Appeal No. 14-3057

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES OBERGEFELL; JOHN ARTHUR; DAVID BRIAN MICHENER; ROBERT GRUNN,

Plaintiffs-Appellees,

v.

LANCE D. HIMES, In his official capacity as the Interim Director of the Ohio Department of Health,

Defendant-Appellant,

CAMILLE JONES,

Defendant.

On Appeal from the United States District Court
for the Southern District of Ohio at Cincinnati
Civil Case No. 1:13-cv-00501 (Honorable Timothy S. Black)

AMICUS CURIAE BRIEF OF CITIZENS FOR COMMUNITY VALUES IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 14-3057 Case Name: Obergefell, et al v. Himes, et al

Name of counsel: Byron J. Babione

Pursuant to 6th Cir. R. 26.1, Proposed Amicus Curiae Citizens for Community Values
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

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No.

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I certify that on April 17, 2014 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Byron J. Babione
Attorney for Amicus Curiae

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Amicus Curiae Citizens for Community Values ("CCV") is an organization that exists to strengthen Ohio families through public advocacy, education, and active community partnership. CCV focuses its efforts on public-policy issues involving marriage, children, and the family, and believes that strong families are founded on the ideal of a lifelong marriage of one man and one woman, and that healthy, enduring marriages enrich the lives of the couple, their children, and the community around them.

This case questions the constitutionality of Ohio's sovereign decision to preserve marriage as the union between one man and one woman. CCV's interest in this case derives from the important public-policy issues implicated by that legal question. In concert with its mission, CCV provides the Court here with its amicus brief, which establishes that the Constitution of the United States permits Ohio to maintain the gendered view of marriage, and confirms that its decision to do so is eminently rational.

[1] This brief is filed pursuant to Federal Rule of Appellate Procedure 29(a) without objection from any party. No party or party's counsel authored this brief in whole or in part or financially supported this brief, and no one other than amicus curiae, its members, or its counsel contributed money intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

The People throughout the various States are engaged in an earnest public discussion about the meaning, purpose, and future of marriage. As a bedrock social institution, marriage has always existed to channel the presumptive procreative potential of man-woman relationships into committed unions for the benefit of children and society. Despite this enduring purpose, some now seek to redefine marriage from a gendered to a genderless institution. Meanwhile, many others sincerely believe that redefining marriage as a genderless institution would obscure its animating purpose and thereby undermine its social utility. Nothing in the Constitution forbids States from either adopting a genderless marriage regime, or affirming gendered marriage.

Yet those who seek to redefine marriage as a genderless institution disagree—in effect they contend that the Constitution itself defines marriage as a genderless institution, and that the People have no say in deciding the weighty social, philosophical, political, and legal issues implicated by this public debate. But this view is mistaken. The Constitution has not removed this question from the People, and it has not settled this critical social-policy issue entrusted to the States.

Although this particular case presents a marriage recognition issue, it implicates the same question as those cases in which Plaintiffs seek a right to marry—whether a sovereign State can determine for itself the definition of

marriage for its own community. The answer is simple—the Fourteenth Amendment does not compel Ohio to adopt a genderless marriage regime. The Supreme Court's recent decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013), confirms this, as any other conclusion would contravene *Windsor* by federalizing a uniform definition of marriage.

Indeed, federal constitutional review of a State's definition of marriage "must be particularly deferential," *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 867 (8th Cir. 2006), because States, subject only to clear constitutional constraints, have an "absolute right to prescribe the conditions upon which the marriage relation between [their] own citizens shall be created." *Sosna v. Iowa*, 419 U.S. 393, 404 (1975) (quotation marks and citations omitted). Ohio's Marriage Laws are subject only to, and easily and convincingly satisfy, rational basis review, and the State's sovereign right to maintain man-woman marriage is further confirmed by consistent Supreme Court jurisprudence establishing that Ohio need not adopt the laws of any other state as its own.

Plaintiffs' constitutional arguments are foreclosed by the enduring public purpose of marriage. History leaves no doubt that marriage owes its existence to society's vital interest in channeling the presumptively procreative potential of man-women relationships into committed unions for the benefit of children and society. Marriage is inextricably linked to the fact that man-woman couples, and

only such couples, are capable of naturally creating new life together, therefore furthering, or threatening, society's interests in responsibly creating and rearing the next generation. That fact alone forecloses Plaintiffs' claims because governing Supreme Court precedent makes clear that a classification will be upheld when "the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not[.]" *Johnson v. Robison*, 415 U.S. 361, 383 (1974).

Marriage laws have been, and continue to be, about the pragmatic business of serving society's child-centered purposes, like connecting children to their mother and father, and avoiding the negative outcomes often experienced by children raised outside a stable family unit led by their biological parents. Redefining marriage harms marriage's ability to serve those interests by severing marriage's inherent connection to procreation and communicating that the primary end of marriage laws is to affirm adult desires rather than serve children's needs, and suppressing the importance of both mothers and fathers to children's development. Faced with these concerns about adverse future consequences, Ohio is free to affirm the man-woman marriage institution, believing that, in the long run, it will best serve the wellbeing of the State's children—their most vulnerable citizens—and society as a whole. Ohioans thus have the right to decide the future

of marriage for their community and thereby "shap[e] the destiny of their own times." *Windsor*, 133 S. Ct. at 2692 (quotation marks omitted).

ARGUMENT

I. The Fourteenth Amendment Does Not Forbid the Domestic-Relations Policy Reflected in Ohio's Marriage Laws.

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

Evaluating the constitutionality of Ohio's Marriage Laws begins with an assessment of the government's interest in (or purpose for) those laws. The government's purpose for recognizing and regulating marriage is distinct from the many private reasons that people marry—reasons that often include love, emotional support, or companionship.

Indeed, from the State's perspective, marriage is a vital social institution that serves indispensable public purposes. As the Supreme Court has stated, marriage is "an institution more basic in our civilization than any other," *Williams v. North Carolina*, 317 U.S. 287, 303 (1942), "fundamental to the very existence and survival of the [human] race." *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (quotations omitted). "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[.]" *Maynard v. Hill*, 125 U.S. 190, 211 (1888).

Throughout history, marriage as a man-woman institution designed to serve the needs of children has been ubiquitous, spanning diverse cultures, nations, and religions. Anthropologists have recognized that "the family—based on a union, more or less durable, but socially approved, of two individuals of opposite sexes who establish a household and bear and raise children—appears to be a practically universal phenomenon, present in every type of society." Claude Levi-Strauss, *The View From Afar* 40-41 (1985); *see also* G. Robina Quale, *A History of Marriage Systems* 2 (1988) ("Marriage, as the socially recognized linking of a specific man to a specific woman and her offspring, can be found in all societies.").

Marriage as a public institution exists to channel sex between men and women into stable unions for the benefit of the children that result and, thus, for the good of society as a whole. Scholars from a wide range of disciplines have acknowledged that marriage is "social recognition . . . imposed for the purpose of regulation of sexual activity and provision for offspring that may result from it." Norval D. Glenn, *The Struggle For Same-Sex Marriage*, 41 Soc'y 25, 26 (2004); *see also* W. Bradford Wilcox et al., eds., *Why Marriage Matters* 15 (2d ed. 2005).

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

that the mere desire for children, and the sex that makes children possible, does not solve." James Q. Wilson, *The Marriage Problem* 41 (2002); *see also* Kingsley Davis, *Introduction: The Meaning and Significance of Marriage in Contemporary Society*, *in* Contemporary Marriage: Comparative Perspectives on a Changing Institution 1, 7-8 (Kingsley Davis ed., 1985).

The origins of our law affirm this enduring purpose of marriage. William Blackstone stated that the "principal end and design" of marriage is linked directly to the "great relation[]" of "parent and child," and that the parent-child relation "is consequential to that of marriage." 1 William Blackstone, Commentaries *410. Blackstone further observed that "it is by virtue of this relation that infants are protected, maintained, and educated." *Id.*

Before the recent political movement to redefine marriage, it was commonly understood and accepted that the public purpose of marriage is to channel the presumptively procreative potential of sexual relationships between men and women into committed unions for the benefit of children and society. Certainly no other purpose can plausibly explain why marriage is so universal or even why it exists at all. *See* Robert P. George et al., *What is Marriage?* 38 (2012).

B. *Windsor* Emphasizes the State's Authority to Define Marriage and Thus Supports the Propriety of Ohio's Marriage Laws.

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

First, the central theme of *Windsor* is the right of States to define marriage for their community. *See, e.g.*, 133 S. Ct. at 2689-90 ("the definition and regulation of marriage" is "within the authority and realm of the separate States"); *id.* at 2691 ("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* stated, in no uncertain terms, that the Constitution permits States to define marriage through the political process, extolling the importance of "allow[ing] the formation of consensus" when States decide critical questions like the definition of marriage:

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

Id. (quotation marks, alterations, and citation omitted).

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

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

These three principles—that States have the right to define marriage for themselves, that States may differ in their marriage laws concerning which couples are permitted to marry, and that federalism demands deference to state marriage policies—lead to one inescapable conclusion: that Ohioans (no less than citizens in States that have chosen to redefine marriage) have the right to define marriage for their community. Any other outcome would contravene *Windsor* by federalizing a definition of marriage and overriding the policy decisions of States (like Ohio) that have chosen to maintain the man-woman marriage institution.

The District Court's and Plaintiffs' reliance on *Windsor*'s equal-protection analysis is therefore unpersuasive. *Windsor* repeatedly stressed DOMA's "unusual character"—its novelty—in "depart[ing] from th[e] history and tradition of [federal] reliance on state law to define marriage." 133 S. Ct. at 2692-93 (referring to this feature of DOMA as "unusual" at least three times). The Court reasoned that this unusual aspect of DOMA required "careful" judicial "consideration" and revealed an improper purpose and effect. *Id.* at 2692; *see also id.* at 2693 ("In determining whether a law is motived by an improper animus or purpose, discriminations of an unusual character especially require careful consideration.") (quotation marks and alterations omitted). Ohio's Marriage Laws, in contrast to DOMA, are neither unusual nor novel intrusions into state authority, but a proper exercise of that power; for Ohio, unlike the federal government, has "essential authority to define the marital relation." *Id*. at 2692. And Ohio's Marriage Laws are not an unusual departure from settled law, but a reaffirmation of that law; they simply enshrine the understanding and definition of marriage that have prevailed throughout the State's history. Unusualness thus does not plague Ohio's Marriage Laws or suggest any improper purpose or unconstitutional effect.

Additionally, *Windsor* "confined" its equal-protection analysis and "its holding" to the federal government's treatment of couples "who are joined in same-sex marriages made lawful by the State." *Id.* at 2695-96. Thus, when

discussing the purposes and effects of DOMA, the Court focused on the fact that the federal government (a sovereign entity without legitimate authority to define marriage) interfered with the choice of the State (a sovereign entity with authority over marriage) to bestow the status of civil marriage on same-sex couples. *See id.* at 2696 ("[DOMA's] purpose and effect [is] to disparage and to injure those whom the State, by its marriage laws, sought to protect"). But those unique circumstances are not presented here.

C. Rational Basis Review Applies to Plaintiffs' Claims.

Rational-basis review applies here because the Marriage Amendment does not infringe a fundamental right or impermissibly discriminate based on a suspect classification. *See Johnson v. Bredesen*, 624 F.3d 742, 746 (6th Cir. 2010).

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

The District Court was compelled to admit that "most courts have not found that a right to same-sex marriage is implicated in the fundamental right to marry." *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 977 (S.D. Ohio 2013). Yet despite the clear import of controlling and persuasive authority, the court refashioned the fundamental right at issue as "the right not to be deprived of one's already existing legal marriage and its attendant rights and benefits." *Id*. at 978. Unfortunately the court cited to no controlling legal authority for the existence of such a right, but rather relied upon a recent law review article written precisely to suggest the

existence of this particular right as an initial matter.[2] *Id*. at 978 n.7. In so doing, the court clearly departed from Supreme Court precedent on the existence and treatment of fundamental rights.

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

The District Court's exceedingly expansive and novel characterization runs afoul of *Glucksberg*'s "careful description" command. In *Glucksberg*, the plaintiffs sought to evade the obvious lack of historical support for their claimed right to assisted suicide by variously defining it as a "liberty to choose how to die," a "right to control of one's final days," a "right to choose a humane, dignified death," and a "liberty to shape death." 521 U.S. at 722 (quotation marks omitted). The Supreme Court rejected those formulations and instead carefully described the asserted right

[2] *See* Steve Sanders, *The Constitutional Right to (Keep Your) Same-Sex Marriage*, 110 Mich. L. Rev. 1421 (2012) ("In this Article, I *argue* that an individual who marries in her state of domicile and then migrates to a mini-defense of marriage act state has a significant liberty interest under the Fourteenth Amendment's Due Process Clause in the ongoing existence of her marriage.") (emphasis added).

with specificity as "the right to commit suicide which itself includes a right to assistance in doing so." *Id*. at 723. The Court then concluded that no such liberty had ever existed in the Nation's history or tradition, and accordingly refused "to reverse centuries of legal doctrine and practice." *Id*. The same logic applies here. The District Court in this instance created a fundamental right out of whole cloth, and this Court should refrain from endorsing it. Supreme Court precedent commands no less.

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

Equal-protection analysis requires the reviewing court to precisely identify the classification drawn by the challenged law. *See Califano v. Boles*, 443 U.S. 282, 293-94 (1979) ("The proper classification for purposes of equal protection analysis . . . begin[s] with the statutory classification itself."). By defining marriage as the union of man and woman, diverse societies, including Ohio, have drawn a line between man-woman couples and all other types of relationships (including same-sex couples). This is the precise classification at issue here, and it is based on an undeniable biological difference between man-woman couples and same-sex couples—namely, the natural capacity to create children.

This biological distinction relates directly to Ohio's interests in regulating marriage. And this distinguishing characteristic establishes that Ohio's definition

of marriage is subject only to rational-basis review, for as the Supreme Court has explained:

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

City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 441-42 (1985). Relying on this Supreme Court precedent, New York's highest court "conclude[d] that rational basis scrutiny is appropriate" when "review[ing] legislation governing marriage and family relationships" because "[a] person's preference for the sort of sexual activity that cannot lead to the birth of children is relevant to the State's interest in fostering relationships that will serve children best." *Hernandez v. Robles*, 855 N.E.2d 1, 11 (N.Y. 2006). Even if this relevant biological difference between man-woman couples and same-sex couples were characterized as a sexual-orientation-based distinction rather than the couple-based procreative-related distinction that it is, this Court, like many others, has concluded that sexual orientation is not a suspect classification. *Davis v. Prison Health Servs.*, 679 F.3d 433, 438 (6th Cir. 2012). Rational-basis review thus applies here.

II. Ohio's Marriage Laws Satisfy Rational-Basis Review.

Rational-basis review constitutes a "paradigm of judicial restraint," under which courts have no "license . . . to judge the wisdom, fairness, or logic of legislative choices." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313-14 (1993). "A statutory classification fails rational-basis review only when it rests on grounds wholly irrelevant to the achievement of the State's objective." *Heller v. Doe*, 509 U.S. 312, 324 (1993) (quotation marks omitted); *see also Dandridge v. Williams*, 397 U.S. 471, 485 (1970) (noting that the challenged classification need not be "made with mathematical nicety") (quotation marks omitted). Thus, Ohio's Marriage Laws "must be upheld . . . if there is any reasonably conceivable state of facts that could provide a rational basis for" them. *Beach Commc'ns, Inc.*, 508 U.S. at 313. And because "marriage has always been, in our federal system, the predominant concern of state government . . . rational-basis review must be particularly deferential" in this context. *Bruning*, 455 F.3d at 867.

1. Ohio's Marriage Laws Further Compelling Interests.

By providing special recognition and support to man-woman relationships, the institution of marriage recognized by Ohio seeks to channel potentially procreative conduct into stable, enduring relationships, where that conduct is likely to further, rather than harm, society's vital interests. The interests that Ohio furthers through this channeling function are at least threefold: (1) providing

stability to the types of relationships that result in unplanned pregnancies, thereby avoiding or diminishing the negative outcomes often associated with unintended children; (2) encouraging the rearing of children by both their mother and their father; and (3) encouraging men to commit to the mothers of their children and jointly raise the children they beget. These interests promote the welfare of children and society, and thus they are not merely legitimate but also compelling, for "[i]t is hard to conceive an interest . . . more paramount for the state than promoting an optimal social structure for educating, socializing, and preparing its future citizens to become productive participants in civil society." *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804, 819 (11th Cir. 2004).

Unintended Children. Ohio has a compelling interest in addressing the particular concerns associated with the birth of unplanned children. Nearly half of all pregnancies in the United States, and nearly 70 percent of pregnancies that occur outside marriage, are unintended. Lawrence B. Finer and Mia R. Zolna, *Unintended Pregnancy in the United States: Incidence and Disparities, 2006*, 84 Contraception 478, 481 Table 1 (2011). Yet unintended births out of wedlock "are associated with negative outcomes for children." Elizabeth Wildsmith et al., *Childbearing Outside of Marriage: Estimates and Trends in the United States*, Child Trends Research Brief 5 (Nov. 2011).

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

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

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

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

Biological Parents. Ohio has a compelling interest in encouraging biological parents to join in a committed union and raise their children together. Indeed, the

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

"[T]he biological bond between a parent and a child is a strong foundation" for "a stable and caring relationship." *Adoptive Couple*, 133 S. Ct. at 2582 (Sotomayor, J., dissenting). The law has thus historically presumed that these "natural bonds of affection lead parents to act in the best interests of their children." *Parham v. J.R.*, 442 U.S. 584, 602 (1979); *accord Troxel v. Granville*, 530 U.S. 57, 68 (2000); *see also* 1 William Blackstone, Commentaries *435 (recognizing the "insuperable degree of affection" for one's natural children "implant[ed] in the breast of every parent").

Social science has proven this presumption well founded, as the most reliable studies have shown that, on average, children develop best when reared by their married biological parents in a stable family unit. As one social-science

survey has explained, "research clearly demonstrates that family structure matters for children, and the family structure that helps children the most is a family headed by two biological parents in a low-conflict marriage." Moore, *supra*, at 6. "Thus, it is not simply the presence of two parents . . . , but the presence of *two biological parents* that seems to support children's development." *Id.* at 1-2.[3]

In addition to these tangible deficiencies in development, children deprived of their substantial interest in "know[ing] [their] natural parents," as the Supreme Court has recognized, experience a "loss[] [that] cannot be measured," one that "may well be far-reaching." *Santosky v. Kramer*, 455 U.S. 745, 760 n.11 (1982). Indeed, studies reflect that "[y]oung adults conceived through sperm donation" (who thus lack a connection to, and often a knowledge of, their biological father)

[3] *See also* W. Bradford Wilcox et al., eds., *Why Marriage Matters* 11 (3d ed. 2011) ("The intact, biological, married family remains the gold standard for family life in the United States, insofar as children are most likely to thrive—economically, socially, and psychologically—in this family form."); Wendy D. Manning and Kathleen A. Lamb, *Adolescent Well Being in Cohabiting, Married, and Single-Parent Families*, 65 J. Marriage & Fam. 876, 890 (2003) ("Adolescents in married, two-biological-parent families generally fare better than children in any of the family types examined here, including single-mother, cohabiting stepfather, and married stepfather families. The advantage of marriage appears to exist primarily when the child is the biological offspring of both parents. Our findings are consistent with previous work[.]"); Sara McLanahan and Gary Sandefur, *Growing Up with a Single Parent: What Hurts, What Helps* 1 (1994) ("Children who grow up in a household with only one biological parent are worse off, on average, than children who grow up in a household with both of their biological parents, regardless of the parents' race or educational background, regardless of whether the parents are married when the child is born, and regardless of whether the resident parent remarries.").

"experience profound struggles with their origins and identities." Elizabeth Marquardt et al., *My Daddy's Name is Donor: A New Study of Young Adults Conceived Through Sperm Donation*, Institute for American Values, at 7, *available at* http://familyscholars.org/my-daddys-name-is-donor-2/.

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

Fathers. Ohio has a compelling interest in encouraging fathers to remain with their children's mothers and participate in raising them. "The weight of scientific evidence seems clearly to support the view that fathers matter." Wilson, *supra*, at 169; *see, e.g.*, Elrini Flouri and Ann Buchanan, *The role of father involvement in children's later mental health*, 26 J. Adolescence 63, 63 (2003) ("Father involvement . . . protect[s] against adult psychological distress in women."); Bruce J. Ellis et al., *Does Father Absence Place Daughters at Special Risk for Early Sexual Activity and Teenage Pregnancy?*, 74 Child Dev. 801, 801 (2003) ("Greater exposure to father absence [is] strongly associated with elevated risk for early sexual activity and adolescent pregnancy."). President Obama has observed the adverse consequences of fatherlessness:

> We know the statistics—that children who grow up without a father are five times more likely to live in

> poverty and commit crime; nine times more likely to drop out of schools and twenty times more likely to end up in prison. They are more likely to have behavioral problems, or run away from home, or become teenage parents themselves. And the foundations of our community are weaker because of it.

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

The importance of fathers reflects the importance of gender-differentiated parenting. "The burden of social science evidence supports the idea that gender-differentiated parenting is important for human development." David Popenoe, *Life Without Father* 146 (1996). Indeed, both commonsense and "[t]he best psychological, sociological, and biological research" confirm that "men and women bring different gifts to the parenting enterprise, [and] that children benefit from having parents with distinct parenting styles[.]" W. Bradford Wilcox, *Reconcilable Differences: What Social Sciences Show About Complementarity of Sexes & Parenting*, Touchstone, Nov. 2005.

Recognizing the child-rearing benefits that flow from the diversity of both sexes is consistent with our legal traditions. *See Bowen v. Gilliard*, 483 U.S. 587, 614 (1987) (Brennan, J., dissenting) (acknowledging that "children have a fundamental interest in sustaining a relationship with their mother . . . [and] father" because, among other reasons, "the optimal situation for the child is to have both

an involved mother and an involved father" (quotation marks and alterations omitted)). Our constitutional jurisprudence acknowledges that "[t]he two sexes are not fungible." *United States v. Virginia*, 518 U.S. 515, 533 (1996) (quotation marks omitted). It thus logically follows that a child would benefit from the diversity of having both her father and mother involved in her everyday upbringing. *See Hernandez*, 855 N.E.2d at 7 (permitting the State to conclude that "it is better, other things being equal, for children to grow up with both a mother and a father"). Ohio, therefore, has a vital interest in fostering the involvement of fathers in the lives of its children.

2. Ohio's Marriage Laws Are Rationally Related to Furthering Compelling Interests.

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

Therefore, the relevant inquiry here is not whether excluding same-sex couples from marriage furthers the State's interest in steering man-woman couples into marriage, but rather "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 (Wash. 2006) (plurality opinion); *Morrison v. Sadler*, 821 N.E.2d 15, 23, 29 (Ind. Ct. App. 2005); *Standhardt v. Superior Court of State of Arizona*, 77 P.3d 451, 463 (Ariz. Ct. App. 2003).

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

Under this analysis, Ohio's Marriage Laws plainly satisfy constitutional review. Sexual relationships between men and women, and only such relationships, naturally produce children, and they often do so unintentionally. *See* Finer, *supra*,

at 481 Table 1. By granting recognition and support to man-woman couples, marriage generally makes those potentially procreative relationships more stable and enduring, and thus increases the likelihood that each child will be raised by the man and woman whose sexual union brought her into the world. *See, e.g.*, Wildsmith, *supra*, at 5; Wendy D. Manning et al., *The Relative Stability of Cohabiting and Marital Unions for Children*, 23 Population Research & Pol'y Rev. 135, 135 (2004).

Sexual relationships between individuals of the same sex, by contrast, do not unintentionally create children as a natural byproduct of their sexual relationship; they bring children into their relationship only through intentional choice and pre-planned action. Moreover, same-sex couples do not provide children with both their mother and their father. Those couples thus neither advance nor threaten society's public purpose for marriage in the same manner, or to the same degree, that sexual relationships between men and women do. Under *Johnson* and *Cleburne*, that is the end of the analysis: Ohio's Marriage Laws should be upheld as constitutional.

In short, it is plainly reasonable for Ohio to maintain an institution singularly suited to address the unique challenges and opportunities posed by the procreative potential of sexual relationships between men and women. *See, e.g.*, *Vance v. Bradley*, 440 U.S. 93, 109 (1979) (stating that a law may "dr[aw] a line around

those groups . . . thought most generally pertinent to its objective"); *Johnson*, 415 U.S. at 378 (stating that a classification will be upheld if "characteristics peculiar to only one group rationally explain the statute's different treatment of the two groups"). Consequently, the "commonsense distinction," *Heller*, 509 U.S. at 326, that Ohio law has always drawn between same-sex couples and man-woman couples "is neither surprising nor troublesome from a constitutional perspective." *Nguyen v. INS*, 533 U.S. 53, 63 (2001).

That is why "a host of judicial decisions" have concluded that "the many laws defining marriage as the union of one man and one woman and extending a variety of benefits to married couples are rationally related to the government interest in 'steering procreation into marriage.'" *Bruning*, 455 F.3d at 867-68; *see, e.g.*, *Jackson*, 884 F. Supp. 2d at 1112-14; *In re Marriage of J.B. & H.B.*, 326 S.W.3d 654, 677-78 (Tex. App. 2010); *Conaway v. Deane*, 932 A.2d 571, 630-34 (Md. 2007); *Andersen*, 138 P.3d at 982-85 (plurality opinion); *Hernandez*, 855 N.E.2d at 7-8; *Morrison*, 821 N.E.2d at 23-31; *Standhardt*, 77 P.3d at 461-64; *Adams v. Howerton*, 486 F. Supp. 1119, 1124-25 (C.D. Cal. 1980); *Singer v. Hara*, 522 P.2d 1187, 1197 (Wash. Ct. App. 1974); *Baker v. Nelson*, 191 N.W.2d 185, 186-87 (Minn. 1971).

III. Plaintiffs' Recognition Claim Lacks Merit.

The District Court's fashioning of a novel "right to remain married," *Obergefell v. Wymyslo*, 962 F. Supp. 2d at 978, directly conflicts with the established right of sovereign states to constitutionally legislate for their own polities within their own borders, and additionally confuses a general rule of comity regarding foreign marriages with a constitutional mandate. In short, while it may be a generally accepted practice to recognize marriages as valid if they are otherwise valid where celebrated, such a practice is not constitutionally required, especially where such recognition will offend the public policy of the domicile state. Moreover, any attempted comparison to *Windsor* again proves illusory, and ignores the crucial distinction between *Windsor* and this case: the government actor that declined to recognize a marriage in *Windsor* (the federal government) had "no authority . . . on the subject of marriage," 133 S. Ct. at 2691 (quotation marks omitted), whereas the government actor that declines to recognize an out-of-state union here (the State of Ohio) has "essential authority to define the marital relation" within its borders. *Id.* at 2692. Thus, this Court should conclude that when declining to recognize a marriage license issued by another state, Ohio (a sovereign entity with unquestioned authority over marriage) can and often must do what the federal government cannot—that is, refuse to recognize another state's marriages as valid.

Indeed, the implications of Plaintiffs' recognition claim starkly illustrate its foundational flaws. Their constitutional theory, if credited, would effectively require Ohio to conform its marriage policy to the varying marriage policies enacted in other States. That, in turn, would terminate States' ability to serve as "laboratories" that independently experiment with domestic-relations (and other social) policy. *See Oregon v. Ice*, 555 U.S. 160, 171 (2009); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Rather than fostering the States' freedom to experiment with different approaches to difficult social questions, Plaintiffs' theory would empower one laboratory to commandeer the others, essentially nationalizing the marriage policy of the most inventive State. Thus, for example, if one State were to legalize plural or polyamorous marriages, Ohio (like all other States), on the plea that one has a "right to remain married," would be forced to recognize those unions, notwithstanding its state constitutional prohibition against plural marriages. *See* Ohio Rev. Code § 3101.01(A). Yet the heart of *Windsor* condemns such a nationalization of marriage policy. *See* 133 S. Ct. at 2691-96.

Plaintiffs' constitutional theory, moreover, would require all States to replace the man-woman marriage institution with a genderless variety. After all, forcing a State to recognize out-of-state marriages that conflict with its core definition would *de facto* disable that State from maintaining its chosen marital

definition. Ironically, the recognition claim pressed here would place States that have redefined marriage into the marriage-meddling role played by the federal government in *Windsor*, mirroring Congress' error of interfering with the marriage policy of the various States. Yet *Windsor* counsels against one government dictating the marriage policy of another, 133 S. Ct. at 2693 (denouncing the federal government's "influence [over] a state's decision as to how to shape its own marriage laws" (quotation marks omitted)), and supports the right of each State to establish its own definition of marriage. *See, e.g.*, *id.* at 2692 (affirming the right of New Yorkers to define marriage for themselves).

Federal full-faith-and-credit principles, *see* U.S. Const. art. IV, § 1, also support the conclusion that Ohio can freely legislate for itself the definition of marriage. Indeed, Supreme Court "precedent differentiates the credit owed to laws (legislative measures and common law) and to judgments." *Baker by Thomas v. Gen. Motors Corp.*, 522 U.S. 222, 232 (1998). Here, marriage licenses issued by other States are not *judgments*, but rather reflect the operation of another State's marriage *statutes*.[4] Put simply, "[t]he Full Faith and Credit Clause does not compel

[4] *See* Ralph U. Whitten, *Full Faith and Credit for Dummies*, 38 Creighton L. Rev. 465, 476 (2005) ("In a nutshell, marriage involves an issue of full faith and credit to the public acts of other states. Marriage is sanctioned and regulated by statute in every state. The regulation of marriage by the states includes limitations on who can marry whom, including age limits, the degree of consanguinity within which marriages are permitted, residency requirements for marriage, and, of course, the permissible gender of parties to marriages. Even in situations in which, as in

'a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.'" *Baker*, 522 U.S. at 232 (quoting *Pac. Employers Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493, 501 (1939)). Instead, a State may decline to recognize another's statutes if affording such recognition "would violate [that State's] own legitimate public policy." *Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488, 497 (2003).

Ohio has decided to constitutionalize gendered marriage, *see* Ohio Const. art. XV, § 11, and has expressly stated that "[a]ny marriage between persons of the same sex is against the strong public policy of th[e] state." Ohio Rev. Code §3101.01(C)(1). Ohio marriage-recognition principles, in particular, and in contradistinction to the District Court's suggestion that Ohio "recognizes all other out-of-state marriages . . . even if not authorized nor validly performed under Ohio law," *Obergefell*, 962 F. Supp. 2d at 973, demonstrate that there is nothing unusual about the State's decision not to recognize Plaintiffs' out-of-state marriage licenses. Indeed, where a marriage is "unalterably opposed to a well defined public policy," *Mazzolini v. Mazzolini*, 155 N.E.2d 206, 208 (Ohio 1958), as same-sex marriage clearly is in Ohio, the general principle of comity in recognizing

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Massachusetts, the state's highest court invalidates a statutory restriction on state constitutional grounds, the issue remains one of full faith and credit to the public act regulating marriage with the constitutionally offensive restriction now eliminated.")

marriages valid elsewhere gives way to the sovereign prerogatives of the State to define marriage for itself. *See also Peefer v. State*, 182 N.E. 117, 121 (Ohio Ct. App. 1931) ("It is well established in [Ohio] that a marriage valid where made is valid here *unless expressly prohibited by law*") (emphasis added).

Ohio thus has not acted unusually in declining to recognize Plaintiffs' marriage licenses. Indeed, that decision falls squarely within the State's longstanding refusal to recognize foreign legal unions entered by its domiciliaries that are clearly prohibited by law or contrary to the express public policy of the State. Plaintiffs' recognition claim thus lacks merit.

CONCLUSION

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

Dated: April 17, 2014

Respectfully submitted,

s/Byron J. Babione

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C), I certify the foregoing document is proportionally spaced, has a typeface of 14 points or more, and contains 6,986 words as calculated by Microsoft Word.

Dated: April 17, 2014

s/Byron J. Babione
Byron J. Babione

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I hereby certify that on April 17th, 2014, the foregoing document was electronically filed with the Clerk of Court, and served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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