No. 14-571

In The Supreme Court of the United States

APRIL DEBOER, et al.,

Petitioners,

v.

RICHARD SNYDER, et al.,

Respondents.

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

BRIEF OF *AMICUS CURIAE* AMERICAN FAMILY ASSOCIATION-MICHIGAN IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae American Family Association-Michigan (AFA-Michigan) is the Michigan state affiliate of the American Family Association. AFA-Michigan has been Michigan's leading voice for the preservation of traditional values and institutions such as marriage between one man and one woman. Michigan's Marriage Protection Amendment was first proposed by AFA-Michigan in June 2003 in response to the legalization by neighboring Ontario, Canada of so-called homosexual "marriage." AFA-Michigan President Gary Glenn – now, since January of this year, a duly-elected member of the Michigan House of Representatives – was one of two co-authors of the final language of the Amendment approved by voters in the November 2004 election. The Amendment's other co-author, Patrick Gillen, is also co-author of this brief. As the initial proponent, a co-author, and a leading advocate of the Amendment, AFA-Michigan submits this brief to assist the Court in reviewing the issues and articulating the bases for memorializing the definition of marriage as the union of one man and one woman in the Michigan Constitution.

[1] Counsel for a party did not author this brief in whole or in part, and no such counsel or party made a monetary contribution to fund its preparation or submission. No person or entity other than *amici curiae* or their counsel made a monetary contribution to the preparation and submission of this brief. By letters on file with the Clerk, all parties have consented to the filing of this brief.

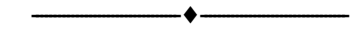
SUMMARY OF ARGUMENT

The Michigan Marriage Protection Amendment ("MMPA") states: "To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose." Mich. Const. art. I, § 25. In leading the effort to draft and enact the MMPA, AFA-Michigan was participating in the exercise of the citizens' "privilege to enact laws as a basic exercise of their democratic power." *Schuette v. Coal. to Defend Affirmative Action*, ___ U.S. ___, 134 S.Ct. 1623, 1636 (2014). Michigan voters exercised that power to overwhelmingly affirm what our entire nation has until quite recently consistently confirmed, i.e., that marriage is a fundamental social institution which, in its essence, is the union of one man and one woman united for life.

The MMPA, like similar amendments and statutes throughout the country, memorializes, but does not create, the definition and meaning of marriage. Marriage is inherently and necessarily limited to one man and one woman because that is its very essence. The State of Michigan has codified this recognition of marriage "since its territorial days." *DeBoer v. Snyder*, 772 F.3d 388, 396 (6th Cir. 2014) (citing An Act Regulating Marriages § 1 (1820), in 1 Laws of the Territory of Michigan 646, 646 (1871)). The MMPA was enacted simply to protect and preserve this essential social institution from the threat of extinction posed by attempts to break the marriage mold and refashion it

into something it never was and never can be, namely, a mere contract encompassing relationships between two men or two women, or between one man and six women (or vice versa), or between *any* combination of individuals other than between one man and one woman.

Once it is established what marriage is, it becomes readily apparent that Michigan's laws recognizing and protecting it easily satisfy the requirements of the Fourteenth Amendment. The Fourteenth Amendment neither requires a state to license a marriage between two people of the same sex, or between any combination of individuals other than between one man and one woman, nor to recognize any such marriage between two people of the same sex, notwithstanding the fact that their marriage was lawfully licensed and performed out-of-state. Moreover, for this Court to rule otherwise would be an unlawful arrogation of authority it does not possess over a question of policy more appropriately left to the legislature and the people. Accordingly, the ruling of the lower court should be affirmed.



ARGUMENT

I. Michigan's Marriage Laws Easily Satisfy the Requirements of the Fourteenth Amendment.

A. The Essence of Marriage.

"Same-sex marriage presents a highly emotional and important question of public policy – but not a difficult question of constitutional law." *United States v. Windsor*, ___ U.S. ___, 133 S.Ct. 2675, 2714 (2013) (Alito, J., dissenting). The federal Constitution is silent on the subject of marriage. And as this Court has long acknowledged, the entire sphere of domestic relations has since time immemorial been reserved to the states. *Windsor*, 133 S.Ct. at 2691-92. We begin, then, with a presumption in favor of the state.

Moreover, these cases turn largely if not exclusively on the understanding of precisely what marriage is at the core of its essence. The State argues that its laws have always recognized marriage as "only between opposite-sex couples." Respondents' Brief at 17. In fact, the State notes, until quite recently, no one ever dreamed marriage could be anything else. *Id.* (citing *Hernandez* v. *Robles*, 7 N.Y.3d 338, 361 (N.Y. 2006)). This Court, too, inferred as much when it stated in *Windsor*: "[M]arriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization." *Windsor*, 133 S.Ct. at 2689. That is why "[t]he limitation of lawful marriage

to heterosexual couples . . . for centuries had been deemed both necessary and fundamental" to society. *Id*.

Petitioners, on the other hand, claim that they "seek no redefinition of the right to marry." Petitioners' Brief at 61. They argue that "the gender of the partners" has never been one of the "limits . . . imposed on the right to marry." *Id*. at 60. But this lawsuit is targeted precisely at Michigan's laws affirming the historical definition of marriage. In fact, the Sixth Circuit expressly found it so: "April DeBoer and Jayne Rowse, a lesbian couple living in Michigan, challenge the constitutionality of this definition." *DeBoer v. Snyder*, 772 F.3d 388, 397 (6th Cir. 2014). It is thus disingenuous at best to now claim they are not attacking the definition of marriage. Petitioners cannot prevail unless this Court effectively redefines the institution of marriage.

The suggestion that the State has done something nefarious in reaffirming the historic and virtually uniform understanding of what constitutes true marriage is ludicrous. "The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis." *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971). As the Sixth Circuit observed, "[f]rom the founding of the Republic to 2003, every State defined marriage as a relationship between a man and a woman." *DeBoer*, 772 F.3d at

404. Yet for all this "invidious discrimination,"[2] this Court dismissed the petition for certiorari in *Baker* for want of a "substantial federal question." *Baker v. Nelson*, 409 U.S. 810, 810 (1972).

It is therefore not *the law* that has changed in the intervening 43 years since the dismissal of the petition in *Baker*, but *the views of the individual Justices* of this Court.

Nor is this recognition of what marriage is unique to the State. The Founders of this great nation uniformly assumed the essence of marriage as one man and one woman united for life. For example, John Locke was revered by some Founders as "an oracle as to the principles . . . of government"[3] and among the "trinity of the three greatest men the world had ever produced."[4] Locke defined marriage as "the First Society," and more precisely as:

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[2] *See* Brief of *Amici Curiae* 167 Members of the U.S. House of Representatives and 44 U.S. Senators in Support of Petitioners, pp. 5, 6.

[3] Benjamin Rush, *The Selected Writings of Benjamin Rush*, Dagobert D. Runes, editor (New York: The Philosophical Library, Inc., 1947), p. 78, "Observations on the Government of Pennsylvania."

[4] Thomas Jefferson, *The Writings of Thomas Jefferson*, Henry Augustine Washington, editor (Washington, D.C.: Taylor & Maury, 1853), Vol. V, p. 559, letter to Dr. Benjamin Rush on January 16, 1811.

> [A] voluntary Compact between Man and Woman; and tho' [sic] it consist chiefly in such a Communion and Right in one another's Bodies, as is necessary to its chief end, Procreation; yet it draws with it mutual Support, and Assistance, and a Community of Interest too, as necessary to unite not only their Care and Affection, but also necessary to their common Off-spring, who have a right to be nourished and maintained by them, till they are able to provide for themselves.

John Locke, *Two Treatises of Government* 179 (1698; Cambridge, U.K.: Cambridge University Press, 1965).

James Wilson, a signer of the Declaration of Independence and the Constitution and one of the first justices of this Supreme Court, wrote regarding marriage:

> Whether we consult the soundest deductions of reason, or resort to the best information conveyed to us by history, or listen to the undoubted intelligence communicated in holy writ, we shall find, that to the institution of marriage the true origin of society must be traced. . . . [T]o that institution, more than any other, have mankind been indebted for the share of peace and harmony which has been distributed among them. . . . The most ancient traditions of every country ascribe to its first legislators and founders, the regulations concerning the union between the sexes.

James Wilson, Lectures on Law: Of the Natural Rights of Individuals (1791), *reprinted in* The Works of the Honourable James Wilson, L.L.D.: 476 (Bird Wilson ed., 1883).

This understanding of marriage at the time of the founding was uniform, across all political parties and ideologies, without a single exception. Indeed, this Court repeatedly underscored the critical importance of marriage – understood as one man and one woman – to all of society. Marriage creates "the most important relation in life, and has more to do with the morals and civilization of a people than any other institution." *Maynard v. Hill,* 125 U.S. 190, 205 (1888). It "is an institution in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress." *Id.* at 211.

> For, certainly, no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take rank as one of the co-ordinate states of the Union, than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all

> beneficent progress in social and political improvement.

Murphy v. Ramsey, 114 U.S. 15, 45 (1885).

Justice Joseph Story, whose "famous"[5] Commentaries on the Constitution are still cited by the Court today, wrote emphatically: "*The contract of marriage* is the most important of all human transactions. It *is the very basis of the whole fabric of civilized society*." Joseph Story, Commentaries on the Conflict of Laws Foreign and Domestic § 109 (3d ed. 1846) (emphasis added).

Professor Robert P. George, an authority on natural marriage, echoes Justice Story's observation: "The family is the fundamental unit of society. . . . [F]amilies . . . produce something that governments need but, on their own, they could not possibly produce: upright, decent people who make honest law-abiding,

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[5] *See, e.g., District of Columbia v. Heller*, 554 U.S. 570, 608 (2008) (noting that "Joseph Story published his famous Commentaries on the Constitution of the United States in 1833"); *see also Van Orden v. Perry*, 545 U.S. 677, 728 n.31 (2005) (Stevens, J., dissenting) ("'Joseph Story, a Member of this Court from 1811 to 1845, and during much of that time a professor at the Harvard Law School, published by far the most comprehensive treatise on the United States Constitution that had then appeared.'" (quoting *Wallace v. Jaffree*, 472 U.S. 38, 104 (1985) (Rehnquist, J., dissenting), and observing that "numerous opinions of this Court, . . . have seen it fit to give authoritative weight to Joseph Story's treatise when interpreting other constitutional provisions")).

public-spirited citizens. And marriage is the indispensable foundation of the family." Robert P. George, *Law and Moral Purpose, First Things*, Jan. 2008.

In short, natural marriage is absolutely vital to civilization itself. At the founding of our nation, the essential purpose of marriage was uniformly recognized. This undeviating understanding continued through the time of the adoption of the Fourteenth Amendment, and right up until modern times.

In no legitimate sense, therefore, can Petitioners claim a "fundamental right" to enter into the institution of marriage as historically understood. Instead, Petitioners ask this Court to alter the very core of our society, our social DNA, in order to accommodate their preferred behaviors.

B. Society's Vital Interests in Preserving and Protecting Natural Marriage Easily Satisfy Rational Basis.

Petitioners argue that Michigan's marriage laws violate the Equal Protection Clause and cannot pass rational basis scrutiny. Pet. Br. at 30. It cannot be seriously argued that Michigan's marriage laws, dating back to the days when it was still a territory, were enacted out of animus against individuals who engage in homosexual behavior or may be involved in homosexual relationships. Neither can animus be inferred by virtue of the State's reaffirmation of the essence of marriage in 1996, when Hawaii was considering an effort to redefine marriage, or when its

voters overwhelmingly approved the MMPA in 2004, in response to *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003), the first case purporting to require recognition of same-sex marriage in 2003. *See DeBoer*, 772 F.3d at 604 ("How can we say that the voters acted irrationally for sticking with the seen benefits of thousands of years of adherence to the traditional definition of marriage in the face of one year of experience with a new definition of marriage?").

This Court has long acknowledged that under a rational basis review, as long as there is some "plausible" reason for the law, the law must stand. *E.g., Heller v. Doe*, 509 U.S. 312, 330 (1993); *Nordlinger v. Hahn*, 505 U.S. 1, 11, 17-18 (1992); *Vance v. Bradley*, 440 U.S. 93, 97 (1979). The lower court rightly noted that the laws of marriage easily satisfy the low bar of rational basis: "A dose of humility makes us hesitant to condemn as unconstitutionally irrational a view of marriage shared not long ago by every society in the world, shared by most, if not all, of our ancestors, and shared still today by a significant number of the States." *DeBoer*, 772 F.3d at 404.

Given this unbroken record reaching back to the very dawn of civilization, and considering that natural marriage has long been deemed essential to "the whole fabric of civilized society," it can hardly be doubted that Michigan's marriage laws satisfy rational basis. "Thus it is for the stability and welfare of society, for the general good of the public, that a proper understanding and preservation of the institution of

marriage is critical." *Ex Parte State of Ala. ex rel. Ala. Policy Institute*, No. 1140460, slip op. 16 (Ala. Mar. 10, 2015).

II. The Fourteenth Amendment Provides No Power to Federalize the Redefinition of Marriage.

A. This Court Has no Authority to Say What the Law Should Be.

1. The meaning of marriage is a policy question reserved to the people, not the judiciary.

As the Michigan Supreme Court has recognized, the initiative process simply reflects and respects the fundamental premise of the American system, i.e., "[a]ccording to the theory of our government, the sovereign power is in the people." *Millard v. Guy*, 334 Mich. 694, 708, 55 N.W.2d 210, 217 (1952).

Interpreting the MMPA, the courts of that sovereign state have described it as the most recent manifestation of a "long public-policy tradition of favoring the institution of marriage . . . deeply entrenched in . . . law . . . as inherently a unique relationship between a man and a woman. . . ." *Nat'l Pride at Work, Inc. v. Granholm*, 274 Mich. App. 147, 158, 732 N.W.2d 139, 147 (2007), *aff'd*, *Nat'l Pride at Work, Inc. v. Governor of Mich.*, 481 Mich. 56, 748 N.W.2d 524 (2008). The Michigan Supreme Court has explicitly linked the traditional understanding of marriage to procreation and thus the family. *See Sissung v.*

Sissung, 31 N.W. 770, 772 (Mich. 1887) (reasoning that the "first purpose of matrimony, by the laws of nature and society, is procreation"). As the court explained further when it interpreted the amendment, "[i]t is a cornerstone of a democratic form of government to assume that a free people acted rationally in the exercise of their power . . . and by their approval vote have determined that the proposal is for the good and expresses the free opinion of a sovereign people." *Nat'l Pride at Work, Inc.*, 732 N.W.2d 139, at 170.

Striking down this sovereign expression of the will of the People of the State of Michigan is unthinkable given the respect for the sovereignty of the people writ large through precedent protecting the political process. For example, in *Meyer v. Grant*, 486 U.S. 414 (1988), this Court observed that the initiative process was "at the heart of political expression such that restraints upon the process subject to the most exacting scrutiny. . . ." *Id.* at 420; *see also*, *Buckley v. American Constitutional Law Found.*, 525 U.S. 182, 186-87 (1999) (recognizing that voter initiatives involve "core political speech . . . for which First Amendment protection is at its zenith").

In *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), this Court struck down efforts to limit campaign speech by corporate persons because "the people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments." *Id.* at 791. More recently, in *Citizens United v. Fed. Election Comm'n*,

558 U.S. 310 (2010), this Court built on *Bellotti*, emphasizing that the "First Amendment stands against attempts to disfavor certain subjects or viewpoints." *Id.* at 888.

This Court has justified its zealous protection of the democratic process on the grounds that history shows that the mechanisms of direct democracy "demonstrate devotion to democracy, not to bias, discrimination, or prejudice." *City of Cuyahoga Falls, Ohio v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003). In fact, recourse to petitioning and popular vote, "tap the energy and the legitimizing power of the democratic process," *Doe v. Reed*, 561 U.S. 186, 195 (2010), and as a result, "[i]n the federal system States respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times." *Bond v. United States*, 564 U.S. ___, 131 S.Ct. 2355, 2364 (2011).

The Court's recent decision in *Schuette v. Coal. to Defend Affirmative Action*, ___ U.S. ___, 134 S.Ct. 1623 (2014), is in keeping with the high value this Court has always attached to democratic decision-making. There, this Court confronted an exercise of direct democracy that barred the use of racial preferences and therefore touched on one of the most sensitive issues in the history of our nation – invidious racial discrimination. *Id.* at 1629. Nevertheless, this Court found "no authority in the Constitution of the United States or this Court's precedents for the Judiciary to set aside Michigan laws," *id.* at 1638, and therefore refused to abrogate a constitutional

amendment initiated and ratified just as was the MMPA here. The Court's rationale was straightforward and compelling: "Democracy does not presume that some subjects are either too divisive or too profound for public debate." *Id.*; *see also id.* at 1639 (Roberts, C.J., concurring, noting that "[p]eople can disagree in good faith on this issue, but it . . . does more harm than good to question the openness and candor of those on either side of the debate").

Petitioners' invitation for this Court to assume authority it does not possess and purport to do what it cannot do (i.e., redefine marriage into something it never was and never can be) should be rejected. For this Court to rule in favor of Petitioners would severely damage the structural foundation of our republic and inflict devastating harm to much of its own carefully constructed precedents.

The "historic institution" of marriage "manifestly is more deeply founded than the asserted contemporary concept of marriage and societal interests for which petitioners contend." *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971), *cert. denied*, 409 U.S. 810 (1972). As such, it should not be lightly tampered with. Moreover, "[t]he due process clause . . . is not a charter for restructuring it by judicial legislation." *Id.*

2. The proper means of amending the Constitution is by following the procedure set forth in Article V.

Given that the Constitution as it currently exists is silent on the issue of marriage, and that traditional equal protection and due process analyses do not provide a legitimate vehicle for declaring Michigan's marriage laws unconstitutional, the Court must effectively rewrite the Constitution in order to justify a finding in favor of Petitioners.

Words mean something. The text of the Constitution was painstakingly crafted and agreed upon only after agonizing debates and often weeks of crafting and compromise. As ratified by the people, it became something of "a covenant between the governed and the governors." *DeBoer*, 772 F.3d at 403. The whole point of a written charter is to bind the parties to a known set of terms and conditions, with the assumption that "the originally understood meaning of the charter generally will be the lasting meaning of the charter." *Id.*

"The written charter cements the limitations on government into an unbending bulwark, not a vane alterable whenever alterations occur." *Id.* Instead, the terms and conditions can only be changed if and when the contracting parties – the people – so choose, using "the agreed-upon mechanisms" set forth in the charter itself. *Id.* "Any other approach, too lightly followed, converts federal judges from interpreters of

the document into newly commissioned authors of it." *Id.*

In other words, a change in something as integral to the survival of society as the definition and meaning of marriage, if it could be altered at all (which it cannot be), is reserved for the political process, not the judicial. As this Court wrote in *Windsor*, "a statewide deliberative process that enable[s] its citizens to discuss and weigh arguments for and against same-sex marriage" demonstrates respect for the democratic process and the structural restraints embedded in our Constitution. *Windsor*, 133 S.Ct. at 2689.

Just as the State of New York's actions in responding "'to the initiative of those who [sought] a voice in shaping the destiny of their own times'"[6] by recognizing same-sex marriage "were without doubt a proper exercise of its sovereign authority within our federal system, all in the way that the Framers of the Constitution intended," so the actions and initiative of the people of Michigan who worked so long and so hard to enact the MMPA were also without a doubt a proper exercise of their sovereign authority within our federal system.[7]

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[6] *Id.* at 2692 (quoting *Bond v. United States*, 564 U.S. ___, 131 S.Ct. 2355, 2364 (2011)).

[7] In truth, New York's attempt to redefine marriage must ultimately fail, because, as shown above, the essence of marriage is one man and one woman united for life; it cannot be changed,

(Continued on following page)

As Judge Kelly stated in his partial dissent in *Kitchen v. Herbert*: "If the States are the laboratories of democracy, requiring every state to recognize same-gender unions – contrary to the views of its electorate and representatives – turns the notion of a limited national government on its head." 755 F.3d 1193, 1231 (10th Cir. 2014) (Kelly, J., concurring in part and dissenting in part) (citing *Bond*, 131 S.Ct. at 2364). That is precisely what Petitioners are asking this Court to do: to arrogate to itself ultimate authority over all issues of importance to the nation, regardless of the structural and political limitations inherent in our federalist system of government.

Predictably, Petitioners argue that this Court should act because it is "emphatically the province and duty of the judicial department to say what the law is." Pet. Br. at 28 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). Regardless of the truth of that proclamation, it is emphatically *not* the province of the Court to say what the law *should be*. That is the province of the legislature, not the judiciary.

Amicus urges this Court to decline Petitioners' invitation, and to exercise judicial restraint. To purport to alter the essence of marriage by the Court's *ipse dixit* is to throw down the gauntlet against the

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regardless of the will of *ipse dixit* of a court or a legislature. Nevertheless, the legislative process was respected in New York, and it should be respected here.

people and against the sovereign states that gave life to this federal government in the first place.

B. Federalizing a Redefinition of Marriage Would Undermine This Court's Fourteenth Amendment Jurisprudence.

Petitioners' effort to federalize a heretofore unknown redefinition of marriage and family also asks this Court to reject over a century of carefully crafted jurisprudence addressing the constitutional allocation of power between the federal and state governments. Although it is difficult to estimate the destructive impact a decision to federalize the redefinition of marriage would have on this Court's precedent, the following are some of the most certain and egregious consequences. It would require this Court to repudiate its carefully crafted Fourteenth Amendment jurisprudence. In short, Petitioners ask this Court to pursue a course of action utterly inconsistent with the constitutional allocation of sovereignty in our federal system. This Court should reject their request summarily.

1. Petitioners' demands impugn the sovereignty of both the people and the state.

Petitioners' contempt for the sovereignty of the people expressed via the democratic process yields a parallel contempt for the sovereignty of the states. The disregard for state sovereignty is unavoidable

given that the case concerns marriage, and ultimately family, for as this Court made plain over a century ago, "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not the laws of the United States." *In re Burrus*, 136 U.S. 586, 593-94 (1890).

But the larger point, which highlights the destructive impact that a decision to federalize a redefinition of marriage would have on this Court's precedent, is that the decision in *In re Burrus* is just one manifestation of the federal structure that provides the bedrock for our system of limited government. In the federal structure created by our Constitution, the states retain "a residuary and inviolable sovereignty," with the consequence that both Congress and this Court must "treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation." *Alden v. Maine*, 527 U.S. 706, 715, 748 (1999).

Given that "Supreme Power resides in the body of the people," *Chisholm v. Georgia*, 2 U.S. 419, 457 (1793), it follows that the state sovereignty protected by the constitutional allocation of power is inextricably interwoven with popular sovereignty. And from this it follows that the constitutional allocation of power is a means to the ultimate end of constitutional government – nothing less than government of, by, and for the people. "State sovereignty is not just an end in itself: 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign

power.'" *New York v. United States*, 505 U.S. 144, 181 (1992) (quoting *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting)). As this Court recently affirmed, "[f]ederalism secures the freedom of the individual." *Bond*, *supra*, 131 S.Ct. at 2364.

Accordingly, this Court has insisted that when the states operate in their traditional areas of competence our Constitution is understood to "allow the States great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons." *Gonzales v. Oregon*, 546 U.S. 243, 270 (2005). And the deference accorded state action in the traditional areas of state sovereignty in turn reflects the insight that the "federal structure allows local policies more sensitive to the diverse needs of a heterogeneous society, permits innovation and experimentation, enables greater citizen involvement in democratic processes, and makes government more responsive by putting the States in competition for a mobile citizenry." *Bond*, 131 S.Ct. at 2364 (internal quotation marks and citation omitted). This Court would have to eviscerate centuries of painstakingly crafted jurisprudence elaborating the place of the Fourteenth Amendment in the federal structure in order to redefine marriage as a matter of federal law.

2. Petitioners' demands would destroy the coherence and integrity of this Court's Fourteenth Amendment jurisprudence.

Federalizing a redefinition of marriage would also destroy the coherence and integrity of this Court's carefully crafted Fourteenth Amendment jurisprudence. Even in this area, where claims of federal power vis-à-vis the states are at their apogee, this Court has labored long and hard to "strike[ ] the proper balance between the supremacy of federal law and the separate sovereignty of the States." *Alden*, 527 U.S. at 757.

In *City of Boerne v. Flores*, 521 U.S. 507, 516 (1997), for example, this Court began its review of the Religious Freedom Restoration Act (RFRA), by emphasizing that the "Federal Government is one of enumerated powers," *id*. at 516, and cautioning that a federal "power to legislate generally upon life, liberty, and property . . . was repugnant to the Constitution." *Id*. at 525. Noting the dramatic impact the federal law would have on the States, "in terms of curtailing their traditional general regulatory power," *id.* at 534, it struck down the intrusion on state sovereignty as inconsistent with this Court's precedent.

Significantly, this Court has eschewed illicit aggrandizements of its power at the expense of state sovereignty even when premised on the Fourteenth Amendment. Thus in *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000), this Court rejected an abrogation

of state sovereign immunity for claims advanced under the Age Discrimination in Employment Act (ADEA), emphasizing that "[o]ur Constitution permits States to draw lines on the basis of age when they have a rational basis for doing so," *id.* at 86, and concluding that "[j]udged against the backdrop of our equal protection jurisprudence, it is clear that ADEA is so out of proportion to the supposed remedial or preventive object that it cannot be understood as . . . designed to prevent unconstitutional behavior." *Id.* at 64. To the same effect is this Court's decision in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), in which this Court rejected an abrogation of state sovereign immunity under the Americans with Disabilities Act because the state's actions were only subject to rational basis review and the legislative record "simply fail[ed] to show that Congress did in fact identify a pattern of irrational state discrimination . . . against the disabled." *Id*. at 368.

Garrett draws attention to another prominent feature of Fourteenth Amendment jurisprudence that merits attention here: use of rational basis review for all but a small group of cases arising from unique circumstances not present here. This practice of deference to legislative judgments in all but the most exceptional cases provides further evidence of the great premium this Court places upon the sovereignty of the people, and consequently, state sovereignty.

In *Garrett*, this Court struck down a federal effort to regulate state employment practices regarding

disabled persons because "[u]nder rational-basis review, where a group possesses distinguishing characteristics relevant to interests the State has authority to implement, a State's decision cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Garrett*, 531 U.S. at 366-67. This Court emphasized its longstanding rule in such cases that the "State need not articulate its reasoning at the moment a particular decision is made," because "the burden is upon the challenging party to negative any reasonably conceivable state of facts that could provide a rational basis for the classification." *Id.* at 367 (internal quotation marks omitted). The Court distinguished *Cleburne v. Cleburne Living Ctr., Inc.,* 473 U.S. 432 (1985), as a case involving "[m]ere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable. . . ." *Garrett*, 531 U.S. at 367.

Cases in which this Court has allowed federal impositions upon state sovereignty under the Fourteenth Amendment are very few, involve extreme circumstances, and provide no meaningful guidance for the cases at bar. For obvious reasons, this Court has rightly upheld federal legislation striking at racial classifications, "a difficult subject against a historical background of race in America that has been a source of tragedy and persisting injustice." *Schuette*, 134 S.Ct. at 1637; *see also South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (upholding federal law restricting state regulation of voting under the

Fifteenth Amendment); *Katzenbach v. Morgan*, 384 U.S. 641 (1966) (upholding federal law regulating state voting under the Fourteenth Amendment). Likewise, it has upheld exercises of federal authority designed to eradicate sex-discrimination well established by the record. *See Nev. Dep't of Human Resources v. Hibbs*, 538 U.S. 721, 729 (2003) (noting "[t]he history of many state laws limiting women's employment opportunities is chronicled in – and, until relatively recently, was sanctioned by – this Court's own opinions.").

But this Court has been vigilant to resist abusive claims made for federal power even in these areas. Thus in *Shelby County v. Holder*, ___ U.S. ___, 133 S.Ct. 2612 (2013), this Court rejected the continued regulation of states even though such measures were once unquestionably proper because there was no showing of current need. *Id.* at 2622. Likewise, in *Coleman v. Court of Appeals of Maryland*, ___ U.S. ___, 132 S.Ct. 1327 (2012), this Court rejected federal abrogation of state sovereign immunity because there was no showing sufficient to justify the regulation of state sovereignty. *Id*. at 1338 (noting that in order to abrogate state sovereign immunity, "Congress must identify a pattern of constitutional violations . . . [i]t failed to do so. . . .").

Similarly, this Court's decision in *Romer v. Evans*, 517 U.S. 620 (1996), cannot support Petitioners' effort to federalize – and revolutionize – the definition of marriage and family. In *Romer*, this Court struck down a criminal law employing a classification based

on sexual-orientation. But it did so because the classification "impos[ed] a broad and undifferentiated disability on a single group," *id*. at 632, which was "identifie[d] . . . by a single trait and then denie[d] . . . protection across the board." *Id*. at 633. Confronted with a law of that kind, this Court found that it "raised the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Id*. at 634.

By contrast, no credible claim can be made that *Romer's* rationale applies here. The present case concerns state laws addressing the ability to marry alone – not the broad and undifferentiated equal protection of the law as in *Romer*. The law governing marriage limits the institution to the union of one man and one woman, applies equally to both, and applies without regard to sexual orientation (or practice, for that matter). *Romer* is therefore inapposite.

Finally, this Court's recent decision in *Windsor* offers yet another explanation why the Fourteenth Amendment cannot be used to nationalize the definition of marriage. In *Windsor*, this Court confronted a federal statute, the Defense of Marriage Act (DOMA), which did not treat as married persons whose marriages were deemed lawful under the law of their home state. This Court began by emphasizing that state laws "defining and regulating marriage . . . must respect the constitutional rights of persons . . . but, subject to those guarantees, regulation of domestic relations is an area that has long been regarded as

a virtually exclusive province of the States." 133 S.Ct. at 2691.

As this Court stated, the "significance of state responsibilities for the definition and regulation of marriage dates to the Nation's beginning; for when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States." *Id*. This Court held that DOMA violated Due Process on the grounds that "DOMA, because of its reach and extent, departs from this history and tradition of reliance on state law to define marriage," *id*. at 2692, and "impose[d] a disability on a class by refusing to acknowledge a status the State finds to be dignified and proper." *Id*. at 2695-96. In this way, *Windsor* jibes with the mainstream of precedent addressing the allocation of sovereignty in our federal system, and more specifically, the status of marriage as the proper subject of state regulation.

There is no question that the American people are engaged in a great national debate about the very nature of the institution of marriage. *See Hollingsworth v. Perry*, ___ U.S. ___, 133 S.Ct. 2652, 2659 (2013) (noting that the "public is currently engaged in an active political debate over whether same-sex couples should be allowed to marry"). But surely this Court is not prepared to stifle that discussion – and purport to dictate the result on this issue – by employing the Fourteenth Amendment in a way that blatantly disregards state sovereignty. This Court

should therefore reject Petitioners' request and affirm the decision below.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

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