NO. 14-574

Supreme Court of the United States

GREGORY BOURKE, *et al.*,

Petitioners,

v.

STEVE BESHEAR, *et al.*,

Respondents.

On Writ of Certiorari to the US Court of Appeals for the Sixth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL FAMILY CIVIL RIGHTS CENTER IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE* [1]

The National Family Civil Rights Center ("NFCRC") is the only national non-profit organization solely committed to protecting and enhancing the civil rights of children and parents in all types of families with the mission to enhance and protect the civil rights of families to equal protection under the law, fundamentally fair proceedings in the courts, and accessibility to legal and government processes which impact the lives of parents and children in every type of family.

[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amicus* or their counsel, make a monetary contribution to the preparation or submission of this brief. All counsel of record have consented to this filing through blanket consents filed with the court.

The NFCRC participates directly in and as *amicus curiae* in courts across the country in proceedings which present significant and pressing issues concerning the civil rights of families.[2]

ARGUMENT

This case presents an issue of great jurisprudential significance to the bedrock of American society, the family, and the oldest of liberty interests:

> The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." We have long recognized that the Amendment's Due Process Clause, like its Fifth Amendment counterpart, "guarantees more than fair process." The Clause also includes a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests." The liberty interest… of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court."

Troxel v Granville, 530 US 57, 65 (2000)

The decision below, conflicting with the decisions of every other sister Circuit, is wholly devoid of any recognition that this national

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[2] Including in *Stankevich v Milliron*, Michigan Supreme Court No. 148097, a same-sex marriage and custody dispute between two women married in Canada that has been held in abeyance by April 25, 2014 order pending resolution of *DeBoer v. Snyder,* presently before this Court.

debate about same-sex marriages is, at its core, a debate that affects the legal interests of millions of American parents and children, and directly denies these families the fundamental liberties that this Court has always protected.

I. THE PETITIONER'S RIGHT TO MARRY IS FOUND IN THE FOURTEENTH AMENDMENT

Today, the concept of a family continues to be redefined and if anything, the traditional family consisting of a married father and mother with children living in one home has become less the norm. What the Sixth Circuit has done, is singled out a class of those families, based only on the constitutionally-protected sexual preferences of the adults in those families, and imposed upon them the exact same unacceptable conditions noted by the Court in 2013 when striking down the federal ban on same sex marriages:

> DOMA undermines both the public and private significance of state-sanctioned same-sex marriages; for it tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition. This places same-sex couples in an unstable position of being in a second-tier marriage. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects, see *Lawrence*, 539 U. S. 558, and whose relationship the State has sought to dignify. *And it humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even*

> *more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.*

United States v. Windsor, 570 US___ (2013) (*emphasis added*)

This refusal to deny marriage to adults based on their constitutionally-protected sexual orientation obviously has ramifications far beyond just marriage licenses and instead, as so many federal courts have recognized, touches upon every aspect of domestic relations laws: marriage, divorce, child custody, and so much more. Thus, this denial of the oldest and most fundamental liberty interests implicating the family is not just humiliation, but the deprivation of rights that affect the most vulnerable, the children being raised in intact, same-sex unions, and the children who have been brought into these unions.

A. Parents in and the children of same-sex marriages are entitled to equal protection

The Court has long protected family relationships and employed a liberal interpretation of the word "family." The Court first placed the parent-child relationship under the protection of the Fourteenth Amendment, recognizing that the right "to marry, establish a home and bring up children" is protected by the Due Process Clause. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *see also Pierce v. Society of Sisters*, 268 U.S. 510, 533-34 (1925). In *Wisconsin v. Yoder*, 406 U.S. 205 (1972) the Court protected families from governmental intrusion into the parental authority inherent in raising a child and later recognized in *Santosky v. Kramer,* 455 U.S. 745, 758 (1982) that the rights of natural parents to

the care custody and management of their child is a fundamental right protected by the Fourteenth Amendment. Notably, the the Court did not employ the use of "birth parents" in *Santosky* which would infer only a biological connection to a child, but instead used "natural parent", which has always been the "first parent" of a child, irrespective of genetic connection, as is often the case with children adopted into or resulting from same-sex unions.

Furthermore, the Court has refused to adopt a narrow definition of "family" that limits constitutional protections to just traditional families, recognizing the need to adopt a broad definition of family. *Moore v. City of East Cleveland*, 431 U.S. 494 (1977). Justice Powell explained: "our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition… Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family." *Id.* at 503-04.

The Court further acknowledged that "family" is not limited to blood, marriage or by adoption in *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 843-44 (1977). Thus the arguments that same-sex marriage cannot result in natural procreation – as reasons to sustain same-sex marriage bans – are utterly meritless.

Also, the Court "has long recognized that freedom of personal choices in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974). The Court further acknowledged that

"[t]he demographic changes of the past century make it difficult to speak of an average American family" when strengthening the rights of parents to determine with whom a child associates in *Troxel v. Granville*, 530 U.S. 57 (2000).

Thus, the decision below cannot be squared with the clear scrutiny required by *Troxel* and the liberal definition of family established by the jurisprudence of this Court.

Further, whereas the Court has acknowledged the importance of a liberal definition of family and rights of parents, it has demonstrated a greater determination to protect the rights of children; in *Pyler v Doe*, 457 U.S. 202 (1982) the Court refused to punish children for the mistakes of the parents. While we certainly do not characterize the choice of two same-sex adults to exercise choice in making a union based upon their constitutionally-protected right to their sexual-orientation, the practical impact of the Sixth Circuit's decision is to punish the children of these lawful relationships between two loving adults. For this reason, the parents and children in these families, have a fundamental right that is being denied, to continue their parent-child relationship with parents, who came together and formed an intact family into which they were born or adopted, deemed legal in many states but not within the Sixth Circuit.

B. **Same-sex marriage bans unfairly discriminate against children based on the constitutionally-protected choices of their parents**

In *Pyler*, this Court observed:

> "Persuasive arguments support the view that a State may withhold its beneficence from those whose very presence within the United States is the product of their own unlawful conduct. These arguments do not apply with the same force to classifications imposing disabilities on the minor children of such illegal entrants…. Their 'parents have the ability to conform their conduct to societal norms,' and presumably the ability to remove themselves from the State's jurisdiction; but the children who are plaintiffs in these cases 'can affect neither their parents' conduct nor their own status." *Id.* at 220.

But in the Sixth Circuit, the status of a child's parents as a same-sex couple – denied the right to marry – is the only reason why these children are excluded from the protections state laws (*see e.g.* the Child Custody Act of Michigan and an assessment of best interests pursuant to MCL 722.23). This cannot be squared with this Court's holding in *Pyler.*

Significantly, the status millions of children's parents, which are being used against them as children of these parents – by removing from those children the same custodial best-interests protections that would otherwise apply – is not an illegal alien status which the Court considered in *Pyler* but instead is a constitutionally protected right that has been repeatedly affirmed by this Court. In *Lawrence v. Texas*, 539 U.S. 558 (2003), this Court recognized the constitutional right of all individuals, to engage in homosexual sexual relations within the privacy of their own homes.

In doing so, the Court expressly overruled *Bowers v. Hardwick*, 478 U.S. 186 (1986) and instead followed *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) and its broad construction of the rights and traditions at stake inherent in the right to sexual liberty.

Indeed, in applying *Pyler*, the Massachusetts Supreme Court held: "[i]t cannot be rational under our laws, and indeed it is not permitted, to penalize children by depriving them of State benefits because the State disapproves of their parents' sexual orientation." *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 964 (Mass. 2003).

Importantly, the states within the Sixth Circuit cannot discriminate against a person based upon their homosexual orientation, *in all respects except marriage*. Clearly, *Lawrence* prevents the Legislatures and voters of these states from interfering with the sexual relations of all individuals based upon a heterosexual or homosexual orientation within the privacy of their own homes.

But in the context of marriage, the Sixth Circuit now permits such discrimination, because in elections past, the "will of the people" indicated a desire to codify such discrimination.

Thus, the "will of the people" reflected in the same-sex bans at issue below contain the same animus this Court directly address in *Windsor*:

> The history of DOMA's enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power, was more than an incidental

> effect of the federal statute. It was its essence. The House Report announced its conclusion that 'it is both appropriate and necessary for Congress to do what it can to defend the institution of traditional heterosexual marriage. . . . H. R. 3396 is appropriately entitled the 'Defense of Marriage Act.' The effort to redefine 'marriage' to extend to homosexual couples is a truly radical proposal that would fundamentally alter the institution of marriage.' H. R. Rep. No. 104–664, pp. 12–13 (1996). The House concluded that DOMA expresses 'both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality.' *Id.,* at 16 (footnote deleted). The stated purpose of the law was to promote an "interest in protecting the traditional moral teachings reflected in heterosexual-only marriage laws." *Ibid.* Were there any doubt of this far-reaching purpose, the title of the Act confirms it: The Defense of Marriage.

There can be no doubt that the state same-sex marriage bans at issue below were enacted for the same reason, to interfere with the dignity of same-sex marriages between homosexual couples.

Moreover, many same-sex citizens in these states would be considered legally married, *if they were not a same-sex couple*, because they possess valid marriage licenses from other states. As such, they are being discriminated against precisely and only because of their constitutionally-protected sexual orientation, which is every bit offensive as if

their marriage certificate was subject to strict scrutiny and validity upon some other constitutionally-protected factor such as their religion, age and ability to conceive or bear children, or their race.

Furthermore, it is readily obvious that the discrimination against the parties in this case, extends to the children in those families who are being punished by the choices and sexual orientation their parents over which they no control.

II. FAILURE TO RECOGNIZE LEGAL SAME-SEX MARRIAGES FROM OTHER JURISDICTION VIOLATES THE UNITED STATES CONSTITUTION AND HARMS FAMILIES

Since this Court's decision in *Lawrence* and the Massachusetts Supreme Court decision in *Goodridge*, every other state has either legalized same-sex marriage or passed a constitutional amendment (or other legislation) to ban same-sex unions. Today, the list of states that have legalized same-sex marriage through federal court decisions expands, but eight states have legalized same-sex marriage through the enactment of legislation (Delaware, Hawaii, Illinois, Minnesota, New Hampshire, New York, Rhode Island, and Vermont), and three through a popular vote (Maine, Maryland and Washington). Same-sex marriage is also legal in Washington, D.C., as well as across the US borders to the north and south in Canada and many jurisdictions in Mexico. Importantly, since *Windsor,* not a single state constitutional or legislative ban has been enacted by voters.

Accordingly, the states in the Sixth Circuit may now refuse to recognize the marriages of its citizens, when performed in other states, and that are legal in other states, only on the grounds that these otherwise legal marriages are between homosexual adults. This raises competing interests of states' rights and individual rights, which the Court did not address in *Windsor*.

But this right to regulate the domestic relations of parties in the context of marriage, conflicts with the fundamental rights vested in children and parents under the authority of the United States Constitution that "may not be submitted to vote; they depend on the outcome of no elections." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). Further, marriage is "the most important relation in life" and as "the foundation of the family and society, without which there would be neither civilization nor progress." *Maynard v. Hill*, 125 U.S. 190, 205, 211 (1888). Finally, a state cannot "unnecessarily impinge on the right to marry" *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978).

Therefore, the state bans at issue below violate the equal protection liberties of same-sex spouses legally married in other jurisdictions that are equally protected by the Fourteenth Amendment to the United States Constitution.

A. This Case Directly Implicates the Domestic Relations Exception to Subject Matter Jurisdiction

The justiciability of the family as a federal question – the unspoken but underlying issue here – cries out for resolution by the Court. Indeed, states seeking to enforce same-sex marriage bans that are

procedurally behind the cases at bar (*e.g. South Carolina*) have raised this in stay applications to the Court. For these reasons, this case presents an ideal vehicle to resolve a deep and entrenched circuit split.

Numerous scholars note that a series of federal "constitutional questions relating to the family — about who can marry, who can have sex, who can procreate or chose not to procreate, and the rights of parents and children" have been decided in the Court and that as a consequence, the federal judiciary is charged with "frequently acting as a check on state prerogatives."[3] These federal constitutional issues have led to conflict over the role of the federal system in domestic relations. Indeed, constitutional review of Congress' "jurisdiction-stripping legislation [1 U.S.C. 7] to prevent federal court review of fundamental family rights" is now under review and this Court has struck down other Congressional attempts to regulate aspects of domestic relations: *see United States v. Morrison*, 529 U.S. 598, 627 (2000); *Thompson v. Thompson*, 484 U.S. 174, 186 n.4 (1988). *Id.* Harbach

Furthermore, the Federal bench has a long-standing tradition of intervening in state domestic relations issues when federal question cases implicate the family, frequently serving as this check upon state prerogatives which impede on the central liberties protected by the Fourteenth Amendment. *Zablocki v. Redhail*, 434 U.S. 374, 376 (1978); *Palmore v. Sidoti*, 466 U.S. 429, 430 (1984); *Loving v. Virginia*, 388 U.S. 1, 3-4 (1966); *Pierce v. Society of*

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[3] Harbach, Meridith Johnson, "*Is the Family a Federal Question*," Washington and Lee Law Review, Volume 66, Issue 1, Article 4, pg 138 [66 Wash. & Lee L. Rev. 131 (2009)]

Sisters, 268 U.S. 510, 510 (1925); *Lawrence v. Texas*, 539 U.S. 558, 578-79 (2003); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 681-82 (1977); *Roe v. Wade*, 410 U.S. 113, 116, 120 (1973); *Eisenstadt v. Baird*, 405 U.S. 438, 440 (1972); *Boddie v. Connecticut*, 401 U.S. 371, 372 (1971); and *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965).

In fact, the "claims of a kind traditionally adjudicated in federal courts... [were] not excepted from federal court jurisdiction simply because they ar[o]se in a domestic relations context." *City of Chi. v. Int'l Coll. of Surgeons*, 522 U.S. 156, 190 n.6 (1997) (Ginsburg, J., dissenting). As the body of federal constitutional decisions affecting families has grown, the federal courts increasingly have faced federal question claims relating to domestic relations – as in the cases at bar. *See e.g. Flood v. Braaten*, 727 F.2d 303, 307 n.17 (3d Cir. 1984) (observing that, given Supreme Court's modem recognition of family law rights of constitutional dimension, "it would be difficult to maintain that the domestic relations exception extends to all sources of jurisdiction").

Yet today, great uncertainty and a split among the circuits has emerged, raising uncertainty about whether federal court have jurisdiction to address the types of federal questions implicating the domestic relations of parties, as in this case: *Ashmore v. New York*, *aff'd sub nom. Ashmore v. Prus*, 510 Fed. App'x 47 (2d Cir. 2013), *cert. denied,* 133 S.Ct. 2038 (2013) ("We expressly decline to address whether the domestic relations exception to federal subject matter jurisdiction applies to federal question actions."); *Mandel v. Town of Orleans*, 326 F.3d 267, 271 (1st Cir. 2003) ("[T]he courts are

divided as to whether the doctrine is limited to diversity claims and this court has never decided that issue. The debate is esoteric but, as federal law increasingly affects domestic relations, one of potential importance."); *Johnson v. Rodrigues*, 226 F.3d 1103, 1111 n.4 (10th Cir. 2000) ("Some district courts in the Second Circuit have applied the domestic relations exception in federal question cases, but other Circuits have held that the exception is limited to diversity suits."); *McLaughlin v. Pernsley*, 876 F.2d 308, 312 (3d Cir. 1989) (recognizing differences in some circuits); *Ruffalo v. Civiletti*, 702 F.2d 710, 717-18 (8th Cir. 1983) ("It is unclear whether the domestic-relations exception applies to cases brought under the federal-question statute."); *Atwood v. Fort Peck Tribal Ct. Assiniboine*, 513 F.3d 943, 947 (9th Cir. 2008) ("We therefore join the Fourth and Fifth Circuits in holding that the domestic relations exception applies only to the diversity jurisdiction statute"); *United States v. Johnson*, 114 F.3d 476, 481 (4th Cir. 1997) ("The 'jurisdictional exception,' in the first place, is applied only as a judicially implied limitation on the diversity jurisdiction; it has no generally recognized application as a limitation on federal question jurisdiction."); *Flood v. Braaten*, 727 F.2d 303, 305, 308 (3d Cir. 1984) ("[W]e cannot agree with the district judge that the PKPA can never support federal question jurisdiction in a lawsuit connected with a child custody dispute. Accordingly, we will remand for further proceedings." ("[A]s a jurisdictional bar, the domestic relations exception does not apply to cases arising under the Constitution or laws of the United States.").

This important debate rages on and shows no sign of abating, evidenced by the March 3, 2015 order of the Alabama Supreme Court that the probate judges of its state were not to marry same-sex Alabama citizens, holding, *inter alia*, that its state Constitution was the relevant authority, not the Federal courts, in direct contravention of the U.S. Constitution and relevant orders of the Federal judiciary. *See Ex parte State of Alabama ex rel. Alabama Policy Institute, et. al.* No. 1140460.

As Alabama once again demonstrates, the Federal courts are more independent and insulated from local bias or majoritarian pressure, enabling them to enforce the U.S. Constitution without fear of reprisal. Moreover, the longstanding tradition of the Federal Courts as enforcers of the Constitution, and the lifetime appointment to the bench, makes the Federal bench more receptive to the Court's precedents and distant from the pressures on state courts which may leave state court Judges cynical and skeptical of constitutional rights in practice. For precisely this reason, legal scholars have noted that

> Expanding the exception to federal questions undermines the value in preserving a federal forum for family law cases raising federal questions. Using the domestic relations exception to bar consideration of federal questions in federal court may increase the possibility that state courts will decline to extend important federal family rights or, worse yet, undermine them knowing their decisions will never be reviewed by the Supreme Court
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> …

> [T]his expansion causes expressive harm and has cultural implications. An expanded exception manifests an attitude that federal family law questions and litigants are less important or worthy than other federal questions. This expressive message lowers the status of these issues, reinforcing the inferior status of family law issues vis-á-vis the federal courts, and assuring the continued marginalization of family law.
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> …
>
> [federal questions are the] core of modern federal court jurisdiction [and] the most important component of the federal courts' workload.

Harbach, at 138.

Finally, we note that the central premise of the domestic relations exception—that "[t]he whole subject of domestic relations of husband and wife, parent and child, belongs to the laws of the states and not to the United States" originally appeared as a dicta. *In re* Burrus, 136 U.S. 586, 593-94 (1890). Although this was first articulated in 1959, the Supreme Court did not rely on this justification for a holding as opposed to dicta until 1930. *Ankenbrandt v. Richards*, 504 U.S. 689, 694 (1992) ((noting that language in Barber, first announcing exception, was "technically dicta") (citing *Barber v. Barber*, 62 U.S. 582, 584 (1858)). For too long, lower courts have been left to their own to interpret what the Court intended in *Akenbrandt.*

For these reasons, direct rejection of the domestic relations exception to subject matter

jurisdiction in federal question actions is both necessary and appropriate in this case.

CONCLUSION

Allowing the Sixth Circuit decision to stand will deny millions of American couples, parents and children the oldest fundamental liberties recognized by the Court. For these reasons, the National Family Civil Rights Center respectfully asks that the Court reverse.

Respectfully submitted,

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