2, 8); 1873 (Wood Decl. ¶¶ 2, 5-6); 1883-85 (Partridge Decl. at ¶¶ 2, 5-9).

Derek Kitchen was raised in Utah and studied political science at the University of Utah. *Id.* at 1842 (Kitchen Decl. ¶¶ 2-3, 5). His partner, Moudi Sbeity, was born in Texas, but grew up in Lebanon until he was forced to leave the country at the age of 18 during the war between Lebanon and Israel in 2006. *Id.* at 1849 (Sbeity Decl. ¶¶ 2, 4). Moudi received his undergraduate degree at Utah State University and is enrolled in a Master's degree program in economics at the University of Utah. *Id.* at 1850 (Sbeity Decl. ¶ 5). Both men knew they were gay from very young ages, and Moudi came out to his mother when he was sixteen. *Id.* at 1842 (Kitchen Decl. ¶ 3), 1849 (Sbeity Decl. ¶ 3). She took Moudi to a psychiatrist, who told her there was nothing wrong with her son. *Id.* at 1849 (Sbeity Decl. ¶ 3). After that experience, Moudi came out to other family members and friends, but did so carefully in an effort to shield his family from ridicule. *Id.* The couple has been in a loving and committed relationship for years and lives in Salt

Lake City, where they also own a small business that serves the local community. *Id.* at 1842-43 (Kitchen Decl. ¶¶ 5-6), 1850 (Sbeity Decl. ¶ 7).

Karen Archer and Kate Call are both in their sixties and share a home in Wallsburg, Utah. *Id.* at 1857 (Archer Decl. ¶¶ 1, 3), 1865 (Call. Decl. ¶¶ 1, 3, 10). Karen was an OB/GYN physician for many years, but was forced to retire in 2001 due to serious medical conditions. *Id.* at 1858-59 (Archer Decl. ¶ 8). Karen has faced numerous obstacles throughout her life because of her sexuality. *Id.* at 1858-59 (Archer Decl. ¶¶ 5-6, 10). Although she came out to her parents in her twenties, for instance, they never accepted her sexuality, believing that it was an abnormality. *Id.* at 1857 (Archer Decl. ¶ 5). When she was in medical school, Karen was one of only thirteen women in her class of 350 students. *Id.* at 1858 (Archer Decl. ¶ 6). At that time, the men in her medical school class referred to all of the female students as "dykes." *Id.* Karen was also a patron in a gay bar when police raided it and assaulted other customers with their batons. *Id.* Kate has lived in Utah for more than fifty years. *Id.* at 1865-66 (Call Decl. ¶ 3). Her father was a professor at Brigham Young University ("BYU"), where Kate also received a degree in 1974. *Id.* at 1865-66 (Call Decl. ¶¶ 3-4). Although Kate tried to date men earlier in her life, she did not find fulfilling and loving relationships until she began dating women. *Id.* at 1866 (Call Decl. ¶ 4). Kate's parents were also mission presidents for the Church of Jesus Christ of Latter-day Saints. *Id.* at 1865 (Call Decl. ¶ 3).

While serving a mission in Argentina, Kate revealed her sexuality to her mission president, who then told her parents and church authorities without Kate's consent. *Id.* at 1866 (Call Decl. ¶ 5). Although her family was surprised at first, they ultimately told her that they loved her unconditionally. *Id.*

Karen and Kate have been in a long-term, loving relationship for years. *Id.* at 1858 (Archer Decl. ¶ 7), 1868 (Call Decl. ¶ 10). Because of Karen's serious medical conditions, however, they are concerned about the lack of legal protections they have. *Id.* at 1859-60 (Archer Decl. ¶¶ 9-10), 1868-69 (Call Decl. ¶¶ 10-11). In an attempt to protect their family, they married in Iowa in 2011. *Id.* at 1859 (Archer Decl. ¶9), 1868-69 (Call Decl. ¶ 11). They have also executed several legal papers in an attempt to protect each other financially, but they are concerned that those documents will not be honored because Utah refuses to recognize their marriage. *Id.* at 1859-60 (Archer Decl. ¶¶ 10-11). In fact, Karen had a similar, prior experience several years ago with a partner who passed away during their relationship. *Id.* at 1859 (Archer Decl. ¶¶ 9-10). Although Karen and that woman executed similar legal documents, at significant expense, Karen was denied her partner's military pension after she died. *Id.* at 1859 (Archer Decl. ¶ 10).

Plaintiffs Laurie Wood and Kody Partridge, both English teachers, met in 2010 and have been in a loving and committed relationship since that time. *Id.* at 1873-74, 1876 (Wood Decl. ¶¶ 5, 11; Partridge Decl. ¶ 1). Both women have lived

in Utah for many years—Laurie since she was three years old, *id.* at 1873 (Wood Decl. ¶ 3), and Kody for the past thirty years—and both have strong ties to the state, *id*. at 1883 (Partridge Decl. ¶ 3). Kody taught at a middle school in Salt Lake County for several years, *id.* at 1884-85 (Partridge Decl. ¶¶ 5-8), and Laurie teaches undergraduate English courses at Utah Valley University, while also supervising high school teachers throughout Utah County, *id.* at 1873 (Wood Decl. ¶ 5). Before becoming a University Professor, Laurie taught in the public school system in Utah County for more than a decade. *Id*. During that time, however, Laurie did not come out because she was afraid she might lose her job if people knew she was a lesbian. *Id*. at 1874-75 (Wood Decl. ¶ 9). Similarly, Kody accepted a teaching job at a private school because she feared losing her job and because the school provides benefits to the same-sex spouses of faculty members. *Id*. at 1884-85 (Partridge Decl. ¶¶ 7-8). Both women have volunteered with non-profit organizations, including Women's Redrock Music Festival, which Laurie co-founded in 2006, *id.* at 1874 (Wood Decl. ¶ 7), the Utah AIDS Foundation, and Habitat for Humanity, *id*. at 1886 (Wood Decl. ¶ 10). After hurricane Katrina, for instance, Kody traveled with her students four times to New Orleans to help build homes for the hurricane victims. *Id.*

Being married is of immense personal importance to each Plaintiff. *Id.* at 1843 (Kitchen Decl. ¶ 7); 1850-51 (Sbeity Decl. ¶ 8); 1859-60 (Archer Decl. ¶¶ 9-10); 1865 (Call Decl. ¶ 2); 1874, 1876 (Wood Decl. ¶¶ 8, 14); 1886 (Partridge Decl.

¶ 11). Utah's denial of that status impacts their lives in numerous ways, "from the mundane to the profound." *Windsor*, 133 S. Ct. at 2694. For example, although the Plaintiff couples have taken the limited steps available to them to protect their relationships by completing powers of attorneys and wills, they live with the uncertainty that those documents may simply be ignored in times of crisis. Aplt. App. at 1843-44 (Kitchen Decl. ¶ 8); 1851 (Sbeity Decl. ¶ 9); 1859-60 (Archer Decl. ¶ 10); 1877-78 (Wood Decl. ¶ 17); 1887 (Partridge Decl. ¶ 13). In short, the Plaintiff couples lack basic protections that married couples in Utah receive automatically, for no reason other than that their partners are persons of the same sex.

III. DECISION BELOW.

The District Court ruled on summary judgment that Amendment 3 violates Plaintiffs' rights to due process and equal protection of the laws under the Fourteenth Amendment. The District Court held that the Supreme Court has long recognized that the right to marry is a fundamental right based upon "an individual's rights to liberty, privacy, and association." *Kitchen*, 2013 WL 6697874, at *11. Finding that "the right to marry vests in every American citizen," the District Court rejected the State's argument that Amendment 3 does not violate Plaintiffs' right to marry because they are free to marry a person of the opposite sex. *Id.* at *13. The District Court explained that the State's argument ignored the liberty interests protected by the right to marry and the "attributes of marriage that form the core justification for

why the Constitution protects this fundamental right." *Id*. Although holding that strict scrutiny was warranted, the District Court found that Utah lacked even a rational basis for denying Plaintiffs the right to marry, and that the challenged laws therefore violated Plaintiffs' right to due process. *Id*. at *18.

The District Court also found that Amendment 3 warrants heightened equal protection scrutiny because it discriminates against Plaintiffs on the basis of their gender. *Id*. at *20. However, the District Court concluded that it need not analyze the State's inability to meet that heightened burden because the laws failed even rational basis review under the Equal Protection Clause. *Id*. The District Court noted that "Plaintiffs dispute the State's argument that children do better when raised by opposite-sex parents than by same-sex parents," but concluded that "the court need not engage in this debate" because "the state fails to demonstrate any rational link between its prohibition of same-sex marriage and its goal of having more children raised in the family structure the State wishes to promote." *Id.* at *25. The District Court found that the State's other proffered interests in proceeding with caution and preserving tradition were not legitimate interests. *Id*. at *26-27. The District Court concluded: "Rather than protecting or supporting the families of opposite-sex couples, Amendment 3 perpetuates inequality by holding that the families and relationships of same-sex couples are not now, nor ever will be, worthy of recognition." *Id*. at *29.

SUMMARY OF ARGUMENT

Utah's refusal to permit Plaintiffs to marry, or to recognize their existing marriages, causes them serious harm. These laws deny Plaintiffs the stability, security, and protections that other families enjoy. In addition, Utah's treatment of Plaintiffs and other same-sex couples in Utah as strangers, rather than families, demeans their deepest relationships and stigmatizes their children by communicating that their families are second class. *See Windsor*, 133 S. Ct. at 2694. These harms violate the most basic principles of due process and equal protection, which prohibit the enactment of laws with the primary purpose and effect of treating a disfavored group unequally. *Id*. at 2693-94.

Amendment 3 violates Plaintiffs' right to due process of law by infringing upon their fundamental right to marry and establish a home and family, to privacy, to autonomy, and to freedom of association. Supreme Court cases have consistently recognized the freedom to marry as "one of the vital personal rights essential to the orderly pursue of happiness by free" persons. *Loving v. Virginia,* 388 U.S. 1, 12 (1967); *see also Zablocki v. Redhail*, 434 U.S. 374, 384 (1978). Contrary to the State's assertion, Plaintiffs do not seek a new right to same-sex marriage. Rather, like any fundamental right, the freedom to marry is defined by the substance of the right at issue and not the identities of the persons asserting it. Plaintiffs seek the same freedom to marry enjoyed by all other Utah citizens.

Amendment 3 also discriminates based on sexual orientation, violating Plaintiffs' right to equal protection of the laws. And because laws that classify based on sexual orientation carry a high risk of reflecting prejudice and harming a particular group, they warrant heightened constitutional scrutiny pursuant to the factors set forth by the Supreme Court. Gay and lesbian persons, for instance, have suffered a long history of invidious discrimination, and it is well established that sexuality has no bearing on a person's ability to perform in or contribute to society. Based on these factors alone, heightened scrutiny is warranted. But Plaintiffs also satisfy even the nonessential factors courts may consider when determining whether a classification warrants heightened scrutiny, including that sexuality is immutable and integral to a person's identity, and that gay and lesbian people as a group lack sufficient political power to overcome the adverse impact of deeply entrenched discrimination and moral condemnation.

Amendment 3 also warrants heightened scrutiny under the Equal Protection Clause because it discriminates based on gender and gender stereotypes. Utah law prohibits Derek Kitchen, for instance, from marrying the person he wishes to marry—Plaintiff Moudi Sbeity—because Moudi is a man, not a woman. This is a classification based on gender. Utah law also imposes government-enforced gender stereotypes that are antithetical to personal freedoms—including that men should only be attracted to women and that women should only be attracted to men.

Amendment 3 cannot survive the heightened scrutiny that applies to such discriminations. Indeed, Amendment 3 cannot withstand *any* level of constitutional scrutiny because the exclusion of same-sex couples from marriage is irrational and fails to further any legitimate governmental interest. As numerous courts have found, there is no rational connection between excluding same-sex couples from marriage and the State's asserted interests in procreation or parenting. These laws do nothing to encourage opposite-sex couples to marry or have children and serve only to stigmatize and harm same-sex couples and their children. Nor do any of the State's other asserted interests bear any rational relationship to excluding same-sex couples from marriage. Even if the State could articulate some legitimate purpose served by Amendment 3, which it cannot, laws intended to harm "a politically unpopular group" cannot survive any level of constitutional review. *Windsor*, 133 S. Ct. at 2693 (quoting *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534–535 (1973)).

STANDARD OF REVIEW

This Court "review[s] the district court's grant of summary judgment *de novo*, applying the same legal standard as the district court." *Christian Heritage Acad. v. Okla. Secondary Sch. Activities Ass'n*, 483 F.3d 1024, 1030 (10th Cir. 2007). This Court "can affirm a lower court's ruling on any grounds adequately supported by the record, even grounds not relied upon by the district court." *Elwell v. Byers*, 699 F.3d 1208, 1213 (10th Cir. 2012).

ARGUMENT

I. *BAKER v. NELSON* DOES NOT CONTROL THIS CASE.

Contrary to the State's arguments, the Supreme Court's summary dismissal, more than forty years ago, of the appeal in *Baker v. Nelson*, 409 U.S. 810 (1972), for want of a substantial federal question, does not control this case. Currently there are at least forty-two (42) federal constitutional challenges to state laws prohibiting marriage for same-sex couples pending in courts in twenty-six (26) states. *See Marriage Litigation*, Freedom to Marry, *at* http://www.freedomtomarry.org/litigation/ (last visited Feb. 23, 2014). Every court to have considered such bans after *Windsor* has not only determined that it could reach the merits notwithstanding *Baker*, but has concluded that the marriage bans at issue violate the federal Constitution. *See*, *e.g.*, *Bostic v. Rainey*, No. 2:13-cv-395, 2014 WL 561978, at *10 (E.D. Va. Feb. 13, 2014); *Bourke v. Beshear*, No. 3:13-cv-750-H, 2014 WL 556729, at *1 (W.D. Ky. Feb. 12, 2014); *Bishop v. U.S. ex rel. Holder*, No. 04-cv-848-TCK-TLW, 2014 WL 116013, at *15-17 (N.D. Okla. Jan. 14, 2014); *Obergefell v. Wymyslo*, No. 1:13-cv-501, 2013 WL 6726688, at *1 (S.D. Ohio Dec. 23, 2013); *Kitchen v. Herbert*, No. 2:13-cv-217, 2013 WL 6697874, *7-9 (D. Utah Dec. 20, 2013).

Just last year, during oral argument in the Supreme Court concerning California's exclusion of same-sex couples from marriage, the attorney defending

California's ban argued that *Baker* was controlling. Justice Ginsburg observed: "*Baker v. Nelson* was 1971. The Supreme Court hadn't even decided that gender-based classifications get any kind of heightened scrutiny. . . . I don't think we can extract much in *Baker v. Nelson*." Tr. of Oral Argument at 12, *Hollingsworth v. Perry*, No. 12-144, 133 S. Ct. 2652 (2013). *Baker* was not mentioned by any other Justice during the argument, and none of the opinions in *Hollingsworth* or in *Windsor* mentioned *Baker*. *See Hollingsworth*, 133 S. Ct. at 2652; *Windsor*, 133 S. Ct. at 2675. That is not surprising because, as explained below, *Baker* does not foreclose claims such as Plaintiffs' constitutional challenges to Utah's marriage bans.

Summary dismissals "do not . . . have the same precedential value . . . as does an opinion of [the Supreme] Court after briefing and oral argument on the merits." *Washington v. Confederated Bands and Tribes of Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979). A summary dismissal is dispositive only as to the "precise issues" presented in a case, *Mandel v. Bradley*, 432 U.S. 173, 176 (1977), and doctrinal developments may deprive a summary dismissal of precedential effect. *See Hicks v. Miranda*, 422 U.S. 332, 344 (1975). These principles compel the conclusion that *Baker* does not control this case.

A. *Baker* Did Not Address The Precise Issues Presented By This Case.

The precedential reach of a summary dismissal by the Supreme Court is extremely limited. "'A summary disposition affirms only the judgment of the court below, and no more may be read into [such disposition] than was essential to sustain that judgment.'" *Montana v. Crow Tribe of Indians*, 523 U.S. 696, 714 n.14 (1998) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 784 n.5 (1983)). "The Supreme Court has cautioned that for purposes of determining the binding effect of a summary action, the action should not be interpreted as adopting the rationale of the lower court, but rather as affirming only the judgment of that court." *Neely v. Newton*, 149 F.3d 1074, 1079 (10th Cir. 1998); *see also Turner v. Safley*, 482 U.S. 78, 96 (1987) ("Because a summary affirmance is an affirmance of the judgment only, the rationale of the affirmance may not be gleaned solely from the opinion below.") (internal citations and quotation marks omitted). For this reason, the State's attempted reliance on the Minnesota Supreme Court's "analysis" and "opinion" in *Baker*, see Aplt. Br. at 31, and its alternative suggestion that the Supreme Court's summary affirmance was based on federalism, *see id.* at 35, have no merit. Neither decision sheds light on the Supreme Court's rationale for affirmance.

This Court's decision in *Neely* demonstrates that the precedential significance of a summary dismissal must be construed narrowly. In *Neely*, this Court considered whether the summary dismissal of a due process challenge to a Michigan law

permitting a verdict of guilty but mentally ill precluded the Court from reaching the merits of a due process challenge to a similar New Mexico law. Although "[a]t first glance, the issue presented . . . appear[ed] to be the same due process issue," careful examination revealed potentially significant differences between the two statutes and the precise issues presented by each case. *Id*. at 1078-79. The Court therefore determined that it must address the merits of the plaintiff's due process challenge: "To avoid our duty to decide a case properly before us by an unquestioning reliance on [the summary dismissal] in [a prior case], where critical differences appear between the two cases, would retard the development of constitutional principles[.]" *Id*. at 1079 (internal citations and quotation marks omitted).

These principles also compel the conclusion that the summary dismissal in *Baker* is not controlling in this case. The judgment affirmed in *Baker* addressed whether same-sex couples were denied equal protection and due process by Minnesota's marriage statute—a measure that did not indicate on its face whether same-sex couples could marry and that had not been enacted for the express purpose of excluding same-sex couples from marriage.[2] *Baker v. Nelson*, 191 N.W.2d 185

[2] It was not until 1977 that Minnesota expressly limited marriages to unions "between a man and a woman." Minn. Stat. § 517.01 (1977) (amended by 1977 Minn. Laws, ch. 441, § 1). Today, Minnesota permits same-sex couples to marry. *See* Minn. Stat. § 517.01 (amended by 1997 Minn. Laws, ch. 203, art. 10, § 1) (defining marriage as "a civil contract between two persons").

(Minn. 1971). In contrast, the Utah laws that Plaintiffs challenge were enacted for the express purpose of excluding same-sex couples from marriage and go so far as to enshrine that exclusion in Utah's constitution. *Baker* did not address the constitutionality of such intentionally discriminatory measures.

Nor did *Baker* address the validity of measures—like Utah's laws—that bar same-sex couples not only from marriage, but also from any official protection for their relationships. *Baker* cannot be read as deciding the validity of such a measure, which unlike the mere silence of the marriage laws at issue in *Baker*, was enacted for the express purpose of preventing any recognition or protection of same-sex couples and their families.

Further, at the time *Baker* was decided, no jurisdiction in the world permitted same-sex couples to marry. *Baker* therefore presented no issue regarding the recognition of marriages entered into in another state, unlike this case, in which Plaintiffs Karen Archer and Kate Call, who married in Iowa, seek a ruling that Utah must recognize their marriage—an issue which, as discussed in Section VII, *infra*, involves additional and distinct constitutional questions.

In sum, the differences between the implicit statutory exclusion of same-sex couples from marriage at issue in *Baker v. Nelson* and the far more sweeping and deliberate exclusions at issue here, which have cemented discrimination against same-sex couples and their children into the State's most basic charter, are

significant and require the Court to address Plaintiffs' claims.

B. Significant Developments In The Supreme Court's Application Of The Equal Protection And Due Process Clauses Have Deprived *Baker* Of Precedential Effect.

The Supreme Court has cautioned that, "when doctrinal developments indicate otherwise," courts should not "adhere to the view that if the Court has branded a question as unsubstantial, it remains so[.]" *Hicks*, 422 U.S. at 344 (internal citations omitted). That admonition should be heeded in this case. Doctrinal developments by the Supreme Court in application of the Equal Protection and Due Process Clauses require that *Baker* no longer have precedential effect even on the issues it considered, as the District Court in this case correctly held. *Kitchen*, 2013 WL 6697874, at *8; *cf. Windsor v. United States*, 699 F.3d 169, 178-79 (2d Cir. 2012).

"In the forty years after *Baker*, there have been manifold changes in the Supreme Court's equal protection jurisprudence." *Id*. At the time *Baker* was decided, the Supreme Court had not yet recognized an intermediate level of heightened equal protection scrutiny or applied such scrutiny to laws that discriminate based on gender or so-called "illegitimacy." *See Craig v. Boren*, 429 U.S. 190, 197 (1976) (striking down gender-based classification under intermediate scrutiny); *Mathews v. Lucas*, 427 U.S. 495, 510 (1976) (striking down law that discriminated against children born outside of marriage under intermediate scrutiny).

The Court had not yet expressly articulated the factors considered in determining whether discrimination based on a particular characteristic warrants heightened scrutiny. *See Frontiero v. Richardson*, 411 U.S. 677, 682-88 (1973) (plurality opinion). The Court had not yet held that laws enacted for the express purpose of disadvantaging a particular group violate the requirement of equal protection. *See Moreno*, 413 U.S. at 534-35. It had not yet applied that principle to laws that target gay and lesbian people, *see Romer v. Evans*, 517 U.S. 620, 635 (1996), or invalidated a law enacted in order to treat same-sex couples unequally, *see Windsor*, 133 S. Ct. at 2693. Certainly the Court had not yet considered a case involving same-sex couples who are legally married, or held that laws must treat those couples and their children with "equal dignity." *Id*.

With respect to due process, at the time *Baker* was decided, the Supreme Court had not yet held that same-sex couples have the same protected liberty interests in their relationships as others. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). Nor had the Court affirmed that "the right to marry is of fundamental importance for all individuals," *Zablocki*, 434 U.S. at 384, or held that incarcerated persons who are unable to procreate nonetheless have a protected right to marry. *Turner*, 482 U.S. at 94-97. And of course, the Court had not considered a case involving married same-sex couples or held that "the injury and indignity" caused by the government's refusal to recognize the lawful marriage of such a couple is "a deprivation of an

essential part of the liberty protected by the Fifth Amendment." *Windsor*, 133 S. Ct. at 2692-93.

In light of these developments, it is not surprising that every federal court, post-*Windsor*, to consider whether *Baker* controls a challenge to a state law barring same-sex couples from marriage has concluded that the answer is no. *See*, *e.g.*, *Bostic*, 2014 WL 561978, at *10; *Bishop*, 2014 WL 116013, at *15-17; *Kitchen*, 2013 WL 6697874, *7-9; *cf. Bourke*, 2014 WL 556729, at *1; *Obergefell*, 2013 WL 6726688, at *1. This Court should reach the same conclusion and address the significant constitutional questions presented by this case.[3]

[3] The State erroneously suggests that *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989) "eliminated" the ability of courts to consider whether doctrinal developments have deprived a summary dismissal of precedential effect. Aplt. Br. at 32. But *Rodriguez de Quijas* "considered the binding effect of full opinions of the Supreme Court, not a dismissal for want of substantial federal question." *Smelt v. Cnty. of Orange*, 374 F. Supp. 2d 861, 874 n.19 (C.D. Cal. 2005), *aff'd in part, vacated in part, remanded*, 447 F.3d 673 (9th Cir. 2006). "In contrast to full opinions of the Supreme Court, the [Supreme] Court . . . has stated doctrinal developments may show a summary dismissal is no longer binding." *Id.* (citing *Hicks*, 422 U.S. at 344). *Hicks* specifically considered the precedential value of a summary dismissal and held that such a dismissal may be disregarded when it has been undermined by subsequent doctrinal developments; it was not overruled or limited by *Rodriguez de Quijas*.

II. UTAH'S EXCLUSION OF SAME-SEX COUPLES FROM MARRIAGE VIOLATES DUE PROCESS.

The District Court was correct in ruling that Amendment 3 violates due process by depriving Plaintiffs and other same-sex couples of the freedom to marry the one, unique person with whom each has chosen to build a life, a home, and a family. The constitutional guarantees of the Due Process Clause include "a substantive component that provides heightened protection against government interference with certain fundamental rights and liberty interests." *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (internal quotations and citations omitted). One of the constitutionally protected fundamental rights and liberty interests is "'freedom of personal choice in matters of marriage and family life.'" *Elwell*, 699 F.3d at 1215 (quoting *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974)). Freedom of personal choice in marriage matters includes the freedom to choose one's spouse. *See Hodgson v. Minnesota*, 497 U.S. 417, 435 (1990); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 620 (1984); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684-85 (1977).

A. The Constitutional Right To Marry Is Rooted In And Protects Each Person's Fundamental Interests In Privacy, Autonomy, And Freedom Of Association; Same-Sex Relationships Share "Equal Dignity" With Respect To These Interests.

The Supreme Court has long recognized that [t]he freedom to marry is "one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Loving*, 388 U.S. at 12. In decisions stretching back more than 90 years, the Supreme

Court has held that marriage is a fundamental right of liberty, *see Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), of privacy, *see Griswold v. Connecticut*, 381 U.S. 479, 486 (1965), and of association, *see M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996). For many people, marriage is "the most important relation in life." *Zablocki*, 434 U.S. at 384 (internal citation omitted). It "is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred." *Griswold*, 381 U.S. at 486.

The Supreme Court, both before and after *Loving*, has "confirm[ed] "that the freedom to marry is of fundamental importance for *all* individuals." *Zablocki*, 434 U.S. at 384 (emphasis added). That freedom protects every person's choice of whom to marry, regardless of gender or sexual orientation. *See Hodgson*, 497 U.S. at 435 ("[T]he regulation of constitutionally protected decisions, such as . . . whom he or she shall marry, must be predicated on legitimate state concerns other than disagreement with the choice the individual has made."); *Roberts*, 468 U.S. at 620 ("[T]he Constitution undoubtedly imposes constraints on the State's power to control the selection of one's spouse"); *Carey*, 431 U.S. at 684-85 ("[A]mong the decisions that an individual may make without unjustified government interference are personal decisions relating to marriage . . . .").

In *Lawrence*, the Supreme Court held that lesbian and gay people have the same protected liberty and privacy interests in their intimate relationships as

heterosexual people. 539 U.S. at 578. The Court reiterated that "our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education" because of "the respect the Constitution demands for the autonomy of the person in making these choices." *Id.* at 574. It observed that such decisions "'involv[e] the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy. . .'" *Id*. (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992)). The Court held that "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do." *Id*.

In *Windsor*, the Supreme Court powerfully reaffirmed the "equal dignity" of same-sex couples' relationships. *Windsor*, 133 S. Ct. at 2693. Addressing for the first time the issue of government respect for, and equal treatment of, the marriages of same-sex couples, the Court emphasized that the right to intimacy recognized in *Lawrence* "can form 'but one element in a personal bond that is more enduring.'" *Windsor*, 133 S. Ct. at 2692-93 (quoting *Lawrence*, 539 U.S. at 567). The Court struck down DOMA because that statute burdened, "in visible and public ways," same-sex couples' personal, private, and constitutionally protected choices to marry. *Id.* at 2694. The Court further held that due process protects not only personal

choices and relationships, but also the equal worth of families headed by same-sex couples and the dignity of the children they are raising:

> [DOMA]…tells [same-sex] couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition. This places same-sex couples in an unstable position of being in a second-tier marriage. The differentiation demeans the couple, whose *moral and sexual choices the Constitution protects*, *see Lawrence*, 539 U. S. 558, 123 S. Ct. 2472, and whose relationship the State has sought to dignify. And it humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes 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. at 2694 (emphasis added). The Court held that, because "the principal purpose and the necessary effect" of DOMA was to "demean" married same-sex couples and their children, the statute was "unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution." *Id.* at 2695.

Excluding Plaintiffs and other same-sex couples from marriage undermines the core principles that underlie both the fundamental right to marry and the Supreme Court's holdings in *Lawrence* and *Windsor* that same-sex couples share "equal dignity" with other couples with respect to their personal choices, their relationships, and their families. The freedom to marry is protected by the Constitution because the intimate bonds a person forms, and the decision whether to express those commitments by undertaking the obligations of civil marriage, implicate deeply held personal beliefs and core values. Permitting the government, rather than individuals,

to make such personal decisions imposes an intolerable burden on individual dignity and self-determination. *Loving*, 388 U.S. at 12 ("Under our Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State."); *Roberts*, 468 U.S. at 620 ("[T]he Constitution undoubtedly imposes constraints on the State's power to control the selection of one's spouse. . . .").

Amendment 3 deprives Plaintiffs of the dignity and autonomy protected by due process by denying persons in same-sex relationships the freedom—enjoyed by other Utah residents—to marry the one person with whom they have forged enduring ties of love and commitment and who, to each of them, is irreplaceable. Particularly in light of *Windsor*, it is clear that same-sex couples are like other couples with respect to "the inner attributes of marriage that form the core justifications for why the Constitution protects this fundamental human right," as the District Court rightly concluded. *Kitchen*, 2013 WL 6697874, at *13.[4]

[4] The State asserts that "the great weight of authority" holds that due process does not require states to allow same-sex couples to marry. Aplt. Br. at 37. In reality, numerous courts interpreting both the federal and state constitutions have concluded that the fundamental right to marry includes same-sex couples. *See, e.g.*, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 995 (N.D. Cal. 2010); *In re Marriage Cases*, 183 P.3d 384, 429 (Cal. 2008)); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 968 (Mass. 2003). Indeed, since *Windsor*, no federal court has held to the contrary. *Bostic*, 2014 WL 561978, at *13-20.

There is another reason the Constitution requires that same-sex couples be given equal access to the legal and social institution of civil marriage. Full citizenship and limited government—on which our democracy rests—are impossible when fundamental rights such as the freedom to marry are arbitrarily denied to one group of people. The freedom to marry safeguards "the decentralized structure of our democratic society," ensuring that there remains a realm of private family life into which the government may not impermissibly intrude. *Lehr v. Robertson*, 463 U.S. 248, 257 (1983). By providing a structure in which individuals exercise freedom of choice without undue interference from the State, marriage "nurtures and develops the individual initiative that distinguishes a free people." *De Burgh v. De Burgh*, 250 P.2d 598, 601 (Cal. 1952); *cf. Bowers v. Hardwick*, 478 U.S. 186, 211 (1986) (Blackmun, J., dissenting) ("It is precisely because the issue raised by this case touches the heart of what makes individuals what they are that we should be especially sensitive to the rights of those whose choices upset the majority."), *overruled by Lawrence*, 539 U.S. at 578.

B. Plaintiffs Seek To Exercise The Same Fundamental Right To Marry That All Other Individuals Enjoy, Not Recognition Of A New Right To "Same-Sex Marriage."

The State erroneously contends that by seeking access to the fundamental freedom to marry, Plaintiffs are asking the Court to establish a new right to "same-sex marriage." Aplt. Br. at 37. Plaintiffs, however, do not seek a new right. Rather,

as equal citizens of Utah, they seek to have the same "freedom of personal choice in matters of marriage and family life," *LaFleur*, 414 U.S. at 639, that is protected for others.[5] Like any fundamental right, the freedom to marry is defined by the substance of the right itself, not the identity of the persons asserting it—let alone the identity of persons who have historically been denied it. The State offers no *substantive* reason why Plaintiffs are unfit to exercise this fundamental freedom, or why their personal choices concerning marriage and family life are not entitled to the same degree of constitutional protection as other citizens. Instead, the State argues formalistically that because marriage licenses have not been issued to same-sex couples in the past, it is permissible to exclude them now. Aplt. Br. at 39.

But the notion that fundamental rights are protected for some groups and not others is antithetical to our Constitution. "Fundamental rights, once recognized, cannot be denied to particular groups on the ground that these groups have historically been denied those rights." *In re Marriage Cases*, 183 P.3d at 430

[5] Because Plaintiffs are not seeking a new constitutional right, but access to an existing right, the analysis for determining when courts should recognize a new fundamental right in *Washington v. Glucksberg*, 521 U.S. 702 (1997), does not apply. Moreover, contrary to the State's assertion, Windsor did not hold or suggest that permitting same-sex couples to marry requires recognition of a new right. Aplt. Br. at 39-40. Rather, *Windsor* described an emerging recognition that same-sex couples can develop intimate emotional and family bonds. As the District Court noted, "it is not the Constitution that has changed, but the knowledge of what it means to be gay or lesbian." *Kitchen*, 2013 WL 6697874, at *17.

(internal quotation marks and alterations omitted). Plaintiffs seek to make a legally binding commitment to one another and to join their lives in a way that must be respected by the government and third parties. To suggest that the right to form a legally protected family is inherently restricted to opposite-sex couples (and that permitting same-sex couples to marry therefore requires the recognition of a "new" right), tautologically begs the very question to be answered in this case. As Justice Greaney from Massachusetts' highest court explained in his concurring opinion in *Goodridge*: "To define the institution of marriage by the characteristics of those to whom it always has been accessible, in order to justify the exclusion of those to whom it never has been accessible, is conclusory and bypasses the core question . . . ." 798 N.E.2d at 972-73 (Greaney, J., concurring).

The Supreme Court has consistently rejected the idea that the scope of a fundamental right can be limited based on whether a particular group has been permitted to exercise that right in the past due to historic patterns of discrimination. In *Loving*, the Supreme Court struck down Virginia's laws barring interracial couples from marriage, even though race-based restrictions on marriage were deeply entrenched in our nation's history and traditions. *See Casey*, 505 U.S. at 847-48 ("[I]nterracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause in *Loving* . . .

."); *Lawrence*, 539 U.S. at 577-78 ("[N]either history nor tradition could save a law prohibiting miscegenation from constitutional attack.") (quoting *Bowers*, 478 U.S. at 216 (Kennedy, J., dissenting)). *Loving* did not recognize a new right to "interracial marriage," but rather affirmed that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." 388 U.S. at 12.[6]

Decisions after *Loving* also declined to limit the freedom to marry based on other types of historically sanctioned exclusions. For much of our nation's past, states routinely barred prisoners from marrying. *See* Virginia L. Hardwick, *Punishing the Innocent: Unconstitutional Restrictions on Prison Marriage and Visitation*, 60 N.Y.U. L. REV. 275, 278 (1985) (noting that such restrictions were "almost universally upheld"). But in *Turner*, the Court held that incarcerated persons have the same freedom to marry as others. 482 U.S. at 95-96. The Court did not limit the freedom to marry based on the long history of excluding prisoners

[6] The State objects to the District Court's reliance on *Loving*, asserting that anti-miscegenation laws were "odious measures that rested on invidious racial discrimination." Aplt. Br. at 41. The fundamental rights doctrine, however, places certain deeply personal choices beyond the scope of the State's authority; it does not matter whether the government's reasons for wishing to restrict such choices are "invidious" or benign. Undoubtedly, the states defending the marriage restrictions at issue in *Loving*, *Turner*, *Zablocki*, and other cases all believed that there were valid reasons for them—as did the majority of voters at the time. That did not stop the Supreme Court from invalidating them under the Constitution.

from marriage. Instead, the Court examined the core attributes of marriage that cause it to be protected as a fundamental right and concluded that prisoners shared the same interest as others in those important, defining attributes. The Court held that even incarcerated prisoners with no right to conjugal visits have a fundamental right to marry because "[m]any important attributes of marriage remain . . . after taking into account the limitations imposed by prison life . . . [including] expressions of emotional support and public commitment," the "exercise of religious faith," and the "expression of personal dedication," which "are an important and significant aspect of the marital relationship." *Id.* at 95-96. Same-sex couples likewise are no less capable of participating in, and benefitting from—and have no less of a personal interest and stake in—the constitutionally protected attributes of marriage than others.[7]

Similarly, for most of our nation's history, the freedom to marry did not include a right to remarry upon divorce. But in the modern era, the Supreme Court has held that states may not burden an individual's right to remarry. *Boddie v. Connecticut*, 401 U.S. 371, 382-83 (1971) (holding that state law requiring indigent

[7] The State's approach conflicts with how the Supreme Court has analyzed other fundamental rights as well. For example, for centuries, men who fathered children out of wedlock were subject to social and legal stigma. Nonetheless, in *Stanley v. Illinois*, the Supreme Court readily held that the established fundamental right to parent included the right of an unmarried father to maintain a custodial relationship with his child. 405 U.S. 645, 658 (1972).

persons to pay court fees to petition for divorce unduly burdened their fundamental right to remarry). In the same vein, modern contraceptives have been available only since the early decades of the twentieth century. Yet the Supreme Court in *Griswold* did not hesitate to hold that barring married couples' access to contraceptives violated their fundamental right to marital privacy. 381 U.S. at 485-86.

The position urged by the State—that Plaintiffs seek not the same right to marry as others, but a new right to "same-sex marriage"—repeats the analytical error of *Bowers*. In *Bowers*, the Court erroneously framed the issue in that case as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy." 478 U.S. at 190. As the Supreme Court explained when it reversed *Bowers* in *Lawrence*, that statement "disclose[d] the Court's own failure to appreciate the extent of the liberty at stake." 539 U.S. at 567. Similarly here, Plaintiffs do not seek a new right specific only to gay and lesbian persons, but simply wish to exercise the same freedom to marry enjoyed by all other citizens of Utah. *See, e.g.*, *Bostic*, 2014 WL 561978, at *12; *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 982 n.5 (N.D. Cal. 2012); *In re Marriage Cases*, 183 P.3d at 420-21.[8]

[8] This Court previously has cited with approval the California Supreme Court's conclusion that same-sex couples seeking the freedom to marry under that state's constitution were not asking the court to establish a new right to "same-sex marriage," but simply seeking to exercise the same freedom to marry that other

In sum, same-sex couples stand on the same footing as other couples with respect to the interests in liberty, autonomy, and privacy that the fundamental freedom to marry seeks to protect. Plaintiffs and other same-sex couples ask nothing more and nothing less than to have those same interests respected by the State of Utah to the same degree, and in the same way, as it does for other couples: through a legally recognized marriage. The Due Process Clause guarantees them that equal dignity and choice.[9]

III. AMENDMENT 3 FAILS CONSTITUTIONAL SCRUTINY UNDER *WINDSOR* BECAUSE ITS PRIMARY PURPOSE AND EFFECT IS TO "IMPOSE INEQUALITY" ON SAME-SEX COUPLES AND THEIR CHILDREN.

In *Windsor*, the Supreme Court held that DOMA's exclusion of legally married same-sex couples from all federal marriage-based benefits violated both equal protection and due process. *See Windsor*, 133 S. Ct. at 2695-96. The Court began its analysis with the well-established proposition that "[t]he Constitution's

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couples enjoy. *Seegmiller v. LaVerkin City*, 528 F.3d 762, 771 (10th Cir. 2008) (citing *In re Marriage Cases*, 183 P.3d at 420-21). The Court cited the California decision along with other examples of the proper application of *Glucksberg* and *Lawrence* to arrive at a "careful description" of the right at issue. *Id.*

[9] As a classification that infringes upon a fundamental freedom, Amendment 3 also warrants heightened scrutiny under the Equal Protection Clause because it denies access to that freedom to one group of citizens. *See Zablocki*, 434 U.S. at 388.

guarantee of equality 'must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot' justify disparate treatment of that group." *Id.* at 2693 (quoting *Moreno,* 413 U.S. at 534). After carefully reviewing the legislative history of DOMA and its effects on same-sex couples and their children, the Court concluded that the law's "principal effect [was] to identify a subset of state-sanctioned marriages and make them unequal" and that its "principal purpose [was] to impose inequality, not for other reasons like governmental efficiency." 133 S. Ct. at 2694. Because "no legitimate purpose [overcame] the purpose and effect to disparage and to injure" married same-sex couples, the Supreme Court concluded that DOMA was unconstitutional despite the various justifications that were offered in defense of the statute. *Id.* at 2696. As with DOMA, the primary purpose and practical effect of Amendment 3 is to "impose inequality" on same-sex couples and their families. The Amendment therefore denies Plaintiffs equal protection and due process for the same reasons that DOMA was held to infringe those constitutional guarantees.

In *Windsor,* the Supreme Court held that "careful consideration" of DOMA's purpose and effect was required to determine whether the statute's exclusion of same-sex couples was enacted primarily to treat same-sex couples unequally, rather than for a permissible purpose. *Id.* at 2693. The Supreme Court closely examined the purpose for which DOMA was enacted and its harmful impact on same-sex

couples and their children. With respect to purpose, the Court concluded that "[t]he history of DOMA's enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages" was the "essence" of the statute. *Id.* With respect to the law's effects, the Court observed that "[u]nder DOMA, same-sex married couples have their lives burdened, by reason of government decree, in visible and public ways . . . from the mundane to the profound." *Id.* at 2694. The Court further noted that this differential treatment "demeans the couple, whose moral and sexual choices the Constitution protects," and "humiliates tens of thousands of children now being raised by same-sex couples." *Id.* Because "no legitimate purpose" overcame these improper purposes, the Court held that DOMA violated due process and equal protection. *Id.* at 2696.

The Supreme Court in *Windsor* did not refer to the traditional equal protection categories of strict, intermediate, or rational basis scrutiny. Nor did it expressly state what level of scrutiny it was applying to DOMA's purposeful discrimination against same-sex couples.[10] However, as the Ninth Circuit recently held, when one

[10] Notably, in affirming the judgment of the Second Circuit in *Windsor*, the Court left undisturbed the Second Circuit's holding that laws that discriminate based on sexual orientation should be scrutinized under the same heightened standard the Supreme Court has applied to gender-based classifications. *See Windsor v. United States*, 699 F.3d 169, 185 (2d Cir. 2012). The Supreme Court observed that whether "heightened equal protection scrutiny should apply to laws that classify on the basis

considers what the Court actually did, it is readily apparent that *Windsor* involved "something more than traditional rational basis review." *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 483 (9th Cir. 2014) (citation and internal quotation marks omitted). The Court in *Windsor* did not consider hypothetical justifications for DOMA, as an ordinary rational basis analysis would require. Instead, it examined the statute's text and legislative history to determine that DOMA's actual "principal purpose . . . is to impose inequality, not for other reasons like governmental efficiency." *Windsor*, 133 S. Ct. at 2694. In addition, *Windsor* carefully considered the severe harm to same-sex couples and their families caused by DOMA's denial of recognition to their marriage and required Congress to articulate a legitimate governmental interest strong enough to "overcome[]" the "disability" on a "class" of persons. *Id.* at 2696.

Windsor makes clear that, when considering a law that facially disadvantages same-sex couples—as Amendment 3 plainly does—courts may not blindly defer to hypothetical justifications proffered by the State, but must carefully consider the actual purpose underlying its enactment and the actual harms it inflicts. If the record demonstrates that the "principal purpose" and "necessary effect" of a challenged law is to "impose inequality" on same-sex couples and their children, *Windsor*, 133 S.

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of sexual orientation" is an issue "still being debated and considered in the courts." *Windsor*, 133 S. Ct. at 2683-84.

Ct. at 2694, 2695, then courts must strike down the law unless a "legitimate purpose overcomes" the "disability" imposed on the affected class of individuals, *id.* at 2696. *See also Obergefell*, 2013 WL 6726688, at *21 (concluding that under *Windsor*, "[w]hen the primary purpose and effect of a law is to harm an identifiable group, the fact that the law may also incidentally serve some other neutral governmental interest cannot save it from unconstitutionality"). As the district court in *Bishop* correctly concluded, *Windsor* means that "courts reviewing marriage regulations, by *either* the state or federal government, must be wary of whether 'defending' traditional marriage is a guise for impermissible discrimination against same-sex couples." *Bishop*, 2014 WL 116013, at *19.

Amendment 3 cannot survive constitutional scrutiny under *Windsor*. Here, both the text of Amendment 3 and the record demonstrate that Amendment 3 was enacted for the express purpose and had the practical effect of imposing legal disadvantages on same-sex couples. Under *Windsor*, this primary purpose and effect of imposing inequality violates equal protection even if the State could proffer some hypothetical justification for its laws, which it cannot.[11]

[11] The improper purpose or "animus" that led the Supreme Court to strike down DOMA in *Windsor* does not mean those who enacted it harbored conscious prejudice or dislike of gay and lesbian people. Instead, a majority's willingness to treat a group unequally may reflect "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable" by the government in enacting legislation. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985). Moreover, "even the

Just as the "principal purpose" and "necessary effect" of DOMA were to "impose inequality" on same-sex couples and their children, *Windsor*, 133 S. Ct. at 2694, 2695, so too the principal purpose and effect of Amendment 3 is to prevent same-sex couples from marrying and to deny recognition to the marriages of same-sex couples from other states. That discriminatory purpose is apparent on the face of the challenged measures, which expressly single out same-sex couples for exclusion from marriage or any other domestic union and bar any recognition of same-sex couples who legally married in other jurisdictions. *See SECYS, LLC v. Vigil*, 666 F.3d 678, 685 (10th Cir. 2012) ("When distinction between groups of persons appears on the face of a state law or action, an intent to discriminate is presumed and no further examination of legislative purpose is required."); *see also Bishop*, 2014 WL 116013, at *21 (concluding that similar Oklahoma laws

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most familiar and generally accepted of social practices and traditions often mask an unfairness and inequality that frequently is not recognized or appreciated by those not directly harmed by those practices or traditions." *In re Marriage Cases*, 183 P.3d at 452. Such attitudes "may result as well from insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves." *Bd. of Trs. of Univ. of Alabama v. Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring). For the same reasons, the fact that Amendment 3 was enacted for the improper purpose of treating same-sex couples unequally does not mean that those who supported or voted for it were motivated by ill will or dislike of gay and lesbian individuals.

intentionally discriminate). In particular, as the District Court noted, that Amendment 3 "went beyond denying gay and lesbian individuals the right to marry and held that no domestic union could be given the same or substantially equivalent legal effect as marriage" "suggests that the imposition of inequality was not merely the law's effect, but its goal." *Kitchen*, 2013 WL 6697874, at *22. That discriminatory purpose is confirmed by Amendment 3's historical context. Amendment 3 and similar laws banning marriage between same-sex individuals are not simply neutral measures enacted for a legitimate purpose that incidentally have an adverse impact on same-sex couples and their families. Rather, these extraordinary measures are part of a national wave of statutes and state constitutional amendments aimed specifically at preventing same-sex couples from marrying or from having their marriages recognized. *Cf. Windsor*, 133 S. Ct. at 2693 (examining historical context of DOMA); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-67 (1977) (explaining "historical background of the decision" is relevant when determining legislative intent).

Utah passed the 2004 statute in the wake of the Massachusetts Supreme Judicial Court's ruling—the first in the nation—permitting marriages between same-sex couples. The legislators who supported Amendment 3 repeatedly invoked morality and the "laws of nature" in official voter materials. Representative Christensen, Senator Buttars, and then Representative Margaret Dayton, for

instance, referred to "the 'Creator,' 'the laws of Nature and Nature's God,' 'the Supreme Judge of the World' and our 'firm reliance on the protection of the divine providence.'" Aplt. App. at 350. They instructed voters that "'sexual orientation' is not comparable to race, religion and ethnicity," and urged voters to "VOTE YES TO STRENGTHEN OUR CONSTITUTION IN DEFENSE OF MARRIAGE." *Id.* (capitalization in original). Just as DOMA had an impermissible purpose of "promot[ing] an 'interest in protecting the traditional moral teachings reflected in heterosexual-only marriage laws'" and just as DOMA's title—"Defense of Marriage Act"—was deemed by the Supreme Court to be evidence of that law's purpose and intent, *Windsor*, 133 S. Ct. at 2693, Amendment 3 was similarly enacted, according to its proponents, to prevent others from "blow[ing] out the moral lights around us." Aplt. App. at 349.

Moreover, Amendment 3 included a provision mandating that "no other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect." Utah Const., Art. 1, § 29. Far from promoting marriage for opposite-sex couples, as the State now claims, Utah took the extreme and drastic step of prohibiting every form of legal recognition for same-sex couples and their families. Such a total exclusion of same-sex couples and their families from legal status and protection is an impermissible form of "[c]lass legislation" that is "obnoxious to the prohibitions of the Fourteenth Amendment."

Romer, 517 U.S. at 635 (internal quotation marks omitted). Amendment 3 classifies gay people "not to further a proper legislative end but to make them unequal to everyone else." *Id.*

In addition to the legislative evidence showing the impermissible purposes of Amendment 3, its "practical effect" is "to impose a disadvantage, a separate status, and so a stigma upon" same-sex couples in the eyes of state officials and other Utah residents. *Windsor*, 133 S. Ct at 2693. Like DOMA, Amendment 3 "demeans the couple, whose moral and sexual choices the Constitution protects." *Id.* at 2694 (citing *Lawrence*, 539 U.S. 558). It also "humiliates" the "children now being raised by same-sex couples." *Id.*

In sum, the legislative record and the circumstances surrounding the enactment of Utah's exclusionary marriage provisions—as well as the laws' plain language and stated intent to prevent same-sex couples from gaining access to marriage or any other type of family protections—demonstrate that their purpose and effect are to impose inequality on same-sex couples and their families. As shown in Section VI, *infra*, Amendment 3 is not rationally related to any legitimate purpose. But even if there were a rational connection between the marriage bans and some hypothetical governmental interest, any such claimed interest is insufficient to "overcome[] the purpose and effect to disparage and to injure" same-

sex couples and their families. *Windsor*, 133 S. Ct at 2696; s*ee also Obergefell*, 2013 WL 6726688, at *21.

IV. AMENDMENT 3 IS SUBJECT TO HEIGHTENED SCRUTINY UNDER THE EQUAL PROTECTION CLAUSE BECAUSE IT SUBJECTS SAME-SEX COUPLES TO UNEQUAL TREATMENT ON THE BASIS OF SEXUAL ORIENTATION.

Contrary to the State's contention, Utah's exclusion of same-sex couples from marriage is subject to more than rational basis review. As shown above, Amendment 3 cannot survive the careful consideration required by *Windsor*. In addition, laws like Amendment 3, which classify on the basis of sexual orientation, warrant heightened scrutiny under the factors used by the Supreme Court to identify classifications triggering heightened scrutiny under the Equal Protection Clause.

This Court has never definitively held what level of scrutiny applies to laws that discriminate on the basis of sexual orientation. This Court has never decided whether laws that discriminate against gay and lesbian persons based on their sexual orientation are subject to the intermediate form of heightened scrutiny applicable to laws that discriminate on the basis of gender. To be sure, there is circuit precedent holding that sexual orientation classifications are not subject to the most demanding level of equal protection review—strict scrutiny—which is reserved for laws that discriminate based on race and similar "suspect" factors. *See Nat'l Gay Task Force v. Bd. of Educ. of Oklahoma City*, 729 F.2d 1270, 1273 (10th Cir. 1984), *aff'd by an equally divided court*, 470 U.S. 903 (1985); *see also Rich v. Sec'y of the Army*, 735

F.2d 1220, 1229 (10th Cir. 1984). Neither of those cases held, however, that sexual orientation classifications are subject only to ordinary rational basis review. *See Nat'l Gay Task Force*, 729 F.2d at 1273 (holding that "something less than a strict scrutiny test should be applied" to law permitting termination of teachers for engaging in public sexual activity); *Rich*, 735 F.2d at 1229 (holding that, even if strict scrutiny applied, classification would be valid in light of "compelling governmental interest in maintaining the discipline and morale of the armed forces"). Although this Court, in three later decisions, included statements indicating sexual orientation classifications receive only rational basis review, those statements were pure *dicta* and rested on inaccurate descriptions of the holdings in *National Gay Task Force* and *Rich*.[12] Thus, it remains an open question in this circuit whether sexual orientation classifications trigger intermediate scrutiny.

[12] *See Price-Cornelison v. Brooks*, 524 F.3d 1103, 1113 n.9 (10th Cir. 2008); *Walmer v. Dep't of Def.*, 52 F.3d 851, 854 (10th Cir. 1995); *Jantz v. Muci*, 976 F.2d 623, 630 (10th Cir. 1992). In *Jantz*, the Court incorrectly stated that *National Gay Task Force* and *Rich* applied rational basis review; this statement was *dicta*, however, because *Jantz* held only that qualified immunity applied since the level of scrutiny applicable to sexual orientation classifications was not clearly established in 1988. *See Jantz*, 976 F.2d at 630. Similarly, *Walmer* inaccurately characterized *Jantz* as holding that rational basis applies to sexual orientation classifications, but *Walmer* actually held only that the military's policy of discharging service members based on sexual orientation advanced a compelling interest that would satisfy even heightened scrutiny. *See Walmer*, 52 F.3d at 854-55. In *Price-Cornelison*, the Court expressly noted that the plaintiff had argued in the proceedings below that discrimination based on sexual orientation triggers strict scrutiny, but that she "d[id]

The Court should now resolve that issue by applying the factors developed by the Supreme Court for determining which classifications carry a high risk of reflecting prejudice or an improper purpose to harm a particular group, and, therefore, should be scrutinized more closely for equal protection purposes. The most important factors in this analysis are 1) whether a classified group has suffered a history of invidious discrimination, and 2) whether the classification has any bearing on a person's ability to perform in or contribute to society. *See Mass Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976) (discussing first factor); *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (discussing second factor); *see also Windsor*, 699 F.3d at 181. Occasionally, the Supreme Court has considered two additional factors to supplement this analysis: 3) whether the characteristic is immutable or an integral part of one's identity, and 4) whether the group is a minority or lacks sufficient political power to protect itself through the democratic process. *See Lyng v. Castillo*, 477 U.S. 635, 638 (1986); *Mathews v. Lucas*, 427 U.S. 495, 505 (1976); *Frontiero*, 411 U.S. at 686; *see also Windsor*, 699 F.3d at 181. These last two factors are not essential to the analysis; the Supreme Court has never denied heightened

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not reassert that claim . . . on appeal." *Price-Cornelison*, 524 F.3d at 1113 n.9. Because the Court concluded that the plaintiff had adequately established an equal protection violation even under the rational basis standard, it had no occasion to consider whether heightened scrutiny applies to sexual orientation classifications. *See id.* at 1114.

scrutiny review where the group in question has experienced a long history of discrimination based on deep-seated prejudice and where the group's defining characteristic has no bearing on the ability of persons to contribute to society. In any event, sexual orientation readily satisfies all of these factors, and the Court should hold that classifications based on sexual orientation are subject to heightened scrutiny.

History of discrimination. Gay, lesbian, and bisexual people have faced a long and painful history of discrimination and persecution.[13] Courts have acknowledged this history in multiple areas, including public employment, denial of child custody and visitation rights, denial of the ability to associate freely, and both legislative efforts and ballot initiatives targeting people on the basis of sexual orientation.[14] The Federal Executive Branch has also recognized this history and

[13] *See, e.g.*, *Windsor*, 699 F.3d at 182 ("It is easy to conclude that homosexuals have suffered a history of discrimination. . . . [W]e think it is not much in debate. Perhaps the most telling proof of animus and discrimination against homosexuals in this country is that, for many years and in many states, homosexual conduct was criminal. These laws had the imprimatur of the Supreme Court."); *Golinski v. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 985-86 (N.D. Cal. 2012); *Perry*, 704 F. Supp. 2d at 981-91, 997.

[14] *See, e.g.*, *Witt v. Dep't of Air Force*, 527 F.3d 806, 824-25 (9th Cir. 2008) ("[H]omosexuals have 'experienced a history of purposeful unequal treatment [and] been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities.'") (quoting *Murgia*, 427 U.S. at 313); *Ben-Shalom*

urged that sexual orientation classifications should be subjected to heightened scrutiny. *See* Brief for the United States on the Merits Question at 22-27, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307), 2013 WL 683048, at *22-27.

Ability to perform in or contribute to society. It is also well established that sexual orientation does not bear any relationship to a person's ability to perform in or contribute to society.[15] Empirical studies have shown no difference between gay, lesbian, and bisexual people and heterosexuals in forming loving, committed relationships and parenting children. *See Perry*, 704 F. Supp. 2d at 967-68; *Gill v.*

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v. Marsh, 881 F.2d 454, 466 (7th Cir. 1989) ("Homosexuals have suffered a history of discrimination and still do").

[15] *See, e.g.*, *Windsor*, 699 F.3d at 182 ("There are some distinguishing characteristics, such as age or mental handicap, that may arguably inhibit an individual's ability to contribute to society, at least in some respect. But homosexuality is not one of them."); *Perry*, 704 F. Supp. 2d at 1002 ("The evidence shows that, by every available metric, opposite-sex couples are not better than their same-sex counterparts . . . ."); *Varnum v. Brien*, 763 N.W.2d 862, 890 (Iowa 2009) ("Not surprisingly, none of the same-sex marriage decisions from other state courts around the nation have found a person's sexual orientation to be indicative of the person's general ability to contribute to society."); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 435 (Conn. 2008) ("[H]omosexuality bears no relation at all to [an] individual's ability to contribute fully to society") (internal quotation and citations omitted).

Office of Pers. Mgmt., 699 F. Supp. 2d 374, 388 & n.106 (D. Mass. 2010); *see also Golinski*, 824 F. Supp. 2d at 986; *Perry*, 704 F. Supp. 2d at 967.

Characteristic that is immutable or integral to identity. Many courts have recognized that "[s]exual orientation and sexual identity are immutable and are so fundamental to one's identity that a person should not be required to abandon them." *Perdomo v. Holder*, 611 F.3d 662, 666 (9th Cir. 2010) (internal citations and quotation marks omitted); *see also Windsor*, 699 F.3d at 183-84; *Golinski*, 824 F. Supp. 2d at 986-87; *Able v. United States*, 968 F. Supp. 850, 863-64 (E.D.N.Y. 1997), *rev'd on other grounds*, 155 F.3d 628 (2nd Cir. 1998). Certainly, "the consensus in the scientific community is that sexual orientation is an immutable characteristic." *Golinski*, 824 F. Supp. 2d at 986; *Perry*, 704 F. Supp. 2d at 966; *see also* Brief for the United States on the Merits Question at 31-32, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307), 2013 WL 683048 at *31-32. But even more fundamentally, as the Supreme Court's decision in *Lawrence* made clear, sexual orientation is a fundamental aspect of human identity that the state has no legitimate interest in punishing or attempting to change. *See Lawrence*, 539 U.S. at 574 (holding that individuals have constitutionally protected right to engage in same-sex intimacy); *see also Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084, 1093 (9th Cir. 2000), *overruled on other grounds*, *Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir. 2005).

Relative disadvantage in the political process. There is no question that gay and lesbian individuals are a small minority who have faced, and continue to face, serious discrimination, stigma, and moral condemnation; indeed, until the Supreme Court's 2003 decision in *Lawrence*, states were free to criminalize their very existence. While gay and lesbian people undoubtedly have made some political gains, their continuing political vulnerability has been recounted in depth by other courts and the Executive Branch. *See Windsor*, 699 F.3d at 184-85; *Golinski*, 824 F. Supp. 2d at 987-90; *Perry*, 704 F. Supp. 2d at 943-44, 987-88; *Kerrigan*, 957 A.2d at 444-47, 452-54; Brief for the United States on the Merits Question at 32-35, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307), 2013 WL 683048, at *32-35. No federal or Utah law prohibits discrimination on the basis of sexual orientation in employment, public accommodations, or education.[16] When gay people have secured limited protections in state courts and legislatures, opponents have aggressively used state ballot initiative and referendum processes to repeal

[16] The Supreme Court has never construed the concept of political powerlessness to mean that a group is unable to secure *any* protections for itself through the normal political process. The limited protections currently provided to lesbian, gay, and bisexual people do not match the legislative protections available, for example, to women at the time the courts first applied heightened scrutiny to classifications based on gender. Indeed, by the time the Supreme Court recognized gender as a suspect or quasi-suspect classification, Congress already had passed Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963. *See Frontiero*, 411 U.S. at 687-88; *Kerrigan*, 957 A.2d at 450-54.

laws, to amend state constitutions, and even to recall state supreme court justices. This extraordinary use of ballot measures to preempt the normal legislative process and withdraw protections from gay and lesbian people vividly illustrates the continuing disadvantages that gay people face in the political arena. *See Windsor*, 699 F.3d at 184.

In sum, the Supreme Court's traditional heightened scrutiny analysis compels the conclusion that Amendment 3 requires heightened scrutiny, and this Court should so hold. As explained in Section VI below, the State's asserted justifications for Amendment 3 are insufficient under any standard of review, and certainly cannot survive heightened scrutiny.

V. AMENDMENT 3 IS SUBJECT TO HEIGHTENED SCRUTINY BECAUSE IT CLASSIFIES BASED ON GENDER AND IMPERMISSIBLY IMPOSES GENDER-BASED EXPECTATIONS.

Amendment 3 also warrants heightened scrutiny under the Equal Protection Clause because it classifies based on gender and impermissibly seeks to impose gender-based expectations and stereotypes about the "proper" role of men and women. The State unabashedly defends Amendment 3 as designed to encourage and reinforce the State's preferred gender-based roles in family life—roles that individuals are constitutionally free to *choose*, but which the law is not free to compel. Under Supreme Court precedent, laws that classify based on gender are invalid unless the State can present an "exceedingly persuasive justification,"

showing that such laws substantially further important governmental interests. *United States v. Virginia* (*VMI*), 518 U.S. 515, 534 (1996).

A. Amendment 3 Expressly Classifies Based On Gender.

As the District Court correctly concluded, Amendment 3 expressly classifies based on gender. *See Kitchen*, 2013 WL 6697874, at *20. Utah's limitation of marriage to male-female couples treats individuals differently based on their gender. Plaintiff Derek Kitchen cannot marry the person he wishes to marry—Plaintiff Moudi Sbeity—because his chosen partner is a man, not a woman. *See Baker v. State*, 744 A.2d 864, 905 (Vt. 1999) (Johnson, J., concurring and dissenting). Viewed alternately, if Derek were a woman instead of a man, he would be free to marry Moudi. *See Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 971 (Mass. 2003) (Greaney, J., concurring).[17] The same analysis holds true for the female Plaintiffs.

Despite Utah's express reliance on gender as a condition of eligibility for marriage, the State contends that Amendment 3 does not trigger heightened scrutiny because it does not disadvantage either men or women *as a group*. Aplt. Br. at 45 (emphasis added). However, that is not the standard for applying heightened scrutiny, as is evident from the *Loving* decision. In *Loving*, the Supreme Court

[17] *See also Perry*, 704 F. Supp. 2d at 996 ("Sexual orientation discrimination can take the form of sex discrimination."); *cf. Golinski*, 824 F. Supp. 2d at 982 n. 4.

"reject[ed] the notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations." *Id.* at 8; *see also McLaughlin v. Florida*, 379 U.S. 184, 191 (1964) (stating that the equal protection inquiry "does not end with a showing of equal application among the members of the class defined by the legislation"); *Perez v. Lippold* (*Perez v. Sharp*), 198 P.2d 17, 20 (Cal. 1948) ("The decisive question . . . is not whether different races, each considered as a group, are equally treated. The right to marry is the right of *individuals*, not of racial groups.") (emphasis added).

These principles are not limited to laws that seek to perpetuate racial oppression, as the State argues. Aplt. Br. at 45. The ideology of white supremacy that characterized the laws struck down in *Loving* was not a prerequisite to the application of heightened judicial scrutiny. *See Loving*, 388 U.S. at 11 n.11 ("[W]e find the racial classifications in these statutes repugnant to the Fourteenth Amendment, even assuming an even-handed state purpose to protect the 'integrity' of all races."). Similarly, the application of heightened scrutiny to gender classifications does not depend on a showing that the classification was adopted for the purpose of promoting the superiority of men over women, or that the classification affects one gender more than the other. *See, e.g., J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 140-42 & 142 n.13 (1994) (holding that gender-based

peremptory strikes of jurors violate equal protection whether exercised against men or women, and even though there was no showing of disproportionate impact on one sex or the other). To the contrary, "the mere recitation of a benign . . . purpose" cannot shield a gender-based classification from heightened scrutiny. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 728 (1982) (quoting *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975)).

Contrary to the State's contention, Plaintiffs' gender discrimination claim cannot be dismissed merely because the Supreme Court's prior decisions have involved laws that singled out men or women as a class for unequal treatment. Aplt. Br. at 45. When the Court last term was considering whether California's exclusion of same-sex couples from marriage could "be treated as a gender-based classification," Justice Kennedy stated: "It's a difficult question that I've been trying to wrestle with . . . ." Tr. of Oral Argument at 13, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), *at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-144_5if6.pdf. Moreover, when counsel defending California's measure argued that the Supreme Court's summary affirmance in *Baker v. Nelson* controlled the case, Justice Ginsburg responded by stating: "*Baker v. Nelson* was 1971. The Supreme Court hadn't even decided that *gender-based classifications* get any kind of heightened scrutiny." *Id.* at 12 (emphases added). The comments by Justices Kennedy and Ginsburg, while not binding, indicate that, contrary to the

State's argument, Plaintiffs' gender discrimination claim merits careful consideration.

B. The Equal Protection Clause Protects Against Laws Such As Amendment 3 That Impose Gender-Based Expectations Or Stereotypes.

The Supreme Court's gender discrimination case law has focused not only on the harm of restricting an individual's opportunities based on gender, but also on the harm inflicted by governmental enforcement of gender-based expectations. The Court has recognized "the real danger that government policies that professedly are based on reasonable considerations in fact may be reflective of 'archaic and overbroad' generalizations about gender, or based on 'outdated misconceptions concerning the role of females in the home rather than in the marketplace and world of ideas.'" *J.E.B.*, 511 U.S. at 135 (internal citations omitted).

The State repeatedly asserts that Amendment 3 is founded upon gender-based expectations and the desirability of requiring couples to adhere to the State's preferred gender roles in marriage and parenting. *See, e.g.*, Aplt. Br. at 73 ("gender complementarity in parenting"); *id.* at 52 ("gendered . . . understanding of marriage"); *id.* at 69 (describing Amendment 3 as designed "to promote [a] gendered parenting model"). While couples are *free to choose* such gender-based roles in their relationships, the State has no legitimate interest in requiring adherence to those

roles or imposing legal disadvantages based on individuals' choices not to conform to those roles.

In contrast to the State's emphasis on gender-differentiated roles of parents, the Supreme Court's gender discrimination cases have focused on the importance of the law generally treating mothers and fathers equally. In *Weinberger v. Wiesenfeld*, the Supreme Court invalidated a Social Security measure that provided for payments to a deceased man's widow and children, but not to a deceased woman's husband and children. *See* 420 U.S. at 653. The Court criticized the law's basis in the "gender-based generalization" that "men are more likely than women to be the primary supporters of their spouses and children," *id.* at 645, and the statutory "inten[tion] to permit women to elect not to work and to devote themselves to the care of children," *id.* at 648, without equally contemplating the possibility that a father who is a widower might wish to care for his child at home following his spouse's death. *See id.* at 651-52. *Wiesenfeld* specifically found the government's attempt to impose these gender-based parenting roles to be impermissible. *Id.* at 652; *see also Orr v. Orr*, 440 U.S. 268, 283 (1979) (invalidating measure that "carrie[d] with it the baggage of sexual stereotypes"); *Califano v. Goldfarb*, 430 U.S. 199, 217 (1977) (finding unconstitutional a Social Security provision differentially treating nondependent widows and widowers "based simply on 'archaic and overbroad' generalizations") (citation omitted); *Frontiero*, 411 U.S. at 685

(discussing how "our statute books gradually became laden with gross, stereotyped distinctions between the sexes"). For similar reasons, the Court struck down a Utah child support statute that provided a longer period of minority for sons than for daughters. *See Stanton v. Stanton*, 421 U.S. 7, 14-15 (1975) ("No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas.").

C. Utah's Continued Exclusion Of Same-Sex Couples From Marriage Conflicts With Its Elimination Of Other Gender-Based Laws Governing Marriage.

The gender-neutrality that the Fourteenth Amendment requires in other contexts is applicable to marriage laws as well. The Constitution disallows any legal presupposition that all married men must be breadwinners or that all married women must be home-makers; nor may laws assume or require that men and women adhere to gender stereotypes in their raising of children. While some married couples embrace a gendered division of labor, a couple is not any less "married" if the spouses depart from conventional gender roles in some or all respects. The law does and must leave such decisions to the individuals involved, and a state is not permitted to impose a preference for the role a wife or husband should play. Utah's exclusion of same-sex couples from marriage reflects and enforces such impermissible gender-based stereotypes.

The exclusion of same-sex couples from marriage stands as a lonely remnant of an otherwise bygone era in which the law defined the rights and duties of spouses based on gender, and in which the law presumed women to be legally, socially, and financially dependent upon men. Historically, marriage laws were based on the common-law doctrine of coverture, which presumed "the unity of husband and wife" and under which a married woman could not own property separately from her husband, sue her husband, or "enforce liabilities against third parties." *Ellis v. Ellis*, 169 P.3d 441, 443 (Utah 2007). Today, however, Utah, like all states, has eliminated nearly all gender differences in its marital law.

Under Utah law today, married women may own and sell property, enter into contracts, and sue their husbands. *See id.* at 443-44. Married women now, equally with married men, are obliged to provide financial support for a spouse, to pay child support or alimony upon divorce, and to assume all of the other obligations entailed by marriage, according to gender-neutral standards. *See*, *e.g.*, *Martinett v. Martinett*, 331 P.2d 821, 823 (Utah 1958) (stating that Utah's statute regarding property division and alimony "does not contemplate . . . any discrimination or inequality in such awards on the basis of sex" and that "the ancient idea of the husband as the pater-familias, or lord and master, is outmoded and unrealistic"). Courts must base child custody decisions on "the best interests of the child without preference for either the mother or father solely because of the biological sex of the parent," Utah

Code § 30-3-10(1)(a), and without reliance on gender stereotypes, *see Pusey v. Pusey*, 728 P.2d 117, 120 (Utah 1986) (holding that preferring mothers in child custody cases "perpetuates outdated stereotypes" and reflects an outdated assumption that "fathers traditionally worked outside the home and mothers did not"); *Sukin v. Sukin*, 842 P.2d 922, 926 (Utah Ct. App. 1992) (holding that custody awards "cannot be based, directly or indirectly, on gender-based preferences or stereotypes").

In contrast to Utah's elimination of gender stereotypes in its laws governing marriage, Utah's continued exclusion of same-sex couples from marriage perpetuates gender expectations that deny equal protection to all Utah residents who wish to marry a same-sex partner. The Supreme Court has instructed that the courts should approach laws that impose gender expectations or seeking to enforce gender stereotypes with skeptical scrutiny, applying "the test for determining the validity of a gender-based classification . . . free of fixed notions concerning the roles and abilities of males and females." *Hogan*, 458 U.S. at 724-25. As explained below, Utah's exclusion of same-sex couples from marriage cannot withstand even rational basis review, much less the heightened scrutiny applicable to such gender-based classifications.

VI. AMENDMENT 3 FAILS UNDER ANY STANDARD OF REVIEW.

For the reasons explained above, Amendment 3 cannot survive the careful

scrutiny applied by the Supreme Court in *Windsor* because its principal purpose and effect is to impose unequal treatment of same-sex couples and their children. Amendment 3 also warrants and fails heightened scrutiny because it deprives Plaintiffs of fundamental rights and liberty interests and, independently, because it discriminates on the basis of sexual orientation and gender. Amendment 3 is also unconstitutional, however, for an even more basic reason: Preventing same-sex couples from marrying does not rationally advance any legitimate governmental interest. Even assuming that each of the governmental interests proffered by the State is legitimate, there simply is no rational connection between any of those asserted objectives and prohibiting same-sex couples from sharing in the protections and obligations of civil marriage. Amendment 3 therefore also fails under rational basis review, the lowest level of scrutiny.

Rational basis review is not "toothless" and does not, contrary to the State's argument, permit a court to accept any asserted rationale at face value, without any meaningful inquiry. *Mathews v. de Castro,* 429 U.S. 181, 185 (1976) (quoting *Mathews v. Lucas*, 427 U.S. 495, 510 (1976)). Even under rational basis review, the asserted rationale for a law must be based on a "reasonably conceivable state of facts." *Copelin-Brown v. N.M. State Personnel Office*, 399 F.3d 1248, 1255 (10th Cir. 2005). In addition, there must be a rational relationship "between the classification adopted and the object to be attained." *Romer*, 517 U.S. at 632-33. A

law that treats two groups differently must rest on "some ground of difference having a fair and substantial relationship to at least one of the stated purposes justifying the different treatment" between the included and the excluded class. *Johnson v. Robison*, 415 U.S. 361, 376 (1974). When a law is "so far removed from [its] particular justifications that [courts] find it impossible to credit them," the law violates the basic equal protection requirement that a law possess "a rational relationship to a legitimate governmental purpose." *Romer*, 517 U.S. at 635; *see also Price-Cornelison*, 524 F.3d at 1114 (holding that differential treatment based on a person's sexual orientation was not rationally related to any legitimate end). None of the State's asserted justifications for Utah's marriage ban satisfies even these basic standards, let alone the heightened scrutiny that is required in this case.

A. The Relevant Inquiry Under Ordinary Rational Basis Review Is Whether The Exclusion Of A Class Is Rationally Related To Achieving The Claimed State Interest; It Is Not Whether The Inclusion Of The Class Is Rationally Related To Achieving The Claimed State Interest.

As the District Court correctly found: "The State poses the wrong question. The Court's focus is not on whether extending marriage benefits to heterosexual couples serves a legitimate governmental interest. . . . Instead, courts are required to determine whether there is a rational connection between the challenged statute and a legitimate state interest." *Kitchen*, 2013 WL 6697874, at *24. That is the relevant inquiry because Amendment 3 does not grant or increase benefits to opposite-sex

couples who marry; instead, its sole effect is to exclude same-sex couples from gaining access to the same benefits opposite-sex married couples already enjoy. *Id.*

The State again advances this erroneous argument on appeal. Citing to *Johnson*, 415 U.S. 361, the State argues that Utah's enactment of laws expressly barring same-sex couples from marriage or any other type of official recognition need not rationally further any legitimate interests, so long as the State has a rational basis for providing marriage to opposite-sex couples. Aplt. Br. at 47-48. That is not the law. As the District Court correctly noted, *Kitchen*, 2013 WL 6697874, at *24, many Supreme Court decisions establish that, in an equal protection case, the focus must be on whether there is a rational connection between the *exclusion* created by the challenged legislation and the governmental interests purportedly advanced by that legislation.[18]

[18] *See, e.g., FCC v. Beach Comm's, Inc.*, 508 U.S. 307, 316-17 (1993) (considering the federal government's interest in exempting dwellings under common ownership from being required to have franchised cable systems, not in requiring that public cable systems be franchised); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448-50 (1985) (examining the city's interest in denying housing for people with developmental disabilities, not the interests advanced by allowing housing for others); *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 315-16 (1976) (considering the State's interest in excluding people over 50 from service as police officers, not in the interests advanced by employing people under 50 as police officers); *Moreno*, 413 U.S. at 535-38 (considering the federal government's interest in excluding unrelated persons from food stamp benefits, not in providing food stamps to households comprised of related persons).

In addition, the issue in *Johnson* was whether a provision granting certain educational benefits to draftees who served on active military duty, but not to religious conscientious objectors who performed mandatory civilian service as an alternative to military service, violated equal protection. The Supreme Court held that inclusion of conscientious objectors would not promote the program's asserted goals of "mak[ing] military service more attractive" or "more palatable." *Johnson*, 415 U.S. at 382. These goals were rationally related to a policy of providing educational benefits to service members, but not to conscientious objectors. As the Court explained, educational benefits would not make "military service more attractive" to conscientious objectors, whose refusal to fight in the Armed Services was based "upon deeply held religious beliefs" and thus would not be influenced by such incentives. *Id.* at 382-83.

Unlike the educational benefits analyzed in *Johnson*, marriage provides numerous protections, benefits, and obligations that are important and valuable to both same-sex and opposite couples. Both same-sex and opposite-sex couples may have children whether or not they are married, and Utah allows couples to marry whether or not they wish, or are able, to have children. Furthermore, the children of both same-sex and opposite-sex couples benefit to the same degree, and in the same ways, from having parents who are married. Unlike the statute in *Johnson*, marriage does not incentivize opposite-sex couples or their children in any way that is

different from the incentives it provides to same-sex couples and their children. Under Amendment 3, even though marriage is "equally attractive to procreative and non-procreative couples" and "is extended to most non-procreative couples," it nevertheless is withheld from "just one type of non-procreative couple." *Bishop*, 2014 WL 116013, at *30. Same-sex couples are subjected to a requirement of "natural procreative ability" that is not imposed on opposite-sex couples, whether they are infertile, elderly, or simply do not wish to procreate. *Id.* There is no rational reason for Utah to provide opposite-sex couples who are unable or unwilling to have and raise children the benefits of marriage, while excluding all same-sex couples—including those who are already raising children. As the *Bishop* district court concluded, "rationality review has a limit, and this well exceeds it." *Id.*[19]

[19] The State also argues that allowing same-sex couples to marry will somehow lead to "low birth rates" and eventually "depopulation of communities, historic cities and even the nation itself." Aplt. Br. at 82. But even the State seems unconvinced by its own argument, admitting that statistics regarding fertility rates "obviously do not prove a causal link between same-sex marriage and declining birthrates." *Id.* at 86. In any event, the State offers no logical or rational explanation of how excluding same-sex couples from marriage contributes to the maintenance of adequate birth rates, or why permitting same-sex couples to marry would result in a reduction in birth rates.

B. There Is No Rational Connection Between Amendment 3's Exclusion of Same-Sex Couples And The State's Asserted Interest In Fostering A Child-Centric Marriage Culture.

The State's argument that barring same-sex couples from marriage is rationally related to fostering a child-centric marriage culture—and, in particular, that eliminating that ban might undermine marriage and cause parents to be less committed to their children—has no footing in any reasonably conceivable state of facts. As an initial matter, that argument ignores the thousands of Utah children being raised by same-sex parents. "These children are also worthy of the State's protection, yet Amendment 3 harms them for the same reasons that the Supreme Court found that DOMA harmed the children of same-sex couples." *Kitchen*, 2013 WL 6697874, at *26 (noting that the State does not dispute that more than 3,000 Utah children have same-sex parents). Rather than furthering an interest in protecting children or encouraging parents to marry, Amendment 3 "needlessly stigmatiz[es] and humiliat[es] children who are being raised by" same-sex parents. *Bostic*, 2014 WL 561978, at *18. In addition, even if it were permissible for the State to focus its concern solely on opposite-sex couples' children and ignore the welfare of same-sex couples' children, the State has offered no legal, factual, or logical reason to believe that permitting same-sex couples to marry will affect the attitudes, beliefs, or conduct of other couples, or of society at large, toward marriage and parenting. Even under rational basis review, an asserted justification must have

"some footing in . . . realit[y]". *See Heller v. Doe by Doe*, 509 U.S. 312, 321 (1993). As the District Court correctly held, "it defies reason to conclude that allowing same-sex couples to marry will diminish the example that married opposite-sex couples set for their unmarried counterparts." *Kitchen*, 2013 WL 6697874, at *25.

The State's argument that marriage today is "child-centered" as opposed to "adult-centered" also disregards that Utah permits marriage between opposite-sex couples who are unable to procreate due to age, infertility, disability, or other circumstances. Utah's laws do not, and never have, required either ability or intent to procreate as a prerequisite for marriage, nor do they permit marriages to be annulled based on infertility. *See* Utah Code § 30-1-17.1 (listing grounds for annulment); *id.* §§ 30-1-1, 30-1-2 (listing marriages that are void by statute). Rational basis review does not require that a law advance a legitimate interest with razor-like precision, but it does require a rational relationship "between the classification adopted and the object to be attained." *Romer*, 517 U.S. at 632. "Assuming a state can rationally exclude citizens from marital benefits due to those citizens' inability to 'naturally procreate,' the state's exclusion of only same-sex couples in this case is so grossly underinclusive that it is irrational and arbitrary." *Bishop*, 2014 WL 116013, at *30.

The State's argument posits a false dichotomy—between the role played by marriage in protecting children's interests and adults' interests—that is directly

belied by the Supreme Court's central decisions about the freedom to marry. The State seeks to denigrate or cast in a suspicious light "the interests of adults" in choosing whether and whom to marry. Aplt. Br. at 61. The Supreme Court, however, has emphasized that those very interests are central to the autonomy of individuals safeguarded by the Fourteenth Amendment. The Court confirmed in *Casey* and *Lawrence* "that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education" because of "the respect the Constitution demands for the autonomy of the person in making these choices." *Lawrence*, 539 U.S. at 574 (citing *Casey*, 505 U.S. at 851). The Supreme Court repeatedly has underscored that the Constitution protects the freedom to marry in furtherance of both autonomy and family ties. *Cf*. Linda C. McClain, *"God's Created Order," Gender Complementarity, and the Federal Marriage Amendment*, 20 BYU J. Pub. L. 313, 336 (2006) (explaining that "the argument that marriage is not about adult love, but about children, sets up an either/or view of the purposes of marriage that is simply wrong with respect to historical and contemporary understandings of marriage").

Marriage is not, as the State would have it, a zero-sum game that pits the needs of children against the desires of adults. To the contrary, marriage benefits the health and wellbeing of both adults and children in numerous ways, as the nation's leading

mental health organizations have emphasized. *See* Brief of the Am. Psychological Ass'n, the Am. Acad. of Pediatrics, and the Am. Med. Ass'n, *et al.* as Amici Curiae on the Merits in Support of Affirmance, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144), 2013 WL 769316, at *14-30. Because both adults and children benefit from marriage, there is no rational reason to conclude that allowing a greater number of adults to marry will be anything other than beneficial for children. Indeed, it is the *exclusion* of same-sex couples from marriage that would seem to undermine the child-centric view, because that exclusion fences out one segment of society and tells them that getting married and having children is not a life path that is open to them.

Additionally, the State's argument needlessly belittles the important purposes of marriage that are related to the two spouses irrespective of the existence of children within the marriage. Marriage is not only about raising children, but about a couple's commitment to share the joys and sorrows of life together, to care for one another through illness or job loss, and to remain each other's partner and companion into old age, long after any children are grown. The State's argument is incompatible with the Supreme Court's express recognition that the Constitution protects all of these aspects of marriage, regardless of whether the spouses are able to have and raise children together. *See Turner*, 482 U.S. 95-96; *see also Bostic*, 2014 WL 561978, at *19. It is also incompatible with the recognition that married couples

have a constitutionally protected right *not* to procreate—and that government attempts to interfere with that decision impermissibly encroach upon the dignity and privacy of the marital relationship. *See Griswold*, 381 U.S. at 485-86; *see also Lawrence*, 539 U.S. at 567. These precedents[20] recognize that, in addition to providing a stable setting in which to raise children for couples who choose to do so, marriage also serves other important public and personal interests that apply equally to same-sex couples.[21]

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[20] The State's description of "Utah's child-centered meaning and purpose of marriage," Aplt. Br. at 59, bears no relation to the Utah Supreme Court's own recent explanation of what constitute the "general hallmarks of marriage." *Myers v. Myers*, 266 P.3d 806, 811 (Utah 2011) (finding that "there is no single prototype of marriage that all married couples conform to" and identifying the hallmarks of marriage as "a shared residence, an intimate relationship, and a common household involving shared expenses and shared decisions."). The Utah Supreme Court's own description of the nature of the marital relationship belies the State's attempt to reduce marriage's purpose to a single element—the raising of children—which may or may not be an aspect of any given couple's marriage.

[21] Notably, the Supreme Court in *Turner* held that the prisoner marriage restriction struck down in that case did not even have a "reasonable relationship" to the governmental interests asserted in support of the regulation. *Turner*, 482 U.S. at 97. Thus, the Supreme Court held that the prison restriction violated due process regardless of whether heightened scrutiny applied. *See id.* Likewise, here, there is no rational connection between Amendment 3 and the promotion of a child-centered view of marriage or any of the other governmental interests on which the State relies. Because every law must always have a rational relationship to some legitimate governmental objective, the holding in *Turner* means that Amendment 3 violates due process regardless of whether it deprives Plaintiffs of an existing fundamental

In sum, Plaintiffs do not dispute "that stable marriages between men and women are indispensable to the welfare of both children and society." Aplt. Br. at 50. What the State ignores, however, is that stable marriages of same-sex couples are equally indispensable to the welfare of children and society. To the extent the purpose of marriage is to promote a child-centric marriage culture, the rational way to achieve that goal is to permit same-sex couples and their children to participate in it. The State's desire to exclude those couples from marriage—and its willingness to inflict serious harms on their children—does not rationally advance this goal. If anything, it undermines it.

C. There Is No Rational Connection Between Excluding Same-Sex Couples From Marriage And The State's Asserted Interests Relating To Procreation And Parenting.

The State asserts that Amendment 3 is justified by a claimed interest in "giv[ing] special preference and recognition to families consisting of children being raised either by both biological parents or at least by two parents of opposite sex." Aplt. Br. at 62. But that claim fails constitutional review in the most basic way: The State has no legitimate interest in giving special preferences to some parents over others, and even if such a governmental objective were permissible, there is no

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right to marry (which it does), or whether Plaintiffs are seeking a new "right to same-sex marriage," as the State argues. Aplt. Br. at 37.

rational link between excluding same-sex couples from marriage and encouraging the raising of children by married opposite-sex parents.

Although states may, through their domestic relations laws, encourage and promote family stability, marriage, and healthy childrearing, the purported interest that the State advances in its brief—a supposed interest in "giv[ing] special preference and recognition to" some families with children over other families with children—is not a legitimate governmental interest that states may pursue. *Id.* It is, instead, the very thing that the Equal Protection Clause prohibits. For example, although being raised in an affluent household undoubtedly confers important advantages on children, the state has no legitimate interest in giving special preference and recognition to such "optimal" families by passing a law prohibiting poor people from marrying. *Id.* at 59. Such a statute would violate the most basic principle of equal protection that the law "neither knows nor tolerates classes among citizens." *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). Likewise, even if the State believes that only married biological parents deserve an "A" on the grading scale of parenting, *see* Aplt. Br. at 2, it has no legitimate interest in expressing that view by punishing same-sex couples and their children through its exclusionary marriage laws.

Moreover, the State's asserted preference contradicts Utah's domestic relations law, which generally seeks to provide stability, protection, and respect to

all Utah children, rather than to impose harms on them or a subset of them.[22] *Indeed, the State concedes that the law causes harm rather than meeting children's needs. See e.g.*, Aplt. Br. at 61 (acknowledging that eliminating Amendment 3 would result in more children benefitting from having married parents). The incongruity between the State's proffered justification of promoting one preferred family arrangement and Utah's general respect for the dignity and equality of all children and all parents compels the conclusion that Amendment 3's purpose is not to further any legitimate aim, but rather simply to disadvantage a disfavored group, even at the expense of harming children. *See Romer*, 517 U.S. at 635.

The illegitimacy of the State's asserted interest is also underscored by the fact that, apart from same-sex couples, Utah does not penalize any other class of potentially "non-optimal" parents (or their children) by barring them from marriage. For example, persons who are addicted to alcohol or drugs, who have been convicted of abusing or molesting children, or who are incapable of biologically procreating

[22] Contrary to the State's claims, Utah's laws do not elevate biology over other ways of becoming a parent or permit differential treatment of parents based on their gender. Instead, those laws recognize that the State has a compelling interest in preserving established parent-child bonds, regardless of whether a child is adopted, born through assisted reproduction, or being raised by a non-biological parent in other circumstances, such as by a husband who is not the child's biological father. *See, e.g.*, Utah Code §§ 78B-15-701 through 78B-15-809 (facilitating the use of assisted reproduction to have children); *Pearson v. Pearson*, 134 P.3d 173, 179 (Utah Ct. App. 2006) (protecting child's relationship with nonbiological father).

children are not barred from marriage. Likewise, unmarried persons who have children are not prohibited from marrying, regardless of whether they wish to marry the other parent of their children or someone else. Utah law also provides ready access to divorce, even in cases where the married couple has biological children.

Moreover, even if preferring certain classes of parents over others were a legitimate objective, that goal is not rationally advanced by prohibiting same-sex couples from marrying. The exclusion of same-sex couples from civil marriage has no effect on who can be a parent, nor does it affect opposite-sex couples' incentives to raise their biological (or non-biological) children within a marital relationship in any rationally conceivable way, as numerous courts have recognized.[23]

For example, in striking down DOMA, the First Circuit noted that "DOMA does not increase benefits to opposite-sex couples—whose marriages may in any event be childless, unstable or both—or explain how denying benefits to same-sex couples will reinforce heterosexual marriage." *Massachusetts v. United States Dep't*

[23] The State's suggestion that Amendment 3 is somehow related to Utah's high rates of marriage and low rates of children born outside of marriage, Aplt. Br. at 69-72, is belied by the fact that those rates include comparisons to other states that also bar same-sex couples from marriage. Moreover, the only evidence in the record is that, in states that permit same-sex couples to marry, all the indicia of healthy opposite-sex marriages are the same or better than before same-sex marriage was permitted. *See* Aplt. App. at 2127-29 (Dr. Badgett Decl. ¶¶ 69-77); 2308, 2322-25 (Dr. Peplau Decl. ¶¶ 15, 56-63); 2736-43.

of Health & Human Servs., 682 F.3d 1, 14 (1st Cir. 2012). "This is not merely a matter of poor fit of remedy to perceived problem, but a lack of any demonstrated connection between DOMA's treatment of same-sex couples and its asserted goal of strengthening the bonds and benefits to society of heterosexual marriage." *Id*. at 15 (internal citation omitted); *see also Windsor*, 699 F.3d at 188 ("DOMA does not provide any incremental reason for opposite-sex couples to engage in 'responsible procreation.' Incentives for opposite-sex couples to marry and procreate (or not) were the same after DOMA was enacted as they were before.") (footnote omitted); *Kitchen*, 2013 WL 6697874, at *25; *Obergefell*, 2013 WL 6726688, at *20; *Bishop*, 2014 WL 116013, at *31.

Furthermore, the scientific consensus of every national health care organization charged with the welfare of children and adolescents—including the American Academy of Pediatrics, the American Academy of Child and Adolescent Psychiatry, the American Psychiatric Association, the American Psychological Association, the American Psychoanalytic Association, the American Sociological Association, the National Association of Social Workers, the American Medical Association, and the Child Welfare League of America—based on a significant and well-respected body of current research, is that children and adolescents raised by same-sex parents are as well-adjusted as children raised by opposite-sex parents. *See* Brief of the Am. Psychological Ass'n, the Am. Acad. of Pediatrics, and the Am.

Med. Ass'n, *et al.*, as *Amici Curiae* on the Merits in Support of Affirmance, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307), 2013 WL 871958 at *18-34.

It is equally well established by "more than 50 peer-reviewed empirical journal articles, and many additional articles and book chapters" that the "adjustment of children and adolescents is unrelated to the gender or sexual orientation of the[ir] parent(s)." Aplt. App. at 2259 (Declaration of Dr. Charlotte J. Patterson, Ph.D. ¶¶ 26, 28) ("Dr. Patterson Decl.").[24] Indeed, like other skills we value in society—such as the ability to be a good worker, or a good student—sexual orientation and gender are simply irrelevant. Rather, "[t]here is wide agreement among social scientists" that the most important factors determining the overall well-being of children are the qualities of the relationships between those children and their parents, the qualities of the relationship between parents or significant adults in the children's lives, and the availability of economic and emotional resources. *Id.* at 2253 (Dr. Patterson Decl. ¶ 12). "Parental sex and sexual orientation are not related to the ability to be

[24] The State attempts to undermine the expert opinions of Dr. Michael Lamb, a preeminent psychologist with more than forty years of experience studying children's development and adjustment, by citing an article he published in 1975. *See* Aplt. Br. at 64-65 n.27. While Dr. Lamb was among a number of researchers who speculated in the 1970's that parental gender might be important, the overwhelming body of research since that time has disproved that hypothesis.

a good parent or to the likelihood of healthy development among children or adolescents." *Id.* And "having parents of both genders is not essential to children's and adolescents' healthy development and good adjustment." *Id*. at 2258 (Dr. Patterson Decl. ¶ 22). In short, "[t]he idea that there is an optimal gender mix of parents has received no empirical support from psychological research." *Id.* at 2260 (Patterson Decl. ¶ 28).

The articles cited by the State in support of its "optimal parenting" rationale are wholly unrelated to same-sex couples and their children. The State cites research concerning children raised by single parents, divorced parents, and step-parents that shows that children in such situations may suffer some disadvantages related to the stresses of divorce, remarriage, and single parenting. *See* Aplt. Br. at 63-69. *That research does not concern parenting by same-sex couples*, and it has no bearing on the wellbeing of children raised by same-sex parents. *See, e.g.*, Aplt. App. at 2253-65 (Dr. Patterson Decl. ¶¶ 11-40). With respect to the studies authored by Mark Regnerus, Aplt. App. at 67-68 n.32, 76 n.42, Regnerus "did not actually study individuals reared by same-sex partners" and the journal that originally published his study has since published an audit noting that this fact alone should have precluded any publication of his work. *See* Aplt. App. at 2260-61 (Dr. Patterson Decl. ¶¶ 29-30). While the State admits that Regnerus' work "is not conclusive"

regarding "same-sex parenting," Aplt. Br. at 76, its citation to this study at all is misleading.[25]

D. There Is No Rational Connection Between Amendment 3 And The State's Asserted Interest In "Accommodating Religious Freedom And Reducing The Potential For Civic Strife."

The State argues that Utah has an interest in "preserving the traditional definition of marriage" because that definition is "essential to preserving social harmony . . . while redefining marriage would be a recipe for social and religious strife . . . ." Aplt. Br. at 90.[26] Because the "vast majority of faith communities" oppose marriage for same-sex couples, the State argues, Utah's laws should do so as well. *Id.* at 91. As an initial matter, the State's suggestion that the number of faith communities opposed to marriage by same-sex couples somehow justifies the state's

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[25] The State also persists in misrepresenting the research of Kristen Anderson Moore. The authors of that study have added an introductory note explicitly warning that no conclusions can be drawn from their research about the well-being of children raised by same-sex parents or adoptive parents. *See* Aplt. App. at 2087 n.19.

[26] The State did not raise this argument in the District Court. This Court "do[es] not ordinarily consider arguments raised for the first time on appeal." *United States v. Alamillo*, 941 F.2d 1085, 1086 (10th Cir. 1991) (citing *United States v. Orr*, 864 F.2d 1505, 1508 (10th Cir. 1988)). Similarly, "[i]n reviewing a ruling on summary judgment, [this Court] will not consider evidence that was not before the district court." *Wilburn v. Mid-South Health Dev., Inc.*, 343 F.3d 1274, 1281 (10th Cir. 2003) (citing *John Hancock Mut. Life Ins. Co. v. Weisman*, 27 F.3d 500, 506 (10th Cir. 1994)). In any event, the argument is without merit for the reasons stated.

imposition of inequality, stigma, and tangible harm on those couples and their children is not only deeply offensive, it is repugnant to our constitutional tradition. The State recognizes as much when it clarifies that this argument does not mean "the State can invoke concerns about religious freedom or religion-related social strife as a basis for denying rights otherwise guaranteed by the Constitution." Aplt. Br. at 97. Yet the State persists with this argument nonetheless.[27]

The State's argument is similar to contending that a small religious congregation can be denied the freedom to worship because its tenets conflict with those of larger faiths, or that a newspaper can be censored because the articles it publishes are offensive to many religious people—or that the will of the majority can stamp out the constitutional liberties of minority populations in any other context. It is axiomatic that "[a] citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be." *Lucas v.*

[27] The State also attempts to distinguish *Loving's* decision regarding interracial marriage by arguing that "objections to interracial marriage were always principally about racism, not about religion or the marriage institution." Aplt. Br. at 92. In fact, many of the most racially oppressive laws in American history, including laws regarding slavery and interracial marriage, were justified in large part by religious and moral disapproval. *See* Brief for Anti-Defamation League, *et al.* as Amici Curiae Supporting Respondents, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144), 2013 WL 769319, at *7-12.

Colorado Gen. Assembly, 377 U.S. 713, 736-37 (1964). As the Supreme Court stated in *Lucas*:

> It is too clear for argument that constitutional law is not a matter of majority vote. Indeed, the entire philosophy of the Fourteenth Amendment teaches that it is personal rights which are to be protected against the will of the majority . . . . The plaintiffs have a right to expect that the cause will be determined in relation to the standards of equal protection. Utilization of other or different standards denies them full measure of justice.

Id. at 737 n.30 (quoting *Lisco v. Love*, 219 F. Supp. 922, 944 (D. Colo. 1963)).

Even if the State's predictions about "social tensions and conflicts," Aplt. Br. at 97, that might arise if same-sex couples are permitted to marry were not completely speculative and unfounded,[28] the Supreme Court has repeatedly held that opposition to equality or threats of violence or unrest by some citizens cannot justify depriving others of their constitutional rights. *See, e.g.*, *Palmer v. Thompson*, 403 U.S. 217, 226 (1971) ("Citizens may not be compelled to forgo their constitutional rights because officials fear public hostility . . . ."); *Cooper v. Aaron*, 358 U.S. 1, 16 (1958) (constitutional rights "are not to be sacrificed or yielded to the violence and

[28] All of the State's arguments based on speculation, fear, and unsubstantiated private views about the alleged inferiority of same-sex couples, as a matter of law, cannot constitute a legitimate state interest justifying marriage inequality. *See e.g.*, Aplt. Br. at 72-80. As the Supreme Court stated in *City of Cleburne*: "Mere negative attitudes or fear, unsubstantiated by factors which are properly cognizable" are not permissible bases for differential treatment. 473 U.S. at 448.

disorder" that might follow). In effect, the State is advocating that same-sex couples' constitutional freedoms should be subject to a "heckler's veto"—a veto that is granted only to those members of society having religious beliefs opposed to marriage for same-sex couples. Constitutional rights would be hollow indeed if courts were precluded from upholding them when some part of the population might be upset.

Further, the State's assertion that "[b]road religious support for marriage . . . exists only because the current legal definition" excludes same-sex couples simply has no mooring in reality. Aplt. Br. at 91. Just as the State's various parenting-related justifications fail to explain how excluding same-sex couples from marriage encourages opposite-sex couples to marry and have children, the State offers no rational reason to believe that permitting same-sex couples to exercise the freedom to enter into civil marriages will affect religious beliefs concerning marriage. Allowing same-sex couples to marry will not require any religious congregation to marry same-sex couples or otherwise alter its own beliefs or requirements concerning marriage by its members.

The State also argues that permitting same-sex couples to marry would infringe religious liberties in a variety of ways, including by creating possible tensions between public schools and parents, punishing school teachers who refused to endorse marriages by same-sex couples, punishing religious colleges for policies

related to married housing, revoking the tax-exempt status of churches, forcing religious institutions to cease adoption and foster care services that exclude same-sex couples, or prosecuting people in "wedding-related businesses" for denying services to same-sex couples. Aplt. Br. at 94-97.

These concerns are not legally tied to the issue of whether same-sex couples can marry. Indeed, almost all of the examples the State provides occurred in states that did not permit or recognize marriages of same-sex couples or are not related to marriage.[29] These cases involved alleged discrimination against either gay or lesbian *individuals* or *unmarried* same-sex couples. The State's remaining examples also involved disputes implicating same-sex relationships more broadly, rather than marriages of same-sex couples specifically.[30] These types of disputes simply reflect

[29] *See, e.g.*, Aplt. Br. at 95 n.65 (citing *Bob Jones University v. United States*, 461 U.S. 574 (1983)); Aplt. Br. at 95 n.66 (citing case from New Mexico, before the state permitted same-sex couples to marry); Aplt. Br. at 96 n.67 (citing incident involving public school teacher in New Jersey, before same-sex couples could marry in that state); Aplt. Br. at 96 n.68 (citing case involving a counseling student who refused to treat gay people in Michigan, a state that does not permit same-sex couples to marry); Aplt. Br. at 97 n.70 (citing a sexual orientation discrimination case under New York's Human Rights Law before same-sex couples were able to marry in that state).

[30] The State claims that religious social services might be forced to stop providing adoption and foster care services "unless they agree to provide those services in a manner contrary to their doctrines and beliefs." Aplt. Br. at 94. Yet the referenced situations concerned the application of state laws prohibiting sexual orientation discrimination to publicly-funded social service agencies, including those run by

the greater visibility and acceptance of gay and lesbian people in our culture; they can and do arise regardless of whether same-sex couples are permitted to marry.

Moreover, even if the State had offered any rational reason to believe that infringements of religious freedom would occur more frequently if same-sex couples could marry, it cites no authority for the remarkable proposition that a present, ongoing violation of one group of citizens' constitutional freedoms may be justified by a hypothetical concern that another group of citizens' rights could be violated at some point in the future. If infringements of religious liberty should occur, the courts are available to remedy them—just as this Court should remedy the constitutional harms that Amendment 3 inflicts on Plaintiffs today.

In sum, Amendment 3 fails even the test of minimal rationality. There is no reasonably conceivable way in which excluding same-sex couples from marriage advances any permissible aim of government. Indeed, the principal justification proffered by the State—a purported interest in preferring some parents over others—is not even a legitimate governmental interest.

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religious organizations. Such laws protect both married and unmarried same-sex couples and apply regardless of whether the state recognizes marriages of same-sex couples. Similarly, *Parker v. Hurley*, 514 F.3d 87, 93 (1st Cir. 2008), concerned parents who objected to a school's use of books depicting the existence of gay people. Such disputes are not unique to states that permit same-sex couples to marry.

VII. UTAH'S REFUSAL TO RECOGNIZE MARRIAGES OF SAME-SEX COUPLES VALIDLY MARRIED IN OTHER JURISDICTIONS IS UNCONSTITUTIONAL.

Utah's refusal to recognize same-sex couples' valid out-of-state marriages violates due process and equal protection for reasons that are independent from and in addition to the reasons the State's refusal to permit same-sex couples to marry within Utah is unconstitutional. As the Supreme Court recognized in *Windsor*, the marriages of same-sex couples entered into in other states share "equal dignity" with other couples' marriages, and those marriages are entitled to the same protections that the Constitution ensures for all other marriages. 133 S. Ct. at 2693. In *Windsor*, the Court held that DOMA "interfere[d] with the equal dignity" of the marriages of same-sex couples by treating those marriages as if they did not exist for purposes of federal law. *Id.*[31]

Utah's wholesale refusal to respect the marriages of same-sex couples who legally married in other states deprives those couples of due process and equal protection for the same reasons that the Supreme Court concluded in *Windsor* that the federal government's categorical refusal to respect such valid marriages infringed those constitutional guarantees. Like DOMA, Utah's anti-recognition

[31] Here, the District Court did not separately address this constitutional claim based on its conclusion that Amendment 3 and the related state laws barring same-sex marriages violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *See Kitchen*, 2013 WL 6697874, at *22-23.

laws unjustifiably intrude upon married same-sex couples' constitutionally-protected liberty interest in their existing marriages and constitute "a deprivation of the liberty of the person" protected by due process. *Id*. at 2695. Similarly, the anti-recognition laws deprive married same-sex couples of equal protection of the laws by discriminating against the class of legally married same-sex couples, not to achieve any important or even legitimate government interest, but simply to express disapproval of that class and subject that class to unequal treatment. *See id.* at 2695-96. As with DOMA, the challenged Utah anti-recognition laws' "principal effect is to identify a subset of state-sanctioned marriages and make them unequal." *Id.* at 2694. Utah's refusal to respect the otherwise valid marriages of same-sex couples cannot withstand constitutional scrutiny because "no legitimate purpose overcomes the purpose and effect to disparage and to injure" married same-sex couples. *Id.* at 2696.

A. Utah's Anti-Recognition Laws Are An Unusual Deviation From Its Longstanding Tradition And Practice Of Recognizing Valid Marriages From Other States.

Utah's anti-recognition laws represent a stark departure from the State's longstanding practice of recognizing valid marriages from other states even if such marriages could not have been entered into within Utah. The anti-recognition laws' departure from Utah's historical treatment of out-of-state marriages imposes severe harms on married same-sex couples, leaving those couples and their families in an

untenable limbo and effectively stripping them of an existing marital status for all state law purposes.

Before the enactment of House Bill 366 ("HB 366") in 1995, Utah law provided that "[m]arriages solemnized in any other country, state or territory, if valid where solemnized, are valid here." Utah Code § 30-1-4 (1994); *see also Cahoon v. Pelton*, 342 P.2d 94, 96 (Utah 1959) ("Generally, the laws of the state where a marriage is consummated determine its validity."), *overruled in part on other grounds by Norton v. Macfarlane*, 818 P.2d 8 (Utah 1991). This rule—known as the "place of celebration rule"—is recognized in every state and is a defining element of our federal system and American family law. *See, e.g.*, *McConnell v. McConnell*, 99 F. Supp. 493, 494 (D.D.C. 1951) ("The general and apparently universally accepted rule is that the validity of a marriage is to be determined by the law of the place of the celebration of the marriage, or the lex loci contractus.").

The place of celebration rule recognizes that individuals order their lives based on their marital status and "need to know reliably and certainly, and at once, whether they are married or not." Luther L. McDougal III et al., *American Conflicts Law* 713 (5th ed. 2001). This rule of marriage recognition also "confirms the parties' expectations, it provides stability in an area where stability (because of children and property) is very important, and it avoids the potentially hideous problems that would arise if the legality of a marriage varied from state to state." William M.

Richman & William L. Reynolds, *Understanding Conflict of Laws* 398 (3d ed. 2002). This firmly rooted doctrine comports with married couples' reasonable expectations that, in our highly mobile society, they may travel throughout the county secure in the knowledge their marriage will be respected in every state and the simple act of crossing a state line will not divest them of their marital status.

Although judicial decisions concerning recognition of out-of-state marriages historically have often referred to a common-law "public policy" exception to the place of celebration rule, courts' reliance on that exception to deny recognition to out-of-state marriages has been extremely rare in Utah and elsewhere. Indeed, "until the recent hysteria associated with same sex marriage, the public policy exception was fast becoming obsolete." Joseph William Singer, *Same Sex Marriage, Full Faith and Credit, and the Evasion of Obligation*, 1 STAN. J. C.R. & C.L. 1, 40 (2005); *see also,* James R. Browning, *Anti-Miscegenation Laws in the U.S.*, 1 Duke B. J. 26, 29, 35 (1951) (describing Utah's practice of recognizing valid interracial marriages from other states). Indeed, a categorical prohibition on recognition of an entire class of out-of-state marriages, in any context, "is very nearly unheard of in the United States." Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy,* 76 Tex. L. Rev. 921, 962 (1998).

Before the enactment of HB 366, the place of celebration rule had been entrenched in Utah law for nearly a century. *See, e.g.*, Utah Rev. Stat. § 1186 (1898).

For the reasons explained below, Utah's refusal to recognize the marriages of an entire category of persons who validly married in other states, solely to exclude a disfavored group from the ordinary legal protections and responsibilities they would otherwise enjoy, and despite the severely harmful impact of that refusal, cannot survive constitutional scrutiny under *Windsor*.

B. Utah's Anti-Recognition Laws Deprive Married Same-Sex Couples Of Due Process And Equal Protection.

Plaintiffs Archer and Call married in Iowa and are now being denied recognition of that marriage by the State of Utah. *Windsor* held that the federal government's refusal to recognize the legal marriages of same-sex couples violated due process because it burdened "many aspects of married and family life, from the mundane to the profound," 133 S. Ct. at 2694, and because its "avowed purpose and practical effect" were to treat those couples unequally, rather than to further a legitimate purpose, *id*. at 2693. Utah's anti-recognition laws deprive married same-sex couples of due process for the same reasons.

Windsor's holding means that the marriages of same-sex couples share "equal dignity" with other couples' marriages, and that legally married same-sex couples possess the same constitutionally protected liberty interests in their marriages as all other married couples. *Windsor*, 133 S. Ct. at 2693. Those liberty interests are protected against unjustified infringement by any level of government—federal,

state, or local and must be afforded "a substantial measure of sanctuary from unjustified interference by the State." *Roberts*, 468 U.S. at 618.

Laws that significantly burden constitutionally protected liberties, such as existing marital and family relationships, are subject to heightened scrutiny. *See, e.g.*, *Griswold*, 381 U.S. at 485-86, 503-04 (applying heightened constitutional scrutiny in striking down law barring use of contraceptives by married couples); *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (holding that where law burdened a protected family relationship, the court must "examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation."); *M.L.B.*, 519 U.S. at 116 (holding that state action burdening a protected parent-child relationship requires "close consideration"); *Windsor*, 133 S. Ct. at 2692 (holding that federal statute burdening marital relationships requires "careful consideration") (internal citations omitted). Plaintiffs have the same protected liberty interest in their marital relationships as did the plaintiffs in *Windsor*, *Loving*, *Griswold*, and other cases involving attempts by the government to burden protected family relationships.

Utah's anti-recognition laws also facially discriminate against the class of legally married same-sex couples—the same class at issue in *Windsor*—in violation of equal protection. *See id.* at 2695 ("The class to which DOMA directs its restrictions and restraints are those persons who are joined in same-sex marriages. .

. ."). That classification, in addition to unconstitutionally discriminating based on gender and sexual orientation, violates equal protection principles in an even more fundamental way—by singling out a disfavored group for disadvantageous treatment, not to further any legitimate goal, but to impose inequality. As *Windsor* recognized, such a law violates the most basic principles of due process and equal protection.

1. Utah's Anti-Recognition Laws Inflict Severe Harms On Married Same-Sex Couples And Their Children And Disrupt Their Marital And Family Relationships.

In a manner virtually unprecedented in this country's history (outside the context of anti-miscegenation laws), Utah's anti-recognition laws cause serious harms to families by disregarding the longstanding, deeply rooted, and otherwise near-universal rule that a marriage that is validly entered into by a couple living in one state will be recognized when the couple travels or relocates to another state. Utah has created an untenable and chaotic situation whereby the married Plaintiffs remain legally married in the state where they wed, are regarded as legally married in the many other states and countries that recognize the marriages of same-sex couples who marry in other jurisdictions, and are recognized legally married for purposes of most federal protections and responsibilities. But as long as they reside in Utah, these Plaintiffs' legal marriage, and those of other legally married same-sex couples, is deemed void and unenforceable under Utah law. The instability and

harms inflicted on these Plaintiffs and other married couples caught in this extraordinary situation are severe, continuing, and cumulative. "[N]ullification of a valid marriage when both partners wish to remain legally married constitutes the most extreme form of state interference imaginable in the marital relationship." Lois A. Weithorn, *Can a Subsequent Change in Law Void a Marriage that Was Valid at Its Inception? Considering the Legal Effect of Proposition 8 on California's Existing Same-Sex Marriages*, 60 Hastings L.J. 1063, 1125 (2009).

Utah's anti-recognition laws deprive same-sex couples of the certainty, stability, permanence, and predictability that marriage is designed to provide, protections that other couples who married outside Utah automatically enjoy.[32]

2. Like DOMA, Utah's Anti-Recognition Laws' Principal Purpose And Effect Is To Treat Married Same-Sex Couples Unequally.

Utah's anti-recognition laws have the same "avowed purpose and practical effect" as DOMA: to deny married same-sex couples all of the benefits and responsibilities that otherwise would flow from Utah's recognition of the valid marriages of couples who marry in other states. That purpose is apparent on the face of the laws themselves, which render "void" any marriages between same-sex

[32] Additionally, the federal government has not yet determined whether certain federal benefits and protections will accrue to married same-sex couples who live in states that do not recognize their marriages. *See Program Operations Manual System*, GN 00210.005, at https://secure.ssa.gov/apps10/poms.nsf/lnx/0200210005.

couples that are legally entered into in other states. *See* Utah Code § 30-1-2(5); Utah Code § 30-1-4; *see also* Utah Const. art. I, § 29. Like DOMA, Utah's anti-recognition laws were enacted "to ensure that if any State decides to recognize same-sex marriages, those unions will be treated as second-class marriages." *Windsor*, 133 S. Ct. at 2693-94. Like Section 3 of DOMA, the Anti-Recognition Laws therefore violate due process and equal protection because "no legitimate purpose overcomes the purpose and effect to disparage and to injure" married same-sex couples in this extraordinary manner. *Id*. at 2696.

C. Section 2 Of DOMA Provides No Justification For Amendment 3.

Section 2 of the federal DOMA does not "authorize" Amendment 3's denial of recognition to married same-sex couples, as the State asserts. Aplt. Br. at 49 n.12. Regardless of what Section 2 provides, this Court must decide whether *Utah's* anti-recognition laws satisfy the Fourteenth Amendment's commands of due process and equal protection of the laws. No statute that Congress passes can exempt Utah from those fundamental requirements. *See, e.g.*, *Shapiro v. Thompson*, 394 U.S. 618, 641 (1969); *Saenz v. Roe*, 526 U.S. 489, 508 (1999).

Moreover, even if it were relevant, Section 2 of DOMA is invalid for the same reasons *Windsor* held Section 3 to be invalid. Like Section 3, Section 2 targets legally married same-sex couples in an unprecedented manner. Never before has Congress passed a statute purporting to authorize states to ignore a whole class of

marriages. The Supreme Court also noted that the title of the statute itself—Defense of Marriage Act—evinced an improper discriminatory purpose, which applies equally to Section 2. *Windsor*, 133 S. Ct. at 2693. In light of *Windsor*'s analysis, it is apparent that Section 2 of DOMA is equally infected with the improper purpose that was fatal to Section 3.

VIII. FEDERALISM REQUIRES THAT STATES RESPECT THE CONSTITUTIONAL RIGHTS OF PERSONS WHEN REGULATING MARRIAGE.

The State argues that federalism gives states exclusive authority to regulate marriage. *See* Aplt. Br. at 4-6. But as *Windsor* affirmed, in our federal system, a state's exercise of that authority must "respect the constitutional rights of persons." 133 S. Ct at 2691; *see also id.* at 2692 (the state's power to regulate marriage is "subject to constitutional guarantees.").[33] Like the Supreme Court, this Court has recognized that a "state's power to legislate, adjudicate, and administer all aspects of family law . . . is subject to scrutiny by the federal judiciary within the reach of the Due Process and/or Equal Protection Clauses of the Fourteenth Amendment." *Wise v. Bravo*, 666 F.2d 1328, 1332 (10th Cir. 1982); *see also Loving*,

[33] In *Windsor*, the Supreme Court made clear that its holding was not based on principles of federalism, but on "basic due process and equal protection principles." 133 S. Ct. at 2693. The Court did not hold that DOMA was unconstitutional because the congressional exercise of federal power improperly encroached on the sovereignty of the states, but because DOMA created a "deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution." *Id.* at 2695.

388 U.S. at 7 (holding that a state's "powers to regulate marriage" must comply with "the commands of the Fourteenth Amendment"). Even when regulating in areas that are properly subject to their regulatory authority, states must respect fundamental constitutional rights, just as the federal government must respect those rights when regulating in areas that are subject to federal control. *Id.*; *see also Bond v. United States*, 131 S. Ct. 2353, 2364 (2011) (holding that federalism ultimately "secures the freedom of the individual"). Indeed, the entire purpose of the Fourteenth Amendment is to prohibit states from exercising their traditional authority in ways that deprive their citizens of liberties guaranteed by the federal Constitution.

For these reasons, the District Court correctly framed the issue before the Court and its relationship to our federal system of government:

> [R]egulation of marriage has traditionally been the province of the states, and remains so today. But any regulation adopted by a state, whether related to marriage or any other interest, must comply with the Constitution of the United States. *The issue the court must address in this case is therefore not who should define marriage, but the narrow question of whether Utah's current definition of marriage is permissible under the Constitution.*

Kitchen, 2013 WL 6697874, at *1 (emphasis added). Federalism means that this Court may not uphold a state law merely because it addresses matters that are primarily (or even exclusively) regulated by the states, but must exercise its independent authority to determine whether the state regulation at issue deprives individuals of rights guaranteed by the United States Constitution.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court affirm the decision of the District Court.

Dated: February 25, 2014

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs respectfully request oral argument, given the significance of the issues in this appeal to Plaintiffs and other same-sex couples in Utah that wish to marry, or to have their valid out-of-state marriages recognized in Utah.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), as modified by the Court's Order of February 7, 2014, because it contains 23,984 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I relied on my word processor, Microsoft Office Word 2010, to obtain said count.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14 point Times New Roman.

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ECF CERTIFICATION

Pursuant to Section II(I) of the Court's CM/ECF User's Manual, the undersigned certifies:

1. All required privacy redactions have been made;

2. Hard copies of the foregoing brief required to be submitted to the clerk's office are exact copies of the brief as filed via ECF; and

3. The brief filed via ECF was scanned for viruses using ESET NOD32 Antivirus 4.2.71.2 and according to that software is free of viruses.

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CERTIFICATE OF SERVICE

I, Peggy A. Tomsic, hereby certify that on February 25, 2014, I filed a true, correct, and complete copy of the foregoing Brief of Plaintiffs-Appellees Derek Kitchen, *et al.* and Addendum with the Court and served it on the following people via the Court's ECF System:

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ADDENDUM

Utah Const. art. I, § 29 [Marriage]

(1) Marriage consists only of the legal union between a man and a woman.

(2) No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect.

Utah Code § 30-1-2. Marriages prohibited and void

The following marriages are prohibited and declared void:

(1) when there is a husband or wife living, from whom the person marrying has not been divorced;

(2) when the male or female is under 18 years of age unless consent is obtained as provided in Section 30-1-9;

(3) when the male or female is under 14 years of age or, beginning May 3, 1999, when the male or female is under 16 years of age at the time the parties attempt to enter into the marriage; however, exceptions may be made for a person 15 years of age, under conditions set in accordance with Section 30-1-9;

(4) between a divorced person and any person other than the one from whom the divorce was secured until the divorce decree becomes absolute, and, if an appeal is taken until after the affirmance of the decree; and

(5) between persons of the same sex.

Utah Code § 30-1-4.1. Marriage recognition policy

(1)(a) It is the policy of this state to recognize as marriage only the legal union of a man and a woman as provided in this chapter.

(b) Except for the relationship of marriage between a man and a woman recognized pursuant to this chapter, this state will not recognize, enforce, or give legal effect to any law creating any legal status, rights, benefits, or duties that are substantially equivalent to those provided under Utah law to a man and a woman because they are married.

(2) Nothing in Subsection (1) impairs any contract or other rights, benefits, or duties that are enforceable independently of this section.