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 *AMICI CURIAE* FAMILY LAW AND CONFLICT OF LAWS PROFESSORS IN SUPPORT OF PLAINTIFFS-APPELLEES

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IDENTITY AND INTEREST OF *AMICI CURIAE*

Pursuant to Federal Rule of Appellate Procedure 29(b), *Amici Curiae*, scholars with a wide range of expertise relating to family law, conflict of laws, and state regulation of marriage, respectfully submit this brief in support of Appellees.[1] *Amici* support all the arguments made by Appellees to this Court on appeal. *Amici* aim to provide the court with information about the history of marriage recognition law, both across the country and in Utah, and its relevance to the constitutionality of the state's ban on the recognition of marriages between people of the same sex validly celebrated in other states, an issue now before the Court. A list of individual signatories may be found in Appendix A.

SUMMARY OF ARGUMENT

Amici file this brief to address the particular issues raised by Utah's ban on the recognition of marriages of same-sex couples from other states which raises separate and distinct constitutional issues beyond those that arise in connection with Utah's ban on allowing new marriages of same-sex couples.[2] *Amici* submit

[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), no counsel for any party authored this brief in whole or in part, and no party or counsel for any party made a monetary contribution intended to fund the preparation or submission of this brief. The parties' consent letters have been filed with the Clerk's office. *See* Fed. R. App. P. 29(a).

[2] The court below did not reach the recognition question, *Kitchen v. Herbert*, No. 2:13-cv-217, WL 6697874, at *28 (D. Utah Dec. 20, 2013), because it was rendered moot by the broader holding that the underlying ban on marriages by same-sex couples was itself constitutionally invalid.

this brief to address why Utah's refusal to give effect to marriages of same-sex couples validly celebrated in other states and countries violates the Constitution's guarantees of due process and equal protection and to provide additional historical context in support of these arguments.

Utah's anti-recognition laws are historically unprecedented. While marriage has been primarily regulated by the states, and states have had points of stark disagreement over impediments to marriage, they have resolved those conflicts by giving effect to one another's marriages in most instances. The touchstone of interstate marriage recognition law is the "place of celebration" rule, which provides that a marriage valid where celebrated is valid everywhere. This rule was subject to narrow exceptions that were oft-recited, but rarely applied, even to marriages that were the subject of great controversy and piqued social and moral disapproval. As state marriage laws converged, marriage recognition issues arose less often, and marriages became more portable than ever. The pro-recognition approach provided stability and predictability to families, promoted marital responsibility, facilitated interstate travel, and protected private expectations. It was widely understood that a contrary rule, one that tended to deny recognition to valid marriages, would produce devastating consequences affecting everything from the legitimacy of children to protection against spousal abuse to inheritance rights.

Utah traditionally followed the same approach to marriage recognition, deferring in most instances to the law of the state in which the marriage was celebrated pursuant to a validation statute. UTAH CODE ANN. § 30-1-4 (1994). In 1995, swept up in a national fervor opposing marriages by people of the same sex, Utah amended the validation statute to create exceptions to the place-of-celebration rule, including one for marriages of two women or two men. UTAH CODE ANN. § 30-1-4 (2014). It also adopted a statutory provision to declare Utah's "policy" against marriages between persons of the same sex and later adopted a constitutional provision to avoid potential lawsuits over whether the anti-recognition rules complied with the state constitution. UTAH CODE ANN. § 30-1-4.5 (2014); UTAH CONST. art. I, § 29. The statutory and constitutional bans on recognition of marriages by same-sex couples are historically unprecedented in that they create overlapping and categorical rules rather than allowing for individualized determinations; they shift decision-making power from courts, where it had largely resided, to the legislature; they draw no distinction between marriages contracted in a particular state to evade restrictions of the couple's home state ("evasive marriages") and those contracted by residents of another state; and, finally, they enshrine the rule of non-recognition in the state's constitution.

Under the principles elucidated in *Romer v. Evans*, 517 U.S. 620 (1996), and *United States v. Windsor*, 133 S. Ct. 2675 (2013), Utah's blanket prohibition on the

recognition of marriages involving same-sex couples validly celebrated elsewhere violates the Equal Protection Clause. While primarily the province of the states, marriage laws must conform to the requirements of the U.S. Constitution. As demonstrated in *Loving v. Virginia*, 388 U.S. 1 (1967), and later cases, a marriage law is not insulated from constitutional review simply because it represents state public policy. In *Windsor*, the Court invalidated the federal-law provision of the Defense of Marriage Act (DOMA), in which Congress adopted a non-recognition rule for marriages by same-sex couples for federal law purposes, based on due process and equal protection grounds. Given DOMA's departure from Congress's long history and tradition of deferring to state-law determinations of marital status, the Court deemed it a discrimination of "unusual character" that warranted "careful consideration" for constitutionality, and raised a strong inference that the law reflects animus. 133 S. Ct. at 2693. Given that DOMA's purpose and effect were to impose disadvantage on same-sex married couples, it could not be justified for any legitimate purpose. In a straightforward application of these principles, Utah's anti-recognition laws suffer the same fate. They were adopted for no reason other than to disadvantage married same-sex couples. Utah offered no reason—nor could any be offered—to explain its deviation from a long tradition of respecting out-of-state marriages.

In addition to equal protection concerns, Utah's anti-recognition laws also run afoul of the Due Process Clause. Marriage, and the right to make personal decisions concerning marriage, has long been recognized as a fundamental liberty interest. Robust constitutional protection for marriage was recently reconfirmed by the Court in *Windsor*. Given the importance of this liberty interest, laws that infringe on an individual's right to *remain* married are inherently suspect and must be examined with a heightened level of scrutiny. Utah's anti-recognition laws operate so that legally married same-sex couples who cross into Utah's borders are unilaterally converted from spouses to legal strangers. As a result, Utah deprives these same-sex couples of all of the rights and privileges connected with marriage. Because there is no legitimate justification for Utah's interference with the liberty interests of married same-sex couples, Utah's anti-recognition laws are unconstitutional under the Due Process Clause.

ARGUMENT

I. UTAH'S ANTI-RECOGNITION LAWS ARE HISTORICALLY UNPRECEDENTED

A. Historically, Marriage Recognition Law Favored Validation of Marriages That Were Valid Where Celebrated

Marriage law has been primarily the province of the states. *See Ex Parte Burrus*, 136 U.S. 586, 593-94 (1890) (the "whole subject of the domestic relations of husband and wife . . . belongs to the laws of the states"); *Maynard v. Hill*, 125

U.S. 190, 205 (1888) ("Marriage . . . has always been subject to the control of the legislature," which "prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effects upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution."); *Windsor*, 133 S. Ct. at 2680 ("By history and tradition the definition and regulation of marriage has been treated as being within the authority and realm of the separate States."). State statutes specifically set forth who can or cannot marry, whether prohibited marriages are void or voidable, and the procedural requirements for creating a valid marriage. *See, e.g.*, UTAH CODE ANN. §§ 30-1-1—30-1-39 (2014). Because states sometimes imposed different restrictions on marriage, questions arose about marriage recognition—whether a marriage would be recognized as valid in a state that would have prohibited its celebration in the first instance.

The general rule of marriage recognition is that a *marriage valid where celebrated is valid everywhere. See, e.g., Joseph Story,* COMMENTARIES ON THE CONFLICT OF LAWS §113, at 187 (8th ed. 1883) ("[t]he general principle certainly is . . . that . . . marriage is to be decided by the law of the place where it is celebrated"); Fletcher W. Battershall, THE LAW OF DOMESTIC RELATIONS IN THE STATE OF NEW YORK 7-8 (1910) (describing "the universal practice of civilized nations" that the "permission or prohibition of particular marriages, of right

belongs to the country where the marriage is to be celebrated"); William M. Richman et al., UNDERSTANDING CONFLICT OF LAWS § 119, 415 (4th ed. 2013) (noting the "overwhelming tendency" in the United States to recognize the validity of marriage valid where performed); *see also In re Loughmiller's Estate*, 629 P.2d 156, 158 (Kan. 1981) (same); *In re Estate of May*, 114 N.E.2d 4, 6 (N.Y. 1953) (same). This rule, known as the "place of celebration" rule or *lex loci contractus*, is recognized in some form in every state and, indeed, is a central element of American family law.[3]

The general rule was traditionally subject to exceptions for out-of-state marriages that violated the state's "positive law" (e.g., a statute that expressly bars extraterritorial recognition of a particular type of marriage) or "natural law" (sometimes described as "public policy"). *See, e.g.*, Joseph R. Long, LAW OF DOMESTIC RELATIONS 87-89 (1905) (describing exceptions). But even those exceptions were typically applied only after a fact- and context-specific analysis by a court considering an individual request for recognition. *See, e.g., Loughmiller's Estate*, 629 P.2d at 161 (upholding evasive, first-cousin marriage because it was not an "odious" form of incest); *Inhabitants of Medway v. Needham*, 16 Mass. 157, 159 (1819) (upholding evasive, interracial marriage from Rhode Island). And

[3] The strong preference for recognition is also embodied in the Uniform Marriage and Divorce Act, which provides for no exceptions. UNIF. MARRIAGE DIVORCE ACT § 210 (1970, amended 1973), 9A U.L.A. 194.

despite these exceptions, courts routinely gave effect to out-of-state marriages that were declared void by state law, *see, e.g.*, *Loughran v. Loughran*, 292 U.S. 216, 222-23 (1934) (giving effect to Florida marriage under District of Columbia law despite statute declaring remarriage by adulterer "absolutely void"); were evasive, *see, e.g.*, *Medway*, 16 Mass. at 159; constituted a criminal a offense, *see, e.g.*, *Bonds v. Foster*, 36 Tex. 68, 70 (1871) (validating interracial marriage from Ohio despite Texas statute criminalizing such marriages); or involved hotly controversial unions, *see, e.g.*, *Pearson v. Pearson*, 51 Cal. 120, 125 (1875) (giving effect to interracial marriage celebrated in Utah despite miscegenation ban in California); *State v. Ross*, 76 N.C. 242, 246 (1877) (upholding interracial marriage from South Carolina, as defense to criminal charges in North Carolina of fornication and adultery, despite conceding the marriage was "revolting to us"). And although many courts have "cited the public policy exception, many have never actually used it to invalidate a marriage." Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 TEX. L. REV. 921, 923 (1998). Even at points of stark disagreement about marriage law, states were nonetheless motivated by comity and concern for married couples to defer in most cases to the law of sister states with respect to the validity of marriage.

Moreover, as the twentieth century saw greater convergence in state marriage laws and the lifting of many traditional marriage restrictions,[4] the "public policy" exception waned and was on the verge of "becoming obsolete" before the controversy over marriage by people of the same sex reinvigorated it. *See* 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); Andrew Koppelman, *Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges*, 153 U. PA. L. REV. 2143, 2148 (2005) (public policy exception was becoming "archaic"). Prior to the current controversy, in fact, the tendency to recognize out-of-state marriages—even evasive ones—was so strong that a leading treatise suggested "it should take *an exceptional case* for a court to refuse recognition of a valid foreign marriage of one of its domiciliaries even in the face of a local prohibition." Eugene Scoles et al., CONFLICTS OF LAWS § 13.9, at 575 (4th ed. 2004) (emphasis added).

The place of celebration rule, and the nuanced, judicial application of its exceptions, provides married couples (and their children) with stability and

[4] Among the developments that reduced the variations in state marriage laws were the lifting of miscegenation bans (even before, in many cases, the Supreme Court's ruling in *Loving*); the elimination of bans and waiting periods for remarriage following divorce; convergence on a standard age for marriage (16 with parental consent; 18 without parental consent); and the repeal of marriage bans rooted in eugenics. *See* Joanna L. Grossman, *Resurrecting Comity: Revisiting the Problem of Non-Uniform Marriage Laws*, 84 ORE. L. REV. 433, 442 (2005) (discussing state marriage law variations).

predictability; protects individual expectations about marital status, and its concomitant rights and obligations; facilitates interstate travel; and avoids the practical complications of having one's marital status vary by location. *See* Richman et al., *supra*, at § 119, at 415 (noting that the general validation rule "avoids the potentially hideous problems that would arise if the legality of a marriage varied from state to state"); James Schouler, LAW OF THE DOMESTIC RELATIONS 47 (2d ed. 1874) (general recognition rule reflects "public policy, common morality, and the comity of nations"); Scoles et al., *supra*, § 13.2, at 559 (noting a strong policy of marriage is to "sustain its validity once the relationship is assumed to have been freely created"); Andrew Koppelman, SAME SEX, DIFFERENT STATES 17 (2006) ("[i]t would be ridiculous to have people's marital status blink on and off like a strobe light" as they travel or move across state lines); *cf. Williams v. North Carolina*, 317 U.S. 287, 299 (1942) (quoting *Atherton v. Atherton*, 181 U.S. 155, 162 (1901), to describe being married in one state but not another as one of "the most perplexing and distressing complication[s] in the domestic relations of . . . citizens"). Without question, interstate transportability of marriage has been a defining, and indeed essential, feature of American law. *Cf. In re Lenherr's Estate*, 314 A.2d 255, 258 (Pa. 1974) ("In an age of widespread travel and ease of mobility, it would create inordinate confusion and defy the reasonable

expectations of citizens whose marriage is valid in one state to hold that marriage invalid elsewhere").

1. Utah's Categorical Refusal to Recognize Marriages of Same-Sex Couples from Other States Represents a Significant Departure from the Traditional Approach

Utah's history is in line with the general developments described above. Prior to the enactment of House Bill 366 ("HB 366") in 1995,[5] which changed the rules of marriage recognition in the wake of a growing national controversy about marriages by same-sex couples, the Utah Code simply provided that "[m]arriages solemnized in any other country, state or territory, if valid where solemnized, are valid here." UTAH CODE ANN. § 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, Norton v. McFarlane*, 818 P.2d 8 (Utah 1991). This provision, in place for nearly a century, *see* UTAH REV. STAT. § 1186 (1898), codified the place of celebration rule without exception.[6] Unlike eighteen other states, Utah never adopted a statute to

[5] Act of March 14, 1995, ch. 146, 1995 Utah laws 146 (providing that a marriage between people of the same sex celebrated in any other state or country may not be recognized in Utah) (codified as amended UTAH CODE ANN. § 30-1-4 (Supp. 1995) (effective May 1, 1995).

[6] The court in *In re Vetas*, 170 P.2d 183 (Utah 1946), declined to give effect to a common-law marriage from Idaho, on the grounds that the validation statute referred only to marriages "solemnized" in another jurisdiction. In 1987, however, the Utah Legislature adopted a statute to allow for the establishment of common-

expressly preclude recognition of evasive marriages. *See* 1 CHESTER G. VERNIER, AMERICAN FAMILY LAWS §45 (1931); Grossman, *supra*, at 464-65 (discussing marriage evasion laws). Nor was there any precedent for invoking the public policy exception to refuse recognition to other socially controversial marriages, such as interracial marriages before Utah repealed its ban in 1963.[7] *See* UTAH CODE § 40-1-2 (1962); *see also* James R. Browning, *Anti-Miscegenation Laws in the United States*, 1 DUKE B.J. 26, 29, 35 (1951) (describing Utah's practice of recognizing valid interracial marriages from other states).

In 1995, Utah created exceptions to the longstanding rule of deference to marriages of sister states for marriages by same-sex couples, bigamous marriages, and certain underage marriages.[8] Act of March 14, 1995, ch. 146, 1995 Utah Laws

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law marriages in Utah, thus mooting the recognition issue. *See* UTAH CODE ANN. § 30-1-4.5 (2014).

[7] *See also Thomas v. Children's Aid Soc'y of Ogden*, 364 P.2d 1029 (Utah 1961) (assuming without deciding that Utah would give effect to an evasive interracial marriage contracted in Idaho if the marriage had not been invalid on other grounds), *overruled in part on other grounds, Wells v. Children's Aid Soc'y of Utah*, 681 P.2d 199 (Utah 1984).

[8] Under traditional marriage recognition law, bigamous marriages are refused recognition under the "natural law" or "public policy" exception, regardless of whether a validation statute expressly so declares. However, because no state allows the celebration of bigamous marriages in the first instance, recognition questions arose rarely and only from non-U.S. marriages. *See, e.g., In re Dalip Singh Bir's Estate*, 188 P.2d 499 (Cal. App. 1948) (allowing two wives to inherit from decedent's estate despite "public policy" against bigamy). Likewise, closely incestuous marriages are generally thought to fall within this exception, but the near universal ban (even globally) on such marriages means that courts are rarely if ever asked to validate one. *See* P. H. Vartanian, *Recognition of Foreign Marriage*

146 (codified as UTAH CODE ANN. § 30-1-4 (2014)). Only the ban on marriages by same-sex couples is followed by a separate code provision announcing that it follows from the "policy of the state" and that the ban also applies 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." UTAH CODE ANN. § 30-1-4.1 (2014). And only the ban on marriages by same-sex couples was enshrined into the Utah Constitution in a 2004 amendment designed to preclude not only judicial consideration as to the validity of a particular marriage, but also judicial consideration of the validity of the non-recognition rule itself. UTAH CONST. art. I, § 29(2) ("No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect."); *see also Pearson v. Pearson*, 134 P.3d 173, 177 n.5 (Utah Ct. App. 2006) (noting that "the public policy in favor of preserving the stability of marriage, always strong in Utah, may be even stronger in light of Utah's enshrinement of so-called traditional marriage into its constitution in 2004"), *aff'd*, 182 P.3d 353 (Utah 2008).

Utah's categorical refusal to give effect to marriages between persons of the same sex from other states was historically unprecedented. Even though many states ultimately adopted similar anti-recognition statutes, Utah led the charge. *See*

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as Affected by Policy in Respect of Incestuous Marriages, 117 A.L.R. 186, 187 (1938) (noting absence of incestuous marriage recognition cases).

Barbara J. Cox, *Same-Sex Marriage and the Public Policy Exception in Choice-of-Law: Does it Really Exist?*, 16 QUINNIPIAC L. REV. 61, 100 n. 276 (1996). The anti-same-sex-marriage enactments in Utah and other states represent a stark departure from a centuries-old approach to marriage recognition. *See, e.g.*, Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 TEX. L. REV. 921, 929-30 (1998) (noting that "[b]lanket non-recognition of same-sex marriage . . . would be an extraordinary rule. There is no evidence that any of the legislatures that recently acted gave any thought to how extraordinary it would be"). The departure involves three key shifts: (1) converting an individualized fact-based analysis to a categorical rule; (2) drawing no distinction between evasive marriages by residents and non-evasive marriages by non-residents who traveled through or moved to the prohibiting state; and (3) converting from judicial to legislative determination of a marriage's validity. The new rule of blanket non-recognition flies in the face of the well-reasoned approach that developed during decades of extreme controversy among states about eligibility to marry. Tolerance of disfavored marriages, in the name of comity, uniformity, and portability of marital status, was an important and widespread value, which was honored by a strong general rule of marriage recognition. *See* Grossman, *supra*, at 471-72. Utah has rejected that value through its enactment of a categorical rule of non-recognition for marriages between persons of the same sex.

B. Utah's Anti-Recognition Laws Deprive Appellees of Equal Protection of the Law

Although marriage regulation has primarily been the province of the states, marriage laws must conform to the mandates of the United States Constitution. *See, e.g., Loving v. Virginia*, 388 U.S. 1 (1967) (invalidating Virginia's miscegenation ban for failure to comply with equal protection or due process requirements of federal constitution); *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Turner v. Safley*, 482 U.S. 78 (1987); *see also Cooper v. Utah*, 684 F. Supp. 1060, 1066 (D. Utah 1987) (invalidating Utah statute imposing special obstacles to marriage for child support obligors because "the right to a lawful marriage, without fear of criminal prosecution, is a part of the fundamental right to marry, coming within the zone of interests protected by the Fourteenth Amendment"). Most recently, in *United States v. Windsor*, the Supreme Court unequivocally affirmed that state laws regarding marriage are "subject to constitutional guarantees" and "must respect the constitutional rights of persons." 133 S. Ct. 2675, 2691, 2692 (2013). Utah's refusal to recognize marriages by same-sex couples from other states, therefore, must pass constitutional muster. It does not.

1. Historically Unprecedented Non-Recognition Laws That Target Marriages of Same-Sex Couples Deprive Appellees of Equal Protection

In *Windsor*, the Supreme Court invalidated Section 3 of the federal Defense of Marriage Act ("DOMA"), which denied recognition to validly celebrated marriages by same-sex couples for purposes of federal law. The Court held that this categorical non-recognition provision was an unconstitutional violation of the due process and equal protection guarantees embodied in the Fifth Amendment. 133 S. Ct. at 2696.

The Court's ruling in *Windsor* was not based on the principle that Congress does not have the power to define marital status for purposes of applying or implementing its own laws. 133 S. Ct. at 2690. Rather, the Court based its ruling on the fact that DOMA's rejection of "the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State" represented an "unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage." *Id.* at 2692-93. For all other types of marriages, the federal government defers to state law determinations of marital status when implementing rights and obligations as important as Social Security, income and estate taxes, and family and medical leave. With DOMA, however, Congress singled out one type of marriage for non-recognition—regardless of the particular law at issue or a particular federal policy, and

regardless of the particular couple's need for, or expectation of, recognition. Never before had Congress taken such a drastic measure with respect to marital status. *Windsor*, 133 S. Ct. at 2690.

"Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision." *Romer v. Evans*, 517 U.S. 620, 633 (1996) (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32 (1928)). In *Romer*, the Supreme Court invalidated Colorado's Amendment 2, which amended the state Constitution to prohibit any special protections for gays and lesbians. The provision, the majority wrote, is not "directed to any identifiable legitimate purpose or discrete objective. It is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit." 515 U.S. at 635. Rather than serving a "proper legislative end," Colorado classified homosexuals in order to "make them unequal to everyone else." *Id.* "This," the Court concluded, "Colorado cannot do." *Id.*

In DOMA, the Court saw a similar constitutional defect. Congress' sudden departure from its usual recognition of state marital status laws was, indeed, a discrimination of "an unusual character." *Windsor*, 133 S. Ct. at 2693. The unusual character of the discrimination was "strong evidence of a law having the

purpose and effect of disapproval of that class." *Id.* Indeed, the text, structure, and history of the law made clear that its "avowed purpose and practical effect" was "to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States." *Id.* Both the law's structure and the legislative history made clear that DOMA was enacted from a bare desire to harm a politically unpopular group, and the United States Constitution does not permit such enactments. *Id.* (citing *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973)). As the Court wrote, "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." *Id.* at 2696.

In recent rulings, two federal district courts have held under *Windsor* that bans on the recognition of marriages between persons of the same sex, similar to the one in Utah, are constitutionally defective.[9] In *Bourke v. Beshear*, No. 3:13-CV-750-H, 2014 WL 556729 (W.D. Ky. Feb. 12, 2014), the court held that, even under the

[9] In addition to the courts below, three federal district courts have held in *Windsor*'s wake that state laws banning the *celebration* of marriages between persons of the same-sex violate the federal constitution's Fourteenth Amendment. *See Bishop v. United States ex rel. Holder*, No. 04-CV-848-TCK-TLW, 2014 WL 116013 (N.D. Okla. Jan. 14, 2014); *Bostic v. Rainey*, Civ. No. 2:13cv395, 2014 WL 561978 (E.D. Va. Feb. 13, 2014); *De Leon v. Perry*, No. 5:13-cv-00982-OLG (W.D. Tex. Feb. 26, 2014); *see also Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010), *aff'd sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *vacated and remanded sub nom. Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

most deferential standard of review, Kentucky's statutory and constitutional bans on the recognition of marriages by same-sex couples from other states violated due process and equal protection guarantees in the Fourteenth Amendment. The court in *Bourke* concluded that Justice Kennedy's reasoning in *Windsor* "establishes certain principles that strongly suggest the result here." *Id.* at *6. Likewise, in *Obergefell v. Wymyslo*, No. 1:13-cv-501, 2013 WL 6726688 (S.D. Ohio Dec. 23, 2013), the court held that Ohio's constitutional and statutory ban on marriages between persons of the same sex was unconstitutional as applied to Ohio death certificates. By "refusing to recognize a particular type of legal out-of-state marriages *for the first time in its history*, Ohio is engaging in 'discrimination[] of an unusual character' without a rational basis for doing so." *Id.* at *19 (quoting *Romer*, 517 U.S. at 633).

Utah's adoption of a categorical rule of non-recognition for marriages by same-sex couples suffers a similar constitutional defect. As discussed in Section I.A, *supra*, Utah law traditionally deemed marriages valid as long as they were validly celebrated. The legislature introduced an unusual and unforgiving exception to that rule for marriages by same-sex couples amid a national panic over the possibility that such marriages would be legalized in other states and foisted upon Utah through marriage recognition law. And while it tried to neutralize the motive by applying the non-recognition rule to two other categories

of marriages, the clear target was same-sex married couples. In defending the state's underlying ban on same-sex marriage, the State concedes as much. *See* Appellant's Br. at 73, 87 (the purpose of the ban is to provide "special privilege and status" to opposite-sex married couple families and to avoid any suggestion that same-sex-couple families "are on a par with traditional man-woman unions.") Just as the Supreme Court concluded with respect to DOMA, the "interference with the equal dignity of same-sex marriages . . . was more than an incidental effect of the . . . statute. It was its essence." *Windsor*, 133 S. Ct. at 2693. And also as with DOMA, the "avowed purpose and practical effect" of Utah's non-recognition law is to disadvantage one group of people, and one type of marriage. Its means and end are one in the same, for the "purpose of disadvantaging the group burdened by the law." *Romer*, 517 U.S. at 633.

2. Blanket Non-Recognition Laws Based On Public Policy Grounds Cannot Survive Constitutional Scrutiny

Even if the Utah laws were not so obviously rooted in animus, and therefore on shaky constitutional ground, there are no constitutionally permissible reasons to justify blanket non-recognition of marriages by same-sex couples.[10] Although the traditional rules of marriage recognition, see Section I.A., *supra*, permitted states

[10] *Amici* support Appellees' argument that Utah's anti-recognition laws should be subjected to heightened scrutiny as both sexual orientation and gender discrimination, *see* Appellees' Br. at 48-63, but believe they do not survive even the most deferential standard of review.

to refuse recognition to out-of-state marriages that violated their strong public policy (a right rarely exercised), the most common reasons for refusal are no longer valid given developments in constitutional jurisprudence. Three types of interests were commonly invoked in defense of a claimed public policy exception to marriage recognition: (1) "a desire to exclude certain sexual couplings or romantic relationships" from the state; (2) "a desire to express the moral disapproval" of the relationship, and (3) "a desire to dissuade couples in the disfavored relationship from migrating to the state in the first place." Tobias Barrington Wolff, *Interest Analysis in Interjurisdictional Marriage Disputes*, 153 U. PA. L. REV. 2215, 2216 (2005). None of these reasons survive modern constitutional standards.

To whatever extent Utah's non-recognition law is founded in dislike or disapproval of gay and lesbian intimate relationships, the Supreme Court's ruling in *Lawrence v. Texas*, 539 U.S. 558 (2003), extinguishes the validity of such an interest. In that case, the Court found protection for a liberty interest in pursuing private and consensual sexual relationships, regardless of the gender of the parties. Gays and lesbians, like everyone else, have the right to make decisions about intimate relationships without interference from the state. Moreover, *Lawrence* also calls into question any interest rooted in moral disapproval. As the majority explained, moral repugnance is an insufficient basis upon which to infringe an

important aspect of the right to privacy. *Id.* at 577-78; *see also* Wolff, *supra*, at 2231; Singer, *supra,* at 23-24. Finally, any intentional effort to dissuade interstate travel may raise its own constitutional problems. *See, e.g.*, *Saenz v. Roe*, 526 U.S. 489, 192-96 (1999) (invalidating California law that forced new residents to wait a year for a higher level of benefits); Mark Strasser, *The Privileges of National Citizenship: On* Saenz*, Same-Sex Couples, and the Right to Travel*, 52 RUTGERS L. REV. 553 (2000).

Utah should not be permitted, any more than Congress is, to "identify a subset of state-sanctioned marriages and make them unequal," nor to tell "those couples, and all the world, that their otherwise valid marriages are unworthy of . . . recognition." *Windsor*, 133 S. Ct. at 2694. Equal protection principles demand more.

C. The Fundamental Liberty Interest that Exists in the Status of Marriage Is Unconstitutionally Interfered with by Utah's Anti-Recognition Laws

1. The Status of Marriage Is a Fundamental Liberty Interest

The status of marriage, that is the status of remaining in the legal status of marriage without unilateral interference by the state, is a recognizable liberty interest. The Due Process Clause protects a fundamental liberty interest in marriage. *See Windsor*, 133 S. Ct. at 2695. Indeed, marriage has long been recognized as a unique institution, entitled to the highest level of constitutional

privacy and protection. *See, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965); *Turner v. Safley*, 482 U.S. 78, 95-96 (1987); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984); *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). Time and again, courts have recognized "that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974); *see also Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (the right "to marry, establish a home and bring up children" is a central part of the liberty protected by the Due Process Clause); *Carey v. Population Servs., Int'l*, 431 U.S. 678, 684-85 (1977) ("[w]hile the outer limits of this aspect of privacy have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government interference *are personal decisions 'relating to marriage . . . .'*") (emphasis added)*; see also Lawrence v. Texas*, 539 U.S. 558, 574 (2003) ("our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education").

In considering the constitutional protections related to marriage, courts have focused primarily on questions concerning the right to marry, *see, e.g.*, *Loving v. Virginia*, 388 U.S. 1 (1967), and the right of privacy and autonomy within a marriage. *See, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965). Until the

promulgation of the historically unprecedented anti-recognition laws, courts have had no occasion to consider whether a State could unilaterally deprive a class of legally married individuals the status of marriage. *See supra* at Section I.A.1. The plethora of decisions recognizing the significance of, and deference accorded to, the right of the individual to make personal decisions with respect to marital relationships are meaningless, however, if States are allowed to unilaterally refuse to recognize disfavored classes of marriages, thereby depriving participants in these marriages of their rights and privileges protected by the United States Constitution. If, indeed there is a fundamental liberty interest in marriage, it therefore must follow that embodied within this fundamental liberty interest, and "implicit in the concept of ordered liberty," is the fundamental right to the status of marriage. *Seegmiller v. LaVerkin City*, 528 F.3d 762, 767 (10th Cir. 2008) (setting forth the standard for determining the existence of a fundamental liberty interest) (quoting *Chavez v. Martinez*, 538 U.S. 760, 787 (2003)); *see also Zablocki v. Redhail*, 434 U.S. 374, 397 n.1 (1978) (Powell, J., concurring) ("[T]here is a sphere of privacy or autonomy *surrounding an existing marital relationship* into which the State may not lightly intrude.") (emphasis added).

2. Utah's Anti-Recognition Laws Cannot Withstand the Heightened Scrutiny that Applies when the State Unilaterally Interferes with the Status of Marriage

"State laws defining and regulating marriage, of course, must respect the constitutional rights of persons." *Windsor*, 133 S. Ct. at 2691. Among the constitutional rights that must be respected is the fundamental liberty interest to maintain the status of marriage. Utah's anti-recognition laws interfere with this fundamental liberty interest as these laws have the unprecedented effect of eviscerating legally married same-sex couples marriages by refusing to allow any recognition of these marriages. UTAH CONST. art. I, § 29 (defining marriage as the legal union between a man and a woman and stating that no other domestic unions may be recognized or treated as a marriage); *see also* Section I.A.1, *supra*. As a result of the operation of Utah's anti-recognition laws, spouses who are legally married are converted into legal strangers to each other when they enter into Utah. *See* Steve Sanders, *The Constitutional Right To (Keep Your) Same-Sex Marriage*, 110 MICH. L. REV. 1421, 1450-51 (2012). The consequences of this conversion are far reaching: "property rights are potentially altered, spouses disinherited, children put at risk, and financial, medical, and personal plans and decisions thrown into turmoil." *Id.* at 1450.

"[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). Whether a couple is considered married or not controls myriad issues including "housing, taxes, criminal sanctions, copyright" to name just a few. *Windsor*, 133 S. Ct. at 2694-95 (describing at length numerous benefits that flow from marriage). Through hundreds of statutes, regulations, and common-law rules, Utah's laws provide married couples with comprehensive protections and responsibilities that enable them to make a legally binding commitment to one another and to any children they may have, and to be treated as a legal family. When Utah refuses to recognize legal marriages by same-sex couples, these families are exposed to an alarming array of legal vulnerabilities and harms, "from the mundane to the profound." *Id.* at 2694.

In enacting its anti-recognition laws, Utah has opted to select a disfavored class of people to nullify their marriages. Heightened scrutiny must be used in determining whether the State's action in unilaterally voiding a marriage, against the will of either spouse, comports with the requirements of Due Process. *Seegmiller*, 528 F.3d at 771 ("If a fundamental right were at stake, only heightened scrutiny would have been appropriate"); *see also Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (When the government "undertakes such intrusive

regulation of the family . . . the usual judicial deference to the legislature is inappropriate."); Sanders, *supra*, at 1452-53. When a law imposes a "direct and substantial" burden on an existing marital relationship, the law cannot be upheld "unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." *Montgomery v. Carr*, 101 F.3d 1117, 1124 (6th Cir. 1996) (internal quotation marks and citation omitted); *see also Griswold*, 381 U.S. at 485-86 (applying heightened constitutional scrutiny in striking down law barring use of contraceptives by married couples). In determining whether Utah's anti-recognition laws violate the Due Process Clause, the Court should therefore apply a heightened standard of review.

3. Anti-Recognition Laws Are Unconstitutional under any Level of Review

Utah has not, and nor could it have, offered a constitutionally sufficient justification for the serious harms inflicted by its anti-recognition laws because each of the justifications offered by the State has already been considered, and rejected by the Supreme Court. Appellants contend that Utah's anti-recognition laws are supported by policy interests related to child-rearing and reproduction concerns. Appellants' Br. at 50-89. These assertions, however, have no logical application to existing marriages, or to the children already being raised by legally married same-sex couples who are actually put in harm's way by the State's refusal

to recognize their parent's marriage. *Windsor*, 133 S. Ct. at 2694. Further, these rationales have already been considered and rejected by the Supreme Court when they were presented in support of DOMA. *See* Brief on the Merits for Respondent the Bipartisan Legal Advisory Group of the U.S. House of Representatives at 28-49, 133 S. Ct. 2675 (2013) (No. 12-307); *Windsor*, 133 S. Ct. at 2696. Appellants' assertion that the anti-recognition laws are justified by the need to accommodate religious freedom and reduce civic strife fare no better. *See* Appellant's Br. at 90-100. These purported justifications are little more than code for the arguments of history, tradition, and moral disapproval, none of which is a legitimate constitutional justification for legislation. *See Windsor*, 133 S. Ct. at 2695; *Lawrence*, 539 U.S. at 571; *Romer*, 517 U.S. at 634-35. Because Utah cannot offer a constitutionally sufficient justification for the serious harms inflicted by the anti-recognition laws, these laws unconstitutionally deprive married same-sex couples of their liberty interests in their existing marriages. Such an unjustified deprivation of fundamental liberties under the Due Process Clause cannot be tolerated.

CONCLUSION

For the foregoing reasons, this Court should hold that Utah's refusal to give effect to valid marriages by same-sex couples violates basic principles of due process and equal protection. Same-sex couples should not be summarily stripped

of a marriage, "the most important relation in life," *Maynard v. Hill*, 125 U.S. 190, 205 (1888), simply by setting foot in Utah.

March 4, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,779 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). 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 2007 in 14-point Times New Roman.

Dated: March 4, 2014

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that:

(1) there are no required privacy redactions to be made in this brief;

(2) the electronic version of this brief that was filed using the ECF filing system is an exact copy of the hard copies of this brief that are being submitted to the Clerk; and

(3) the digital submission has been scanned for viruses with the most recent version of the commercial virus scanning program Sophos Endpoint Security and Control version 10.3 and, according to the program, is free of viruses.

Dated: March 4, 2014

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing 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 parties in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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APPENDIX A

Amici Curiae are scholars with a wide range of expertise relating to family law, conflict of laws, and state regulation of marriage. Their expertise thus bears directly on the issues before the Court in this case. These *Amici* are listed below. Their institutional affiliations are listed for identification purposes only.

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