No. 14-562

In The Supreme Court of the United States

VALERIA TANCO, et al.,

Petitioners,

v.

WILLIAM HASLAM, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF RESPONDENTS

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QUESTION PRESENTED

Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state?

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The March 14, 2014 memorandum opinion of the district court granting plaintiffs' motion for a preliminary injunction is reported at 7 F. Supp. 3d 759. Pet. Apx. 108a. The corresponding district-court orders are unreported. Pet. Apx. 104a, 106a. The April 25, 2014 order of the United States Court of Appeals for the Sixth Circuit granting respondents' motion for a stay pending appeal is unreported. Pet. Apx. 101a. The November 6, 2014 opinion of the Sixth Circuit reversing the preliminary-injunction order of the district court is reported at 772 F.3d 388. Pet. Apx. 1a.

INTRODUCTION

In our federal system, States are equal sovereigns, and one State may not impose its policy choices on another State. This proposition has particular force in an area of traditional state concern like marriage. Over the last 12 years, some States have expanded their definitions of marriage, and petitioners insist that the remaining States must fall in line and adjust their own policies to match that expanded definition. The Fourteenth Amendment does not compel such a result.

STATEMENT

Since 2003, a minority of States (17 and the District of Columbia) have expanded the definition of marriage to include same-sex couples by legislative action, ballot measure, or state-court decision.[1] Tennessee is among the majority of States that maintain the traditional definition of marriage: the union of one man and one woman. *See* Tenn. Const. art. XI, § 18; Tenn. Code Ann. § 36-3-113. Pet. Apx. 132a, 133a. Petitioners are three same-sex couples who were married in States that license such marriages: one couple was married in California in 2008, and two couples were married in New York in 2011. J.A. 476, 477. All three couples thereafter moved to Tennessee, J.A. 488, 491, 495, and in October 2013, they filed a joint complaint challenging the constitutionality of Tennessee's marriage laws. Petitioners alleged that their marriages are not recognized under Tennessee law and that this nonrecognition violates their rights to due process, equal protection, and travel under the Fourteenth Amendment to the United States Constitution. J.A. 502-15.[2]

Tennessee has always defined marriage in the traditional way. And in 1996, the Tennessee General

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[1] *See infra* note 9. By virtue of federal-court injunctions, same-sex marriages are currently authorized in some 18 additional States.

[2] The couple from California has since returned to that State, but press their case on the basis of their prior residence in Tennessee. Pet. 6.

Assembly enacted a statute, Tenn. Code Ann. § 36-3-113, reaffirming that traditional definition. The statute declared that "Tennessee's marriage licensing laws reinforce, carry forward, and make explicit the long-standing public policy of this state to recognize the family as essential to social and economic order and the common good and as the fundamental building block of society." In addition to reaffirming the "historical institution" and traditional definition of marriage, the statute provides that any law that otherwise defines marriage "is contrary to the public policy of Tennessee." It further provides that if a marriage is licensed out-of-state but not permitted in Tennessee, "any such marriage shall be void and unenforceable in this state." Pet. Apx. 133a. In 2006, the voters of Tennessee, by an 81% majority,[3] approved an amendment to the State Constitution, art. XI, § 18, similarly codifying the "historical institution" and traditional definition of marriage and providing that any law that otherwise defines marriage "is contrary to the public policy of this state and shall be void and unenforceable in Tennessee." J.A. 132a.

On March 14, 2014, the district court granted petitioners' motion for preliminary relief and enjoined the State from enforcing these marriage laws as to them. Pet. Apx. 104a. Tennessee appealed, and the

[3] The statewide vote total was 1,419,434 in favor and 327,536 against, J.A. 521, and the measure passed in every one of the State's 95 counties, J.A. 525-29.

Sixth Circuit granted a stay pending appeal. Pet. Apx. 103a.

On November 6, 2014, the Sixth Circuit reversed. Pet. Apx. 1a. The court majority rejected all of petitioners' arguments for sustaining the district-court injunction, concluding that neither the Due Process Clause nor the Equal Protection Clause of the Fourteenth Amendment requires a State to expand its definition of marriage to include same-sex couples. Determining that state laws codifying the traditional definition of marriage do not burden a fundamental right and do not involve a suspect classification or otherwise require heightened scrutiny, Pet. Apx. 44a-55a, the court found that such laws have a rational basis. First, "awareness of the biological reality that couples of the same sex do not have children in the same way as couples of the opposite sexes and that couples of the same sex do not run the risk of unintended offspring . . . suffices to allow the States to retain authority over an issue they have regulated from the beginning." Pet. Apx. 34a. Second, "a State might wish to wait and see before changing a norm that our society (like all others) has accepted for centuries." Pet. Apx. 34a. *See also* Pet. Apx. 56a ("States must enjoy some latitude in matters of timing, for reasonable people can disagree about just when public norms have evolved enough to require a democratic response. Today's case captures the point.").

The Sixth Circuit also held that the Constitution does not prohibit a State from denying recognition to

same-sex marriages conducted in other States. "If it is constitutional for a State to define marriage as a relationship between a man and a woman, it is also constitutional for the State to stand by that definition with respect to couples married in other States or countries." Pet. Apx. 60a. In response to petitioners' significant reliance on this Court's decision in *United States v. Windsor*, 133 S.Ct. 2675 (2013), for its due-process and equal-protection arguments, the court not only distinguished *Windsor* but found that it supported the court's holding. Pet. Apx. 24a, 40a, 50a, 59a; *see* Pet. Apx. 62a ("Far from undermining these points, *Windsor* reinforces them."). The court also held that Tennessee's Marriage Laws do not violate the guarantees that protect the right to travel. Pet. Apx. 64a.

The dissent took issue both with the merits and the approach of the majority opinion; it rejected "the majority's resolution of these questions based on its invocation of *vox populi* and its reverence for 'proceeding with caution.'" Pet. Apx. 67a. On January 16, 2015, this Court granted certiorari in this case and three related cases. *See Obergefell v. Hodges*, 135 S.Ct. 1039 (2015).

SUMMARY OF ARGUMENT

The Fourteenth Amendment does not require Tennessee to recognize petitioners' out-of-state same-sex marriages, which are contrary to Tennessee's

public policy. Interstate recognition of marriage is governed by state choice-of-law rules, and under those rules States have always had authority to decline to recognize out-of-state marriages that violate their own public policy. The Full Faith and Credit and Due Process Clauses of the Constitution combine to impose only modest restrictions on a State's choice of law, and those requirements are satisfied here. Tennessee is more than competent to legislate on the subject of marriage, and it is not required to substitute another State's law for its own. Petitioners reside in Tennessee, so there is a significant contact and a sufficient state interest. The State has a keen interest whenever it is asked by its residents to recognize an out-of-state marriage and thus administer and regulate all of the incidents, benefits, and obligations of marriage. Applying Tennessee law is not arbitrary or unfair; Tennessee has always defined marriage in the traditional way, and it has made clear that it will not recognize out-of-state marriages that are contrary to its public policy.

Substantive-due-process principles do not require Tennessee to recognize petitioners' same-sex marriages, because there is no fundamental right to same-sex marriage. Decisions of this Court recognizing a fundamental right to marry have considered marriage under its traditional definition: the union of one man and one woman. The fundamental importance of marriage is necessarily linked to the procreative capacity of that man-woman union, and this Court has said that the right to marry is fundamental

precisely *because* marriage and procreation are fundamental to the existence of society.

Without a fundamental right to their same-sex marriages, petitioners cannot invoke any corresponding right to "remain married." And this Court's decision in *United States v. Windsor*, 133 S.Ct. 2675 (2013), does not support petitioners' claim. Unlike the situation in *Windsor*, petitioners' claim implicates the sovereign power of another State, Tennessee, to define the marital relation within its own borders. And Tennessee is where petitioners reside, so Tennessee does not create two contradictory marriage regimes within the same State when it declines to recognize petitioners' marriages.

Equal-protection principles likewise do not require recognition of petitioners' marriages. Tennessee's recent marriage enactments do not "starkly depart" from its common-law rule for marriage recognition, and the comparison is inappropriate in any event. Tennessee does not "target" same-sex couples who marry out-of-state; Tennessee recognizes out-of-state marriages depending upon whether they comport or conflict with Tennessee's own public policy. That classification is rationally related to the State's legitimate interest in maintaining a uniform, consistent marriage regime and treating all of its citizens alike with respect to marriage.

Petitioners' right to travel is not infringed by not recognizing their marriages. As new residents of Tennessee, petitioners enjoy the right to be treated

like permanent residents. But Tennessee's marriage laws treat all of its citizens the same regardless of their length of residence. Migration is not penalized merely because the rights enjoyed by the citizens of one State are not enjoyed by the citizens of another State.

Ultimately, Tennessee is not required to recognize petitioners' out-of-state same-sex marriages because its own marriage policy is indeed legitimate. The Fourteenth Amendment allows a State to define marriage in the traditional way because the traditional definition is rationally related to a legitimate state interest. Marriage cannot be separated from its procreative purpose, and the inherently procreative capacity of opposite-sex couples cannot be denied. Maintaining a traditional definition of marriage ensures that when couples procreate, the children will be born into a stable family unit, and the promotion of family stability is certainly a legitimate state interest. The same situation is simply not presented by same-sex couples, who as a matter of pure biology do not naturally procreate. So there exists a rational explanation for not expanding marriage to same-sex couples.

Heightened scrutiny of Tennessee's traditional definition of marriage is not warranted. It does not discriminate on the basis of sex, a quasi-suspect class, because it does not provide dissimilar treatment of men and women who are similarly situated. And this Court need not decide here whether sexual orientation is a suspect class, because the traditional and

longstanding definition of marriage is not the product of the arbitrary and invidious discrimination that heightened scrutiny is designed to root out. The traditional definition goes back thousands of years, and that history does not support the presumption of prejudice on which heightened-scrutiny analysis is based.

The Constitution does not compel the result petitioners seek, and the ongoing debate regarding same-sex marriage is properly left to each State. The Constitution vests each State with the power to define marriage for its own community, and our federal structure accounts for the kind of division that currently exists among the States on the question whether same-sex marriage should be recognized. Each State must be afforded the ability to best address the needs, wishes, and values of its own people. When a State has exercised its sovereign authority to establish its own policy and reaffirm the traditional definition of marriage, that authority must not be intruded upon by requiring it to give way to the policy of another State that has chosen to expand its marriage definition.

ARGUMENT

I. THE FOURTEENTH AMENDMENT DOES NOT REQUIRE A STATE TO RECOGNIZE AN OUT-OF-STATE SAME-SEX MARRIAGE.

A. States have always had authority under the Constitution not to recognize marriages licensed in other states.

Ours is a nation of separate States. Although it was the purpose of the Full Faith and Credit Clause in Article IV, § 1, of the Constitution "'to alter the status of the several states as independent foreign sovereignties,'" *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 232 (1998) (quoting *Milwaukee Cnty. v. M.E. White Co.*, 296 U.S. 268, 277 (1935)), the States remain equal sovereignties—"equal in power, dignity and authority," *Shelby Cnty. v. Holder*, 133 S.Ct. 2612, 2623 (2013) (internal quotation marks omitted). This Court's precedents differentiate between the credit that one State owes to other States' *judgments* and the credit that one State owes to other States' *laws*. *Baker*, 522 U.S. at 232. The Clause imposes an "exacting" obligation on one State to give full faith and credit to the judgments of other States, *id.* at 233, but it "does not compel 'a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate,'" *id.* (quoting *Pacific Employers Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493, 501 (1939)).

This Court's precedents clearly establish that "the Full Faith and Credit Clause does not require a State to apply another State's law in violation of its own legitimate public policy." *Nevada v. Hall*, 440 U.S. 410, 422 (1979). *See Pacific Employers Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493, 504 (1939) (full faith and credit "does not here enable one state to legislate for the other or to project its laws across state lines"). The Clause does not demand "subserviency" from a state; another state can make and enforce its own policy as it chooses, but "[o]nce that policy is extended into other States, different considerations come into play." *Carroll v. Lanza*, 349 U.S. 408, 413-14 (1955); *see also Allstate Ins. Co. v. Hague*, 449 U.S. 302, 323 (1981) (Stevens, J., concurring) ("[I]n view of the fact that the forum State is also a sovereign in its own right, in appropriate cases it may attach paramount importance to its own legitimate interests.").

Interstate recognition of marriage has long been governed by state choice-of-law rules, and those rules have long included some form of a public-policy exception to the general rule that out-of-state marriages will be recognized. *See, e.g.*, Restatement (First) of Conflict of Laws §§ 121, 132, 134 (1934); Restatement (Second) of Conflict of Laws §§ 283, 284 (1971). "States have always had the power to decline to recognize marriages from other states, and they have been exercising that power for centuries." Andrew Koppelman, *Same Sex, Different States: When Same-Sex Marriages Cross State Lines* 117 (2006); *see also*

Patrick J. Borchers, *The Essential Irrelevance of the Full Faith and Credit Clause to the Same-Sex Marriage Debate*, 38 Creighton L. Rev. 353, 357 (2005) ("The public policy exception is a deeply ingrained feature of traditional choice-of-law principles. . . . State courts have long refused to recognize marriages that violate their public policy even if the marriage was validly celebrated elsewhere.").

The Due Process Clause of the Fourteenth Amendment to the Constitution and the Full Faith and Credit Clause together place "modest" restrictions on a State's choice of law, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985), but the Constitution does not compel any particular choice-of-law rule, *Sun Oil Co. v. Wortman*, 486 U.S. 717, 735 (1988) (Brennan, J., concurring). *See id.* at 728-29 (Court will not inquire into the wisdom of an existing choice-of-law precedent). For a State's application of its own substantive law to be constitutionally permissible, "that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Allstate*, 449 U.S. at 312-13; *cf. Phillips*, 472 U.S. at 822 (a State "may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them").

The modest restrictions imposed by the Constitution do not require Tennessee to recognize petitioners' out-of-state same-sex marriages, which conflict with Tennessee's public policy. First, while a State's own

law must relate to a subject matter "concerning which it is competent to legislate," *Baker*, 522 U.S. at 233, Tennessee is more than competent to legislate on the subject of marriage, and it has always maintained a traditional definition of marriage. As this Court reaffirmed in *United States v. Windsor*, 133 S.Ct. 2675 (2013), the regulation of marriage and domestic relations is "'an area that has long been regarded as a virtually exclusive province of the States.'" 133 S.Ct. at 2691 (quoting *Sosna v. Iowa*, 419 U.S. 393, 404 (1975)).[4] Second, petitioners are residents of Tennessee, so the State has a significant contact, creating a state interest. *See Allstate*, 449 U.S. at 313. *See also* Koppelman, *supra* at 20 (acknowledging that appropriate weight must be given to the marriage policy of the State in which the couple resides). "The recognition of civil marriages is central to state domestic relations law applicable to its residents and citizens," *Windsor*, 133 S.Ct. at 2691, so when a State is asked by its domiciliaries to recognize a marriage that another State licensed, i.e., to administer and regulate all of the incidents, benefits, and obligations

[4] Although the Court stressed this point in the context of vertical federalism, i.e., the power of a State to define marriage vis-à-vis that of the federal government, the point applies with equal force in the context of horizontal federalism, i.e., the power of a State to define marriage vis-à-vis that of another State. *See Windsor*, 133 S.Ct. at 2693 ("The responsibility of the States for the regulation of domestic relations is an important indicator of the substantial societal impact *the State's* classifications have in the daily lives and customs of *its people*.") (emphasis added).

of marriage, it has a keen interest at stake. *See Sherrer v. Sherrer*, 334 U.S. 343, 354 (1948) ("[T]he regulation of the incidents of the marital relation involves the exercise by the States of powers of the most vital importance."). And applying Tennessee law to decline recognition is not arbitrary or unfair. *See Allstate*, 449 U.S. at 313. Given both the longstanding public-policy exception under choice-of-law rules and the clear provision in Tennessee law that the State will not recognize marriages that are contrary to the State's public policy, *see* Tenn. Code Ann. § 36-3-113(d), petitioners cannot say that they had "no idea" that their marriages would not be recognized, *cf. Phillips*, 472 U.S. at 822.

The ability of a State to apply its own law and decline to recognize an out-of-state marriage on the basis of its own legitimate public policy comports with the interests of federalism. *See Pacific*, 306 U.S. at 501 ("the very nature of the federal union of states" precludes compelling one state to substitute the laws of another state). By reserving the subject of domestic relations to the States, the Constitution reserves the subject of domestic relations and marriage to *each and every* State, to regulate, manage, and define as each sees fit according to the needs and values of the people "in their own community." *Windsor*, 133 S.Ct. at 2692. "States enjoy exclusive authority over family law . . . because of the fundamental role of localism in the federal design." Anne C. Dailey, *Federalism and Families*, 143 U. Pa. L. Rev. 1787, 1790 (1995). *See Bond v. United States*, 131 S.Ct. 2355, 2364 (2011)

(quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)) ("The federal structure allows local policies 'more sensitive to the diverse needs of a heterogeneous society'. . . .").

"[N]o single State [can] . . . impose its own policy choice on neighboring States," *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 571 (1996)—a principle that Massachusetts seemed to recognize when it became the first State in the Nation to allow same-sex marriage, *see Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 967 (Mass. 2003).[5] But when petitioners and their amici urge this Court to conclude that the laws of States allowing same-sex marriage must prevail in *every* State, they threaten the federal design. Indeed, by asking this Court to override a sovereign State's definition of marriage, petitioners and their amici are asking this Court to do that for which Section 3 of the federal Defense of Marriage Act was condemned in *Windsor*.

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[5] In rejecting the argument "that expanding the institution of civil marriage in Massachusetts to include same-sex couples will lead to interstate conflict," that State's highest court stated: "We would not presume to dictate how another State should respond to today's decision. . . . The genius of our Federal system is that each State's Constitution has vitality specific to its own traditions, and that, subject to the minimum requirements of the Fourteenth Amendment, each State is free to address difficult issues of individual liberty in the manner its own Constitution demands." *Id.*

B. A State is not required to recognize an out-of-state same-sex marriage as a matter of substantive due process.

Petitioners invoke substantive due process to insist that Tennessee must recognize their New York and California marriages, asserting a fundamental right to marry and the deprivation of a liberty interest "in their existing marriages." Br. Pet. 19-21. Both arguments fail.

1. There is no fundamental right to same-sex marriage.

The substantive component of the Due Process Clause "provides heightened protection against government interference with certain fundamental rights and liberty interests," but only "those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition' . . . and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'" *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (citations omitted). Under this Court's "established method" of substantive-due-process analysis, "a 'careful description' of the asserted fundamental liberty interest" is required, and "[o]ur Nation's history, legal traditions, and practices" provide the crucial guideposts "that direct and restrain" exposition of the Clause. *Id.* This method of analysis reflects the Court's "reluctan[ce] to expand the concept of substantive due process," which flows from the Court's recognition that when it extends

constitutional protection to an asserted right or liberty interest, "[the Court], to a great extent, place[s] the matter outside the arena of public debate and legislative action." *Id.* at 720.

Petitioners invoke the fundamental right to marry. Br. Pet. 17. Carefully described, though, the right petitioners are invoking can only be the right to same-sex marriage. Because in every case in which this Court has considered marriage and the marital relationship, it has necessarily considered marriage only under its traditional definition: the union of *one man and one woman*. *See, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (noting that the law in question "operates directly on an intimate relation of husband and wife"); *Maynard v. Hill*, 125 U.S. 190, 212 (1888) (quoting *Ditson v. Ditson*, 4 R.I. 87, 101 (1856)) ("marriage . . . signifies the relation of husband and wife"). *See also Goodridge,* 798 N.E.2d at 952 (quoting *Black's Law Dictionary* 986 (7th ed. 1999) ("[t]he everyday meaning of 'marriage' is 'the legal union of a man and a woman as husband and wife'"). Petitioners rely specifically on this Court's decision in *Loving v. Virginia*, 388 U.S. 1 (1967), as well as those in *Zablocki v. Redhail*, 434 U.S. 374 (1978); and *Turner v. Safley*, 482 U.S. 78, 95-96 (1987), in support of the proposition that they have the right to marry the person of their choice. As the Sixth Circuit observed, however, "[w]hen *Loving* and its progeny used the word marriage, they did not

redefine the term but accepted its traditional meaning." Pet. Apx. 47a.[6]

Moreover, the Court's reason for deeming the right to marry fundamental has undoubtedly been based on the procreative capacity of that man-woman relationship. *See Zablocki*, 434 U.S. at 386 ("A decision to marry and raise the child in a traditional family setting must receive . . . protection."); *Loving*, 388 U.S. at 12 ("Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival."); *Maynard*, 125 U.S. at 211 ("[Marriage] is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress."); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (The right to "marry, establish a home and bring up children . . . [is] essential to the orderly pursuit of happiness by free men."). In short, this Court has said that "the right to marry is of fundamental importance," *Zablocki,* 434 U.S. at 383, precisely *because* "[m]arriage

[6] In *Baker v. Nelson*, 409 U.S. 810 (1972), this Court dismissed, for want of a substantial federal question, an appeal from a state court presenting the question whether the right to marry without regard to the sex of the parties is a fundamental right. *See Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971). The Sixth Circuit aptly asked in this regard, "Had *Loving* meant something more when it pronounced marriage a fundamental right, how could the Court hold in *Baker* five years later that gay marriage does not even raise a substantial federal question?" Pet. Apx. 46a.

and procreation are fundamental to the very existence and survival of the race," *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

This understanding regarding the fundamental purpose of marriage has been expressed by commentators throughout history,[7] and the union of one man and one woman has been the definition of marriage throughout the United States since its founding. *See, e.g.*, Joel Prentiss Bishop, *Commentaries on the Law of Marriage & Divorce* § 225 (1852) ("It has always . . . been deemed requisite to the entire validity of every marriage . . . that the parties should be of different sex."). Marriage, to be sure, is not just about sex; marriage has other important aspects as well, such as the "expressions of emotional support and public commitment" to which petitioners point. Br. Pet. 20. But these aspects are not why marriage has

[7] *See, e.g.*, John Locke, *The Second Treatise of Civil Government* §§ 78, 79 (1690) (defining marriage as "a voluntary compact between man and woman" and opining that "this conjunction betwixt male and female ought to last, even after procreation, so long as is necessary to the nourishment and support of the young ones"); Noah Webster, *An American Dictionary of the English Language* 897 (1st ed. 1828) (marriage "was instituted . . . for the purpose of preventing the promiscuous intercourse of the sexes, for promoting domestic felicity, and for securing the maintenance and education of children."). *See also* Br. Amici Curiae Scholars of History Supporting Respondents 2 ("eminent authorities throughout the ages have uniformly confirmed that the institution of marriage owes its very existence to society's vital need to regulate sexual relationships between men and women").

been deemed "fundamental to our very existence and survival." *Loving*, 388 U.S. at 12; *see Vacco v. Quill*, 521 U.S. 793, 799 (1997) (citing *San Antonio Independent Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33-35 (1973)) ("courts must look to the Constitution, not the 'importance' of the asserted right, when deciding whether an asserted right is 'fundamental' ").

Petitioners suggest that *Lawrence v. Texas*, 539 U.S. 558 (2003), supports their contention that same-sex marriage is a fundamental right. Br. Pet. 20. In *Lawrence*, this Court held that a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct was unconstitutional as a violation of due process. 539 U.S. at 578-79. The decision stands for the proposition that the Fourteenth Amendment prohibits a State from intruding upon the privacy of a same-sex relationship by criminalizing private, consensual intimate conduct. But the Court expressly noted that the case "[did] not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter," *id.* at 578, and the case does not support that proposition. *See id.* (O'Connor, J., concurring) ("Texas cannot assert any legitimate state interest here, such as . . . preserving the traditional institution of marriage.").

In contrast to traditional marriage, same-sex marriage is of relatively recent vintage and is not "deeply rooted in our legal tradition," *Glucksberg*, 521 U.S. at 721; same-sex marriages were unknown to the laws of this Nation before 2003. Indeed, this Court

acknowledged in *Windsor* that "until recent years . . . marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization." 133 S.Ct. at 2689. To find that same-sex marriage is a fundamental right, this Court "would have to reverse centuries of legal doctrine and practice, and strike down the considered policy choice" of a majority of States. *Glucksberg*, 521 U.S. at 723.

Petitioners' amici suggest that the institution of marriage has moved from its traditional moorings; that States have gained "a new perspective on same-sex marriage" and that traditional marriage "does not reflect modern society." Br. Amici Curiae of NAACP Legal Defense & Educ. Fund, et al., in Support of Petitioners 5; Br. Amici Curiae of the State of Minnesota in Support of Petitioners 18. In apparent support of this point, they assert that only 13 States do not allow same-sex marriage. NAACP Br. at 5; Minnesota Br. at 15.[8] But this assertion is highly misleading. While there is no question that some States have seen fit to allow same-sex marriage, it is a clear *minority* of States that have done so. Only 17 States and the District of Columbia currently allow same-sex

[8] Other amici for petitioners repeat this assertion. *See, e.g.*, Br. Amici Curiae of the Columbia Law School Sexuality and Gender Law Clinic in Support of Petitioners 4. Petitioners themselves similarly assert that a "minority" of States do not allow same-sex marriage. Br. Pet. 13.

marriage by legislative or popular enactment or by state-court decision.[9] Meanwhile, traditional marriage is by no means an anachronism in this country. At least 30 States, by legislation or popular enactment or both, maintain a traditional definition of marriage.[10] These numbers do not at all support recognition

[9] California (2014 Cal. Stat. ch. 82); Connecticut (2009 Conn. Pub. Acts 09-13); Delaware (79 Del. Laws 19 (2013)); Hawaii (2013 Haw. Sess. Laws 2d Spec. Sess. Act 1, § 3); Illinois (2013 Ill. Laws 98-597); Iowa (*Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009)); Maine (referendum approving 2011 Me. Laws I.B. 3); Maryland (referendum approving 2012 Md. Laws ch. 2); Massachusetts (*Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003)); Minnesota (2013 Minn. Laws ch. 74); New Hampshire (2009 N.H. Laws 60); New Jersey (*Garden State Equal. v. Dow*, 82 A.3d 336 (N.J. Super. Ct. Law Div. 2013), *stay denied*, 79 A.3d 1036 (N.J. 2013)); New Mexico (*Griego v. Oliver*, 316 P.3d 865 (N.M. 2013)); New York (2011 N.Y. Laws ch. 95); Rhode Island (2013 R.I. Laws ch. 13-5); Vermont (2009 Vt. Acts & Resolves 3); Washington (referendum approving 2012 Wash. Sess. Laws ch. 3); District of Columbia (2009 D.C. Laws 18-110).

[10] Alabama (Ala. Const. art. I, § 36.03); Alaska (Alaska Const. art. I, § 25); Arizona (Ariz. Const. art. XXX, § 1); Arkansas (Ark. Const. amend. 83, § 1); Colorado (Colo. Const. art. II, § 3); Florida (Fla. Const. art. I, § 27); Georgia (Ga. Const. art. I, § 4); Idaho (Idaho Const. art. III, § 28); Indiana (Ind. Code § 31-11-1-1); Kansas (Kan. Const. art. 15, § 16); Kentucky (Ky. Const. § 233A); Louisiana (La. Const. art. XII, § 15); Michigan (Mich. Const. art. I, § 25); Mississippi (Miss. Const. art. 14, § 263A); Missouri (Mo. Const. art. I, § 33); Montana (Mont. Const. art. XIII, § 7); Nebraska (Neb. Const. art. I, § 29); North Carolina (N.C. Const. art. XIV, § 6); North Dakota (N.D. Const. art. XI, § 28); Ohio (Ohio Const. art. XV, § 11); Oklahoma (Okla. Const. art. II, § 35); South Carolina (S.C. Const. art. XVII, § 15); South Dakota (S.D. Const. art. XXI, § 9); Tennessee (Tenn. Const. art. XI, § 18); Texas (Tex. Const. art. I, § 32); Utah (Utah Const. art.

(Continued on following page)

of a fundamental right to same-sex marriage.[11] Although a few States have acquiesced in recent federal injunctions against their traditional-marriage laws, at best the States are decidedly split on the question. History and tradition, therefore, must be both the starting and the ending point of the substantive-due-process inquiry in this case. *Cf. Lawrence*, 539 U.S. at 572.

2. There is no fundamental right of same-sex couples to "remain married."

Petitioners assert that the Fourteenth Amendment requires States to recognize their same-sex marriage because not to do so would violate their right to "remain married." Br. Pet. 21. It is true that this Court has often said that the marital relationship deserves protection. It is "the basic foundation of the family in our society." *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 843 (1977). But as discussed above, in those decisions the Court was necessarily examining the contours of the *traditional* marriage relationship and the fundamental

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1, § 29); Virginia (Va. Const. art. I, § 15-A); West Virginia (W. Va. Stat. § 48-2-104); Wisconsin (Wisc. Const. art. XIII, § 13); Wyoming (Wyo. Stat. § 20-1-101).

[11] The suggestion of petitioners' amici gains no support from developments in the international community either. *See generally* Br. Amici Curiae for 50 International and Comparative Law Experts, et al., for the Respondent.

right to marry. Without a fundamental right to their same-sex marriages, petitioners cannot invoke any corresponding right to "remain married."

Petitioners nevertheless point to this Court's decision in *Windsor* to support their argument, contending that "*Windsor* underscored the liberty interests at stake here." Br. Pet. 22. It did not. The situation presented in *Windsor* was materially different from the situation presented here. Indeed, because of those differences, *Windsor* hurts rather than helps petitioners' cause.

In *Windsor*, this Court held that Section 3 of the federal Defense of Marriage Act (DOMA) violated "basic due process and equal protection principles applicable to the federal government" not because the Constitution requires recognition of same-sex marriages but because the *federal* government lacks authority to interfere with a State's power to define marriage by imposing a different definition on persons residing in a State that recognizes same-sex marriage. "By creating two contradictory marriage regimes *within the same State*, DOMA force[d] same-sex couples to live as married for the purpose of state law but unmarried for the purpose of federal law. . . ." *Windsor*, 133 S.Ct. at 2694 (emphasis added). Central to the Court's decision was the State's power in defining the marital relation, a power that New York had chosen to exercise to expand its marriage definition to include same-sex couples in that community.

Id. at 2692-93.[12] But DOMA intruded upon that power and "injure[d] the very class New York seeks to protect." *Id.* at 2693.

Windsor reaffirmed that "the regulation of domestic relations is an area that has been regarded as a virtually exclusive province of the States" and that "[t]he definition of marriage is the foundation" of that broader authority. *Id.* at 2691. Here, that power is also of central relevance. But petitioners' claim for recognition of their marriages, in contrast to the one in *Windsor*, necessarily implicates the power and authority of another State with *equal* power to define the marital relation within its borders. Moreover, petitioners now reside in that second sovereign, the State of Tennessee, which maintains a traditional definition of marriage. Marital status "depends on the general recognition states give to one another's marriages." Joanna L. Grossman, *Resurrecting Comity: Revisiting the Problem of Non-Uniform Marriage Laws*, 84 Or. L. Rev. 433, 473 (2005). By not recognizing petitioners' marriages, Tennessee does not

[12] The couple in *Windsor* had not married in New York. They resided in New York but traveled to Canada in 2007 to be married. After one member of the couple died in 2009, the other sought recognition of the marriage in the context of seeking eligibility for a marital exemption from the federal estate tax. At that time, New York recognized same-sex marriages performed elsewhere, *id.* at 2683 (citing *Windsor v. United States*, 699 F.3d 169, 177-78 (2d Cir. 2012)); in 2011, New York amended its statutes to permit same-sex marriages, *id.* at 2689.

create two marriage regimes within the same State as in *Windsor*.

Each State is entitled to make policy determinations for itself, for its own community. As this Court recounted in *Windsor*, New York "sought to give further protection and dignity" to the bond between same-sex couples. *Id.* at 2692. But this was more than the Fourteenth Amendment requires. A State can choose to do more than the Amendment requires, *Crawford v. Bd. of Educ. of Los Angeles*, 458 U.S. 527, 535 (1982), but when it does, surely the Fourteenth Amendment does not then require other States, with equal sovereignty and power over the subject at hand, to be bound by that choice.

Petitioners complain of "the most egregious of intrusions" on their marriages by Tennessee, Br. Pet. 23, and their amici offer a laundry list of "harms" that are imposed upon same-sex couples who occupy the same position, Br. Amici Curiae of States of Massachusetts, et al. 32-37. But Tennessee has not "intruded" upon petitioners' lives, and it is simply unfair to lay this litany of "harms" at Tennessee's feet. After all, it was petitioners who moved into Tennessee, subjecting themselves to Tennessee's laws. The Due Process Clause requires States not to deprive citizens of their fundamental rights, but it does not impose affirmative obligations on States to act. *See Deshaney v. Winnebago Cnty. Dep't of Social Servs.*, 489 U.S. 189, 196 (1989). As the Sixth Circuit observed, Tennessee has merely applied its own rule of law—the definition of marriage that the State has

always had. *See* Pet. Apx. 40a (Tennessee's most recent enactment "codified a long-existing, widely held social norm already reflected in state law."). If the circumstances were otherwise, if every State in this country had always defined marriage to allow the marriage of two persons of the same sex, and then Tennessee *altered* that definition to limit it to "the union of one man and one woman," one might better understand the complaints of "intrusion" and "harm."

The reality, however, is exactly the opposite. It is New York and California, among other States, that have altered the legal landscape by recognizing same-sex marriage. That is their right and prerogative, of course. But petitioners cannot rightly point to that shift and use it as the basis upon which to insist that Tennessee, which had no voice in those decisions, must now give way. *See Hall*, 440 U.S. at 426. The people of Tennessee have the same right and prerogative to keep marriage as it has always been. "In a country like ours where each state has the constitutional power to translate into law its own notion of policy concerning the family institution, and where citizens pass freely from one state to another, tangled marital situations . . . inevitably arise." *Williams v. North Carolina*, 317 U.S. 287, 304 (1942) (Frankfurter, J., concurring). By merely exercising its sovereign right to apply its own law and declining to recognize petitioners' out-of-state marriages, Tennessee does not deprive petitioners of a liberty interest.

C. A State is not required to recognize an out-of-state same-sex marriage as a matter of equal protection.

Focusing on Tennessee's 1996 and 2006 marriage enactments, petitioners argue that equal-protection principles require that Tennessee recognize their New York and California marriages. They assert that the interstate-recognition component of Tennessee's laws should be invalidated under the same "careful consideration" that DOMA was given in *Windsor*, because it "represents a stark departure" from Tennessee's prior choice-of-law rule and practice and because it "targets" for unequal treatment same-sex couples lawfully married in other States. Br. Pet. 32. These arguments fail, for several reasons.

First, so long as a State meets the minimum restrictions for applying its own law under the Full Faith and Credit and Due Process Clauses, a State's choice-of-law rule and its practice thereunder should be constitutionally irrelevant. *See Sun Oil,* 486 U.S. at 735 (Brennan, J., concurring) (quoting *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 516 (1953) ("[t]he Full Faith and Credit Clause does not compel a state to adopt any particular set of rules of conflict of laws"); *see also Allstate*, 449 U.S. at 332 (Stevens, J., concurring) ("It is not this Court's function to establish and impose upon state courts a federal choice-of-law rule, nor . . . to ensure that state courts correctly apply whatever choice-of-law rules they have themselves adopted."). It follows, therefore, that within those minimal constitutional bounds, a State should be free

to alter, modify, and apply its extant choice-of-law rule as it sees fit. *See Sun Oil*, 486 U.S. at 729 (noting that a State could adopt a new conflict-of-law rule "[i]f current conditions render it desirable"); *Hall*, 440 U.S. at 426 (quoting *Bank of Augusta v. Earle*, 38 U.S. 519, 590 (1839)) ("when . . . the interest or policy of any state requires it to restrict the rule [of comity], it has but to declare its will"). And on the particular subject of marriage recognition in Tennessee, the Tennessee Supreme Court has acknowledged that "[t]he legislature has, beyond all possible question, the power to enact what marriages shall be void in its own state, notwithstanding their validity in the state where celebrated." *Pennegar v. State*, 10 S.W. 305, 306 (Tenn. 1889).

Second, any comparison between Tennessee's practice under its common-law rule and under its enacted-law rule is at once inapt, notwithstanding that petitioners offer a rather narrow articulation of Tennessee's common-law rule. Br. Pet. 32. It is clear that Tennessee subscribed to the general rule that prevailed in most every jurisdiction: that a marriage valid where solemnized is valid everywhere, except where the marriage conflicts with a State's own public policy. *See Rhodes v. McAfee*, 457 S.W.2d 522, 523 (Tenn. 1970); *see also Pennegar*, 10 S.W. at 306 ("there are exceptions to the [general] rule as well established as the rule itself"). Tennessee's enacted marriage laws work in much the same way; they reaffirm the traditional definition of marriage as the State's public policy and clarify that laws which

otherwise define marriage conflict with that public policy and will not be recognized.

Under the common-law rule, this traditional definition of marriage was always understood; it was a given.[13] As this Court observed in *Windsor*, until recent years "marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term." 133 S.Ct. at 2689. That marriage is the union between a man and a woman was always a part of Tennessee's (and every other State's) public policy. So to compare Tennessee's recognition of out-of-state same-sex marriages against the frequency with which Tennessee courts did or did not recognize out-of-state traditional marriages in the past is to draw an inappropriate comparison. *See Windsor*, 133 S.Ct. at 2696 (Roberts, C.J., dissenting) (noting, with respect to the federal government's deference to State marriage definitions prior to DOMA, that "none of those prior state-by-state variations had involved differences over [the very definition of marriage]" and that "it is hardly surprising" that the federal government would treat this "fundamental question" differently).

Third, Tennessee law does not "target and discriminate against same-sex couples who married out-of-state

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[13] *See, e.g.*, Tenn. Code of 1917 § 4190 (to solemnize marriage, "the parties shall respectively declare, in the presence of the minister or officer, that they accept each other as man and wife"); *see also* Tenn. Code of 1858, Title 4, Ch. 1 (Of Rights in the Domestic Relations Of Husband and Wife).

as a class." Br. Pet. 32. As discussed above, the application of Tennessee law certainly does not impact same-sex marriages in the same way that DOMA did. And Tennessee recognizes out-of-state marriages depending upon whether they comport or conflict with Tennessee's own public policy.[14] Other out-of-state marriages, not just same-sex marriages, that conflict with that public policy would not be recognized in Tennessee. *See, e.g.*, Tenn. Code Ann. §§ 36-3-101 (consanguinity), 36-3-102 (bigamy); *see also* Tenn. Code Ann. § 36-3-113(b) (defining marriage as the union of *one* man and *one* woman). Indeed, the Tennessee marriage statute expressly provides that "[i]f another State or foreign jurisdiction issues a license for persons to marry, which marriages are prohibited in this state, *any such marriage* shall be void and unenforceable." Tenn. Code Ann. § 36-3-113(d) (emphasis added).[15]

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[14] Respondents acknowledge that the public policy on which Tennessee relies (its definition of marriage) must be "legitimate" and thus must itself satisfy equal-protection requirements. Petitioners' arguments that Tennessee's marriage laws discriminate on the basis of sex and sexual orientation, Br. Pet. 34-45, are more properly treated as challenges to that definition and, accordingly, are addressed separately below. *See infra* Sec. II.B.

[15] Petitioner cites only the Tennessee constitutional provision, not the statute. Br. Pet. 32-33. In the lower courts, petitioners argued that the statute should be construed as applying only to same-sex marriages, but the provision is plain and unambiguous. Petitioners have also argued that the decision in *Farnham v. Farnham*, 323 S.W.3d 129, 134 (Tenn. Ct. App. 2009), a private-party case in which the court recognized an

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The equal-protection guarantee of the Fourteenth Amendment "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). A state law complies with that direction and will be sustained "if the classification drawn by the statute is rationally related to a legitimate state interest." *Id.* at 440. Tennessee's law distinguishes between out-of-state marriages that comport with the State's public policy and those that conflict with it; that classification is rationally related to the State's legitimate interest in maintaining a uniform, consistent marriage regime and treating all of its citizens alike with respect to marriage.

In the particular case of out-of-state same-sex marriages, Tennessee's rule treats same-sex couples who have long resided in the State the same as same-sex couples who have moved into the State. *See Califano v. Torres*, 435 U.S. 1, 4 (1978) (per curiam) (making reference to "the independent power of each State under our Constitution to enact laws uniformly applicable to all of its residents"); *see also* Koppelman, *supra* at 88 ("A state could reasonably conclude that it would be unfair to have recent arrivals enjoy benefits that are denied to long-term residents."). By not

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out-of-state marriage on estoppel grounds, contradicts the statute. But the court in *Farnham* did not cite, much less address, § 36-3-113(d).

recognizing petitioners' out-of-state same-sex marriages, Tennessee does not deny equal protection of the law.

D. A State is not required to recognize an out-of-state same-sex marriage on the basis of the right to travel.

Petitioners argue that by not recognizing their New York and California marriages, Tennessee infringes upon their right to travel and to take up residence in Tennessee. Br. Pet. 23-24. They say that Tennessee's marriage laws force them "to 'choose between travel and a basic right' of citizenship, such as the liberty interest in one's marriage." Br. Pet. 26 (quoting *Dunn v. Blumstein*, 405 U.S. 330, 342 (1972)). But as discussed above, there is no fundamental right to same-sex marriage. So no "basic right of citizenship" is implicated by petitioners' traveling to and taking up residence in Tennessee. *Cf. Blumstein*, 405 U.S. at 342 ("In the present case, such laws force a person who wishes to travel and change residences to choose between travel and the basic right to vote.").

The right to travel finds its source in both the Privileges and Immunities Clause of Article IV, § 2, of the Constitution and the Privileges or Immunities Clause of the Fourteenth Amendment. In *Saenz v. Roe*, 526 U.S. 489 (1999), this Court identified three different components to the right to travel. 526 U.S. at 501-02. The first provides the right of "free interstate movement," i.e., the right of a citizen of one

State to enter and to leave another State without impediment. *See Edwards v. California*, 314 U.S. 160 (1941) (invalidating law criminalizing bringing indigent persons into California). The second is the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State. *See Paul v. Virginia*, 75 U.S. 168, 180 (1868) (the citizens of each State are placed "upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those [other] States are concerned"; "[s]pecial privileges enjoyed by citizens in their own States are not secured in other States"). The third component encompasses the right to be treated like a permanent resident for those travelers who elect to become permanent residents of the second State. *See Califano*, 435 U.S. 1 (new residents to a State are guaranteed the same benefits as those that existing residents enjoy). This right, which derives specifically from the Fourteenth Amendment, "is protected not only by the new arrival's status as a state citizen, but also by her status as a citizen of the United States." *Saenz*, 526 U.S. at 503; *see id.* at 504 ("That newly arrived citizens have two political capacities, one state and one federal, adds special force to their claim that they have the same rights as others who share their citizenship.") (internal quotation marks omitted). It is this third component of the right to travel that petitioners' argument invokes.

Saenz held unconstitutional a California statute that imposed a durational residency requirement by limiting welfare benefits through a recipient's first

year of residency. 526 U.S. at 492, 510-11. In *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898 (1986), this Court declared unconstitutional a New York law restricting civil-service-examination preference only to those veterans who entered the armed forces while residing in New York rather than to veterans who were not New York residents upon enlisting but became residents before the time of examination. 476 U.S. at 900. In each instance, the State either advantaged residents (*Soto-Lopez*) or disadvantaged new residents (*Saenz*), thereby treating newcomers differently from their own citizens. The Court held that these laws violated the right to travel because they imposed a direct penalty on migration, i.e., they treated newcomers to the State differently from those who already resided there. *See Saenz*, 526 U.S. at 503-04.

By contrast, Tennessee's marriage laws make no distinction between or among its citizens based on the length of their citizenship or residency in Tennessee. Tennessee does not recognize any same-sex marriage, in-state or out-of-state, regardless of the couple's residency; as discussed above, *no* out-of-state marriage is recognized if that marriage conflicts with the State's public policy. Indeed, petitioners' assertion that Tennessee "treat[s] them adversely as compared to other married Tennesseans," Br. Pet. 26, amounts to a restatement of their equal-protection argument. On the distinct right-to-travel question, the Sixth Circuit performed exactly the right comparison, Pet. Apx. 64a-65a; Tennessee's marriage laws treat all

citizens of the State exactly the same, regardless of their length of residence in Tennessee. Migration is not "penalized" merely because the rights enjoyed by the citizens of one State are not enjoyed by the citizens of another State. *See Califano*, 435 U.S. at 908 (rejecting the argument that a newcomer must be given benefits superior to current residents of a State if the newcomer enjoyed superior benefits in another State). By not recognizing petitioners' out-of-state marriages, Tennessee does not infringe upon their right to travel.

II. THE FOURTEENTH AMENDMENT ALLOWS A STATE TO DEFINE MARRIAGE IN THE TRADITIONAL WAY.

Respondents' position that the Fourteenth Amendment does not require a State to recognize an out-of-state same-sex marriage necessarily assumes that the Fourteenth Amendment allows a State to maintain the traditional definition of marriage, i.e., that the Tennessee public policy with which petitioners' out-of-state same-sex marriages conflict is indeed legitimate. The Sixth Circuit stated it in the converse: "If it is constitutional for a State to define marriage as a relationship between a man and a woman, it is also constitutional for the State to stand by that definition with respect to couples married in other States or countries." Pet. Apx. 60a. It is constitutional for Tennessee to so define marriage.

A. The traditional definition of marriage has a rational basis.

A state law challenged under the Due Process or Equal Protection Clauses of the Fourteenth Amendment must, at a minimum, be rationally related to a legitimate state interest. *See Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992); *Glucksberg*, 521 U.S. at 728. Under rational-basis review, a law is presumed constitutional, and "[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." *Heller v. Doe*, 509 U.S. 312, 320 (1993) (internal quotation marks omitted). Petitioners insist that Tennessee's marriage laws lack a "rational connection" to any state interest, Br. Pet. 47, but their argument turns rational-basis review upside down. Rather than show, as they must, how Tennessee's traditional, opposite-sex definition of marriage lacks any rational basis, petitioners assert that there would be no harm in expanding the definition to include same-sex couples, Br. Pet. 48, 50, and they focus on the irrationality of, and the harms they say result from, the State's failure to so expand it. Br. Pet. 47-50. This is essentially a policy argument; it is not an argument for why Tennessee's definition is unconstitutional. *See Heller*, 509 U.S. at 319 (rational-basis review does not "authorize the judiciary to sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations") (internal quotation marks omitted).

"[C]ourts are quite reluctant to overturn governmental action on the ground that it denies equal

protection of the laws." *Vance v. Bradley*, 440 U.S. 93, 96-97 (1979). In areas of social policy, a statutory classification must be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *F.C.C. v. Beach Commc'ns*, 508 U.S. 307, 314 (1993). Deference is particularly justified here, where the challenge is to a State's definition of marriage, a subject falling within the State's "virtually exclusive province." *Windsor*, 133 S.Ct. at 2691; *see Sugarman v. Dougall*, 413 U.S. 634, 648 (1973) (noting that equal-protection scrutiny "will not be so demanding where we deal with matters resting firmly within a State's constitutional prerogatives"). Tennessee's marriage laws also include a state constitutional amendment, approved by an overwhelming majority of Tennessee voters,[16] and the presumption that a law is constitutional is stronger with regard to laws passed by the citizens themselves at the ballot box. *See Gregory v. Ashcroft*, 501 U.S. 452, 471 (1991) (noting that a state constitutional provision is approved by "the people of [the State] as a whole" and thus "reflects . . . the considered judgment . . . of the citizens of [the State] who voted for it.").

Nevertheless, one need not strain to conceive of a rational basis for Tennessee's definition of marriage as the union of one man and one woman. As discussed

[16] Article XI, § 18, of the Tennessee Constitution was passed in 2006 in every one of the State's 95 counties and by a statewide majority of 81% of the voters. J.A. II. 520-529.

above, marriage cannot be divorced from its procreative purpose, *see, e.g., Skinner*, 316 U.S. at 535 ("[M]arriage and procreation are fundamental to the very existence and survival of the race."), and the inherently procreative capacity of the man-woman relationship cannot be denied. The Sixth Circuit aptly observed that "governments got into the business of defining marriage, and remain in the business of defining marriage, not to regulate love but to regulate sex, most especially the intended and unintended effects of male-female intercourse." Pet. Apx. 31a. The promotion of family stability is certainly a legitimate state interest, and Tennessee furthers that interest through its definition of marriage by increasing the likelihood that when children are born, they will be born into stable family units. *See* Tenn. Code Ann. § 36-3-113(a) (recognizing family "as the fundamental building block of our society"). There is nothing *irrational* about maintaining the institution of marriage under its traditional definition.[17]

The same rational basis exists for distinguishing between opposite-sex couples and same-sex couples. Obviously, same-sex couples cannot procreate naturally. Biology alone, therefore, provides a rational explanation for not expanding marriage to add same-sex

[17] The Sixth Circuit agreed that this was a rational basis for maintaining a traditional definition of marriage. It also found a second: that "a State may wish to wait and see before changing a norm that our society (like all others) has accepted for centuries." Pet. Apx. 34a.

couples. *See Johnson v. Robinson*, 415 U.S. 361, 383 (1974) (rational basis exists where "the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not"); *see also Heller*, 509 U.S. at 320 (there is no violation of the Equal Protection Clause "if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose"). Any charge that the State's traditional definition of marriage does not do enough, or even that it does too much, to further the State's interest must be disregarded in the constitutional analysis. *See Heller*, 509 U.S. at 330 (where the State identifies a rational basis, "[the Court] must disregard the existence of alternative methods of furthering the objective"); *Armour v. City of Indianapolis*, 132 S.Ct. 2073, 2083 (2012) ("the Constitution does not require [a legislature] to draw the perfect line nor even to draw a line superior to some other line it might have drawn"). Tennessee's marriage laws easily pass rational-basis review.

B. A State's traditional definition of marriage does not warrant heightened scrutiny.

The Equal Protection Clause does not forbid classifications. *Nordlinger*, 505 U.S. at 10. States "must treat like cases alike but may treat unlike cases accordingly." *Vacco*, 521 U.S. at 799. In *Romer v. Evans*, 517 U.S. 620 (1996), this Court acknowledged that "most legislation classifies for one purpose or another, with resulting disadvantage to various

groups or persons." 517 U.S. at 631. Heightened scrutiny of a law is warranted only when it "burdens a fundamental right [or] targets a suspect class." *Id.*; *see Nordlinger*, 505 U.S. at 10. The reason for subjecting laws that target a suspect class to heightened scrutiny is that such classifications "are more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective." *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982). Tennessee's law defining marriage as the union of one man and one woman does not warrant heightened scrutiny. For the reasons discussed above, Tennessee's definition of marriage does not burden a fundamental right. And for the reasons discussed here, it does not target a suspect class or otherwise reflect the invidious discrimination that heightened scrutiny otherwise presumes. *See id.* at 217.

1. There is no discrimination on the basis of sex.

Sex is a quasi-suspect class, and petitioners argue that Tennessee's definition of marriage draws a distinction based on sex and perpetuates stereotypical gender roles. Br. Pet. 35, 36. But while the words "man" and "woman" obviously are part of the traditional definition, this definition does not distinguish between men and women. As discussed above, by defining marriage as the *union* of a man and a woman, the law focuses not on the sex of the individual but on the opposite sexes of the couple. The distinction then, when one introduces the question of same-sex

marriage, is between opposite-sex couples and same-sex couples.

Tennessee's marriage law does not provide "dissimilar treatment for men and women who are . . . similarly situated." *Reed v. Reed*, 404 U.S. 71, 76 (1971). It does not give advantage, disadvantage, or preference to one above the other. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (citing *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972)). And it does not engender "disparate treatment of men and women resulting from sex stereotypes." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252 (1989). Petitioners may be correct to say that marriage has historically enshrined sex roles in the law, Br. Pet. 38, but the fundamental purpose of marriage—to make provision for the procreative capacity of the male-female relationship—is not based on any stereotype. In short, an opposite-sex definition of marriage does not amount to gender discrimination.

Petitioners' reliance on *Loving* is misplaced. Br. Pet. 35. *Loving* invalidated the Virginia miscegenation statutes because they "rest[ed] solely upon distinctions drawn according to race." 388 U.S. at 11. Although the Court rejected the argument that there was no invidious discrimination because these "statutes punish equally both the white and the Negro participants in an interracial marriage," *id.* at 8, the laws were invalidated because they promoted racial disparity. The Court rested its holding on the conclusion that there was "patently no legitimate overriding

purpose independent of invidious racial discrimination" that justified the classification. *Id.* at 11. The same cannot at all be said about the longstanding definition of what constitutes a marriage.

2. Sexual orientation does not trigger higher scrutiny.

Sexual orientation has not previously been identified as a suspect class, but petitioners assert that Tennessee's traditional definition of marriage discriminates on the basis of sexual orientation and that this discrimination warrants heightened review. Br. Pet. 39. Petitioners point out that the Court has previously had no need to determine whether sexual orientation is a suspect classification, Br. Pet. 40, and it need not do so here. A State law defining marriage as the union of a man and a woman is not the product of the "arbitrary and invidious discrimination" that heightened scrutiny is designed to root out. *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964); *see City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion) (purpose of heightened scrutiny is to "smoke out" illegitimate uses of a "suspect tool").

Tennessee, like every other State in the Nation prior to 2003, has always defined marriage in the traditional way. And it would strain reason to suggest that by defining marriage this way, Tennessee has been discriminating against same-sex couples for hundreds of years—that this definition reflects "deep-seated prejudice" rather than rationality, *Plyler*, 457 U.S. at

216 n.14, when the idea that same-sex couples might aspire to occupy the institution of marriage is a relatively recent development, *see Windsor*, 133 S.Ct. at 2689. As the Sixth Circuit explained, while "[t]he traditional definition of marriage goes back thousands of years and spans almost every society in history," this Court has noted that "laws targeting same-sex couples did not develop until the last third of the 20th century." Pet. Apx. 50a (quoting *Lawrence*, 539 U.S. at 570) (internal quotation marks omitted). Consequently, history does not support the presumption of prejudice on which heightened-scrutiny analysis is based; there is no cause for the skepticism that would engender such review. "The usual leap from history of discrimination to intensification of judicial review does not work." Pet. Apx. 50a.

Petitioners' arguments focus on Tennessee's recent enactments, but those just reaffirmed the traditional definition; they "codified a long-existing, widely held social norm already reflected in state law." Pet. Apx. 40a. *See* Tenn. Code Ann. § 36-3-113(a) (making reference to the "historical institution" of marriage). Pet. Apx. 133a. If the traditional definition does not invidiously discriminate against same-sex couples, the mere codification of that definition does not either.

But even if one focuses on the State's decision to reaffirm the traditional definition, "reasons exist to promote the institution of marriage beyond mere disapproval of an excluded group." *Lawrence*, 539 U.S. at 585 (O'Connor, J., concurring). Indeed,

Tennessee's statute expressly declares that its marriage laws "reinforce, carry forward, and make explicit the long-standing public policy of this state to recognize the family as essential to social and economic order." Pet. Apx. 133a. Tennessee does not maintain a traditional definition of marriage with the design to "exclude" same-sex couples; as discussed above, that is but the natural consequence of marriage's original and fundamental purpose and the inescapable biological fact that opposite-sex couples procreate and same-sex couples do not. And that reality counsels against, not in favor of, closer judicial scrutiny. *See City of Cleburne*, 473 U.S. at 441-42.

The State and its voters can legitimately favor this traditional purpose of marriage without that view having anything to do with denigrating same-sex couples. Commentators have observed that proponents of the traditional definition of marriage "emphasize [its] mandatory nature. That is, they continue to insist on the unity of sex, marriage, and procreation; the complementary nature of the relationship between men and women; and the importance of commitment . . . to marital stability." Naomi Cahn & June Carbone, *Red Families v. Blue Families: Legal Polarization and the Creation of Culture* 119 (2010); *see id.* at 128 ("Within the red paradigm, marriage is the optimal basis for childrearing, and it is an eternal institution, rooted 'in creation itself,' for the purpose of ordering sexual relations and uniting mothers, fathers, and their biological children."). The vote in favor of traditional marriage is a vote in

favor of traditional marriage; it is not a vote against same-sex couples as persons. *See Prepared Statement of Maggie Gallagher*, 58 Drake L. Rev. 889, 896 (2010) ("The idea marriage has something important to do with procreation was not made up in response to gay marriage. We did not invent it because we do not like gay people.").[18] There is no reason to suspect invidious discrimination; the Court need not subject Tennessee's marriage definition to heightened scrutiny.

III. THE STATES' RECOGNITION OF SAME-SEX MARRIAGE MUST BE LEFT TO EACH STATE.

Marriage is an area of traditional state concern, though "[s]tate laws defining and regulating marriage, of course, must respect the constitutional rights of persons." *Windsor*, 133 S.Ct. 2691. Respondents agree with petitioners that "constitutional law is not a matter of majority vote." Br. Pet. 55 (quoting *Lucas v. Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713, 737 n.30 (1964)). But the Fourteenth Amendment

[18] Respondents acknowledge that some individuals may act with improper motives, but "it is unrealistic . . . to invalidate otherwise legitimate action simply because an improper motive affected the deliberation of a participant in the decisional process." *Washington v. Davis*, 426 U.S. 229, 253 (1976) (Stevens, J., concurring). *See also Schuette v. Coal. to Defend Affirmative Action*, 134 S.Ct. 1623, 1638 (2014) ("It is demeaning to the democratic process to presume that voters are not capable of deciding an issue of this sensitivity on decent and rational grounds.").

does not compel the result petitioners seek—it does not require States to recognize same-sex marriages.

The question whether States *should* recognize same-sex marriage is obviously a matter of great debate, and it is one on which people of good will disagree. Indeed, the differences among the States on the question of same-sex marriage appear to reflect the larger cultural divide that currently exists in this country on a host of family-related issues. *See* Cahn & Carbone, *supra* at 119. "But the goal of constitutional adjudication is surely not to remove inexorably 'politically divisive' issues from the ambit of the legislative process, whereby the people through their elected representatives deal with matters of concern to them. The goal . . . is to hold true the balance between that which the Constitution puts beyond the reach of the democratic process and that which it does not." *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 521 (1989) (plurality opinion). Our federal structure accounts for such divisions, and the answer is debate and democratic consensus. "[D]emocratic institutions are weakened . . . when [the Court] appears unnecessarily to decide sensitive issues of broad social and political importance at the very time they are under consideration within the prescribed constitutional process." *Frontiero*, 411 U.S. at 692.

The Constitution invests each State with the power to define marriage; it does not put the question whether that definition should encompass same-sex couples beyond the reach of the democratic process. Our federal structure is well suited to address divisive

social-policy issues like this one. *See* Cahn & Carbone, *supra* at 208 ("[M]arriage promotion should be handled in decentralized ways through the federalist system, allowing each part of the country to redefine family aspirations in regional terms based on shared values."). That structure also protects the "dignity and respect afforded a state," *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 268 (1997), and the dignity of individual state voters—"the right of citizens to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course of their own times," *Schuette v. Coal. to Defend Affirmative Action*, 134 S.Ct. 1623, 1637 (2014). The whole point of horizontal federalism is to afford each State the opportunity to best address the needs, wishes, and values of its own people; it "enables greater citizen 'involvement in the democratic processes,' and makes government 'more responsive by putting the States in competition for a mobile citizenry.'" *Bond*, 131 S.Ct. at 2364. Here, having invested in that process and reaffirmed the traditional definition of marriage for their own community, both through an act of the legislature and with 1.4 million of their votes, the citizens of Tennessee have an interest at stake too.

The decision of a State like New York or California to expand its definition of marriage to include same-sex couples is "without doubt a proper exercise of its sovereign authority within our federal system." *Windsor*, 133 S.Ct. at 2692. But it is also a proper exercise of Tennessee's sovereign authority within our

federal system to maintain the traditional definition of marriage, and to recognize out-of-state marriages accordingly. It would intrude on Tennessee's sovereignty to require it to substitute another State's marriage policy for its own.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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