No. 13A687

In the
Supreme Court of the United States

Gary R. Herbert, in his official capacity as Governor of Utah, and
Sean D. Reyes, in his official capacity as Attorney General of Utah,
Applicants,

v.

Derek Kitchen, Moudi Sbeity, Karen Archer, Kate Call, Laurie Wood, Kody Partridge,
and Sherrie Swensen, in her official capacity as Clerk of Salt Lake County,

Respondents.

Reply In Support Of Application To Stay Judgment Pending Appeal

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INTRODUCTION

Respondents' Opposition does not dispute three overriding realities. First, whether the United States Constitution mandates recognition of same-sex marriage by the States is a recurring question of great public importance. Second, the district court's decision is merely the starting point for resolution of that issue. And third, that issue is squarely presented in this case, without jurisdictional problems or other issues that might weigh against this Court's review if the Tenth Circuit affirms. Accordingly, the real question is whether—during the interim as this and other cases make their way through the appellate process—States like Utah should be forced to license, perform, and recognize same-sex marriages, or whether those States will be allowed to follow their own public policies and State constitutional provisions until the issue has been resolved definitively. Applicants respectfully submit that the very principles of comity and federalism that animated this Court's decision last Term in *United States* v. *Windsor*, 570 U.S. ___, 133 S.Ct. 2675 (2013), weigh decisively in favor of recognizing and protecting a State's right to define marriage during the interim.

More specifically, although Respondents quibble around the edges, they have failed to offer any persuasive rebuttal to the Application's showing that under settled standards the Court should stay the district court's judgment and injunction pending appeal. For example, although Respondents contest whether this case will be *the* specific vehicle used to resolve the question that *Windsor* pointedly left open—*i.e.*, whether the States can constitutiona ly limit marriage to man-woman unions—Respondents do not dispute that this is an issue that the Court is highly likely to decide (again, if the Tenth Circuit affirms), or that this case squarely presents that issue. See Application to Stay Judgment Pending Appeal ("App.") at 8-9. Similarly, although Respondents criticize some of the sociological studies the Applicants cite, Respondents do not even squarely address, much less dispute, the common-sense notions (1) that mother-father

parenting (*i.e.*, gender complementarity) generally benefits children, or (2) that limiting marriage to man-woman unions increases the likelihood that children will be raised with those benefits—thereby providing at least a rational basis for and, indeed, a compelling interest in the Utah laws that the district court wrongly enjoined. See App. at 15-19. And although Respondents quibble about how the Applicants sought to protect the State from irreparable injury in the lower courts, Respondents do not and cannot deny that every marriage that occurs in Utah as a result of the district court's unlawful injunction not only undermines the same prerogative that *Windsor* sought to protect—the prerogative of a sovereign State and its people to define marriage in the way they believe will best further the public welfare—but also irreparably injures the State, by interfering with its enforcement of its own laws. See App. at 19-22.

All of that—combined with Respondents' failure to identify any *concrete* harm to themselves or third parties that would occur if a stay is granted—amply warrants a stay.

I. Although the law does not support Respondents' additional requirements for a stay in this context, each of them nevertheless points decidedly *toward* a stay here.

Respondents first contend that "Applicants fail to acknowledge or apply the heightened burden they must meet when asking this Court to grant a stay in a case still pending before the Court of Appeals," Memorandum in Opposition to Application to Stay Judgment Pending Appeal ("Opp.") at 6, a burden, they say, that goes beyond the four factors articulated in decisions such as *Hollingsworth* v. *Perry*, 558 U.S. 183, 189 (2010) (per curiam). They argue, for example, that Applicants must demonstrate that the Court of Appeals is "demonstrably wrong in its application of accepted stay standards." Opp. at 3. But that alleged additional requirement is based on phrases torn out of context from decisions discussing when to *vacate* a stay issued by the court of appeals. See Opp. at 3, 6-7 (quoting *Coleman* v. *Paccar, Inc.*, 424 U.S. 1301, 1304 (1976) (Rehnquist, J., in chambers) ("[A] Circuit Justice has jurisdiction *to vacate a stay* where it

appears that the rights of the parties to a case pending in the court of appeals ... may be seriously and irreparably injured by the stay, and the Circuit Justice is of the opinion that the court of appeals is demonstrably wrong in its application of accepted standards in *deciding to issue the stay*.") (emphasis added)); see also *id.* at 10, 34 (quoting *Western Airlines, Inc.* v. *Int'l Bhd. Teamsters*, 480 U.S. 1301, 1305 (1987) (O'Connor, J., in chambers) (quoting *Coleman*, 424 U.S. at 1304)). Invoking decisions like *Heckler* v. *Lopez*, 463 U.S. 1328, 1330 (1983) (Rehnquist, J., in chambers), and *Edwards* v. *Hope Medical Group for Women*, 512 U.S. 1301 (1994) (Scalia, J., in chambers), Respondents further argue that beyond the circumstances justifying a stay under the *Hollingsworth* standards, an application seeking a stay pending appeal must be supported by some *additional* "unusual" circumstance. See Opp. at 8. But Respondents ignore the fact that the *Hollingsworth* factors themselves exist to identify the very sorts of "unusual"—even "extraordinary"—circumstances meriting a stay. See, *e.g.*, *Rostker* v. *Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers) (describing cases that meet these factors as "extraordinary cases"); *Conkright* v. *Frommert*, 556 U.S. 1401, 129 S. Ct. 1861, 1861-62 (2009) (Ginsburg, J., in chambers) (listing the factors and stating that "denial of such in-chambers stay applications is the norm; relief is granted only in 'extraordinary cases'" (quoting *Rostker*, 448 U.S. at 1308)); *Bellotti* v. *Latino Political Action Comm.*, 463 U.S. 1319, 1320 (1983) (Brennan, J., in chambers) (quoting *Rostker*); *Karcher* v. *Daggett*, 455 U.S. 1303, 1305 (1982) (Brennan, J., in chambers) (same). And Respondents cite no decision—and we have found none—holding or even suggesting that a stay pending appeal requires any "unusual" circumstances beyond the satisfaction of those factors. See *San Diegans for the Mt. Soledad Nat'l War Memorial* v. *Paulson*, 548 U.S. 1301, 1302 (2006) (Kennedy, J., in chambers) (citing the same factors as controlling in deciding whether to grant a stay pending appeal).

But even if the application at issue here were subject to these additional requirements—*i.e.*, additional "unusual" circumstances and a "demonstrably wrong" application of stay-related law by the lower courts—*both* of those conditions are amply present here.

1. Most importantly, this case presents a highly unusual situation in which a district court has enjoined the enforcement of an important State law—including, in this case, an amendment to a State constitution adopted in a popular referendum—without any stay pending further review being issued by either the district court or the Court of Appeals. Such a situation is an obvious affront both to the State's democratic processes, to the principles of federalism, and to this Court's position as the final arbiter of the constitutionality of State laws. And neither Respondents nor Applicants have been able to identify a single case in which this Court, the matter having been brought to its attention through a proper application, has allowed that situation to persist. Accordingly, it appears that a *refusal* to grant a stay in the circumstances presented here would be, at a minimum, highly unusual.

Indeed, even in the *Hollingsworth* litigation—in which California's traditional marriage law was invalidated by both the district court and the Ninth Circuit—both lower courts appreciated the importance of allowing the people of California an opportunity to fully defend their law before its operation was enjoined, and both courts therefore granted stays pending further appellate review. See *Perry* v. *Schwarzenegger*, 702 F. Supp. 2d 1132, 1135, 1139 (N.D. Cal. 2010) (Walker, J.) (granting a stay for "a limited time solely in order to permit the court of appeals to consider the issue in an orderly manner"); *Perry* v. *Schwarzenegger*, No. 10-16696, 2010 WL 3212786, *1 (9th Cir. Aug. 16, 2010) (Leavy, Thomas, and Hawkins, JJ.) (granting a motion for stay of the district court's order "pending appeal"). Accordingly, if some "unusual circumstance" beyond the traditional stay factors is required, the fact that the lower courts here

refused to grant the same kind of stay that both Judge Walker and the Ninth Circuit *granted* in the *Hollingsworth* case is sufficiently unusual to satisfy that requirement.

The unusual character of this case is further enhanced by Respondents' tacit admission—already clear from the grant of certiorari in *Hollingsworth*—that the issue presented here will undoubtedly be worthy of this Court's review if the Tenth Circuit affirms the district court's judgment and injunction. By denying a stay, moreover, the district court and the Tenth Circuit have reduced this Court's ability to provide fully effective relief if the Court ultimately decides to grant certiorari and reverse, because the injury to the State's sovereignty by the issuance of marriage licenses contrary to State law is irreparable. Denial of the present Application would further reduce the Court's ability to provide complete relief after a reversal. That unusual circumstance likewise reinforces the need for a stay now.

2. The Court of Appeals' application of "accepted standards" governing stay applications was also "demonstrably wrong" in at least three key respects. Cf. *Coleman*, 424 U.S. at 1304 (Rehnquist, J., in chambers) ("[A] Circuit Justice has jurisdiction to vacate a stay where ... the Circuit Justice is of the opinion that the court of appeals is demonstrably wrong in its application of accepted standards in deciding to issue the stay.").

First, the Tenth Circuit committed plain legal error by failing to adhere to the principle that "*any time* a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *New Motor Vehicle Bd.* v. *Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers) (emphasis added). While the Court of Appeals cited "the threat of irreparable harm if the stay is not granted," and acknowledged it as a "critical" factor, it proffered no reason for disregarding the State's common-sense contention that the continued operation of the district court's injunction—without more—constituted irreparable harm. Order Denying Emergency Motion for Stay and Temporary

Motion for Stay at 2, *Kitchen* v. *Herbert*, No. 13-4178 (10th Cir. Dec. 24, 2013), App. at D-2 ("Order").

Perhaps the Tenth Circuit was influenced by the district court, whose opinion denying a stay the Tenth Circuit appeared to adopt by reference, and which rejected the established principle that a federal injunction halting the enforcement of a State law qualifies as irreparable injury. See Order on Motion to Stay at 4-5, *Kitchen* v. *Herbert*, No. 2:13-cv-00217-RJS (D. Utah Dec. 23, 2013), App.at C-4-5 ("Order on Motion"). The district court's disregard of this Court's decisions articulating what qualifies as irreparable injury, see *Maryland* v. *King*, 567 U.S. ___, 133 S.Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd.*, 434 U.S. at 1345); *Planned Parenthood of Greater Texas Surgical Health Servs.* v. *Abbott*, 571 U.S. ___, 134 S.Ct. 506, 506 (Scalia, J., concurring in denial of application to vacate stay) (same), cannot be justified on the tenuous ground that the principle has appeared only in opinions where the Circuit Justice was inclined to credit the validity of the underlying law. See Order on Motion at 5. Still less can such a plain error be justified by the district court's straw-man argument attempting to equate a simple acknowledgement that a federal order enjoining enforcement of State law necessarily inflicts irreparable injury with a hard-and-fast rule requiring an *automatic* stay of *every* district court judgment "invalidat[ing] a State law." *Id.* The State sought only the former, not the latter.

In short, by ignoring the unambiguous principle that enjoining the enforcement of State law constitutes irreparable injury, the Tenth Circuit was "demonstrably wrong in its application of accepted standards in deciding [whether] to issue the stay." Opp. at 3 (quotation omitted).

Second, the Court of Appeals was likewise "demonstrably wrong," *id.*, in apparently deferring to the district court's ruling, in rejecting a stay, that "the status quo is currently that same-sex couples are allowed to marry in the State of Utah." Order on Motion at 6. The district

court thus embraced the novel view that "the court would no longer be issuing a stay of its judgment, but an injunction enjoining county clerks in Utah from issuing marriage licenses to same-sex couples." *Id.* But this ruling contradicts black letter law holding that a stay pending appeal aims at "temporarily suspending the source of authority to act—the order or judgment in question," while an injunction pending appeal "direct[s] an actor's conduct." *Nken* v. *Holder*, 556 U.S. 418, 428-29 (2009); see also *id.* at 429 (reasoning that a stay "'simply suspend[s] *judicial* alteration of the status quo'") (quoting *Ohio Citizens for Responsible Energy, Inc.* v. *NRC*, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers)) (emphasis added). No one can reasonably dispute that "the order or judgment in question," *id.*, is the district court's December 20 order enjoining the State from enforcing its traditional definition of marriage. The district court's insistence that the status quo relevant to the Applicants' motion for a stay pending appeal consisted of the situation it confronted when considering the motion for a stay, rather than when its merits decision was issued, rested on the court's evident confusion of a stay with an injunction pending appeal. Failure to correct that error by the Tenth Circuit was "demonstrably wrong." Opp. at 3.

Third, the Court of Appeals likewise went astray when it apparently concluded that Applicants have only "a mere possibility of success" on the merits, Order at 2, despite the precedential force of *Baker* v. *Nelson*, 409 U.S. 810 (1972). Summary or not, in the lower courts *Baker* remains "*controlling* precedent unless and until re-examined by *this Court*." *Tully* v. *Griffin, Inc.*, 429 U.S. 68, 74 (1976) (emphasis added); accord *Hicks* v. *Miranda*, 422 U.S. 332, 344-45 (1975) ("[L]ower courts are bound by summary decisions by this Court until such time as the Court informs [them] that [they] are not."). Respondents concede that, at least in the lower courts, *Baker* is binding precedent on "'the precise issues presented and necessarily decided.'" Opp. at 25 (quoting *Mandel* v. *Bradley*, 432 U.S. 173, 186 (1979)). Because *Baker* indeed

presented precisely the same issues decided by the district court—whether a State's refusal to issue a marriage license to persons of the same sex offends the Fourteenth Amendment, see *Baker* v. *Nelson*, No. 71-1027, Jurisdictional Statement at 3 (Oct. Term 1972); *Baker* v. *Nelson,* 191 N.W.2d 185 (Minn. 1971)—it remains binding precedent in the Tenth Circuit.

Nevertheless, the district court simply dismissed *Baker* as having "little if any precedential effect today"—even in the lower courts. Memorandum Decision and Order at 14, *Kitchen* v. *Herbert*, No. 2:13-cv-00217-RJS (D. Utah Dec. 20, 2013), App. at A-14 ("Decision"). That conclusion contradicts the firmly established precept that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). To be sure, in *this* Court a summary dismissal like *Baker* is not "'of the same precedential value as would be an opinion of this Court treating the question on the merits.'" *Tully*, 429 U.S. at 74 (quoting *Edelman* v. *Jordan*, 415 U.S. 651, 671 (1974)) (emphasis added). But flexibility for this Court to reconsider and, if it wishes, reverse its own precedent does not extend to lower courts, which must "leav[e] to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas*, 490 U.S. at 484. And the Court of Appeals' failure to heed this principle was, once again, "demonstrably wrong." Opp. at 3.

In short, the additional considerations invoked by Respondents, if indeed they were required on an application for stay pending appeal, strongly support Applicants' request.

II. If the Tenth Circuit affirms, there is a strong likelihood that at least four Justices will vote to grant certiorari.

Respondents also cannot deny that the question presented here—the constitutionality of man-woman marriage laws under the Fourteenth Amendment—is a question worthy of this

Court's review. The only question, then, is the likelihood that four Justices will vote to grant certiorari on that question in *this* case in the event the Tenth Circuit affirms the district court's constitutional holding. That likelihood seems very high—well beyond the "fair prospect" ordinarily required for a stay.

Indeed, just last Term the Court in *Hollingsworth* v. *Perry*, __ U.S. __, 133 S.Ct. 2652 (2013), granted certiorari on the same question at issue here. And but for the standing defect requiring dismissal in that case, *id.* at 2668, the Court would already have resolved Respondents' central contention that the Fourteenth Amendment bars states from defining marriage as solely between one man and one woman. If the Court considered that question sufficiently well-developed and important to be worthy of certiorari last Term, there is a very strong likelihood that it will so conclude again if the Tenth Circuit affirms here.

Respondents dismiss this obvious point as having "no merit" because the "Applicants have not shown they are likely to prevail on appeal" and because "it is not possible to predict with certainty how, or on what basis, the Court of Appeals might rule." Opp. at 35. The first point is irrelevant to the likelihood of certiorari; it conflates the probability of granting certiorari prong of the analysis with the separate likelihood of success on the merits prong. See *Hollingsworth* v. *Perry*, 558 U.S. 183, 189 (2010) (per curiam). And Respondents' second point, offered without supporting law, is true of *all* applications for a stay of a district court decision pending appeal; if accepted, the argument would always preclude such a stay. But see 28 U.S.C. § 2101(f) (granting jurisdiction to entertain and grant a request for a stay pending appeal); 28 U.S.C. § 1651(a) (granting authority to issue stays and injunctions in aid of the Court's jurisdiction). Respondents' insistence that the Tenth Circuit has already concluded that Applicants are unlikely to prevail there, Opp. at 35, only *increases* the likelihood that four Justices will vote to grant review of that court's ultimate decision.

Respondents downplay the magnitude of a federal court decision invalidating state law, arguing that it does not assure or "'guarantee'" certiorari. *Id.* (citing commentary to the Supreme Court Case Selections Act, 28 U.S.C. § 1254). While the Court obviously has discretion to deny certiorari in such cases, it has not hesitated to grant certiorari when a federal court invokes the federal Constitution to void a state law touching on a fundamental element of state sovereignty—such as the basic authority to define and regulate marriage. The Court's grant in *Perry* illustrates the point. None of Respondents' examples in which certiorari was denied involved remotely comparable state interests. See *United States* v. *Alabama*, 691 F.3d 1269, 1276-81 (11th Cir. 2013) (Alabama statute regulating illegal immigration preempted by federal law); *Brewer* v. *Diaz*, 656 F.3d 1008, 1010-12, 1015 (9th Cir. 2013) (Arizona statute limiting heath care benefits for the dependents of state employees to heterosexual spouses and children).

Respondents also argue that *Citizens for Equal Prot., Inc.* v. *Bruning*, 455 F.3d 859 (8th Cir. 2006), would not present a square circuit conflict if the Tenth Circuit affirms the district court because "the plaintiffs in *Bruning* brought different claims than those at issue here." Opp. at 36. But that is incorrect. *Bruning* squarely rejected an equal protection challenge to a Nebraska law that—just as Utah's here—defines marriage as the union of a man and a woman and forbids formal recognition of "the uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship." *Id.* at 863. The Eighth Circuit further held that "laws limiting the state-recognized institution of marriage to heterosexual couples *are rationally related to legitimate state interests* and therefore do not violate the Constitution of the United States." *Id.* at 871 (emphasis added). In contrast, the district court below held "that Amendment 3 *bears no rational relationship to any legitimate state interests* and therefore fails rational basis review" under the Equal Protection Clause. Decision at 41 (emphasis added); see also *id.* at 43-50. Unless reversed, the conflict with *Bruning* on the equal

protection issue could not be more direct. And Respondents do not and cannot dispute that *Bruning*'s rejection of the equal-protection argument at issue there is likewise contrary in principle to the district court's due process holding here, which also relies upon the asserted absence of a rational basis for the man-woman restriction. Decision at 41-50.

Moreover, it cannot be denied that this case, even more so than *Perry*, presents issues of enormous and pressing importance to Utah, to the states in the Tenth Circuit, and to the Nation. These factors likewise will militate strongly in favor of certiorari if the court below affirms. See SUP. CT. R. 10(c) (authorizing certiorari where "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court").

Finally, Respondents occasionally suggest that this Court might not choose this case as the vehicle with which to resolve the constitutionality of State man-woman marriage laws. *E.g.*, Opp. at 37. But that ignores the Court's practice, when multiple petitions present the same certworthy issue, of holding the additional petitions pending resolution of the favored petition on the merits. Thus, even if the Court concludes that another case offers a better vehicle with which to resolve the constitutionality of State man-woman marriage laws, it is highly likely that the Court would hold this case pending that resolution, and then grant, vacate and remand the petition in this case in light of its resolution of the issue in the other case. For that reason too, it is highly likely that at least four Justices will vote to grant certiorari if the Tenth Circuit affirms the district court's decision here.

III. If the Tenth Circuit affirms, there is a strong likelihood that at least five Justices will vote to reverse.

There is also far more than the requisite "fair prospect" that at least five Justices will vote to reverse the Tenth Circuit if it affirms the district court. Respondents do not dispute that in *Windsor* four Justices have already quite clearly indicated their view that restricting marriage to

man-woman unions comports with the Fourteenth Amendment, while not one Justice indicated a contrary belief. See App. at 10 (discussing opinions). Moreover, as previously discussed, this Court in *Baker* has already held that restricting marriage to man-woman unions comports with the requirements of the Fourteenth Amendment. Although that summary decision will not command the same precedential effect in this Court as a plenary decision, it will likely command at least *some* respect when the Court faces the issue decided there.

Respondents' other arguments likewise fail to undermine Applicants' showing of a likelihood of reversal. Those arguments either ignore or sidestep (1) the powerful concerns about federalism and comity that permeate all the opinions in *Windsor*; (2) the clear, common-sense bases on which the State of Utah and its people could rationally decide to limit marriage to man-woman unions; (3) the fatal weaknesses in the district court's due process holding; and (4) the similarly fatal weaknesses in its equal protection holding.

A. Respondents ignore *Windsor's* repeated reaffirmations of the States' virtually plenary authority over marriage.

What is perhaps most striking about Respondents' Opposition is its failure to come to grips with the powerful expressions of support for States' authority over marriage, not just in the dissenting opinions, but in the majority opinion as well. Like the district court, for example, Respondents ignore the majority's quotation of the Court's earlier statement in *Williams* v. *North Carolina*, 317 U.S. 287, 298 (1942), that "[e]ach state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders," and its related observation 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.'" 133 S.Ct. at 2691 (quoting *Williams*, 317 U.S. at 298) (alteration in original). Like the district court, Respondents likewise ignore the statement

by the *Windsor* majority that "[t]he significance of state responsibilities for the definition and regulation of marriage dates to the Nation's beginning; for 'when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States.'" *Id.* (quoting *Ohio ex rel. Popovici* v. *Agler*, 280 U.S. 379, 383-84 (1930)). And like the district court, Respondents' ignore the majority's conclusion that the federal government's refusal in DOMA to respect the State's authority to define marriage as it sees fit represented a significant—and unwarranted—"federal intrusion on state power." *Id* at 2692.

Perhaps most important, Respondents nowhere explain how the district court's decision to invalidate a core feature of Utah's marriage law could possibly be reconciled with the *Windsor* majority's repeated indications of support for the principle of federalism in general, and for the States' plenary authority over marriage in general. As explained in greater detail below, the district court's specific holdings run afoul of this Court's decisions in multiple ways. But even by itself, the commitment to federalism reflected in the *Windsor* majority is a powerful indicator that, if the Tenth Circuit affirms and this Court grants review, reversal is likely.

B. Utah's decision to limit marriage to man-woman unions has a strong basis in both common sense and social science research.

The heart of the district court's holdings under both the due process and equal protection components of the Fourteenth Amendment was its view that Utah's decision to limit marriage to man-woman unions lacks any rational connection to any valid State policy. See Decision at 44-45. However, as explained in the Application (at 14-15), and as the district court tacitly acknowledged, the long tradition of limiting marriage to man-woman unions is not grounded in animus against gays and lesbians. It is, rather, grounded in the common-sense notion (among others) that (1) children generally do best across a range of outcomes when raised by their father

and mother (biological or adoptive), living together in a committed relationship, and (2) limiting the definition of marriage to man-woman unions substantially increases the *likelihood* that children will be raised in such an arrangement. Respondents do not deny that this is one of the major reasons why civilized societies have (until recently) virtually always decided to limit marriage to man-woman unions.

Respondents, moreover, do not even attempt to dispute the second proposition, *i.e.*, that this limitation encourages *all* would-be parents to do their best to ensure that any children they conceive are raised by a mother and a father, or that this encouragement thereby increases the overall likelihood that children will be raised in that kind of family environment. That is precisely the "rational connection" between the State's policy of limiting marriage to man-woman unions and the benefits of gender complementarity in parenting that the State seeks to provide for its children. And Respondents—like the district court—simply refuse to engage that fundamental point. That refusal speaks volumes.

Although they attempt to address the first proposition—*i.e.*, that children generally do better in various ways when raised by a mother and father, at least one of whom (or preferably both) is a biological parent—Respondents attack a straw man: They mischaracterize this point as an argument that "same-sex parents are inferior to opposite-sex parents." Opp. at 21. That is not the point: The State does not contend that the individual parents in same-sex couples are somehow "inferior" as parents to the individual parents who are involved in married, mother-father parenting. The point, rather, is that the *combination* of male and female parents is likely to draw from the strengths of both genders in ways that cannot occur with any combination of two men or two women, and that this gendered, mother-father parenting model provides important benefits to children. See App. at 15-16.

That this would be so is hardly surprising. Society has long recognized that diversity in education brings a host of benefits to students. See, *e.g.*, *Grutter* v. *Bollinger*, 539 U.S. 306 (2003). If that is true in education, why not in parenting? At a minimum, the State and its people could rationally conclude that gender diversity—*i.e.*, complementarity—in parenting is likely to be beneficial to children. And the State and its people could therefore rationally decide to encourage such diversity by limiting the coveted status of "marriage" to man-woman unions.

Although Applicants will be under no obligation to prove harm at the merits stage, as explained in the Application (at 14-18), social science also provides very good reasons to conclude that redefining marriage would undermine the State's interest in gender complementarity in parenting and impose other harms on Utah's legitimate interests. To take just one example—which Respondents do not directly dispute—there is overwhelming consensus in the literature and among policy makers that, in general, fatherless parenting inflicts serious personal and social harms.[1] To avoid such ills, Utah has an unquestionably legitimate interest in sending a powerful message to women that marriage to the fathers of their children is important to the welfare of those children and to society itself. But the genderless marriage definition sought by Respondents would directly undermine that message by holding up same-sex marriages—where fathers by definition would not be essential to the meaning and purpose of marriage and where, in many cases, they would not even be present—as of equal value in the eyes of the State as traditional man-woman marriages.[2] Respondents do not dispute this.

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[1] See, *e.g.*, DAVID BLAKENHORN, FATHERLESS AMERICA: CONFRONTING OUR MOST URGENT SOCIAL PROBLEM (1995); DAVID POPENOE, LIFE WITHOUT FATHER: COMPELLING NEW EVIDENCE THAT FATHERHOOD & MARRIAGE ARE INDISPENSABLE FOR THE GOOD OF CHILDREN & SOCIETY 146 (1996); Barack Obama, Speech on Fatherhood (June 15, 2008), *transcript available at* http://www.realclearpolitics.com/articles/2008/06/obamas_speech_on_fatherhood.html ("[C]hildren 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 school, and twenty times more likely to end up in prison."); see also App. at 15-17 (citing other similar evidence).

[2] To take another example, it is reasonable to believe that same-sex marriage will lead to increased use of surrogacy and sperm-donation by same-sex couples as a means of bearing children. Such children would, by definition, not be

To be sure, as Respondents point out, some researchers and a number of "health care organizations" have attempted to deny that gender diversity in parenting is all that important to children. Opp. at 21. But the fact that some researchers and politically correct trade associations disagree with the "legislative facts" underlying the judgment of Utah and its people does not matter. See, *e.g.*, *Vance* v. *Bradley*, 440 U.S. 93, 112 (1979) ("It makes no difference that the [legislative] facts may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such contrariety.") (internal quotation marks omitted)). All that matters is whether rational people could believe those legislative facts. And the supporting social science—combined with common sense and long historical practice—makes it impossible to deny that they could.

C. The district court's due process analysis is contradicted, not supported, by *Windsor* and this Court's other due process decisions.

Recent history also offers a very good prospect that at least five Justices will ultimately vote to reverse the district court's judgment if, as Respondents predict, the Tenth Circuit affirms. See Opp. at 35. In *Windsor*, not a single member of the Court expressed agreement with the remarkable proposition, adopted by the district court here, that *State* laws defining marriage exclusively in male-female terms "deny its gay and lesbian citizens their fundamental right to marry and, in so doing, demean the dignity of these same-sex couples for no rational reason." Decision at 2. The district court's bold conclusion also contradicts the view of *Windsor's* four dissenting Justices, who agreed that DOMA's traditional definition of marriage was perfectly constitutional. See 133 S.Ct. at 2696 (Roberts, C.J., dissenting) ("Interests in uniformity and stability amply justified Congress's decision to retain the definition of marriage that, at that point, had been adopted by every State in our Nation, and every nation in the world."); *id.* at

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the beneficiaries of the State of Utah's preferred mother-father parenting model, thus undermining the State's rational policy choices.

2709 (Scalia & Thomas, JJ., dissenting) (describing DOMA as "an Act that did no more than codify an aspect of marriage that has been unquestioned in our society for most of its existence; indeed, it had been unquestioned in virtually all societies for virtually all of human history"); *id.* at 2711 (Alito, J., dissenting) ("I would therefore hold that Congress did not violate Windsor's constitutional rights by enacting § 3 of [DOMA] ....").

Moreover, the *Windsor* majority's powerful reaffirmation of the States' "historic and essential authority to define the marital relation," *id.* at 2692, added to *Baker* v. *Nelson*'s denial of federal power to compel the acceptance of same-sex marriage, makes it likely that at least one of the Justices in the *Windsor* majority also would vote to reverse. Indeed, the judicious resolution created by *Windsor* and *Baker*—which together require federal recognition of State-authorized marriages while leaving States free to define marriage as they choose—is more consistent with federalism and *stare decisis* than the wholesale constitutionalization of State marriage laws. See *Planned Parenthood of S.E. Penn.* v. *Casey*, 505 U.S. 833, 856 (1992) (*stare decisis* counsels adherence even to questionable constitutional precedent, given "the certain cost of overruling [it] for people who have ordered their thinking and living around that case").

A good prospect of reversal is evident, as well, from substantive conflicts between the district court's decision and *Windsor*. See *Hollingsworth*, 558 U.S. at 190. For example, the district court misconstrued *Windsor* for the principle that "[t]he Constitution's protection of individual rights of gay and lesbian citizens is equally dispositive whether this protection requires a court to respect a state law, as in *Windsor*, or strike down a state law, as the Plaintiffs ask the Court to do here." Decision at 13. This tails-I-win, heads-you-lose interpretation finds no support in the *Windsor* majority opinion, which the district court admitted "did not resolve" the constitutionality of "state-law prohibitions of same-sex marriage." *Id.* at 12-13. *Windsor* struck down section 3 of DOMA because the Court could find no legitimate purpose for the

federal government's interference with the States' "historic and essential authority to define the marital relation," 133 S.Ct. at 2692—not because the Due Process Clause protects a free-standing right to same-sex marriage. Such a fundamental misreading of *Windsor* disregards the majority's specific disclaimer that its "opinion and its holding are confined to those lawful marriages" already authorized by a particular State. *Id.* at 2696.[3]

Respondents do not deny the conflicts between the district court's judgment and the *Windsor* majority. Indeed, they are unable to make up their minds whether this case presents an open question, see Opp. at 13, or an easy one, already dictated by *Windsor* and other due process decisions, on the alleged principle that "gay and lesbian persons must be included within the constitutionally protected right to marry." *Id.* at 14. But *Windsor* does not support that principle. To credit their interpretation one would have to accept that *Windsor* resolves the very question it expressly leaves open—the constitutionality of State laws prohibiting same-sex marriage—and does so despite the Court's profound respect for the principle of federalism and its express disclaimer strictly "confin[ing]" its judgment to same-sex marriages in States where they are now "lawful." 133 S.Ct. at 2696. Neither *Windsor's* discussion of personal dignity nor the truism that "State laws defining and regulating marriage of course, must respect the constitutional rights of persons," *id* at 2691, implies a right to same-sex marriage endorsed by no member of the Court. Respondents are wrong to suggest that the Court in *Windsor* has altered foundational principles of constitutional law through winks and nudges.[4]

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[3] As for the district court's mischaracterization of Justice Scalia's dissent, see Decision at 13, his concerns about where the majority's reasoning *might* lead cannot be understood as an endorsement of the proposition that *Windsor* already dictates same-sex marriage. 133 S.Ct. at 2709 (Scalia, J., dissenting) (agreeing that with regard to the "state denial of marital status to same-sex couples ... State and lower federal courts should take the Court at its word and distinguish away").

[4] Nor does *Windsor* support the argument that a State that limits marriage to man-woman unions is required to recognize marriages performed in states that do not impose that limitation. For one thing, Section 2 of DOMA—which was not challenged in *Windsor* or in this case, provides that "[n]o State ... shall be required to give effect to any public act, record, or judicial proceeding of any other State ... respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State ... or a right or claim arising from such

For all these reasons, the prospect of reversal is at least "fair." *Hollingsworth*, 558 U.S. at 190. Indeed, if the Tenth Circuit affirms and the Court grants review, reversal seems likely.

D. The district court's equal protection holding is likewise contradicted, not supported, by this Court's decisions.

The same is true of the district court's equal protection analysis.

1. Respondents first deny that Applicants have a good likelihood of obtaining reversal of the district court's equal protection holding based on an argument the district court did not adopt: that sexual orientation is a suspect class warranting heightened scrutiny. Opp. at 16-19. The district court properly rejected that argument based on existing Tenth Circuit precedent. Decision at 36 ("[T]he Tenth Circuit currently applies only rational basis review to classifications based on sexual orientation.") (citing *Price-Cornelison* v. *Brooks*, 524 F.3d 1103, 1113 (10th Cir. 2008) (rejecting heightened scrutiny for sexual orientation)). Ten other circuits have likewise held that that sexual-orientation classifications are subject to rational-basis review.[5] The Second Circuit's decision in *Windsor* v. *United States*, 699 F.3d 169, 180-85 (2d Cir. 2012), is the lone exception to this overwhelming consensus.

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relationship." 28 U.S.C. § 1738C. And quite apart from this controlling and unchallenged provision of federal law, Utah's refusal to recognize the Iowa marriage of Respondents Archer and Call is founded on the bedrock constitutional principle that "the Full Faith and Credit Clause does not require a State to apply another State's law in violation of its own legitimate public policy." *Nevada* v. *Hall*, 440 U.S. 410, 422 (1979). That principle safeguards the integrity of Utah's public policy, which unambiguously forbids recognition of same-sex marriages performed out-of-state. Utah Code § 30-1-4.1(1)(a) ("It is the policy of [Utah] to recognize as marriage only the legal union of a man and a woman . . . ."). Moreover, compelling Utah—or any other State—to recognize same-sex marriages performed elsewhere "would be the most astonishingly undemocratic, counter-majoritarian political development in American history." Patrick J. Borchers, Baker v. General Motors: *Implications for Interjurisdictional Recognition of Non-Traditional Marriages*, 32 CREIGHTON L. REV. 147, 150 (1998).

[5] See, *e.g.*, *Cook* v. *Gates*, 528 F.3d 42, 61-62 (1st Cir. 2008); *Thomasson* v. *Perry*, 80 F.3d 915, 927-28 (4th Cir. 1996); *Johnson* v. *Johnson*, 385 F.3d 503, 532 (5th Cir. 2004); *Davis* v. *Prison Health Servs.*, 679 F.3d 433, 438 (6th Cir. 2012); *Ben-Shalom* v. *Marsh*, 881 F.2d 454, 464 (7th Cir. 1989); *Citizens for Equal Prot.* v. *Bruning*, 455 F.3d 859, 866-67 (8th Cir. 2006); *High Tech Gays* v. *Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 573-74 (9th Cir. 1990); *Price-Cornelison* v. *Brooks*, 524 F.3d 1103, 1113 (10th Cir. 2008); *Lofton* v. *Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2004); *Padula* v. *Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987); *Woodward* v. *United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989). But see *Windsor* v. *United States*, 699 F.3d 169, 180-85 (2d Cir. 2012) (applying heightened scrutiny to sexual orientation).

This Court, moreover, has never applied heightened scrutiny based on sexual orientation despite repeated invitations to do so, including most recently in *Windsor*. See Brief for the United States on the Merits Question at 18-36, *United States* v. *Windsor*, 570 U.S. ___, 133 S.Ct. 2675 (2013) (No. 12-307), 2013 WL 683048 at *18-36 (arguing that "classifications based on sexual orientation should be subject to heightened scrutiny"); Brief on the Merits for Respondent Edith Schlain Windsor at 17-32, *United States* v. *Windsor*, 570 U.S. ___, 133 S.Ct. 2675 (2013) (No. 12-307), 2013 WL 701228 at *17-32 (arguing that "discrimination on the basis of sexual orientation . . . requires heightened scrutiny" and "is not entitled to a presumption of constitutionality"). This Court's evident reluctance to embrace that argument in other cases makes it unlikely that the Court would do so here.

Indeed, *Windsor's* holding that Section 3 of DOMA is invalid for lacking a "*legitimate* purpose," 133 S.Ct. at 2696 (emphasis added), is standard rational-basis language, see *Heller* v. *Doe*, 509 U.S. 312, 320 (1993) (rational basis review requires only a "rational relationship between the disparity of treatment and some *legitimate* governmental purpose") (emphasis added), and contrasts sharply with the requirements of strict or intermediate scrutiny, see, e.g., *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 227 (1995) (strict scrutiny requires showing that law is "narrowly tailored" to "further *compelling* governmental interests") (emphasis added) and *Craig* v. *Boren*, 429 U.S. 190, 197 (1976) (intermediate scrutiny requires that gender classifications "serve *important* governmental objectives" and be "substantially related to achievement of those objectives.") (emphasis added). Respondents' insinuation that *Windsor* tacitly endorses heightened scrutiny for sexual orientation is entirely misplaced.

Even when this Court in *Romer* v. *Evans*, 517 U.S. 620 (1996), faced a classification based on sexual orientation that was "unprecedented in our jurisprudence" because of its animus-produced targeting of homosexuals for historically unique political disabilities, *id.* at 633, the

Court made clear that it was applying conventional rational basis review. *Id.* at 631-32; see also *id.* at 635 (concluding that "a law must bear a rational relationship to a legitimate governmental purpose, and Amendment 2 does not." (citation omitted)). In short, this Court has never identified sexual orientation as a suspect or quasi-suspect class, and indeed has gone out of its way to apply rational basis review in such cases.

To be sure, as Respondents argue, Opp. at 18, both *Romer* and *Windsor* quote *Louisville Gas & Elec. Co.* v. *Coleman*, 277 U.S. 32, 37-38 (1928), for the proposition that "[d]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision." *Romer*, 517 U.S. at 633; *Windsor*, 133 S.Ct. at 2693. But that principle cannot support striking down Utah's marriage laws, because the traditional, gendered definition of marriage—which until recently was ubiquitous in American law and predates Western civilization itself—can hardly be said to be "unusual [in] character," much less "unprecedented in [this Court's] jurisprudence," *Romer*, 517 U.S. at 633. Moreover, as noted in the Application, the district court correctly refused to find animus, making it even less likely that the Court will employ anything but ordinary rational basis review.[6]

Nevertheless, Respondents confidently predict that the Court is likely to recognize a new suspect class and employ heightened scrutiny. Opp. at 19. But this Court has cautioned that the judiciary must be "very reluctant" to establish new suspect (or quasi-suspect) classes given "our federal system and ... our respect for the separation of powers," *City of Cleburne* v. *Cleburne*

[6] Respondents concede, as they must, that "the District Court ultimately refrained from expressly finding that Utah's marriage ban reflects animus toward gay and lesbian persons," but they nonetheless insist that the court's reasoning "strongly supports that conclusion." Opp. at 18 n.4. Their determination to paste the label of "animus" on Utah law rests on the false premise that a State law recognizing only traditional marriage unions is *per se* the product of animus because it treats same-sex couples unequally. See *id.* at 18-19 n.4. Equating mere unequal treatment with animus, however, not only breezes past the district court's sensible conclusion that "[s]ome citizens may have voted for Amendment 3 purely out of a belief that the amendment would protect the benefits of opposite-sex marriage," Decision at 40, but also begs the central question in this case: whether Utah's laws offend the Constitution by reserving marriage for a man and a woman for no rational reason. As explained in the Application (at 14-18), the State has powerful reasons—including among others considerations that bear on the well-being of its children—for limiting the definition of marriage to man-woman unions. Respondents' charges of animus are baseless.

Living Ctr., Inc., 473 U.S. 432, 441 (1985), and hence has not added to the short list of suspect or quasi-suspect classes in nearly forty years. This is not the place for a full analysis of the factors bearing on whether the Court should recognize a new suspect class. Suffice it to say that homosexuality would be an anomalous choice for a new suspect class shielded from the ordinary give and take of democratic lawmaking, as gays and lesbians now have enormous political power, which has grown exponentially with each election cycle. Cf. *Cleburne*, 473 U.S. at 445 (admonishing that a class should not be regarded as suspect when the group has some "ability to attract the attention of the lawmakers").

2. Respondents also argue that the Court is likely to employ heightened scrutiny based on the strained argument that Utah's marriage laws discriminate on the basis of sex. Opp. at 20-21; see Decision at 35. In allowing only marriages between men and women, Utah law affects men as a class and women as a class identically, to the disadvantage of neither. There is no validity in Respondents' philosophical argument that the male-female definition of marriage is rooted in archaic, "gender-based expectations" or "'assumptions about the proper roles of men and women.'" Opp. at 21 (quoting *Miss. Univ. for Women* v. *Hogan*, 458 U.S. 718, 726 (1982)). The law itself says no such thing, and Utah couples are free to negotiate gender roles within their marriages any way they see fit. Not surprisingly, most courts addressing the question have concluded that traditional marriage laws do not discriminate based on sex.[7]

3. Because Utah's traditional definition of marriage neither infringes on a fundamental right nor affects a suspect class, it is valid so long as it satisfies rational basis review. Respondents, therefore, face an almost insurmountable burden—one that makes it highly likely that Applicants will prevail on plenary review.

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[7] *See, e.g.*, Sevcik v. Sandoval, 911 F.Supp.2d 996, 1005 (D. Nev. 2012); *Jackson* v. *Abercrombie*, 884 F. Supp. 2d 1065, 1098-99 (D. Haw. 2012); *Smelt* v. *County of Orange*, 374 F. Supp. 2d 861, 876-77 (C.D. Cal. 2005); *Wilson* v. *Ake*, 354 F. Supp. 2d 1298, 1307-08 (M.D. Fla. 2005).

As this Court has long held, "[o]n rational basis review, a classification in a statute . . . comes . . . bearing a strong presumption of validity, and those attacking the rationality of the legislative classification have the burden 'to negative every conceivable basis which might support it.'" *F.C.C.* v. *Beach Commc'ns, Inc.*, 508 U.S. 307, 314-15 (1993) (quoting *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)). The Court, moreover, has indicated that federal courts are not authorized to "resolve conflicts in the evidence against the legislature's conclusion or even to reject the legislative judgment on the basis that without convincing statistics in the record to support it, the legislative viewpoint constitutes nothing more than . . . pure speculation." *Vance*, 440 U.S. at 111 (internal quotation marks omitted). "In general, [under rational basis review] the Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification." *Nordlinger* v. *Hahn*, 505 U.S. 1, 11 (1992). This judicial deference to the People's democratic policy choices is the hallmark of rational basis review.[8]

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[8] Hence, the constitutionality of Utah's marriage laws does not turn on a battle of experts, where the biggest footnote or heaviest appendix decides the issue. Compare Opp. at 21 n.6 (citing studies) with *F.C.C.* v. *Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993) ("[L]egislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.") and *San Antonio Indep. Sch. Dist.* v. *Rodriguez*, 411 U.S. 1, 43 (1973) (where the "ultimate wisdom as to [a public policy] is not likely to be divined for all time even by the scholars who now so earnestly debate the issues . . . the judiciary [should] refrain from imposing on the States inflexible constitutional restraints"). We are not ruled by experts, and our Constitution assuredly does not compel a State to adopt their ever-shifting understandings about what is best for society.

Nevertheless, Respondents' suggestion that experts agree same-sex parenting is equal to traditional mother-father parenting is inaccurate. See, e.g., Douglas W. Allen, *High School Graduation Rates Among Children of Same-Sex Households*, 11 REV. ECON. HOUSEHOLD 635 (2013) (finding lower graduation rates among children of same-sex households based on extensive Canadian census data). And their claim that Professor Regnerus' extensive study finding significant differences between mother-father and same-sex parenting has been discredited fails to recognize his comprehensive response, wherein he concludes that, even accounting for his critics' concerns, the data "still reveal numerous differences between adult children who report maternal same-sex behavior (and residence with her partner) and those with still-married (heterosexual) biological parents." Mark Regnerus, *Parental Same-Sex Relationships, Family Instability, and Subsequent Life Outcomes for Adult Children: Answering Critics of the New Family Structures Study with Additional Analysis*, 41 SOC. SCI. RES. 1367, 1367 (2012); see also *id.* at 1377 ("Until much larger random samples can be drawn and evaluated, the probability-based evidence that exists—including additional NFSS analyses herein—suggests that the biologically-intact two-parent household remains an optimal setting for the long-term flourishing of children."). Moreover, researchers have noted that many of the studies purporting to show no difference in parenting suffer from deep methodological flaws. See, *e.g.*, Loren D. Marks, *Same-Sex Parenting and Children's Outcomes: A Closer Examination of the American Psychological Association's Brief on Lesbian and Gay Parenting*, 41 SOC. SCI. RESEARCH 735, 748 (2012) (noting significant flaws in 59 studies conducted on same-sex parenting that involved small, non-random, convenience samples and that the generalized

The notion that the traditional definition of marriage—which until a few years ago was universally extolled and upheld by laws, courts, and preeminent authorities throughout the world—is so arbitrary that it cannot even pass rational basis review is untenable. As previously discussed, the State maintains that traditional marriage provides a unique benefit to the couple's children—the opportunity to be reared by the father and mother who brought them into the world. It maintains as a matter of fundamental public policy, and with eminent rationality, that enduring biological, psychological, cultural, social, and historical forces make this the optimal form of childrearing. It maintains, in other words, that both mothers *and* fathers can make important and even unique contributions to the wellbeing of their own children. For the benefit of children, it therefore seeks to channel all procreative and childrearing activities of heterosexual couples into the time-honored marital institution.

Even in the case of adoption, Utah (unlike some other states) does not allow unmarried, cohabiting couples to adopt, so that as much of this benefit as possible can be enjoyed by the child. See Utah Code Ann. § 78B-6-117(3) ("A child may not be adopted by a person who is cohabiting in a relationship that is not a legally valid and binding marriage under the laws of this state.").

The State unquestionably has a legitimate (indeed, a compelling) interest in encouraging heterosexual parents to marry and faithfully parent their children. It has an interest in encouraging as many children as possible to be raised in what it reasonably judges—or even "speculat[es]," *Vance*, 440 U.S. at 111, to be a uniquely beneficial setting. And by defining marriage in a form that embodies and promotes that preferred mother-father parenting structure,

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claim of no difference was "not empirically warranted"). Finally, Respondents' comment that the Child Trends study did not directly analyze same-sex parenting is true but irrelevant. Opp. at 21 n.6. That study, like so many others, confirms the enormous benefits that arise when a child is parented by a married father and mother. See KRISTIN ANDERSON MOORE ET. AL., CHILD TRENDS, MARRIAGE FROM A CHILD'S PERSPECTIVE: HOW DOES FAMILY STRUCTURE AFFECT CHILDREN AND WHAT CAN WE DO ABOUT IT? 1-2 (June 2002). Those child-welfare benefits are among the compelling interests Utah seeks to advance by upholding a marriage definition and institution that is directly associated with such benefits.

the traditional marriage definition is rationally connected to that end. Under rational basis review, nothing more is necessary. At a minimum, it establishes for purposes of the stay analysis not only "a fair prospect that a majority of the Court will vote to reverse the judgment below," *Hollingsworth*, 558 U.S. at 189, but a high likelihood.

4. For their part, Respondents "agree with Applicants that marriage provides enormous benefits for children," Opp. at 23, but then, like the district court, Decision at 42-43, demand what ordinary rational basis review simply does not require: that the State demonstrate a "rational connection between barring same-sex couples from marriage and the promotion of 'responsible procreation' or 'optimal parenting' by opposite-sex couples." Opp. at 22. As previously explained, there is indeed a rational—nay, a powerful—connection between the State's decision to limit the definition of marriage to man-woman unions and its desire to increase the likelihood that children will be raised by a father and mother. But in any event, Respondents' contention is nothing more than an underinclusiveness argument: *i.e.*, that the State's ends could still be advanced or at least not harmed by including more persons within the challenged class. Such arguments almost invariably fail on rational basis review, where a classification must be upheld as rational if "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); see also *Vance*, 440 U.S. at 108-09 ("Even if [a] classification . . . is to some extent both underinclusive and overinclusive, and hence the line drawn by Congress imperfect, it is nevertheless the rule that in [rational basis review] 'perfection is by no means required.'" (quoting *Phillips Chemical Co.* v. *Dumas School Dist.*, 361 U.S. 376, 385 (1960)).

Here, the argument fails because the inclusion of same-sex couples within Utah's definition of marriage would not advance Utah's strong policy of promoting mother-father parenting—that is, a genderless definition of marriage would not promote Utah's legitimate

interest in encouraging gender complementarity in parenting. Thus, even if extending the definition of marriage to same-sex couples would not harm opposite-sex couples or their children, it is still rational for Utah to draw the line where it has. However, as explained in the Application (at 14-19) and above, there are very good reasons to conclude that redefining marriage would indeed impose harms on Utah's legitimate interest in fostering gender complementarity in parenting.

Other harms could be elaborated, including increased focus on accommodating adult relationship choices over the welfare of children (the distinction between conjugal and consent-based marriage discussed in Justice Alito's *Windsor* opinion), and profound clashes with parental and religious interests across a range of other social institutions. But again, Applicants have no obligation to prove harm. Under rational basis review, it suffices that Utah's definition of marriage rationally advances its policy of mother-father parenting. And for that reason and others explained above and in the Application, the likelihood that the district court's equal protection holding will be reversed (if the Tenth Circuit affirms) seems not just "fair," but high.

IV. The balance of equities strongly favors a stay.

Finally, Respondents' arguments on the equities confirm that the balance of equities tips strongly in favor of a stay.

1. Against the harm suffered by the State and its democratic interests as a result of the district court's decision to enjoin enforcement of State laws passed by its legislature and its people in a direct vote, see App. at 19-22, Respondents allege that they would be harmed by a stay in two ways. First, they say that they and their children would suffer "irreparable harm" because Utah's laws would once again "stigmatize the[ir] relationships as inferior and unequal." Opp. at 38. But whatever harm such stigma might cause would be erased by a subsequent decision affirming the district court's decision, and therefore does not count as *irreparable* harm.

Second, Respondents claim that Respondents Archer and Call will suffer irreparable injury if a stay is issued because Call "is suffering from a terminal illness that may very well prevent her from surviving the instant appeal." Opp. at 39. Ms. Call and Ms. Archer have the Applicants' deepest sympathies, but this couple, already wed in Iowa, has not shown any concrete harm linked to issuance of a stay. They have not identified any imminent transaction or legal event where a stay will prejudice their interests. Any harm to them, the other Respondents, or Utah same-sex couples generally is a result of one practical and legal reality: The status of same-sex marriages is and will remain uncertain until the constitutionality of man-woman marriage is conclusively resolved on appeal. The presence or absence of a stay will not eliminate that inescapable uncertainty.

2. Respondents, by contrast, have failed to undermine the Applicants' showing of irreparable injury. For one thing, Respondents do not dispute that allowing additional same-sex marriages to take place in violation of Utah law risks irreparable injury to both the State and the couples so married, if those marriages must later be unwound as a result of a decision reversing the district court's decision. See App. at 19-22. Contrary to Respondents' suggestion, Opp. at 28-29, the fact that implementation of the district court's order is being accomplished without major administrative impact says nothing about the likely costs of dealing with the possible *unwinding* of marriages that will be solemnized if a stay is not granted. Moreover, the fact that such "administrative costs" are "not enough" by themselves to warrant the relief sought here, Opp. at 29-30, does not mean that those costs are not irreparable or worthy of consideration.

Most important, Respondents have no plausible response to our showing that, under *this* Court's precedents, a State suffers a form of irreparable injury whenever a court enjoins enforcement of a State law whose constitutionality has not been fully and finally litigated. App. at 19-22. That settled principle has particular force here for two reasons. *First*, as this Court

emphasized in *Windsor*, the Constitution and its core concept of federalism give a State virtually plenary power to regulate domestic relations within its borders and, particularly, to define marriage. See 133 S. Ct. at 2680-81, 2691-92. A State's marriage laws are of a higher and different order than most of its laws, as the federal government learned when it interfered with New York's marriage laws. *Second*, compared to the residents of other States, Utah's people adhere most fully to the practices, norms, and ideals of "conjugal" marriage identified by Justice Alito in *Windsor*, see Dkt. No. 36 at 47-55 (affidavit of Dr. Joseph P. Price)—a vision of marriage that Justice Alito also identified as being profoundly different from the "consent-based" vision of marriage underlying a genderless marriage regime. 133 S. Ct. at 2711, 2718. One cannot overestimate the disrespect to Utah's people caused by the district court's decision effectively denigrating "conjugal" marriage, striking down their highest laws designed to protect it, and imposing on them by force of federal law a fundamentally contrary vision of marriage.

To these realities, the Respondents have but one counter-argument: The district court's decision, in their view, is right and will prevail on appeal. Opp. at 30-34. But that argument overlooks the fact that the district court's decision is just the beginning of the process by which the constitutionality of Utah's laws will be determined. In that process, the district court's decision has *no* binding precedential value, not for other district judges in Utah, not for the Tenth Circuit, and certainly not for this Court. See, *e.g.*, *Am. Elec. Power Co., Inc.* v. *Connecticut*, 131 S. Ct. 2527, 2540 (2011) ("[F]ederal district judges, sitting as sole adjudicators, lack authority to render precedential decisions binding other judges, even members of the same court").

Moreover, Respondents' counter-argument is based on their quite confused treatment of *Windsor*. On the one hand, they concede that *Windsor* expressly left open the ultimate issue of "conjugal" marriage's constitutionality, Opp. at 13, but then, on the other hand, their entire analysis of the equities *assumes* that *Windsor* effectively resolved that issue in their favor. Yet

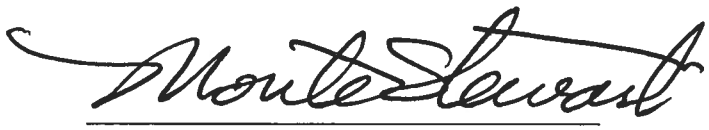
as shown above, taken as a whole, *Windsor* supports Utah's marriage laws. See *supra* 16-26. In any event, it is for this Court to announce authoritatively—at the appropriate time—*Windsor*'s implications for the ultimate issue.

In short, a stay will minimize the harms—to Utah and its laws, to the large majority of its people, and even to same-sex couples—resulting from the practical limbo in which those laws now reside pending authoritative appellate review. Most important, a stay will eliminate the daily affront to the State and its citizens of being compelled by a single federal judge to solemnize marriages that strike at the heart of the State's democratic processes and of the conjugal view of marriage embraced by the vast majority of its people.

CONCLUSION

For the reasons stated above and in the Application, the Applicants respectfully request that the Circuit Justice issue the requested stay of the district court's judgment and injunction pending appeal. If the Circuit Justice is either disinclined to grant that relief or simply wishes to have the input of the full Court on this application, Applicants again respectfully request that it be referred to the full Court.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of January, 2014, I served the foregoing Reply In Support Of Application To Stay Judgment Pending Appeal via email and United States mail on the following counsel of record:

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