Case Nos. 13-4178, 14-5003, 14-5006

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

DEREK KITCHEN, ET AL.,
Plaintiffs–Appellees,

v.

GARY R. HERBERT, ET AL.,
Defendants–Appellants,

On Appeal from the United States District Court, District of Utah
No. 2:13-cv-00217

MARY BISHOP, ET AL.,
Plaintiffs–Appellees,

v.

SALLY HOWE SMITH, ET AL.,
Defendants–Appellants.

On Appeal from the United States District Court, Northern District of Oklahoma
No. 4:04-cv-00848

BRIEF OF AMICI CURIAE EQUALITY UTAH FOUNDATION AND UTAH PRIDE CENTER IN SUPPORT OF APPELLEES AND AFFIRMANCE

Clifford J. Rosky
Professor of Law
University of Utah
S.J. Quinney College of Law
332 South 1400 East
Salt Lake City, Utah 84112
(801) 581-7352
clifford.rosky@law.utah.edu

Michael D. Zimmerman
Troy L. Booher
Noella A. Sudbury
ZIMMERMAN JONES BOOHER LLC
136 South Main Street, Suite 721
Salt Lake City, Utah 84101
(801) 924-0200
tbooher@zjbappeals.com

Attorneys for Amici Curiae Equality Utah Foundation and Utah Pride Center

March 4, 2014

Corporate Disclosure Statement

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned states that neither of the amici is a corporation that issues stock or has a parent corporation that issues stock.

Table of Contents

Table of Authorities

Cases

Statutes

Rules

Identity and Interest of Amici Curiae[1]

Amici Curiae Equality Utah Foundation and the Utah Pride Center (collectively "Amici") are Utah's largest nonprofit organizations working to serve lesbian, gay, bisexual, and transgender (LGBT) Utahns and their families. Amici submit this brief in support of Plaintiffs-Appellees and of affirmance of the district court's order. Equality Utah Foundation is an IRS 501(c)(3) nonprofit organization that educates the people of Utah about issues impacting LGBT Utahns and their families. The Utah Pride Center is an IRS 501(c)(3) nonprofit organization that provides information, programs, referrals, and services to the LGBT community in the Salt Lake City metropolitan area.

As Utah's largest nonprofit LGBT organizations, Amici represent the interests of LGBT Utahns living in a broad and diverse range of family circumstances. In particular, Amici represent the interests of many same-sex couples married in Utah and in other jurisdictions whose marriages are no longer recognized by Defendants-Appellants. Amici also represent the interests of many unmarried LGBT Utahns who seek the freedom to marry a person of the same sex. Finally, Amici represent the interests of many allies of LGBT people—children, parents, relatives, and friends who recognize the equal dignity of LGBT persons under our laws.

[1] All parties to this appeal have consented to the filing of this brief pursuant to Federal Rule of Appellate Procedure 29(a). No party's counsel authored this brief in whole or in part, and no one other than Amici, their members, or their counsel contributed money intended to fund the preparation or submission of this brief.

Summary

Utah's Amendment 3[2] violates basic due process and equal protection principles even more clearly than did Section 3 of the Defense of Marriage Act (DOMA), which was invalidated by the Supreme Court in *United States v. Windsor*, 133 S. Ct. 2675 (2013). The purpose and effect of the two laws are the same, and the justifications advanced in support of the laws are substantially similar.

First, Utah's Amendment 3 has the same effect as DOMA: "to identify a subset of state-sanctioned marriages and make them unequal." *Id.* at 2694. Indeed, the text, scope, and effect of the two laws are nearly identical.

Second, the text and history of Amendment 3 demonstrate that it has the same purpose as DOMA: to "impose inequality" on same-sex couples by prohibiting the recognition of same-sex unions. *Id*. The text of Amendment 3 declares that same-sex unions are unequal to "the legal union between a man and a woman"—that they are neither "the same" nor "substantially equivalent." Utah Const. art. I, § 29. The history of Amendment 3 confirms that it was intended to prohibit same-sex couples from marrying or obtaining any equivalent status under Utah law. Appx. to Op. Br. at 349-50.

Third, the fact that Amendment 3 is a state law, not a federal law, only exacerbates the inequalities that the law imposes. Because the State has broader authority to define marriage—and because "[t]he recognition of civil marriages is central to state domestic

[2] Amici use "Amendment 3" to refer to both the Utah constitutional amendment and the Utah statutory provisions prohibiting same-sex marriage. *See Kitchen v. Herbert*, No. 2:13-cv-217, 2013 WL 6697874, at *5 n.1 (D. Utah Dec. 20, 2013).

relations law," *Windsor*, 133 S. Ct. at 2691—the State's definition of marriage has a more "substantial societal impact . . . in the daily lives and customs of its people," *id*. at 2693. By excluding same-sex couples from the definition of marriage under state law, rather than federal law, Amendment 3 has a more harmful impact on same-sex couples and their families, imposing inequality more deeply into their daily lives.

By operating in conjunction with Utah's marriage statutes, Amendment 3 directly prohibits same-sex couples from marrying in Utah, or from obtaining 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." Utah Code § 30-1-4.1(1)(b). And by operating in conjunction with Utah's adoption and parentage laws, Amendment 3 prohibits same-sex couples from being recognized as the legal parents of the children they are raising together. *Id*. §§ 78B-6-117, 78B-15-106, -204, -801(3).

Fourth, because Amendment 3 has the purpose and effect of imposing inequality on same-sex couples, it violates basic due process and equal protection principles applicable to the States through the Fourteenth Amendment. The State claims that because Amendment 3 is a state law, rather than a federal law, it "falls squarely" within the State's traditional authority to regulate domestic relations. Op. Br. at 3, 22, 34. This is not so. As the Supreme Court repeatedly emphasized in *Windsor*, "State laws defining and regulating marriage, of course, must respect the constitutional rights of persons." *Id*. at 2691 (citing *Loving v. Virginia*, 388 U.S. 1 (1967)).

Most significantly, the *Windsor* Court recognized that DOMA imposed a particular injustice on children 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. The Court's analysis applies directly to Amendment 3. The children of same-sex couples living in Utah neither know nor care whether these daily indignities are imposed by the State of Utah or the Federal Government. The Fourteenth Amendment provides no less protection for them than does the Fifth Amendment.

Fifth, the State has not offered any independent or legitimate justifications for Amendment 3. The State attempts to justify Amendment 3 as a way of: (1) "fostering a child-centric marriage culture," Op. Br. at 51; (2) "giv[ing] special preference and recognition to . . . biological parents or at least by two parents of opposite sex," Op. Br. at 62; (3) "ensuring adequate reproduction," *id*. at 82; and (4) "accommodating religious freedom," *id*. at 90. The State's first two claims were presented as justifications for DOMA in *Windsor*, and they were rejected by the Supreme Court. 133 S. Ct. at 2696. In any event, none of the State's claims establishes a rational basis for Amendment 3.

Rather than attempting to justify the law's prohibition on same-sex couples marrying, the State provides irrelevant explanations for why it permits men and women to marry. By doing so, the State effectively asks this Court to ignore Amendment 3's impact on same-sex couples and their families. The State has not shown that Amendment 3 is rationally related to any independent or legitimate state interest that overcomes the inequalities that the law imposes. Although this Court should subject Amendment 3 to heightened scrutiny, the law cannot satisfy even rational basis review.

Argument

I. Like DOMA, Amendment 3 Violates Basic Due Process and Equal Protection Because it Has the Principal Purpose and Effect of Imposing Inequality on Same-Sex Couples and Their Families.

In *United States v. Windsor*, 133 S. Ct. 2675 (2013), the Supreme Court held that DOMA violated "basic due process and equal protection principles," *id*. at 2693, because the law's "principal purpose" and "principal effect" was "to impose inequality" on same-sex couples and their families, *id*. at 2694. Because the Court recognized that DOMA was justified by "no legitimate purpose," it held that the law was "in violation of the Fifth Amendment." *Id*. at 2696. And because Amendment 3 has the same purpose and effects as did DOMA, it violates basic due process and equal protection principles for the same reasons DOMA did in *Windsor*.

A. Like DOMA, Amendment 3 has the Principal Effect of Imposing Inequality on Same-Sex Couples and Their Families.

Although Amendment 3 is a state law, not a federal law, it is similar to DOMA in every other respect relevant to the issue here.

The first clause of Amendment 3 is nearly identical to Section 3 of DOMA. Like DOMA, Amendment 3 defines "marriage" to include "only . . . the legal union between a man and a woman." *Compare* Utah Const. art. I, § 29, *with* 1 U.S.C. § 7. As a result, the first clause of Amendment 3 achieves the same effect as Section 3 of DOMA. It prohibits the recognition of same-sex marriages lawfully entered in other jurisdictions.

Within their respective jurisdictions, the scope of the two laws is nearly identical. Like DOMA, Amendment 3 "writes inequality" into the entire Utah Code, controlling the

State's definition of marriage in numerous statutes and regulations. *Windsor*, 133 S. Ct. at 2694. A Westlaw search of the Utah Code yields 547 statutes using the terms "marriage," "married," "spouse," "husband," or "wife," which represents 1.37% of the 40,019 Utah provisions on Westlaw. An identical search of the United States Code yields 1,024 provisions, which represents 1.46% of the 70,213 federal provisions on Westlaw.

As a result, Amendment 3 imposes many of the same tangible inequalities that DOMA imposed on same-sex couples. Like DOMA, Amendment 3:

- prevents same-sex couples from "obtaining government healthcare benefits they would otherwise receive," *compare Windsor*, 133 S. Ct. at 2694, *with* 2014 PEHP Medical Master Policy, §§ 2.15, 3.1;
- deprives same-sex couples of "the Bankruptcy Code's special protections for domestic-support obligations," *compare Windsor*, 133 S. Ct. at 2694, *with* Utah Code § 78B-5-505(1)(a)(vii); and
- forces same-sex couples "to follow a complicated procedure to file their state and federal taxes jointly," *compare Windsor*, 133 S. Ct. at 2694, *with* Utah Code § 59-10-503.[3]

In addition, Amendment 3 imposes all of the same dignitary inequalities that DOMA imposed on same-sex couples. Like DOMA, Amendment 3:

- "interfere[s] with the equal dignity of same-sex marriages," *Windsor*, 133 S. Ct. at 2693;
- "undermines both the public and private significance of state-sanctioned same-sex marriages," *id*. at 2694;
- "places same-sex couples in an unstable position of being in a second-tier marriage," *id*.; and

[3] *See also* Utah State Tax Commission, Utah Income Tax Filing Status for Same-Sex Couples, Oct. 9, 2013.

- "demeans the couple, whose moral and sexual choices the Constitution protects," *id*. (citing *Lawrence v. Texas*, 539 U.S. 558 (2003)).

Finally, Amendment 3 imposes all of the same inequalities on children being raised by same-sex couples. Like DOMA, Amendment 3:

- "brings financial harm to children of same-sex couples" by "rais[ing] the cost of health care for families," *compare Windsor*, 133 S. Ct. at 2695, *with* Utah Code § 59-10-1023;
- "denies or reduces benefits allowed to families upon the loss of a spouse and parent," *compare Windsor*, 133 S. Ct. at 2695, *with* Utah Code § 75-2-202;
- harms "tens of thousands of children now being raised by same-sex couples" by making "it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives," *Windsor*, 133 S. Ct. at 2694; and
- instructs "all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others," *id*. at 2696.

Because Amendment 3 and DOMA are nearly identical in text, scope, and effect, Amendment 3 violates basic due process and equal protection principles for the same reason that DOMA violated those principles in *Windsor*. The law's "principal effect is to identify a subset of state-sanctioned marriages and make them unequal." *Id*. at 2694.

B. Like DOMA, Amendment 3 has the Principal Purpose of Imposing Inequality on Same-Sex Couples and Their Families.

The text and history of Amendment 3 demonstrate that the law's imposition of inequality on same-sex couples was "more than an incidental effect." *Windsor*, 133 S. Ct. at 2693. Amendment 3's "principal purpose is to impose inequality, not for other reasons like governmental efficiency." *Id*. at 2694.

The text of Amendment 3 expressly declares two purposes: (1) to prohibit same-sex couples from marrying and (2) to prohibit the State from recognizing same-sex unions lawfully entered in other jurisdictions. It states:

> 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 Const. art. I, § 29. In unambiguous terms, the law declares that same-sex unions are unequal to "the legal union between a man and a woman"—that they are neither "the same" nor "substantially equivalent." *Id.*

In addition, the history of Amendment 3's enactment confirms that the law's effect on same-sex couples was intentional. In the Utah Voter Information Pamphlet, two legislators offered the following "Argument For" the adoption of Amendment 3:

> Vote Yes on this amendment to ensure that same sex marriage is not allowed in Utah. . . . This amendment will do three things. First, it ensures that no state court in Utah can ever make a ruling like the one in Massachusetts that overruled the people and redefined marriage against their will. Second, it prevents state courts from requiring that same sex marriages from other states be recognized in Utah. Third, it prevents 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.

Appx. to Op. Br. at 349.

Finally, the State acknowledges that Amendment 3's negative impact on same-sex couples was neither "incidental" nor accidental. In its brief's opening pages, the State candidly admits that Amendment 3 is a way of "giving an 'A'" to one family structure and not others. Op. Br. at 2. Later, the State identifies Amendment 3 as a way "to give

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," *id*. at 62, and to avoid "teaching" Utahns "that same-sex unions are on a par with traditional man-woman marriages," *id*. at 73.

Although the State claims that these justifications for Amendment 3 are "not intended to demean other family structures," *id*. at 2, its arguments demonstrate that the law's purpose is to establish that same-sex unions are unequal—not "on a par with traditional man-woman marriages," *id*. at 73. In *Windsor*, the Supreme Court held that laws based on such preferences deny equal protection in the most literal sense. As the Court explained, Congress's stated desire "to defend the institution of traditional heterosexual marriage" by excluding same-sex couples demonstrated—on its face—that the law was designed "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 (quotations omitted). Because this objective could not serve as an independent justification for DOMA, the Court held that DOMA was "motivated by an improper animus or purpose." *Id.* at 2693.

Contrary to the State's claims, the illegitimacy of the State's preference for man-woman marriage does not depend on a judicial finding that Utah voters harbored any subjective ill-will toward lesbian and gay persons. Op Br. at 42 n.8. Like Congress's desire "to defend the institution of traditional heterosexual marriage," the State's preference for man-woman marriages cannot serve as a rational basis for Amendment 3 because it does not provide any *independent* justification for the law's exclusion of same-

sex couples. As the Supreme Court has held in a long line of cases: "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a . . . . purpose to discriminate against [a particular class] cannot, in and of itself and without reference to [] some independent [] considerations in the public interest, justify" a law under the Equal Protection Clause. *U.S. Dep't. of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (quotations omitted); *see also Windsor*, 133 S. Ct. at 2693; *Romer v. Evans*, 517 U.S. 620, 634 (1996);. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 447-48 (1985).

While the Supreme Court has sometimes suggested that laws drawn for the purpose of disadvantaging a group are based on "animus," that term simply denotes the absence of an "independent and legitimate" purpose for the law, not a subjective disdain for or dislike of a particular class. *Romer*, 517 U.S. at 632-33. Because the State concedes that Amendment 3 is motivated by a desire "to give special preference" to man-woman marriages, Op. Br. at 62, and to teach Utahns that same-sex unions are not "on a par with traditional man-woman marriages," *id*. at 73, Amendment 3 "cannot survive under these principles." *Windsor*, 133 S. Ct. at 2693.

II. Because Amendment 3 Excludes Same-Sex Couples from the Definition of Marriage under State Law, Rather than Federal Law, It has a More Harmful Impact on Same-Sex Couples and Their Families, Imposing Inequality More Deeply into Their Daily Lives.

Amendment 3 is different than DOMA in one respect: Amendment 3 is a state law, and DOMA was a federal law. But contrary to the State's claims, this distinction exacerbates the inequalities that Amendment 3 imposes.

In *United States v. Windsor*, the Court recognized that States have broader authority than the Federal Government to define and regulate marriage: "By history and tradition the definition and regulation of marriage . . . has been treated as being within the authority and realm of the separate States." *Id*. at 2689-90. Within this federalist framework, the Court explained that the State's definition of marriage plays a central role in the regulation of domestic relations:

> The recognition of civil marriages is central to state domestic relations law applicable to its residents and citizens. The definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the "[p]rotection of offspring, property interests, and the enforcement of marital responsibilities."

Id. at 2691 (quoting *Williams v. North Carolina*, 317 U.S. 287, 298 (1942)).

Throughout its opinion, however, the Court repeatedly emphasized that the State's power to define marriage remained subject to the constitutional guarantees of the Fourteenth Amendment: "State laws defining and regulating marriage, of course, must respect the constitutional rights of persons." *Id*. (citing *Loving*, 388 U.S. at 1). To emphasize the significance of this constraint on the State's power, the Court repeated it several times, whenever it described the State's authority to define and regulate marital relations. *Id*. at 2691-2692.

In this appeal, the State implies that federalism and democracy cannot be reconciled with the State's obligation to respect the equal dignity of same-sex couples and their families. Op Br. at 33-36. But *Windsor* instructs otherwise. In *Windsor*, the Court explained that States have the primary authority to define marriage precisely *because* marriage plays a central role in the daily lives of the State's citizens: "The

States' interest in defining and regulating the marital relation . . . stems from the understanding that marriage is more than a routine classification for purposes of certain statutory benefits." *Id*. at 2692. The State's responsibility to define the marital relation "is an important indicator of the substantial societal impact the State's classifications have in the daily lives and customs of its people." 133 S. Ct. 2675, 2693 (2013). Because the State's authority to define marriage has a more profound impact "in the daily lives and customs of its people," *id*., this authority cannot diminish the State's responsibility to "respect the constitutional rights" of its people, *id*. at 2691.

Because Amendment 3 exercises the State's authority to exclude same-sex couples from the definition of marriage under state law, rather than a federal law, "the resulting injury and indignity" of the law is greater. *Id*. at 2692. By excluding same-sex couples from a status that "is central to state domestic relations law," *id*. at 2691, Amendment 3 has a more harmful impact on same-sex couples and their families, imposing inequality more deeply into their daily lives.

This impact is clear from Amendment 3's interaction with the State's other domestic relations laws. First, operating in conjunction with the State's laws governing the licensing, solemnization, and recognition of marriages, Amendment 3:

- prohibits same-sex couples in Utah from marrying, Utah Code § 30-1-2(5);
- prohibits same-sex couples in Utah from obtaining "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," *id*. § 30-1-4.1(b);
- discourages same-sex couples who have entered marriages, civil unions, or domestic partnerships in other States from moving, visiting, or returning to

Utah, by threatening to strip them of any "legal status, rights, benefits, or duties" that they have obtained, *id*. §§ 30-1-4, -4.1; and

- punishes the solemnization of a marriage between two persons of the same-sex, "with or without a license," as a class A misdemeanor, punishable by a term of imprisonment of up to one year, *id*. §§ 30-1-15, 30-1-2, 76-3-204(1).

In addition, Amendment 3 operates in conjunction with Utah's adoption and parentage laws to prohibit same-sex couples from being the legal parents of the children they are raising together. In particular, Amendment 3's definition of marriage prohibits same-sex couples from:

- adopting children, *id*. § 78B-6-117;
- entering valid gestational agreements, *id*. § 78B-15-801(3);
- entering valid sperm or egg donation agreements, *id*. §§ 78B-15-703, -106; and
- establishing parentage of children born to a spouse during the marriage, *id*. §§ 78B-15-106, -204.

As a result, Amendment 3 has a more devastating impact than DOMA on the children of same-sex couples. Like DOMA, Amendment 3 tells these children, "Your parents are not really married." In addition, Amendment 3 tells these children, "One of your parents is not really your parent." Even more profoundly than DOMA, Amendment 3 ensures that children raised by same-sex couples will not be legally recognized as belonging to "real" families—families entitled to equal respect and protection under the State's laws.

III. Because Amendment 3 Violates Basic Due Process and Equal Protection Principles, It is an Impermissible Exercise of the State's Authority to Regulate Domestic Relations.

Federalism cannot save a state law that violates the Fourteenth Amendment. "State laws defining and regulating marriage, of course, must respect the constitutional rights of persons." *United States v. Windsor*, 133 S. Ct. 2675, 2691 (2013) (citing *Loving v. Virginia*, 388 U.S. 1, 1 (1967)). The State attempts to distinguish *Windsor* by claiming that unlike DOMA, Amendment 3 "falls squarely within what the Supreme Court in *Windsor* called the States' 'broad[] authority to regulate the subject of domestic relations.'" Op. Br. at 3. In the State's view, the Fourteenth Amendment allows each State to determine "the proper balance between competing interests in the marriage debate." *Id.* To rule otherwise, the State suggests, "would be to effectively federalize domestic relations law." *Id.*

This is incorrect. The district court's ruling in this case has not federalized domestic relations law any more than the Supreme Court's ruling in *Loving v. Virginia* did. To maintain otherwise, the State seizes upon a handful of quotations from *Windsor* and implies that DOMA was invalidated as "an impermissible 'federal intrusion on state power.'" *Id*. at 34. But *Windsor* squarely held that "DOMA [was] unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment"—not the Tenth Amendment. 133 S. Ct. at 2695. Although the *Windsor* Court once described DOMA as a "federal intrusion on state power," it used this phrase only in the course of explaining that "it [was] *unnecessary to decide* whether this federal intrusion on state

power is a violation of the Constitution because it disrupts the federal balance." *Id*. at 2692 (emphasis added).

To be sure, the *Windsor* Court acknowledged that the State's power to define marriage was "of central relevance in this case quite apart from principles of federalism," because it signaled that DOMA was a discrimination of an "unusual character." *Id*. (quotations omitted). In *Windsor*, the Court explained, New York's "decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import." *Id*. In addition, the Court observed that "DOMA's unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage . . . . is strong evidence of a law having the purpose and effect of disapproval that class." *Id*. at 2693.

But these references to DOMA's "federal intrusion on state power" do not imply that the State's authority to define marriage is immune from the "constitutional guarantees" of the Fourteenth Amendment. *Id*. at 2691-92. Nor do they imply that the dignity of same-sex couples is *derived* from state marriage laws, and therefore may "vary in some respects from State to State." *Id*. at 2691. And finally, nothing in *Windsor* implies that the protections of liberty and equality in the Fourteenth Amendment are any weaker than those in the Fifth Amendment. If anything, the Fourteenth Amendment's equal protection guarantee is "more explicit," *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954), and "more specific," *Windsor*, 133 S. Ct. at 2695. Because the Fourteenth Amendment protects the liberty and equality of all persons, the State's authority to define marriage may not be deployed "to restrict the freedom and choice of [same-sex] couples,

id. at 2693, or "to identify a subset of state-sanctioned marriages and make them unequal," *id*. at 2694.

Long before *Windsor*, the Supreme Court held that a State's ability to discriminate against gay people and same-sex relationships is limited by the Equal Protection and Due Process Clauses of the Fourteenth Amendment. In *Romer v. Evans*, the Court invalidated Colorado's Amendment 2 under the Equal Protection Clause because it "classifie[d] homosexuals not to further a proper legislative end but to make them unequal to everyone else." 517 U.S. 620, 635. And in *Lawrence v. Texas*, the Court invalidated a Texas sodomy statute under the Due Process Clause because it sought "to control a personal relationship that . . . is within the liberty of persons to choose." 539 U.S. 558, 567. In *Windsor*, the Court applied the same "basic due process and equal protection principles . . . to the Federal Government," 133 S. Ct. at 2693, because "the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws," *id*. at 2695 (citing *Bolling*, 347 U.S. at 499-500).

The fallacy of the State's federalism claim is revealed by the *Windsor* Court's finding that DOMA impermissibly harmed the children of same-sex couples. The *Windsor* Court recognized that DOMA harms "tens of thousands of children now being raised by same-sex couples," because "[t]he 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. Children being raised by same-sex couples in Utah neither know nor care whether these daily indignities are imposed the State of Utah or the Federal Government. They know

only that Amendment 3, like DOMA, instructs "all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others." *Id*. at 2696. The Fourteenth Amendment provides no less protection for these children than does the Fifth Amendment.

Finally, the inequality imposed by Amendment 3 cannot be cured by the State's claim that "[d]ifferent states have struck a different balance than Utah's, and *Windsor* held that choice is protected." Op. Br. at 3. Although "[m]arriage laws vary in some respects from State to State," *Windsor*, 133 S. Ct. at 2691, the State may not require same-sex couples and their children to leave Utah to avoid the inequality that Amendment 3 imposes in their daily lives.

IV. Amendment 3 is Not Rationally Related to Any Independent and Legitimate Interests that Overcome the Law's Imposition of Inequalities on Same-Sex Couples and their Families.

Amici agree that Amendment 3 should be subjected to heightened scrutiny because it infringes on a fundamental right and discriminates based on sexual orientation and sex. Ans. Br. at 28-39, 48-63. In addition, Amici agree that under the Supreme Court's analysis in *Windsor*, Amendment 3 should be subjected to "careful consideration," because it has the purpose and effect of imposing inequality on same-sex couples. *Id*. at 39-48. In this brief, however, Amici explain why Amendment 3 fails rational basis review.

Although rational basis review is a deferential standard, the Supreme Court has cautioned that it "is not a toothless one, and will not be satisfied by flimsy or implausible justifications." *U.S.R.R. Bd. v. Fritz*, 449 U.S. 166, 184 (1980) (quotations omitted).

"[E]ven the standard of rationality . . . must find some footing in the realities of the subject addressed by the legislation." *Heller v. Doe*, 509 U.S. 312, 321 (1993). "By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, [courts] ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Romer v. Evans*, 517 U.S. 620, 633 (1996).

In an attempt to justify the inequalities that Amendment 3 imposes on same-sex couples, the State argues that Amendment 3 is rationally related to achieving the following objectives: (1) "fostering a child-centric marriage culture," Op. Br. at 51; (2) "giv[ing] special preference and recognition to . . . biological parents or at least [by] two parents of opposite sex," Op. Br. at 62; (3) "ensuring adequate reproduction," *id*. at 82; and (4) "accommodating religious freedom," *id*. at 90. As explained below, the *Windsor* Court rejected the State's first two claims when those claims were presented as justifications for DOMA. *United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013). None of the State's claims provides a rational basis for Amendment 3.

A. Amendment 3 is Not Rationally Related to the State's Purported Interests in Fostering a Child-Centric Marriage Culture or Giving a Special Preference to Mothers and Fathers.

The State argues that Amendment 3 is justified as a way of "fostering a child-centric marriage culture that encourages parents to subordinate their own interests to the needs of their children," Op. Br. at 51, and "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," *id*. at 62.

This Court should reject both of the State's parenting claims because the Supreme Court rejected them when they were presented as justifications for DOMA in *Windsor*. If these arguments did not provide any "legitimate purpose" for DOMA, *Windsor*, 133 S. Ct. at 2696, then they cannot provide any "legitimate purpose" for Amendment 3.

Although the State attempts to update these familiar arguments with novel terms like "child-centric culture" and "gender complementarity," *see* Op. Br. at 51, 62, they are precisely the same claims that the Bipartisan Legal Advisory Group of the U.S. House of Representatives (BLAG) presented to the Supreme Court as justifications for DOMA in *Windsor*. *Compare* Op. Br. at 51-82, *with* Brief on the Merits for Respondent the Bipartisan Legal Advisory Group of the U.S. House of Representatives, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307), 2013 WL 267026, at *44-48 [hereinafter BLAG Br].

In *Windsor*, BLAG claimed that "the institution of marriage represents society's and government's attempt to encourage current and potential mothers and fathers to establish and maintain close, interdependent, and permanent relationships, for the sake of their children, as well as society at large," and that "the institution of marriage was a direct response to the unique tendency of opposite-sex relationships to produce unplanned and unintended offspring." *Id*. at *45.

The State advances the same claims in defending Amendment 3. The State claims the man-woman definition of marriage serves "to establish a means of formally linking mothers *and* fathers with their offspring." Op. Br. at 52. This link is needed, the State

suggests, because "sex between men and women naturally—and often accidentally—produces children," but "it does not necessarily produce stable families." *Id*.

In *Windsor*, BLAG also claimed that DOMA was rationally related to the government's interests in "[e]ncouraging the [r]earing of [c]hildren by [t]heir [b]iological [p]arents," BLAG Br. at 47, and "[p]romoting [c]hild rearing by a [m]other and a [f]ather," *id*. at 48. Because BLAG believed that "[b]iological parents have a genetic stake in the success of their children that no one else does," *id*. at 47, and "children benefit from having parental role models of both sexes," *id*. at 48, it claimed DOMA was justified as a way of offering "special encouragement and support for . . . this type of family structure." *Id*.

The State tries to justify Amendment 3 on the same grounds. The State claims that "[c]ommon sense, long experience, and sociological evidence confirm that children do best when raised by their biological mothers and fathers in stable marriage unions," and these alleged "child-welfare benefits flow from biology and gender complementarity (i.e., diversity) in parenting." Op. Br. at 62. With remarkable candor, the State seeks to defend Amendment 3 as a "special preference," *id*.—a way of "giving an 'A'" to man-woman marriages, *id*. at 2, based on the belief that "a mom and a dad is the ideal parenting environment," *id*. at 1.

In *Windsor*, the Supreme Court rejected both of BLAG's parenting claims and held that DOMA was not justified by any "legitimate purpose." 133 S. Ct. at 2696. After finding that DOMA's text and history indicated the law was designed to "interfer[e] with

the equal dignity of same-sex marriages," the Court observed that "[t]he arguments put forward by BLAG [were] just as candid about the congressional purpose." *Id*. at 2693.

If BLAG's parenting arguments did not provide any "legitimate purpose" for DOMA in *Windsor*, they cannot provide any "legitimate purpose" for Amendment 3. After all, Amendment 3 was enacted for the same purpose as DOMA: "to ensure that if any State decides to recognize same-sex marriages, those unions will be treated as second-class marriages." *Id*. The only difference between the two laws is that Amendment 3 excludes same-sex couples from the definition of marriage under state law instead of under federal law. But this difference only serves to show that Amendment 3 has a more harmful impact on same-sex couples and their families and imposes inequality more deeply into their daily lives.

It is not difficult to understand why the Supreme Court rejected BLAG's parenting claims in *Windsor*, and why this Court should reject them. Here, as in *Windsor*, the State's parenting arguments may provide plausible reasons for *allowing opposite-sex* couples to marry, but they do not provide any reasons for *prohibiting same-sex* couples from marrying. This lawsuit is about what Amendment 3 prohibits, not what it permits. Far from seeking to deny or invalidate anyone else's marriages, the Plaintiffs here seek only the freedom to marry in the State where they live and the recognition of domestic unions lawfully entered in Utah and in other States. Appx to Op. Br. at 92.

As a result, the public's interest in encouraging mothers and fathers to raise children together is a nonsequitur. It has no bearing on the constitutionality of Amendment 3, nor on any law that prohibits same-sex couples from marrying. By

offering this Court only reasons to permit opposite-sex marriages—rather than reasons to prohibit same-sex marriages—the State effectively asks this Court to ignore Amendment 3's impact on same-sex couples and their families.

By contrast, the State makes no plausible attempt to show that Amendment 3's *exclusion* of same-sex couples from marriage is rationally related to an independent or legitimate interest. There is no basis in logic, fact, or law to presume that allowing same-sex couples to marry will have any effect on the parental decisions of mothers and fathers in opposite-sex marriages. The State has not offered any evidence to this effect, beyond the baseless (and, frankly, fanciful) assertion that Amendment 3 "might encourage parents to forego abusing alcohol or drugs; avoid destabilizing extramarital affairs; avoid excessively demanding work schedules; or limit time-consuming hobbies or other interests that take them away from their children." Op. Br. at 60.

As the district court recognized, many same-sex couples in Utah are raising children together. *Kitchen v. Herbert*, No. 2:13-cv-217, 2013 WL 6697874, at *26 (D. Utah Dec. 20, 2013). While same-sex partners do not create children by engaging in sexual intercourse, they can and do become parents in ways many opposite-sex couples become parents. *Id*. In spite of the substantial obstacles that Amendment 3 imposes on same-sex couples who hope to become parents, the State does not dispute that there are approximately 3,000 children currently being raised by same-sex couples in Utah. *Id*. "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." *Id*.

As the State concedes, same-sex parents can "make the same selfless, child-centric choices as a biological mother and father." Op. Br. at 60. But the State offers no explanation for why Amendment 3 may seek to foster a "child-centric culture" only among man-woman marriages, while seeking to prevent the establishment of a "child-centric culture" among same-sex couples. Just as marriage may provide "a means of formally linking mothers *and* fathers with their offspring," *id*. at 52, it may provide a means of formally linking two parents of any sex with children they are raising together.

Finally, the State's claim that "[c]ommon sense, long experience, and sociological evidence confirm that, in the aggregate, children do best when raised by their biological mothers and fathers in stable marriage unions" is misleading, because it is not based on comparisons to children raised by same-sex couples. Op. Br. at 62. Instead, the State's parenting claims are based on comparisons to "children in single-parent families, children born to unmarried mothers, and children in stepfamilies or cohabiting relationships." *Id*. at 62. Because the State's parenting claims are not supported by evidence about children who were raised by same-sex couples, those claims have no bearing on the constitutionality of Amendment 3.

In contrast, the Plaintiffs rely on a significant body of peer-reviewed research that specifically examines the well-being of children raised by same-sex parents. Ans. Br. at 78-79. Based on this literature, the nation's leading health care organizations have unanimously concluded that children raised by same-sex parents are as well-adjusted as children raised by opposite-sex parents. 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.

B. Amendment 3 is Not Rationally Related to the State's Purported Interests in Ensuring Adequate Reproduction or Accommodating Religious Freedom.

The State presents two justifications for Amendment 3 that were not rejected by the Supreme Court in *Windsor*. The State claims that Amendment 3 is justified as a way of "ensuring adequate reproduction," Op. Br. at 82, and "accommodating religious freedom," *id*. at 90. Neither of these claims establishes that Amendment 3 is rationally related to a legitimate state interest.

First, as Justice Scalia has observed, the State's claim that Amendment 3 is rationally related to the State's interest in encouraging reproduction is belied by the fact that the State permits infertile and elderly persons to marry:

> If moral disapprobation of homosexual conduct is 'no legitimate state interest' for purposes of proscribing that conduct, . . . what justification could there possibly be for denying the benefits of marriage to homosexual couples . . . ? Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry.

Lawrence v. Texas, 539 U.S. 558, 604-05 (2003) (Scalia, J., dissenting).

Moreover, Amendment 3 prohibits all same-sex couples from marrying, even though many same-sex couples can and do procreate through insemination and surrogacy, just as many male-female couples do. In fact, by operating in conjunction with Utah's parentage laws, Amendment 3 actually *discourages* same-sex couples in Utah from procreating by prohibiting them from adopting, entering gestational and donor agreements, and establishing parentage of children born to a spouse during their

marriages. Utah Code §§ 78B-6-117, 78B-15-106, -204, -801(3). The State offers no explanation for preferring one method of procreation over another—let alone for allowing only married male-female couples to avail themselves of the State's parentage laws in order to procreate through alternative methods.

Finally, as the State concedes, accommodating religious freedom cannot serve as an independent justification for Amendment 3. Op. Br. at 97. The Supreme Court has repeatedly held that laws that discriminate against same-sex couples, same-sex relationships, and gay persons may not be justified by reference to the majority's religious and moral beliefs. *Windsor*, 133 S. Ct. at 2693; *Lawrence*, 539 U.S. at 577; *Romer*, 517 U.S. at 635.

Conclusion

The impact of Amendment 3's inequality is not limited to the thousands of same-sex couples living in Utah, or even to children being raised by those couples. In addition, Amendment 3 imposes inequality on all LGBT Utahns, and the many parents, relatives, friends, and colleagues who love and support them. By writing inequality into Utah's laws, Amendment 3 inflicts a devastating blow on LGBT children, who are among the State's most vulnerable citizens: "Utah's prohibition of same-sex marriage further injures the children . . . who themselves are gay or lesbian, and who will grow up with the knowledge that the State does not believe they are as capable of creating a family as their heterosexual friends." *Kitchen*, 2013 WL 6697874, at *26.

Because the State has failed to offer any plausible justification for Amendment 3, this Court should affirm the district court's grant of summary judgment and the issuance of an injunction against the Defendants.

Dated this 4th day of March, 2014.

/s/ Clifford J. Rosky
Clifford J. Rosky
Professor of Law
University of Utah
S.J. Quinney College of Law
332 South 1400 East
Salt Lake City, Utah 84112
801-581-7352
clifford.rosky@law.utah.edu

Michael D. Zimmerman
Troy L. Booher
Noella A. Sudbury
ZIMMERMAN JONES BOOHER LLC
Kearns Building, Suite 721
136 South Main Street
Salt Lake City, UT 84101
Telephone: 801-924-0200
tbooher@zjbappeals.com

Attorneys for Amici Curiae Equality Utah Foundation and Utah Pride Center

Certificate of Compliance with Rule 32(a)

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because this brief contains 7000 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in a 13-point Times New Roman font.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

DATED this 4th day of March, 2014.

/s/ Clifford J. Rosky
Clifford J. Rosky
Professor of Law
University of Utah
S.J. Quinney College of Law
332 South 1400 East
Salt Lake City, Utah 84112
801-581-7352
clifford.rosky@law.utah.edu

Michael D. Zimmerman
Troy L. Booher
Noella A. Sudbury
ZIMMERMAN JONES BOOHER LLC
Kearns Building, Suite 721
136 South Main Street
Salt Lake City, UT 84101
Telephone: 801-924-0200
tbooher@zjbappeals.com

Attorneys for Amici Curiae Equality Utah Foundation and Utah Pride Center

Certificate of Digital Submission and Privacy Redactions

I hereby certify that a copy of the foregoing Brief of Amici Curiae Equality Utah and Utah Pride Center in Support of Appellees and Affirmance as submitted in Digital Form via this Court's CM/ECF system is an exact copy of the written document filed with the Clerk and has been scanned for viruses with Microsoft Security Essentials version 1.165.3928.0 (updated March 4, 2014) and, according to the program, is free of viruses. I also certify that any required privacy redactions have been made.

DATED this 4th day of March, 2014.

/s/ Clifford J. Rosky
Clifford J. Rosky
Professor of Law
University of Utah
S.J. Quinney College of Law
332 South 1400 East
Salt Lake City, Utah 84112
801-581-7352
clifford.rosky@law.utah.edu

Michael D. Zimmerman
Troy L. Booher
Noella A. Sudbury
ZIMMERMAN JONES BOOHER LLC
Kearns Building, Suite 721
136 South Main Street
Salt Lake City, UT 84101
Telephone: 801-924-0200
tbooher@zjbappeals.com

Attorneys for Amici Curiae Equality Utah Foundation and Utah Pride Center

Certificate of Service

I hereby certify that I electronically filed a true, correct, and complete copy of the foregoing *Brief of Amici Curiae Equality Utah Foundation and Utah Pride Center in Support of Appellees and Affirmance* with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system on March 4, 2014.

I certify that all participants in the case are represented by counsel, who are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Clifford J. Rosky
Clifford J. Rosky

4852-1098-2169, v. 3