NO. _____

IN THE
Supreme Court of the United States

SALLY HOWE SMITH, IN HER OFFICIAL CAPACITY AS COURT CLERK FOR TULSA COUNTY, STATE OF OKLAHOMA,

Petitioner,

v.

MARY BISHOP, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution forbid the State of Oklahoma from defining marriage as the union of a man and a woman.

PARTIES TO THE PROCEEDING

Petitioner is Sally Howe Smith, in her official capacity as Court Clerk for Tulsa County, State of Oklahoma. She was a defendant in the district court and the appellant/cross-appellee in the circuit court.

Respondents include Oklahoma residents Mary Bishop and Sharon Baldwin. They were plaintiffs in the district court and appellees in the circuit court. Respondents also include Oklahoma residents Susan G. Barton and Gay E. Phillips. They were plaintiffs in the district court and appellees/cross-appellants in the circuit court.

Other parties—the State of Oklahoma, Brad Henry, in his official capacity as Governor of Oklahoma, Drew Edmondson, in his official capacity as Attorney General of Oklahoma, the United States of America, George W. Bush, in his official capacity as President of the United States of America, John Ashcroft and Eric H. Holder, Jr., in their official capacity as Attorney General of the United States of America, and the Bipartisan Legal Advisory Group of the United States House of Representatives—were defendants in the district court, but were not parties in the circuit court.

CORPORATE DISCLOSURE STATEMENT

No nongovernmental corporations are or have been parties to this case.

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INTRODUCTION

The People throughout the various States are engaged in an earnest public debate about the meaning, purpose, and future of marriage. A social institution of utmost importance, marriage has always existed to steer naturally procreative relationships into enduring unions and to connect children to both their mother and their father. Some now seek to move marriage further away from these purposes by redefining marriage from a gendered (man-woman) institution to a genderless (any two persons) institution. Others, however, want to preserve marriage as a gendered institution because they have reasonably determined that redefining marriage would obscure its still-vital purposes and thereby undermine its social utility.

So far, the States have reached differing decisions on this important question of social policy. The People in eleven States, acting through a vote of the citizens or the legislature, have adopted a genderless-marriage regime, while eight other States have had marriage redefined as a result of court rulings. *See Defining Marriage: State Defense of Marriage Laws and Same-Sex Marriage*, Nat'l Conference of State Legislatures (July 28, 2014), http://www.ncsl.org/research/human-services/same-sex-marriage-overview.aspx. Elsewhere, the People in the remaining thirty-one States, Oklahoma among them, have decided, mostly through state constitutional amendments, to preserve marriage as a man-woman union. *Id.*

The Tenth Circuit's decision in this case, if allowed to stand, would end this robust political debate. That court expanded the fundamental right to marry to include all relationships that provide "emotional support" and express "public commitment," App. 94a (Kelly, J., dissenting) (internal quotation marks omitted), and it broadly held that States may no longer define marriage as a man-woman union, App. 22a. By failing to heed this Court's warning against "expand[ing] the concept of substantive due process," *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997), the court below "place[d] the matter [of marriage's definition] outside the arena of public debate and legislative action," *id.* The Tenth Circuit thus removed "the right of citizens to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course of their own times" on this important issue. *Schuette v. BAMN*, 134 S. Ct. 1623, 1636-37 (2014) (plurality opinion). This Court should grant review and return to the People this critical issue of marriage policy.

DECISIONS BELOW

The Tenth Circuit's opinion is reported at 2014 WL 3537847 and reprinted at App. 1a. The district court's opinion is reported at 962 F. Supp. 2d 1252 and reprinted at App. 97a.

STATEMENT OF JURISDICTION

The Tenth Circuit entered its judgment on July 18, 2014. This Court has jurisdiction under 28 U.S.C. § 1254(1). 28 U.S.C. § 2403(b) does not apply because

Petitioner is a state officer for purposes of this case. *See* App. 8a, 38a (acknowledging that Petitioner is a "state defendant").[1]

PERTINENT CONSTITUTIONAL PROVISIONS

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

The Marriage Amendment to the Oklahoma Constitution, found at Article II, Section 35, provides in pertinent part that "[m]arriage in this state shall consist only of the union of one man and one woman." Okla. Const. art. II, § 35(A).

STATEMENT OF THE CASE

1. Marriage in Oklahoma (like in all other States until a mere decade ago) has always been defined as the union of one man and one woman. App. 74a-77a (Holmes, J., concurring); *see, e.g.*, Okla. Stat. tit. 43, § 3. In 2004, soon after the Massachusetts Supreme Judicial Court interpreted its state constitution to require the redefinition of marriage, *see Goodridge v.*

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[1] In the event that 28 U.S.C. § 2403(b) may apply, Petitioner has served this petition on the Attorney General of Oklahoma. Although the court below did not certify to him the fact that this case draws into question the constitutionality of Oklahoma law, the Attorney General of Oklahoma joined an amicus brief filed in support of Petitioner in the court below.

Dep't of Pub. Health, 798 N.E.2d 941, 969 (Mass. 2003), Oklahomans enshrined the State's longstanding man-woman marriage definition in their state constitution. *See* Okla. Const. art. II, § 35(A).[2] By "exercising [their] age-old police power to define marriage in the way that [they], along with [the People in] every other State, always had," App. 83a (Holmes, J., concurring), Oklahomans reaffirmed their "considered perspective on the . . . institution of marriage" in order to ensure that the People themselves, rather than state-court judges, would "shap[e] the destiny of their own times" on the meaning of marriage, *United States v. Windsor*, 133 S. Ct. 2675, 2692-93 (2013).

2. Respondents are two same-sex couples, one who seeks to obtain an Oklahoma marriage license (the Bishop couple) and another who wants Oklahoma to recognize their California marriage license (the Barton couple). They filed this suit in district court against state and federal officials raising constitutional challenges to the Marriage Amendment and the federal Defense of Marriage Act (DOMA). App. 6a-7a. After the district court denied a motion to dismiss filed by Oklahoma's Governor and Attorney General, *see* App. 7a, the Tenth Circuit (on interlocutory appeal) held that because those state officials had "no specific duty to enforce" the challenged Marriage Amendment, Respondents "lack[ed] Article III standing" to sue them, *Bishop v. Oklahoma*, 333 F. App'x 361, 365 (10th Cir. 2009) (unpublished opinion).

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[2] Petitioner refers to this constitutional amendment as "the Marriage Amendment."

Following remand, Respondents filed an amended complaint, which named Petitioner in place of the dismissed state officials. App. 8a. Respondents alleged that both the Marriage Amendment and federal DOMA violate the due-process and equal-protection guarantees of the United States Constitution. App. 8a-9a. All parties filed dispositive motions.

The district court, applying rational-basis review, held that Oklahoma's man-woman marriage definition "violates the Equal Protection Clause of the Fourteenth Amendment" and permanently enjoined its enforcement. App. 186a. That court dismissed Respondents' remaining claims, concluding that the Barton couple lacks standing to raise their recognition claim (their challenge to the Marriage Amendment provision[3] that precludes the State from recognizing their California marriage license), App. 131a-134a, and determining (after this Court's ruling in *Windsor*) that all Respondents' claims against federal DOMA fail on standing or mootness grounds, App. 110a. Following this Court's example in *Herbert v. Kitchen*, 134 S. Ct. 893 (2014), the district court stayed its injunction pending appeal. App. 186a-187a.

3. Petitioner appealed the district court's invalidation of Oklahoma's man-woman marriage definition. App. 9a. The Barton couple cross-appealed the dismissal of their recognition claim.

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[3] Okla. Const. art. II, § 35(B) ("A marriage between persons of the same gender performed in another state shall not be recognized as valid and binding in this state").

App. 9a. No party appealed the dismissal of the DOMA claims. App. 9a.

a. On appeal, the Tenth Circuit unanimously held that the Barton couple lacks standing to raise their recognition claim because Petitioner, the only remaining state defendant, has "no power to recognize [their] out-of-state marriage, and therefore no power to redress their injury." App. 38a; *accord* App. 56a n.2 (Holmes, J., concurring); App. 85a (Kelly, J., dissenting). The recognition claim is thus not part of this petition.

In contrast, the court of appeals confirmed that the Bishop couple has standing to challenge the Marriage Amendment's man-woman definition, even though they did not contest the corresponding state statutes. App. 9a-16a. Their failure to challenge the parallel statutes does not jeopardize their standing, the Tenth Circuit concluded, because "[u]nder Oklahoma law . . . the statutory [provisions] are subsumed in the challenged constitutional provision" and thus "an injunction against the latter's enforcement will redress the claimed injury." App. 4a. Petitioner does not challenge that interpretation of Oklahoma law here.

b. Finding no standing deficiency in the Bishop couple's claim, the two-judge majority incorporated its analysis from *Kitchen v. Herbert*, No. 13-4178, 2014 WL 2868044 (10th Cir. June 25, 2014), and struck down the man-woman marriage definition in Oklahoma's Constitution. App. 17a. It first concluded that this Court's decision in *Baker v. Nelson*, 409 U.S. 810 (1972), "is not controlling."

App. 17a. It then held that Respondents, by attempting to marry a person of the same sex, "seek to exercise the fundamental right to marry." App. 17a. Finally, the court applied strict scrutiny to Oklahoma's marriage definition and concluded that "arguments based on the procreative capacity of . . . opposite-sex couples do not meet the narrow tailoring prong." App. 17a-18a. The majority thus declared that "states may not, consistent with the United States Constitution, prohibit same-sex marriages." App. 22a. Notably, the majority declined to affirm the district court's conclusion that the man-woman marriage definition fails rational-basis review. App. 17a-18a n.4. The court stayed its mandate pending the disposition of any petitions for a writ of certiorari. App. 55a.

In addition to joining (and authoring a portion of) the majority opinion, Judge Holmes wrote a concurrence explaining why the Marriage Amendment is "free from impermissible animus." App. 58a. Animus exists "only where there is structural evidence that [a law] is aberrational," either because "it targets the rights of a minority in a dangerously expansive and novel fashion, *see Romer [v. Evans]*, 517 U.S. [620,] 631-35 [(1996)]," or because "it strays from the historical territory of the lawmaking sovereign just to eliminate privileges that a group would otherwise receive, *see Windsor*, 133 S. Ct. at 2689-95." App. 72a. Oklahoma's Marriage Amendment, Judge Holmes observed, "is aberrational in *neither* respect. In fact, both considerations cut strongly against a finding of animus." App. 72a-73a.

Examining the novelty factor, Judge Holmes noted that marriage as a man-woman union was "literally the *only* precedent in all fifty states until little more than a decade ago," App. 75a; it is "actually as deeply rooted in precedent as any rule could be," App. 76a. Then turning to the lawmaking-authority consideration, Judge Holmes stated that "*Windsor*'s concern with traditional federalist spheres of power is a compelling indication that [the Marriage Amendment]—which is a natural product of the State of Oklahoma's sphere of regulatory concern—is not inspired by animus." App. 83a. In short, the Marriage Amendment "is not plagued by impermissible animus" because it "formalized a definition [of marriage] that every State had employed for almost all of American history, and it did so in a province the States had always dominated." App. 84a.

Judge Kelly dissented from the majority's assessment of the Marriage Amendment's constitutionality. App. 86a. Whether marriage should be redefined as a genderless institution "is a public policy choice for the states, and should not be driven by a uniform . . . fundamental rights analysis." App. 93a. The majority, Judge Kelly lamented, "'deduced [a right] from abstract concepts of personal autonomy' rather than anchoring it to this country's history and legal traditions concerning marriage." App. 93a-94a (quoting *Glucksberg*, 521 U.S. at 725) (alteration in original). The majority viewed marriage "as the public recognition of an emotional union," but that, Judge Kelly recognized, "is an ahistorical understanding of marriage." App. 94a. "[N]one of [this Court's] cases suggest a

definition of marriage so at odds with historical understanding." App. 96a. "Removing gender complementarity from the historical definition of marriage," Judge Kelly explained, "is simply contrary to the careful analysis prescribed by [this Court] when it comes to substantive due process." App. 96a.

Judge Kelly thus concluded that the court should have applied rational-basis review. App. 96a. Had the court applied that standard, a majority (both Judge Kelly and Judge Holmes) would have upheld the Marriage Amendment. App. 96a & n.2. Indeed, at oral argument in the companion case challenging Utah's man-woman marriage laws, Judge Holmes told counsel for the plaintiffs that "under rational-basis review, I don't see how you win." Audio of Oral Argument at 41:11-41:15, *Kitchen v. Herbert*, No. 13-4178, 2014 WL 2868044 (10th Cir. June 25, 2014), *available at* http://www.uscourts.gov/courts/ca10/13-4178.mp3.

REASONS FOR GRANTING THE WRIT

This Court should grant review (1) to decide whether to return to the People throughout the various States the authority to define marriage, (2) to resolve the conflicts that the decision below creates with the decisions of other appellate tribunals, and (3) to correct the Tenth Circuit's manifest errors in disregard of this Court's precedents.

First, this case presents a constitutional question of pressing national importance—whether

the Fourteenth Amendment bans States from defining marriage as the union of a man and a woman. The Tenth Circuit's resolution of that question disables the People from debating and collectively resolving the crucial policy issues implicated by the current debate over marriage's definition. Thus, allowing the Tenth Circuit's decision to stand would thwart cherished principles of democratic self-governance and federalism.

Second, the decision below conflicts with widespread appellate authority that has rejected federal constitutional challenges to state laws defining marriage as the union of a man and a woman. That appellate authority includes, most notably, this Court's decision in *Baker v. Nelson*, 409 U.S. 810 (1972), and the Eighth Circuit's decision in *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 871 (8th Cir. 2006).

Third, the Tenth Circuit's analysis is inconsistent with this Court's precedents. It conflicts with *Windsor*'s affirmation of States' authority to define marriage for their own communities. It is incompatible with the substantive-due-process principles that this Court announced in *Glucksberg*. And it misconstrues this Court's decisions in *Lawrence v. Texas*, 539 U.S. 558 (2003), *Loving v. Virginia*, 388 U.S. 1 (1967), *Zablocki v. Redhail*, 434 U.S. 374 (1978), and *Turner v. Safley*, 482 U.S. 78 (1987).

Finally, this case provides a good vehicle to resolve the important question presented here. No doubts about standing remain. The court below

definitively resolved that issue on state-law grounds, and this Court, following its longstanding practice, accepts that conclusion without reconsideration. *See Windsor*, 133 S. Ct. at 2683 (citing *Windsor v. United States*, 699 F.3d 169, 177-78 (2d Cir. 2012)). Additionally, a concrete adversarial dispute exists between the opposing parties. And as the voice of the State in this case, Petitioner forcefully presents the federalism considerations at the center of this constitutional controversy.

I. The Question Presented Is Exceedingly Important.

The uniting of a man and a woman lay at the heart of marriage's very definition since the founding of our Nation until a mere decade ago. *See* Noah Webster, *An American Dictionary of the English Language* (1st ed. 1828) (defining marriage as the "union of a man and woman"); Black's Law Dictionary 992 (8th ed. 2004) (defining marriage as "[t]he legal union of a couple as husband and wife"); App. 84a (Holmes, J., concurring). Even today, the man-woman definition of marriage continues to prevail in the majority of States. *See Defining Marriage: State Defense of Marriage Laws and Same-Sex Marriage*, Nat'l Conference of State Legislatures (July 28, 2014), http://www.ncsl.org/research/human-services/same-sex-marriage-overview.aspx. The decision below, however, judicially mandates that States redefine marriage from a gendered institution to a genderless institution. Whether the Constitution itself requires such a fundamental transformation of marriage is an

exceedingly important question that should be settled by this Court.

The court below, by "holding that states may not . . . prohibit same-sex marriages," made clear that the effect of its decision reaches beyond Oklahoma. App. 22a. It requires all States that maintain the man-woman marriage definition within the Tenth Circuit—including Wyoming, Colorado, and Kansas—to redefine the institution. *See* Wyo. Stat. Ann. § 20-1-101; Colo. Const. art. II, § 31; Kan. Const. art. XV, § 16. Indeed, a federal district court in Colorado has already held that the decision below requires it to enjoin enforcement of Colorado's man-woman marriage law. *See Burns v. Hickenlooper*, No. 14-cv-01817-RM-KLM, 2014 WL 3634834, at *2 (D. Colo. July 23, 2014). More broadly, the Tenth Circuit's analysis, if adopted in other circuits, will judicially mandate the redefinition of marriage from coast to coast.

At present, each of the thirty-one States that define marriage as a man-woman union is facing at least one lawsuit that raises a federal constitutional challenge to that marriage definition. *See* Michael Winter, *Lawsuit Challenges North Dakota Gay Marriage Ban*, USA Today, June 6, 2014, http://www.usatoday.com/story/news/nation/2014/06/06/north-dakota-same-sex-marriage-ban/10082033/. This underscores the pressing national importance of the question presented here. Such a widely litigated issue of crucial public importance needs this Court's unifying voice.

A. Whether to Redefine Marriage Is an Important Question of Social Policy.

The magnitude of the underlying social-policy choice between these two fundamentally distinct conceptions of marriage and the weight of the interests at stake underscore the importance of the constitutional question presented here.

Marriage's importance as a social institution is undeniable. As this 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*, 434 U.S. at 384 (internal quotation marks omitted); *accord Loving*, 388 U.S. at 12. 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 overriding social purposes of marriage include (1) steering naturally procreative relationships into enduring unions and (2) connecting children to both their mother and their father. *See Windsor*, 133 S. Ct. at 2718 (Alito, J., dissenting) (noting that marriage "throughout human history" has been "inextricably linked to procreation and biological kinship"). "Through marriage," anthropologists have explained, "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). Sociologists have similarly recognized that "[m]arriage is 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). The origins of our Nation's laws affirm these enduring purposes of marriage. *See, e.g.*, 1 William Blackstone, Commentaries *410; John Locke, *Second Treatise on Civil Government* §§ 78-79 (1690).

Redefining marriage in genderless terms would transform it into an institution that no longer has any intrinsic definitional connection to its overriding social purposes of regulating naturally procreative relationships and connecting children to both their mother and their father. Although it is not possible to know the long-term consequences of redefining marriage in this way, *see* Transcript of Oral Argument at 48, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144) (Kennedy, J.) (indicating that counsel challenging California's man-woman marriage definition asked the Court "to go into uncharted waters"),[4] it is undeniable that legally redefining marriage as a genderless institution will have real-world consequences. Complex social institutions like marriage comprise a set of norms, rules, patterns, and expectations that powerfully affect people's choices, actions, and perspectives. *See* Peter L. Berger & Thomas Luckmann, *The Social*

[4] Petitioner cites the official version of this transcript, which is available on this Court's website at http://www.supremecourt.gov/oral_arguments/argument_audio_detail.aspx?argument=12-144&TY=2012.

Construction of Reality: A Treatise in the Sociology of Knowledge 72 (1966). Changing the legal definition of a pervasive institution will inevitably alter society's views and expectations regarding that institution and ultimately individuals' choices and actions when they interact with it.

Faced with these uncertainties, it is logical for the People to project that the redefinition of marriage will jeopardize its utility in serving its purpose of connecting children to both their mother and their father. For example, genderless marriage necessarily undermines the importance of, and eliminates the State's preference for, children being raised by both their mother and their father. *See* Witherspoon Institute, *Marriage and the Public Good: Ten Principles* 18-19 (2008). As over seventy prominent scholars have acknowledged, that would tend to alienate fathers from "tak[ing] responsibility for the children they beget." *Id.*; *see also* Robert P. George et al., *What is Marriage?* 8 (2012). And it would encourage mothers to create or raise children apart from their fathers. Those developments, collectively, would lead to more children being raised without their fathers.

The State's concern is that those children would suffer. For those who never know their father, they will experience a "loss[] [that] cannot be measured," one that, as this Court has recognized, "may well be far-reaching." *Santosky v. Kramer*, 455 U.S. 745, 760 n.11 (1982); *see also* Elizabeth Marquardt et al., *My Daddy's Name is Donor: A New Study of Young Adults Conceived Through Sperm Donation* 7 (Institute for American Values 2010) (revealing that

"[y]oung adults conceived through sperm donation . . . experience profound struggles with their origins and identities"). And for those children who are not raised by their father, they will experience increased hardships. As President Obama has explained:

> 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* (June 15, 2008), http://www.realclearpolitics.com/articles/2008/06/obamas_speech_on_fatherhood.html.[5]

These concerns, and others like them, lie at the heart of the current public debate over the definition of marriage. Evaluating the competing interests and projecting the anticipated effects of redefining marriage are important matters for the People to debate, discuss, and decide for themselves. As a plurality of this Court recently acknowledged in *Schuette*, identifying the "adverse results" that might accompany a controversial social change "is,

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[5] *See, e.g.*, Jane Mendle et al., *Associations Between Father Absence and Age of First Sexual Intercourse*, 80 Child Dev. 1463, 1463 (2009); Eirini Flouri & Ann Buchanan, *The Role of Father Involvement in Children's Later Mental Health*, 26 J. Adolescence 63, 63 (2003).

and should be, the subject of [ongoing political] debate." 134 S. Ct. at 1638. "Democracy does not presume that some subjects are either too divisive or too profound for public debate." *Id.*

B. This Case Raises Important Issues of Democratic Self-Governance.

The Tenth Circuit's fundamental-rights analysis, as Judge Kelly explained, "short-circuits the healthy political processes" currently addressing whether marriage should be redefined. App. 93a. The decision below thus thwarts the People's right to decide this important question of social policy for themselves and their community.

In *Windsor*, this Court stressed the value of permitting the People to define marriage through political processes, extolling the benefits of "allow[ing] the formation of consensus" when the People seek "a voice in shaping the destiny of their own times" on the definition of marriage. 133 S. Ct. at 2692. Such democratic lawmaking, this Court emphasized, is "without doubt a proper exercise of [the State's] sovereign authority within our federal system, all in the way that the Framers of the Constitution intended." *Id.*

Similarly, in *Schuette*, a plurality of this Court affirmed the People's right to "shap[e] the destiny of their own times" on sensitive matters of public policy. 134 S. Ct. at 1636 (quoting *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011)). "[F]reedom does not stop with individual rights. Our constitutional system embraces, too, the right of

citizens to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course of their own times[.]" *Id.* at 1636-37. That a particular question of public policy is "sensitive," "complex," "delicate," "arcane," "difficult," "divisive," or "profound" does not disable the People from "prudently" addressing it. *Id.* at 1637-38. Concluding otherwise would not only "demean[] . . . the democratic process," it would impermissibly restrict "the exercise of a fundamental right held not just by one person but by all in common"—namely, "the right to speak and debate and learn and then, as a matter of political will, to act through a lawful electoral process." *Id.* at 1637.

The Tenth Circuit, however, negated the exercise of this fundamental right by more than one million Oklahomans and millions of voters in other States. Invalidating the People's voice on an issue as profound as the definition of marriage presents an important question that warrants this Court's review.

C. This Case Raises Important Federalism Issues Concerning the Authority of States over Marriage.

The decision below intruded deeply into a matter of unquestioned state sovereignty. It therefore raises significant federalism concerns.

In *Windsor*, this Court emphasized the sovereign authority of States to define marriage. *See, e.g.*, 133 S. Ct. at 2691 (stating that 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" (internal 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.* at 2692 (discussing the State's "essential authority to define the marital relation"). *Windsor* grounded its recognition of this unassailable principle on other precedents of this Court. *See, e.g.*, *Sosna v. Iowa*, 419 U.S. 393, 404 (1975) (recognizing that States have a near "absolute right to prescribe the conditions upon which the marriage relation between [their] own citizens shall be created").

Rather than respecting the State's "essential authority to define the marital relation," *Windsor*, 133 S. Ct. at 2692, the Tenth Circuit arrogated that power to itself. Gone now are the days in the Tenth Circuit when States could maintain their chosen definition of marriage while acting as "laboratories," *Oregon v. Ice*, 555 U.S. 160, 171 (2009), that independently experiment with different approaches to the domestic-relations issues posed by same-sex relationships. *Compare Griego v. Oliver*, 316 P.3d 865, 889 (N.M. 2013) (redefining marriage to include same-sex couples), *with* Colo. Rev. Stat. § 14-15-102 (creating civil unions for same-sex couples).[6]

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[6] As Colorado law demonstrates, States that decline to redefine marriage are not without means for addressing the interests of same-sex couples and other nonmarital households. *See, e.g.*, Colo. Rev. Stat. § 14-15-102 (creating civil unions); Colo. Rev. Stat. § 15-22-105 (creating "[a] designated beneficiary

More troublingly, the Tenth Circuit's freestanding right to marry, which is "independent of the persons exercising it," *Kitchen*, 2014 WL 2868044, at *18, reaches beyond the same-sex-marriage issue and substantially curtails the States' historically broad authority over marriage. Because the Tenth Circuit's reasoning extends the constitutional right to marry to all relationships that provide "emotional support" and express "public commitment," *id.* at *15 (quoting *Turner*, 482 U.S. at 95-96), one is left to wonder what authority the States retain over their marriage policy.

Unless they can satisfy the stringent requirements of strict scrutiny, States now must recognize all emotional relationships (including polygamous, polyamorous, and incestuous) as marriages. *See* Transcript of Oral Argument at 46-47, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144) (Sotomayor, J.) (wondering "what State restrictions could ever exist" on marriage if courts adopt the broadly conceived fundamental right to marry urged by litigants challenging man-woman marriage laws). But if States must recognize all relationships as marriages, their purpose for having a marriage policy in the first place—to recognize and subsidize particular relationships because of the societal interests that they serve—would be eradicated. This far-reaching effect on the States' marriage policy would unsettle well-established federalism principles in the area of domestic relations. This Court's review is needed.

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agreement" that affords many of the rights and benefits associated with marriage).

II. The Tenth Circuit's Decision Conflicts with Decisions of this Court and Widespread Appellate Authority Upholding Man-Woman Marriage Laws.

By declaring man-woman marriage laws unconstitutional, the Tenth Circuit's decision conflicts with binding precedent of this Court holding that the man-woman definition of marriage does not violate the Fourteenth Amendment. In *Baker v. Nelson*, 409 U.S. 810 (1972), this Court unanimously dismissed, "for want of a substantial federal question," an appeal from the Minnesota Supreme Court squarely presenting the question whether a State that maintains marriage as a man-woman union violates the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment. *Id.*; *see also* Jurisdictional Statement at 3, *Baker v. Nelson*, 409 U.S. 810 (1972) (No. 71-1027); *Baker v. Nelson*, 191 N.W.2d 185, 186-87 (Minn. 1971). That summary dismissal in *Baker* is a decision on the merits that constitutes "controlling precedent, unless and until re-examined by this Court." *Tully v. Griffin, Inc.*, 429 U.S. 68, 74 (1976).

Additionally, the Tenth Circuit's decision, together with the recent decision of the Fourth Circuit in *Bostic v. Schaefer*, Nos. 14-1167, 14-1169, 14-1173, 2014 WL 3702493, at *1 (4th Cir. July 28, 2014) (invalidating Virginia's man-woman marriage laws), conflicts with the Eighth Circuit's decision in *Bruning*. In that case, the Eighth Circuit rejected a federal constitutional challenge to Nebraska's state constitutional amendment defining marriage as the union of a man and a woman. *Bruning*, 455 F.3d at

871. And the decision below diverges from every state appellate decision that has addressed a federal constitutional challenge to the man-woman definition of marriage (all of which have upheld those laws). *See In re Marriage of J.B. & H.B.*, 326 S.W.3d 654, 681 (Tex. App. 2010), *review granted*, No. 11-0024 (Tex. Aug. 23, 2013); *Standhardt v. Superior Court*, 77 P.3d 451, 465 (Ariz. Ct. App. 2003), *review denied*, No. CV-03-0422-PR, 2004 Ariz. LEXIS 62 (Ariz. May 25, 2004); *Dean v. District of Columbia*, 653 A.2d 307, 308 (D.C. 1995) (per curiam); *Singer v. Hara*, 522 P.2d 1187, 1197 (Wash. Ct. App.), *review denied*, 84 Wash. 2d 1008 (1974); *Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. 1973); *Baker*, 191 N.W.2d at 186-87.

III. The Tenth Circuit's Constitutional Analysis Is Incompatible with this Court's Precedents.

A. The Tenth Circuit's Fundamental-Rights Analysis Misconstrues and Contravenes Decisions of this Court.

The Tenth Circuit's holding that same-sex couples "seek to exercise the fundamental right to marry," App. 17a, is inconsistent with many decisions of this Court.

To begin with, that holding contravenes *Windsor* in at least three ways. First, the Tenth Circuit claimed to derive its fundamental-rights holding "in large measure" from *Windsor*. *Kitchen*, 2014 WL 2868044, at *31. But the *Windsor* Court disclaimed such an expansive interpretation of its decision.

Indeed, the Court expressly confined its "holding" and "opinion" to the peculiar situation where the federal government refused to recognize "same-sex marriages made lawful by the State." 133 S. Ct. at 2695-96. *Windsor* also emphasized that "[t]he State's power in defining the marital relation [wa]s of *central relevance* in th[at] case," *id.* at 2692 (emphasis added), because the federal government unusually "depart[ed] from [its] history and tradition of reliance on state law to define marriage," *id.* Here, in contrast, Oklahoma has not departed from, but has simply reaffirmed, its history and tradition on marriage. Therefore, in this case, the State's authority over marriage "come[s] into play on the other side of the board," *id.* at 2697 (Roberts, C.J., dissenting), and bolsters the constitutionality of the challenged marriage law.

Second, the Tenth Circuit's fundamental-rights analysis, as Judge Kelly recognized, depended on the majority's "[r]emoving gender complementarity from the historical definition of marriage." App. 96a. Yet that conflicts with *Windsor*'s acknowledgment that the uniting of a man and a woman "no doubt had been thought of by most people as *essential to the very definition of [marriage]* . . . throughout the history of civilization." 133 S. Ct. at 2689 (emphasis added).

Third, *Windsor* confirmed that States have the "essential authority to define the marital relation," *id.* at 2692, identifying "[t]he definition of marriage [as] the foundation of the State's broader authority to regulate the subject of domestic relations," *id.* at 2691. But the decision below prohibits States from

maintaining the marriage definition (a union of "a man and a woman") that most people have considered "essential" to marriage's "role and function throughout the history of civilization." *Id.* at 2689. By nationalizing a genderless definition of marriage, the Tenth Circuit rendered illusory *Windsor*'s affirmation of States' authority to define marriage for themselves.

The Tenth Circuit's analysis, moreover, is incompatible with *Glucksberg*. This Court in *Glucksberg* explained the process for ascertaining whether an asserted right is fundamental. 521 U.S. at 720-21. The reviewing court must provide "a careful description of the asserted fundamental liberty interest," *id.* at 721 (internal quotation marks omitted); and it must determine whether the carefully described right is "objectively, deeply rooted in this Nation's history and tradition," *id.* at 720-21 (internal quotation marks omitted); *see also id.* at 722 (requiring courts to look for "concrete examples" of asserted fundamental rights "in our legal tradition"). Here, however, the court below did not carefully describe the right at issue (the right to marry a person of the same sex), and its refusal to do so was "contrary to the careful analysis prescribed" in *Glucksberg*. App. 96a (Kelly, J., dissenting).[7]

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[7] The Tenth Circuit is not excused from *Glucksberg*'s careful-description requirement simply because it purported to apply an already-established fundamental right. Indispensible in all substantive-due-process cases, the careful-description requirement enables courts to discern when a plaintiff seeks to disguise a novel right as an established liberty interest.

In addition, the Tenth Circuit's reliance on *Lawrence* is misplaced. The circuit court emphasized that its fundamental-rights holding rested "in large measure" on *Lawrence*. *See Kitchen*, 2014 WL 2868044, at *31. But *Lawrence*—which struck down a criminal statute that prohibited "the most private human conduct, sexual behavior, . . . in the most private of places, the home," 539 U.S. at 567—explicitly stated that it did "not involve," and thus did not decide, "whether the government must give formal recognition to any relationship that homosexual persons seek to enter," *id.* at 578. *Lawrence* therefore, as the First Circuit has acknowledged, does not "mandate[] that the Constitution requires states to permit same-sex marriages." *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 8 (1st Cir. 2012).

Furthermore, the Tenth Circuit misconstrued this Court's right-to-marry cases—*Loving*, *Zablocki*, and *Turner*. *See Kitchen*, 2014 WL 2868044, at *12-15. When discussing those cases, the Tenth Circuit never attempted to define the right to marry that is deeply rooted in the history and traditions of our Nation. Had it done so, it would have recognized that the historically rooted right to marry—the right recognized in this Court's right-to-marry cases—is the right to enter the relationship of husband and wife. As this Court acknowledged in *Windsor*, the man-woman element of marriage has been a *universal* and a *defining* feature of marriage for almost all our Nation's history. *Windsor*, 133 S. Ct. at 2689; *see also* Webster, *supra*; Black's Law Dictionary, *supra*, at 992; App. 84a (Holmes, J., concurring). And as Judge Kelly observed, the core

"elements of marriage" like "gender complementarity" are indispensible to defining it. App. 94a-95a. Ignoring that reality, as the court below did, produces an "ahistorical" fundamental right that lacks any support in this Court's right-to-marry cases. App. 94a (Kelly, J., dissenting).

Loving, *Zablocki*, and *Turner* all involved one person marrying another person of the opposite sex. And this Court's discussion of marriage in those cases—specifically, the repeated references to procreation (both implicit and explicit)—plainly demonstrates that it has understood the right to marry as the right to enter into a gendered relationship (the only type of relationship capable of producing children). *See Loving*, 388 U.S. at 12 (discussing the link between marriage and "our very existence and survival"); *Zablocki*, 434 U.S. at 383-84 (same); *id.* at 384 (discussing "the right to marry, establish a home and bring up children" (internal quotation marks omitted)); *id.* at 386 (discussing the plaintiff's "decision to marry and raise the child in a traditional family setting"); *Turner*, 482 U.S. at 96 (discussing the link between marriage and "consummat[ion]" and the link between marriage and the "legitimation of children"). It is thus erroneous to glean from these cases a fundamental right to marry a person of the same sex.

The Tenth Circuit's reliance on *Loving* is particularly unavailing. Deriding any form of fundamental-rights analysis that focuses on marriage's definition, the court below claimed that "[o]ne might just as easily have argued [in *Loving*] that interracial couples are by definition excluded

from the institution of marriage." *Kitchen*, 2014 WL 2868044, at *19. History flatly refutes that claim. Although many States regrettably enacted miscegenation laws "designed to maintain White Supremacy," *Loving*, 388 U.S. at 11, interracial marriages have always existed in our Nation; they were recognized at common law, in six of the original thirteen colonies, and in many other States that never prohibited them. *See* Irving G. Tragen, *Statutory Prohibitions against Interracial Marriage*, 32 Cal. L. Rev. 269, 269-70 & n.2 (1944); Lynn Wardle & Lincoln C. Oliphant, *In Praise of Loving: Reflections on the "Loving Analogy" for Same-Sex Marriage*, 51 How. L.J. 117, 180-81 (2007); Transcript of Oral Argument at 49, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144) (Kennedy, J.) (acknowledging that the recognition of interracial marriages "was hundreds of years old in the common law countries"). In contrast, same-sex marriages were unknown in this country "until little more than a decade ago," App. 75a (Holmes, J., concurring), and even now, are recognized in only a minority of jurisdictions. The Tenth Circuit's analogy to *Loving* thus misses the mark.

B. The Tenth Circuit's Means-End Analysis Conflicts with Decisions of this Court and Other Appellate Authority.

After assuming that the State has a compelling interest in connecting children to both their mother and their father, App. 19a, the court below concluded that the man-woman marriage definition does not satisfy the constitutionally prescribed means-end

analysis. That conclusion cannot be squared with this Court's precedents.

As explained above, Respondents' claims do not implicate the fundamental right to marry, and thus the Tenth Circuit should not have applied strict-scrutiny analysis. Instead, Respondents' claims are subject to rational-basis review, a deferential standard that a majority of the court below (both Judge Kelly and Judge Holmes) thought the Marriage Amendment would satisfy. *See* App. 96a & n.2 (Kelly, J., dissenting); *supra* at 9.

Under that standard, 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 v. Robison*, 415 U.S. 361, 383 (1974). Therefore, the relevant inquiry here is not, as the Tenth Circuit would have it, whether "a prohibition on same-sex marriage" furthers the State's interest in connecting children to both their mother and their father. App. 19a. "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 v. Abercrombie*, 884 F. Supp. 2d 1065, 1107 (D. Haw. 2012); *accord Andersen v. King County*, 138 P.3d 963, 984-85 (Wash. 2006) (plurality opinion); *Morrison v. Sadler*, 821 N.E.2d 15, 23, 29 (Ind. Ct. App. 2005); *Standhardt*, 77 P.3d at 463. This analysis is a specific 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) (internal quotation marks and citation omitted).

Applying these principles, the man-woman marriage definition plainly satisfies constitutional review. As discussed above, marriage's social purposes are (1) to steer naturally procreative relationships into enduring unions and (2) to connect children to both their mother and their father. *See supra* at 13-14. Only sexual relationships between men and women advance these interests because only those relationships naturally (and often unintentionally) produce children, and only those relationships provide children with both their mother and their father.

Sexual relationships between same-sex couples, by contrast, do not create children as the natural (often unintentional) byproduct of their relationship. Nor do they provide children with both their mother and their father. Same-sex couples thus do not further society's compelling interests in steering naturally procreative relationships into enduring unions or connecting children to both their mother and their father. Under this Court's precedent in *Johnson*, that is the end of the analysis: the Marriage Amendment satisfies constitutional review.

It is, therefore, constitutional for States to maintain an institution to address the unique governmental interests implicated 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"). 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.*, *In re Marriage of J.B. & H.B.*, 326 S.W.3d at 677-78; *Conaway v. Deane*, 932 A.2d 571, 630-34 (Md. 2007); *Hernandez v. Robles*, 855 N.E.2d 1, 7-8 (N.Y. 2006); *Andersen*, 138 P.3d at 982-85 (plurality opinion); *Morrison*, 821 N.E.2d at 23-31; *Standhardt*, 77 P.3d at 461-64; *Singer*, 522 P.2d at 1197; *Baker*, 191 N.W.2d at 186-87. Yet by striking down Oklahoma's man-woman marriage law, the decision below conflicts with this long line of appellate authority.

IV. This Case Is a Good Vehicle for Resolving the Important Question Presented.

This case cleanly presents the question whether the Constitution prohibits States from defining marriage as a man-woman union. It thus provides a good vehicle for deciding that important issue.

The Tenth Circuit definitively settled any doubt regarding the Bishop couple's standing. App. 9a-16a. Although they did not contest the marriage statutes that preceded the Marriage Amendment, they nevertheless have standing because "[u]nder Oklahoma law . . . the statutory [provisions] are subsumed in the challenged constitutional provision"

and thus "an injunction against the latter's enforcement will redress the claimed injury." App. 4a. That conclusion, which turned on the Tenth Circuit's interpretation of state law, *see* App. 13a-16a, need not be reassessed because this Court "ordinarily accept[s] the determination of local law by the [c]ourt of [a]ppeals," *Comm'r of Internal Revenue v. Estate of Bosch*, 387 U.S. 456, 462 (1967). Indeed, in *Windsor*, this Court adopted, without review, the circuit court's resolution of a state-law question that established the plaintiff's standing. *See* 133 S. Ct. at 2683 (citing *Windsor*, 699 F.3d at 177-78).

Nor are there any doubts that Petitioner is a proper defendant for the Bishop couple's claim and a party with standing to appeal. A public official (like Petitioner) who issues marriage licenses is undeniably a proper defendant because by carrying out her official duties, she directly causes and is able to directly remedy the Bishop couple's alleged injury. *See Bostic*, 2014 WL 3702493, at *4 (concluding that plaintiffs had standing to sue a county clerk). And as a proper governmental defendant with an injunction issued against her, Petitioner unquestionably has standing to appeal. *See Diamond v. Charles*, 476 U.S. 54, 62 (1986) (noting that a governmental defendant "has standing to defend the constitutionality" of a challenged law).

This case, moreover, is a good vehicle because it presents a concrete adversarial conflict between Petitioner and Respondents. Prudential-standing "considerations demand that the Court insist upon 'that concrete adverseness which sharpens the

presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.'" *Windsor*, 133 S. Ct. at 2687 (quoting *Baker v. Carr,* 369 U.S. 186, 204 (1962)). Given the obviously adversarial nature of the dispute between the opposing parties, this case presents no issue of prudential standing to cloud this Court's review.

Also, Petitioner's role as the State's representative and her staunch defense of the State's marriage policy sharply frame the federalism issues at the center of this controversy. Petitioner is an agent of the state courts, *see Bishop*, 333 F. App'x at 365 (quoting *Speight v. Presley,* 203 P.3d 173, 177 (Okla. 2008)), and thus, as the court below recognized, she represents the State and its interests in this case, *see* App. 8a, 38a (acknowledging that Petitioner is a "state defendant"). Confirming the State's support for Petitioner as its agent in this case, the Attorney General of Oklahoma joined an amicus brief filed in support of Petitioner in the court below. *See* Amicus Brief of State of Indiana et al., *Bishop v. Smith*, Nos. 14-5003, 14-5006, 2014 WL 3537847 (10th Cir. July 18, 2014), 2014 WL 580552. Therefore, the State's voice, as expressed through Petitioner, provides a robust discussion of the federalism issues implicated here.

Additionally, unlike several district courts in the Fifth, Sixth, and Seventh Circuits, *see* App. 57a (Holmes, J., concurring) (citing cases), the court below did not deflect its attention to Respondents' flawed animus arguments. In his concurrence, Judge Holmes cogently explained that challenges to man-

woman marriage laws—enactments that embrace a definition of marriage "as deeply rooted in precedent as any rule could be," App. 76a—do not permit "a finding of animus," App. 72a-73a; *see also supra* at 7-8. Because an animus-based rationale, as Judge Holmes noted, might cause a law to "fall[]" for that reason alone, App. 71a, the absence of that issue ensures that this Court will reach the fundamental-rights question at the core of this legal debate and provide definitive guidance to the thirty-one States currently facing legal challenges like this one.

Finally, this case presents only one question: whether a State must redefine marriage *by issuing marriage licenses* to same-sex couples. It does not raise the additional question whether a State must *recognize* marriage licenses that same-sex couples have received from other jurisdictions. *See* App. 38a (concluding that the Barton couple lacks standing to raise a recognition claim). The recognition question implicates ancillary issues such as comity, *see Hilton v. Guyot*, 159 U.S. 113, 164 (1895) (discussing comity), and full faith and credit, *see* U.S. Const. art. IV, § 1. It also invokes additional constitutional questions like whether "the fundamental right to marry . . . includes the right to remain married," *Kitchen*, 2014 WL 2868044, at *16, and whether couples who receive marriage licenses from one State "possess a fundamental right . . . to have their marriages recognized" by another State, *id.* at *21. If the Court wants to focus solely on a State's authority to license marriages only between man-woman couples, without the auxiliary issues that the recognition question implicates, this case provides a good vehicle to do so.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant review. In the alternative, if the Court decides to take up the question presented here, but does so through a different vehicle, Petitioner asks that the Court hold this petition pending the outcome of that case, thereby keeping intact the stay of the district court's injunction.

Respectfully submitted,

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