IN THE

United States Court of Appeals

FOR THE TENTH CIRCUIT

DEREK KITCHEN, individually, *et al.*,

Plaintiffs-Appellees,

—v.—

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

Defendants-Appellants.

MARY BISHOP, *et al.*,

Plaintiffs-Appellees,

—and—

SUSAN G. BARTON, *et al.*,

Plaintiffs-Appellees/Cross-Appellants,

—v.—

SALLY HOWE SMITH, in her official capacity as Court Clerk for Tulsa County, State of Oklahoma,

Defendant-Appellant/Cross-Appellee.

Case No. 13-4178: Appealed from a Decision of the United States District Court for the District of Utah · Civil Case No. 13-CV-00217-RJS · Honorable Robert J. Shelby
Case Nos. 14-5003 and 14-5006: Appealed from a Decision of the United States District Court for the Northern District of Oklahoma · Civil Case No. 04-CV-848-TCK-TLW · Honorable Terence C. Kern

BRIEF OF *AMICI CURIAE* DOUGLAS WORTHAM, NICHOLAS NERO, LYNN BELTRAN, CLAUDIA O'GRADY, STANFORD ROVIG, AND CHARLES FLUKE IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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INTEREST OF AMICI CURIAE[1]

This brief of *amici curiae* challenging the constitutionality of certain provisions in the Utah Constitution and statutory code is being submitted on behalf of three gay and lesbian couples, each of whom is in a committed, long-term relationship ("*Amici Curiae*" or the "*Amici Curiae* Couples"). *Amici Curiae* seek to obtain equal protection under the law in connection with the very significant and concrete rights, benefits, and duties that, for straight couples in Utah, come with marriage. Indeed, certain provisions in Utah's statutes and Constitution, that were not discussed fully in the proceedings below, are particularly egregious from a constitutional standpoint because they not only deny gay couples, like the *Amici Curiae*, access to marriage, but actually prohibit the provision of any governmental right, duty, or benefit to any gay couple regardless of the circumstances.

Douglas Wortham and Nicholas Nero have been together in a committed relationship for the past thirty years, living in Salt Lake City during that entire period. Doug and Nick own a home together and keep

[1] This brief is filed with the consent of all parties; thus, no motion for leave to file is required. *See* Joint Notice of Consent to File Brief of Amicus Curiae, Kitchen v. Herbert, No. 13-4178 (10th Cir. Jan. 24, 2014); *see also* Fed. R. App. P. 29(a). Counsel for a party did not author this brief in whole or in part, and no one other than the *Amici Curiae* or their counsel contributed money that was intended to fund the preparation or submission of this brief.

joint financial accounts. Doug has been employed as a French teacher at a private high school for the past thirty-six years, and Nick works in the travel industry. Doug and Nick would like to file joint tax returns, and are concerned about the financial consequences to their estate—accumulated over their three decades together—when one of them passes away. *See, e.g.*, Utah Code Ann. § 59-10-503(1) (authorizing married couples to file joint tax returns); Utah Code Ann. §§ 75-2-102, -103, -202(1) (establishing the rights of the surviving spouse of one who has died intestate). Additionally, Doug and Nick are also concerned about the complexities of medical and end-of-life decisions without any legal recognition of their relationship. *See, e.g.*, Utah Code Ann. § 75-2a-108(1)(b) (appointing an adult's spouse as surrogate to make medical decisions on behalf of the ailing spouse).

Lynn Beltran and Claudia O'Grady have been in a relationship for fourteen years. They were married on December 23, 2013 in Salt Lake County. Lynn and Claudia have both dedicated their careers to public service. As public employees, although Lynn and Claudia both participate as individuals in the Utah retirement system, neither of them will be able to pass those benefits on to the other when she dies. *See, e.g.*, Utah Code Ann. § 49-12-402(3) (authorizing only a "lawful spouse" to collect continuing monthly payments when a public employee or retiree passes away). They

would also very much like to participate jointly in the state health system, since such participation would provide them with several advantages. They are not permitted to do so solely because they are lesbians. *See, e.g.*, Pub. Emps. Health Plan, Benefits Summary 27 (2013-2014), *available at* https://www.pehp.org/ mango /pdf/pehp/stat/BenefitsSummary/pdf (dependent means subscriber's "lawful spouse").

Stanford Rovig and Charles Fluke, who have been together in a relationship for approximately eight years, were married on December 31, 2013 in Salt Lake County. As retirees, Stan and Charles live an active life in Salt Lake City, regularly attending the symphony, opera, and ballet. They too are concerned that they will be unable to take advantage of certain tax, inheritance, and other rights should one of them become sick or when one of them passes away. *See, e.g.*, Utah Code Ann. § 59-10-503(1); Utah Code Ann. §§ 75-2-102, -103, -202(1); Utah Code Ann. § 75-2a-108(1)(b).

SUMMARY OF ARGUMENT

The district court properly held that Amendment 3 and Section 30-1-4.1 are unconstitutional in their entirety. While the district court was correct for all of the reasons articulated in its opinion, there is a separate, independent basis for holding these Utah laws unconstitutional that was not addressed by the district court. In particular, both Amendment 3 and Section

30-1-4.1 discriminate against gay couples not only by denying them the right to marry—itself clearly unconstitutional—but also because they each contain additional provisions that blatantly and permanently deny gay couples *any legal rights as a couple in any form whatsoever*. Utah Const. art. I, § 29; Utah Code Ann. § 30-1-4.1.

More specifically, Utah Code Section 30-1-4.1(1)(b) provides that:

> 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.

(emphasis added). Likewise, Section 2 of Amendment 3, now set forth as Article I, Section 29 of the Utah Constitution, provides as follows:

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

The scope of the above-quoted provisions is breathtaking. They expressly bar the State of Utah from recognizing *any* legal rights, responsibilities, or protections—regardless of the subject matter—to any member of any gay couple at any time or in any place. By depriving the gay citizens of Utah access to myriad statutory rights and benefits available to straight couples through marriage, these laws constitute independent and

grievous violations of the constitutional guarantee of equal protection. Effectively, what these provisions do is to write inequality into Utah law in violation of the Fourteenth Amendment to the United States Constitution. *See United States* v. *Windsor*, 133 S.Ct. 2675 (2013); *Romer* v. *Evans*, 517 U.S. 620 (1996).

ARGUMENT

I. The Decision Below Should Be Affirmed

The United States Supreme Court has now explicitly recognized in *Windsor* that gay men and lesbians (and their relationships) have equal dignity as straight people. *United States* v. *Windsor*, 133 S.Ct. 2675, 2693 (2013). This is obviously true whether a court is considering Edie Windsor and Thea Spyer's forty-four years together in *Windsor*, or Douglas Wortham and Nicholas Nero's thirty-year union here. The Supreme Court in *Windsor* correctly understood the marriages of gay couples to be far "more than a routine classification for purposes of certain statutory benefits," but instead a "far-reaching legal acknowledgment of the intimate relationship between two people, a relationship deemed by the State worthy of dignity in the community equal with all other marriages." *Id.* at 2692–93. Thus, the essence of the Court's decision in *Windsor* is that gay people, like straight people, have dignity, and that the U.S. Constitution mandates that this

dignity must be respected equally under the law. *See, e.g.*, *id.* at 2693 ("[I]nterference with the *equal dignity* of same-sex marriages . . . was more than an incidental effect of the federal statute.") (emphasis added); *id.* at 2692 ("[T]he State's decision to give this class of persons the right to marry conferred upon them a *dignity* and status of immense import.") (emphasis added); *id.* at 2696 ("The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and *dignity*.") (emphasis added).

Because gay people are entitled to be treated in a way that recognizes their equal dignity under the law, there can be no possible justification for Utah's radically disparate treatment of them here. The Equal Protection Clause, as this Court has stated in *SECSYS, LLC* v. *Vigil*, requires that a court determine: (1) "whether the challenged state action intentionally discriminates between groups of persons" and (2) if so, "whether the state's intentional decision to discriminate can be justified by reference to some upright government purpose." 666 F.3d 678, 685–86 (10th Cir. 2012). As the district court concluded, Utah's laws barring gay couples from being married cannot possibly satisfy that standard and must be set aside as unconstitutional because they "conflict[] with the United States

Constitution's guarantee of equal protection and due process under the law." *Kitchen* v. *Herbert*, No. 2:13-cv-00217, 2013 WL 6697874, at *1 (D. Utah Dec. 20, 2013). Following *Windsor*, the district court correctly reasoned that "[t]he Constitution's protection of the individual rights of gay and lesbian citizens is equally dispositive whether this protection requires a court to respect a state law, as in *Windsor*, or strike down a state law, as the Plaintiffs ask the court to do here." *Id.* at *7.

Not surprisingly, a large number of other federal district courts have reached the exact same conclusion. *See Bourke* v. *Beshear*, No. 3:13-CV-750, 2014 WL 556729, at *12 (W.D. Ky. Feb. 12, 2014) ("*Romer*, *Lawrence*, and finally, *Windsor* . . . ha[ve] led to this place and this time, where the right of same-sex spouses to the state-conferred benefits of marriage is virtually compelled."); *Bishop* v. *United States ex rel. Holder*, No. 4:04-CV-848, 2014 WL 116013, at *17 (N.D. Okla. Jan. 14, 2014) ("This Court interprets *Windsor* as an equal protection case holding that DOMA drew an unconstitutional line between lawfully married opposite-sex couples and lawfully married same-sex couples." (citing *Windsor*, 133 S.Ct. at 2694)); *Obergefell* v. *Wymyslo*, No. 1:13-CV-501, 2013 WL 6726688, at *9 (S.D. Ohio Dec. 23, 2013) ("Defendants have not provided evidence of any state interest compelling enough to counteract the harm Plaintiffs suffer

when they *lose*, simply because they are in Ohio, the immensely important dignity, status, recognition, and protection of lawful marriage." (citing *Windsor*, 133 S.Ct. at 2692)); *Lee* v. *Orr*, No. 1:13-CV-8719, 2013 WL 6490577, at *3 (N.D. Ill. Dec. 10, 2013) ("Equally compelling are the intangible personal and emotional benefits that the dignity of equal and official marriage status confers." (citing *Windsor*, 133 S.Ct. at 2692)); *Gray* v. *Orr*, No. 1:13-CV-8449, 2013 WL 6355918, at *4 (N.D. Ill. Dec. 5, 2013) ("Equally, if not more, compelling is Plaintiffs' argument that . . . they will also be deprived of enjoying the less tangible but nonetheless significant personal and emotional benefits that the dignity of official marriage status confers." (citing *Windsor*, 133 S.Ct. at 2692)).

Indeed, since the Supreme Court issued its *Windsor* decision last June, no fewer than *fourteen* courts throughout the United States have utilized this core principle of equal dignity in *Windsor* to extend rights to gay people.[2]

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[2] *See Bassett* v. *Snyder*, 951 F. Supp. 2d 939 (E.D. Mich. 2013); *Obergefell* v. *Kasich*, No. 1:13-CV-501, 2013 WL 3814262 (S.D. Ohio July 22, 2013); *Cozen O'Connor, P.C.* v. *Tobits*, No. 2:11-CV-00045, 2013 WL 3878688 (E.D. Pa. July 29, 2013); *Cooper-Harris* v. *United States*, No. 2:12-CV-00887, 2013 WL 4607436 (C.D. Cal. Aug. 29, 2013); *Garden State Equality* v. *Dow*, 82 A.3d 336 (N.J. Super. Ct. 2013); *Gray* v. *Orr*, No. 1:13-CV-8449, 2013 WL 6355918 (N.D. Ill. Dec. 5, 2013); *Lee* v. *Orr*, No. 1:13-CV-8719, 2013 WL 6490577 (N.D. Ill. Dec. 10, 2013); *Griego* v. *Oliver*, 316 P.3d 865 (N.M. 2013); *Kitchen* v. *Herbert*, No. 2:13-CV-217, 2013 WL 6697874 (D. Utah Dec. 20, 2013); *Obergefell* v. *Wymyslo*, No. 1:13-CV-501, 2013 WL 6726688 (S.D. Ohio Dec. 23, 2013); *Bishop* v. *United States*

Significantly, not a single court faced with these issues has gone the other way. *See, e.g.*, David S. Cohen and Dahlia Lithwick, *It's Over: Gay Marriage Can't Lose in the Courts*, Slate, Feb. 14, 2014 (noting that, subsequent to *Windsor*, "all [judicial decisions concerning gay rights] have found for equality").

II. The Relevant Provisions of Utah's Constitution and Statutes Deprive Gay Couples of Rights Available to Other Couples Through Marriage

As discussed above, the Utah Constitution prohibits gay and lesbian couples not only from marrying, but also prohibits them from receiving *any* of the benefits available to married couples in any circumstances. Utah Code Section 30-1-4.1(1)(b) could hardly be more explicit when it states that: "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." (emphasis added). This language on its face purports to prohibit the government in Utah from providing even specific, discrete benefits to gay couples such as the right to make medical decisions for one's

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ex rel. Holder, No. 4:04-CV-848, 2014 WL 116013 (N.D. Okla. Jan. 14, 2014); *SmithKline Beecham Corp.* v. *Abbott Labs.*, 740 F.3d 471 (9th Cir. 2014); *Bourke* v. *Beshear*, No. 3:13-CV-750, 2014 WL 556729 (W.D. Ky. Feb. 12, 2014); *Bostic* v. *Rainey*, No. 2:13-CV-395, 2014 WL 561978 (E.D. Va. Feb. 13, 2014).

partner in case of emergency, or the right to participate as a family member in a health insurance plan. In other words, gay people in Utah are permanently disabled under Utah law from being treated as anything other than second-class citizens.

As when construing any statute, Section 30-1-4.1 and Amendment 3 must be examined as a whole, not merely as isolated sections. *See Food & Drug Admin.* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). Thus, while this Court must give careful attention to Utah's prohibition of marriages between gay people, its analysis cannot end there. The Court must also decide whether Utah's prohibition of gay people from ever obtaining *any* rights as committed couples—at *any* time and under *any* circumstances—passes constitutional muster. For the reasons set forth below, it does not.

In finding DOMA unconstitutional in *Windsor*, Justice Kennedy emphasized that Section 3 of DOMA "touches many aspects of married and family life, from the mundane to the profound . . . [and] divests married same-sex couples of the duties and responsibilities that are an essential part of married life and that they in most cases would be honored to accept were DOMA not in force." *Windsor*, 133 S.Ct. at 2694–95. *See also* Transcript of Oral Argument at 71, United States v. Windsor, 133 S.Ct. 2675 (2013)

(No. 12-307) ("Justice Ginsburg: [I]t's—as Justice Kennedy said, 1,100 statutes, and it affects every area of life . . . [DOMA says there are] two kinds of marriage, the full marriage, and then this sort of skim milk marriage."). The *Windsor* court catalogued many of the key injuries wrought by DOMA: it "prevent[ed]" access to "government healthcare benefits," "deprive[d]" gay couples "of the Bankruptcy Code's special protections," "prohibit[ed]" gay couples "from being buried together in veterans' cemeteries," rendered "inapplicable" protections for the family members of United States officials, judges, and federal law enforcement officers, "br[ought] financial harm to children of same-sex couples . . . rais[ing] the cost of health care for families by taxing health benefits provided by employers to their workers' same-sex spouses," and "denie[d] or reduce[d] benefits allowed to families upon the loss of a spouse and parent, . . . [which] are an integral part of family security." *Id*. at 2694–95.

It cannot be seriously disputed that Section 2 of Amendment 3 and Utah Code Section 30-1-4.1(1)(b), by failing to grant equal dignity to gay couples, do exactly the same thing. Just as DOMA worked to "impose restrictions and disabilities" on gays and lesbians like Edie Windsor living in New York, the Utah Code and administrative regulations provide scores of significant benefits and rights to Utah citizens, "from the mundane to the

profound." *Windsor*, 133 S.Ct. at 2694. They govern financial decisions and financial security, familial relationships and parental obligations, access to healthcare and the authority to make medical decisions for a loved one, estate planning and the transfer of assets.[3] The deliberate withholding of these statutory protections from committed gay and lesbian couples in Utah offends basic principles of equal protection. An illustrative though not comprehensive list of some of the more significant rights and benefits is discussed below.

- **Income tax**. Utah law authorizes married couples to file joint tax returns. Utah Code Ann. § 59-10-503(1). For couples such as the *Amici Curiae*, who keep joint accounts and co-own property, being able to file joint returns that reflect their financial interconnectedness would obviate the unnecessary complication and expense of filing taxes as if they lived separate financial lives. In addition, for some couples, filing jointly would reduce their overall tax burden compared to filing two separate individual returns. Adding insult to injury, the State of Utah has announced that gay

[3] Notably, most of these benefits accrue to married couples without regard to the presence of children, thereby thoroughly undermining the "child-centric" view of marriage advanced by the State to justify its discriminatory denial of these benefits and rights to all gay couples. *See, e.g.*, Brief of Appellants at 72, Kitchen v. Herbert, No. 13-4178 (10th Cir. Feb. 3, 2014) ("The State's fundamental public interest in marriage lies in maximizing the welfare of children—present and future.").

and lesbian couples who married between December 20, 2013 and December 31, 2013 may file joint state income taxes for 2013, but not for future years, even though the State does not recognize the validity of these marriages. Utah State Tax Comm'n, Individual Income Tax Returns for Same-Sex Couples for Tax Year 2013 (Jan. 15, 2014), *available at* http://tax.utah.gov/notice/2014-01-15.pdf.

- **Retirement and health benefits for public employees**. Public employees in Utah are entitled to participate in generous state retirement plans and access affordable healthcare for their families. However, the most beneficial retirement payment options available under the Utah State Retirement and Insurance Benefit Act are available *only* to the "spouse" of a retiree, and not to any other designated beneficiary. *See, e.g.*, Utah Code Ann. § 49-11-609(3)(a); Utah Code Ann. § 49-12-402(3). For example, if a public employee or retiree passes away, only a "lawful spouse" is authorized to collect continuing monthly payments; gay partners are ineligible for this important source of income. Utah Code Ann. § 49-12-402(3).

As a result, gay and lesbian employees, including *amici* Lynn Beltran and Claudia O'Grady, are denied full access to the benefits they have earned through their efforts and service. Some public employees, including Claudia O'Grady, purchase health insurance through Public Employees Health

Program ("PEHP"), sponsored by the State. An employee's spouse can join the plan for a nominal fee, but gay and lesbian partners, including Claudia's partner Lynn, are not allowed to do so.[4]

- **Family and parenthood**. Utah law expressly prohibits gay partners from adopting children: "A child may not be adopted by a person who is cohabitating in a relationship that is not a legally valid and binding marriage under the laws of this state." Utah Code Ann. § 78B-6-117(3).[5] Further, the inability to establish a legally recognized parent-child relationship excludes gay and lesbian couples and their children from many rights and obligations

[4] Pub. Emps. Health Plan, Benefits Summary 27 (2013-2014), *available at* https://www.pehp.org/mango/pdf/pehp/star/BenefitsSummary.pdf ("'Dependent' means: 1. The Subscriber's lawful spouse. Adequate legal documentation may be required."); *id.* at 20 ("PEHP shall also allow you and/or your Dependents to enroll if you gain an eligible Dependent through marriage, birth, adoption or placement for adoption.").

[5] Even where a gay individual, prior to cohabitating, lawfully adopted a child, Utah law prevents a gay partner from later becoming a second parent to that child. Curiously, state law authorizes single, gay individuals to adopt. Utah Code Ann. § 78B-6-117(4) (any single individual can adopt under certain circumstances, for example, if there are no qualified married couples or if it is in the best interests of the child). However, if a gay individual enters into a committed, long-term relationship and lives with his or her partner, the State prevents that child from benefitting from two loving parents rather than only one. Thus, contrary to the State's assertion that the State "does not interfere with adults' ability to commit to an exclusive, loving relationship with others of the same sex, or bring children into that relationship," Brief for Appellants, *supra* note 3, at 100, Utah's laws *expressly prevent* gay couples from starting a family via adoption.

established by the parent-child relationship under Utah law.[6] In addition, despite the great need for people to serve as foster parents, Utah is one of only a handful of states to prohibit gay and lesbian couples from being licensed to serve as foster or proctor parents, limiting such licenses only to "[l]egally married couples and single individuals." Utah Admin. Code r. 501-12-6(1)(b).

- **Healthcare decisions**. Utah law presumes that gay people are not qualified or permitted to make medical decisions on behalf of their committed, long-term partners. In the absence of an advance health-care directive, the following individuals, in order of priority, are appointed as surrogates: (1) the adult's spouse (which obviously cannot include a gay partner); or (2) a child, parent, sibling, grandchild, or grandparent. Utah Code Ann. § 75-2a-108(1)(b). Utah does not authorize a gay or lesbian partner to serve as a surrogate.

- **Probate, transfer of assets, and statutory claims**. The Utah Uniform Probate Code protects and provides for surviving spouses, but denies these rights to surviving gay and lesbian partners. Gay partners are prevented from obtaining the elective share a surviving spouse is able to take

[6] *See, e.g.*, Utah Code Ann. Title 53a (State System of Public Education); Utah Code Ann. Title 62a (Utah Human Services Code); Utah Code Ann. Title 75 (Utah Uniform Probate Code); Utah Code Ann. Title 76 (Utah Criminal Code).

from the decedent's estate, which is property that can be used to support the surviving spouse even when the decedent's will makes no provision for such support. Utah Code Ann. § 75-2-202(1).[7] Additionally, gay partners are not included within the laws of intestate succession. Utah Code Ann. §§ 75-2-102, -103 (describing "heirs" and their respective shares).[8]

Statutory rights of action for wrongful death are also not available to gay men and lesbians in Utah. The cause of action is only for the benefit of the decedent's statutory heirs, which excludes a surviving gay partner. Utah Code Ann. § 78B-3-105; Utah Code Ann. § 78B-3-106(1); Utah Code Ann. § 78B-3-106.5(1). Similarly, if there is a workplace accident, a spouse, but again, not a gay or lesbian partner, is authorized to collect worker's compensation. Utah Code Ann. § 34A-2-403. And while spouses of certain public employees (such as police officers) who die in the line of duty are entitled to statutory death benefits, gay partners are excluded from these

[7] The surviving spouse is also entitled to a homestead allowance in the amount of $22,500, Utah Code Ann. § 75-2-402, and to $15,000 in household furniture, automobiles, furnishings, appliances, and personal effects, Utah Code Ann. § 75-2-403.

[8] In addition, several other laws reference the Probate Code's scheme of intestate succession. For example, where a public employee does not designate a beneficiary, any death benefits are paid in accordance with the order of precedence established by the Probate Code. Utah Code Ann. § 49-12-501(11).

benefits. Utah Code Ann. § 49-14-501(1) (spouse of public safety officer); Utah Code Ann. § 49-16-501(1) (spouse of firefighter).

- **Misc. Duties**. With rights, of course, come responsibilities. Gay couples in Utah are not only prohibited from receiving any of the benefits of marriage, but they are also exempt from any of its responsibilities. Thus, when a gay couple separates, there are no available options for legally-sanctioned divorce, alimony, or child support. *See* Utah Code Ann. § 30-3-1(3) (divorce only available for those in a "marriage"); Utah Code Ann. § 30-3-5 (court authority in a divorce proceeding to enter orders related to the disposition of property, alimony, and child custody). Nor is a state employee who is gay required to disclose information about his or her partner for conflict of interest purposes. *See, e.g.*, Utah Code Ann. §§ 17-16a-6, 17-16a-7, 67-16-7 (requiring disclosure by state and county officers and employees of a spouse's ownership interest in businesses regulated by or doing business with the state or county); Utah Code Ann. § 36-11-101 *et seq.* (requiring disclosures by lobbyists regarding expenditures for the benefit of "public officials," defined to include the spouse of an elected official); Utah Code Ann. § 63G-6a-2304.5 (prohibiting gifts or gratuities to the spouse of a state procurement officer and prohibiting a state procurement officer from soliciting gifts or gratuities for himself or a spouse).

* * *

In sum, not only does Utah deny gay and lesbian couples the right to marry, but it expressly prohibits them from ever enjoying the many tangible benefits that married couples in Utah have—solely because they are gay. In the words of the Supreme Court, however, "[t]hese are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society." *Romer*, 517 U.S. at 631. The irrational denial of these important rights and benefits available to straight couples is another significant reason for striking down Amendment 3 and Section 30-1-4.1 as violations of the Equal Protection Clause of the Fourteenth Amendment.

III. The Utah Laws Precluding the Provision of Any Rights to Gay Couples in Utah Violate the Constitution Under *Romer* and *Windsor*

In *Romer* v. *Evans*, the Supreme Court held that an amendment to the Colorado Constitution that prevented both the State of Colorado and individual Colorado municipalities from protecting gay people from discrimination was unconstitutional on equal protection grounds.[9] 517 U.S.

[9] The relevant amendment, Colo. Const. art. II, § 30b, stated that:

620 (1996). The *Romer* court found the Colorado amendment to be unconstitutional because it "classifie[d] homosexuals not to further a proper legislative end but to make them unequal to everyone else." *Id.* at 635. The Supreme Court in *Romer* correctly determined that such blatant and far-reaching discrimination was a violation of the Fourteenth Amendment's guarantee of equal protection. As the Court held, "[a] State cannot so deem a class of persons a stranger to its laws." *Id.*

Last term, in *Windsor*, the Court reaffirmed this principle in the strongest possible terms. The Court emphasized that the "Constitution's 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." *Windsor*, 133 S.Ct. at 2693 (internal quotations omitted). Just like the state constitutional amendment at issue in *Romer*, the

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> Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.
>
> *Id.* at 624.

Utah laws at issue here "withdraw[] from homosexuals, but no others, specific legal protection . . . ." *Romer*, 517 U.S. at 627.

Here, as in *Romer* and *Windsor*, there is significant evidence of improper animus towards gay and lesbian people in the discussion surrounding the passage of Amendment 3 in Utah. The district court, for example, pointed out certain statements "in the Voter Information Pamphlet that was provided to Utah voters," including "that the amendment was necessary to 'maintain[] public morality' and to ensure the continuation of 'the ideal relationship where men, women and children thrive best.'" *Kitchen* v. *Herbert*, 2013 WL 6697874, at *23.

There is also powerful evidence of animus published in the media at the time of Amendment 3's enactment. For example, an article in the local paper reported that sixty Christian leaders had endorsed Amendment 3, "saying that traditional marriage is necessary to protect the *moral fiber of society*" (emphasis added). Linda Thomson, *35 Faith Leaders Oppose Amendment*, Deseret Morning News, Oct. 31, 2004. *See also* Richard G. Smurthwaite, Letter to the Editor, *Yes on Amendment 3*, Deseret Morning News, Oct. 17, 2004 ("[T]here are many who equate legality with *moral* correctness. A vote in favor of Amendment 3 is a vote to reaffirm society's judgment that homosexuality should not be legitimized or promoted by its

laws." (emphasis added)); Deborah Bulkeley, *Same-sex: LDS Stand*, Deseret Morning News, Oct. 20, 2004 (quoting Senate Majority Whip John Valentine's characterization of the LDS Church's support of Amendment 3: "The Church 'has consistently made statements on *moral issues* . . . . This new statement is consistent with that concern about *moral issues*.'" (emphases added)); Layne K. Abbott, Letter to the Editor, *Homosexuality is Wrong*, Deseret Morning News, Nov. 12, 2004 ("There are those of us who believe there is a wrong and a right based on a *morality* that was not defined by man but by his creator. This is why we passed Amendment 3." (emphasis added)).

These statements clearly reflect impermissible "animus" toward gay and lesbian couples. *See Windsor*, 133 S.Ct. at 2693 (discussing the necessity of "careful consideration" in "determining whether [discriminatory laws are] motivated by an improper animus or purpose"). The term "animus" for equal protection purposes does not necessarily mean that an individual must have overt hatred or hostility toward gay people. Animus can reflect instead an "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 Trustees of Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J.,

concurring). In other words, animus can be demonstrated as a result of fundamental changes in the societal understanding over time of gay people and their relationships. *See Lawrence* v. *Texas*, 539 U.S. 558, 578 (2003) ("[T]imes can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress."); Transcript of Oral Argument at 106, United States v. Windsor, 133 S.Ct. 2675 (2013) (No. 12-307) ("Chief Justice Roberts: '84 Senators based their vote on moral disapproval of gay people?' Ms. Kaplan: 'No . . . I think what is true, Mr. Chief Justice, is that times can blind, and that back in 1996 people did not have the understanding that they have today.'").

In *Windsor*, the Supreme Court concluded that a statement in the 1996 House Report for DOMA containing similar "moralistic" language disapproving of gay people compelled the conclusion that DOMA was unconstitutional. *See Windsor*, 133 S.Ct. at 2693 ("The House concluded that DOMA expresses 'both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality.'" (citation omitted)). So too here. The statements from 2004 stating that passage of Amendment 3 in Utah was necessary "to maintain public morality" or the "moral fiber of society" make it absolutely clear that a constitutionally impermissible motive—*i.e.*, moral

disapproval of gay people—was a motivating force behind Amendment 3. *Id.* at 2694 ("The stated purpose of the law was to promote an 'interest in protecting the traditional moral teachings reflected in heterosexual-only marriage laws.'" (citation omitted)).

While several *amici curiae* on the other side argue that Utah voters were motivated by rationales other than "moral disapproval" or animus, and that animus is irrelevant in any event,[10] the Supreme Court has made it clear that the existence of animus, or "moral disapproval," by at least some of an anti-gay law's backers is a highly relevant concern. *See Romer*, 517 U.S. at 632 ("[T]he amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state

[10] *See*, *e.g.*, Brief for United States Conference of Catholic Bishops et al. as Amici Curiae Supporting Defendants-Appellants at 7–11, Kitchen v. Herbert, No. 13-4178 (10th Cir. Feb. 10, 2014) (arguing that voters acted to protect traditional marriage based on their religious beliefs and to safeguard against activist state judges rather than out of animus); Brief for the State of Indiana et al. as Amici Curiae Supporting Defendants-Appellants at 15, Kitchen v. Herbert, No. 13-4178 (10th Cir. Feb. 10, 2014) (arguing that voters were motivated by the "positive, important and concrete societal interests in the procreative nature of opposite-sex relationships" rather than by animus); Brief for the State of Michigan as Amicus Curiae Supporting Defendants-Appellants at 4, Kitchen v. Herbert, No. 13-4178 (10th Cir. Feb. 10, 2014) (arguing that voters were "simply acknowledg[ing]" that same-sex relationships are not procreative); Brief for Perry et al. as Amici Curiae Supporting Neither Party at 6–7, Kitchen v. Herbert, No. 13-4178 (10th Cir. Feb. 10, 2014) (arguing that "[e]stablished principles of constitutional decision-making are entirely adequate to determine the constitutional claims . . . without requiring lower courts to impugn the motives of supporters of the challenged laws").

interests."); *Lawrence*, 539 U.S. at 583 (2003) (O'Connor, J., concurring) ("Moral disapproval of a group cannot be a legitimate government interest under the Equal Protection Clause because legal classifications must not be 'drawn for the purpose of disadvantaging the group burdened by the law.'" (citation omitted)).

After all, the Supreme Court in *Windsor* made no attempt to track the vote of each Congressman and Senator who voted for DOMA. And, obviously, it would have been impossible for any court to do so since no human can ever know what was in the hearts or minds of every legislator or voter who voted in favor of a law. But the Supreme Court has now made it clear that such a psychological or philosophical analysis is not only unnecessary, but beside the point. In *Windsor*, the very fact that there was significant evidence of unconstitutional animus directed toward gay people was enough. *Windsor*, 133 S.Ct. at 2693 ("The House concluded that DOMA expresses 'both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality.' The stated purpose of the law was to promote an 'interest in protecting the traditional moral teachings reflected in heterosexual-only marriage laws.'" (citations omitted)); *see also* Transcript of Oral Argument at 74, United States v. Windsor, 133 S.Ct. 2675 (2013)

(No. 12-307) ("Mr. Clement: Does the House Report say that? Of course, the House Report says that. And if that's enough to invalidate the statute, then you should invalidate the statute.").

The sheer breadth of the Utah laws at issue here also demonstrates their unconstitutionality. The laws here preclude *any* recognition of relationships between gay and lesbian couples and deprive those couples of any and all rights and benefits to which they would have been entitled if they were not gay. *See Windsor*, 133 S.Ct. at 2693 ("In determining whether a law is motivated by an improper animus or purpose, 'discriminations of an unusual character' especially require careful consideration." (citing *Romer*, 517 U.S. at 633)). None of the various rationales proffered by the State, whether child-centric or otherwise, would support the laws of such vast scope here. In Utah now, as in Colorado before *Romer*, "[t]he breadth of the amendment is so far removed from these particular justifications that we find it impossible to credit them." *Romer*, 517 U.S. at 635. Significantly, as discussed above, Amendment 3 even includes a bar against imposing any "duties" on gay couples, such as those imposed upon straight couples under the ethics or anti-nepotism laws. There could be no possible explanation for these exclusions of gay people other than irrational animus. The far-reaching nature of the Utah laws thus only reinforces the conclusion that the

"sheer breadth" of the challenged laws "is so discontinuous with the reasons offered for [them] that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests." *Romer*, 517 U.S. at 632.

For these very reasons, even before the voters had approved Utah's Amendment 3, then Utah Attorney General Mark Shurtleff, a Republican, *who was otherwise opposed to allowing gay couples to marry in Utah*, was concerned about the very provisions of Utah law at issue in this brief. He observed, for example, that Amendment 3 "could strip away many fundamental rights for parents and their children in common law marriages and other relationships during death, disability or breakups . . . ." Press Release, Attorney General Explains Opposition to Proposed Utah Marriage Amendment (Aug. 6, 2004) (*available at* https://web.archive.org/web/20040912045631/http://attorneygeneral.utah.gov/PrRel/praug062004.htm) ("Utah AG Press Release"). Presumably in consideration of the Supreme Court's decision in *Romer*, he further warned that Amendment 3 "*goes too far. It could forever deny to a group of citizens the right to approach its legislature to seek benefits and protections.* That is bad law and should be rejected by the fair-minded citizens of the state of Utah." Utah AG Press Release (emphasis added). *See also* Lisa Riley Roche & Deborah Bulkeley,

Walker Backs Marriage Measure, Deseret Morning News, Oct. 8, 2004 (reporting that although Governor Walker supported Amendment 3, she "raised questions [] about the impact of the proposal's second part" and would have preferred only the first clause).[11]

In *Romer*, the Supreme Court articulated this exact same principle—the Court there observed that the Colorado amendment at issue was unconstitutional because it "withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination. . . . Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint. . . . This is so no matter how local or discrete the harm, no matter how public and widespread the injury." *Romer*, 517 U.S. at 627, 631. As the former Utah Attorney General concluded a decade ago, the same, of course, is true with respect to the Utah laws at issue here. These

[11] The Indiana House of Representatives recently determined that a similar provision in a proposed Indiana constitutional amendment "went too far," permanently jeopardizing the access of gay people to benefits and protections. *See* Dan Carden, *House Divorces Second Sentence from Marriage Amendment*, The Times of Nw. Ind., Jan. 27, 2014, *available at* http://www.nwitimes.com/news/local/govt-and-politics/house-divorces-second-sentence-from-marriage-amendment/article_681f205a-bffa-5b12-9e7e-9cf658703e9e.html. Although the Arizona legislature recently passed an even more discriminatory bill, S.B. 1062, 51st Leg., 2nd Sess. (Ariz. 2014), given the Ninth Circuit's recent opinion that heightened scrutiny applies to laws that discriminate against gay people, *SmithKline Beecham Corp.* v. *Abbott Labs.*, 740 F.3d 471, 484 (9th Cir. 2014), if passed into law, that bill is virtually certain to be struck down as unconstitutional.

laws effectively establish a permanent, perpetual caste system of discrimination, or "skim-milk" citizenship, for gay people in the State of Utah. As the Supreme Court has made clear, "[i]t is not within our constitutional tradition to enact laws of this sort." *Romer*, 517 U.S. at 633.

CONCLUSION

In addition to prohibiting gay and lesbian marriage, the Utah laws at issue here contain provisions that blatantly discriminate against gay and lesbian people by denying legal recognition in any form whatsoever to gay couples and barring the provision to them of any legal rights or protections in any form and of any scope. For these reasons as well, they violate the Fourteenth Amendment's guarantee of equal protection of the law.

The judgment below should be affirmed.

Dated: February 26, 2014

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