NO. 12-144

IN THE
SUPREME COURT OF THE UNITED STATES

DENNIS HOLLINGSWORTH, et al.,
Petitioners,

v.

KRISTIN M. PERRY, et al.,
Respondents.

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

BRIEF OF THIRTY-SEVEN SCHOLARS OF FEDERALISM AND JUDICIAL RESTRAINT AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici are 37 law professors and scholars of politics and government whose areas of study include American constitutional law and government.[2] They have a particular interest in the role of the Supreme Court in maintaining the constitutional system. They hold a variety of views about theories of constitutional interpretation and about the issue of same-sex marriage. They have in common, however, the belief that constitutional questions should be resolved in a way that is healthy for the political system as a whole. They also share an appreciation for the ways in which this Court has recognized that the responsible exercise of its authority requires careful consideration of the significant consequences that its role has for the larger political system. *Amici's* interest in this case stems from their professional judgment that the Court's disposition of the case will have especially important implications for federalism and for the capacity of political institutions to mediate divisive cultural disputes. They believe that these implications counsel that the Court exercise prudent

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that, in consultation with *amici*, they authored this brief in its entirety and that none of the parties or their counsel, nor any person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for *amici* also represent that all parties have consented to the filing of this brief. Counsel for petitioners and respondents have filed letters with the Clerk granting blanket consent to the filing of *amicus* briefs.

[2] A full list of *amici*, including their institutional affiliations, is set forth in the Appendix to this brief.

restraint in its resolution of this case. *Amici* therefore have filed this brief in support of Petitioners.

SUMMARY OF THE ARGUMENT

This Court treads with "the utmost care" when confronting newly asserted liberty and equality interests. Principles of federalism and judicial restraint urge this Court to exercise caution when considering the expansion of constitutional rights in areas of contentious social dispute. This Court's cases reflect its understanding that its role should not be as a soldier in the vanguard of social and political battles, but a careful and judicious shepherd of gradually evolving constitutional traditions.

This Court's cases repeatedly emphasize three generally applicable reasons for judicial restraint when considering novel expansions of constitutional rights. First, out of deference to the States as separate sovereigns in our system of federalism, this Court is reluctant to intrude into areas of traditional state concern, including the law of marriage and domestic relations. Second, out of respect for the States' role as laboratories of democracy, this Court is loath to short-circuit democratic experimentation in areas of social policy. Third, the scarcity of guideposts for judicial decisionmaking in the unchartered territory of substantive due process makes this Court circumspect about enshrining new liberty and equality interests. Respondents' request for constitutional recognition of same-sex marriage implicates all three of these concerns.

Five specific guideposts for the exercise of judicial restraint repeatedly recur in the cases implicating these three general concerns. In this case, all five guideposts unanimously counsel against the recognition of a constitutional right to same-sex marriage.

First, this Court acts with greatest confidence when there is a close nexus between the new constitutional right and the central purpose of an express constitutional provision. Such a close nexus was present in cases involving interracial marriage, the death penalty, and gun control, where this Court recognized new constitutional rights. In contrast to those cases, the right of same-sex marriage does not stand in close relation to the central purpose of any constitutional provision, but instead is located on the more elusively defined continuum of liberty recognized in this Court's substantive due process cases.

Second, this Court attempts to discern an established or emerging national consensus in favor of the requested right. For example, this Court has discerned such a consensus, and recognized new constitutional rights, in cases involving marital contraceptive use, the execution of juveniles and the mentally disabled, and sexual privacy. By contrast, in cases involving the refusal of medical care, the right to physician-assisted suicide, and the right of access to DNA evidence, this Court has been unable to discern such a consensus and has declined to recognize new rights. At this time, no established or emerging national consensus in favor of same-sex marriage can be discerned.

Third, this Court considers whether the asserted right is currently the subject of active, multi-sided debate and legal development in the States. In cases involving physician-assisted suicide, refusal of medical care, and access to DNA evidence, this Court refused to short-circuit ongoing debate and legal development in the States. On the other hand, in cases involving interracial marriage, marital contraceptive use, execution of juveniles and the mentally disabled, and sexual privacy, there was either no notable legal development on the issues, or the development moved uniformly in the direction of recognizing the expanded right. Same-sex marriage is currently the subject of intense debate and rapid legal development in the States, and this development trends in divergent directions. This state of affairs counsels against judicial intervention.

Fourth, this Court considers whether recognizing the expanded constitutional right would involve incremental or sweeping change. The preference for incremental change is evident in this Court's cases involving the right to refuse medical care, the death penalty, and the reaffirmation of the right to abortion. Recognizing a constitutional right to same-sex marriage would constitute a sweeping change. It would invalidate the recently adopted policies of 38 States favoring the traditional definition of marriage. In addition, it would short-circuit the incremental approach favored by the many States, including California, that have adopted intermediate levels of legal recognition for same-sex relationships.

Fifth, this Court considers whether the right is novel within our Nation's history and tradition, or

conversely, whether the government's attempt to restrict the right is novel. In the cases of marital use of contraception, sexual privacy, and gun control, for example, the government's attempt to restrict the right was unprecedented in the face of widespread exercise of those rights. In the case of physician-assisted suicide, by contrast, there was a long tradition of restricting the right, which had been recently reaffirmed through state democratic processes. In this case, there has likewise been a long tradition favoring the traditional definition of marriage, which has been recently reaffirmed in democratic enactments adopted by a sizeable majority of States.

Because all five of this Court's well-established guideposts for the exercise of judicial restraint point in the same direction, this Court should decline to recognize a constitutional right to same-sex marriage in this case.

ARGUMENT

I. Principles of Federalism and Judicial Restraint Counsel This Court To Exercise the Utmost Care In Recognizing New Constitutional Rights.

From time to time, this Court has been called upon to consider contentious issues of social policy, such as interracial marriage, contraceptive use, abortion rights, assisted suicide, the death penalty, sexual privacy, and gun control. When called upon to decide such volatile issues, this Court treads with "the utmost care." *Washington v. Glucksberg*, 521

U.S. 702, 720 (1997) (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992)); *see also District Attorney's Office for the Third Judicial Dist. v. Osborne*, 557 U.S. 52, 73 (2009) (same).

The need for "the utmost care" is particularly compelling in cases involving the assertion of new liberty and equality interests. "The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field." *Collins*, 503 U.S. at 125. This Court's substantive due process doctrine calls for the exercise of "reasoned judgment" and "restraint" in such cases. "[A]djudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment." *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833, 849 (1992) (plurality opinion). Judicial restraint is a touchstone of this Court's exercise of reasoned judgment in such cases:

> [Due process] is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.

Id. at 850 (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)).

Three general principles, repeatedly invoked in this Court's cases, counsel for the exercise of "the utmost care" and "restraint" in the recognition of new constitutional rights: (1) the unique respect afforded to the States as separate sovereigns in our system of federalism; (2) the role of the States as the "laboratories of democracy" in the development of emerging conceptions of liberty and equality; and (3) the scarcity of reliable guideposts for constitutional decisionmaking in the "unchartered" territory of fundamental-liberty jurisprudence.

A. Deference to the States as sovereigns and joint participants in the governance of the Nation urges judicial self-restraint.

"[O]ur federalism" requires that the States be treated as "residuary sovereigns and joint participants in the governance of the Nation." *Alden v. Maine*, 527 U.S. 706, 748 (1999); *see also Bond v. United States*, 131 S. Ct. 2355, 2364 (2011) (recognizing "the integrity, dignity, and residual sovereignty of the States"). "By 'splitting the atom of sovereignty,' the founders established 'two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it'." *Alden*, 527 U.S. at 751 (quoting *Saenz v. Roe*, 526 U.S. 489, 504 n.17 (1999)); *see also Printz v. United States*, 521 U.S. 898, 920 (1997).

Federalism, which "was the unique contribution of the Framers to political science and political theory," rests on the seemingly "counter-intuitive … insight of the Framers that freedom was enhanced by the creation of two governments, not one." *United States v. Lopez*, 514 U.S. 549, 575-76 (1995) (Kennedy, J., concurring). Federalism, combined with the separation of powers, creates "a double security … to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself." *Id.* at 576 (quoting The Federalist No. 51, at 323 (C. Rossiter ed. 1961) (J. Madison)). This additional security can only be maintained if the States are granted their proper role. "The theory that two governments accord more liberty than one requires for its realization two distinct and discernable lines of political accountability: one between the citizens and the Federal Government; the second between the citizens and the States." *Id.*

To be sure, federalism "does not mean blind deference to 'States' Rights' any more than it means centralization of control over every important issue in our National Government and its courts." *Younger v. Harris*, 401 U.S. 37, 44 (1971). Rather, it calls for a system of "sensitivity to the legitimate interests of both State and National Governments … in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Id.*

Over the long run, excessive federal intrusion into areas of state concern tends to corrode the unique security given to liberty by the American system of dual sovereignties. "Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory." *Lopez*, 514 U.S. at 577 (Kennedy, J., concurring). In such circumstances, "[t]he resultant inability to hold either branch of the government answerable to the citizens is more dangerous even than devolving too much authority to the remote central power." *Id.*

For these reasons, this Court is generally averse to projecting its authority into areas of traditional state concern. For example, in *Osborne*, this Court rejected a substantive due process claim that would have "thrust the Federal Judiciary into an area previously left to state courts and legislatures." 557 U.S. at 73 n.4; *see also, e.g., Poe*, 367 U.S. at 503 (Frankfurter, J.) (declining to address a fundamental-liberty claim due to prudential concerns that "derive from the fundamental federal and tripartite character of our National Government and from the role—restricted by its very responsibility—of the federal courts, and particularly this Court, within that structure").

The instant case directly implicates these principles of federalism. "One of the principal areas in which this Court has customarily declined to intervene is the realm of domestic relations." *Elk*

Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 12 (2004); *see also Boggs v. Boggs*, 520 U.S. 833, 850 (1997) ("[D]omestic relations law is primarily an area of state concern"); *Mansell v. Mansell*, 490 U.S. 581, 587 (1989) ("[D]omestic relations are preeminently matters of state law"); *Moore v. Sims*, 442 U.S. 415, 435 (1979) ("Family relations are a traditional area of state concern"); *Sosna v. Iowa*, 419 U.S. 393, 404 (1975) (observing that a State "has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created") (quoting *Pennoyer v. Neff*, 95 U.S. 714, 734-35 (1878)); *see also Citizens For Equal Prot. v. Bruning*, 455 F.3d 859, 867 (8th Cir. 2006) ("Our rational-basis review begins with an historical fact—the institution of marriage has always been, in our federal system, the predominant concern of state government."). To be sure, state restrictions in the law of marriage and domestic relations are subject to constitutional scrutiny, *see Loving v. Virginia*, 388 U.S. 1, 12 (1967), but the fact that this is an area of traditional state concern counsels this Court to seek a particularly clear constitutional mandate before recognizing novel expansions of constitutional rights.

B. This Court respects the role of the States as laboratories of democracy in the development of emerging conceptions of liberty and equality.

Second, as this Court has often acknowledged, prematurely constitutionalizing controversial issues of tends to interfere with the creative possibilities of policy development at the state level. This Court has "long recognized the role of the States as

laboratories for devising solutions to difficult legal problems." *Oregon v. Ice*, 555 U.S. 160, 171 (2009). "This Court should not diminish that role absent impelling reason to do so." *Id.* Thus, at times when "States are presently undertaking extensive and serious evaluation" of disputed social issues, "the challenging task of crafting appropriate procedures for safeguarding liberty interests is entrusted to the 'laboratory' of the States in the first instance." *Glucksberg*, 521 U.S. at 737 (O'Connor, J., concurring) (ellipses and quotation marks omitted) (quoting *Cruzan v. Dir., Mo. Dept. of Health*, 497 U.S. 261, 292 (1990) (O'Connor, J., concurring)). In such cases, "the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear." *Lopez*, 514 U.S. at 581 (Kennedy, J., concurring). "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

The role of the States as laboratories of democracy is consistent with this Court's recognition that new constitutional liberties arise within a living tradition. The very concept of an evolving tradition presupposes that, at times, it may be premature to recognize a fundamental right, because such recognition would place this Court too far ahead of, or even at variance with, evolving social values. *Casey*, 505 U.S. at 849-50; *Poe*, 367 U.S. at 542 (Harlan, J., dissenting). The political processes of

the States are fundamental incubators for the evolution of such values.

This case directly implicates this concern. As discussed further below, *see infra* Part II.C, the issue of the legal recognition to be afforded to same-sex relationships is currently under active consideration and rapid development in the States, which have taken various approaches in this evolving area.

C. The scarcity of clear guideposts for decisionmaking in the unchartered territory of substantive due process calls for judicial restraint.

Third, this Court exercises particular caution when called upon to constitutionalize newly asserted liberty and equality interests. "As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Collins*, 503 U.S. at 125 (Stevens, J.); *see also Osborne*, 557 U.S. at 72 (same); *Glucksberg*, 521 U.S. at 720 (same). Similarly, *Glucksberg* reasserted the necessity of "rein[ing] in the subjective elements that are necessarily present in due-process judicial review," through reliance on definitions of liberty that had been "carefully refined by concrete examples involving fundamental rights found to be deeply rooted in our legal tradition." 521 U.S. at 722.

The scarcity of "clear guideposts for responsible decisionmaking" creates challenges, both for

determining whether a new constitutional right should be recognized at all, and for defining the precise contours of that right. "[T]he outlines of the 'liberty' specially protected by the Fourteenth Amendment" are "never fully clarified, to be sure, and perhaps not capable of being fully clarified." *Id.* Thus, *Glucksberg* expressed concern, not only about whether the asserted liberty interest in physician-assisted suicide should be recognized at all, but also about how to define and contain the contours of that liberty if it were recognized. "[W]hat is couched as a limited right to 'physician-assisted suicide' is likely, in effect, a much broader license, which could prove extremely difficult to police and contain." *Id.* at 733.

A similar concern is at work in this case. Respondents' request for constitutional recognition of same-sex marriage raises concerns about how to draw principled boundaries for marriage as a distinct, highly valued social institution. If the boundaries of marriage are to be constitutionalized as Respondents request, this Court will inevitably be called upon to determine whether other persons in committed personal relationships—including those whose cultures or religions may favor committed relationships long disfavored in American law—are likewise entitled to enjoy marital recognition. As these cases arise, guideposts for decisionmaking in this area will be no less scarce and open-ended than in *Osborne*, *Glucksberg*, and *Collins*.

II. Five Guideposts Implementing the Principle of Judicial Restraint, Repeatedly Invoked in This Court's Cases, All Counsel Against the Recognition of a Constitutional Right to Same-Sex Marriage.

This Court has repeatedly invoked five objective criteria governing its exercise of "utmost care" and "judicial self-restraint" when confronted with newly asserted constitutional rights. These criteria recur regularly in this Court's cases involving contentious social issues—most particularly in the area of substantive due process, but in other areas as well. They are thus well established as prudential guideposts informing this Court's role as a careful and judicious shepherd of evolving constitutional traditions. This Court has been extremely reluctant to countenance novel expansions of constitutional rights unless multiple guideposts point in favor of the expansion. In this case, these five guideposts unanimously counsel against recognizing a constitutional right to same-sex marriage.

These five guideposts are: (1) whether there is a close nexus between the right asserted and the core purpose of an express constitutional provision; (2) whether this Court can discern an established or emerging national consensus in favor of the right; (3) whether the right is currently the subject of active, multi-sided debate and legal development in the States; (4) whether recognizing the right would involve an incremental or far-reaching change; and (5) whether the right is relatively novel within our history and tradition, or conversely, whether the government's attempt to restrict that right is novel.

A. This Court considers whether there is a close nexus between the right asserted and the central purpose of a constitutional provision.

First, this Court acts with maximal confidence, so to speak, when recognizing an equality or liberty interest that has a close nexus to the core purpose of an express constitutional provision. A paradigmatic example is *Loving v. Virginia*, 388 U.S. 1 (1967). Invalidating "a statutory scheme adopted by the State of Virginia to prevent marriages between persons solely on the basis of racial classifications," *Loving* emphasized from the outset that the reasons for its decision "seem to us to reflect the central meaning of th[e] constitutional commands" of the Fourteenth Amendment. *Id.* at 2. "The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States." *Id.* at 10. "[R]estricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause." *Id.* at 12. In invalidating the laws against interracial marriage, *Loving* repeatedly returned to the point that those laws were repugnant to this "central meaning" and "clear and central purpose" of the Fourteenth Amendment. *See id.* at 6, 9, 10, 11. *Loving*'s discussion of the due process liberty interest in marriage likewise emphasized the central meaning of the Fourteenth Amendment: "To deny this fundamental freedom [to marry] on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive to the principle of equality at the heart of the Fourteenth

Amendment, is surely to deprive all the State's citizens of liberty without due process of law." *Id.* at 12.

Moreover, *Loving* built upon this Court's similar recognition of the central purpose of the Fourteenth Amendment in *Brown v. Board of Educ. of Topeka*, 347 U.S. 483 (1954). In repudiating the "separate but equal" doctrine of *Plessy v. Ferguson*, 163 U.S. 537 (1896), *Brown* consciously sought to reestablish the doctrine of "the first cases in this Court construing the Fourteenth Amendment," which understood the Amendment's core purpose "as proscribing all state-imposed discriminations against the Negro race." *Brown*, 347 U.S. at 490. *Brown* saw the Fourteenth Amendment as "declaring that the law in the States shall be the same for the black as for the white … and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color." *Id.* at 490 n.5 (quoting *Strauder v. West Virginia*, 100 U.S. 303, 307 (1880)).

This Court has also acted with confidence when it has discerned a direct nexus between an asserted right and the central purpose of a constitutional provision outside the Fourteenth Amendment. For example, invalidating the District of Columbia's ban on possession of operable handguns for self-defense, this Court devoted extensive historical analysis to establishing that "the inherent right of self-defense has been central to the Second Amendment right." *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008). *Heller* repeatedly emphasized that the right

of self-defense was the "central component" of the freedom guaranteed by the Second Amendment. *Id.* at 599 (holding that "self-defense … was the *central component* of the right itself") (emphasis in original); *id.* at 630 (describing "self-defense" as "the core lawful purpose" protected by the Second Amendment); *id.* at 634 (holding that firearm possession is the "core protection" of an "enumerated constitutional right"). Because the handgun ban at issue in *Heller* was inconsistent with the "core … purpose" of an express constitutional provision, *id.* at 630, this Court did not shrink from invalidating it, notwithstanding ongoing political controversies surrounding that particular right.

Similarly, in recognizing substantive restrictions on the applicability of the death penalty, this Court has frequently emphasized that the central purpose of the Eighth Amendment is to codify "the basic precept of justice that punishment for a crime should be graduated and proportioned to the offense." *Roper v. Simmons*, 543 U.S. 551, 560 (2005) (quotation marks and brackets omitted) (quoting *Atkins v. Virginia*, 536 U.S. 304, 311 (2002) (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910))).

In this case, by contrast, the right to constitutional recognition of same-sex marriage cannot be viewed as falling within the "central meaning" or the "clear and central purpose" of the Fourteenth Amendment. *Loving*, 388 U.S. at 2, 10. Even if the asserted interest is defined more generally as the freedom to marry whom one chooses—a definition which begs the question as to how "marriage" is to be defined—this liberty interest

still lacks the same close and direct nexus to the core purpose of Fourteenth Amendment as was present in *Loving*. No one contends that enshrining a right to marry whom one chooses, regardless of sex, was as central to the purpose of the Fourteenth Amendment as was eradicating invidious racial discrimination.

Thus, same-sex marriage is not located among the "series of isolated points pricked out" by the express guarantees of the Bill of Rights and the Civil War Amendments; rather, it purports to be located in the "rational continuum, which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints." *Casey*, 505 U.S. at 848 (quoting *Poe*, 367 U.S. at 543 (Harlan, J., dissenting)). The recognition of novel liberties along this more elusively defined "rational continuum" of freedom is precisely where this Court's cases call for greater caution—indeed, for "judgment and restraint." *Id.* at 850 (quoting *Poe*, 367 U.S. at 542 (Harlan, J., dissenting)).

B. This Court considers whether it can discern an established or emerging national consensus in favor of the new right.

Second, this Court carefully considers whether it can discern an established or emerging national consensus in favor of the new right. For example, the absence of a national consensus was critical to this Court's cautious approach in the right-to-die cases involving the refusal of life-prolonging medical care for incompetent patients and physician-assisted suicide. *See Glucksberg*, 521 U.S. at 710 ("In almost

every State—indeed, in almost every western democracy—it is a crime to assist a suicide."); *Cruzan*, 497 U.S. at 269-77, 277 (reviewing the law of many States regarding the right to refuse life-prolonging medical care, and concluding that "these cases demonstrate both similarity and diversity in their approaches to decision of what all agree is a perplexing question"); *id.* at 292 (O'Connor, J., concurring) ("As is evident from the Court's survey of state court decisions, no national consensus has yet emerged on the best solution for this difficult and sensitive problem.") (citation omitted).

By contrast, where a national consensus in favor of a new liberty or equality interest can be discerned, this Court has weighed such consensus in favor of recognizing the expanded right. For example, at the time this Court invalidated Connecticut's ban on marital contraceptive use in *Griswold v. Connecticut*, 381 U.S. 479 (1965), several Justices remarked that the prohibition was dramatically at odds with actual social practices in other States, and indeed, within Connecticut itself. *See*, *e.g.*, *Griswold*, 381 U.S. at 498 (Goldberg, J., concurring) (relying on "the admitted widespread availability to all persons in the State of Connecticut, unmarried as well as married, of birth-control devices"); *id.* at 505-06 (White, J., concurring in the judgment) (observing that "Connecticut does not bar the importation or possession of contraceptive devices, ... and their availability in that State is not seriously disputed," and that the eighty-year history of the law was one of "total nonenforcement … and apparent nonenforceability"); *Poe*, 367 U.S. at 501-02 (plurality opinion) (observing that "[d]uring the more

than three-quarters of a century since [the ban's] enactment, a prosecution for its violation seems never to have been initiated" but once, and that "contraceptives are commonly and notoriously sold in Connecticut drug stores" in "ubiquitous, open, public sales"); *id.* at 554 (Harlan, J., dissenting).

This Court seeks to discern national consensus in its decisions regarding individual liberties under constitutional provisions other than the Fourteenth Amendment as well. "[E]vidence of national consensus" is the touchstone of this Court's Eighth Amendment jurisprudence, *Roper*, 543 U.S. at 564, and objective standards for discerning such consensus are well developed. "We have pinpointed that the 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures'." *Atkins*, 536 U.S. at 312 (quoting *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989)). Moreover, an emerging national consensus may be discerned from a persistent, uniform trend in a single direction, even if the laws of a significant minority of States are not yet in accord with that trend. "It is not so much the number of these States that is significant, but the consistency of the direction of change." *Roper*, 543 U.S. at 566 (quoting *Atkins*, 536 U.S. at 315). In both *Atkins* and *Roper*, though the unconstitutional practice was still authorized in a significant minority of States, a uniform trend moved toward abolition of that practice.

Interestingly, the trend toward abolition that this Court observed in *Roper* and *Atkins* was quite similar to that described in *Loving*, which noted that

14 States had repealed their bans on interracial marriage within the previous 15 years, leaving only 16 States (almost all in the deep South) with such bans on the books. 388 U.S. at 6 n.5.

Again, considering the question of sexual privacy in *Lawrence v. Texas*, 539 U.S. 558 (2003), this Court relied, in large part, on a clearly discernible national consensus against the criminalization of consensual same-sex sexual relations, supported by a uniform trend of abolishing such restrictions in the minority of States that had retained them. "It was not until the 1970's that any State singled out same-sex relations for criminal prosecution, and only nine States have done so…. Over the course of the last decades, States with same-sex prohibitions have moved toward abolishing them." *Id.* at 570. At the time of *Lawrence*, only 13 States retained prohibitions against consensual sodomy, of which only four enforced their laws "only against homosexual conduct." *Id.* at 573. Moreover, "[i]n those States where sodomy is still proscribed, … there is a pattern of nonenforcement with respect to consenting adults acting in private." *Id.* These trends reflected an "emerging awareness" that sexual privacy merits constitutional protection: "[O]ur laws and traditions in the past half century are of most relevance here. These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex." *Id.* at 571-72.

By contrast, no such emerging awareness or national consensus in favor of same-sex marriage

can be discerned at this time. In contrast to the four States that still criminalized same-sex relations at the time of *Lawrence*, there are currently 38 States whose laws explicitly define marriage as the union between a man and a woman; thirty do so in their state constitutions, and eight by statute. *See* National Conference of States Legislatures, Defining Marriage, *at* http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx (hereinafter "Defining Marriage"). Moreover, all of these definitions have been enacted in the last 15 years, and all were adopted principally for the purpose of clarifying that marriage does not include same-sex relationships. And, in contrast to *Lawrence*, there is no "pattern of non-enforcement" of these marriage laws—none of these States issues marriage licenses to same-sex couples. Neither a national consensus in favor of same-sex marriage, nor any uniform emerging awareness that same-sex marriage merits constitutional protection, can be discerned in the Nation at this time.

C. This Court hesitates to constitutionalize an area that is currently the subject of active, multi-sided debate and legal development in the States.

Third, this Court is particularly hesitant to adopt a new constitutional norm when not only is there no national consensus on the issue, but also the issue is currently the subject of active, multi-sided debate and legal development in the States. For example, a compelling consideration in *Glucksberg* was the ongoing state-level consideration and legal development of the issue of physician-

assisted suicide, through legislative enactments, judicial decisions, and ballot initiatives. *See* 521 U.S. at 716-19. *Glucksberg* observed that "the States are currently engaged in serious, thoughtful examinations of physician-assisted suicide and other similar issues." *Id.* at 719. This Court desired to permit the democratic debate and development to continue. "Throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society." *Id.* at 735; *see also id.* at 737 (O'Connor, J., concurring) ("States are presently undertaking extensive and serious evaluation of physician-assisted suicide and other related issues.").

This Court's reluctance to cause a premature cessation of legal development in the States played a key role in *Cruzan* and *Osborne* as well. *Cruzan* conducted an extensive survey of recent developments in the law surrounding right-to-die issues that had occurred in the previous fifteen years. 497 U.S. at 269-77. It was telling, not only that these developments failed to reveal a national consensus, but also that they reflected an ongoing "diversity in their approaches to decision," *id.* at 277. *Cruzan* prudently declined to "prevent States from developing other approaches for protecting an incompetent individual's liberty interest in refusing medical treatment." *Id.* at 292 (O'Connor, J., concurring).

Similarly, *Osborne* reviewed the diverse and rapidly developing approaches to the right of access

to DNA evidence that were then current in the States, observing that "the States are currently engaged in serious, thoughtful examinations" of the issues involved. 557 U.S. at 62 (quoting *Glucksberg*, 521 U.S. at 719). *Osborne* emphasized that "[t]he elected governments of the States are actively confronting the challenges DNA technology poses to our criminal justice systems and our traditional notions of finality…. To suddenly constitutionalize this area would short-circuit what looks to be a prompt and considered legislative response." *Id.* at 72-73. To "short-circuit," *id.* at 73, would have been inappropriate because it would have "take[n] the development of rules and procedures in this area out of the hands of legislatures and state courts shaping policy in a focused manner and turn[ed] it over to federal courts applying the broad parameters of the Due Process Clause." *Id.* at 56. In light of the active legal developments in the States, *Osborne* saw "no reason to constitutionalize the issue in this way." *Id.*

The active debate and development of state law in cases like *Glucksberg*, *Cruzan*, and *Osborne* contrasts with the status of state law in cases where this Court has seen fit to recognize new fundamental liberty or equality interests. In those cases, either there was no significant debate or development at all, or the development ran uniformly in favor of recognizing the expanded right. In *Lawrence*, for example, as discussed above, the Court discerned a very strong trend away from criminalization of consensual same-sex relations, with no discernible trend in the other direction. 539 U.S. at 571-72. In *Loving*, the Court also observed a strong trend toward decriminalization of interracial marriage,

with no discernible counter-trend of States adopting new restrictions on the practice. 388 U.S. at 6 n.5. In *Griswold*, there was no significant debate in the Nation about whether the use of marital contraceptives should be criminalized. 381 U.S. at 498 (Goldberg, J., concurring). And, as noted above, in the related context of the Court's death penalty jurisprudence, the Court emphasized the "consistency of the direction of change." *Roper*, 543 U.S. at 566; *Atkins*, 536 U.S. at 315.

In this case, it is beyond dispute that the issue of same-sex marriage is the subject of ongoing legal development and "earnest and profound debate," *Glucksberg*, 521 U.S. at 735, in state legislatures, state courts, and state forums for direct democracy. And this "earnest and profound debate" is by no means one-directional. If anything, the more powerful trend in the law has run against the recognition of same-sex marriages. *Compare id.* at 716 ("Though deeply rooted, the States' assisted-suicide bans have in recent years been reexamined and, generally, reaffirmed."). In recent years, 38 States have adopted and retained express prohibitions on same-sex marriage, including eight by statute and 30 by state constitutional amendment. Defining Marriage. Moreover, of those 30 state constitutional amendments, all were adopted since 1998, and 29 were adopted in the past 10 years. Human Rights Campaign, Statewide Marriage Prohibitions, *at* http://www.hrc.org/files/assets/resources/US_Marriage_Prohibitions.pdf. At the same time, in the past 10 years, nine States and the District of Columbia have recognized same-sex marriage. Human Rights Campaign, Marriage

Equality & Other Relationship Recognition Laws, *at* http://www.hrc.org/files/assets/resources/Relationship_Recognition_Laws_Map.pdf.

And the extent of this debate is broader than the question of marriage. It encompasses various forms of legal recognition for same-sex relationships, some of which encompass many, or virtually all, of the legal incidents of marriage. *See id.* (describing various levels of legal recognition of same-sex relationships in 10 States other than the nine that recognize same-sex marriage). This state of affairs counsels against the recognition of a constitutional right to same-sex marriage. "The question is whether further change will primarily be made by legislative revision and judicial interpretation of the existing system, or whether the Federal Judiciary must leap ahead—revising (or even discarding) the system by creating a new constitutional right and taking over responsibility for refining it." *Osborne*, 557 U.S. at 74. As in *Osborne*, any decision to "leap ahead" of national consensus in this active and contentious area of public debate would be inconsistent with this Court's role.

D. This Court's jurisprudence favors incremental change over sweeping and dramatic change.

Fourth, this Court's jurisprudence of individual rights strongly favors incremental change, and actively disfavors radical or sweeping change. Confronted, in *Cruzan*, with "what all agree is a perplexing question with unusually strong moral

and ethical overtones," this Court emphasized the necessity of proceeding incrementally in such cases:

> We follow the judicious counsel of our decision in *Twin City Bank v. Nebeker*, 167 U.S. 196, 202 (1897), where we said that in deciding "a question of such magnitude and importance ... it is the [better] part of wisdom not to attempt, by any general statement, to cover every possible phase of the subject."

Cruzan, 497 U.S. at 277-78 (ellipsis and brackets added by the *Cruzan* Court). *See also*, *e.g.*, *Heller*, 554 U.S. at 635 ("[S]ince this case represents this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field.").

The preference for incremental change is likewise illustrated in this Court's death penalty jurisprudence. After *Furman v. Georgia*, 408 U.S. 238 (1972), imposed a temporary moratorium on the death penalty in the United States, this Court did not heed the voices of those who urged a complete abolition of the practice at that time. Rather, in *Gregg v. Georgia*, 428 U.S. 153 (1976), this Court favored the more incremental approach of allowing the death penalty to proceed under procedures that reduced the chances of arbitrary imposition. Substantive restrictions on the death penalty, such as restrictions on the execution of the underage and mentally disabled, were also adopted incrementally, as national consensuses against those policies

emerged. *See Roper*, 543 U.S. at 564; *Atkins*, 536 U.S. at 306.

One notable exception to this Court's preference for incremental change is *Roe v. Wade*, 410 U.S. 113 (1973), which invalidated at a stroke the abortion laws of most States. But *Roe* was widely criticized for this very reason, *i.e.*, that it had abandoned an incremental approach and failed to show appropriate deference to democratic developments. "The political process was moving in the 1970s, not swiftly enough for advocates of swift, complete change, but majoritarian institutions were listening and acting. Heavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict." Ruth Bader Ginsberg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 385-86 (1985). By contrast, this Court's preference for incremental change resurged in *Casey*, which arose in the unique posture of considering whether to overturn a constitutional right already granted in a previous case. *Casey* expressed unwillingness to overrule *Roe*, in large part because suddenly revoking the right to abortion would have inflicted just as dramatic a change on settled expectations as had been imposed by *Roe* in the first place. *See Casey*, 505 U.S. at 856.

In this case, it is beyond dispute that the constitutional enshrinement of a right to same-sex marriage would impose sweeping, rather than incremental, change. It would invalidate the recent, democratically adopted policies of 38 States. Moreover, numerous States have opted for a more incremental approach, affording forms of legal

recognition short of marriage to same-sex relationships. Considerations of constitutional prudence dictate that this incremental, democratic process should be allowed to continue. One prominent supporter of same-sex marriage has expressed this very insight. "Barring gay marriage but providing civil unions is not the balance I would choose, but it is a defensible balance to strike, one that arguably takes 'a cautious approach to making such a significant change to the institution of marriage' … while going a long way toward meeting gay couples' needs." Jonathan Rauch, *A 'Kagan Doctrine' on Gay Marriage*, NEW YORK TIMES (July 2, 2010), *available at* http://www.nytimes.com/2010/07/03/opinion/03rauch.html.

An affirmance of the decision under review on the putatively narrower basis adopted by the Ninth Circuit, moreover, would likewise impose a sweeping change on the Nation's legal landscape. The principal rationale for the Ninth Circuit's decision was its holding that no motivation other than bare animus could explain California's adoption of the traditional definition of marriage. *Perry v. Brown*, 671 F.3d 1052, 1093 (9th Cir. 2012). In addition to being wholly unconvincing, this analysis effectively calls into question the validity of every other such marriage law in the Nation.

Indeed, one particularly pathological feature of the decision under review is that it tends to rule out any incremental approach to expanding legal recognition of same-sex relationships through the democratic process. Like several other States, California has granted significant legal recognition

to same-sex relationships, but stopped short of granting them full marital status. *See id.* at 1076-77. The fact that Californians struck this incremental balance, however, was treated as a constitutional evil by the court below, which implied that California would be on stronger footing if it denied any benefits of recognition to same-sex relationships. *See id.* at 1063, 1077-78, 1081. Such reasoning tends to encourage the very polarization and hardening of opposing positions that the incremental approach to constitutional adjudication is designed to allay.

E. This Court considers the novelty of the asserted right, or conversely, the novelty of the government's attempt to restrict the right.

Fifth, this Court considers the novelty of the asserted right, in light of the Nation's history and tradition. "History and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry." *Lawrence*, 539 U.S. at 572 (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)); *see also Glucksberg*, 521 U.S. at 721. If the asserted right is relatively novel, such novelty counsels against premature recognition of the right. By contrast, if the government's attempt to restrict the right is novel, in the face of a long tradition of unfettered exercise of the right, such novelty weighs in favor of recognizing the right.

Here, this Court is most unwilling to recognize a new constitutional right when both the tradition of

restricting the right has deep roots, and the decision to restrict it has recently been consciously reaffirmed. Such was the case in *Glucksberg*, which noted that prohibitions on assisted suicide had been long in place, and that recent debate had caused the States to reexamine the issue and, in most cases, to reaffirm their prohibitions. *See Glucksberg*, 521 U.S. at 716 ("Though deeply rooted, the States' assisted-suicide bans have in recent years been reexamined and, generally, reaffirmed.").

This Court is also averse to recognizing a constitutional right when the right is so newly asserted that there is no established legal tradition on one side or the other. In *Osborne*, the asserted right of access to DNA evidence was so novel, due to the recent development of DNA technology, that there was yet no tradition in favor of or against it. Thus, this Court was unwilling to recognize the right as a fundamental liberty. "There is no long history of such a right, and 'the mere novelty of such a claim is reason enough to doubt that "substantive due process" sustains it'." *Osborne*, 557 U.S. at 72 (square brackets omitted) (quoting *Reno v. Flores*, 507 U.S. 292, 303 (1993)). *Cruzan* presented a similar case in which, due to the recent development of life-prolonging medical technology, legal consideration of the right to refuse such care had only recently "burgeoned" during the 12 years prior to this Court's decision. 497 U.S. at 270.

On the flip side, this Court acts with greater confidence in recognizing a new right when the governmental attempt to restrict that right is novel, in the face of a long tradition of unfettered exercise

of the right. Such was the case in *Griswold*, where the concept of criminal prosecution for the marital use of contraceptives had almost no antecedents in American law, and where there was a longstanding *de facto* practice of availability and use of contraceptives in marriage. *See Griswold*, 381 U.S. at 498 (Goldberg, J., concurring); *id.* at 505 (White, J., concurring in the judgment). Justice Harlan's dissent from the jurisdictional dismissal in *Poe v. Ullman* likewise emphasized the "utter novelty" of Connecticut's criminalization of marital contraception:

> [C]onclusive, in my view, is the utter novelty of this enactment. Although the Federal Government and many States have at one time or other had on their books statutes forbidding or regulating the distribution of contraceptives, none, so far as I can find, has made the *use* of contraceptives a crime.

Poe, 367 U.S. at 554 (Harlan, J., dissenting) (emphasis in original).

Lawrence confronted a very similar state of affairs as did *Griswold*. By 2003, conceptions of sexual privacy had become so firmly rooted that Texas's attempt to bring criminal charges against the petitioners for consensual sodomy had become truly exceptional. *Lawrence*, 539 U.S. at 571, 573. Even the handful of States that retained sodomy prohibitions exhibited a "pattern of non-enforcement with respect to consenting adults acting in private." *Id.* at 573.

By the same token, in *Heller*, this Court emphasized that the District of Columbia's near-total restriction on handgun possession constituted a clear outlier from a longstanding tradition of qualified legal protection for the possession of firearms. "Few laws in the history of our Nation have come close to the severe restriction of the District's handgun ban. And some of those few have been struck down." *Heller*, 554 U.S. at 629.

Again, in *Romer v. Evans*, 517 U.S. 620 (1996), this Court repeatedly emphasized the sheer novelty of the challenged provision's attempt to restrict the access of homosexuals to the political process. *Romer* noted that the state constitutional amendment at issue was "an exceptional … form of legislation," which had the "peculiar property of imposing a broad and undifferentiated disability on a single named group." *Id.* at 632. *Romer's* conclusion that "[i]t is not within our constitutional tradition to enact laws of this sort," drew support from its recognition that the "disqualification of a class of persons from the right to seek specific protections from the law is unprecedented in our jurisprudence." *Id.* at 633.

Legal recognition of same-sex relationships in the United States today bears little resemblance to the state of criminal enforcement of sodomy laws in *Lawrence*, or to the state of criminal penalties for the marital use of contraception in *Griswold*. Rather, this case bears close resemblance to *Glucksberg*, where there was a longstanding previous tradition prohibiting physician-assisted suicide; and where the policy against physician-assisted suicide had

been the subject of recent active reconsideration, resulting in a reaffirmation of that policy in most States. So also here, there has been a longstanding previous tradition of defining marriage as the union of one man and one woman, in California and elsewhere in the United States. "Marriage in California was understood, at the time [*i.e.*, 1849] and well into the twentieth century, to be limited to relationships between a man and a woman." *Perry*, 671 F.3d at 1065. Likewise here, the policy of defining marriage as the union of a man and a woman has recently been reexamined and reaffirmed, both in California and in a sizeable majority of—though not all—other States. This trend in favor of the traditional definition of marriage, during the past fifteen years, cannot plausibly be viewed as a novel intrusion into an area of liberty previously thought sacrosanct, as in *Griswold*. Rather, this trend represents conscious reaffirmation of an understanding of marriage that was already deeply rooted. *Compare Glucksberg*, 521 U.S. at 716.

F. All five guideposts of judicial restraint counsel against the recognition of a constitutional right to same-sex marriage in this case.

All five of these well-established guideposts of judicial restraint point in one direction—against the recognition of a constitutional right to same-sex marriage in this case.

It is telling that, in almost every case in which this Court has recognized a newly expanded

constitutional right in an area of intense contention over the last fifty years, multiple—and typically several—of these guideposts have weighed in favor of recognizing the expansion of rights. This was true, for example, of *Griswold*, *Loving*, *Atkins*, *Roper*, *Lawrence*, and *Heller*. As discussed above, in each of these cases, at least three of these guideposts pointed in favor of recognizing the expanded right. The notable exception to this rule, *Roe v. Wade*, has been broadly criticized for its failure to follow these prudential counsels and partially overruled.

By contrast, this Court has been extremely reluctant to recognize expanded constitutional rights in cases where all five of these guideposts have counseled against recognition. As discussed above, none of these five guideposts pointed in favor of recognizing the asserted rights in *Cruzan*, *Osborne*, or *Glucksberg*, and in each case, this Court declined to recognize the expanded right.

In fact, this case bears strong resemblance to *Glucksberg* under each of the five guideposts. (1) In *Glucksberg*, this Court recognized that no express constitutional command provided judicial guidance, but that the issue arose in the "unchartered area" where "guideposts for responsible decisionmaking … are scarce and open-ended." 521 U.S. at 720 (quoting *Collins*, 503 U.S. at 125). So also in this case, "the utmost care" is required, because clear guideposts for determining both the existence and the scope of the right asserted are equally "scarce and open-ended." *Id.* (2) *Glucksberg* relied on the fact that, "[t]hough deeply rooted, the States' assisted-suicide bans have in recent years been

reexamined and, generally, reaffirmed." *Id.* at 716. Likewise in this case, "voters and legislators continue for the most part to reaffirm their States' prohibitions" on same-sex marriage, *id.*, as evidenced by the explicit reaffirmation of the traditional definition of marriage by 38 States over the last 15 years. (3) *Glucksberg* was reluctant to constitutionalize the law regarding physician-assisted suicide at a time when "[p]ublic concern and democratic action are … sharply focused on how best to protect dignity and independence at the end of life, with the result that there have been many significant changes in state laws and in the attitudes these laws reflect." *Id.* In this case as well, "the States are currently engaged in serious, thoughtful examinations of" same-sex marriage "and other similar issues," *id.* at 719, including various forms of legally sanctioned domestic partnerships. (4) *Glucksberg* emphasized that its holding would permit an ongoing, incremental approach to regulation of physician-assisted suicide and related end-of-life issues, instead of constitutionalizing the field at a stroke. *Id.* at 735. Equally in this case, a judgment reversing the decision under review will "permit[] this debate" over legal recognition of same-sex relationships "to continue, as it should in a democratic society." *Id.* (5) In *Glucksberg*, this Court was "confronted with a consistent and almost universal tradition that has long rejected the asserted right, and continues explicitly to reject it today." *Id.* at 723. Likewise in this case, the longstanding "consistent and almost universal tradition," *id.*, favoring the traditional definition of marriage counsels heavily against recognizing a constitutional right to same-sex marriage.

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In sum, in the exercise of "utmost care" and "judicial self-restraint," this Court should reverse the decision below and allow the issue of same-sex marriage recognition to be settled through democratic processes.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court reverse the decision of the court below.

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APPENDIX

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