Case Nos. 14-5003, 14-5006

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MARY BISHOP, et al.,

Plaintiffs-Appellees,

and

SUSAN G. BARTON, et al.,

Plaintiffs-Appellees/Cross-Appellants,

v.

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

Defendant-Appellant/Cross-Appellee,

and

THE UNITED STATES OF AMERICA, ex rel. **ERIC H. HOLDER, JR.**, in his official capacity as Attorney General of the United States of America,

Defendant,

BIPARTISAN LEGAL ADVISORY GROUP OF THE U.S. HOUSE OF REPRESENTATIVES, et al.,

Intervenors-Defendants.

On appeal from the United States District Court for the Northern District of Oklahoma,
Case No. 04-CV-848-TCK-TLW
The Honorable Terence C. Kern

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Oral Argument Set for April 17, 2014

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Advantage Media, LLC v. City of Eden Prairie,
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Agostini v. Felton,
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Baehr v. Lewin,
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Baker v. Nelson,
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Baker v. State,
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Bishop v. Oklahoma,
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Blunt v. Blunt,
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Board of Trustees of the University of Alabama v. Garrett,
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Bowen v. Gilliard,
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Califano v. Boles,
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Citizens for Equal Protection v. Bruning,
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City of Cleburne v. Cleburne Living Center, Inc.,
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City of Erie v. Pap's A.M.,
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Conaway v. Deane,
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Covenant Media of South Carolina, LLC v. City of North Charleston,
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Craig v. Boren,
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Dandridge v. Williams,
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FCC v. Beach Communications, Inc.,
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FCC v. National Citizens Committee for Broadcasting,
436 U.S. 775 (1978).....67

Frontiero v. Richardson,
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Get Outdoors II, LLC v. City of San Diego, California,
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Goodridge v. Department of Public Health,
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Griswold v. Connecticut,
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Grutter v. Bollinger,
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Harp Advertising Illinois, Inc. v. Village of Chicago Ridge, Illinois,
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Heller v. Doe,
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Hernandez v. Robles,
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Hicks v. Miranda,
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Hunt v. Hunt,
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Jackson v. Abercrombie,
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Johnson v. Robison,
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Jones v. Hallahan,
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In re Kandu,
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Kern v. Taney,
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Lawrence v. Texas,
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Lewis v. Harris,
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Lofton v. Secretary of the Department of Children & Family Services,
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Loving v. Virginia,
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Lujan v. Defenders of Wildlife,
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In re Marriage Cases,
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In re Marriage of J.B. & H.B.,
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Massachusetts v. U.S. Department Health & Human Services,
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Maverick Media Group, Inc. v. Hillsborough County, Florida,
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Maynard v. Hill,
125 U.S. 190 (1888).....24

Midwest Media Property, LLC v. Symmes Township, Ohio,
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Mississippi University for Women v. Hogan,
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Mudd v. Perry,
235 P. 479 (Okla. 1925).....5

Murphy v. Ramsey,
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Nichols v. Brown,
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Nguyen v. Immigration and Naturalization Service,
533 U.S. 53 (2001).....58

Oklahoma Telecasters Association v. Crisp,
699 F.2d 490 (10th Cir. 1983).....21, 22

In re Opinions of the Justices to the Senate,
802 N.E.2d 565 (Mass. 2004)..... 6-7

Parham v. J.R.,
442 U.S. 584 (1979).....49

Price-Cornelison v. Brooks,
524 F.3d 1103 (10th Cir. 2008).....16, 45

Reed v. Reed,
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Rodriguez de Quijas v. Shearson/American Express, Inc.,
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Romer v. Evans,
517 U.S. 620 (1996).....22, 34

San Antonio Independent School District v. Rodriguez,
411 U.S. 1 (1973).....43

Santosky v. Kramer,
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Save Palisade FruitLands v. Todd,
279 F.3d 1204 (10th Cir. 2002).....37

Sevcik v. Sandoval,
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Singer v. Hara,
522 P.2d 1187 (Wash. Ct. App. 1974).....42, 59

Smelt v. County of Orange,
447 F.3d 673 (9th Cir. 2006).....68

Smelt v. County of Orange,
374 F. Supp. 2d 861 (C.D. Cal. 2005).....40, 41

Smith v. Organization of Foster Families For Equality & Reform,
431 U.S. 816 (1977).....49

Sosna v. Iowa,
419 U.S. 393 (1975).....2, 29

Southwestern Bell Telephone Company v. Oklahoma State Board of Equalization,
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Standhardt v. Superior Court of State of Arizona,
77 P.3d 451 (Ariz. Ct. App. 2003).....41, 56, 59, 60, 61

Storrs v. Holcomb,
645 N.Y.S.2d 286 (N.Y. Sup. Ct. 1996).....41

Timmons v. White,
314 F.3d 1229 (10th Cir. 2003).....20

Troxel v. Granville,
530 U.S. 57 (2000).....49

Turner Broadcasting System, Inc. v. FCC,
520 U.S. 180 (1997).....67, 68

Turner Broadcasting System, Inc. v. FCC,
512 U.S. 622 (1994).....67

United States v. Virginia,
518 U.S. 515 (1996).....41, 43, 54

United States v. Windsor,
133 S. Ct. 2675 (2013).....*passim*

Utah v. Babbitt,
137 F.3d 1193 (10th Cir. 1998).....86

Vacco v. Quill,
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Vance v. Bradley,
440 U.S. 93 (1979).....58

Vincent v. Vincent,
257 P.2d 512 (Okla. 1953).....69

Washington v. Glucksberg,
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WeGo Perforators v. Hilligoss,
397 P.2d 113 (Okla. 1964).....5

White v. United States,
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Williams v. North Carolina,
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Wilson v. Ake,
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Wooden v. Wooden,
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Zablocki v. Redhail,
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Oklahoma Statute Chapter 31, Section 3234 (1908) 5

Oklahoma Statute Chapter 45, Sections 3884 (1908).....5

Oklahoma House Bill 1151, 35th Legislature, 1st Regular Session (1975).....6

Oklahoma Statute Title 43, Section 3 (1975) 6

Oklahoma Statute Title 10, Section 7700-204.....27

Oklahoma Statute Title 43, Section 3 .....5, 9

Oklahoma Statute Title 43, Section 3.1 .....6, 9

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Oklahoma Statute Title 43, Section 107.1 27

Oklahoma Statute Title 43, Section 201 69

United States Code Title 28, Section 1291 4

United States Code Title 28, Section 1331 4

Other Authorities

Douglas W. Allen, *An Economic Assessment of Same-Sex Marriage Laws*, 29 Harv. J.L. & Pub. Pol'y 949 (2006) 25, 64, 70

Douglas W. Allen and Maggie Gallagher, *Does Divorce Law Affect the Divorce Rate? A Review of Empirical Research, 1995-2006*, Institute for Marriage and Public Policy Research Brief (Jul. 2007), *available at* http://www.marriagedebate.com/pdf/imapp.nofault.divrate.pdf.....70

Assisted Reproductive Technology, Centers for Disease Control and Prevention, http://www.cdc.gov/art/ (last visited Feb. 23, 2014) 84

Robert N. Bellah et al., *The Good Society* (1991) 64

Jessica Bennett, *Polyamory: The Next Sexual Revolution?*, Newsweek, Jul. 28, 2009, *available at* http://www.newsweek.com/polyamory-next-sexual-revolution-82053.....82

Peter L. Berger and Thomas Luckmann, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* (1966) 64

William Blackstone, Commentaries 26, 49

Elizabeth Brake, *Minimal Marriage: What Political Liberalism Implies for Marriage Law*, 120 Ethics 302 (2010) 82

Adrienne Burgess, *Fathers and public services*, *in* Daddy Dearest?, Institute for Public Policy Research 57 (Kate Stanley ed., 2005) 53

Ray Carter, *Marriage question among most popular on state ballot*, Journal Record, Oct. 12, 2004 36

Andrew J. Cherlin, *The Deinstitutionalization of American Marriage*, 66 J. Marriage & Fam. 848 (2004).....77, 78

Kingsley Davis, *Introduction: The Meaning and Significance of Marriage in Contemporary Society*, *in* Contemporary Marriage: Comparative Perspectives on a Changing Institution 1 (Kingsley Davis ed., 1985)....26, 52

Divorce rates by State: 1990, 1995, and 1999-2011, Centers for Disease Control and Prevention, *available at* http://www.cdc.gov/nchs/data/dvs/divorce_rates_90_95_99-11.pdf 79

William J. Doherty et al., *Responsible Fathering*, 60 J. Marriage & Fam. 277 (1998).....48, 74, 75, 80

Bruce J. Ellis et al., *Does Father Absence Place Daughters at Special Risk for Early Sexual Activity and Teenage Pregnancy?*, 74 Child Dev. 801 (2003).....53

William N. Eskridge, Jr. and Darren R. Spedale, *Gay Marriage: For Better or for Worse? What We've Learned from the Evidence* (2006).....65

Lawrence B. Finer and Mia R. Zolna, *Unintended Pregnancy in the United States: Incidence and Disparities, 2006*, 84 Contraception 478 (2011).....47, 56, 62

Elrini Flouri and Ann Buchanan, *The role of father involvement in children's later mental health*, 26 J. Adolescence 63 (2003).....53

Gary J. Gates, *LGBT Parenting in the United States*, The Williams Institute, UCLA School of Law (Feb. 2013) 85

Robert P. George et al., *What is Marriage?* (2012).....*passim*

Norval D. Glenn, *The Struggle For Same-Sex Marriage*, 41 Soc'y 25 (2004) 25, 74, 76, 77, 83

William J. Goode, *World Changes in Divorce Patterns* (1993).....70

E.J. Graff, *Retying the Knot*, The Nation, Jun. 24, 1996 65

David Harper, *Focus: Gay-marriage clamor grows louder and louder*, Tulsa World, Mar. 22, 2004 36

Institute for American Values, *Marriage and the Law: A Statement of Principles* 18 (2006), *available at* http://www.americanvalues.org/search/item.php?id=22.....76

Ron Jenkins, *Agreement ends fight on same-sex marriage ban,* Associated Press, Apr. 14, 2004.....36

Claude Levi-Strauss, *The View From Afar* (1985) 24

John Locke, *Second Treatise of Civil Government* (1690).....26

Wendy D. Manning et al., *The Relative Stability of Cohabiting and Marital Unions for Children*, 23 Population Research & Pol'y Rev. 135 (2004).....57, 73

Wendy D. Manning and Kathleen A. Lamb, *Adolescent Well Being in Cohabiting, Married, and Single-Parent Families*, 65 J. Marriage & Fam. 876 (2003).....50

Loren D. Marks, *Same-Sex Parenting and Children's Outcomes: A Closer Examination of the American Psychological Association's Brief on Lesbian and Gay Parenting*, 41 Soc. Sci. Res. 735 (2012).....85

Elizabeth Marquardt et al., *My Daddy's Name is Donor: A New Study of Young Adults Conceived Through Sperm Donation*, Institute for American Values, *available at* http://familyscholars.org/my-daddys-name-is-donor-2/.....52

Sara McLanahan and Gary Sandefur, *Growing Up with a Single Parent: What Hurts, What Helps* (1994) 50-51

Kristin Anderson Moore et al., *Marriage from a Child's Perspective: How Does Family Structure Affect Children, and What Can We do About It?*, Child Trends Research Brief (June 2002).....48, 50, 81

National Marriage and Divorce Rate Trends, Centers for Disease Control and Prevention, *available at* http://www.cdc.gov/nchs/nvss/marriage_divorce_tables.htm 79

Barack Obama, *Obama's Speech on Fatherhood* (Jun. 15, 2008), *transcript available at* http://www.realclearpolitics.com/articles/2008/06/obamas_speech_on_fatherhood.html 53

Opinion of the Attorney General of Oklahoma No. 04-010 (2004) 5

Allen M. Parkman, *Good Intentions Gone Awry: No-fault Divorce and the American Family* (2000)..... 70-71

David Popenoe, *Life Without Father* (1996) 51, 53

Marie Price, *State GOP lawmakers are urging constitutional approaches to strengthen laws regarding marriage*, Tulsa World, Feb. 6, 2004.....36

Kyle D. Pruett, *Fatherneed* (2000) 52, 53

G. Robina Quale, *A History of Marriage Systems* (1988) 25

A.R. Radcliffe-Browne, *Structure and Function in Primitive Society* (1952) 64

Joseph Raz, *Ethics in the Public Domain* (1994) 65

Mark Regnerus, *How Different Are the Adult Children of Parents Who Have Same-Sex Relationships? Findings from the New Family Structures Study*, 41 Soc. Sci. Research 752 (2012).....84

Charles J. Rothwell et al., *Fertility, Family Planning, and Reproductive Health of U.S. Women: Data from the 2002 National Survey of Family Growth*, Centers for Disease Control and Prevention (Dec. 2005), *available at* http://www.cdc.gov/nchs/data/series/sr_23/sr23_025.pdf 61

Bertrand Russell, *Marriage & Morals* (Liveright Paperbound Edition, 1970) 28, 78

Benjamin Scafidi, *The Taxpayer Costs of Divorce and Unwed Childbearing: First-Ever Estimates for the Nation and All Fifty States* (2008).....73

Carl E. Schneider, *The Channelling Function in Family Law*, 20 Hofstra L. Rev. 495 (1992) 64

Michelangelo Signorile, *Bridal Wave*, OUT Magazine, Dec./Jan. 1994.....65

Judith Stacey, *In the Name of the Family: Rethinking Family Values in the Postmodern Age* (1996) 82

Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 Harv. L. Rev. 4 (1996).....66

Julien O. Teitler et al, *Effects of Welfare Participation on Marriage*, 71 J. Marriage & Fam. 878 (2009).....73

United Nations Convention on the Rights of the Child Article 7, Section 1.....49

Judith S. Wallerstein et al., *The Unexpected Legacy of Divorce: The 25 Year Landmark Study* (2000) 70

W. Bradford Wilcox and Jeffrey Dew, *Is Love a Flimsy Foundation? Soulmate versus institutional models of marriage*, 39 Soc. Sci. Research 687 (2010).....80

W. Bradford Wilcox, *Reconcilable Differences: What Social Sciences Show About Complementarity of Sexes & Parenting*, Touchstone, Nov. 2005.....54

W. Bradford Wilcox et al., eds., *Why Marriage Matters* (3d ed. 2011).....50

W. Bradford Wilcox et al., eds., *Why Marriage Matters* (2d ed. 2005).....25, 51, 80

Elizabeth Wildsmith et al., *Childbearing Outside of Marriage: Estimates and Trends in the United States*, Child Trends Research Brief (Nov. 2011), *available at* http://www.childtrends.org/wp-content/uploads/2013/02/Child_Trends-2011_11_01_RB_NonmaritalCB.pdf 47, 48, 57, 62

Ellen Willis, *Can Marriage Be Saved? A Forum*, The Nation, Jul. 5, 2004 82

James Q. Wilson, *The Marriage Problem* (2002) 26, 51, 52

Witherspoon Institute, *Marriage and the Public Good: Ten Principles* (2008)..... 51, 52, 72, 74, 75, 77, 80

STATEMENT OF RELATED APPEALS

Bishop v. Oklahoma, No. 06-5188, 333 F. App'x 361 (10th Cir. June 5, 2009) – This is a prior appeal of a collateral order in the pending case challenging the constitutionality of Oklahoma's constitutional amendment defining marriage as the union of one man and one woman. Plaintiffs originally named two state defendants, the Oklahoma Governor and Attorney General, as parties to the suit. Counsel for the state defendants filed a motion to dismiss on Eleventh Amendment immunity grounds. The United States District Court for the Northern District of Oklahoma denied that motion, and the state defendants appealed that decision to this Court under the collateral-order exception to 28 U.S.C. § 1291. This Court held that because the state "officials' generalized duty to enforce state law . . . [was] insufficient to subject them to a suit challenging a constitutional amendment they have no specific duty to enforce," Plaintiffs "lack[ed] Article III standing" to bring their claims against those officers. *Bishop*, 333 F. App'x at 365. Following remand, Plaintiffs filed an amended complaint that named Appellant Sally Howe Smith, in her official capacity as Court Clerk for Tulsa County, State of Oklahoma, as a defendant in place of the two previously named state officials.

Kitchen v. Herbert, No. 13-4178 (10th Cir.) – The plaintiffs in *Kitchen* are challenging the constitutionality of Utah laws that define marriage as the union of one man and one woman. The plaintiffs assert that those laws violate the Due

Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. The United States District Court for the District of Utah agreed with the plaintiffs and granted their motion for summary judgment. The state defendants appealed to this Court, and the case is pending here. The issues raised in that appeal are similar to the issues raised in this appeal.

Sevcik v. Sandoval, No. 12-17668 (9th Cir.) – The plaintiffs in *Sevcik* are challenging the constitutionality of Nevada laws that define marriage as the union of one man and one woman. The plaintiffs assert that those laws violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. The United States District Court for the District of Nevada rejected the plaintiffs' claims and upheld Nevada's laws as constitutional. The plaintiffs appealed to the Ninth Circuit, and the case is pending there. The issues raised in that appeal are similar to the issues raised in this appeal.

INTRODUCTION

The People throughout the various States are engaged in an earnest public discussion about the meaning, purpose, and future of marriage. As a bedrock social institution, marriage has always existed to channel the presumptive procreative potential of man-woman relationships into committed unions for the benefit of children and society. Despite this enduring purpose, some now seek to redefine marriage from a gendered to a genderless institution. Meanwhile, many others sincerely believe that redefining marriage as a genderless institution would obscure its animating purpose and thereby undermine its social utility.

So far, the States have reached differing decisions on this important question. The People in 11 States, acting through a vote of the citizens or the state legislature, have adopted a genderless-marriage regime, while six other States have redefined marriage as a result of state-court rulings. *See* Brief of Appellants at Addendum 2, *Kitchen v. Herbert* (10th Cir. Feb. 3, 2014) (No. 13-4178). No provision of the United States Constitution prohibits those States from adopting that marriage policy. *See United States v. Windsor*, 133 S. Ct. 2675, 2692 (2013). Elsewhere, the People in the remaining 33 States, Oklahoma among them, have decided, mostly through state constitutional amendments, to preserve marriage as a man-woman union. *See* Brief of Appellants at Addendum 2, *Kitchen v. Herbert*

(10th Cir. Feb. 3, 2014) (No. 13-4178). Nothing in the Constitution forbids them from affirming that marriage policy.

Yet Plaintiffs, discontented with the People's sovereign decision, have filed this lawsuit. They argue that the public discussion about the meaning, purpose, and future of marriage was and is meaningless. They claim that the issue was taken out of the People's hands in the 1860s—when the Fourteenth Amendment was ratified—that the Constitution itself defines marriage as a genderless institution, and that the People have no say in deciding the weighty social, philosophical, political, and legal issues implicated by this public debate. But Plaintiffs are mistaken. The Constitution has not removed this question from the People. It has not settled this critical social-policy issue entrusted to the States.

The District Court thus erred in holding that the Fourteenth Amendment to the United States Constitution requires Oklahomans to redefine marriage for their community. Federal constitutional review of a State's definition of marriage "must be particularly deferential," *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 867 (8th Cir. 2006), because States, subject only to clear constitutional constraints, have an "absolute right to prescribe the conditions upon which the marriage relation between [their] own citizens shall be created." *Sosna v. Iowa*, 419 U.S. 393, 404 (1975); *see also Windsor*, 133 S. Ct. 2691.

Plaintiffs' constitutional arguments, moreover, are foreclosed by the enduring public purpose of marriage. History has left no doubt that marriage owes its very existence to society's vital interest in channeling the presumptively procreative potential of man-women relationships into committed unions for the benefit of children and society. Marriage is thus inextricably linked to the undeniable biological fact that man-woman couples, and only such couples, are capable of naturally creating new life together and, therefore, are capable of furthering, or threatening, society's interests in responsibly creating and rearing the next generation. That fact alone forecloses Plaintiffs' claims, for Supreme Court precedents make clear that a classification will be upheld when "the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not[.]" *Johnson v. Robison*, 415 U.S. 361, 383 (1974).

Furthermore, Oklahomans realize that marriage has been, and continues to be, about the business of serving child-centered purposes, like connecting children to both their mother and father, and avoiding the negative outcomes often associated with children raised outside a stable family led by both their mother and father. Redefining marriage would likely harm marriage's ability to serve those interests—harm that flows from severing marriage's inherent connection to procreation, communicating to the community that marriage's primary end is to affirm adult desires rather than serve children's needs, and suppressing the

importance of both mothers and fathers to children's development. Faced with these concerns about adverse future consequences, the People of Oklahoma are free to affirm the man-woman marriage institution, believing that, in the long run, it will best serve the wellbeing of the State's children—their most vulnerable citizens—and society as a whole. Oklahomans thus have the right to decide the future of marriage for their community and thereby "shap[e] the destiny of their own times." *Windsor*, 133 S. Ct. at 2692.

JURISDICTIONAL STATEMENT

Plaintiffs raise constitutional claims under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. 28 U.S.C. § 1331 provides jurisdiction to decide these constitutional claims.

28 U.S.C. § 1291 affords this Court appellate jurisdiction to review the District Court's final judgment and order, which granted Plaintiffs' summary-judgment motion in part and dismissed Plaintiffs' remaining claims. The District Court entered its order and final judgment on January 14, 2014. Smith filed her notice of appeal on January 16, 2014.

STATEMENT OF THE ISSUE

Whether the Fourteenth Amendment forbids Oklahoma from defining marriage as the union of one man and one woman.

STATEMENT OF THE CASE

I. History of Oklahoma's Marriage Laws

Marriage in Oklahoma has always been the union of one man and one woman. *See* Op. Att'y Gen. Okla. No. 04-010 (2004) (stating that "marriage is limited to those persons who are of the opposite sex" and that the "definition of marriage . . . has remained constant" in Oklahoma); Okla. Stat. tit. 43, § 3(A) (noting that an "unmarried person" may marry "a person of the opposite sex"). From the State's inception in 1907, Oklahoma's marriage statutes have reflected the gendered understanding of marriage. *See, e.g.*, Okla. Stat. ch. 31, § 3234 (1908) ("Husband and wife contract toward each other obligations of mutual respect, fidelity and support."); Okla. Stat. ch. 45, § 3884 (1908) (prohibiting marriage between "a stepfather [and] a stepdaughter, stepmother [and] stepson, . . . uncles and nieces, aunts and nephews," and "brothers and sisters").

Indeed, in the 1920s, the Oklahoma Supreme Court affirmed that "'[m]arriage' as at common law creates the status of husband and wife under the law of this state. . . . It is a contract between . . . man and woman." *Mudd v. Perry*, 235 P. 479, syllabus[1] (Okla. 1925), *superseded on other grounds as recognized in Copeland v. Stone*, 842 P.2d 754, 757-59 (Okla. 1992). Many decades later, in 1975, the Legislature amended the statutory section that prescribes the conditions

[1] It is . . . well settled that . . . a syllabus embodies the law of the case in [Oklahoma]." *WeGo Perforators v. Hilligoss*, 397 P.2d 113, 119 (Okla. 1964).

of marriage. *See* H.B. 1151, 35th Leg., 1st Reg. Sess. (Okla. 1975) ("Any unmarried person of the age of eighteen (18) or upwards . . . is capable of contracting and consenting to marriage with a person of the opposite sex"). In that bill, the Legislature expressly recognized what had always been understood in Oklahoma—that marriage is a union entered into "with a person of the opposite sex[.]" Okla. Stat. tit. 43, § 3 (1975).

In 1993, the Hawai'i Supreme Court issued a decision suggesting that its state laws defining marriage as a man-woman union might violate its state constitution, thereby creating the prospect that Hawai'i might redefine marriage. *See Baehr v. Lewin*, 852 P.2d 44, 68 (Haw. 1993). Faced with this development, in 1996, Oklahoma enacted a statute affirming that it would not recognize "marriage[s] between persons of the same gender performed in another state." Okla. Stat. tit. 43, § 3.1. Oklahoma took this step to protect its own definition of marriage—ensuring that marriage would not be indirectly redefined within its borders (without the consent of its People) through the recognition of unions solemnized in other States.

In 2003 and 2004, two decisions from the Massachusetts Supreme Judicial Court construed its state constitution to require that Massachusetts redefine marriage. *See Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003); *In re Opinions of the Justices to the Senate*, 802 N.E.2d 565, 572 (Mass.

2004). Prompted by the concern that state-court judges in Oklahoma might similarly interpret their state constitution to require a genderless-marriage regime, the Oklahoma Legislature proposed a referendum to place the State's definition of marriage in its Constitution and beyond the reach of those judges. Aplt.App.256-62.

In April 2004, the referendum passed the Legislature, Aplt.App.264-67, and it was presented to the People during the November 2004 election. Aplt.App.262. The ballot title told voters the effect of the provision at issue in this appeal: "It defines marriage to be between one man and one woman." Aplt.App.258, 262. On November 2, 2004, to ensure that state-court judges could not remove the People's sovereign authority to define marriage for their community, the voters enacted the Marriage Amendment, which is now found in Article II, Section 35 of the Oklahoma Constitution. More than one million Oklahomans, 1,075,216 to be exact, voted in favor of the Amendment. Aplt.App. 269-70.

The People thus exercised their "voice in shaping the destiny of their own times" on the profoundly important question of the meaning and public purpose of marriage. *Windsor*, 133 S. Ct. at 2692. The Marriage Amendment, in short, reflects Oklahomans' "considered perspective on the . . . the institution of marriage[.]" *Id.* at 2692-93.

II. Procedural History

After the election, Plaintiffs (two same-sex couples residing in Oklahoma) filed this suit raising various constitutional challenges to the Marriage Amendment and the federal Defense of Marriage Act ("DOMA"). *See* Compl. at 4-6 (ECF No. 1). Plaintiffs named two state defendants, the Oklahoma Governor and Attorney General, and two federal defendants, the President and Attorney General of the United States. *See id* at 3. After the District Court refused to dismiss the state officials on Eleventh Amendment immunity grounds, *see* Am. Op. and Order at 21-22 (ECF No. 93), this Court concluded that those officials had "no specific duty to enforce" the challenged Marriage Amendment, and thus held that Plaintiffs "lack[ed] Article III standing" to sue them. *Bishop v. Oklahoma*, 333 F. App'x 361, 365 (10th Cir. 2009) (unpublished).

Following remand, Plaintiffs filed an amended complaint. Aplt.App.033. In addition to listing the United States Attorney General as a defendant, that complaint sued Sally Howe Smith, Court Clerk for Tulsa County, in place of the dismissed state officials. Aplt.App.033-34. The Bipartisan Legal Advisory Group of the U.S. House of Representatives subsequently intervened to defend part of federal DOMA.

Plaintiffs allege that both the Marriage Amendment and federal DOMA violate the due-process and equal-protection guarantees of the United States

Constitution. Aplt.App.040-41. Plaintiffs challenge Part A of the Marriage Amendment, which defines marriage in Oklahoma as "the union of one man and one woman," Okla. Const. art. II, § 35(A) (*see* Aplt.App. 035-041 ¶¶11, 25, 27-28), and Part B of the Amendment, which provides that a same-sex marriage "performed in another state shall not be recognized" in Oklahoma, Okla. Const. art. II, § 35(B) (*see* Aplt.App.044). But as the District Court acknowledged, *see* Aplt.App.626 n.2-3 (Op. at 3),[2] Plaintiffs did not challenge the marriage statutes. *See* Okla. Stat. tit. 43, § 3(A) (indicating that marriage is a union "with a person of the opposite sex"); Okla. Stat. tit. 43, § 3.1 (declining to recognize out-of-state same-sex marriages).

All parties filed dispositive motions, *see* Aplt.App.632-33 (Op. at 9-10), which included the two motions at issue in this appeal: (1) Plaintiffs' Motion for Summary Judgment (Aplt.App.053); and (2) Smith's Cross-Motion for Summary Judgment (Aplt.App.187).

III. The District Court's Decision

The District Court issued an order resolving all dispositive motions on January 14, 2014. Aplt.App.690-91 (Op. at 67-68). The court began by dismissing all claims against federal DOMA on standing and mootness grounds, and those

[2] Citations to the District Court's decision include a reference to Appellant's Appendix and a corresponding reference to the specific page number of the opinion.

claims are not part of this appeal. *See* Aplt.App.633 (Op. at 10). The District Court next determined that Plaintiffs Barton and Phillips, who together received a marriage certificate in the State of California, lacked standing to bring their challenge to Part B of the Marriage Amendment against Smith. Aplt.App.649-51 (Op. at 26-28). That conclusion is the subject of Plaintiffs' cross-appeal. *See* Pls.' Notice of Appeal, ECF No. 281.

The District Court then addressed the claims of Plaintiffs Bishop and Baldwin (who together seek a marriage license in Oklahoma) against Part A of the Marriage Amendment. Aplt.App.651-91 (Op. at 28-68). After satisfying itself that Plaintiffs had standing for their challenge to Part A, *see* Aplt.App.651-53 (Op. at 28-30), the District Court held that Part A "violates the Equal Protection Clause of the Fourteenth Amendment[.]" Aplt.App.690 (Op. at 67). Those conclusions are challenged in this appeal.

The District Court opined that the Supreme Court's summary dismissal in *Baker v. Nelson*, 409 U.S. 810 (1972), does not foreclose Plaintiffs' challenge to the Marriage Amendment.[3] *See* Aplt.App.653-57 (Op. at 30-34). *Baker*, the District Court rightly acknowledged, "presented the precise legal issues presented in this case—namely, whether a state law limiting marriage to opposite-sex couples

[3] Unless otherwise indicated, subsequent references to the "Oklahoma Marriage Amendment," the "Marriage Amendment," or the "Amendment" refer to Part A, which is the subject of this appeal.

violates due process or equal protection rights guaranteed by the U.S. Constitution." Aplt.App.654 (Op. at 31). But the District Court reasoned that *Baker*'s binding force has been displaced by subsequent "doctrinal developments." Aplt.App.655-57 (Op. at 32-34).

The District Court also considered the impact of the Supreme Court's recent decision in *Windsor*, which invalidated Section 3 of federal DOMA as an improper federal intrusion into the marriage policies of the States. *See* Aplt.App.658-61 (Op. at 35-38). The court reasoned that *Windsor* "is not a perfect fit" here because "a state law defining marriage," unlike Section 3 of federal DOMA, "is not an 'unusual deviation' from the state/federal balance" and therefore it "must be approached . . . with more caution[] than the Supreme Court approached DOMA." Aplt.App.659-60 (Op. at 36-37). And *Windsor*'s "lengthy discussion of states' authority to define and regulate marriage," the District Court also acknowledged, supports Oklahomans' decision to enact the Marriage Amendment. Aplt.App.660 (Op. at 37).

The District Court did not "reach the question" whether the Marriage Amendment violates Plaintiffs' asserted "fundamental right to marry a person of their choice" because "[s]uch a holding . . . would possibly affect other Oklahoma laws burdening [that asserted] right[.]" Aplt.App.671 n.33 (Op. at 48 n.33) (quotation marks omitted). Yet before moving beyond the fundamental-right issue,

the court observed that "language in *Windsor* indicates that same-sex marriage may be a 'new' right, rather than one subsumed within the Court's prior 'right to marry' cases." *Id.*

Under its equal-protection analysis, the District Court "define[d] the relevant class as same-sex couples desiring an Oklahoma marriage license," Aplt.App.665 (Op. at 42), because "[t]he classification made by [the Marriage Amendment] is aimed . . . at same-sex couples who want to marry, rather than all homosexuals." Aplt.App.665 n.29 (Op. at 42 n.29). The Marriage Amendment does not impermissibly discriminate on the basis of sex, the District Court concluded, because it "does not draw any distinctions between same-sex male couples and same-sex female couples, does not place any disproportionate burdens on men and women, and does not draw upon stereotypes applicable only to male or female couples." Aplt.App.672 (Op. at 49). Instead, according to the District Court, the distinction at issue "is best described as sexual-orientation discrimination," Aplt.App.673 (Op. at 50), and "classifications based on . . . sexual orientation are not subject to any form of heightened review in [this] Circuit." Aplt.App.673-74 (Op. at 50-51).

The District Court then evaluated the relevant governmental interests under the rational-basis standard. *See* Aplt.App.674-89 (Op. at 51-66).[4] The court "accept[ed] that Oklahoma has a legitimate interest . . . in steering 'naturally procreative' relationships into marriage," Aplt.App.679 (Op. at 56), and "assume[d] . . . that [] the 'ideal' environment for children [is] opposite-sex, married, biological parents, and [] that 'promoting' this ideal is a legitimate state interest." Aplt.App.684 (Op. at 61). The court also acknowledged that rational-basis review is satisfied when the "*inclusion* of one group promotes a legitimate governmental purpose, and the addition of other groups would not[.]" Aplt.App.683 (Op. at 60) (quoting *Johnson*, 415 U.S. at 383) (emphasis added). Yet the court invalidated the Marriage Amendment because it believed that "*excluding* same-sex couples from marriage" would not further the State's interests. Aplt.App.681 (Op. at 58) (emphasis added); *accord* Aplt.App.685 (Op. at 62) (focusing on "exclusion").

The District Court then summarily discarded Smith's arguments about the projected adverse consequences of redefining marriage, Aplt.App.687-88 (Op. at 64-65), concluding that these concerns seek to uphold a "view of the marriage

[4] Claiming that "Oklahoma legislators promoted [the Marriage Amendment] as upholding one specific moral view of marriage," Aplt.App.676 (Op. at 53), the District Court denounced this supposed interest as an "[im]permissible justification," Aplt.App.677 (Op. at 54), even though, as the court admitted, that interest was "not advanced in this litigation." Aplt.App.676 (Op. at 53).

institution" that is "impermissibly tied to moral disapproval of same-sex couples." Aplt.App.688 (Op. at 65). Having rejected all the state interests that it considered, the District Court thus held that the Marriage Amendment "violates the Equal Protection Clause[.]" Aplt.App.690 (Op. at 67).

The District Court entered its final judgment on January 14, 2014. Aplt.App.692-93. Smith filed her appeal on January 16, 2014. Aplt.App.694-95.

SUMMARY OF ARGUMENT

The Fourteenth Amendment does not forbid the People of Oklahoma from retaining marriage as a man-woman union. Therefore, this Court should reverse the District Court's decision.

1. The precise claims that Plaintiffs raise here have been definitively decided by the Supreme Court's summary dismissal in *Baker v. Nelson*. The Supreme Court's ruling in *Baker* is a decision on the merits, which establishes that neither the Due Process Clause nor the Equal Protection Clause bars States from defining marriage as a man-woman union. That decision is binding on all lower courts. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (per curiam). This Court should follow *Baker* because the Supreme Court has not overruled it, *see Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989), or indicated that it was wrongly decided.

2. Even without *Baker*'s controlling force, the Fourteenth Amendment does not ban Oklahomans from defining marriage as the union of a man and a woman. The Supreme Court's recent decision in *Windsor* affirms Oklahoma's right to determine its own marriage policy. *Windsor* discussed four principles that are relevant here: (1) that States have the right to define marriage for themselves; (2) that States have the right to redefine marriage as a genderless institution; (3) that States may differ in their marriage laws concerning which couples are permitted to marry; and (4) that federalism affords deference to state marriage policies. When read together, these principles confirm that the People of Oklahoma acted constitutionally in approving the Marriage Amendment. Any other conclusion would contravene *Windsor* by federalizing a uniform definition of marriage.

The People enacted the Marriage Amendment to further compelling interests of the highest order. The immediate purpose of the Amendment, as reflected in its plain language and determined by its objective effect, is to ensure that the state judiciary cannot change the definition of marriage that has always prevailed in Oklahoma. By preserving the status quo, the Amendment affirms the man-woman marriage institution and its longstanding public purpose of channeling the presumptive procreative potential of man-woman relationships into committed unions for the benefit of children and society. These are legitimate and compelling

purposes, and the District Court erred in suggesting that the Amendment was driven by impermissible motivations.

In attempting to challenge this sovereign act of the People, Plaintiffs face a high hurdle, for their claims are subject to rational-basis review—the most deferential form of constitutional scrutiny. There are four reasons why the rational-basis standard applies here. First, Plaintiffs' claims do not implicate a fundamental right. Second, the Marriage Amendment does not impermissibly discriminate on the basis of sex. Third, the distinction between man-woman couples and all other relationships is based on "distinguishing characteristics" relevant to the State's interest in steering potentially procreative sexual relationships into committed unions. *See City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 441-42 (1985). Fourth, this Court has held that sexual orientation is not a suspect or quasi-suspect classification. *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1113 n.9 (10th Cir. 2008).

Under the rational-basis standard, the Marriage Amendment easily satisfies constitutional review. By seeking to channel potentially procreative relationships into stable unions, marriage furthers at least three compelling interests: (1) providing stability to the types of relationships that result in unplanned pregnancies and thereby avoiding or diminishing the negative outcomes often associated with unintended children; (2) encouraging the rearing of children by both their mother

and their father; and (3) encouraging men to commit to the mothers of their children and jointly raise the children they beget.

The Marriage Amendment directly furthers these compelling interests. Sexual relationships between men and women—because they alone produce children naturally, produce children unintentionally, and provide children with their own mother and father—implicate these interests directly. Same-sex relationships, in contrast, simply do not advance or threaten these interests like sexual relationships between men and women do. Thus, because "the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not," *Johnson*, 415 U.S. at 383, the Constitution does not forbid the People from retaining marriage as the union of one man and one woman.

The District Court misapplied rational-basis analysis and transformed it into a type of heightened scrutiny under which the government must demonstrate that redefining marriage would likely "harm, erode, or somehow water-down . . . the marriage institution." Aplt.App.681 (Op. at 58). Even under this heightened form of scrutiny, however, the Marriage Amendment should be upheld, because redefining marriage as a genderless institution, and transforming its understanding in the public consciousness, presents a substantial risk that marriage, over time, would less effectively achieve the child-focused interests it has always served.

This concern derives from marriage's role as a ubiquitous and vitally important social institution. Complex social institutions like marriage comprise a set of norms, rules, patterns, and expectations that powerfully affect people's choices, actions, and perspectives. Legally replacing man-woman marriage with genderless marriage would, as supporters of same-sex marriage admit, have real-world consequences over time. No one can know for sure what those effects would be, but the State is entitled to make logical projections, and those predictive judgments are entitled to substantial deference from the judiciary.

No-fault divorce laws provide an analogue for projecting the likely effects of redefining marriage. No-fault divorce fundamentally altered the permanency norm of marriage—that is, the legal and social expectation that marriage will last for life. Those laws communicated that society no longer valued the permanency of marriage as it once had. Looking back now decades after those laws were enacted, many scholars have concluded that no-fault divorce laws, notwithstanding assurances that they would bring about only favorable results, helped to increase rates of divorce well above their historical trends and create a culture where marriages are demonstrably less stable.

Like no-fault divorce laws, legally redefining marriage would fundamentally change a marital norm that has existed in diverse societies for centuries—the norm of sexual complementarity (marriage's man-woman definition). Redefining

marriage would erase that norm from the law. That, in turn, would communicate that marriage has no intrinsic connection to procreation, that marriage's primary purpose is to affirm adult relationships rather than provide for children's needs, and that the State is indifferent to whether children are raised by both their mother and father. As the law and the State convey these messages, it is likely that, over time, fewer man-woman couples having or raising children will marry, that marriages will become less stable, and that fewer children will be raised in stable homes headed by their married mother and father. Faced with these adverse projections, the State has the right to conclude that reaffirming the man-woman marriage institution will best serve children and society. The Constitution poses no barrier to Oklahoma's choosing that marriage policy.

3. Finally, Plaintiffs lack standing to bring their claims and thus even to raise the important constitutional question presented in this case. In the District Court, Plaintiffs challenged the Marriage Amendment, but decided not to contest Oklahoma's marriage statutes. Aplt.App.626 n.2-3 (Op. at 3 n.2-3). Consequently, the District Court's injunction prohibits enforcement of the Amendment against same-sex couples, but does not forbid enforcement of the marriage statutes. Aplt.App.690 (Op. at 67). Those statutes thus remain an independent cause of Plaintiffs' asserted injury, and as a result, Plaintiffs cannot satisfy the causation or redressability requirements of standing.

STANDARD OF REVIEW

This Court "review[s] a grant of summary judgment de novo and appl[ies] the same legal standard used by the district court." *Timmons v. White*, 314 F.3d 1229, 1232 (10th Cir. 2003). Under that standard, summary judgment is appropriate if "the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

ARGUMENT

I. *Baker* Forecloses Plaintiffs' Claims.

In *Baker v. Nelson*, as the District Court recognized below, the Supreme Court dismissed "the precise legal [claims] presented in this case." Aplt.App.654 (Op. at 31). The petitioners in *Baker* appealed the Minnesota Supreme Court's decision holding that its state marriage laws, which defined marriage as a man-woman union, did not violate the Due Process or Equal Protection Clause. *Baker v. Nelson*, 191 N.W.2d 185, 186-87 (Minn. 1971). In their jurisdictional statement filed with the United States Supreme Court, the *Baker* petitioners contended that Minnesota's marriage laws "deprive[d] [them] of their liberty to marry and of their property without due process of law under the Fourteenth Amendment," and that those laws "violate[d] their rights under the equal protection clause of the Fourteenth Amendment." Jurisdictional Statement at 3, *Baker v. Nelson*, 409 U.S.

810 (1972) (No. 71-1027) (Aplt.App.276). The Supreme Court dismissed the appeal "for want of a substantial federal question." *Baker*, 409 U.S. at 810.

The *Baker* decision establishes that neither the Due Process Clause nor the Equal Protection Clause bars States from maintaining marriage as a man-woman union, because a Supreme Court summary dismissal is a ruling on the merits, and lower courts are "not free to disregard [it]." *Hicks v. Miranda*, 422 U.S. 332, 343-45 (1975). Summary dismissals thus "prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by" the dismissal. *Mandel*, 432 U.S. at 176 (per curiam).

While acknowledging *Baker*'s binding force, the District Court believed that *Baker* has been displaced by subsequent "doctrinal developments." Aplt.App.655-57 (Op. at 32-34). But whatever might be the proper interpretation of the "doctrinal developments" dicta, which the Supreme Court stated (though did not apply) only once, *see Hicks*, 422 U.S. at 344, and which this Court recited (though did not apply) only once, *see Oklahoma Telecasters Association v. Crisp*, 699 F.2d 490, 495 (10th Cir. 1983), *rev'd sub nom. Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984)), it cannot mean that a lower court has the freedom to depart from directly-on-point precedent. As the Supreme Court has made clear, "[i]f a precedent of th[e] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower court] should follow the

case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Rodriguez de Quijas*, 490 U.S. at 484; *accord Agostini v. Felton*, 521 U.S. 203, 237 (1997) (reaffirming this rule).

In any event, Supreme Court case law since 1972 does not establish that *Baker*'s summary disposition has ceased to "bind[] . . . the lower federal courts." *Crisp*, 699 F.2d at 495. None of the four purported "doctrinal developments" cited by the District Court suggests that the Supreme Court has overruled *Baker*'s merits ruling on the identical due-process and equal-protection claims presented here. *See* Aplt.App.656 (Op. at 33). First, as the District Court elsewhere determined, *see* Aplt.App.672 (Op. at 49), and as discussed below, *see infra* at 41-43, the Marriage Amendment does not impermissibly discriminate on the basis of sex, so the constitutional standard of scrutiny for a sex-discrimination claim is irrelevant. Second, the law challenged in *Romer v. Evans*, 517 U.S. 620 (1996), which effectuated a "[s]weeping and comprehensive . . . change" in the law, *id.* at 627, is nothing like the Marriage Amendment, which merely reaffirmed long-existing state law on the specific issue of marriage. Third, *Lawrence v. Texas*, 539 U.S. 558 (2003), expressly stated that it did not decide "whether the government must give formal recognition to any relationship that homosexual persons seek to enter." *Id.* at 578; *see also Massachusetts v. U.S. Dep't Health & Human Servs.*, 682 F.3d 1, 8 (1st Cir. 2012) (concluding that, notwithstanding *Romer* and *Lawrence*, *Baker*

forecloses arguments that "presume or rest on a constitutional right to same-sex marriage"). Fourth, as explained below, *Windsor* supports (rather than undermines) the right of States to establish their own marriage policy. *See infra* at 28-31.

II. The Fourteenth Amendment Does Not Forbid the Domestic-Relations Policy Reflected in the Marriage Amendment.

A. The Public Purpose of Marriage in Oklahoma Is to Channel the Presumptive Procreative Potential of Man-Woman Couples into Committed Unions for the Good of Children and Society.

Evaluating the Marriage Amendment's constitutionality begins with an assessment of the government's interest in (or purpose for) marriage. The government's purpose for recognizing and regulating marriage is distinct from the many private reasons that people marry—reasons that often include love, emotional support, or companionship. Although these are valid private motivations for marrying, the State does not concern itself with such personal and individualized considerations.

Rather, from the State's perspective, marriage is a vital social institution that serves indispensible public purposes. As the Supreme Court has stated, marriage is "an institution more basic in our civilization than any other," *Williams v. North Carolina*, 317 U.S. 287, 303 (1942), "fundamental to the very existence and survival of the [human] race." *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978); *see also Loving v. Virginia*, 388 U.S. 1, 12 (1967). It "is an institution, in the maintenance of which . . . 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." *Maynard v. Hill*, 125 U.S. 190, 211 (1888). The Oklahoma Supreme Court has similarly acknowledged that "the relationship brought about by marriage is of [great] public concern," *Blunt v. Blunt*, 176 P.2d 471, 472 (Okla. 1947), and that "the rights of the [spouses] are not isolated from the general interest of society in preserving the marriage relation as the foundation of the home and the state." *Wooden v. Wooden*, 239 P. 231, 233 (Okla. 1925); *see also Hunt v. Hunt*, 100 P. 541, 543 (Okla. 1909) (stating that the marital relationship has "consequences . . . to the public").

Throughout history, marriage as a man-woman institution designed to serve the needs of children has been ubiquitous and practically universal, spanning diverse cultures, nations, and religions. As one anthropologist has stated, "the family—based on a union, more or less durable, but socially approved, of two individuals of opposite sexes who establish a household and bear and raise children—appears to be a practically universal phenomenon, present in every type of society." Claude Levi-Strauss, *The View From Afar* 40-41 (1985) (Aplt.App.294-95). Another anthropologist offers similar observations: "Marriage, as the socially recognized linking of a specific man to a specific woman and her offspring, can be found in all societies. Through marriage, children can be assured of being born to both a man and a woman who will care for them as they mature."

G. Robina Quale, *A History of Marriage Systems* 2 (1988) (Aplt.App.301); *see also Windsor*, 133 S. Ct. at 2718 (Alito, J., dissenting) ("[T]here is no doubt that, throughout human history and across many cultures, marriage has been viewed as an exclusively opposite-sex institution and as one inextricably linked to procreation and biological kinship.").

Marriage as a public institution thus exists to channel sex between men and women into stable unions for the benefit of the children that result and, thus, for the good of society as a whole. Indeed, scholars from a wide range of disciplines have acknowledged that marriage is "social recognition . . . imposed for the purpose of regulation of sexual activity and provision for offspring that may result from it." Norval D. Glenn, *The Struggle For Same-Sex Marriage*, 41 Soc'y 25, 26 (2004); *see also* Douglas W. Allen, *An Economic Assessment of Same-Sex Marriage Laws*, 29 Harv. J.L. & Pub. Pol'y 949, 957 (2006) (hereinafter "Allen, *Economic Assessment*") ("Many economists have concluded that marriage is primarily . . . designed to regulate procreative behavior"); W. Bradford Wilcox et al., eds., *Why Marriage Matters* 15 (2d ed. 2005) (Aplt.App.367) (hereafter "Wilcox, *Marriage Matters I*").

By channeling sexual relationships between a man and a woman into a committed setting, marriage encourages mothers and fathers to remain together and care for the children born of their union. Marriage is thus "a socially arranged

solution for the problem of getting people to stay together and care for children that the mere desire for children, and the sex that makes children possible, does not solve." James Q. Wilson, *The Marriage Problem* 41 (2002) (Aplt.App.348).

> The genius of the [marital] system is that, through it, the society normally holds the biological parents responsible for each other and for their offspring. By identifying children with their parents, . . . the social system powerfully motivates individuals to settle into a sexual union and take care of the ensuing offspring.

Kingsley Davis, *Introduction: The Meaning and Significance of Marriage in Contemporary Society*, *in* Contemporary Marriage: Comparative Perspectives on a Changing Institution 1, 7-8 (Kingsley Davis ed., 1985) (Aplt.App.372-73).

The origins of our law affirm this enduring purpose of marriage. William Blackstone stated that the "principal end and design" of marriage is linked directly to the "great relation[]" of "parent and child," and that the parent-child relation "is consequential to that of marriage." 1 William Blackstone, Commentaries *410 (Aplt.App.331). Blackstone further observed that "it is by virtue of this relation that infants are protected, maintained, and educated." *Id.* John Locke similarly explained that "the end of conjunction between male and female [i.e., marriage] being not barely procreation, but the continuation of the species, 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 . . . ." John Locke, *Second Treatise of Civil Government* § 79 (1690) (Aplt.App.288-89).

These abiding purposes of marriage are reflected in Oklahoma law. The presumption of paternity, for example, shows the State's interest in legally connecting husbands to both their wives and their children. *See* Okla. Stat. tit. 10, § 7700-204(A)(1) ("A man is presumed to be the father of a child if . . . [h]e and the mother of the child are married to each other and the child is born during the marriage"). Demonstrating the State's interest in encouraging biological parents to stay together and raise their children, one of the grounds for divorce in Oklahoma is that "the wife[,] at the time of her marriage, was pregnant by another than her husband." Okla. Stat. tit. 43, § 101. And because the State has a heightened interest in avoiding divorce for married parents raising their children, the law imposes a waiting period for divorce "where there are minor children involved," *id.* at § 107.1(A)(1), and during that time, the parties may "voluntarily participate in marital or family counseling" to assess the likelihood of "reconciliation." *Id.* at § 107.1(D).

Before the recent political movement to redefine marriage, it was commonly understood and accepted, without a hint of controversy, that the public purpose of marriage is to channel the presumptively procreative potential of sexual relationships between men and women into committed unions for the benefit of children and society. Certainly no other purpose can plausibly explain why marriage is so universal or even why it exists at all. *See* Robert P. George et al.,

What is Marriage? 38 (2012) ("[T]he only way to account for the remarkable fact that almost all cultures have regulated male-female sexual relationships" is that "[t]hese relationships alone produce new human beings"); Bertrand Russell, *Marriage & Morals* 77 (Liveright Paperbound Edition, 1970) (Aplt.App.377) ("But for children, there would be no need of any institution concerned with sex.").

The District Court did not dispute that the public purpose of marriage is to steer sexual relationships between men and women into committed unions to benefit children and society. In fact, the court below "accept[ed] that Oklahoma has a legitimate interest . . . in steering 'naturally procreative' relationships into marriage," Aplt.App.679 (Op. at 56), and did not even attempt to proffer an alternative social purpose for marriage.

B. *Windsor* Emphasizes the State's Authority to Define Marriage and Thus Supports the People's Right to Enact the Marriage Amendment.

Four principles from the *Windsor* decision, which at its heart calls for federal deference to the States' marriage policies, directly support the right of Oklahomans to define marriage as they have.

First, the central theme of *Windsor* is the right of States to define marriage for their community. *See, e.g.*, 133 S. Ct. at 2689-90 ("the definition and regulation of marriage" is "within the authority and realm of the separate States"); *id.* at 2691 ("regulation of domestic relations," including "laws defining . . . marriage," is "an

area that has long been regarded as a virtually exclusive province of the States" (quotation marks omitted)); *id.* ("The definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations"); *id.* (discussing "state responsibilities for the definition and regulation of marriage"); *id.* at 2692 (discussing the State's "essential authority to define the marital relation"); *see also Sosna*, 419 U.S. at 404 (noting that States have an "absolute right to prescribe the conditions upon which the marriage relation between [their] own citizens shall be created").

Second, *Windsor* stated, in no uncertain terms, that the Constitution permits States to redefine marriage through the political process, extolling the importance of "allowing the formation of consensus" when States decide critical questions like the definition of marriage:

> In acting first to recognize and then to allow same-sex marriages, New York was responding to the initiative of those who sought a voice in shaping the destiny of their own times. These actions were without doubt a proper exercise of its sovereign authority within our federal system, all in the way that the Framers of the Constitution intended. The dynamics of state government in the federal system are to allow the formation of consensus respecting the way the members of a discrete community treat each other in their daily contact and constant interaction with each other.

133 S. Ct. at 2692 (quotation marks, alterations, and citation omitted); *see also id.* at 2693 (mentioning "same-sex marriages made lawful by the unquestioned authority of the States").

Third, the Court in *Windsor* recognized that federalism provides ample room for variation between States' domestic-relations policies concerning which couples may marry. *See id.* at 2691 ("Marriage laws vary in some respects from State to State."); *id.* (acknowledging that state-by-state marital variation includes the "permissible degree of consanguinity" and the "minimum age" of couples seeking to marry).

Fourth, *Windsor* stressed federal deference to the public policy reflected in state marriage laws. *See id.* at 2691 ("[T]he Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations," including decisions concerning citizen's "marital status"); *id.* at 2692 (discussing "th[e] history and tradition of [federal] reliance on state law to define marriage"); *id.* at 2693 (mentioning "the usual [federal] tradition of recognizing and accepting state definitions of marriage").

These four principles—that States have the right to define marriage for themselves, that States have the right to redefine marriage as a genderless institution, that States may differ in their marriage laws concerning which couples are permitted to marry, and that federalism demands deference to state marriage policies—lead to one inescapable conclusion: that Oklahomans (no less than citizens in States that have chosen to redefine marriage) have the right to define marriage for their community. Any other outcome would contravene *Windsor* by

federalizing a definition of marriage and overriding the policy decisions of States (like Oklahoma) that have chosen to maintain the man-woman marriage institution.

1. *Windsor*'s Equal-Protection Analysis Does Not Apply Here.

The District Court's and Plaintiffs' reliance on *Windsor*'s equal-protection analysis is unpersuasive. *Windsor* repeatedly stressed DOMA's "unusual character"—its novelty—in "depart[ing] from th[e] history and tradition of [federal] reliance on state law to define marriage." 133 S. Ct. at 2692-93 (referring to this feature of DOMA as "unusual" at least three times). The Court reasoned that this unusual aspect of DOMA required "careful" judicial "consideration" and revealed an improper purpose and effect. *Id.* at 2692; *see also id.* at 2693 ("In determining whether a law is motived by an improper animus or purpose, discriminations of an unusual character especially require careful consideration." (quotation marks and alterations omitted)); *id.* ("DOMA's unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage . . . is strong evidence of a law having the purpose and effect of disapproval").

The Marriage Amendment, however, is not an unusual or novel intrusion into state authority, but a proper exercise of that power; for the State of Oklahoma, unlike the federal government, has "essential authority to define the marital relation." *Id*. at 2692. And the Marriage Amendment is not an unusual departure from settled law, but a reaffirmation of that law; for it simply enshrines in the

Oklahoma Constitution the definition of marriage that has prevailed throughout the State's history and that continues to govern in the majority of States. Unusualness thus does not plague the Marriage Amendment or suggest any improper purpose or unconstitutional effect.

Additionally, *Windsor* "confined" its equal-protection analysis and "its holding" to the federal government's treatment of couples "who are joined in same-sex marriages made lawful by the State." *Id.* at 2695-96. Thus, when discussing the purposes and effects of DOMA, the Court focused particularly on the fact that the federal government (a sovereign entity without legitimate authority to define marriage) interfered with the choice of the State (a sovereign entity with authority over marriage) to bestow the status of civil marriage on same-sex couples. *See id.* at 2696 ("[DOMA] refus[ed] to acknowledge a status the State finds to be dignified and proper"); *id.* ("[DOMA's] purpose and effect [is] to disparage and to injure those whom the State, by its marriage laws, sought to protect"). But those unique circumstances, of course, are not presented here. The District Court, therefore, incorrectly concluded that *Windsor*'s "reasoning regarding the 'purpose and effect' of DOMA can be readily applied to the purpose and effect of similar or identical state-law marriage definitions." Aplt.App.659 (Op. at 36). If that were true, *Windsor*'s emphasis on the right of States to define marriage for themselves would be meaningless.

2. The People Enacted the Marriage Amendment for Legitimate and Compelling Purposes.

The Marriage Amendment's purpose, as reflected in its plain language and determined by its objective effect, is to ensure that the state judiciary cannot change the definition of marriage that has always existed in Oklahoma law. By preserving the status quo, the Amendment affirms the man-woman marriage institution and its longstanding public purpose of channeling the presumptive procreative potential of man-woman relationships into committed unions for the benefit of children and society.

Seeking to obscure the important public interests furthered by the Marriage Amendment, and intimating that the Amendment is like DOMA, the District Court claimed that the People enacted it merely to "promot[e] or uphold[] morality." Aplt.App.676 (Op. at 53). As support for this, the court below cited newspaper articles quoting three state legislators, one local politician, and an editorial writer, suggesting that isolated and carefully selected quotes from these individuals reflect the motivations of more than a million voters. Aplt.App.676-77 (Op. at 53-54).[5] But Supreme Court precedent belies the District Court's consideration of these extraneous materials to discern the Marriage Amendment's purpose.

[5] All of the newspaper articles that Plaintiffs submitted as exhibits, *see* Aplt.App.155-66, and many of the articles that the District Court cited, *see* Aplt.App.668-69, 676-77 (Op. at 45-46, 53-54), were published in Tulsa World, the newspaper that employs Plaintiffs Bishop and Baldwin as editors. Aplt.App.106-07 ¶¶3-4.

Notably, the Court in *Romer*, a case that discussed the purpose of a voter-enacted statewide referendum, did not analyze public statements by the referendum's supporters, but gleaned intent exclusively from the law's objective effect. Indeed, *Romer* drew "the inevitable inference that the disadvantage imposed" by the challenged law was "born of animosity" solely from looking at the language and effect of the law, which "belie[d] any legitimate justifications that may be claimed for it." 517 U.S. at 634-35. The Court did not look to *any* other evidence, much less the extraneous statements that the District Court reviewed below.

Nor does *Windsor* support the District Court's approach. To begin with, *Windsor* stressed that laws "motived by an improper animus or purpose" reflect "[d]iscriminations of an unusual character." 133 S. Ct. at 2693. Yet here, as explained above, *see supra* at 31-32, the Marriage Amendment is anything but unusual, thereby belying the District Court's charge of an improper purpose. Moreover, *Windsor* assessed DOMA's purpose by considering its official legislative history, *see* 133 S. Ct. at 2693 (discussing the "House Report"), its text, *see id.* (discussing the "title" of the law), and its objective effect, *see id.* at 2694 (discussing the law's "operation in practice" and its "principal effect"). The Court did not cite any public statements outside the official legislative record. The

District Court thus erred in proffering newspaper statements as evidence of the Marriage Amendment's purpose.[6]

In any event, considering what was said during the public debate does not support the District Court's view of the Marriage Amendment's purpose. The public discussion leading up to the vote—when considered in its totality—confirms that the People enacted the Amendment to ensure that the definition of marriage in Oklahoma will be determined by the People rather than (as had just occurred in Massachusetts, *see Goodridge*, 798 N.E.2d at 969) by state-court judges.

Indeed, the Oklahoma Senate issued a press release stating that the Marriage Amendment, like similar laws in other States, was intended "to provide constitutional protections to traditional marriage to combat efforts by . . . activist judges seeking to redefine marriage[.]" Aplt.App.667 (Op. at 44) (emphasis omitted). State Senator James Williamson, the legislator most cited by the District

[6] Oklahoma law confirms this. Indeed, the State Supreme Court, when determining voter intent for a constitutional amendment, likewise confines its review to the measure's ballot title, text, and objective effect. *Sw. Bell Tel. Co. v. Oklahoma State Bd. of Equalization*, 231 P.3d 638, 642 (Okla. 2009) ("When construing a constitutional amendment that was proposed by the Legislature pursuant to the [referendum process], th[e] Court will read the ballot title together with the text of the measure" to discern the intent "of the Legislature as the framers and of the electorate as the adopters of the constitutional amendment").

Court, repeatedly emphasized this purpose.[7] And another legislator quoted by the District Court, State Representative Todd Hiett, also discussed that goal.[8] Thus, far from revealing an improper impetus, the public discussion of the Marriage Amendment corroborates that the People enacted it to achieve the compelling purposes of preserving their "voice in shaping the destiny of their own times,"

[7] *See, e.g.*, Marie Price, *Republican legislators wary of same-sex ruling*, Tulsa World, Feb. 6, 2004 (Aplt.App.155) ("Legislative Republicans said Thursday that this week's Massachusetts Supreme Court ruling outlining constitutional protection for same-sex marriages puts Oklahoma in jeopardy of a similar decision. . . . '[The Governor's] reluctance to protect traditional marriage could put Oklahoma at risk that a court will force same-sex unions on us here.' Williamson said."); David Harper, *Focus: Gay-marriage clamor grows louder and louder*, Tulsa World, Mar. 22, 2004 (Aplt.App.163) ("Williamson . . . said that after the Massachusetts court ruled, he asked his staff members to analyze whether Oklahoma's laws could be interpreted the same way by a court. After hearing that they could, Williamson said he wanted the state constitution changed 'to make it clear that marriage in Oklahoma is with one man and one woman.'"); Ron Jenkins, *Agreement ends fight on same-sex marriage ban*, Associated Press, Apr. 14, 2004 ("State law already bans same-sex marriages in Oklahoma, but Williamson said it is important to put the prohibition in the state Constitution to prevent an 'activist' judge from ruling the law unconstitutional."); Ray Carter, *Marriage question among most popular on state ballot*, Journal Record, Oct. 12, 2004 ("Supporters say the amendment was made necessary by judicial activists. 'It's a response to the Massachusetts Supreme Court decision wherein they declared, based on their constitution, their marriage laws are unconstitutional,' said Sen. James Williamson, . . . a leader in the effort to put the issue on the ballot. 'And since we have a similar equal protection clause in our constitution we wanted to make it clear in Oklahoma that marriage is between one man and one woman and by putting it in the constitution we protect it from that kind of court decision.'").

[8] *See* Price, *supra*, at 1 (Aplt.App.155) ("The Massachusetts decision 'just further emphasizes the need in the state of Oklahoma for us to address the issue constitutionally,' Hiett said.").

Windsor, 133 S. Ct. at 2692, and retaining the man-woman marriage institution for the good of children and society.

C. Rational-Basis Review Applies to Plaintiffs' Claims.

Rational-basis review applies here because the Marriage Amendment does not infringe a fundamental right or impermissibly discriminate based on a suspect classification. *See Save Palisade FruitLands v. Todd*, 279 F.3d 1204, 1213 (10th Cir. 2002).

1. Plaintiffs' Claims Do Not Implicate a Fundamental Right.

Plaintiffs below argued that their claims implicate a fundamental right, Aplt.App.076-78, but that argument conflicts with Supreme Court precedent. In *Washington v. Glucksberg*, 521 U.S. 702 (1997), the Court demarcated the process for ascertaining whether an asserted right is fundamental, identifying "two primary features" of the analysis. *Id.* at 720. The Court required "a careful description of the asserted fundamental liberty interest," *id*. at 721 (quotation marks omitted), and reaffirmed that the carefully described right must be "objectively, deeply rooted in this Nation's history and tradition." *Id*. at 720-21 (quotation marks omitted).

Plaintiffs assert that they have raised the "right to marry the person of their choice" regardless of sex, Aplt.App.076, but this exceedingly expansive characterization runs afoul of *Glucksberg*'s "careful description" command. In *Glucksberg*, the plaintiffs sought to evade the obvious lack of historical support for

their claimed right to assisted suicide by variously defining it as a "liberty to choose how to die," a "right to control of one's final days," a "right to choose a humane, dignified death," and a "liberty to shape death." 521 U.S. at 722 (quotation marks omitted). The Supreme Court rejected those formulations and instead carefully described the asserted right with specificity as "the right to commit suicide which itself includes a right to assistance in doing so." *Id* at 723. The Court then concluded that no such liberty had ever existed in the Nation's history or tradition, and accordingly refused "to reverse centuries of legal doctrine and practice." *Id.* The same logic applies here, and thus this Court should decline to adopt Plaintiffs' exceedingly broad characterization of the asserted right.

Nor can Plaintiffs rely on the established fundamental right to marry upheld by the Supreme Court, for that deeply rooted right is the right to enter the relationship of husband and wife. Marriage, after all, is a term that, throughout Supreme Court precedent developing the fundamental right to marry, has always meant "the union . . . of one man and one woman." *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885). Indeed, *every* case vindicating the fundamental right to marry has involved a man marrying a woman. And the Supreme Court's repeated references to the vital link between marriage and "our very existence and survival" confirm that the Court has understood marriage as a gendered relationship with an intrinsic

connection to procreation. *See, e.g.*, *Loving*, 388 U.S. at 12; *Zablocki*, 434 U.S. at 383-84.

Lest there be any doubt, the Supreme Court has already indicated that the fundamental right to marry does not include the right to marry a person of the same sex. Just four years after *Loving*, the Court was presented with the same asserted fundamental right raised here, but it denied that claim on the merits, summarily and unanimously. *Baker*, 409 U.S. at 810. And as the District Court intimated, the Supreme Court's recent decision in *Windsor* contains language confirming that Plaintiffs assert "a 'new' right, rather than one subsumed within the Court's prior 'right to marry' cases." Aplt.App.671 n.33 (Op. at 48 n.33). *Windsor* stated:

> It seems fair to conclude that, until recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire to . . . lawful marriage. For 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. . . . The limitation of lawful marriage to heterosexual couples . . . for centuries had been deemed both necessary and fundamental[.]

133 S. Ct. at 2689. This discussion belies any suggestion that the fundamental right to marry rooted in the history and tradition of our Nation includes the right to marry a person of the same sex.

With the right at issue properly framed, it cannot be said that the alleged right to marry a person of the same sex is "objectively, deeply rooted in this Nation's history and tradition." *Glucksberg*, 521 U.S. at 720-21 (quotation marks

omitted). Same-sex marriage was unknown in the laws of this Nation before 2004, *see Goodridge*, 798 N.E.2d at 970, and is permitted or recognized in only a minority of States (17) even now. *See* Brief of Appellants at Addendum 2, *Kitchen v. Herbert* (10th Cir. Feb. 3, 2014) (No. 13-4178). Also, much like in *Glucksberg*, *see* 521 U.S. at 717-18, the adoption of genderless marriage in a minority of jurisdictions has provoked a reaffirmation of man-woman marriage in nearly twice as many States (33). *See* Brief of Appellants at Addendum 2, *Kitchen v. Herbert* (10th Cir. Feb. 3, 2014) (No. 13-4178).

It is thus not surprising that the overwhelming majority of courts that have faced this question, under a state or the federal constitution, have concluded that there is no fundamental constitutional right to marry a person of the same sex. *See, e.g.*, *Bruning*, 455 F.3d at 870-71; *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065, 1096 (D. Haw. 2012); *Smelt v. Cnty. of Orange*, 374 F. Supp. 2d 861, 879 (C.D. Cal. 2005), *aff'd in part, vacated in part, remanded*, 447 F.3d 673 (9th Cir. 2006); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1307 (M.D. Fla. 2005); *In re Kandu*, 315 B.R. 123, 140 (Bankr. W.D. Wash. 2004); *Conaway v. Deane*, 932 A.2d 571, 624-29 (Md. 2007); *Lewis v. Harris*, 908 A.2d 196, 211 (N.J. 2006); *Andersen v. King Cnty.*, 138 P.3d 963, 976-79 (Wash. 2006) (plurality opinion); *Hernandez v. Robles*, 855 N.E.2d 1, 9-10 (N.Y. 2006); *Baehr*, 852 P.2d at 57; *Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. 1973); *Baker*, 191 N.W.2d at 186; *In re Marriage of*

J.B. & H.B., 326 S.W.3d 654, 675-76 (Tx. Ct. App. 2010); *Morrison v. Sadler*, 821 N.E.2d 15, 32-34 (Ind. App. 2005); *Standhardt v. Super. Ct.*, 77 P.3d 451, 460 (Ariz. Ct. App. 2003); *Kern v. Taney*, 11 Pa. D & C. 5th 558, 570-74 (Pa. Com. Pl. 2010); *Storrs v. Holcomb*, 645 N.Y.S.2d 286, 287-88 (N.Y. Sup. Ct. 1996).

2. The Marriage Amendment Does Not Impermissibly Discriminate on the Basis of Sex.

Plaintiffs below argued that the Marriage Amendment discriminates "based on sex" and thus "require[s] heightened scrutiny." Aplt.App.084. The District Court correctly concluded that the Marriage Amendment does not impermissibly discriminate on the basis of sex because it "does not draw any distinctions between same-sex male couples and same-sex female couples, does not place any disproportionate burdens on men and women, and does not draw upon stereotypes applicable only to male or female couples." Aplt.App.672 (Op. at 49). This Court should affirm that analysis.

The Supreme Court's sex-discrimination equal-protection cases have never strayed from the baseline rule that a law does not impermissibly discriminate on the basis of sex unless it subjects men as a class or women as a class to disparate treatment. The laws that the Supreme Court has invalidated because of impermissible sex-based classifications "have all treated men and women differently." *Smelt*, 374 F. Supp. 2d at 876 (citing *United States v. Virginia*, 518 U.S. 515, 519-20 (1996) (excluding women from attending military college); *Miss.*

Univ. for Women v. Hogan, 458 U.S. 718, 718-19 (1982) (excluding men from attending nursing school); *Craig v. Boren*, 429 U.S. 190, 191-92 (1976) (allowing women to buy beer at a lower age than men); *Frontiero v. Richardson*, 411 U.S. 677, 678-79 (1973) (imposing a higher burden on females than males to establish spousal dependency); *Reed v. Reed*, 404 U.S. 71, 73 (1971) (affording automatic preference for men over women when administering estates)).

The Marriage Amendment, however, does not discriminate on the basis of sex because it treats men and women equally: any man or woman may marry a person of the opposite sex; and no man or woman may marry a person of the same sex. So it is no marvel that almost every court (including the District Court here) that has addressed whether the man-woman definition of marriage constitutes sex discrimination has flatly rejected the claim. *See, e.g.*, *Jackson*, 884 F. Supp. 2d at 1098-99; *Sevcik v. Sandoval*, 911 F. Supp. 2d 996, 1004-05 (D. Nev. 2012); *In re Marriage Cases*, 183 P.3d 384, 439 (Cal. 2008); *Conaway*, 932 A.2d at 598-99; *Andersen*, 138 P.3d at 988 (plurality opinion); *Hernandez*, 855 N.E.2d at 10-11; *Baker v. State*, 744 A.2d 864, 880 n.13 (Vt. 1999); *Singer v. Hara*, 522 P.2d 1187, 1192 (Wash. Ct. App. 1974); *Baker*, 191 N.W.2d at 187.

Seeking to escape the weight of that precedent, Plaintiffs below invoked *Loving v. Virginia* to bolster their sex-discrimination theory. *See* Aplt.App.085. But that argument is unavailing. The miscegentation law struck down in *Loving*

was based "upon distinctions drawn according to race." 388 U.S. at 11. But from a constitutional perspective, distinctions in *race* are different than distinctions in *sex*. As the Supreme Court has explained:

> [O]ur precedent . . . does not make sex a proscribed classification. Supposed inherent differences are no longer accepted as a ground for race or national origin classifications. Physical differences between men and women, however, are enduring: The two sexes are not fungible; a community made up exclusively of one sex is different from a community composed of both.

Virginia, 518 U.S. at 533 (quotation marks, citations, and alterations omitted). Therefore, the proper question when assessing a sex-discrimination claim, as explained above, is whether men as a class are treated differently from women as a class (or vice versa). *Id* at 532-34. If the law were otherwise, the State would create a constitutional crisis every time it offered sex-specific restrooms, locker rooms, living facilities, or sports teams. But acknowledging the real biological distinctions between men and women (or, as in this case, between couples comprising one sex, whether men or women, and couples comprising both sexes) is not discrimination when both men and women have the same benefits and restrictions.

3. The Classification Drawn by the Marriage Amendment Is Based on a Distinguishing Characteristic Relevant to the State's Interest in Marriage.

Equal-protection analysis requires the reviewing court to precisely identify the classification drawn by the challenged law. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 18-29 (1973); *see also Califano v. Boles*, 443 U.S. 282,

293-94 (1979) ("The proper classification for purposes of equal protection analysis . . . begin[s] with the statutory classification itself."). By defining marriage as the union of man and woman, diverse societies, including the People of Oklahoma, have drawn a line between man-woman couples and all other types of relationships (including same-sex couples). This is the precise classification at issue here, as the District Court acknowledged, *see* Aplt.App.665 (Op. at 42) (defining "the relevant class as same-sex couples desiring an Oklahoma marriage license"), and it is based on an undeniable biological difference between man-woman couples and same-sex couples—namely, the natural capacity to create children.

This biological distinction, as explained above, *see supra* at 23-28, relates directly to Oklahoma's interests in regulating marriage. And this distinguishing characteristic establishes that Oklahoma's definition of marriage is subject only to rational-basis review, for as the Supreme Court has explained:

> [W]here individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement, the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued. In such cases, the Equal Protection Clause requires only a rational means to serve a legitimate end.

Cleburne, 473 U.S. at 441-42. Relying on this Supreme Court precedent, New York's highest court "conclude[d] that rational basis scrutiny is appropriate" when "review[ing] legislation governing marriage and family relationships" because "[a]

person's preference for the sort of sexual activity that cannot lead to the birth of children is relevant to the State's interest in fostering relationships that will serve children best." *Hernandez*, 855 N.E.2d at 11.

Even if this relevant biological difference between man-woman couples and same-sex couples were characterized as a sexual-orientation-based distinction rather than the couple-based procreative-related distinction that it is, this Court, "like many others, has previously rejected the notion that homosexuality is a suspect classification." *Price-Cornelison*, 524 F.3d at 1113 n.9 (collecting cases). The District Court acknowledged this, *see* Aplt.App.673-74 (Op. at 50-51), and Plaintiffs conceded it below. *See* Aplt.App.084-085, 091-092 n.11 ("The Tenth Circuit has declined to view sexual orientation standing alone as a suspect classification."). Rational-basis review thus applies here.

D. The Marriage Amendment Satisfies Rational-Basis Review.

Rational-basis review constitutes a "paradigm of judicial restraint," under which courts have no "license . . . to judge the wisdom, fairness, or logic of legislative choices." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313-14 (1993). "A statutory classification fails rational-basis review only when it rests on grounds wholly irrelevant to the achievement of the State's objective." *Heller v. Doe*, 509 U.S. 312, 324 (1993) (quotation marks omitted); *see also Dandridge v. Williams*, 397 U.S. 471, 485 (1970) (noting that the challenged classification need not be

"made with mathematical nicety"). Thus, the Marriage Amendment "must be upheld . . . if there is any reasonably conceivable state of facts that could provide a rational basis for" it. *Heller*, 509 U.S. at 320. And because "marriage has always been, in our federal system, the predominant concern of state government . . . rational-basis review must be particularly deferential" in this context. *Bruning*, 455 F.3d at 867; *see also Windsor*, 133 S. Ct. at 2691 (marriage is "an area that has long been regarded as a virtually exclusive province of the States").

Plaintiffs "have the burden to negative every conceivable basis which might support" the Marriage Amendment. *Beach Commc'ns*, 508 U.S. at 315 (quotation marks omitted). And although Smith has done so in this case, the government is not required to produce "evidence or empirical data" to support the challenged law. *Id.*

1. The Marriage Amendment Furthers Compelling Interests.

By providing special recognition, encouragement, and support to man-woman relationships, the institution of marriage recognized by the Oklahoma Constitution seeks to channel potentially procreative conduct into stable, enduring relationships, where that conduct is likely to further, rather than harm, society's vital interests. The interests that the State furthers through this channeling function are at least threefold: (1) providing stability to the types of relationships that result in unplanned pregnancies and thereby avoiding or diminishing the negative

outcomes often associated with unintended children; (2) encouraging the rearing of children by both their mother and their father; and (3) encouraging men to commit to the mothers of their children and jointly raise the children they beget. These interests, as explained below, promote the welfare of children and society; and thus they are not merely legitimate but compelling, for "[i]t is hard to conceive an interest more . . . more paramount for the state than promoting an optimal social structure for educating, socializing, and preparing its future citizens to become productive participants in civil society." *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804, 819 (11th Cir. 2004). The District Court, therefore, could not but "accept[] that Oklahoma has a legitimate interest . . . in steering 'naturally procreative' relationships into marriage[.]" Aplt.App.679 (Op. at 56).

Unintended Children. The State has a compelling interest in addressing the particular concerns associated with the birth of unplanned children. Unintended pregnancies account for nearly half of the births in the United States. *See* Lawrence B. Finer and Mia R. Zolna, *Unintended Pregnancy in the United States: Incidence and Disparities, 2006*, 84 Contraception 478, 481 Table 1 (2011) (finding that nearly half of all pregnancies in the United States, and nearly 70 percent of pregnancies that occur outside marriage, were unintended); Elizabeth Wildsmith et al., *Childbearing Outside of Marriage: Estimates and Trends in the United States*, Child Trends Research Brief 5 (Nov. 2011), *available at* http://www.childtrends.

org/wp-content/uploads/2013/02/Child_Trends-2011_11_01_RB_NonmaritalCB.pdf (stating that "many nonmarital births are unintended"). Yet unintended births out of wedlock "are associated with negative outcomes for children." Wildsmith, *supra*, at 5.

In particular, children born from unplanned pregnancies where their mother and father are not married to each other are at a significant risk of being raised outside stable family units headed by their mother and father jointly. *See* William J. Doherty et al., *Responsible Fathering*, 60 J. Marriage & Fam. 277, 280 (1998) (Aplt.App.471) ("In nearly all cases, children born outside of marriage reside with their mothers" and experience "marginal" father presence). And unfortunately, on average, children do not fare as well when they are raised outside "stable marriages between [their] biological parents," as a leading social-science survey explains:

> Children in single-parent families, children born to unmarried mothers, and children in stepfamilies or cohabiting relationships face higher risks of poor outcomes than do children in intact families headed by two biological parents. . . . There is thus value for children in promoting strong, stable marriages between biological parents.

Kristin Anderson Moore et al., *Marriage from a Child's Perspective: How Does Family Structure Affect Children, and What Can We do About It?*, Child Trends Research Brief 6 (June 2002) (Aplt.App.384).

Thus, unintended pregnancies—the frequent result of sexual relationships between men and women, but never the product of same-sex relationships—pose particular concerns for children and, by extension, for society.

Biological Parents. The State also has a compelling interest in encouraging biological parents to join in a committed union and raise their children together. Indeed, the Supreme Court has recognized a constitutional "liberty interest" in "the natural family," a paramount interest having "its source . . . in intrinsic human rights." *Smith v. Org. of Foster Families For Equal. & Reform*, 431 U.S. 816, 845 (1977). While that right surely vests in natural parents, *id.* at 846, "children [also] have a reciprocal interest in knowing their biological parents." *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2582 (2013) (Sotomayor, J., dissenting); *see also* United Nations Convention on the Rights of the Child art. 7, § 1 ("The child . . . shall have . . . , as far as possible, the right to know and be cared for by his or her parents.").

"[T]he biological bond between a parent and a child is a strong foundation" for "a stable and caring relationship." *Adoptive Couple*, 133 S. Ct. at 2582 (Sotomayor, J., dissenting). The law has thus historically presumed that these "natural bonds of affection lead parents to act in the best interests of their children." *Parham v. J.R.*, 442 U.S. 584, 602 (1979); *accord Troxel v. Granville*, 530 U.S. 57, 68 (2000); *see also* 1 William Blackstone, Commentaries *435

(Aplt.App.334) (recognizing the "insuperable degree of affection" for one's natural children "implant[ed] in the breast of every parent").

Social science has proven this presumption well founded, as the most reliable studies have shown that, on average, children develop best when reared by their married biological parents in a stable family unit. As one social-science survey has explained, "research clearly demonstrates that family structure matters for children, and the family structure that helps children the most is a family headed by two biological parents in a low-conflict marriage." Moore, *supra*, at 6 (Aplt.App.384). "Thus, it is not simply the presence of two parents . . . , but the presence of *two biological parents* that seems to support children's development." *Id.* at 1-2 (Aplt.App.379-80). Many other studies and social-science reviews corroborate the importance of biological parents.[9]

[9] *See, e.g.*, W. Bradford Wilcox et al., eds., *Why Marriage Matters* 15 (3d ed. 2011) (hereafter "Wilcox, *Marriage Matters II*") ("The intact, biological, married family remains the gold standard for family life in the United States, insofar as children are most likely to thrive—economically, socially, and psychologically—in this family form."); Wendy D. Manning and Kathleen A. Lamb, *Adolescent Well Being in Cohabiting, Married, and Single-Parent Families*, 65 J. Marriage & Fam. 876, 890 (2003) (Aplt.App.437) (hereafter "Manning, *Adolescent*") ("Adolescents in married, two-biological-parent families generally fare better than children in any of the family types examined here, including single-mother, cohabiting stepfather, and married stepfather families. The advantage of marriage appears to exist primarily when the child is the biological offspring of both parents. Our findings are consistent with previous work[.]"); Sara McLanahan and Gary Sandefur, *Growing Up with a Single Parent: What Hurts, What Helps* 1 (1994) (Aplt.App.487) ("Children who grow up in a household with only one biological parent are worse off, on average, than children who grow up in a household with

Further confirming the primacy of the biological home is a body of scholarship demonstrating that children raised in stepfamilies, on average, do not fare as well as children raised by their biological parents in an intact family. It surely "make[s] a difference" in childrearing, Professor David Popenoe explains, whether "the father is biologically related to the child[.]" David Popenoe, *Life Without Father* 150 (1996) (Aplt.App.450); *see also* Wilson, *supra*, at 169-70 (Aplt.App.350-51) (discussing studies showing disparities between children raised by stepfathers and children raised by their biological fathers). For example, girls raised in stepfamilies are much more likely to experience premature sexual development often leading to teenage pregnancy. Wilcox, *Marriage Matters I*, at 7, 14 (Aplt.App.359, 366); Witherspoon Institute, *Marriage and the Public Good: Ten Principles* 10 (2008) (Aplt.App.502). And boys raised in stepfamilies are much more likely to display antisocial behavior. Witherspoon Institute, *supra*, at 10-11 (Aplt.App.502-03).

In addition to these tangible deficiencies in development, children deprived of their substantial interest in "know[ing] [their] natural parents," as the Supreme Court has recognized, experience a "loss[] [that] cannot be measured," one that

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both of their biological parents, regardless of the parents' race or educational background, regardless of whether the parents are married when the child is born, and regardless of whether the resident parent remarries.").

"may well be far-reaching." *Santosky v. Kramer*, 455 U.S. 745, 760 n.11 (1982). Indeed, studies reflect that "[y]oung adults conceived through sperm donation" (who thus lack a connection to their biological father) "experience profound struggles with their origins and identities." Elizabeth Marquardt et al., *My Daddy's Name is Donor: A New Study of Young Adults Conceived Through Sperm Donation*, Institute for American Values, at 7 *available at* http://familyscholars.org/my-daddys-name-is-donor-2/; *see also* Witherspoon Institute, *supra*, at 10 (Aplt.App.502) (discussing Kyle D. Pruett, *Fatherneed* (2000) (Aplt.App.462)).

Children thus have weighty tangible and intangible interests in being reared by their own mother and father in a stable home. But they, as a class of citizens unable to advocate for themselves, must depend on the State to protect those interests for them.

Fathers. The State also has a compelling interest in encouraging fathers, often referred to as the "weak link" in "the family system," *see* Davis, *supra*, at 8 (Aplt.App.373), to remain with their children's mothers and participate in raising them. "The weight of scientific evidence seems clearly to support the view that fathers matter." Wilson, *supra*, at 169 (Aplt.App.350). "A substantial body of research now indicates that high levels of involvement by fathers in two-parent families are associated with a range of desirable outcomes in children . . . . The

converse is also true: low levels of involvement are associated with a range of negative outcomes." Adrienne Burgess, *Fathers and public services, in* Daddy Dearest?, Institute for Public Policy Research 57 (Kate Stanley ed., 2005) (Aplt.App.460).[10] President Obama has lamented the great social costs of fatherlessness:

> We know the statistics—that children who grow up without a father are five times more likely to live in poverty and commit crime; nine times more likely to drop out of schools and twenty times more likely to end up in prison. They are more likely to have behavioral problems, or run away from home or become teenage parents themselves. And the foundations of our community are weaker because of it.

Barack Obama, *Obama's Speech on Fatherhood* (Jun. 15, 2008), *transcript available at* http://www.realclearpolitics.com/articles/2008/06/obamas_speech_on_fatherhood.html.

The importance of fathers reflects the importance of gender-differentiated parenting. "The burden of social science evidence supports the idea that gender-differentiated parenting is important for human development." Popenoe, *supra*, at 146 (Aplt.App.448). Indeed, both commonsense and "[t]he best psychological,

[10] *See also* Elrini Flouri and Ann Buchanan, *The role of father involvement in children's later mental health*, 26 J. Adolescence 63, 63 (2003) ("Father involvement . . . protect[s] against adult psychological distress in women."); Bruce J. Ellis et al., *Does Father Absence Place Daughters at Special Risk for Early Sexual Activity and Teenage Pregnancy?*, 74 Child Dev. 801, 801 (2003) ("Greater exposure to father absence [is] strongly associated with elevated risk for early sexual activity and adolescent pregnancy."); Pruett, *supra*, at 158 (Aplt.App.465); Popenoe, *supra*, at 139-63 (Aplt.App.444-56).

sociological, and biological research" confirm that "men and women bring different gifts to the parenting enterprise, [and] that children benefit from having parents with distinct parenting styles[.]" W. Bradford Wilcox, *Reconcilable Differences: What Social Sciences Show About Complementarity of Sexes & Parenting*, Touchstone, Nov. 2005.

Recognizing the child-rearing benefits that flow from the diversity of both sexes is consistent with our legal traditions. *See Bowen v. Gilliard*, 483 U.S. 587, 614 (1987) (Brennan, J., dissenting) (acknowledging that "children have a fundamental interest in sustaining a relationship with their mother" and "a fundamental interest . . . in sustaining a relationship with their father" because, among other reasons, "the optimal situation for the child is to have both an involved mother and an involved father" (alterations omitted)). Indeed, our constitutional jurisprudence acknowledges that "[t]he two sexes are not fungible." *Virginia*, 518 U.S. at 533; *see also id.* ("a community made up exclusively of one sex is different from a community composed of both" (alteration omitted)). And the Supreme Court has recognized that diversity in education is beneficial for adolescents' development. *See Grutter v. Bollinger*, 539 U.S. 306, 327-33 (2003). It thus logically follows that a child would benefit from the diversity of having both her father and mother involved in her everyday upbringing. *See Hernandez*, 855 N.E.2d at 7 (permitting the State to conclude that "it is better, other things

being equal, for children to grow up with both a mother and a father"). The State, therefore, has a vital interest in fostering the involvement of fathers in the lives of their children.

2. The Marriage Amendment Is Rationally Related to Furthering Compelling Interests.

Under the rational-basis test, the State establishes the requisite relationship between its interests and the means chosen to achieve those interests when "the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not[.]" *Johnson*, 415 U.S. at 383. Similarly, the State satisfies rational-basis review if it enacts a law that makes special provision for a group because its activities "threaten legitimate interests . . . in a way that other [groups' activities] would not." *Cleburne*, 473 U.S. at 448.

Therefore, the relevant inquiry here is not, as the District Court would have it, whether "excluding same-sex couples from marriage" furthers the State's interest in steering man-woman couples into marriage, or whether "[p]ermitting same-sex couples to receive a marriage license . . . harm[s]" the State's advancement of that interest. Aplt.App.681 (Op. at 58); *see also* Aplt.App.689 (Op. at 66) (searching "for a rational link between exclusion of this class from civil marriage and promotion of a legitimate governmental objective"). "Rather, the relevant question is whether an opposite-sex definition of marriage furthers legitimate interests that would not be furthered, or furthered to the same degree, by

allowing same-sex couples to marry." *Jackson*, 884 F. Supp. 2d at 1107; *accord* *Andersen*, 138 P.3d at 984 (plurality opinion); *Morrison*, 821 N.E.2d at 23, 29; *Standhardt*, 77 P.3d at 463.

Other principles of equal-protection jurisprudence confirm that this is the appropriate inquiry, for the Constitution does not compel the State to include groups that do not advance a legitimate purpose alongside those that do. This commonsense rule represents an application of the general principle that "[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." *Vacco v. Quill*, 521 U.S. 793, 799 (1997) (quotation marks and citation omitted). "[W]here a group possesses distinguishing characteristics relevant to interests the State has the authority to implement, a State's decision to act on the basis of those differences does not give rise to a constitutional violation." *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 366-67 (2001) (quotation marks omitted).

Under this analysis, the Marriage Amendment plainly satisfies constitutional review. Sexual relationships between men and women, and only such relationships, naturally produce children, and they often do so unintentionally. *See* Finer, *supra*, at 481 Table 1.[11] By granting recognition and support to man-woman couples,

[11] As demonstrated above, it is the presumptive procreative capacity of man-woman relationships—including the very real threat that capacity poses to the

marriage generally makes those potentially procreative relationships more stable and enduring, and thus increases the likelihood that each child will be raised by the man and woman whose sexual union brought her into the world. *See, e.g.*, Wildsmith, *supra*, at 5 ("promoting marriage among unmarried parents remain[s] [an] important goal[] of federal and state policies and programs designed to improve the well-being of women and children"); Wendy D. Manning et al., *The Relative Stability of Cohabiting and Marital Unions for Children*, 23 Population Research & Pol'y Rev. 135, 135 (2004) (hereafter "Manning, *Stability*") ("children born to cohabiting parents experience greater levels of instability than children born to married parents").

Sexual relationships between individuals of the same sex, by contrast, do not unintentionally create children as a natural byproduct of their sexual relationship; they bring children into their relationship only through intentional choice and action. Moreover, it is a biological reality that same-sex couples do not provide children with both their mother and their father. Those couples thus neither advance nor threaten society's public purpose for marriage in the same manner, or to the same degree, that sexual relationships between men and women do. Under

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interests of society and to the welfare of children conceived unintentionally—that the institution of marriage has always sought to address. *See supra* at 23-28.

Johnson and *Cleburne*, that is the end of the analysis: the Marriage Amendment should be upheld as constitutional.

In short, it is plainly reasonable for Oklahoma to maintain a unique institution to address the unique challenges and opportunities posed by the procreative potential of sexual relationships between men and women. *See, e.g.*, *Vance v. Bradley*, 440 U.S. 93, 109 (1979) (stating that a law may "dr[aw] a line around those groups . . . thought most generally pertinent to its objective"); *Johnson*, 415 U.S. at 378 (stating that a classification will be upheld if "characteristics peculiar to only one group rationally explain the statute's different treatment of the two groups"). Consequently, the "commonsense distinction," *Heller*, 509 U.S. at 326, that Oklahoma law has always drawn between same-sex couples and man-woman couples "is neither surprising nor troublesome from a constitutional perspective." *Nguyen v. INS*, 533 U.S. 53, 63 (2001).

That is why "a host of judicial decisions" have concluded that "the many laws defining marriage as the union of one man and one woman and extending a variety of benefits to married couples are rationally related to the government interest in 'steering procreation into marriage.'" *Bruning*, 455 F.3d at 867-68; *see, e.g.*, *Jackson*, 884 F. Supp. 2d at 1112-14; *In re Marriage of J.B. & H.B.*, 326 S.W.3d at 677-78; *Conaway*, 932 A.2d at 630-34; *Andersen*, 138 P.3d at 982-85 (plurality opinion); *Hernandez*, 855 N.E.2d at 7-8; *Morrison*, 821 N.E.2d at 23-31;

Standhardt, 77 P.3d at 461-64; *Adams v. Howerton*, 486 F. Supp. 1119, 1124-25 (C.D. Cal. 1980); *Singer*, 522 P.2d at 1197; *Baker*, 191 N.W.2d at 186-87.

3. The District Court Erred in its Rational-Basis Analysis.

The District Court's most fundamental misstep in applying the rational-basis test was inverting the standard and requiring the government to demonstrate that "excluding" same-sex couples would advance the state interests identified above. Aplt.App.681 (Op. at 58); *accord id.* at 685 (Op. at 62) (focusing on "exclusion"). The court, instead, should have accepted the biological reality that same-sex couples simply do not implicate the State's interests in (1) providing stability to the types of relationships that result in unplanned pregnancies, (2) encouraging the rearing of children by both their mother and their father, and (3) encouraging men to commit to the mothers of their children and jointly raise the children they beget.

Seeking to discredit the State's purpose for marriage, the District Court observed that "[c]ivil marriage in Oklahoma does not have any procreative prerequisites." Aplt.App.681 (Op. at 58). But that argument rests on a misunderstanding of the State's enduring purpose for recognizing marriage. That purpose is not to ensure that all marital unions produce children. Instead, it is to channel the presumptive procreative *potential* of man-woman relationships into enduring marital unions so that *if* any children are born, they are more likely to be

raised in stable family units by both their mothers and fathers. The State's purpose, in other words, is prophylactic rather than prescriptive.

Furthermore, the state-imposed "procreative prerequisites" implicitly demanded by the District Court would be unconstitutional, ineffective, and damaging to society's public purpose for marriage. They would be unconstitutional because the presumed enforcement measures—premarital inquisitions about procreative intentions and fertility testing—would unquestionably impinge upon constitutionally protected privacy rights. *See Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965). And they would be ineffective because many fertile man-woman couples who do not plan to have children may experience unintended pregnancies or simply change their minds. *See Standhardt*, 77 P.3d at 462. Also, some couples who believe that they are infertile might find out otherwise due to the medical difficulty of determining fertility, or they might remedy their infertility through modern medical advances. *See id.*

Because these intrusive measures would be ineffective, the State would keep from marriage man-woman couples who subsequently procreate. Yet that would impair the State's achievement of its goals by resulting in the birth of children to mothers who are not married to their children's fathers. Demanding these procreative prerequisites, moreover, would undermine the State's interest because even where a couple together is infertile, if one of the spouses is not, permitting the

couple to marry decreases the likelihood that the fertile spouse will engage in sexual activity with a potentially fertile third party (and possibly create an unintended child). Finally, even if both spouses are infertile, allowing them to wed furthers the State's purposes for marriage by reinforcing the social expectation that man-woman couples in sexual relationships should marry. For all these reasons, as many courts have recognized, the absence of procreative prerequisites for marriage does not undermine the challenged marriage law. *See, e.g.*, *Conaway*, 932 A.2d at 631-34; *Andersen*, 138 P.3d at 983 (plurality opinion); *Hernandez*, 855 N.E.2d at 11-12; *Morrison*, 821 N.E.2d at 27; *Standhardt*, 77 P.3d at 462-63; *Baker*, 191 N.W.2d at 187.

The District Court then reasoned that "non-procreative" opposite-sex couples—that is, "couples who cannot 'naturally procreate' or do not ever wish to 'naturally procreate'"—are "similarly situated" to same-sex couples. Aplt.App.681 (Op. at 58). But in most instances, the State does not know whether a man and a woman are fertile, so treating all man-woman couples as having presumptive natural procreative capacity is reasonable, particularly when the vast majority of those couples do in fact produce children.[12] Same-sex couples, on the other hand,

[12] *See* Charles J. Rothwell et al., *Fertility, Family Planning, and Reproductive Health of U.S. Women: Data from the 2002 National Survey of Family Growth*, Centers for Disease Control and Prevention (Dec. 2005), *available at* http://www.cdc.gov/nchs/data/series/sr_23/sr23_025.pdf (showing on Table 69 that

are categorically infertile. Therefore, when viewed through the lens of the State's prophylactic purpose for marriage, it cannot be said that these two groups of couples are similarly situated.

The District Court also claimed that "a same-sex couple's inability to naturally procreate is not a biological distinction of critical importance" when considering the State's public purpose for marriage. Aplt.App.682 (Op. at 59). But same-sex couples' inability to naturally procreate means that they cannot unintentionally bring a child into the world. Man-woman relationships, by contrast, often without forethought produce children as a natural byproduct of their sexual relationship; indeed, nearly half of all children born in our country are the result of unintended pregnancies. Finer, *supra*, at 481 Table 1. This "natural procreation" distinction is thus of critical importance, because the risk of abandonment facing an unplanned child greatly exceeds the corresponding risk to an intended child, *see Morrison*, 821 N.E.2d at 25, and because unplanned births out of wedlock, in particular, "are associated with negative outcomes for children." Wildsmith, *supra*, at 5.

Finally, the District Court's refusal to follow the Supreme Court's decision in *Johnson v. Robison* rests on a faulty analogy. Aplt.App.683-84 (Op. at 60-61).

6,925 of 7,740—nearly 90%—of married women between the ages of 40 and 44 have given birth).

The relevant question is not, in the District Court's words, whether the benefit "of marriage is . . . attractive" to Plaintiffs. Aplt.App.683 (Op. at 60). The question is whether affording the benefit of marriage to Plaintiffs will "promote" the "governmental purpose." *Johnson*, 415 U.S. at 383. Yet neither in *Johnson* nor in this case would including the plaintiff group further the government's interest. In *Johnson*, the government's purpose, in part, was to increase the number of draftees who assume military service. *See id.* at 382-83. But including the plaintiff class of conscientious objectors would not have furthered that purpose because their religious convictions precluded them from assuming military service. *See id.* And here, the State's purpose for recognizing marriage is to address the unique threats, while advancing the compelling opportunities, created by the presumptive procreative potential of sexual relationships between men and women. Yet Plaintiffs do not implicate those interests. Hence, the District Court's attempt to distinguish *Johnson* is unpersuasive.

E. The Marriage Amendment Satisfies Heightened Scrutiny.

As explained above, the Marriage Amendment is subject only to rational-basis review, a deferential standard that it plainly satisfies. The District Court, however, transformed rational-basis analysis into a type of heightened scrutiny under which the government must demonstrate that redefining marriage would likely "harm, erode, or somehow water-down . . . the marriage institution."

Aplt.App.681 (Op. at 58). Although this form of heightened scrutiny is not the appropriate standard, the Marriage Amendment should be upheld even under this more searching review.

1. Legally Redefining Marriage as a Genderless Institution Would Have Real-World Consequences.

Complex social institutions like marriage comprise a set of norms, rules, patterns, and expectations that powerfully (albeit often unconsciously) affect people's choices, actions, and perspectives.[13] Marriage in particular is a pervasive and influential social institution, entailing "a complex set of personal values, social norms, religious customs, and legal constraints that regulate . . . particular intimate human relation[s]." Allen, *Economic Assessment*, at 949-50.

Although the law did not create marriage, its recognition and regulation of that institution has a profound effect on "mold[ing] and sustain[ing]" it. *See* Carl E. Schneider, *The Channelling Function in Family Law*, 20 Hofstra L. Rev. 495, 503 (1992). Indeed, *Windsor* acknowledged that the State's "regulation of domestic

[13] *See* Robert N. Bellah et al., *The Good Society* 10 (1991) ("In its formal sociological definition, an institution is a pattern of expected action of individuals or groups enforced by social sanctions, both positive and negative."); Peter L. Berger and Thomas Luckmann, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* 52 (1966) ("Institutions . . . , by the very fact of their existence, control human conduct by setting up predefined patterns of conduct, which channel it in one direction as against the many other directions that would theoretically be possible."); A.R. Radcliffe-Browne, *Structure and Function in Primitive Society* 10-11 (1952) ("[T]he conduct of persons in their interactions with others is controlled by norms, rules or patterns" shaped by social institutions).

relations" has a "substantial societal impact . . . in the daily lives and customs of its people." 133 S. Ct. at 2693.

Plaintiffs ask this Court to use the law's power to redefine the institution of marriage. That redefinition would transform marriage in the public consciousness from a gendered to a genderless institution—a conversion that would be swift and unalterable, the gendered institution having been declared unconstitutional. *See Lewis*, 908 A.2d at 222 ("To alter [the man-woman] meaning [of marriage] would render a profound change in the public consciousness of a social institution of ancient origin."). Scholar and genderless-marriage supporter Joseph Raz has written about this "great . . . transformation in the nature of marriage":

> When people demand recognition of gay marriages, they usually mean to demand access to an existing good. In fact they also ask for the transformation of that good. For there can be no doubt that the recognition of gay marriage will effect as great a transformation in the nature of marriage as that from polygamous to monogamous or from arranged to unarranged marriage.

Joseph Raz, *Ethics in the Public Domain* 23 (1994).[14]

[14] Many other genderless-marriage advocates acknowledge that redefining marriage would change marriage and its public meaning. *See*, *e.g.*, William N. Eskridge, Jr. and Darren R. Spedale, *Gay Marriage: For Better or for Worse? What We've Learned from the Evidence* 19 (2006) ("enlarging the concept [of marriage] to embrace same-sex couples would necessarily transform it into something new"); E.J. Graff, *Retying the Knot*, The Nation, Jun. 24, 1996, at 12 (noting that after marriage is redefined, "that venerable institution will ever after stand for sexual choice, for cutting the link between sex and diapers"); Michelangelo Signorile, *Bridal Wave*, OUT Magazine, Dec./Jan. 1994, at 161 (urging same-sex couples to "demand the right to marry" in order to "radically

The newly instated genderless-marriage regime would sever the inherent link between procreation (a necessarily gendered endeavor) and marriage—a link that for good reason has endured throughout the ages. And that, in turn, would powerfully convey that marriage exists to advance adult desires rather than serving children's needs, and that the State is indifferent to whether children are raised by their own mother and father. The law's authoritative communication of these messages to the masses would necessarily transform social norms, views, beliefs, expectations, and (ultimately) choices about marriage. George, *supra*, at 40; *see also* Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 Harv. L. Rev. 4, 70 (1996) ("By communicating certain messages, law may affect social norms."). In this way, then, redefining marriage would undoubtedly have real-world ramifications.

To be sure, "the process by which such consequences come about" would "occur over an extended period of time." *Windsor*, 133 S. Ct. at 2715 (Alito, J., dissenting). But as explained below, those consequences, in the long run, pose a significant risk of negatively affecting children and society.

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alter an archaic institution"); *Windsor*, 133 S. Ct. at 2715 (Alito, J., dissenting) (citing additional examples).

2. Predictive Judgments about the Anticipated Effects of Redefining Marriage Are Entitled to Substantial Deference.

When reviewing a law's constitutionality even under heightened scrutiny, "courts must accord substantial deference to . . . predictive judgments." *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997) (*Turner II*); *see also Grutter*, 539 U.S. at 327-28 (concluding that a racial classification was "justified by a compelling state interest" because the public university's "judgment that [racial] diversity [was] essential to its educational mission [was] one to which [the Court] defer[red]"). "Sound policymaking often requires [democratic decisionmakers] to forecast future events and to anticipate the likely impact of [those] events based on deductions and inferences for which complete empirical support may be unavailable." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665 (1994) (plurality opinion) (*Turner I*); *see also FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 813-14 (1978) (stating that "complete factual support in the record" for determinations of a "predictive nature" "is not possible or required"). Because Oklahomans "are the individuals who . . . have . . . firsthand knowledge" about marriage and its operation in their State, they may make reasonable "judgments about the [projected] harmful . . . effects" of redefining it. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 297-98 (2000) (plurality opinion).

This substantial deference to the State's predictive judgments is warranted for at least three reasons. First, the complexity of marriage as a social institution

demands deference to projections regarding its future. *See Windsor*, 133 S. Ct. at 2715 (Alito, J., dissenting) ("[T]he process by which such [changes to marriage] come about is complex, involving the interaction of numerous factors"); *Smelt v. Cnty. of Orange*, 447 F.3d 673, 681 (9th Cir. 2006) ("[I]t is difficult to imagine an area more fraught with sensitive social policy considerations" than "the institution of marriage"). Indeed, deference has "special significance" when the government makes predictive judgments regarding matters "of inherent complexity and assessments about the likely interaction of [institutions] undergoing rapid . . . change." *Turner II*, 520 U.S. at 196; *see also Grutter*, 539 U.S. at 328 (deferring to the State's "complex educational judgments").

Second, respect for the separation of governmental powers also warrants deference to the State's projections concerning "the harm to be avoided and . . . the remedial measures adopted for that end[.]" *Turner II*, 520 U.S. at 196. Affording such deference appropriately values the People's right to decide important question of social policy for their community.

Third, federalism demands an additional measure of deference because the "regulation of domestic relations," including "laws defining . . . marriage," is "an area that has long been regarded as a virtually exclusive province of the States." *Windsor*, 133 S. Ct. at 2691 (quotation marks omitted). "[T]he Federal Government, through our history, has deferred to state-law policy decisions with

respect to domestic relations," including decisions concerning citizens' "marital status." *Id.* Hence, federal courts applying the federal constitution should be "particularly deferential" when scrutinizing state laws that define marriage. *Cf. Bruning*, 455 F.3d at 867 (discussing rational-basis review).

3. A Prior Legal Change to a Fundamental Marital Norm Altered Perceptions about Marriage and Increased Marital Instability.

The core marital norms throughout Oklahoma's history have included sexual complementarity, *see* Okla. Const. art. II, § 35(A) (defining marriage as "the union of one man and one woman"), monogamy, *see* Okla. Const. art. I, § 2 (prohibiting "[p]olygamous or plural marriages"), sexual exclusivity, *see* Okla. Stat. tit. 43, § 201 ("Husband and wife contract towards each other obligations of . . . fidelity"); Okla. Stat. tit. 43, § 101 (identifying adultery as a ground for divorce), and permanence. *See Vincent v. Vincent*, 257 P.2d 512, 516 (Okla. 1953) ("[I]t is sound public policy to give the marriage contract all inducements to endurance, preservation and success."). Once before, the law fundamentally altered one of these foundational norms: when Oklahoma, like most other States, enacted no-fault divorce. *See* Okla. Stat. tit. 43, § 101 (including "[i]ncompatibility" as a ground for divorce). Legislatures throughout the Nation adopted those laws for laudable purposes like facilitating the end of dangerous or unhealthy marriages. *See* Amicus Br. of Alan J. Hawkins et al. at 10. But although proponents assured their fellow

citizens that this legal change—a step that substantially undermined the marital norm of permanence—would have no ill effects, history has shown that those assurances were myopic and misguided.

Looking back now decades later, scholars have observed that no-fault divorce laws changed social norms and expectations associated with marriage. *See* William J. Goode, *World Changes in Divorce Patterns* 144 (1993) (stating that no-fault divorce laws "helped to create a set of social understandings as to how easy it is to become divorced if married life seems irksome"). Those legal changes ushered in "the creation of a divorce culture," which "has lead to a society with more . . . individualism[] and less commitment." Allen, *Economic Assessment*, at 975-76. Those laws, at bottom, "created new kinds of families in which relationships are fragile and often unreliable." Judith S. Wallerstein et al., *The Unexpected Legacy of Divorce: The 25 Year Landmark Study* 297 (2000).

Empirical studies have confirmed that these changes in norms and expectations led to a change in marital behavior. Indeed, studies have shown that no-fault divorce laws increased divorce rates well above their historical trends. *See* Douglas W. Allen and Maggie Gallagher, *Does Divorce Law Affect the Divorce Rate? A Review of Empirical Research, 1995-2006*, Institute for Marriage and Public Policy Research Brief 1 (Jul. 2007), *available at* http://www.marriagedebate.com/pdf/imapp.nofault.divrate.pdf; Allen M. Parkman, *Good*

Intentions Gone Awry: No-fault Divorce and the American Family 91-93 (2000) (summarizing available research).

The legacy of no-fault divorce thus bolsters the State's concerns that eradicating another marital norm—this time, sexual complementary, the norm that maintains marriage's intrinsic link to procreation—would have negative ramifications on children and society. Some judges have already recognized that the analogue of no-fault divorce and similar changes to domestic-relations law support the present concerns about redefining marriage. *See, e.g.*, *Windsor*, 133 S. Ct. at 2715 n.5 (Alito, J., dissenting) (discussing "the sharp rise in divorce rates following the advent of no-fault divorce"); *Goodridge*, 798 N.E.2d at 1003 n.36 (Cordy, J., dissenting) ("Concerns about such unintended consequences cannot be dismissed as fanciful or far-fetched. Legislative actions taken in the 1950's and 1960's in areas as widely arrayed as domestic relations law and welfare legislation have had significant unintended adverse consequences in subsequent decades including the dramatic increase in children born out of wedlock, and the destabilization of the institution of marriage.").

4. Redefining Marriage Presents a Substantial Risk of Negatively Affecting Children and Society.

a) Genderless Marriage Would Convey That Marriage Is a Mere Option (Not an Expectation) for Childbearing and Childrearing, and That Would Likely Lead to Adverse Consequences for Children and Society.

Procreation is a necessarily gendered endeavor, and thus transforming marriage into a genderless institution would cut the intrinsic link between marriage and procreation. *See* Witherspoon Institute, *supra*, at 18 (Aplt.App.510) ("[Redefining] marriage would further undercut the idea that procreation is intrinsically connected to marriage."). Put differently, the gendered-marriage institution includes a class of couples (man-woman couples) who engage in sexual conduct of the type that produces children, but redefining marriage would include a class of couples (same-sex couples) whose sexual conduct is of a type that does not produce children. Genderless marriage thus would promote "the mistaken view that civil marriage has little to do with procreation[.]" *Goodridge*, 798 N.E.2d at 1002 (Cordy, J., dissenting).

Because genderless marriage would sever the intrinsic link between marriage and procreation, the social connection between marriage and procreation would wane over time. As this occurs, the social expectation and pressure for man-woman couples having or raising children to marry would likely decrease further. *See* George, *supra*, at 62 (noting that it might be "more socially acceptable . . . for

unmarried parents to put off firmer public commitments"). These developments, over time, would lodge in the public mind the idea that marriage is merely an option (rather than a social expectation) for man-woman couples raising children.

That, in turn, would likely result in fewer fathers and mothers marrying each other, particularly in lower-income communities where the immediate impact of marriage would be financially disadvantageous to the parents. *See* Julien O. Teitler et al, *Effects of Welfare Participation on Marriage*, 71 J. Marriage & Fam. 878, 878 (2009) (concluding that "the negative association between welfare participation and subsequent marriage reflects temporary economic disincentives"). Without the stability that marriage provides, more man-woman couples would end their relationships before their children are grown, *see* Manning, *Stability*, at 135, and more children would be raised outside a stable family unit led by their married mother and father.

The adverse anticipated effects would not be confined to children whose parents separate. Rather, the costs would run throughout society. Indeed, as fewer man-woman couples marry and as more of their relationships end prematurely, the already significant social costs associated with unwed childbearing and divorce would continue to increase. *See* Benjamin Scafidi, *The Taxpayer Costs of Divorce and Unwed Childbearing: First-Ever Estimates for the Nation and All Fifty States* 5 (2008) (indicating that divorce and unwed childbearing "cost[] U.S. taxpayers at

least $112 billion each and every year, or more than $1 trillion each decade" (emphasis omitted)); *see also* George, *supra*, at 45-46 (discussing other studies).

b) Genderless Marriage Would Undermine the Importance of Both Fathers and Mothers, and That Would Likely Lead to Adverse Consequences for Children and Society.

Genderless marriage would remove the State's ability to convey that, all things being equal, it is best for a child to be reared by her own mother and father. *See* George, *supra*, at 58. Instead, it would tell the community that the State is indifferent to whether children are raised by their mother and father, and that there is nothing intrinsically valuable about fathers' or mothers' roles in rearing their children. *See* Witherspoon Institute, *supra*, at 18 (Aplt.App.510) ("It would undermine the idea that children need both a mother and a father"); *see also* Glenn, *supra*, at 25 (explaining that one of the "clear dangers to marriage in the political and ideological conflict about same-sex marriage" is the "denial of the value of fathers for the socialization, development, and well being of children").

Conveying these messages would likely have an adverse effect on fathers' involvement in the lives of their children. Researchers have already observed that "the culture of fatherhood and the conduct of fathers change from decade to decade as social and political conditions change." Doherty, *supra*, at 278 (Aplt.App.469). This inconstant history of fatherhood has led many scholars to conclude that fathering is "more sensitive than mothering to contextual forces." *Id.*

Thus, as the State undermines the importance of fathers, it would likely, over time, "weaken[] the societal norm that men should take responsibility for the children they beget," Witherspoon Institute, *supra*, at 18-19 (Aplt.App.510-11), and "soften the social pressures and lower the incentives . . . for husbands to stay with their wives and children[.]" George, *supra*, at 8; *see also* Doherty, *supra*, at 283 (Aplt.App.474) ("[O]ptimal father involvement will be forthcoming . . . when a father . . . receives social support for his parenting[] and is not undermined by . . . other institutional settings."). In these ways, a genderless-marriage institution would directly undermine marriage's core purpose of encouraging men to commit to the mothers of their children and jointly raise the children they beget, with the anticipated outcome that fewer children would be raised by their mother and father in a stable family unit.

c) Genderless Marriage Would Entrench an Adult-Centered View of Marriage and Likely Lead to Adverse Consequences for Children and Society.

Genderless Marriage Is Premised on an Adult-Centered View of Marriage. Genderless marriage would communicate that marriage exists primarily for the government to approve emotional or romantic bonds, because those sorts of bonds (not sexual conduct of the type that creates children) would be the predominate feature shared by the couples who marry. *See* George, *supra*, at 55 ("Legally wedded opposite-sex unions would increasingly be defined by what they ha[ve] in

common with same-sex relationships."). Hence, the law would convey that an emotional or romantic connection is the defining characteristic of marriage.

In addition, a genderless-marriage regime would tell society that the State recognizes marriage primarily to serve private (not public) purposes. Indeed, redefining marriage would morph one of the foremost private purposes for marriage (emotional union or romantic love) into its accepted public purpose. And in so doing, genderless marriage would further obscure the overriding public purpose of marriage—connecting procreation and childrearing for the good of children.[15]

Plaintiffs' own arguments confirm that redefining marriage would entrench the adult-centered view of that institution. Plaintiffs claim that marriage, above all, is the means by which the State recognizes "the commitment and permanence" of adult relationships. Aplt.App.072 at ¶38; Aplt.App.108 at ¶7. Plaintiffs are not alone in this; the entire genderless-marriage movement depends on an "adult-centric" view of marriage that focuses on "the rights of adults to make choices." Institute for American Values, *Marriage and the Law: A Statement of Principles* 18 (2006), *available at* http://www.americanvalues.org/search/item.php?id=22; *see also* Glenn, *supra*, at 28 (noting that genderless-marriage advocates argue that "any

[15] Ironically, by elevating the emotionally based private purposes for marriage, genderless marriage would convey that the State is concerned with something—whether a citizen has developed a close, romantically loving relationship with another—about which the State manifestly has no interest.

couple in a 'loving relationship' deserves the rights, protections, and privileges of marriage"). "[A]cceptance of the[ir] arguments" would produce an understanding "of marriage as being for the benefit of those who enter into it rather than as an institution for the benefit of society, the community, or any social entity larger than the couple." Glenn, *supra*, at 26. In particular, this Court's acceptance of Plaintiffs' arguments would "enshrine" the adult-centered "vision of marriage in our constitutional jurisprudence" and thereby deeply embed it in our law. *See Windsor*, 133 S. Ct. at 2719 (Alito, J., dissenting).[16]

The Adult-Centered View Inherent in a Genderless-Marriage Institution Obscures the Importance of Self-Sacrifice. The child-centered view of marriage prevails when both law and culture champion marriage as an institution designed to join a man and a woman together to raise the children born of their union. This vision of marriage promotes a self-giving and sacrificial ethic among spouses, encouraging them to subordinate their personal desires to provide for their children's needs. *See* Witherspoon Institute, *supra*, at 14 (Aplt.App.506)

[16] This adult-centered view of marriage, to be sure, has gained traction in some pockets of our country and some segments of society. *See* Andrew J. Cherlin, *The Deinstitutionalization of American Marriage*, 66 J. Marriage & Fam. 848, 851-53 (2004) (Aplt.App.531-33) (discussing modern developments affecting the institution of marriage). Yet it does not reign in Oklahoma. And even if that view has made some inroads, Oklahomans have the right to promote an alternative understanding of marriage through their laws, public policy, and social systems. Disconcertingly, however, mandating a genderless-marriage institution as a constitutional imperative would foreclose the People's freedom to do that.

(discussing the association between this view of marriage and an ethic of sacrifice); Russell, *supra*, at 77 (Aplt.App.377) ("[A]s soon as children enter in, the husband and wife, if they have any sense of responsibility or any affection for their offspring, are compelled to realize that their feelings towards each other are no longer what is of most importance.").

In contrast, the adult-centered romantic view of marriage inherent in a genderless-marriage institution rests on a different foundational ethic—that of pursuing personal happiness, individualism, and romantic love. *See* Cherlin, *supra*, at 853 (Aplt.App.533) ("[P]ersonal choice and self-development loom large in people's construction of their marital careers."). Although these pursuits are worthy, their predominance diminishes the importance of spouses making personal sacrifices for each other and their children. *See id.* (discussing the decreased likelihood that spouses will "focus on the rewards to be found in fulfilling socially valued roles such as the good parent or the loyal and supportive spouse").

As genderless marriage emphasizes this marital ethic of pursuing personal happiness and romantic love at the expense of the marital ethic of self-sacrifice, it is likely that children would experience increased instability in their home lives. Because the highest goal under the adult-centered view is achieving deep romantic love, man-woman couples in acceptable low-conflict (but not perfect) marriages would likely feel justified in ending their marriages and departing on their own

respective quests for romance. *See* George, *supra*, at 62 (noting that it might be "more socially acceptable for fathers to leave their families"). That, however, would disserve the children involved because, as previously discussed, children develop best on average when raised by their own mother and father in a stable family unit. *See supra* at 50-51.

Available data lends credence to these projections of greater marital instability under a genderless-marriage regime. Massachusetts's divorce rate, for example, was 22.7% *higher* in 2011 than it was in 2004—the year that State redefined marriage. *See* Divorce rates by State: 1990, 1995, and 1999-2011, Centers for Disease Control and Prevention, *available at* http://www.cdc.gov/nchs/data/dvs/divorce_rates_90_95_99-11.pdf. The national divorce rate, in contrast, was 2.7% *lower* when comparing those two years. *See* National Marriage and Divorce Rate Trends, Centers for Disease Control and Prevention, *available at* http://www.cdc.gov/nchs/nvss/marriage_divorce_tables.htm. Of course, it would be impossible at this point in history to prove that the redefinition of marriage caused the increase in Massachusetts's divorce rate, but the statistics tend to confirm—and certainly do not abate—these concerns about increased marital instability.

The Adult-Centered View Inherent in a Genderless-Marriage Institution Decreases Marital Satisfaction and Father Involvement. Paradoxically, although

the adult-centered vision of marriage emphasizes romantic love and adult happiness, empirical evidence shows that spouses who embrace this view and its corresponding ethic are, on average, less satisfied with their marriages and more likely to experience conflict and divorce. *See* W. Bradford Wilcox and Jeffrey Dew, *Is Love a Flimsy Foundation? Soulmate versus institutional models of marriage*, 39 Soc. Sci. Research 687, 687 (2010) (concluding that "spouses who embraced a soulmate model of marriage . . . experienced high levels of conflict and divorce"); Wilcox, *Marriage Matters I*, at 16 (Aplt.App.368) ("[I]ndividuals who embrace a conditional ethic to marriage—an ethic based on the idea that marriages ought to continue only as long as both spouses are happy—are less happy in their marriages."); Witherspoon Institute, *supra*, at 14 (Aplt.App.506) (similar).

Undermining the quality of marital relationships, in turn, often decreases the involvement of fathers in the lives of their children. "[R]esearch strongly indicates that substantial barriers exist for most men's fathering outside a caring, committed, collaborative marriage[,] and that the promotion of these kinds of enduring marital partnerships may be the most important contribution to responsible fathering in our society." Doherty, *supra*, at 290 (Aplt.App.481). The entrenchment of this adult-centered view of marriage, then, not only hinders personal marital satisfaction, but also creates barriers to fathers' participation in raising their children.

Genderless Marriage Would Undermine Other Stabilizing Marital Norms. Genderless marriage, as discussed above, would teach that the defining feature of marriage is romantic love or an emotional bond. But if those (often fleeting) subjective conditions are the ultimate determinant of marriage, then no logical grounds reinforce other marital norms like sexual exclusivity, permanence, and monogamy. *See* George, *supra*, at 7, 56. Some people, for example, might determine that their relationship will be enhanced by sexual openness, that their emotional attachment runs between and among a few partners at the same time, or that their marriage is no longer fulfilling because attraction has waned. With love or emotion as the ultimate guidepost, it seems counterintuitive under this marital regime to deny oneself any of these steps toward personal fulfillment.

Obscuring the logic of stabilizing norms like sexual exclusivity, permanence, and monogamy poses at least two concerns for children and society. First, "people tend to abide *less* by any given norms, the less those norms make sense." *Id.* at 67. So as society fails to live in conformity with these norms, especially permanence and sexual exclusivity, marriages on the whole are likely to become more unstable, which would adversely affect children. *Id.*; *see also* Moore, *supra*, at 6 (Aplt.App.384) ("Parental divorce is . . . linked to a range of poorer academic and behavioral outcomes among children."). Second, legal advocates (supported by the logical implications of genderless marriage) would likely seek

government recognition of polyamorous relationships,[17] arguing that it is arbitrary and irrational to recognize all loving relationships between couples but not among three or more people.[18] To the extent that those advocates succeed, the State would be required to promote a home environment with unknown effects on children[19] and to resolve the novel questions of legal parentage arising therefrom.

d) The District Court Inappropriately Discounted These Arguments.

The District Court rejected the foregoing arguments about the anticipated adverse consequences of redefining marriage, and characterized those concerns as

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[17] Polygamy, a social arrangement where one man may marry multiple wives, is not the concept referred to here. Instead, the reference is to polyamory, a romantic group relationship involving whatever gender composition the participants find agreeable. "Researchers . . . estimate that openly polyamorous families in the United States number more than half a million[.]" Jessica Bennett, *Polyamory: The Next Sexual Revolution?*, Newsweek, Jul. 28, 2009, *available at* http://www.newsweek.com/polyamory-next-sexual-revolution-82053.

[18] Many same-sex marriage proponents, consistent with the implications of their arguments, support group marriage. *See, e.g.*, Elizabeth Brake, *Minimal Marriage: What Political Liberalism Implies for Marriage Law*, 120 Ethics 302, 303 (2010) (advocating that individuals should be allowed to "have legal marital relationships with more than one person, reciprocally or asymmetrically, themselves determining the sex and number of parties, the type of relationship involved, and which rights and responsibilities to exchange with each"); Ellen Willis, *Can Marriage Be Saved? A Forum*, The Nation, Jul. 5, 2004, at 16 ("[I]f homosexual marriage is OK, why not group marriage"); Judith Stacey, *In the Name of the Family: Rethinking Family Values in the Postmodern Age* 127 (1996) (advocating for "small-group marriages").

[19] Polyamorous households are likely to produce unfavorable results for children because, as previously explained, social science has consistently confirmed that, on average, children develop best when raised by their married mother and father in a stable family unit. *See supra* at 50-51. No other childrearing environment has proven as effective.

an improper attempt to promote a "view of the marriage institution" that is "impermissibly tied to moral disapproval of same-sex couples." Aplt.App.687-88 (Op. at 64-65). This charge is baseless. Seeking to sustain a view of marriage that encourages a man and a woman in a sexual relationship to jointly raise the children that result from their union is grounded in the enduring public purpose of marriage and furthers the good of society. It is only by ignoring marriage's critical public purpose and vital social role that the District Court could even attempt to characterize these social concerns as mere moralizing.

Projecting these negative consequences of redefining marriage, moreover, is not premised on (as the District Court claimed) a "perceived 'threat'" that same-sex couples "pose to the marital institution." Aplt.App.688 (Op. at 65). Rather, *it is redefining marriage in the public consciousness* (not same-sex couples themselves) that would likely, over time, impede the institution's effectiveness in carrying out its child-centered purposes. George, *supra*, at 7; *see also* Glenn, *supra*, at 25 ("The main stated concern of opponents to same-sex marriage . . . is likely harm to the institution of marriage. . . . [T]here are clear dangers to marriage in the political and ideological conflict about same-sex marriage.").

* * * * *

The preceding discussion about the anticipated consequences of redefining marriage focused on the likely effects to children conceived by sex between men

and women and children born to man-woman couples. From the State's perspective, these are critical considerations, because the overwhelming majority of children are conceived by sex,[20] and society has a compelling interest in encouraging the men and women who conceive those children to marry each other and raise their children together.

It remains uncertain what effect redefining marriage would have on children living with same-sex couples. Although many argue (like the District Court did below) that genderless marriage would benefit those children, *see* Aplt.App.685 (Op. at 62), the State has reservations about promoting that childrearing environment, particularly in light of recent research indicating that children raised in stable, intact mother-father families generally fare better across a wide range of outcomes than children whose parents are in same-sex relationships. *See* Mark Regnerus, *How Different Are the Adult Children of Parents Who Have Same-Sex Relationships? Findings from the New Family Structures Study*, 41 Soc. Sci. Research 752, 763 (2012) (analyzing a large, randomly selected, nationally representative, diverse sample of 3,000 participants, and concluding that there are "numerous, consistent differences . . . between the children of women who have had a lesbian relationship and those with still-married (heterosexual) biological

[20] *See* Assisted Reproductive Technology, Centers for Disease Control and Prevention, http://www.cdc.gov/art/ (last visited Feb. 23, 2014) (stating that approximately "1% of all infants born in the United States every year are conceived using ART [assisted reproductive technology]").

parents" in categories such as receipt of public assistance, employment history, and victimization).[21]

This is not to say that the State has no interest in children presently being raised by same-sex couples. It most certainly does, and it provides for them, like all children, in myriad ways such as through public education and subsidized social services. But the State cannot responsibly ignore the projected society-wide costs of embracing a genderless-marriage institution. Rather, the State must (as it has) balance the potential drawbacks of maintaining the man-woman marriage institution with the anticipated costs of replacing it with a genderless-marriage institution. Under that calculus, the State has concluded that any disadvantage experienced by the small number of children currently living with same-sex couples,[22] while regrettable, does not outweigh the long-term costs that redefining marriage would likely impose on children as a class and society as a whole. That

[21] Some genderless-marriage advocates claim that children raised by same-sex couples fare just as well as children raised by a married mother and father, but the studies they rely on, as the Eleventh Circuit recognized, suffer from "significant flaws in [their] methodologies and conclusions, such as the use of small, self-selected samples; reliance on self-report instruments; politically driven hypotheses; and the use of unrepresentative study populations consisting of disproportionately affluent, educated parents." *Lofton*, 358 F.3d at 825; *see also* Loren D. Marks, *Same-Sex Parenting and Children's Outcomes: A Closer Examination of the American Psychological Association's Brief on Lesbian and Gay Parenting*, 41 Soc. Sci. Res. 735, 736-38 (2012).

[22] "Approximately [three] in a thousand children (0.3%) in the [United States] are living with a same-sex couple." Gary J. Gates, *LGBT Parenting in the United States*, The Williams Institute, UCLA School of Law, at 3 (Feb. 2013).

sovereign decision should be respected and affirmed. The Fourteenth Amendment does not forbid it.

III. Plaintiffs Cannot Satisfy the Causation or Redressability Requirement of Standing.

To demonstrate standing to pursue their claims, Plaintiffs must show (1) that they have suffered an "injury in fact," (2) that "a causal connection [exists] between the injury and the conduct complained of," and (3) "that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Plaintiffs here fail to satisfy the causation and redressability requirements of standing, and applying de novo review, *see Utah v. Babbitt*, 137 F.3d 1193, 1203 (10th Cir. 1998), this Court should dismiss their claims.

Because Plaintiffs below challenged only the Marriage Amendment and not the marriage statutes, *see* Aplt.App.626 n.2-3 (Op. at 3 n.2-3), the District Court "permanently enjoin[ed] enforcement of Part A [of the Amendment] against same-sex couples seeking a marriage license," but did not prohibit the State from enforcing the marriage statutes. Aplt.App.690 (Op. at 67). Those statutes thus remain an independent cause of Plaintiffs' asserted injury, and as a result, Plaintiffs cannot satisfy the causation or redressability element of standing.

Widespread legal authority holds that a court should dismiss a claim for lack of standing when there is an independent and unchallenged cause of the plaintiff's injury. In *Nichols v. Brown*, 945 F. Supp. 2d 1079 (C.D. Cal. 2013), for instance,

the court held that the plaintiff lacked standing to challenge a local ordinance because an unchallenged state statute similarly caused the plaintiff's asserted injury. In finding a lack of redressability, the court provided this explanation:

> [T]o the extent that Plaintiff's purpose in filing suit is to vindicate his right to carry a loaded firearm in public, the invalidation of [the local ordinance] will not redress his injury if [the state law], which prohibits carrying "a loaded firearm on the person or in a vehicle while in any public place," is permitted to stand.

Id. at 1102.

Similarly, in *White v. United States*, 601 F.3d 545 (6th Cir. 2010), the Sixth Circuit concluded that the plaintiffs lacked standing because their alleged injuries could ultimately be traced to both a challenged federal law and unchallenged state laws. The plaintiffs, game-fowl sellers and breeders, challenged anti-animal-fighting provisions in federal law, but did not raise claims against state laws that also prohibited animal fighting. This proved fatal to the plaintiffs' standing, as both causation and redressability were lacking. *Id*. at 552 (concluding that the plaintiffs' asserted injuries were "not traceable only to" the federal law, and that those injuries would not "be redressed by the relief plaintiffs [sought] since the states' prohibitions on [animal fighting] would remain").

Myriad other courts agree that plaintiffs lack standing when there is an independent and unchallenged cause of their asserted injury. *See, e.g.*, *Maverick Media Grp., Inc. v. Hillsborough Cnty., Fla.*, 528 F.3d 817, 820-22 (11th Cir.

2008) (concluding that a company failed to establish redressability for its challenge to a sign ordinance because the government could have denied the permit application under an unchallenged provision of the ordinance); *Get Outdoors II, LLC v. City of San Diego, Cal.*, 506 F.3d 886, 892-93 (9th Cir. 2007) (similar); *Covenant Media of S.C., LLC v. City of N. Charleston*, 493 F.3d 421, 428-30 (4th Cir. 2007) (similar); *Midwest Media Prop., L.L.C. v. Symmes Twp., Ohio*, 503 F.3d 456, 461-63 (6th Cir. 2007) (similar); *Advantage Media, L.L.C. v. City of Eden Prairie*, 456 F.3d 793, 801-02 (8th Cir. 2006) (similar); *Harp Adver. Ill., Inc. v. Vill. of Chicago Ridge, Ill.*, 9 F.3d 1290, 1292 (7th Cir. 1993) (similar).

Plaintiffs chose not to challenge the marriage statutes. Yet those statutes remain an independent cause of their alleged injury. Consequently, the District Court's injunction, even if implemented, does not remedy Plaintiffs' asserted injury because it does not enjoin enforcement of the marriage statutes. Plaintiffs thus lack standing here.

CONCLUSION

For the foregoing reasons, this Court should reverse the District Court's decision and remand with instructions for the District Court to enter an order declaring that the Fourteenth Amendment does not forbid Oklahomans from defining marriage as the union of one man and one woman.

ORAL ARGUMENT STATEMENT

This Court has set oral argument for April 17, 2014. Given the importance of the legal issues raised, Smith agrees that oral argument is necessary and will be beneficial to the Court.

Dated: February 24, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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1. This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 28.1(e)(2)(A) and 32(a)(7)(B), as enlarged by this Court's order entered February 18, 2014, because it contains 20,736 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a 14-point proportionally spaced Times New Roman typeface using Microsoft Word 2007.

Date: February 24, 2014

s/ Byron J. Babione
Byron J. Babione

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify (1) that all the required privacy redactions have been made as required by Tenth Circuit Rule 25.5, (2) that the submitted hard copies are an exact copy of the ECF submission, and (3) that the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, Sophos Endpoint Security and Control, Version 10.3, and are free of viruses according to that program.

Date: February 24, 2014

s/ Byron J. Babione
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CERTIFICATE OF SERVICE

I hereby certify that on February 24, 2014, a true and accurate copy of this brief and addenda was electronically filed with the Court using the CM/ECF system, which will send notification of such filing to the following:

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ADDENDA

1) District Court's Opinion and Order (Jan. 14, 2014)

2) District Court's Order Correcting Typographical Errors (Jan. 17, 2014)