No. 13-4178

In the United States Court of Appeals for the Tenth Circuit

DEREK KITCHEN, *ET AL.*
Plaintiffs-Appellees,

v.

GARY R. HERBERT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF UTAH, *ET AL.*,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CIVIL ACTION NO. 2:13-CV-00217-RJS, HON. ROBERT J. SHELBY

BRIEF FOR *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF APPELLANTS AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the FEDERAL RULES OF APPELLATE PROCEDURE, *amicus curiae* Eagle Forum Education & Legal Defense Fund makes the following disclosures:

1) For non-governmental corporate parties please list all parent corporations: None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: None.

Dated: February 10, 2014

Respectfully submitted,

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IDENTITY, INTEREST AND AUTHORITY TO FILE

Amicus curiae Eagle Forum Education & Legal Defense Fund ("Eagle Forum"), a nonprofit corporation, files this brief with the consent of the parties.[1] Since its founding in 1981, Eagle Forum has consistently defended traditional American values, including traditional marriage, defined as the union of husband and wife. In addition, Eagle Forum's founder, Phyllis Schlafly, was a leader in the movement against the Equal Rights Amendment in the 1970s and 1980s, and the history of that effort has a direct bearing on the issues that plaintiffs here attempt to import into the Fourteenth Amendment. For the foregoing reasons, Eagle Forum has a direct and vital interest in the issues before this Court.

STATEMENT OF THE CASE

Three same-sex couples (collectively, "Plaintiffs") seek to invalidate Utah's constitutional definition of marriage as "consist[ing] only of the legal union between a man and a woman," Utah Laws 2004, H.J.R. 25 §1(1), App. 191, 347 (hereinafter, "Amendment 3"), and to compel the state and local officer-defendants (collectively, "Utah") to recognize same-sex marriage. The District Court granted Plaintiffs' motion for summary judgment and enjoined Utah's enforcing Amendment 3 and related Utah statutes.

[1] Pursuant to FED. R. APP. P. 29(c)(5), the undersigned counsel certifies that: counsel for *amicus* authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to this brief's preparation or submission.

Forty years ago, in *Baker v. Nelson*, 409 U.S. 810 (1972), the Supreme Court faced essentially the same questions presented here: whether the Constitution provides a right to same-sex marriage. The Court answered that question in the negative, dismissing "for want of a substantial federal question," *id.*, a mandatory appeal under former 28 U.S.C. §1257(2) (1988) from *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (Minn. 1971).

Thirty years ago, this Nation finally rejected the Equal Rights Amendment, H.J.Res. 208, 86 Stat. 1523 (1972) ("ERA"),[2] which proposed to add language to the Constitution that *might* have provided a basis for Plaintiffs' claims here. Moreover, the American people rejected the ERA in large part because of a well-founded fear that ERA would lead to the very result that Plaintiffs demand. *Amicus* Eagle Forum respectfully submits that the People's rejection of the ERA – the only constitutional text that arguably might have supported Plaintiffs' claims – compels this Court to reject Plaintiffs' claims.

Last year, in *U.S. v. Windsor*, 133 S. Ct. 2675 (2013), the Supreme Court held that the federal husband-wife definition of marriage, 1 U.S.C. §7, from the Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) ("DOMA") violates the Constitution. *See* Section I.C, *infra* (discussing *Windsor*). In the four-

[2] *See Nat'l Org. for Women, Inc. v. Idaho*, 459 U.S. 809 (1982) (ERA's extended ratification period expired in 1982).

decade interval between *Baker* and *Windsor*, federal appeals courts routinely cited *Baker* to dismiss claims seeking to establish a right to same-sex marriage under the Fourteenth Amendment.[3] The question is whether *Windsor* changes the result.

STATEMENT OF FACTS

Plaintiffs are Utah residents, and two of the Plaintiff same-sex couples seek to compel Utah to allow them to marry in Utah. The third Plaintiff same-sex couple was married in Iowa, but seeks to compel Utah to recognize their Iowa relationship.[4] Plaintiffs have not introduced evidence to negative the theoretical connections between husband-wife marriage and responsible procreation and childrearing.

SUMMARY OF ARGUMENT

Plaintiffs cannot state an equal-protection claim because they are not similarly situated with opposite-sex married couples based on their inability to parent and raise children as biological mother-father families (Section I.A). Utah's preference for that family arrangement satisfies the rational-basis test because Plaintiffs have not met their burden of producing evidence (which cannot yet and

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[3] *See, e.g.*, *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 870-71 (8th Cir. 2006); *Adams v. Howerton*, 673 F.2d 1036, 1042 (9th Cir. 1982).

[4] Because it invalidated Amendment 3, the District Court did not decide whether the Fourteenth Amendment compels Utah to recognize the Iowa relationship even if the Fourteenth Amendment does not compel Utah to perform same-sex marriages within Utah.

may never exist) to negative the *theoretical* connection between biological mother-father families and improved parenting and childrearing outcomes (Section I.B).

Windsor cannot help Plaintiffs because the majority decision focused on Congress acting irrationally to impose an across-the-board federal definition over state-created relationships that Congress lacked a basis to reject (Section I.C). Instead, *Baker* controls in this area of traditional, and near-exclusive, state authority (Section I.D). In addition, the Nation's debate over the ERA in the decade after *Baker* focused in large part on same-sex marriage, and the People's rejection of the ERA similarly rejected imposing that outcome as a matter of constitutional law, a decision by the ultimate sovereigns that this Court should honor here (Section I.D.2).

Elevated scrutiny does not apply because Amendment 3 treats the sexes equally (Section II.A) and the fundamental right to marriage always has meant opposite-sex marriage (Section II.B). In any event, preserving the social fabric, as well as ensuring and optimizing the procreation of future generations, would be compelling governmental interests, if elevated scrutiny applied (Section II.C).

ARGUMENT

I. AMENDMENT 3 SATISFIES THE RATIONAL-BASIS TEST

Under the Equal Protection Clause, courts evaluate differential treatment based on sexual orientation under the rational-basis test. *Romer v. Evans*, 517 U.S.

620, 631-32 (1996); *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1113 (10th Cir. 2008). As explained in this section, Amendment 3 readily meets that test, as recognized in *Baker* and not changed by *Windsor*.

A. Plaintiffs Are Not Similarly Situated with Married Opposite-Sex Couples, and Utah Has No Discriminatory Purpose

The Equal Protection Clause "'embodies a general rule that States must treat like cases alike but may treat unlike cases accordingly.'" *Coalition for Equal Rights, Inc. v. Ritter*, 517 F.3d 1195, 1199 (10th Cir. 2008) (*quoting Vacco v. Quill*, 521 U.S. 793, 799 (1997)). For a class to raise an equal-protection claim vis-à-vis the government's treatment of a similarly situated class, the two classes must be "'in all relevant respects alike.'" *Id.* (*quoting Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992)). Further, "ordinary equal protection standards" require a plaintiff to "show both that the [challenged action] had a discriminatory effect and that it was motivated by a discriminatory purpose." *Wayte v. U.S.*, 470 U.S. 598, 608 (1985). The required "discriminatory purpose" means "more than intent as volition or intent as aware of consequences. It implies that the decisionmaker ... selected or reaffirmed a course of action at least in part *'because of,'* not merely *'in spite of'* its adverse effects upon an identifiable group." *Pers. Adm'r v. Feeney*, 442 U.S. 256, 279 (1979) (emphasis added). Plaintiffs cannot either establish that they are similarly situated with opposite-sex married couples or show an impermissibly discriminatory purpose in Amendment 3.

First, same-sex couples and opposite-sex couples are not "similarly situated" with respect to procreation: "an individual's right to equal protection of the laws does not deny … the power to treat different classes of persons in different ways." *Johnson v. Robison*, 415 U.S. 361, 374-75 (1974) (interior quotations omitted, alteration in original). A classification is clearly "reasonable, not arbitrary" if it "rest[s] upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Reed v. Reed*, 404 U.S. 71, 75-76 (1971) (*quoting Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)); *Rostker v. Goldberg*, 453 U.S. 57, 67 (1981) (Equal Protection allows Navy to base actions on uncontested differences between male and female officers). Provided that Utah rationally may rely on marriage to encourage biological mothers and fathers to raise Utah children, *see* Section I.B, *infra*, Plaintiffs are not similarly situated with opposite-sex married couples.

Second, any "foreseeable" or even "volitional" impact on the non-favored class does not qualify as a "[d]iscriminatory purpose" if the state lawfully may benefit the favored class. *Feeney*, 442 U.S. at 278-79. Put another way, "where a group possesses distinguishing characteristics relevant to interests the State has the authority to implement, a State's decision to act on the basis of those differences does not give rise to a constitutional violation." *Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 366-67 (2001) (interior quotations omitted).

While it may not be Plaintiffs' fault that their union cannot engage in procreation as mother and father, it certainly is not Utah's fault. Provided that Utah rationally may rely on marriage to encourage biological mothers and fathers to raise Utah children, *see* Section I.B, *infra*, Amendment 3's impact on Plaintiffs or their families does not qualify as a "discriminatory purpose" under the Equal Protection Clause.

If Plaintiffs are not similarly situated with opposite-sex married couples and Utah lacks an impermissible "discriminatory purpose," Plaintiffs cannot state an Equal Protection claim on which relief can be granted. As indicated, the question then becomes whether Utah has a rational basis for preferring that biological mothers and fathers raise their children.

B. The Rational-Basis Test Is Flexible for Defendants, Demanding for Most Plaintiffs, and Impossible for these Plaintiffs to Satisfy

At the outset, it is not clear that restricting marriage to husband and wife even implicates the Equal Protection Clause, given the obvious difference between same-sex and opposite-sex couples with respect to procreation. *See* Section I.A, *supra*. But assuming *arguendo* that Plaintiffs' complaint states a potential claim under the rational-basis test, Plaintiffs must offer far more evidence than they have – indeed, evidence that will not even exist for *at least* a generation – before they could ever dislodge Utah's preference that the two biological parents raise

Utah children in a family.[5]

Specifically, rational-basis plaintiffs must "negative every conceivable basis which might support [the challenged statute]," including those bases on which the state plausibly *may have* acted. *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973) (internal quotations omitted); *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 462-63 (1988). Further, it is enough that a plausible policy *may have guided* the decisionmaker and that "the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational." *Nordlinger*, 505 U.S. at 11-12 (citations omitted, emphasis added). Under the rational-basis test, government action need only "further[] a legitimate state interest," which requires only "a plausible policy reason for the classification." *Id.* Moreover, courts give economic and social legislation a presumption of rationality, and "the Equal Protection Clause is offended only if the statute's classification rests on grounds wholly irrelevant to the achievement of the State's objective." *Kadrmas*, 487 U.S. at 462-63 (interior quotations omitted). Amendment 3 easily meets this test.

With respect to husband-wife marriage, it is enough, for example, that Utah

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[5] Summary judgment for defendants is appropriate "whenever plaintiffs fail adequately to support one of the elements of their claim upon which they ha[ve] the burden of proof." *Milne v. USA Cycling Inc.*, 575 F.3d 1120, 1125-26 (10th Cir. 2009) (internal quotations omitted). Because Plaintiffs failed to support their claim, summary judgment for Utah is required.

"rationally may have … considered [it] to be true" that marriage has benefits for responsible procreation and childrearing. *Nordlinger*, 505 U.S. at 11-12; *Adar v. Smith*, 639 F.3d 146, 162 (5th Cir. 2011) (*en banc*); *Lofton v. Sec'y of Dept. of Children & Family Services*, 358 F.3d 804, 818-20 (11th Cir. 2004). Numerous other courts have readily recognized the rationality of states' interests in limiting marriage to opposite-sex couples. *See* Utah Br. at 43 (collecting cases). Further, "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993). Accordingly, Plaintiffs cannot prevail by marshaling "impressive supporting evidence … [on] the probable consequences of the [statute]" vis-à-vis the legislative purpose, but must instead negate "the *theoretical* connection" between the two. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463-64 (1981) (emphasis in original). Although the typical rational-basis plaintiff has a difficult evidentiary burden, Plaintiffs here face an *impossible* burden.

Unfortunately for Plaintiffs, the data simply do not exist to *negative* the procreation and childrearing rationale for traditional husband-wife marriage. And yet those data are Plaintiffs' burden to produce. Nothing that Plaintiffs have produced or could produce undermines the rationality of believing that children raised in a marriage by their biological mother and father may have advantages

over children raised under other arrangements:

> Although social theorists ... have proposed alternative child-rearing arrangements, none has proven as enduring as the marital family structure, nor has the accumulated wisdom of several millennia of human experience discovered a superior model.

Lofton, 358 F.3d at 820. Society is *at least* a generation away from the most minimal longitudinal data that could even purport to compare the relative contributions of same-sex versus opposite-sex marriages to the welfare of society. While Eagle Forum submits that Plaintiffs *never* will be able to negative the value of traditional husband-wife families for childrearing, Plaintiffs cannot prevail when the data *required by their theory of the case* do not (and cannot) yet exist.[6]

C. *Windsor* Does Not Support Plaintiffs Here

Because *Windsor* neither follows nor overrules the rational-basis outline described in Section I.B, *supra*, the impact of that decision here is unclear from the face of the majority decision. As explained in this section, *Windsor* can only be understood as a holding that the federal government lacked any rational basis to prefer opposite-sex marriage over same-sex marriage when doing so required the federal government to reject state-authorized same-sex marriages that the federal government lacked any authority to reject. As Chief Justice Roberts signaled in his

[6] Although this litigation does not present the question, *amicus* Eagle Forum respectfully submits that states could establish rational bases (*e.g.*, procreation and childrearing) for favoring opposite-sex couples over same-sex couples even outside of the question of marriage.

dissent, moreover, that deference to the states as the entities with the authority to define marital relationships in *Windsor* translates to deference to the states when courts are presented with state legislation like Amendment 3. *See Windsor,* 133 S.Ct. at 2697 (Roberts, C.J., dissenting). As shown in this section, nothing in *Windsor* or the Equal Protection Clause requires sovereign states to recognize same-sex marriage.

1. *Windsor* Applied a Truncated Form of Rational-Basis Review to Conclude that DOMA §3's Principal Purpose Was to Demean Same-Sex Marriages

Windsor plainly held that Congress lacked a "legitimate purpose" for DOMA §3's "principal purpose and … necessary effect" that the majority perceived (namely "to demean those persons who are in a lawful same-sex marriage"). *Windsor,* 133 S.Ct. at 2695-96. As the dissents explain, however, the surface of the opinion does not reveal what rationale – exactly – led the *Windsor* majority to that holding:

> The sum of all the Court's nonspecific hand-waving is that this law is invalid (maybe on equal-protection grounds, maybe on substantive-due-process grounds, and perhaps with some amorphous federalism component playing a role) because it is motivated by a "'bare … desire to harm'" couples in same-sex marriages.

Id. at 2705 (Scalia, J., dissenting). Reading below the surface, however, three factors make clear that *Windsor* was decided under equal-protection principles via the rational-basis test, premised on the irrationality perceived by the *Windsor*

majority of federal legislation imposing an across-the-board federal definition of "marriage," when states – not the federal government – have the authority to define lawful marriages within their respective jurisdictions.[7]

First, *Windsor* does not rely on elevated scrutiny of any sort, holding only that DOMA §3 lacks any "legitimate purpose" whatsoever. *Windsor*, 133 S.Ct. at 2696. In equal-protection cases that present thorny merits issues – even issues that might implicate elevated scrutiny if proved – courts sometimes can sidestep the difficult equal-protection merits by rejecting a law's underlying distinctions as wholly arbitrary. For example, as-applied, race-based challenges to *facially neutral* limits on voting or holding office could proceed *facially* against freeholder requirements on the theory that restricting those privileges to freeholders (*i.e.*, property owners) was arbitrary, even without proving that the as-applied, race-based impact constituted racial discrimination. *Turner v. Fouche*, 396 U.S. 346,

[7] Although *Windsor* discusses due process and equal protection, the Fifth Amendment's equal-protection component falls within the Due Process Clause's liberty interest. *Jimenez v. Weinberger*, 417 U.S. 628, 637 (1974) (referencing "the equal protection of the laws guaranteed by the due process provision of the Fifth Amendment"); *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954). Thus, for federal defendants, equal-protection rights *are* due-process issues. In any event, assuming *arguendo* that no fundamental rights apply, *see* Section II.B, *infra*, substantive due process collapses into essentially the same question that arises under the equal-protection analysis: "'substantive' due process requires only that termination of that interest not be arbitrary, capricious, or without a rational basis." *Curtis v. Oklahoma City Pub. Schs. Bd. of Educ.*, 147 F.3d 1200, 1215 (10th Cir. 1998) (internal quotation and brackets omitted).

362 (1970); *Quinn v. Millsap*, 491 U.S. 95, 103 n.8 (1989). As in *Turner* and *Quinn*, the *Windsor* majority found DOMA §3 void under the rational-basis test, without needing to resort to elevated scrutiny under other theories pressed by the parties.

Second, DOMA §3's "discrimination of an unusual character" lacked any perceived legitimate purpose, evidencing the animus that established an equal-protection violation. *Windsor*, 133 S.Ct. at 2693. As such, the majority did not need even to consider the bases – such as responsible parenting and childrearing – proffered by the House interveners or the enacting Congress in defense of DOMA. *See* H.R. Rep. No. 104-664, at 12 (1996), *reprinted at* 1996 U.S.C.C.A.N. 2905, 2916. Typically, a rational basis excuses even discriminatory purposes; in *Windsor*, the majority found only the purpose "to injure the very class New York seeks to protect," based on the perceived "unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage." *Windsor*, 133 S.Ct. at 2693. Under that unusual posture, *Windsor* did not even need to evaluate the rational bases on which Congress claimed to have acted.

Third, federalism is essential to the *Windsor* holding. Federalism not only defines "the very class … protect[ed]" (*i.e.*, state-approved same-sex marriages), but also makes the *federal* action unusual. *Id.* Because Amendment 3 is entirely "usual" and falls within the "virtually exclusive province of the States." *Id.* at 2691

(interior quotations omitted), *Windsor* has no bearing here.

These three interrelated factors establish that *Windsor* cannot help Plaintiffs here. All three are absent when states regulate marriage under their own sovereign authority.

2. Amendment 3 Does Not Disparage or Demean Same-Sex Couples as DOMA §3 Did under *Windsor*

Although the *Windsor* majority found DOMA §3's primary purpose was to demean certain same-sex couples, *id.* at 2693, that holding does not translate to this litigation for the reasons identified in the prior section. Unlike DOMA §3 in *Windsor*, Amendment 3 fits within Utah's authority and is entirely "usual" as an exercise of that authority. Unlike Amendment 3 – which governs the marriage-related facts on the ground in Utah – DOMA §3 did not undo the fact of Ms. Windsor's New York marriage. Thus, unlike the "unusual" *Windsor* case, this "usual" case requires this Court to evaluate Utah's proffered rational bases for adopting Amendment 3, which *Windsor* did not even consider: "cases cannot be read as foreclosing an argument that they never dealt with." *Waters v. Churchill*, 511 U.S. 661, 678 (1994). Only if Amendment 3 fails there, *see* Section I.B, *supra*, can Plaintiffs prevail.

3. Utah's Concern for *All* Utah Children in the Aggregate Is Rational and Suffices to Answer the *Windsor* Majority's Concern for Children Raised in Same-Sex Marriages

The *Windsor* majority also considered it relevant that DOMA §3 "humiliates

tens of thousands of children now being raised" nationally in state-authorized, same-sex marriages. *Windsor*, 133 S.Ct. at 2694. As Utah shows, however, the question of same-sex marriage affects not only the present (and future) children in same-sex marriages, but also *all future children. See* Utah Br. at 72-80 If Utah and other states with similar marriage laws have permissibly concluded that reserving marriage for opposite-sex couples ensures the highest aggregate likelihood of optimal upbringings for future children, the *Windsor* concern for thousands of children being raised in same-sex marriages cannot trump Utah's and those states' concern for the best interests of the millions of children for whom they seek to optimize parenting and childrearing outcomes.[8]

Assuming *arguendo* that the *Windsor* opinion's concern for children living in homes headed by same-sex couples could qualify as part of the Court's holding on a childless couple's estate taxation, that holding would go to the arbitrariness of the federal government's rejecting an aspect of New York family law that the federal government had no authority to define, reject, or redefine for federal purposes. See *Windsor*, 133 S.Ct. at 2693-94. The same cannot be said of Utah

[8] While any negative impact on children of non-favored relationships is something that a state legislative process may consider in making a legislative judgment, that impact – like the impact on adults in non-favored relationships – is not a judicial concern, *provided that the state law permissibly favors marriage. See* Section I.B, *supra.* Simply put, any "foreseeable" or even "volitional" impact on the non-favored class does not qualify as a "[d]iscriminatory purpose" under the Equal Protection Clause. *Feeney*, 442 U.S. at 278-79.

because legislation – by an entity with the near-exclusive authority to legislate in this arena – necessarily involves choosing: "the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one." *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 314 (1976). Assuming that it does not involve either fundamental rights or suspect classes, "[s]uch a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller v. Doe*, 509 U.S. 312, 320 (1993). Here, Utah permissibly based its classification on optimizing aggregate parenting and childrearing outcomes.

Classifications do not violate Equal Protection simply because they are "not made with mathematical nicety or because in practice it results in some inequality." *Dandridge v. Williams*, 397 U.S. 471, 485 (1970). "Even if the classification involved here is to some extent both underinclusive and overinclusive, and hence the line drawn by [the legislature] imperfect, it is nevertheless the rule that in a case like this perfection is by no means required." *Vance v. Bradley*, 440 U.S. 93, 108 (1979) (interior quotations omitted); *Murgia*, 427 U.S. at 315-317 (rational-basis test does not require narrow tailoring). As the entity vested with authority over family relationships, Utah can make choices to ensure the best aggregate outcomes, without violating the Equal Protection Clause.

D. *Baker* Remains Controlling

In *Baker*, the Supreme Court considered and rejected the concept that the federal Constitution included a federal right to same-sex marriage. The *Baker* plaintiffs sought the same rights and benefits that Minnesota conveyed to husband-wife marriage, and the Supreme Court dismissed the case for want of a substantial federal question. *Baker*, 409 U.S. at 810. That holding requires this Court to rule for Utah here.

Because it resolved *Baker* summarily and dismissed for want of a substantial federal question, the issues "presented and necessarily decided" in *Baker* are binding on both the District Court and this Court. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). Accordingly, "lower courts are bound by summary decision by [the Supreme] Court 'until such time as the Court informs [them] that [they] are not.'" *Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975) (*quoting Doe v. Hodgson*, 478 F.2d 537, 539 (2d Cir. 1973)). The *Baker* jurisdictional statement plainly presented the question whether denying same-sex marriage violates the Constitution's equal-protection and due-process rights that Plaintiffs here assert. *Baker v. Nelson*, No. 71-1027, Jurisdictional Statement at 3 (Oct. Term 1972). Under *Mandel* and *Hicks* then, *Baker* necessarily decided that there is no basis under federal equal-protection or due-process analysis to support the claim that same-sex relationships deserve the same recognition, rights, or benefits as

husband-wife marriage.

1. The Supreme Court Has Not Rejected *Baker*, and Lower Courts Must Follow It

Given that *Baker* remains on point for same-sex marriages, the lower federal courts have an obligation to follow that authority and leave it to the Supreme Court to reverse *Baker:*

> "[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, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."

Agostini v. Felton, 521 U.S. 203, 237 (1997) (interior quotation omitted). Although the Supreme Court itself has not overruled *Baker*, Plaintiffs claim that *Lawrence*, *Romer*, and *Windsor* render *Baker* non-controlling.

With respect to *Lawrence*, there is an obvious difference between criminalizing consensual and private adult behavior in *Lawrence* and requiring public and societal recognition, including monetary benefits, in *Baker*. In any event, *Lawrence* expressly disavows any suggestion of undermining *Baker:*

> The present case … does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.

Lawrence, 539 U.S. at 578. As such, the suggestion that *Lawrence* undermines *Baker* cannot be squared with *Lawrence* itself, much less *Baker* and *Agostini*.

Similarly, *Romer* found Colorado's Amendment 2 unconstitutional for

broadly limiting the *political* rights to petition government that homosexuals – *as individuals* – theretofore had shared with all citizens under the federal and state constitutions. *Romer,* 517 U.S. at 632-33. Guaranteeing universal political rights under *Romer* in no way undermines allowing husband-wife definitions of marriage under *Baker*. Unlike the targeted and common definition of "marriage" at issue here, the *Romer* law was sufficiently overbroad and unusual to allow the *Romer* majority to infer animus. *Romer*, 517 U.S. at 633. Amendment 3 simply does not present that situation.

Finally, in *Windsor,* the Supreme Court merely rejected what the majority perceived as an overbroad federal intrusion into an area of state dominance, with the resulting "discrimination" so unusual as to provide evidence of animus as the law's principal purpose. 133 S.Ct. at 2693-95. By contrast, here Utah acts within that primary area of dominance to enact a law that is hardly unusual. Indeed, as the Chief Justice explained, that state "power will come into play on the other side of the board in future cases about the constitutionality of state marriage definitions." *Windsor*, 133 S.Ct. at 2697 (Roberts, C.J., dissenting). Because none of the features relevant to the *Windsor* majority apply here, *see* Sections I.A.1-I.A.3, *supra*, *Windsor* does not undermine *Baker*.

In summary, *Lawrence*, *Romer*, and *Windsor* did not undermine *Baker*. As such, *Baker* remains binding precedent that the District Court and this Court have

an obligation to follow.

2. The People's Rejection of the ERA Reinforces *Baker*

Amicus Eagle Forum respectfully submits that ERA's history also is relevant to whether the Equal Protection Clause requires the imposition of same-sex marriage nationwide. This Court should heed the will and wisdom of the People in rejecting that outcome a mere thirty years ago.

When the Supreme Court decided *Baker*, the Nation had recently begun a ten-year political drama to consider, debate, and ultimately reject a proposal to amend the Constitution to guarantee "equality of rights ... on account of sex" under the ERA. *Id.* Among the ERA's many debatable ramifications was the issue of whether its ratification would have created a federal constitutional right to same-sex marriage, thereby abrogating *Baker*. Eagle Forum's founder was deeply involved in that consideration, debate, and rejection, and Eagle Forum respectfully submits that the People's rejection of the ERA compels this Court to reject the same claims today.

Scholarly opinion and the legislative history both were divided on the ERA's impact on same-sex marriage. One camp – which included both ERA supporters and ERA opponents – focused the inquiry on the individual's choice of a mate, stressing that the traditional definition of marriage undeniably restricts one's choice of a mate "on account of sex." The other camp assumed that the definition

of marriage would remain unchanged because laws defining marriage as an opposite-sex union applied equally to both sexes.

The first camp included the authors of *The Legality of Homosexual Marriage*, 82 YALE L.J. 573 (1973), who argued passionately that the ERA would provide a firm constitutional basis for homosexual marriage:

> [T]he new Amendment represents an unqualified prohibition – an absolute guarantee [of equality that would be] much less flexible than that of the Fourteenth Amendment.

Id. at 585. Thus, ERA's proponents included those who supported the relief that Plaintiffs seek here. In addition to those ERA supporters, ERA *opponents* also argued that the ERA would support same-sex marriage, both in the public debate[9] and in academia and Congress. 118 Cong. Rec. 4373 (daily ed. March 21, 1972) ("it would follow that laws outlawing wedlock between members of the same sex would be as invalid as laws forbidding miscegenation") (*quoting* Harvard Professor Paul A. Freund's testimony from *Hearings on H.J. Res. 35, 208 Before Subcomm. No. 4 of the House Comm. on the Judiciary,* 92d Cong., 1st Sess. (1971)) (Sen. Ervin).

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[9] Prof. Eugene Volokh's web log excerpts contemporaneous articles under the heading that *Phyllis Schlafly said it would be like this*. *See* http://www.volokh.com/2003_11_16_volokh_archive.html#106917664607446885 (Nov. 18, 2003); and http://www.volokh.com/2005/03/14/phyllis-schlafly-said-it-would-be-like-this/ (Mar. 14, 2005) (last visited Feb. 10, 2014).

The second camp of ERA supporters – largely feminists – denied that the ERA would require same-sex marriage. *See, e.g.*, 118 Cong. Rec. 4389 (daily ed. March 21, 1972) (Sen. Bayh). This camp included Yale Law School professor Thomas I. Emerson, co-author of an influential law review article on the proposed ERA. Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871 (1971). As the article purported to cover all the amendment's possible consequences – including its effect on marriage – without mentioning the possibility of same-sex marriage, this group of ERA proponents deemed the omission significant and used it to argue against any suggestion that the ERA would allow same-sex marriage.[10]

The People *rejected* the ERA in large part because of a well-founded fear that ERA would lead to the very result that Plaintiffs demand here: "The vote in Virginia [against the ERA] came after proponents argued on behalf of civil rights for women and opponents trotted out the *old canards about homosexual marriages*..." Judy Mann, *Obstruction*, WASHINGTON POST, B1, Feb. 19, 1982 (emphasis added). Having failed with the ERA, the canards have returned to try to

[10] Speaking in Birmingham, Alabama in 1976, Prof. "Emerson said fears by anti-ERA supporters concerning women being drafted into combat, legalized homosexual marriages and rearrangement of family structures are 'fears not based on fact. I don't blame them (for being against ERA),' he said. 'If all that were true I'd be against it too.'" Melanie Jones, *Anti-ERA Forces' Fears Are Not Based on Fact, Proponent Says*, BIRMINGHAM NEWS, Feb. 2, 1976.

roost in the Fourteenth Amendment. However they might have fared under the ERA, they cannot survive without it.

In rejecting the ERA, the People rejected even the *possibility* of the Equal Protection Clause's requiring same-sex marriage. Two canons of statutory construction counsel against this Court's now amending the Constitution in a way that the People rejected in defeating the ERA, the only constitutional text that *might* have supported Plaintiffs' claims. First, such post-enactment history – *i.e.*, post-ratification of the Fifth and Fourteenth Amendments – is "entitled to great weight in statutory construction" of the original Amendments. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 380-81 (1969). Second, "[f]ew principles of statutory construction are more compelling than the proposition that [a legislative body] does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (citation omitted). Both of these canons weigh against Plaintiffs' attempt to reinterpret Equal Protection to require same-sex marriage.

During the ERA's ratification process, Justice Powell emphasized that courts must not circumvent the democratic process by constitutionalizing policy issues that the People were then debating:

> democratic institutions are weakened, and confidence in the restraint of the Court is impaired, when we appear unnecessarily to decide sensitive issues of broad social and political importance at the very time they are under

> consideration within the prescribed constitutional processes.

Frontiero v. Richardson, 411 U.S. 677, 692 (1973) (Powell, J., concurring in judgment). That same respect for the democratic process counsels this Court to accept the People's decision against enlarging the scope of the Equal Protection Clause to embrace an absolute equality of sexual relationships. This Court should honor the will of the People in rejecting the ERA.

E. As Ratified by the States, the Equal Protection Clause Does Not Compel Recognition of Same-Sex Marriage

The *Windsor* majority very carefully tied its rationale and limited its holding to state-recognized same-sex marriages that the federal government declined to recognize for all purposes, notwithstanding that the general authority over family relationships lies with the states. *Windsor*, 133 S.Ct. at 2691. That is an entirely different question from the question presented here: whether the Fourteenth Amendment *requires states* to recognize same-sex marriages in the first place.

While the "power to interpret the Constitution … remains in the Judiciary," *City of Boerne v. Flores*, 521 U.S. 507, 524 (1997), the Constitution is not a blank check that the federal judiciary can wield to remake this Nation wholly apart from the states' and the People's intent in ratifying the Constitution's generally worded provisions. The Supreme Court already has recognized the limits posed on using the Due Process Clause to legislate beyond "fundamental rights and liberties which

are, objectively, deeply rooted in this Nation's history and tradition." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). The obvious intent of the states that ratified the Equal Protection Clause should limit the judiciary's hand in imposing judicial preferences in the guise of interpreting the Constitution.

With statutory text, the Supreme Court readily recognizes the judiciary's role as arbiter, not author, of our laws:

> Had Congress intended so fundamental a distinction, it would have expressed that intent clearly in the statutory language or the legislative history. It did not do so, however, and it is not this Court's function to sit as a super-legislature and create statutory distinctions where none were intended.

Securities Industry Ass'n v. Bd. of Governors of Fed'l Reserve Sys., 468 U.S. 137, 153 (1984) (interior quotations omitted). Similarly, when refereeing disputes between the Federal Government and the sovereign states, federal courts do not presume federal preemption "unless that was the *clear and manifest purpose* of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (emphasis added), "because respect for the States as independent sovereigns in our federal system leads [federal courts] to assume that Congress does not cavalierly pre-empt [state law]." *Wyeth v. Levine*, 555 U.S. 555, 565 n.3 (2009) (internal quotations omitted); *cf.* H.R. Rep. No. 104-664, at 16 (1996), *reprinted at* 1996 U.S.C.C.A.N. 2905, 2920 ("what is most troubling in a representative democracy is the tendency of the courts to involve themselves far beyond any plausible constitutionally-

assigned or authorized role"). *Amicus* Eagle Forum respectfully submits that the same respect for the states – as well as respect for the People – requires restraint in interpreting the Constitution.

Sodomy was a criminal offense in the original thirteen states that ratified the Bill of Rights and all but five of the thirty-seven states that ratified the Fourteenth Amendment. *Bowers v. Hardwick*, 478 U.S. 186, 192-94 & nn.5-6 (1986), *rev'd on other grounds, Lawrence v. Texas*, 539 U.S. 558 (2003); *see also* 4 WILLIAM BLACKSTONE, COMMENTARIES *215 (describing the common-law crime). It is simply inconceivable that those states understood Equal Protection to *require* the states to recognize same-sex marriage.

Given states' "virtually exclusive" authority over marriage, *Windsor*, 133 S.Ct. at 2691, as "a traditional area of state concern," *Moore v. Sims*, 442 U.S. 415, 435 (1979), *amicus* Eagle Forum respectfully submits that courts should interpret the Constitution to allow states to retain their definitions of marriage: "When the text … is susceptible of more than one plausible reading," federal courts should "ordinarily accept the reading that disfavors" overturning the intent of those who enacted that text. *Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008) (interior quotations omitted). Mandating same-sex marriage surely is not compelled by anything that the states or the People ever intentionally ratified.

II. AMENDMENT 3 DOES NOT TRIGGER – BUT WOULD READILY SATISFY – ELEVATED SCRUTINY

Although it respectfully submits that the Court must decide this case under the rational-basis test, see Section I, *supra*, *amicus* Eagle Forum here addresses Plaintiffs' arguments that Amendment 3 warrants elevated scrutiny as both discrimination based on sex and the denial of the fundamental right to marry. Although these arguments provide no basis for this Court to apply elevated scrutiny, *amicus* Eagle Forum respectfully submits that Amendment 3 readily would meet elevated scrutiny.

A. Amendment 3 Does Not Discriminate Based on Sex

The District Court found Amendment 3 to discriminate on the basis of sex by prohibiting one from marrying someone of the same sex. Slip Op. at 34-35. When evaluating sex-discrimination claims, the Supreme Court has applied "intermediate scrutiny" requiring that sex-based distinctions achieve "important governmental objectives," with the "discriminatory means… substantially related to [achieving such] objectives." *U.S. v. Virginia*, 518 U.S. 515, 533 (1996) (interior quotations omitted). For that scrutiny even potentially to apply, however, the defendant must have acted *because of* the plaintiff's sex, not merely in spite of it. *Feeney*, 442 U.S. at 279. Amendment 3 is facially neutral with respect to sex because it applies equally to same-sex female couples and same-sex male couples, as the male and female Plaintiffs themselves demonstrate. Something other than

the Plaintiffs' sex motivates any differential treatment.

By contrast, in *Loving v. Virginia,* 388 U.S. 1 (1967), the Supreme Court rightly rejected Virginia's claim that its miscegenation statute applied neutrally, treating whites and blacks equally. *Loving,* 388 U.S. at 8-9. That statute *did not* apply equally to whites and non-whites, had a race-based purpose, and indeed was "designed to maintain White Supremacy." *Id.* at 11-12. Accordingly, the Court correctly applied heightened scrutiny. *Lawrence,* 539 U.S. at 600 (Scalia, J., dissenting). By contrast, Amendment 3 has no *sex-based* purpose whatsoever because it advances neither males nor females over the other sex.

Discrimination based on sex means that "members of one sex are exposed to disadvantageous terms or conditions … to which members of the other sex are not exposed." *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 81 (1998). Here, Amendment 3 treats male and female same-sex couples the same, but treats those same-sex couples differently from opposite-sex couples. Even if that constituted differential treatment under the Equal Protection Clause, it would not be differential treatment *because of sex.*

B. Amendment 3 Does Not Abridge Fundamental Rights

Same-sex marriage is not a fundamental right under the Due Process Clause. Although husband-wife marriage unquestionably is a fundamental right, *Turner v. Safley,* 482 U.S. 78, 95 (1987) ("decision to marry is a fundamental right");

Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541 (1942) ("Marriage and procreation are fundamental"), the federal Constitution has never required an unrestricted right to marry *anyone.*

Instead, the fundamental right recognized by the Supreme Court applies only to marriages between one man and one woman: "Marriage is one of the basic civil rights of man, fundamental to our very existence and survival." *Loving*, 388 U.S. at 12. Unlike opposite-sex marriage, same-sex relationships are not fundamental to the existence and survival of the human race. Indeed, the Supreme Court already has held that same-sex couples have *no right* to marry, much less a fundamental right do so. *Baker*, 409 U.S. at 810; Section I.D, *supra.* Since *Loving* was extant in 1972 when the Supreme Court decided *Baker, Loving* obviously does not relate to this litigation. In that respect, nothing has changed materially since 1972.

Given "[t]he tendency of a principle to expand itself to the limit of its logic," *Glucksberg*, 521 U.S. at 733 n.23 (interior quotations omitted), the Supreme Court has recognized that federal courts must tread cautiously when expounding substantive due-process rights outside the "fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition." *Id.* at 720-21. "[E]xtending constitutional protection to an asserted right or liberty interest" thus requires "the utmost care … lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the [federal judiciary]." *Id.* at

720. Accordingly, to qualify as "fundamental," a right must be both "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty" (*i.e.*, "neither liberty nor justice would exist if [the right] were sacrificed"). *Id.* at 720-21. Even those who fervently believe that same-sex marriage meets that test's second prong must admit that same-sex marriage cannot meet the first. Leaving aside what the Founders had in mind *in 1787* or what the states that ratified the Fourteenth Amendment had in mind *in the 1860s*, same-sex marriage (which the Supreme Court easily rejected in 1972) is not "deeply rooted" even *today*.

C. Amendment 3 Would Survive Elevated Scrutiny, If Elevated Scrutiny Applied

Although elevated scrutiny does not apply, *amicus* Eagle Forum respectfully submits that Amendment 3 readily meets elevated scrutiny. Altering something "fundamental to our very existence and survival," *Loving*, 388 U.S. at 12, implicates the most compelling governmental interests:

> At present, no one – including social scientists, philosophers, and historians – can predict with any certainty what the long-term ramifications of widespread acceptance of same-sex marriage will be.

Windsor, 133 S.Ct. at 2716 (Alito, J., dissenting). Utah has every right to resist Plaintiffs' proposed radical change. *U.S. v. Griffin*, 7 F.3d 1512, 1517 (10th Cir. 1993) ("[i]mportant government interests include … minimizing the risk of harm

to … the public"). Even under elevated scrutiny, this Court should decline Plaintiffs' invitation to impose their brave new world on Utah.

CONCLUSION

This Court should direct the entry of summary judgment for Utah.

Dated: February 10, 2014

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CERTIFICATE OF COMPLIANCE WITH RULE 32

1. The foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 6,997 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32.2.

2. The foregoing brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Century Schoolbook 14-point font.

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1. The foregoing brief complies with the privacy requirements of Tenth Cir. Rule 25.5 because the brief does not contain any private information that that rule would require to be redacted.

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