No. 14-574

IN THE
Supreme Court of the United States

GREGORY BOURKE, et al., and TIMOTHY LOVE, et al.,
Petitioners,

v.

STEVE BESHEAR, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF KENTUCKY
Respondent.

On a Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Kentucky and Michigan have made the institution of marriage part of their civil law. Marital status, when conferred, "is a far-reaching legal acknowledgement of the intimate relationship between two people" – an official stamp of legitimacy and worth. *United States v. Windsor*, 133 S. Ct. 2675, 2692 (2013). These States have also elected to condition innumerable "protection[s]," *id.* – ranging from adoption rights to survivorship guarantees – on marital status. Yet the States offer these legal protections to only part of their populations; they refuse to allow gay people equal access to them.

According to the States, petitioners must earn these protections "through the ballot box." Michigan Br. 2. Only when gay people have prevailed "in a state-by-state democratic debate," the States say, will they become entitled to form marital unions and to enjoy legal safeguards that straight people take for granted. Kentucky Br. 1.

This is not how our constitutional system works. While the states have primacy over many things, including most aspects of family law, they must always "respect the constitutional rights of persons." *Windsor*, 133 S. Ct. at 2691. Thus, even if petitioners could eventually overcome their "history of unequal treatment," Kentucky Br. 23, through democratic processes in all fifty states, they should not have to do so. The Fourteenth Amendment's guarantees of liberty and equality "are warrants for the here and now." *Watson v. City of Memphis*, 373 U.S. 526, 533 (1963). And, after the States' filings in this case, there can no longer be any doubt that the States' marriage bans violate those guarantees.

I. Kentucky's Marriage Ban Demands Close Judicial Examination.

Nothing in the States' briefs undermines the central reality that marriage bans impinge upon the equal dignity of gay people. Kentucky's ban consequently requires close judicial examination.

A. The Marriage Ban Infringes The Fundamental Right To Marry.

Neither Kentucky nor Michigan disputes that marriage is a fundamental right or that denials of fundamental rights are subject to strict scrutiny. Yet the States maintain that the right to marry extends only to different-sex couples. None of the States' arguments withstands scrutiny.

1. The States' primary contention is that history and tradition exclude same-sex couples from access to the fundamental right to marry. Invoking *Washington v. Glucksberg*, 521 U.S. 702 (1997), they argue that "the importance of marriage in our society" is limited to "the context of the traditional man-woman version of the institution." Kentucky Br. 18. Petitioners and their amici have already addressed this argument. Petr. Br. 18-23; *see also* Br. of Virginia 19-25 (explaining proper use of history and tradition in fundamental-rights analysis); Br. of Laurence Tribe et al. 11-13 (same). In short, history and tradition establish that marriage is a "vital personal right[] essential to the orderly pursuit of happiness" for *all* persons. *Loving v. Virginia*, 388 U.S. 1, 12 (1967). And same-sex couples "may seek autonomy for these purposes, just as heterosexual persons do." *Lawrence v. Texas*, 539 U.S. 558, 574 (2003).

The States resist this logic, arguing that the right to be married is fundamental only because it was

historically a "necessary prerequisite" for procreation. Michigan Br. 25; *see also* Kentucky Br. 17. But the fundamental right to marry has never been limited to couples who can conceive their own biological children. *See* Br. of Historians of Marriage 6-15. In *Turner v. Safley*, 482 U.S. 78 (1987), for example, this Court held that prisoners enjoy the fundamental right to marry even while barred from procreating. *Id.* at 95-96. To be sure, this Court noted that "most" prisoners have an opportunity upon discharge to consummate their marriages. *Id.* at 96. But some do not, and this Court stressed that other elements of prisoners' relationships – including "expressions of emotional support and public commitment," "spiritual significance," and an "expression of personal dedication" – are sufficient to form a "constitutionally protected marital relationship." *Id.* at 95-96.[1] Same-sex couples deserve at least the same protection.

So do infertile different-sex couples, whom the States imply they would also bar from marriage if only they could. *See* Kentucky Br. 34; Michigan Br. 34. Marriages between elderly persons and others unable to procreate have always been celebrated – not merely tolerated on the supposed ground that "sterility and fertility testing [would be] a severe invasion of privacy," Michigan Br. 34. This is because the fundamental right here is the right to form a "bilateral loyalty" that is "intimate to the degree of being sacred." *Zablocki v.*

[1] *Turner* also disposes of the States' contention that *Butler v. Wilson*, 415 U.S. 953 (1974), held that prisoners serving life sentences have no right to marry because there is "no expectation of procreation." Michigan Br. 26; *accord* Kentucky Br. 18. *Turner* distinguished *Butler* by noting that in that case "denial of the right was part of the punishment for crime." *Turner*, 482 U.S. at 96. *Butler* had nothing to do with procreation.

Redhail, 434 U.S. 374, 384 (1978) (quoting *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965)). Same-sex couples, no less than anyone else, are worthy of such relationships.

Nor can the fundamental right to marry be recast, as Michigan suggests, as merely a right to engage in sexual relations without criminal prosecution. Michigan Br. 24-25. As this Court declared in *Lawrence*, "it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse." 539 U.S. at 567. Under Michigan's cramped conception of the liberty interest at stake, the right to marry would have vanished with the repeal of anti-fornication laws, leaving the Fourteenth Amendment to protect only sex itself. *See id.*; *Eisenstadt v. Baird*, 405 U.S. 438 (1972). Our Constitution means more than that.

No doubt some religious traditions "have intrinsically tied marriage to procreation" (Kentucky Br. 17) and even to permission to have sex. But religious teachings "do not answer the question before us." *Lawrence*, 539 U.S. at 571. We deal here with *civil* marriage. And religious convictions about the connection between marriage and procreation cannot determine the destiny of same-sex couples (or anyone else).

2. The States are likewise incorrect that petitioners seek to "chang[e] the definition of marriage." Michigan Br. 41; *accord* Kentucky Br. 1. Marriage is defined not by the identities of its participants but by the mutual "rights and responsibilities" afforded them by law. *Windsor*, 133 S. Ct. at 2694. In Kentucky and Michigan, as elsewhere, these rights and responsibilities number in the hundreds. Petitioners seek to change none. They do not need to; each one applies to their families just as

to those of different-sex couples. *See* Br. of Family Law Scholars 3-28.

True, Kentucky's marriage ban, like those of other states, takes the form of a law "defin[ing]" marriage as between one man and one woman. Ky. Rev. Stat. § 402.005. But any exclusionary provision can be structured in this way. Kentucky's Constitution, for instance, formerly defined "voter" as a "male citizen" who is at least twenty-one years old. Ky. Const. § 145 (1891). Allowing Petitioners to be married will no more "redefin[e]" marriage (Michigan Br. 3) than women's suffrage redefined voting. In other words, petitioners do not seek to create a new institution of "same-sex" or "genderless" marriage. Kentucky Br. 16-17. They merely seek access to *marriage* – the same set of protections and duties that different-sex couples enjoy in Kentucky and Michigan today, and the same that plaintiffs in *Loving*, *Turner*, and *Zablocki* sought for themselves decades ago.

3. Michigan warns (Br. 19, 23) of a slippery slope, asserting that if states cannot limit marriage to different-sex couples, then states also could not limit access to the institution based on other criteria, such as age or number of participants. Similar scare tactics, of course, were deployed in *Lawrence*. Yet this Court explained that whatever lines might exist in this sphere cannot be drawn at sexual orientation. 539 U.S. at 574.

At any rate, restrictions that "involve minors" or "persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused" simply stand on different footing than attempts to restrict access to marriage based on sexual orientation. *Lawrence*, 539 U.S. at 578. Michigan itself concedes that age restrictions are designed "to prevent

coercion." Br. 23. States similarly have argued that laws restricting marriages between multiple spouses or close relatives serve related purposes. *See, e.g.*, *State v. Green*, 99 P.3d 820, 830 (Utah 2004) (accepting Utah's argument that anti-polygamy law "serves the State's interest in protecting vulnerable individuals from exploitation and abuse"). No coercion-based argument has been (or could be) advanced here.

4. Even if marriage were not a fundamental right, the "fundamentally important" nature of the institution (Pet. App. 37a) would still require this Court to apply intensified scrutiny to the States' marriage bans. As petitioners have explained (Br. 23-25), the approach this Court adopted in *Plyler v. Doe*, 457 U.S. 202 (1982), with respect to bans on education applies equally here: barring lesbians and gay men from marriage denies them "the ability to live within the structure of our civic institutions." *Id.* at 223. "It should require a particularly strong justification to deny equal participation in an institution of such surpassing personal and social importance." U.S. Br. 22. Neither State even tries to respond to this argument.

B. The Marriage Ban Imposes Sweeping Inequality Based On Identity.

Close examination is also required here because the marriage bans discriminate on multiple levels.

1. *Second-Class Status.* Neither of the States disputes that laws relegating gay people to second-class status trigger enhanced scrutiny. *See* Petr. Br. 26-27. The States suggest, however, that their marriage bans lack this purpose or effect because instead of denying protections to same-sex couples, they merely withhold certain "governmental aid," such as "special tax treatment and survivor benefits." Michigan Br. 24, 27

(quoting *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989)); *see also* Kentucky Br. 30 (marriage ban merely excludes same-sex couples from "tax and other benefits").

But this case is not about a narrow tax incentive for married procreators. Marriage – as this Court noted no fewer than nine times in *Windsor* – is "protection." 133 S. Ct. at 2690-96. It is protection against being alienated from one's child upon the death of one's spouse. *See* Petr. Br. 9; Br. of Am. Acad. of Matrimonial Lawyers et al. 7-11. It is protection against being left destitute after the dissolution of the marital relationship. Br. of Am. Acad. of Matrimonial Lawyers et al. 15-17. It is protection of intimate communication, such that spouses cannot be compelled to testify against each other. *See* Ky. R. Evid. 504; Mich. Comp. Laws § 600.2162. It is protection, when one's spouse dies, against being ejected from the family's home or left without access to the family's financial resources. *See* Br. of Am. Acad. of Matrimonial Lawyers et al. 11-12. The list goes on and on. *See id.* at 19-22; Br. of Family Law Scholars 4-8.

The strikingly broad effects of the States' marriage bans "outrun and belie," *Romer v. Evans*, 517 U.S. 620, 635 (1996), Michigan's assurances that the bans do not "stigmatize[]" or "disparage" gay people, Br. 1, 18. For gay people, these sweeping exclusions are "practically a brand upon them, affixed by the law, an assertion of their inferiority." *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880). And it is no answer to say that this stigma results "not by reason of anything found in the act, but solely because [gay people] choose[] to put that construction upon it." *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896), *overruled by Brown v. Board of Educ.*, 347

U.S. 483 (1954). When states protect some people, the Equal Protection Clause – in its "most literal sense" – requires the states to protect all equally. *Romer*, 517 U.S. at 633.

Worse yet, Kentucky and Michigan don't stop at preventing same-sex couples from equal access to marriage. The States go much further, even prohibiting them from receiving any other form of legal recognition "similar" to marriage. Ky. Const. § 233A; *accord* Mich. Const. art I, § 25. There can be no doubt, therefore, that the marriage bans "singl[e] out a certain class of citizens for disfavored legal status or general hardships." *Romer*, 517 U.S. at 633.

2. *Sexual Orientation Discrimination.* The States advance two theories to avoid heightened scrutiny based on sexual orientation discrimination. Neither has merit.

a. The States contend that their marriage bans do not discriminate based on sexual orientation because "[m]en and women, whether heterosexual or homosexual, are free to marry persons of the opposite sex." Kentucky Br. 26; *accord* Michigan Br. 53. To the extent the absurdity of this argument does not speak for itself, this Court has already rejected analogous reasoning. *See Lawrence*, 539 U.S. at 599 (Scalia, J., dissenting) (arguing that sodomy law did not discriminate because "[m]en and women, heterosexuals and homosexuals, are all subject to its prohibition of deviate sexual intercourse with someone of the same sex"). Laws that target the intimate relationships of same-sex couples discriminate against "gay persons as a class." *Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 689 (2010) (quoting *Lawrence*, 539 U.S. at 583 (O'Connor, J., concurring in the judgment)); *cf. Bray v.*

Alexandria Women's Health Clinic, 506 U.S. 263, 270 (1993) ("A tax on wearing yarmulkes is a tax on Jews.").

b. Although the States quibble with minor aspects of petitioners' four-factor suspect classification analysis, neither State comes close to demonstrating that sexual orientation discrimination should be treated as presumptively legitimate.

History of discrimination. Kentucky asserts that gay people have experienced merely "social rejection," and not "the systematic governmental discrimination experienced by recognized protected classes." Kentucky Br. 23-24. But gay people have been branded as criminals by sodomy statutes, barred as psychopaths from entering the country, and banned from federal employment and military service. *See* U.S. Br. 3-6. It is hard to imagine what more could possibly be required to meet Kentucky's requirement of "systematic governmental discrimination."

Ability to contribute. Michigan argues that sexual orientation is relevant to a person's ability to contribute to society because same-sex couples lack "the unique capacity to create new life" through intercourse. Michigan Br. 52. This answers the wrong question. To determine whether heightened scrutiny is appropriate, this Court "look[s] to the likelihood that governmental action premised on a particular classification is valid *as a general matter*," not with respect to any "specific[]" law. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446 (1985) (emphasis added). Applying that test here, a person's sexual orientation is not the type of "characteristic that the government may legitimately take into account in a wide range of decisions." *Id.*; *see also* U.S. Br. 17-19.

Obvious, immutable, or distinguishing traits. Kentucky suggests without citation that a "legitimate debate" exists regarding whether sexual orientation is immutable, Br. 24, while Michigan asserts that lesbians and gay men are not "a discrete group" at all because sexual orientation "ranges along a continuum," Br. 51 (quotation marks and citation omitted). Neither contention hits the mark. Sexual orientation is an "enduring" element of human identity. Br. of Am. Psychological Ass'n et al. 7-9. And a characteristic need not fall into tidy categories to trigger heightened scrutiny. Race, like sexual orientation, runs along a continuum, and yet race-based classifications are a classic source of enhanced scrutiny.

Political power. The States repeat the Sixth Circuit's general argument that sexual orientation classifications do not require heightened scrutiny because gay people in certain areas of the country have occasionally been able to "attract the attention of lawmakers." Kentucky Br. 20; *accord* Michigan Br. 49-50. Petitioners and their amici have already dealt with that argument. *See* Petr. Br. 36-37; Br. of Constitutional Law Scholars 13-19. If anything, the limited protections recently extended to gay people reflect a growing awareness that a person's sexual orientation is *not* a legitimate basis for discrimination. *Cf. Frontiero v. Richardson*, 411 U.S. 677, 687-88 (1973) (plurality opinion) (Congress's recognition that sex discrimination is illegitimate supported applying heightened scrutiny).

In any event, a minority group's political power cannot be assessed by cherry-picking information from particular parts of the country. The majority of states – including every state within the Sixth Circuit – have

not adopted a single law explicitly prohibiting sexual orientation discrimination in employment, housing, or public accommodations. Br. of Leadership Conference on Civil and Human Rights et al. 32-33. Whatever political power gay people may have in other states, therefore, they remain largely – if not entirely – unable to protect themselves through the democratic processes in numerous states. *See* Br. of Campaign for Southern Equality et al. 4-22. That lack of access to democratic channels in several states is more than enough to require heightened scrutiny.

* * *

The particulars of the four factors aside, the ultimate question is whether a person's sexual orientation should be a presumptively valid basis for imposing differential treatment. Should we, as the States argue, tolerate discrimination based on sexual orientation regardless of "the wisdom, fairness, or logic" of state laws? Michigan Br. 29 (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993)). The answer is plainly no. This Court's opinions in *Romer, Lawrence,* and *Windsor* all start from the premise that gay people and heterosexuals stand before the law with equal dignity. And those decisions require the government to have a good reason for departing from the norm of equal treatment under the law.

3. *Sex Discrimination.* Unable to dispute that marriage bans facially discriminate based on sex, the States argue that the laws' sex-based classifications do not trigger heightened scrutiny because (a) "[t]he laws treat the sexes equally" and (b) "differences in biology between the sexes" are relevant here. Michigan Br. 55; *accord* Kentucky Br. 26-28. This Court, however, has repeatedly rejected the argument that sex-based

classifications are exempt from heightened scrutiny simply because they apply equally to men and women. *See, e.g.*, *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 143 (1994); Br. of Stephen Clark et al. 9-14.[2] This Court likewise held in *Loving* that enhanced scrutiny applied to Virginia's anti-miscegenation law, "even assuming" it applied "even-handed[ly]" to all races. 388 U.S. at 12 n.11.

As for differences in "biology," the question is not whether there are differences between men and women. It is whether such differences constitute an "exceedingly persuasive" reason, in any given case, for the different treatment. *United States v. Virginia*, 518 U.S. 515, 533 (1996); *see also Nguyen v. INS*, 533 U.S. 53, 70 (2001).

Heightened scrutiny due to sex discrimination is especially appropriate here insofar as Michigan's law genuinely derives from the view that "different sexes bring different contributions to parenting." Michigan Br. 39 (quotation marks and citations omitted). Laws premised on stereotypical views of men and women demand heightened scrutiny. This is so "even when some statistical support can be conjured up for the generalization[s]." *J.E.B.*, 511 U.S. at 139 n.11. Equal protection is concerned with the "rights of individuals, not groups." *Id.* at 152 (Kennedy, J., concurring in the judgment).

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[2] This Court has similarly rejected the "equal application" argument in the context of Title VII's ban on sex discrimination. *See Latta v. Otter*, 771 F.3d 456, 480 n.3 (9th Cir. 2014) (Berzon, J., concurring) (collecting this Court's cases on the topic).

C. State Primacy Over Family Law Does Not Diminish The Force Of The Fourteenth Amendment In This Context.

Notwithstanding the discriminatory elements of its marriage ban, Kentucky urges this Court to give the States "wide latitude" to restrict access to marriage in light of "the states' authority over these types of domestic matters." Br. 12 (quotation marks and citation omitted); *accord* Br. of Louisiana et al. 4-17. But while *Windsor* acknowledges the states' traditional authority "in the regulation of domestic relations," 133 S. Ct. at 2691 (quotation mark and citation omitted), nothing in that decision requires constitutional deference to state definitions of marriage. To the contrary, *Windsor* makes clear that "[s]tate laws defining and regulating marriage, of course, must respect the constitutional rights of persons." *Windsor*, 133 S. Ct. at 2691 (citing *Loving v. Virginia*, 388 U.S. 1 (1967)).

Nor is there anything about our federal system in general that requires hesitancy in the context of domestic relations before enforcing the Fourteenth Amendment. When a federal *statute* potentially intrudes upon "traditional state authority," this Court exercises special restraint before holding that state law has been preempted. *Gregory v. Ashcroft*, 501 U.S. 452, 469 (1991) (citation omitted). But the Fourteenth Amendment is different. It "contain[s] prohibitions expressly directed at the States." *Seminole Tribe v. Florida*, 517 U.S. 44, 59 (1996). There is accordingly no basis for suspending the Amendment's application in the setting of marriage. "[T]he Court's duty to refrain from interfering with state answers to domestic relations questions has never required that the Court should blink at [Fourteenth Amendment] violations in

state statutes." *Santosky v. Kramer*, 455 U.S. 745, 768 n.18 (1982) (quotation marks and alteration omitted); *see also Hall v. Florida*, 134 S. Ct. 1986, 2001 (2014) ("The States are laboratories for experimentation, but those experiments may not deny the basic dignity the Constitution protects.").

II. No Legitimate State Interest Justifies Kentucky's Marriage Ban.

The States chafe at the possibility that this Court might brand people who supported their marriage bans as bigoted or irrational. Petitioners have explained why there is no basis for such concerns. Petr. Br. 30-31. But if such concerns were valid, this Court could assuage them by explicitly analyzing the States' proposed interests under heightened scrutiny. As Professor Laycock and others explain, "[h]olding that the disparate burden imposed on same-sex families fails heightened scrutiny will vindicate their rights while avoiding unnecessary denigration of conflicting views." Br. of Douglas Laycock et al. 8; *see also* Br. of General Conference of Seventh Day Adventists & The Becket Fund for Religious Liberty 35-36. Under any standard of review, however, the States' marriage bans are constitutionally invalid.

A. Democratic Process

Citing *Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623 (2014), the States reprise the Sixth Circuit's assertion that the marriage bans protect the ability of voters to decide "sensitive issues" through the democratic process. Kentucky Br. 13-15; Michigan Br. 1-2, 13-16. This argument ignores the reality that by constitutionalizing their marriage bans, the States themselves have removed the issue from ordinary political processes. *See* Petr. Br. 40-41.

At any rate, *Schuette* offers no support for the States. In that case, the voters considered two choices – retaining or prohibiting affirmative action – both of which this Court assumed to be constitutionally legitimate. *Schuette*, 134 S. Ct. at 1635 (plurality opinion); *see also id.* at 1640 (Scalia, J., concurring in the judgment); *id.* at 1649 (Breyer, J., concurring in the judgment). This case is diametrically different. Here, the policy the voters chose is exactly what petitioners claim is unconstitutional. That being so, a preference for democratic resolution of the issue is no answer. *See* Petr. Br. 40.[3]

In some respects, of course, these cases are indeed about "[w]ho decides," Michigan Br. 1. But the real choice is not between state lawmaking and the courts. It is between the government and the individual. "The Court has long recognized that, because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State."

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[3] Nor is a democratic resolution preferable on the theory that invalidating marriage bans would "make it difficult for the people to enact and enforce accommodations" for churches and others with religious objections to marriage equality. Michigan Br. 16. States are perfectly capable of enacting accommodations for churches and related institutions without using the marriage rights of same-sex couples as a bargaining chip in the legislative process. And questions concerning when religious accommodations to anti-discrimination laws can be enforced are neither new nor unique to the context of marriage for same-sex couples. *See* Br. of President of the House of Deputies of the Episcopal Church et al. 5; Br. of Americans United for the Separation of Church and State 4. The courts have ample tools to address any conflicts that might arise. *See, e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012).

Roberts v. U.S. Jaycees, 468 U.S. 609, 618 (1984). Marriage is at the very top of that list. "Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 851 (1992).

B. Procreation And Parenting

None of the interests the States advance justifies their marriage bans.

1. Kentucky says its marriage ban is intended to further a state interest never mentioned in the 2004 amendment's ballot materials or credited by the Sixth Circuit: encouraging "population growth." Kentucky Br. 30. But Kentucky's marriage ban only thwarts that purported interest. Same-sex couples who conceive with assisted reproduction also contribute to population growth, while in no way dissuading different-sex couples from procreating too. So if the Commonwealth is correct that marriage incentivizes couples to have children, then allowing same-sex couples to marry will further that interest. *See* Gary J. Gates, The Williams Inst., *LGBT Parenting in the United States* 1 (2013).

2. Allowing same-sex couples to marry would not undermine any purported interest in "responsible procreation." Petr. Br. 46-50. But according to the States, that does not matter because this Court stated in *Johnson v. Robison*, 415 U.S. 361, 383 (1974), that "[w]hen . . . the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not, we cannot say [when conducting rational-basis review] that the statute's classification of beneficiaries and nonbeneficiaries is invidiously discriminatory." *See* Kentucky Br. 31; Michigan Br. 35.

This principle from *Johnson* applies only when the two groups are "not similarly circumstanced." 415 U.S. at 382. When, in contrast, two similarly situated groups are treated differently, equal protection demands at least "a rational relationship between *the disparity of treatment* and some legitimate governmental purpose." *Heller v. Doe*, 509 U.S. 312, 320 (1993) (emphasis added); *accord Hooper v. Bernalillo Cnty. Assessor*, 472 U.S. 612, 618 (1985) ("When a state distributes benefits unequally, the distinctions it makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment."). And when something as important as marriage is at issue, the state's burden is even higher. *See Zablocki v. Redhail*, 434 U.S. 374, 390 (1978); U.S. Br. 22.

Same-sex couples and different-sex couples who raise children are, in fact, similarly situated with respect to the state interest in "encouraging parents to stick together to care for and raise their children." Michigan Br. 42. And the children of same-sex couples are similarly situated to the children of different-sex couples in deriving critical protections from having married parents. *See* Br. of Family Equal. Council et al. 29-34. That is, the protections of marriage help keep *all* parents together to provide a stable environment that benefits children – whether the parents had children intentionally or accidentally, whether they adopted or conceived with assisted reproduction, whether they are gay or heterosexual. Instead of promoting "the paradigm that procreation takes place within marriage," Michigan Br. 58, excluding same-sex couples from the institution simply forces more procreation and child rearing to take place outside of marriages.

In all events, equal protection requires that "the principles of law which officials would impose upon a minority must be imposed generally." *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring). Yet Kentucky and Michigan fail to live up to this maxim. The States forbid gay people from marrying on the supposed ground that they cannot create children through intercourse. Yet the States are unwilling to impose the same burdens on similarly situated straight couples. In particular, the States allow infertile couples to marry even when age alone makes it clear – without any "invasion of privacy" – that "natural" conception is impossible. Michigan Br. 34. Such disparate treatment is impermissible.

3. Michigan's related argument (Br. 33) that it has an interest in "maximiz[ing] the likelihood that every child will know and be raised by his or her mother and father" – an argument never endorsed by the Sixth Circuit – fares no better.

To the extent Michigan prefers "having both a man and a woman as part of the parenting team," Br. 39, such a policy demands heightened scrutiny under this Court's sex discrimination jurisprudence. *See supra* at 12. And it flunks that review because statutes that assign gender-based roles to parents based on nothing more than "the 'baggage of sexual stereotypes'" cannot pass constitutional muster. *Califano v. Westcott*, 443 U.S. 76, 89 (1979) (quoting *Orr v. Orr*, 440 U.S. 268, 283 (1979)).

To the extent Michigan prefers families in which children are being raised by both "biological" parents, this argument is both illogical and offensive. Michigan never explains – nor could it – how excluding same-sex couples from marrying would encourage more different-

sex couples to raise their own "biological" children. *See* Petr. Br. 50. Moreover, the district court in *DeBoer* and amicus briefs from leading professional organizations have already explained in great detail that "the parenting abilities of gay men and lesbians – and the positive outcomes for their children – are *not* areas where credible scientific researchers disagree." Br. of Am. Psychological Ass'n et al. ("APA Br.") 26; *see also id.* at 22-30; Br. of Am. Sociological Ass'n ("ASA Br.") 14-27; *DeBoer* Pet. App. 107a-23a. Scientific research also debunks the notion that children tend to do better if they are raised by two biological parents as opposed to parents who conceive through donor sperm or ova. *See* APA Br. 18; ASA Br. 13-18.

Crediting a state interest in privileging children who are "biologically connected" to their mother and father, Michigan Br. 28, would also be deeply stigmatizing. Millions of children in this country are adopted, and tens of thousands each year are conceived "as a result of assisted reproduction that involves donor eggs or sperm." Br. of Family Law Scholars 13. If anything, those numbers will only grow in the future.

Meanwhile, we are long past the day when it was permissible for states to enact "discriminatory laws relating to status of birth." *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 176 (1972). To the contrary, the public policy in every state is to recognize adoption as the legal equivalent of biological parenthood. Br. of Family Law Scholars 12; *see also Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 843 (1977) ("[B]iological relationships are not exclusive determination of the existence of a family."). The notion that some methods of conception produce "optimal" families not only "humiliates tens of thousands of

children now being raised by same-sex couples," *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013), but also the even greater number of children raised by different-sex parents who were conceived with the assistance of a donor or who have been adopted.

III. Kentucky's Recognition Ban Also Violates The Fourteenth Amendment.

Petitioners who married outside Kentucky seek to "live with pride in themselves and their union and in a status of equality with all other married persons," without having to move from their home state. *United States v. Windsor*, 133 S. Ct. 2675, 2689 (2013). Neither of the Commonwealth's arguments for distinguishing their plight from Edith Windsor's is persuasive.

1. Contrary to the Commonwealth's assertion (Br. 35-36), *Windsor* is not limited to federal recognition of marriage. *Windsor* held that recognition bans impermissibly "displace [the] protection" of marriage and treat married same-sex couples "as living in marriages less respected than others." *Id.* at 2696. This disruption of the "stability and predictability of basic personal relations" that another sovereign state "has found it proper to acknowledge and protect," *id.* at 2694, is no more proper because it is being done by a state as opposed to the federal government. "[T]he Constitution imposes upon federal, state, and local governmental actors the *same* obligation to respect the personal right to equal protection of the laws." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 231-32 (1995) (opinion of O'Connor, J., joined by Kennedy, J.) (emphasis added); *see also Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (where local government "undertakes such intrusive regulation of the family . . . the usual judicial deference to the legislature is inappropriate").

2. Kentucky's recognition ban is also constitutionally infirm because it substantially deviates from ordinary state recognition practices without legitimate justification.

The Commonwealth objects to petitioners' characterization of the ban here as a departure from convention, arguing that its "non-recognition of same-sex marriages is consistent with its refusal to recognize other marriages that violate its public policy." Br. 39. In particular, the Commonwealth notes that it has long deemed certain marriages – such as marriages between cousins – to be categorically void. *Id.* at 37-40.

The mere existence of a few other statutory recognition bans hardly refutes the point – acknowledged elsewhere even by the Commonwealth – that its ban here is an "exception[] to the general rule" that marriages valid where celebrated are valid everywhere. Br. 39; *see also* Br. of Conflict of Laws and Family Law Professors 5-9. Indeed, the federal government refuses to recognize valid state marriages in some contexts, such as marriages "entered into for the purpose of procuring an alien's admission [to the United States] as an immigrant." *Windsor*, 133 S. Ct. at 2690 (alteration in original) (quoting 8 U.S.C. § 1186a(b)(1)). This Court nonetheless deemed DOMA's recognition ban to be an "unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage" – and, therefore, subject to "careful consideration." *Id.* at 2693.

Petitioners' point, of course, is not that the Fourteenth Amendment, pursuant to the place of celebration rule, automatically "obligate[s] Kentucky . . . to recognize every marriage from other jurisdictions if valid in the foreign jurisdiction."

Kentucky Br. 39. Rather, the Due Process and Equal Protection Clauses simply require the Commonwealth to justify any decision to deviate from customary practice and to disrespect a particular category of existing marriages.

In the context of its refusal to recognize marriages between close relatives, the Commonwealth may well be able to advance a legitimate justification for its ban. But the Commonwealth's sole defense of its refusal to recognize marriages between same-sex couples is that Kentucky law renders such marriages against "public policy." Br. 39-40. That bald declaration does not explain *why* the Commonwealth has a legitimate basis to depart from its longstanding and near-universal practice of recognizing marriages validly entered into in other jurisdictions – and to do so through an across-the-board measure. And no legitimate explanation exists elsewhere in the Commonwealth's brief.[4]

In the end, proclaiming the marriages of same-sex couples void or against public policy is just another way of casting them as morally objectionable. *See* Br. of Conflict of Law Scholars 15-20. But "[m]oral disapproval of [a] group, like a bare desire to harm the group, is an interest that is insufficient to satisfy [even] rational basis review." *Lawrence v. Texas*, 539 U.S.

[4] Insofar as the Commonwealth analogizes to full faith and credit principles (Br. 38), those principles do not aid it here. Full faith and credit "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). But, for all of the reasons described above, discriminating against same-sex couples is not a "legitimate" public policy. Nor does the Full Faith and Credit Clause – even if it applied here – permit a state to violate the Fourteenth Amendment simply by labeling something as against public policy.

558, 582 (2003) (O'Connor, J., concurring in the judgment). Whatever questions may exist about the outer boundary of state authority to deny recognition to marriages on public policy grounds, this Court's Fourteenth Amendment precedents confirm that simple moral disapproval of same-sex couples and their families cannot be a legitimate state public policy.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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