No. 12-307

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

EDITH SCHLAIN WINDSOR

and

BIPARTISAN LEGAL ADVISORY GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

BRIEF ADDRESSING THE MERITS OF THE STATE OF INDIANA AND 16 OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT THE BIPARTISAN LEGAL ADVISORY GROUP OF THE U.S. HOUSE OF REPRESENTATIVES

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QUESTION PRESENTED

Whether Section 3 of the Defense of Marriage Act, 1 U.S.C. § 7, violates the equal protection component of the Due Process Clause of the Fifth Amendment.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF THE *AMICI* STATES 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

I. Ordinary Rational-Basis Scrutiny Applies to Congress's Traditional Marriage Definition 4

A. Section 3 of DOMA classifies on the basis of a couple's general procreative capacity, not their sexuality as such 4

B. The traditional role of states in regulating marriage does not justify heightened scrutiny of Congress's regulation of federal marriage benefits 7

II. The Second Circuit Erred in Rejecting the Responsible Procreation Rationale for DOMA and Marriage Laws Generally 13

A. The decision below undermines all laws predicated on a traditional definition of marriage 13

B. Marriage serves interests inextricably linked to the procreative nature of opposite-sex relationships 16

III. Constitutionalizing Same-Sex Marriage Would Poison the Political Well..... 21

CONCLUSION 26

TABLE OF AUTHORITIES

CASES

Adarand Constructors, Inc. v. Pena,
515 U.S. 200 (1995)..... 1

Bd. of Trs. of Univ. of Alabama v. Garrett,
531 U.S. 356 (2001)..... 6

Bond v. United States,
131 S. Ct. 2355 (2011)..... 11

Citizens for Equal Prot. v. Bruning,
455 F.3d 859 (8th Cir. 2006)..... 14, 15

Dandridge v.Williams,
397 U.S. 471 (1970)..... 24

Dep't of Revenue v. Davis,
553 U.S. 328 (2008)..... 9

FERC v. Mississippi,
456 U.S. 742 (1982)..... 21

Feliciano v. Rosemar Silver Co.,
514 N.E.2d 1095 (Mass. 1987)..... 14

Florida v. U.S. Dep't Health & Human Servs.,
648 F.3d 1235 (11th Cir. 2011)..... 12

Hernandez v. Robles,
855 N.E.2d 1 (N.Y. 2006)..... 14

CASES [CONT'D]

Hughes v. Alexandria Scrap Corp.,
426 U.S. 794 (1976) 9

Johnson v. Robison,
415 U.S. 361 (1974) 15

Lewis v. Casey,
518 U.S. 343 (1996) 6

Lochner v. New York,
198 U.S. 45 (1905) 24

Massachusetts v. U.S. Dep't of Health & Human Servs.,
682 F.3d 1 (1st Cir. 2012) 3, 7, 8, 12

Morrison v. Sadler,
821 N.E.2d 15 (Ind. Ct. App. 2005) 19

Nat'l Fed'n of Indep. Bus. v. Sebelius,
132 S. Ct. 2566 (2012) 10, 12

Pedersen v. Office of Pers. Mgmt.,
No. 3:10-cv-1750, 2012 WL 3113883 (D. Conn. July 31, 2012) 14

Reeves, Inc. v. Stake,
447 U.S. 429 (1980) 9

Roe v. Wade,
410 U.S. 113 (1973) 23

CASES [CONT'D]

Sevcik v. Sandoval,
No. 2:12-cv-00578, 2012 WL 5989662 (D. Nev. Nov. 26, 2012)..... 5

Singer v. Hara,
522 P.2d 1187 (Wash. Ct. App. 1974) 17

Skinner v. Oklahoma ex rel. Williamson,
316 U.S. 535 (1942)..... 15, 16

Tigner v. Texas,
310 U.S. 141 (1940)..... 15

Turner v. Safley,
482 U.S. 78 (1987)..... 1

Washington v. Davis,
426 U.S. 229 (1976)..... 6

FEDERAL STATUTES

1 U.S.C. § 7..... 1

OTHER AUTHORITIES

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142 Cong. Rec. S10100-02 (Sept. 10, 1996) (Sen. Lott) 7

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Brutus, *To the Citizens of the State of New York* (Oct. 18, 1787) 10

Cass R. Sunstein, *Three Civil Rights Fallacies*, 79 Cal. L. Rev. 751 (1991) 24

Centinel, *To the Freemen of Pennsylvania* (Oct. 5, 1787) 10

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Laurence H. Tribe & Joshua Matz, *The Constitutional Inevitability of Same-Sex Marriage*, 71 Md. L. Rev. 471 (2012) 2

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Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. Rev. 1185 (1992) ... 23, 24, 25

The Debate on the Constitution (Bernard Bailyn. ed. 1993) 10

The Federalist No. 10 (James Madison) 11

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INTEREST OF THE *AMICI* STATES

Congress and four-fifths of the states define marriage as the union of one man and one woman, consistent with the historical definition of marriage. Section 3 of DOMA defines the basic attributes of marriage for federal purposes and affects the availability of over 1,000 federal rights, privileges, and benefits tied to marital status. *See* 1 U.S.C. § 7; U.S. Gen. Accounting Office, GAO-04-353R, *Defense of Marriage Act: Update to Prior Report* 1 (2004). Similarly, few states promote marriage through labels alone; most join official recognition with access to particular rights, privileges, and benefits. *See Turner v. Safley*, 482 U.S. 78, 96 (1987) ("[M]arital status often is a precondition to the receipt of government benefits (*e.g.,* Social Security benefits), property rights (*e.g.,* tenancy by the entirety, inheritance rights), and other, less tangible benefits (*e.g.*, legitimation of children born out of wedlock).").

Because the same equal protection principles generally apply to state and federal laws, *see Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 213-18, 226-27 (1995), it requires no great leap of logic to conclude that a judicial rejection of DOMA would erode constitutional support for similar state laws. Although DOMA does not license marriages or dictate marriage policy for states, the decision below invalidated the very definition of marriage long employed by most (until recently, *all*) states. If the

federal government may not adhere to a traditional definition of marriage as it confers exclusive benefits based on marital status, considerations of tradition or gradualism are unlikely to save state marriage laws. *See* Laurence H. Tribe & Joshua Matz, *The Constitutional Inevitability of Same-Sex Marriage*, 71 Md. L. Rev. 471, 477 & n.25 (2012).

The *Amici* States, therefore, have two interests at stake: (1) protecting their own power to define marriage in the traditional manner, and (2) clarifying equal protection principles that apply to marriage laws.

SUMMARY OF THE ARGUMENT

In the decision below, the Second Circuit invalidated a federal law that affirms marriage as it has been understood for centuries by every American colony and state. It agreed with the theory that DOMA targets a protected class (homosexuals) and cannot survive heightened scrutiny. Neither DOMA nor traditional state marriage laws, however, *target* homosexuals. Traditional marriage laws, of course, have a particular *impact* on homosexuals, but as this Court has long held, disparate impact is not the same as disparate treatment for purposes of equal protection doctrine. What is more, the traditional definition of marriage has always been about the need to encourage potentially procreative couples to stay together for the sake of the children their sexual union may produce, not about animus toward

homosexuals. Accordingly, ordinary rational basis is the proper level of scrutiny here.

Moreover, the traditional role of states in defining marriage does not justify heightened scrutiny of DOMA as applied to states that recognize same-sex marriages. *See Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 11-13 (1st Cir. 2012). It is improper to conflate the structural protections of liberty inherent in federalism with the individual rights and freedoms secured by the Fifth Amendment as the justification for a new, more rigorous level of equal protection scrutiny applicable to DOMA. No piece of our intricately plotted government of limited and enumerated powers divided among three branches should be carelessly used as a means to an end. In the long run, a novel use of federalism to leverage equal protection standards risks negation of structural constitutionalism as a separate guarantor of individual liberty.

The fundamental equal protection issue here asks whether there is anything wrong with adhering to the traditional definition of marriage. As long as some legitimate governmental purpose exists for conferring exclusive benefits on qualified opposite-sex couples, DOMA is valid in all applications. Such a legitimate rationale is crystal-clear: opposite-sex couples are the *only* procreative relationships that exist, which means that such couples are the only ones the government has a need to encourage. No

other limiting principle for marriage exists; if this innately biological rationale is dismissed, the government has no coherent argument for denying marriage status to any number of persons who desire a committed relationship with each other.

Finally, divining a constitutional mandate for same-sex marriages would cause irredeemable harm to the Nation as a deliberate, democratic society. As has been shown by the entrenched discord inflicted by *Roe v. Wade*, judicial decisions that remove issues from the political branches of government can hinder, instead of facilitate, national consensus on contentious topics. Whether to reconstitute civil marriage so that its definition includes same-sex couples is currently the subject of robust nationwide debate. Arguments in support of scrapping the meaning of marriage that has existed for all time should be allowed to find fertile ground, or not, as part of the democratic process, not as untouchable constitutional law.

ARGUMENT

I. Ordinary Rational-Basis Scrutiny Applies to Congress's Traditional Marriage Definition

A. Section 3 of DOMA classifies on the basis of a couple's general procreative capacity, not their sexuality as such

The Second Circuit subjected Section 3 of DOMA to "intermediate scrutiny" where "a classification must be 'substantially related to an important government interest,'" meaning that "the explanation must be 'exceedingly persuasive.'" Supp. App. 23a (citations omitted). It did so based on its conclusion that DOMA discriminates against homosexuals, a "quasi-suspect" class. Supp. App. 23a. The *amici* states take no position on whether homosexuals constitute a specially protected class in the abstract. They reject, however, the view that Section 3 of DOMA, and by extension traditional state definitions of marriage, constitute facial discrimination against homosexuals.

Traditional marriage laws do not target homosexuals. *See Sevcik v. Sandoval*, No. 2:12-cv-00578, 2012 WL 5989662, at *7 (D. Nev. Nov. 26, 2012) ("[T]he distinction is not by its own terms drawn according to sexual orientation. Homosexual persons may marry in Nevada, but like heterosexual persons, they may not marry members of the same sex."). Rather, they draw a classification based on the relationship of two individuals to each other. Traditional marriage definitions are not by their terms concerned with any single trait of an individual seeking to marry, but instead with the relationship of traits between the two individuals. It is not the sexual orientation of the participants that counts, but the general capacity of the couple to reproduce through sexual intercourse.

While traditional marriage laws *impact* heterosexuals and homosexuals differently, that is not enough to treat such laws as creating classifications based on sexuality, particularly in view of the benign history of traditional marriage laws generally. A law's disparate impact on a suspect class is insufficient to justify strict scrutiny absent evidence of discriminatory purpose. *Washington v. Davis,* 426 U.S. 229, 239, 241-42 (1976); *see also Bd. of Trs. of Univ. of Alabama v. Garrett*, 531 U.S. 356, 372-73 (2001) ("Although disparate impact may be relevant evidence of . . . discrimination . . . such evidence alone is insufficient even where the Fourteenth Amendment subjects state action to strict scrutiny."); *Lewis v. Casey*, 518 U.S. 343, 375 (1996) (Thomas, J., concurring) ("We rejected a disparate-impact theory of the Equal Protection Clause altogether . . . .").

In enacting DOMA, Congress was merely preserving the traditional definition of marriage for purposes of federal programs in the face of a new national movement to undermine that definition. 142 Cong. Rec. H7441-03 (July 11, 1996) (Rep. Canady) ("[L]awyers are soon likely to win the right for homosexuals to marry in Hawaii, and . . . attempt to 'nationalize' that anticipated victory under force of the Full Faith and Credit Clause of the U.S. Constitution."); 142 Cong. Rec. H7480-05 (July 12, 1996) (Rep. Sensenbrenner) ("Because this United States Code does not contain a definition of marriage, a State's definition of marriage is

regularly utilized in the implementation of Federal laws and regulations. Such deference is possible now . . . because the difference in State marriage laws, although numerous, are relatively minor. . . . If Hawaii legalizes same-sex marriage, which the gentlewoman from Hawaii says is going to happen, then the basic qualification is altered."); 142 Cong. Rec. S10100-02 (Sept. 10, 1996) (Sen. Lott) ("What the Hawaiian court decides could also affect the operations of the Federal Government. It could have an impact upon programs like Medicare, Medicaid, veterans' pensions, and the Civil Service Retirement System.").

It is surely implausible to infer that marriage was invented thousands of years ago as a device to discriminate against homosexuals. Nor does a decision to adhere to that longstanding traditional definition of marriage betray a purpose to discriminate on the basis of sexual orientation. Accordingly, there is no basis for applying any sort of heightened scrutiny.

B. The traditional role of states in regulating marriage does not justify heightened scrutiny of Congress's regulation of federal marriage benefits

In a separate DOMA section 3 challenge, *Massachusetts v. United States Department of Health & Human Services*, 682 F.3d 1 (1st Cir. 2012), the First Circuit invoked a different rationale for

applying something other than ordinary rational-basis scrutiny. According to that court, a test more rigorous than rational basis is warranted because with DOMA Congress was regulating in an area—marriage—traditionally reserved for states. *Id.* at 8, 10-11 (professing "not to create some new category of 'heightened scrutiny' for DOMA under a prescribed algorithm," but to "undertake[] a more careful assessment of the justifications than the light scrutiny offered by conventional rational basis review"). The First Circuit's purported concern for areas of traditional state regulation echoes Tenth Amendment doctrine, yet that court separately (and properly) *rejected* Massachusetts' actual Tenth Amendment challenge to Section 3 of DOMA. *See id.* at 11-13. The First Circuit did not explain how federalism had any residual connection to the equal protection standard applicable to the federal government.

While the *Amici* States respect and appreciate efforts to police the proper boundaries between state and federal power, they object to the idea of leveraging individual rights claims using the Constitution's structural safeguards. For if concern for state prerogatives justifies heightened Fifth Amendment equal protection scrutiny even where there is no Tenth Amendment violation, it would seem to follow that general concern for the limits of state authority in light of dormant Commerce Clause doctrine could ratchet up Fourteenth Amendment scrutiny even when there is no Commerce Clause

violation.[1] Or, similarly, the mere assertion of a colorable preemption theory might be enough to justify "intensified scrutiny" of state laws under the Fourteenth Amendment even where state and federal statutes are ultimately deemed compatible.

Constitutional structure and individual rights protections both protect individual liberty, but they are properly kept distinct in order to preserve their independent vitality. The Constitution contains both safeguards to prevent different political excesses, and a doctrine that conflates them risks losing some measure of the liberty protection each was meant to achieve.

The Founders were acutely aware of the danger of concentrated power, particularly in the hands of a distant, unresponsive government. Their primary solution to this threat was structural: a national government of limited and enumerated powers

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[1] This would be especially troubling when states are alleged to discriminate against out-of-state commerce, but where Commerce Clause doctrine would permit such overt classifications. *See, e.g.*, *Dep't of Revenue v. Davis*, 553 U.S. 328 (2008) (upholding a state income tax exemption for interest earned from bonds issued by the taxing state); *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980) (upholding a state policy that prohibited sales of cement produced by a state-owned cement plant to out-of-state residents); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976) (upholding a state law providing bounties to in-state scrappers with indemnity agreements but requiring more extensive documentation from out-of-state scrappers).

divided among three branches. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2577-78 (2012) (Roberts, C.J.); *The Federalist No. 84* (Alexander Hamilton) (arguing that the Constitution was itself a bill of rights). Guarantees of individual rights, Alexander Hamilton argued, were "unnecessary" and "dangerous" as they might imply Congress possessed powers not granted. *The Federalist No. 84* (Alexander Hamilton); *see also* 1 Annals of Cong. 436-40 (1789) (Joseph Gales ed., 1834) (statement of Rep. James Madison).

But as the Anti-Federalists argued, distance from the local electorate, collusion among the branches, and broad grants of power could undermine the effectiveness of structural guarantees. *See* Centinel, *To the Freemen of Pennsylvania* (Oct. 5, 1787), *reprinted in* 1 *The Debate on the Constitution* 52, 52-62 (Bernard Bailyn. ed., 1993) [hereinafter *The Debate*]; Cincinnatus, *Reply to James Wilson's Speech* (Nov. 1, 1787), *reprinted in* 1 *The Debate, supra*, 92-94; Brutus, *To the Citizens of the State of New York* (Oct. 18, 1787), *reprinted in* 1 *The Debate*, *supra*, 164, 168-69, 171-72; Brutus, *To the Citizens of the State of New York* (Jan. 31, 1788), *reprinted in* 2 *The Debate*, *supra*, 129, 133-35; Patrick Henry, *Speech at the Virginia Ratifying Convention* (June 7, 1788), *reprinted in* 2 *The Debate*, *supra*, 623, 635-36; *see also* Peter J. Smith, *Sources of Federalism: An Empirical Analysis of the Court's Quest for Original Meaning*, 52 UCLA L. Rev. 217, 239-46 (2004). The Anti-Federalists' opposition to ratification yielded

guarantees that the first Congress would enact a Bill of Rights designed to address these political threats to liberty. *See* Smith, *supra*, at 246.

Experience has proved the genius of dual safeguards. On the one hand, federalism enhances individual liberty by limiting central authority, putting states into competition with one another, and bringing the organs of government into closer contact with the people. *See, e.g.*, *Bond v. United States*, 131 S. Ct. 2355, 2364-65 (2011); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 3-5 (1988). On the other hand, American difficulties with attacks on the fundamental rights of political, racial and other minorities at both the federal and state levels proved that structuralism could not prevent majority oppression entirely, as Madison warned. *See The Federalist No. 10* (James Madison); Barry Friedman, *Valuing Federalism*, 82 Minn. L. Rev. 317, 367 (1997). The Bill of Rights (alone and through the Fourteenth Amendment) provides yet more protection of liberty.

The complementary relationship between structural protections and specific individual-rights guarantees is critical: any one mechanism to preserve liberty may be incomplete or even contain dangers that must be counteracted by another. Intermixing doctrines that animate structure and individual rights may thus obscure the value and

erode the effectiveness of these independent protections.

Because the role of structure in preserving freedom is easily overlooked—*see, e.g.*, *Florida v. U.S. Dep't Health & Human Servs.*, 648 F.3d 1235, 1361-65 (11th Cir. 2011) (Marcus, J., dissenting) (seeing the plaintiffs' individual liberty concerns as relevant to due process but not Tenth Amendment arguments), *aff'd in part & rev'd in part sub nom. Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012)—courts should avoid implying that structural provisions affect individual liberty only insofar as they enhance or limit the operation of individual rights guarantees. If federalism supports the cause of individual liberty in this case, the Tenth Amendment is the natural mode of giving effect to structural principles. Rerouting federalism arguments, which the First Circuit rejected, *Massachusetts*, 682 F.3d at 11-13, into a new equal protection standard only reinforces the dangerous misconception that only specific rights guarantees are important for individual liberty.

II. The Second Circuit Erred in Rejecting the Responsible Procreation Rationale for DOMA and Marriage Laws Generally

A. The decision below undermines all laws predicated on a traditional definition of marriage

Although it addressed only the definition of marriage for purposes of federal law, the decision below casts doubt on *all* laws embodying the traditional definition of marriage. The panel concluded that "homosexuals compose a class that is subject to heightened scrutiny," Supp. App. 23a, and that DOMA could not survive intermediate scrutiny on the basis, among others, of encouraging responsible procreation. Supp. App. 24a. It held that preserving this traditional objective of marriage is insufficient: "DOMA does not provide any incremental reason for opposite-sex couples to engage in 'responsible procreation.' Incentives for opposite-sex couples to marry and procreate (or not) were the same after DOMA was enacted as they were before." Supp. App. 29a-30a.

The panel asked the wrong question: the correct constitutional query is simply whether DOMA *upholds* the rationales for traditional marriage. Implicit in the panel's decision is the idea that the status quo is somehow deficient and that DOMA is impermissible because acknowledging same-sex marriages—the "remedy"—would not harm opposite-

sex marriages. *See* Supp. App. 30a (citing *Pedersen v. Office of Pers. Mgmt.*, No. 3:10-cv-1750, 2012 WL 3113883, at *40-43 (D. Conn. July 31, 2012)). The panel gave short shrift to the long-accepted understanding of marriage as being fundamentally connected to the procreative nature of opposite-sex couples.

Asking how excluding same-sex couples benefits opposite-sex couples ignores the fact that DOMA was not an isolated legislative act. It expressly codified a preexisting understanding of marriage that occurs over 1,000 times in federal law. When originally conferring marriage rights and benefits, Congress undoubtedly assumed that it was incenting eligible couples—which at the time would have meant opposite-sex couples only—to marry. *See, e.g.*, *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 867-68 (8th Cir. 2006) (recognizing as rational the practice of giving benefits to incentivize marriage); *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006) (plurality opinion) (same); *Feliciano v. Rosemar Silver Co.*, 514 N.E.2d 1095, 1096 (Mass. 1987) (observing that extending a right to recover for loss of consortium to a cohabitating partner would "subvert[]" the state purpose of promoting marriage). Therefore, the panel below simply needed to ask why Congress sought to incentivize traditional marriages, and whether that rationale extends to same-sex couples.

The constitutionality of DOMA thus turns on whether Congress may expressly perpetuate its long-assumed distinction between same-sex and opposite-sex couples even when some states have rejected it. To state the obvious, if there is a sufficient reason for Congress to distinguish between opposite-sex and same-sex relationships, it is fitting to enact laws that promote marriages among opposite-sex couples alone. *See Citizens for Equal Prot.*, 455 F.3d at 867-68; *see also Johnson v. Robison*, 415 U.S. 361, 383 (1974) ("When . . . the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not, we cannot say that the statute's classification of beneficiaries and nonbeneficiaries is invidiously discriminatory."); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 540 (1942) ("[T]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." (quoting *Tigner v. Texas*, 310 U.S. 141, 147 (1940))).

Conferring exclusive benefits on opposite-sex couples promotes a legitimate governmental purpose if any relevant differences exist between same-sex and opposite-sex couples. In striking down such benefits the decision below necessarily rejected the existence of a legitimate distinction between them and, in so doing, cast doubt on all traditional marriage laws.

B. Marriage serves interests inextricably linked to the procreative nature of opposite-sex relationships

As explained in more detail in the Brief of Amici Curiae Indiana, Virginia, and 17 other States in *Hollingsworth v. Perry*, No. 12-144, the choice to promote traditional marriages is based on an understanding that civil marriage recognition arises from the need to encourage biological parents to remain together for the sake of their children. It protects the *only* procreative relationship that exists and makes it more likely that unintended children, among the weakest members of society, will be cared for.

1. Civil recognition of marriage historically has not been based on a state interest in adult relationships in the abstract. Marriage instead is predicated on the positive, important, and concrete societal interests in the procreative nature of opposite-sex relationships. Only opposite-sex couples can naturally procreate, and the responsible begetting and rearing of new generations is of fundamental importance to civil society. *See Skinner*, 316 U.S. at 541 ("Marriage and procreation are fundamental to the very existence and survival of the race.").

Traditional marriage protects civil society by encouraging opposite-sex couples to remain together to rear the children they conceive. It creates the

norm that potentially procreative sexual activity should occur in a long-term, cohabitative relationship. It is the institution that provides the greatest likelihood that both biological parents will nurture and raise the children they beget, which is optimal for children and society at large. "[M]arriage's vital purpose in our societies is not to mandate man/woman procreation but to ameliorate its consequences." Monte Neil Stewart, *Judicial Redefinition of Marriage*, 21 Can. J. Fam. L. 11, 47 (2004).

This ideal does not disparage the suitability of arrangements where non-biological parents have legal responsibility for children. But these alternative relationships are exactly that—alternatives to the model. States may rationally conclude that, all things being equal, it is better for the biological parents also to be the legal parents, and that marriage promotes that outcome.

2. The fact that opposite-sex couples may marry even if they do not plan to have children or are unable to have children does not undermine this norm or invalidate the states' interest in traditional marriage. *See Singer v. Hara*, 522 P.2d 1187, 1195 (Wash. Ct. App. 1974) (holding that marriage is justified by reference to procreation "even though married couples are not required to become parents and even though some couples are incapable of becoming parents and even though not all couples who produce children are married"). Such couples

reinforce and exist in accord with the traditional marriage norm. "By upholding marriage as a social norm, childless couples encourage others to follow that norm, including couples who might otherwise have illegitimate children." George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 J.L. & Pol. 581, 602 (1999).

Furthermore, it would be a tremendous intrusion on individual privacy to inquire of every couple wishing to marry whether they intended to or could procreate. States are not required to go to such extremes simply to prove that the purpose behind civil recognition of marriage is to promote procreation and child rearing in the traditional family context.

3. Fundamentally, even if childless married couples, no-fault divorce laws, or any other phenomena of contemporary society undermine the responsible procreation rationale, that still does not logically require recognition of same-sex marriages. A constitutional doctrine that requires the same benefits for same-sex and opposite-sex couples must supply a coherent rationale for government recognition of both, not simply attack traditional marriage as antiquated or somehow ill-considered. Proponents of same-sex marriage must either articulate a rationale for government recognition of *their* preferred relationships or be satisfied with arguing against *any* recognition of civil marriage.

Yet there is no alternative coherent justification for marriage as a limited institution. Procreative potential provides the core utilitarian basis for state interest in marriage while providing at the same time a coherent limit on the definition of marriage. Absent this principle, there is no apparent reason why the state should care about mutual commitments among adult sexual partners any more than it cares about other voluntary relationships of two or more people. *See Morrison v. Sadler*, 821 N.E.2d 15, 29 (Ind. Ct. App. 2005) (lead opinion).

One rationale put forth is that, through same-sex marriage, government can support mutual commitment for purposes of raising children over which couples share joint parental rights. Yet such commitment rationale does not assume a sexual, much less a procreative, component to the marriage relationship, so it could encompass a variety of platonic relationships—even those that states may unquestionably prohibit from being sexual, such as incestuous or kinship relationships. A brother and sister, a father and daughter, an aunt and nephew, two business partners, or simply two friends could decide to form an "exclusive and permanent" household partnership featuring no sex whatever. Nor does commitment provide any inherent basis for limiting marriage to *couples*. Groups of three or more adults may desire to form a household and to remain exclusive and committed to one other based on mutual affection, or simply a desire to "co-parent" children. Once the link between marriage and

procreation is severed, there is no reason for government to prefer couples over larger groups.

Similarly, if the purpose of marriage is to promote stability and other social goods, there is still no governmental objective vindicated by limiting marriages to sexual partners, couples or unrelated individuals. Polyamorous or platonic kinship relationships might provide the same level of family stability and care for members of the family unit as that provided by same-sex couples. And government can facilitate governance, public order, and property ownership by recognizing social units of more than two adults perhaps even more efficiently than by recognizing couples only.

If the purpose of marriage is to recognize adult commitment or secure a broad array of social goods, a limitless number of rights claims could be set up that evacuate the term "marriage" of any meaning. The theory of traditional marriage, by contrast, focuses on the unique qualities of the male-female couple, particularly for purposes of procreating and rearing children under optimal circumstances. As such, it not only reflects and maintains the deep-rooted traditions of our Nation, but also furthers public policy objectives, while containing an inherent limitation on the types of relationships warranting civil recognition.

III. Constitutionalizing Same-Sex Marriage Would Poison the Political Well

Although this case targets only Congress's definition of marriage for purposes of federal law, invalidation of that definition on equal protection grounds would imply collateral invalidity of identical state definitions. The Court should not cut short the robust democratic debates occurring across the country by deeming same-sex marriage to be a matter of federal constitutional law.

Keeping decisions about fundamental social issues within the ambit of state political processes helps inculcate democratic habits and values; the greater availability of political resolution encourages citizen participation, fosters political accountability, and enhances acceptance of the outcomes. *See* Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 2, 7-8 (1988); *see also FERC v. Mississippi*, 456 U.S. 742, 789-90 (1982) (O'Connor, J., concurring in part and dissenting in part).

The benefits of our federalist system resonate with especial clarity regarding the same-sex marriage debate—it is "[s]o well suited" to the issue "that it might almost have been set up to handle it." Jonathan Rauch, *A More Perfect Union: How the Founding Fathers Would Have Handled Gay Marriage*, The Atlantic, April 2004, *available at* www.theatlantic.com/magazine/archive/2004/04/a-

more-perfect-union/2925. Some states have chosen to experiment with legal recognition of same-sex unions, while others have chosen to retain the centuries-old definition of marriage. The citizens of each state can observe the effects of the differing policies. They can attempt to persuade their fellow citizens as to the appropriate choice and vote for their desired policy and, if they are unhappy with the outcome of the democratic process, they retain the option of moving to a jurisdiction with laws more to their liking. "On certain social issues, such as abortion and homosexuality, people don't agree and probably never will—and the signal political advantage of the federalist system is that they don't have to. Individuals and groups who find the values or laws of one state obnoxious have the right to live somewhere else." *Id.*

Preemptively short-circuiting the democratic process by announcing only one permissible policy choice by *any* government under the Constitution destroys these benefits and should not occur unless the Constitution clearly mandates the legitimacy of only one outcome. The Nation's experience in the wake of *Roe v. Wade* bears this out. *See* Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. Rev. 375, 376 (1985) [hereinafter *Thoughts on Autonomy*] (remarking that *Roe* has "sparked public opposition and academic criticism, in part . . . because the Court ventured too far in the change it ordered and presented an incomplete justification for its action");

J. Harvie Wilkinson, III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 Va. L. Rev. 253, 293-95 (2009) (observing that *Roe* "shut down this process of legislative accommodation, polarizing the debate and making future compromise more difficult," leading "[m]any scholars" to comment on the "*Roe* backlash" and the intense partisan divide that has resulted).

Outrage in the wake of *Roe* occurred despite increasing public support for abortion and a "marked trend in state legislatures 'toward liberalization of abortion statutes.'" Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. Rev. 1185, 1205 (1992) [hereinafter *Judicial Voice*] (quoting *Roe v. Wade*, 410 U.S. 113, 140 (1973)); *see also Thoughts on Autonomy*, *supra*, at 385 ("The political process was moving in the early 1970s, not swiftly enough for advocates of quick, complete change, but majoritarian institutions were listening and acting."). But the Court's "[h]eavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict." *Thoughts on Autonomy*, *supra*, at 385-86. Unlike the Court's previous decisions concerning gender classifications, *Roe* provoked backlash because it "invited no dialogue with legislators" and "seemed entirely to remove the ball from the legislators' court." *Judicial Voice*, *supra*, at 1205.

Not only did *Roe* produce conflict, it was also an ineffective engine of social change. The Court's abrupt adjustment of national policy "may have

prevented state legislatures from working out long-lasting solutions based upon broad public consensus." Cass R. Sunstein, *Three Civil Rights Fallacies*, 79 Cal. L. Rev. 751, 766 (1991). Professor Sunstein observed that *Roe*'s effectiveness "has been limited, largely because of its judicial source." *Id.* at 766-67.

The Court's bold substantive-rights approach in *Roe* invites comparison with *Lochner v. New York*, 198 U.S. 45 (1905). The decision reminded Professor John Hart Ely "of an era when the Court thought the Fourteenth Amendment gave it power to strike down state laws 'because they may be unwise, improvident, or out of harmony with a particular school of thought.'" John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 Yale L.J. 920, 937-39 (1973) (quoting *Dandridge v. Williams*, 397 U.S. 471, 484 (1970)). For "*precisely* the point of the *Lochner* philosophy," Ely remarked, is to "grant unusual protection to those 'rights' that somehow *seem* most pressing, regardless of whether the Constitution suggests any special solicitude for them." *Id.* at 939.

Particularly with regard to the creation of individual rights that would preclude legislative policymaking at all levels, appropriate judicial restraint cautions courts to recognize that "they participate in a dialogue with other organs of government, and with the people as well." *Judicial Voice*, *supra*, at 1198; *see also* Jack M. Balkin, Roe v.

Wade*: An Engine of Controversy*, *in* What *Roe v. Wade* Should Have Said: The Nation's Top Legal Experts Rewrite America's Most Controversial Decision 3, 24 (Jack M. Balkin ed., 2005) ("Courts do recognize rights and defend them from legislative abridgement. But those rights also arise out of politics; they are tested by politics, and they are modified by courts as a result of politics."). Leaving room for legislatures to exercise their policymaking authority is particularly important amidst a dynamic process of citizen dialogue and legislative response. *See Judicial Voice*, *supra*, at 1206.

Shifting poll numbers on marriage policy and frequent political activity bearing on state marriage laws reveal a robust national debate on this very fundamental issue. Far from resolving anything, a judicial mandate without warrant in constitutional text or history that centralizes the controversy is likely to entrench social differences, undermine public confidence in courts as policy-neutral guardians of both republican governance and well-understood core political rights, and trigger a political backlash that could be with us for decades.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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