No. 14-571

In the Supreme Court of the United States

APRIL DEBOER, ET AL., PETITIONERS

v.

RICHARD SNYDER, GOVERNOR, STATE OF MICHIGAN, IN HIS OFFICIAL CAPACITY, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Fourteenth Amendment to the U.S. Constitution preclude the people of a State from defining marriage as the union of one man and one woman?

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INTRODUCTION

This case comes down to two words: who decides. The history of our democracy demonstrates the wisdom of allowing the people to decide important issues at the ballot box, rather than ceding those decisions to unelected judges. With respect to how to define marriage, the admonition of the Court's plurality opinion in *Schuette* v. *Coalition to Defend Affirmative Action* is worth repeating here: "It is demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds." 134 S. Ct. 1623, 1637 (2014). And that principle is exactly what the Sixth Circuit recognized below, holding that the issue of how to define marriage must be left where "it has been since the founding: the hands of state voters." Pet. App. 29.

Over the past two decades, the American people have discussed and debated this very topic. These discussions have culminated with the citizens of almost every State addressing the issue through the democratic process, either through direct democracy or elected legislatures, in either state constitutions or statutes. Millions of Americans have expressed their views on the issue by exercising their right to vote—a right fundamental to our constitutional system.

Early in this dialogue, state courts in Hawaii and Massachusetts took the issue out of voters' hands. Since then, the citizens of a majority of the States—30, all told—have amended their state constitutions to define marriage as only between a man and a woman, thereby preventing state judges from

overriding the democratic process. Other States addressed the issue by statute. And, within those States and others, the debate has continued. In the last five years, for example, voters in 12 States and the District of Columbia have voted to redefine marriage to include same-sex couples.

But some federal courts have recently halted this ongoing exercise of self-governance on the theory that the people have already resolved the issue by passing the Fourteenth Amendment in 1868. These courts—relying on conflicting rationales—struck down democratically enacted laws in 19 States.

Specifically, four circuits (the Fourth, Seventh, Ninth, and Tenth Circuits) and a Pennsylvania district court have struck down the statutes of four States (Pennsylvania, Virginia, West Virginia, and Wyoming) and the constitutional amendments of 15 more (Alaska, Arizona, California, Colorado, Idaho, Kansas, Montana, Nevada, North Carolina, Oklahoma, Oregon, South Carolina, Utah, Virginia, and Wisconsin). While disagreeing on the means, they have reached the same end and created a new constitutional right: a right to same-sex marriage.

In contrast, the Sixth Circuit recognized that democratic processes and our constitutional structure "may be the most reliable, liberty-assuring guarantees of our system of government." Pet. App. 14. Concluding that none of the plaintiffs' arguments made the case for constitutionalizing the definition of marriage, the court of appeals left the issue with the people at the state level. And, acknowledging that 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 States," it concluded that rational bases existed for the definition. Pet. App. 32. It thus joined the Eighth Circuit in upholding a state marriage amendment.

Michigan fully recognizes that the state democratic process must yield if the majority adopts a policy that conflicts with the U.S. Constitution. But this is not such a case. The Constitution does not define marriage; rather it leaves that task to voters at the state level. The right asserted here—to marry someone of the same sex—does not qualify as a fundamental right under this Court's substantive-due-process test, which requires a right to be "objectively, 'deeply rooted in this Nation's history and tradition.' " *Washington* v. *Glucksberg*, 521 U.S. 702, 720–21 (1997). Same-sex marriage does not have those necessary deep historical roots, as this Court recognized last year in *United States* v. *Windsor*: "It seems fair to conclude that, until recent years, many citizens had not even considered the possibility that two person of the same sex might" marry. 133 S. Ct. 2675, 2689 (2013). As the Sixth Circuit correctly held, "[n]ot one of the plaintiffs' theories" supports taking this issue away from the voters.

Given the importance of the issue—who decides important issues in our constitutional democracy—and the split among the circuits that allows the citizens of some States, but not others, to vote on the definition of marriage, Michigan does not oppose review by this Court. Instead, it asks this Court to affirm.

STATEMENT OF THE CASE

A. The history of marriage in Michigan

Michigan's marriage law dates back to its days as a territory. From the beginning, marriage has been the union of one man and one woman. E.g., 1 *Laws of the Territory of Michigan* 30–32 (W.S. George & Co. 1871) (1805 statute using the terms "wife" and "husband" and "man" and "woman"); contra Pet. 7 (asserting that "[f]or many years prior to 1996, Michigan law defined eligibility to marry without reference to gender"). To be married, early statutes required "that the parties solemnly declare . . . that they take each other as husband and wife." MICH. REV. STAT. 1846, Ch. 83, § 9. This was consistent with the fact that "[t]he law of every common-law state, and indeed of every European and American state, deals with marriage as a voluntary union of a man and a woman." JOSEPH H. BEALE ET AL., *Marriage and the Domicil*, 44 Harv. L. Rev. 501, 504 (1931).

The people of Michigan reaffirmed this and other aspects of marriage in 1996: "Marriage is inherently a unique relationship between a man and a woman." MICH. COMP. LAWS § 551.1. As the statutes explain, "[a]s a matter of public policy, this state has a special interest in encouraging, supporting, and protecting that unique relationship in order to promote, among other goals, the stability and welfare of society and its children." *Id.*

In 2004, one year after Massachusetts' highest court struck down that State's marriage laws, more than 2.7 million Michigan voters reaffirmed this

understanding of marriage by enacting a constitutional amendment defining marriage: "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.

B. The plaintiffs

April DeBoer and Jayne Rowse are an unmarried, same-sex couple residing in Hazel Park, Michigan. They have lived together for eight years. Both are nurses and state-licensed foster parents. Each has adopted children with special medical needs: DeBoer has adopted child R, and Rowse has adopted both N and J. Pet. App. 105.

C. District-court proceedings

This case began as a challenge to Michigan's adoption laws. But when the district court concluded that Michigan's adoption laws had not caused any injury to the plaintiffs, the court did not dismiss the complaint for lack of standing. Instead, it "invit[ed] plaintiffs to seek leave to amend their complaint to include a challenge to [Michigan's marriage amendment]." Pet. App. 106.

After the plaintiffs accepted the court's invitation by adding a second count to their complaint that challenged the marriage amendment as violating both due process and equal protection, the court denied the parties' cross motions for summary judgment. (Op. & Order, RE 89, Page ID 2003.) The court recognized both that "[t]he underlying facts are not in dispute" and that under rational-basis review

" '[t]he government has no obligation to produce evidence to support the rationality of its . . . [imposed] classifications and may rely entirely on rational speculation unsupported by any evidence or empirical data.' " (Op. & Order, RE 89, Page ID 1997 & 2000.) The court nonetheless concluded that "a triable issue of fact exists regarding whether the alleged rationales for the [Michigan marriage amendment] serve a legitimate state interest." (Op. & Order RE 89, Page ID 2000.) The trial on whether the voters of Michigan had a rational basis for defining marriage as between one man and one woman lasted nine days and focused on expert witnesses on social science.

The district court issued its opinion on Friday, March 21, 2014. Treating the question of rational basis as hinging on factual disputes that could be resolved in a courtroom, the court concluded that the testimony of every one of the plaintiffs' expert witnesses was credible and gave weight to each. Pet. App. 109–16 (Brodzinsky, a psychologist; Rosenfeld, a sociologist; Sankaran, a law professor; Gates, a demographer; Cott, a historian; and Brown, a county clerk). In contrast, the court decided that not one of the State's witnesses gave credible testimony that was entitled to any weight. Pet. App. 116–23 (Regnerus, a sociologist; Marks, a family studies professor; Price, an economist; and Allen, an economist).

Following trial, the district court struck down Michigan's marriage definition. In so doing, the court recognized that it was not possible to make any finding that the voters acted out of animus: "Since

the Court is unable [to] discern the intentions of each individual voter who cast their ballot in favor of the measure, it . . . cannot ascribe such motivations to the approximately 2.7 million voters who approved the measure." Pet. App. 133.

In its conclusions of law, the district court recognized that it was supposed to apply "the most deferential level of scrutiny, i.e., rational basis review," a level of review under which the government has " 'no obligation to produce evidence' " and under which the plaintiff can prevail only if " 'the government's actions were irrational.' " Pet. App. 126. The court then concluded that none of the State's suggestions for why voters might have enacted the amendment provided a rational basis for the amendment. Pet. App. 127.

The district court did not grant the State's request for a stay, even though this Court had already reversed a district court and the Tenth Circuit for denying a stay in similar circumstances. Order, *Herbert* v. *Kitchen*, No. 13A687 (U.S. Jan. 6, 2014). As a result, county clerks across Michigan issued marriage licenses to more than 300 individuals on Saturday, March 22, 2014, the day after the opinion—a process that was halted when the Sixth Circuit granted the State's emergency motion for a stay pending appeal.

D. The Sixth Circuit's decision

The Sixth Circuit reversed, with Judges Sutton and Cook in the majority and Judge Daughtrey dissenting. At the outset, the majority recognized that "[t]his is a case about change—and how best to

handle it under the United States Constitution." Pet. App. 13. The court explained that our constitutional structure leaves the question of how to define marriage not to the federal courts, but "to the less expedient, but usually reliable, work of the state democratic processes." Pet. App. 16.

Writing for the majority, Judge Sutton first considered whether a lower court is always bound by an on-point holding of this Court, even if the holding is a summary disposition. Citing this Court's instruction in *Mandel* v. *Bradley*, 432 U.S. 173, 176 (1977), that summary dispositions "prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions," the majority concluded it was bound by *Baker* v. *Nelson*, 409 U.S. 810 (1972). Pet. App. 25–26. Because *Baker* resolved the same issues this case does, the majority concluded it had "no license to engage in a guessing game about whether the Court will change its mind or, more aggressively, to assume authority to overrule *Baker* ourselves." Pet. App. 24.

The court of appeals then examined the question through a number of lenses—"originalism; rational basis review; animus; fundamental rights; suspect classifications; evolving meaning"—before concluding that "[n]ot one of the plaintiffs' theories . . . makes the case for constitutionalizing the definition of marriage and for removing the issue from the place it has been since the founding: in the hands of state voters." Pet. App. 28–29.

Starting with original meaning, the Sixth Circuit reasoned that people who ratified the Fourteenth

Amendment would not have understood it "to require the States to change the definition of marriage." Pet. App. 30. And although the people did not create a federalized constitutional marriage definition in 1868, they remain free to use "the agreed-upon mechanisms"—that is, the amendment process—to change the U.S. Constitution in the future. Pet. App. 29.

Turning to rational-basis review, the court recognized that governments have an interest in the definition of marriage "not to regulate love," but out of concern for "the intended and unintended effects of male-female intercourse." Pet. App. 32. Given this legitimate interest, the court concluded that at least two rational bases support Michigan's definition of marriage. First, "[b]y creating a status (marriage) and by subsidizing it (e.g., with tax-filing privileges and deductions), the States created an incentive for two people who procreate together to stay together for purposes of rearing offspring." Pet. App. 34–35. "That does not convict the States of irrationality, only of awareness of the biological reality that couples of the same sex do not have children the same way as couples of opposite sexes and that couples of the same sex do not run the risk of unintended offspring." Pet. App. 35.

Second, the court recognized that it is rational "to wait and see before changing a norm that our society (like all others) has accepted for centuries." Pet. App. 35. This caution is not simply "preserving tradition for its own sake." Pet. App. 35. Keeping in mind that Michigan enacted its state constitutional amendment just one year after Massachusetts'

highest court introduced same-sex marriage to the United States, it cannot be said that the voters acted irrationally by "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." Pet. App. 35–36.

In accepting these reasons as rational, the majority acknowledged that marriage laws include inconsistencies, but explained that other views of marriage, including the plaintiffs' definition of marriage based primarily on love and commitment, suffer from "line-drawing problems" of their own and thus would fall too if the existence of under-inclusion and over-inclusion problems were sufficient to make a law irrational. Pet. App. 37.

Like the district court, the Sixth Circuit also concluded that the state marriage amendments were not motivated by animus. The amendments merely "codified a long-existing, widely held social norm already reflected in state law." Pet. App. 40. "[I]f there was one concern animating the initiatives, it was the fear that the courts would seize control over an issue that people of good faith care deeply about." Pet. App. 41. The court concluded that it is just as "unfair to paint the proponents of the measures as a monolithic group of hate-mongers" as it is "to paint the opponents as a monolithic group trying to undo American families." Pet. App. 44. The court refused to paint the people of Michigan as acting out of animus, because "'[i]t is demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on

decent and rational grounds.' " Pet. App. 42 (quoting *Schuette*, 134 S. Ct. at 1637).

As for substantive due process, the majority reiterated this Court's test: whether the asserted right is " 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.' " Pet. App. 46 (quoting *Washington* v. *Glucksberg*, 521 U.S. 702, 721 (1997) (internal citations omitted)). And it concluded that same-sex marriage does not satisfy this test because "[t]he first state high court to redefine marriage to include gay couples did not do so until 2003." Pet. App. 46. Nor, the court reasoned, did *Loving* v. *Virginia*, 388 U.S. 1 (1967), change this analysis, as evidenced by the fact that, just five years after *Loving*, this Court in *Baker* v. *Nelson* rejected the same due-process argument the plaintiffs make here. Pet. App. 47.

The court of appeals also declined to create a new suspect class based on sexual orientation, noting that "[t]he Supreme Court has never held that legislative classifications based on sexual orientation receive heightened review." Pet. App. 50. The court also noted that while "gay individuals have experienced prejudice in this country," "the institution of marriage arose independently of this record of discrimination," which shows that "[t]he usual leap from history of discrimination to intensification of judicial review does not work." Pet. App. 51.

Finally, the court concluded that even if it were to take into account "evolving moral and policy considerations" under the "living constitution"

theory, the focus would be "on evolution in *society's* values, not evolution in *judges'* values." Pet. App. 57. Because the objective evidence of society's values can be seen in the fact that, "[f]reed of federal-court intervention, thirty-one States would continue to define marriage" as only between a man and a woman, the majority concluded it had no right "to say that societal values, as opposed to judicial values, have evolved toward agreement in favor of same-sex marriage." Pet. App. 57.

REASONS FOR GRANTING THE PETITION

I. The circuits are split on whether States may define marriage as only between a man and a woman without violating the Fourteenth Amendment.

Six circuits have addressed whether the Fourteenth Amendment prevents States from defining marriage as between a man and a woman. Two (the Sixth and Eighth Circuits) have concluded it does not, thereby allowing the States of Kentucky, Michigan, Ohio, Tennessee, Arkansas, Missouri, Nebraska, North Dakota, and South Dakota to retain their marriage amendments. In contrast, four (the Fourth, Seventh, Ninth, and Tenth Circuits) have concluded it does, thereby invalidating the laws of Alaska, Arizona, California, West Virginia, Indiana, Colorado, Idaho, Kansas, Nevada, North Carolina, Montana, Oklahoma, Oregon, South Carolina, Utah, Virginia, Wisconsin, and Wyoming.

In addition to the Sixth Circuit's decision in this case, the Eighth Circuit has also rejected the contention that defining marriage as between a man

and a woman violates the Equal Protection Clause. In *Citizens for Equal Protection* v. *Bruning*, 455 F.3d 859 (8th Cir. 2009), the plaintiffs alleged that Nebraska's marriage amendment violated the Equal Protection Clause. *Id.* at 863. Noting that "the Supreme Court has never ruled that sexual orientation is a suspect classification for equal protection purposes," the Eighth Circuit declined to apply heightened scrutiny. *Id.* at 866. Recognizing that "[r]ational-basis review is highly deferential to . . . the electorate that directly adopted" Nebraska's marriage amendment, and that "the institution of marriage has always been, in our federal system, the predominant concern of state government," the court upheld the amendment. *Id.* at 867.

The Seventh and Ninth Circuits reached the opposite conclusion on the equal-protection issue. The Seventh Circuit, eschewing what it called "the conventional approach" to equal-protection analysis, *Baskin* v. *Bogan*, 766 F.3d 648, 656 (7th Cir. 2014), applied heightened scrutiny based on its conclusion that sexual orientation is a suspect class. *Id.* at 654 (treating the amendment as a classification that "proceeds *along suspect lines*"); *id.* at 656 (discussing discrimination "against a protected class" and asserting that "[t]he challenged laws discriminate against a minority defined by an immutable characteristic"). The court's discussion relied on policy considerations ranging from the court's view of science (how it thought evolution might have led to same-sex attraction, *id.* at 657–58) to the court's view of morality (that moral concerns should be limited to "tangible, secular, material" harms, *id.* at 669 (citing John Stuart Mill's harm principle)). By

applying heightened scrutiny, the Seventh Circuit was able to deviate from the rule that a classification can survive rational-basis review even if it is "both underinclusive and overinclusive," *Vance* v. *Bradley*, 440 U.S. 93, 108–09 (1979), and thus condemn Indiana's and Wisconsin's laws because it did not view them as sufficiently narrowly tailored. E.g., *Baskin*, 766 F.3d at 655, 656, 661, 672. The Seventh Circuit expressly "avoid[ed] engaging with the plaintiffs' further argument that the states' prohibition of same-sex marriage violates a fundamental right protected by the due process clause of the Fourteenth Amendment." *Id.* at 656–57.

The Ninth Circuit also applied heightened scrutiny in its equal-protection analysis, striking down Nevada's and Idaho's laws. *Latta* v. *Otter*, --- F.3d ---, 2014 WL 4977682, at *4 (9th Cir. 2014). The majority's theory was that state marriage laws defining marriage as only between a man and a woman discriminated based on sexual orientation, and that "sexual orientation" is a protected class. *Id.* Judge Reinhardt, the author of the majority opinion, concurred separately to say that he would also hold that the fundamental right to marriage includes "the right to marry an individual of one's choice." *Id.* at *11. The other two panel members did not endorse his fundamental-rights analysis. Similarly, Judge Berzon wrote a lone concurrence to express her view that the laws classify on the basis of sex and should be invalidated on that additional ground. *Id.* at *14.

As for fundamental rights under substantive due process, the Fourth and Tenth Circuits have reached holdings opposite of the Sixth Circuit. In *Bostic* v.

Schaefer, 760 F.3d 352 (4th Cir. 2014), the Fourth Circuit concluded that "*Glucksberg*'s analysis applies only when courts consider whether to recognize new fundamental rights," and that "the right to same-sex marriage" is not new, because it is part of the right to marry. *Id.* at 376. Under this reasoning, the court was free to set aside the " 'guideposts for responsible decisionmaking' "—i.e., "this Nation's history and tradition"—that this Court has marked out in the area of substantive due process, *Glucksberg*, 521 U.S. at 720, 721. Using this freedom, the Fourth Circuit majority took an existing fundamental right (the right to marry) and redefined that right. *Bostic*, 760 F.3d at 376. Having set aside the prerequisites of history and tradition to find a fundamental right to same-sex marriage, the Fourth Circuit then applied strict scrutiny and concluded that no compelling interest—including, ironically, history—supported maintaining the definition of marriage. *Id.* at 384. It accordingly struck down, over a dissent from Judge Niemeyer, Virginia's marriage laws. *Id.* The majority did not conclude that the laws violated equal protection independent of the fundamental-rights analysis.

In *Kitchen* v. *Herbert*, 755 F.3d 1193 (10th Cir. 2014), the Tenth Circuit similarly concluded that Utah's marriage laws violated the fundamental right to marry. Like the Fourth Circuit, the Tenth Circuit reached this outcome by redefining the fundamental right at issue, the right to marry, as the right to marry the person of one's choice. *Id.* at 1215. The court also reasoned that "in describing the liberty interest at stake, it is impermissible to focus on the identity or class-membership of the individual

exercising the right." *Id.* This reasoning has no limiting principle; it would eliminate other components of state marriage laws, because each requirement could be challenged by members of the affected classes. Further, as Judge Kelly explained in his partial dissent, redefining marriage as a right to marry the person of one's choice ignores the fact that the right to marry as discussed by the Supreme Court was "a right with objective meaning and contours"—contours derived from state law, including the fact that "for centuries 'marriage' has been universally understood to require two persons of opposite gender." *Id.* at 1234. Applying strict scrutiny, the Tenth Circuit struck down Utah's laws as insufficiently narrowly tailored. *Id.* at 1218, 1219, 1227. The Tenth Circuit did not conclude that the laws failed rational-basis review or that the laws should be subject to heightened scrutiny because of any suspect classification.

In a related case challenging Oklahoma's marriage laws, Judge Holmes, who was part of the *Kitchen* majority, concurred specially to explain that state marriage laws do not show the type of animus this Court has found to be sufficient to invalidate a law. *Bishop* v. *Smith*, 760 F.3d 1070, 1105 (10th Cir. 2014) (Holmes, J., concurring). For example, he noted that the marriage laws are far from the type of "unprecedented" law this Court invalidated in *Romer* v. *Evans*, 517 U.S. 620, 633 (1996); quite the opposite, "they are actually as deeply rooted in precedent as any rule could be." *Bishop*, 760 F.3d at 1105 (Holmes, J., concurring). They are also unlike the Defense of Marriage Act that this Court invalidated in *United States* v. *Windsor*, 133 S. Ct.

2675 (2013), where animus could be inferred from the fact that the federal government "veered sharply" from the usual deference it gave to state marriage laws. *Bishop*, 760 F.3d at 1108 (Holmes, J., concurring). But, when the subject of the challenge is a state law, "those federalism interests 'come into play on the other side of the board.' " *Id.* (quoting *Windsor*, 133 S. Ct. at 2697 (Roberts, C.J., dissenting)).

In the end, there are multiple circuit splits, but the majority positions are not what the conventional wisdom portrays it to be. A majority of circuits have rejected each of the plaintiffs' lines of argument. Of the five circuits to consider the fundamental-rights argument, a majority of three (the Sixth, Seventh, and Ninth Circuits) has *declined* to accept the argument that there is a substantive-due-process right to same-sex marriage. Accord Pet. 14. And of the six circuits to consider the equal-protection argument, a majority of four (the Fourth, Sixth, Eighth, and Tenth Circuits) has *declined* to accept the argument that a state marriage definition fails rational-basis review or amounts to discrimination against a suspect class. Accord Pet. 14–15. In short, the circuits that have overridden democratically enacted state laws cannot agree on a constitutional theory to support their decisions.

Only this Court can resolve these deep conflicts among the circuits. Certiorari is warranted.

II. The Sixth Circuit's decision was correct.

A. Same-sex marriage does not qualify as a fundamental right under this Court's test because it is not deeply rooted in our Nation's history.

We as a country have tied our own hands by removing certain issues from the political process. Some rights are so important that we have enshrined them in the Bill of Rights. *W. Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 638 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."). Some rights, even though not spelled out in the Constitution, are nonetheless so fundamental that they too cannot be impaired by Congress or by a State. To qualify for this latter fundamental-rights category, this Court has required the right in question to be so "objectively, 'deeply rooted in this Nation's history and tradition,' " and "so rooted in the traditions and conscience of our people as to be ranked as fundamental" that they are " 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.' " *Glucksberg*, 521 U.S. at 720–21 (citations omitted).

Efforts to fit same-sex marriage into either category fall short. Same-sex marriage is not a topic the people have expressly addressed in the U.S. Constitution, thereby resolving it through the democratic process. Nor is it a right that is so deeply

rooted in our Nation's history and tradition that it may be deemed a fundamental right.

This Court addressed the latter point in *Windsor*. The Court contrasted the history of same-sex marriage with the history of marriage generally, and recognized that only marriage between a man and a woman has deep historical roots within our Nation. As to same-sex marriage, this Court observed that "[i]t seems fair to conclude that, until recent years, many citizens had not even considered the possibility that two persons of the same sex might" marry. *Windsor*, 133 S. Ct. at 2689, 2690; accord *Hernandez* v. *Robles*, 7 N.Y.3d 338, 361 (2006) (plurality) ("Until a few decades ago, it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex."). And as to marriage, this Court in *Windsor* specifically observed that "[t]he limitation of lawful marriage to heterosexual couples" had "for centuries . . . been deemed both necessary and fundamental." *Id.* at 2689. If the limitation itself has historically been deemed fundamental to what marriage is, it cannot be true that marriage without the limitation qualifies as a fundamental right.

This ties back into the reason that rights must "be deeply rooted in our legal tradition" to be recognized under a substantive-due-process theory. The objective requirement of historical roots protects democracy by "rein[ing] in" the necessarily "subjective elements" of substantive-due-process review, *Glucksberg*, 521 U.S. at 722, so that rights will be recognized through the democratic process,

rather than being created by federal courts. See also *id.* at 723 (rejecting the argument that assisted suicide was a fundamental right because accepting that proposition would require "revers[ing] centuries of legal doctrine and practice, and strik[ing] down the considered policy choice of almost every State").

Applying this history-focused test, as the Sixth Circuit did, Pet. App. 46, is not "abdicat[ing]" a court's duty to the Constitution, any more than looking to the Constitution's text to see what rights it protects would be. Pet. 13; Pet. App. 102 (dissent asserting that courts have "the responsibility[ ] to right fundamental wrongs left excused by a majority of the electorate"). Quite the opposite, the Sixth Circuit fulfilled its duty by first asking whether the right asserted here was in fact a fundamental right under the Constitution. Pet. App. 46. Only after recognizing that same-sex marriage is not deeply embedded in U.S. history did it discuss the wisdom of trusting citizens (instead of federal courts) to address new social questions. Pet. App. 60–61 ("It is dangerous and demeaning to the citizenry to assume that *we*, and only *we*, can fairly understand the arguments for and against gay marriage.").

And when the Sixth Circuit cited the Civil Rights Act of 1964 to illustrate that "[r]ights need not be countermajoritarian to count," Pet. App. 60, it might have gone further. It might have observed that our most cherished minority-protecting rights arose by majority vote. It was the majority who chose, by amending the federal Constitution, to protect religious minorities, unpopular speakers, suspects, those charged with crimes, prisoners, racial

minorities, and women. U.S. CONST. amends. I, IV, V, VI, VIII, XIII, XIV, XV, & XIX.

B. As *Windsor* reaffirmed, marriage is an issue left to voters at the state level.

Windsor reaffirmed a basic point stretching back through this Court's jurisprudence: "By history and tradition the definition and regulation of marriage . . . has been treated as being within the authority and realm of the separate States." 133 S. Ct. at 2689–90. *Windsor* specifically recognized that "[t]he definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the '[p]rotection of offspring, property interests, and the enforcement of marital responsibilities.' " *Id.* at 2691.

Indeed, when the *Windsor* majority overturned the federal Defense of Marriage Act, it highlighted the fact that DOMA was an "unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage," an aberration that conflicted with "the unquestioned authority of the States" over marriage. *Id.* at 2693. Marriages recognized as valid under state law (such as, in *Windsor*, under New York law) were entitled to be treated with dignity precisely because it was "a dignity conferred *by the States* in the exercise of their sovereign power." *Id.* (emphasis added). The Court's entire equal-protection analysis rests on this premise of state-conferred dignity. See *id.* ("the congressional purpose [was] to influence or interfere with state sovereign choices about who may be married"); *id.* at 2694 (recognizing that DOMA affected "state-sanctioned marriages" that "the State has sought to

dignify"); *id.* at 2695 ("marriages made lawful by the State"); *id.* at 2696 ("a status the State finds to be dignified and proper"); *id.* (referring to "those whom the State, by its marriage laws, sought to protect in personhood and dignity").

Applying this analysis requires respecting "state sovereign choices" and implicitly recognizes that State voters do in fact have a choice not to extend marriage to same-sex couples. Many "States in the exercise of their sovereign power" have chosen not to extend the boundaries of marriage. Other States have chosen to extend marriage to same-sex couples. If the people of a State choose the former—as the people of at least 30 States, including States as diverse as California, Texas, Oregon, Wisconsin, and Michigan have—their decision is also entitled to respect. Respecting the dignity of individuals in a democracy includes preserving not just their liberty to engage in private conduct, *Lawrence* v. *Texas*, 539 U.S. 558, 578 (2003), but also their liberty to engage in self-government. *Burson* v. *Freeman*, 504 U.S. 191, 214 (1992) (Kennedy, J., concurring) ("Voting is one of the most fundamental and cherished liberties in our democratic system of government.").

Justice Kennedy emphasized this point in the *Schuette* plurality opinion: "It is demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds." 134 S. Ct. at 1637. To put this in perspective, scores of millions of American voters across the country have voted to retain the definition of marriage as between one man and one woman. Respect for the dignity of these millions of

voters, who must be presumed to be "decent and rational," should make courts reluctant to conclude that support for maintaining the definition of marriage is irrational. After all, a decision by this Court that there is no rational basis for Michigan's voters to have defined marriage as they did necessarily means that not only Michigan's voters, but millions of other American citizens who have voted the same way, did not have among them a single conceivable rational basis for their votes.

Leaving issues of domestic law to the people at the state level also makes sense, as it allows the people to address social issues at a more local level. E.g., *Chandler* v. *Florida*, 449 U.S. 560, 579 (1981) (discussing States as laboratories of democracy). This freedom to vote has benefitted supporters of same-sex marriage, as they have succeeded in a number of States (in Maine, New Hampshire, Rhode Island, New York, Vermont, Delaware, Maryland, Illinois, Minnesota, Hawaii, and Washington) and in the District of Columbia in persuading voters through the democratic processes to redefine marriage to include same-sex relationships.

But if the people of a given State choose not to alter a foundational building block of society or have other good-faith reasons for wanting to retain marriage as is, they should also have the freedom to make those choices. And by leaving this issue to the democratic processes, rather than engraving it into the bedrock of constitutional law, e.g., *Roe* v. *Wade*, 410 U.S. 113 (1973), the people can review their decisions concerning the definition of marriage and look for ways to resolve the issue through

compromise and agreement, rather than through a judicial mandate.

The plurality opinion in *Schuette* is also consistent with how international tribunals have consistently analyzed the question of "who decides" how to define marriage. The vast majority of international tribunals have declined the invitation to judicially rewrite the longstanding marriage definition. The United Nations Human Rights Committee and the European Court of Human Rights have both rejected the argument that opposite-sex couples have a constitutional or human right to marry. *Herbert* v. *Kitchen*, No. 14-124, Amici Br. of 36 Comparative Law Scholars 16–17. Likewise, the Constitutional Tribunal of Chile, the French Constitutional Court, the German Federal Constitutional Court, the Italian Constitutional Court, and the Spanish Constitutional Court have all rejected constitutional claims for marriage between same-sex partners. *Id.* These international decisions uniformly rebuff the view of the judicial branch as a political institution that fashions new constitutional rights instead of deferring to the people acting through the democratic process.

C. Rational-basis review protects the democratic process by deferring to voters.

The rational-basis standard for reviewing democratically enacted laws is not a mere legal technicality. It is an important principle of judicial restraint and of separation of powers because it preserves the people's authority to govern themselves by making policy decisions. The Equal

Protection Clause "is not a license for courts to judge the wisdom, fairness, or logic of [the voters'] choices." *FCC* v. *Beach Commc'ns*, *Inc.*, 508 U.S. 307, 313 (1993). To the contrary, "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 [a State's] interests should be pursued." *City of Cleburne*, *Tex.* v. *Cleburne Living Ctr.*, 473 U.S. 432, 441–42 (1985).

That is why this Court has emphasized that "rational basis review" includes "a strong presumption of validity." *Beach Commc'ns*, 508 U.S. at 314–15. "Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function." *Id.* at 315 (internal quotation marks omitted). "This standard of review is a paradigm of judicial restraint." *Id.* at 314.

"These restraints on judicial review have added force 'where the legislature must necessarily engage in a process of line-drawing.' " *Beach Commc'ns*, 508 U.S. at 315 (quoting *U.S. R.R. Ret. Bd.* v. *Fritz*, 449 U.S. 166, 179 (1980)). This added force applies here because setting the definition of marriage inherently requires line-drawing—lines such as age, number of participants, sex, consanguinity requirements, duration, and exclusivity. And "[e]ven if [a] classification . . . is to some extent both underinclusive and overinclusive, and hence the line drawn by [the legislature or people] is imperfect, it is nevertheless the rule that in [rational basis review]

'perfection is by no means required.'" *Vance* v. *Bradley*, 440 U.S. 93, 108–09 (1979) (quoting *Phillips Chemical Co.* v. *Dumas Sch. Dist.*, 361 U.S. 376, 385 (1960)).

D. The definition of marriage that has existed for centuries is not irrational or based on animus.

The first question in considering whether it is rational to define marriage as between one man and one woman is to ask what the State's interest in marriage is in the first place. Why is it that Michigan—like many other States and countries around the world, throughout all of history—has thought it important to have laws relating to marriage, while leaving other relationships, like friendships, free from restrictions?

While nearly all married people consider the emotional connection to be a critical component of marriage, emotional connection alone does not explain the State's interest. Friendships and relationships, after all, can also demonstrate love and commitment (think of a soldier diving on a grenade to save his squad), yet no State or country has shown any interest in passing laws about what it takes to enter into a friendship, or what it takes to end one. Friendships and relationships do not have age, gender, number, or consanguinity limits—siblings can be friends, and groups of people can be friends. If marriage, like other friendships, were only about an emotional connection—if it were only about love, commitment, and companionship—then it would be unclear what interest (other than moral approval of that friendship) the State might have.

The State's interest in marriage springs from a feature of opposite-sex intimate relationships that is biologically different from other relationships (including opposite-sex Platonic friendships and same-sex intimate relationships): the sexual union of a man and a woman produces something more than just an emotional relationship between two people—it produces the possibility, even the likelihood, of the creation of a new life.

In short, the State has an interest in encouraging men and women to marry because of its interest in stable relationships for the procreation and raising of children. As the Sixth Circuit recognized, the people could think that "a reasonable first concern of any society is the need" to address "the unique procreative possibilities" of opposite-sex relationships. Pet. App. 33. This point is well established in the law. E.g., *Loving* v. *Virginia*, 388 U.S. 1, 12 (1967) (describing marriage as "fundamental to our very existence and survival"). And a number of reasons rationally support this interest.

1. Michigan voters could rationally have concluded that it is beneficial for children to be raised by both a mom and a dad.

It is certainly within the realm of rational speculation, see *Beach Commc'ns*, 508 U.S. at 315, to believe that children benefit from being raised by both a mother and a father. Men and women are different, moms and dad are not interchangeable, and having both a man and a woman as part of the parenting team could reasonably be thought to be a good idea.

This Court has recognized that " '[t]he two sexes are not fungible; a community made up exclusively of one is different from a community composed of both.' " *Ballard* v. *United States*, 329 U.S. 187, 193 (1946). In *Ballard*, in the context of whether women needed to be included on juries, the Court recognized that "a distinct quality is lost if either sex is excluded." *Id.* If this principle—that both men and women have important viewpoints and contributions to make—is true in the context of a jury pool, it is at least rational to conclude it is also true in the context of a family.

This is not to deny that same-sex couples can provide a caring, nurturing home. They obviously can. But it is also rational to think that moms and dads both might make important contributions to child raising. Even the plaintiffs' experts agree there are "average differences in the ways that mothers and fathers interact with their children." (2/25/14 Trial Tr., RE 143 (Part B) at 15 (Brodzinsky).) As another of the plaintiffs' experts acknowledged, "different sexes bring different contributions to parenting," and "there are different benefits to mothering versus fathering." (2/28/14 Trial Tr., RE 149 at 55 (Cott).) If, as the plaintiffs' experts thus concede, mothers and fathers provide different benefits, it is hard to see how it could be irrational to encourage a structure that brings both sets of benefits to children. A rational person, in short, might think that " '[t]he optimal situation for the child is to have both an involved mother and an involved father.' " *Bowen* v. *Gilliard*, 483 U.S. 587, 614 (1987) (Brennan, J., dissenting).

2. It is rational to promote marriage in the setting where children biologically come from—the union of a man and a woman.

It is a basic fact of biology that children come from the sexual union of a man and a woman. Because sexual interactions between a man and a woman produce children, the State has an interest in encouraging long-term, committed relationships between men and women, so that any resulting children, including those from accidental pregnancies, will be raised by both their mom and their dad.

Marriage between opposite-sex couples advances this interest. Promoting marriage as an institution encourages long-term, committed relationships. Promoting marriage between a man and a woman thus increases the likelihood that when children are born, both of their biological parents will be there to care for them and to prepare them to be mature members of society. E.g., *Hernandez*, 7 N.Y.3d at 359 ("The Legislature . . . could find that an important function of marriage is to create more stability and permanence in the relationships that cause children to be born. It thus could choose to offer an inducement—in the form of marriage and its attendant benefits—to opposite-sex couples who make a solemn, long-term commitment to each other.").

Promoting marriage between opposite-sex couples is thus a rational means to advance the State's interest in caring for children, as a number of courts have recognized. E.g., *Citizens for Equal*

Protection v. *Bruning*, 455 F.3d 859, 867 (8th Cir. 2006) (recognizing that "defining marriage as the union of one man and one woman" is "rationally related to the government interest in 'steering procreation into marriage' "); *Andersen* v. *King Cnty.*, 158 Wash. 2d 1, 37 (2006) ("Under the highly deferential rational basis inquiry, encouraging procreation between opposite-sex individuals within the framework of marriage is a legitimate government interest furthered by limiting marriage to opposite-sex couples."). The voters' decision to tie marriage to opposite-sex couples, as it has been throughout all of human history, thus is not an act of bigotry or animus. It is a simple recognition that biology matters. *Nguyen* v. *INS*, 533 U.S. 53, 73 (2001) ("To fail to acknowledge even our most basic biological differences . . . risks making the guarantee of equal protection superficial, and so disserving it.").

3. Citizens of a State might not have wished to alter a central building block of society without knowing more about its long-term impact.

Voters, even those who approve of same-sex relationships, might not wish to alter the definition of this time-tested building block of society. A rational voter might worry about the law of unintended consequences, and might conclude that there is some risk that changing the definition of marriage to remove its inherent connection to procreation might undermine the value of marriage in the long term as an institution for linking parents to their biological children. A rational person might think, for example, that "[t]he long-term consequences of this change are not now known and

are unlikely to be ascertainable for some time to come." *Windsor*, 133 S. Ct. at 2715 (Alito, J., dissenting). "At present, no one—including social scientists, philosophers, and historians—can predict with any certainty what the long-term ramifications of widespread acceptance of same-sex marriage will be." *Id.* at 2716.

Considering all of these points supporting defining marriage as between a man and a woman, reasonable people of good will might think it is at least debatable that this definition advances the State's interest in encouraging parents to stick together to care for and raise their children. And if it is at least debatable, then federal courts have no authority to overturn the people's legislative choice. *Beach Commc'ns*, 508 U.S. at 320 ("The assumptions underlying these rationales may be erroneous, but the very fact that they are 'arguable' is sufficient, on rational-basis review, to 'immuniz[e]' the congressional choice from constitutional challenge.") (alteration in original).

* * *

As members of this Court recently observed, "[d]emocracy does not presume that some subjects are either too divisive or too profound for public debate." *Schuette*, 134 S. Ct. at 1638 (plurality). To the contrary, "the Constitution foresees the ballot box, not the courts, as the normal instrument for resolving differences and debates." *Id.* at 1649 (Breyer, J., concurring in judgment). "In short, the 'Constitution creates a democratic political system through which the people themselves must together find answers' to disagreements of this kind." *Id.* at

1650. When the Constitution is silent on an important issue of public debate, as is the case here, the issue should remain, where it has always been, with the people.

CONCLUSION

For these reasons, Michigan does not oppose the petition but rather urges this Court to affirm.

Respectfully submitted,

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