No. 14-50196

# In the United States Court of Appeals for the Fifth Circuit

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CLEOPATRA DELEON; NICOLE DIMETMAN; VICTOR HOLMES; MARK PHARISS,

*Plaintiffs-Appellees*,

v.

RICK PERRY, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF TEXAS; GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS TEXAS ATTORNEY GENERAL; DAVID LAKEY, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE DEPARTMENT OF STATE HEALTH SERVICES,

*Defendants-Appellants*.

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On Appeal from the United States District Court
for the Western District of Texas, San Antonio Division
Case No. 5:13-cv-982

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## APPELLANTS' BRIEF

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## Certificate of Interested Persons

Counsel of record certifies that the following persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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## STATEMENT REGARDING ORAL ARGUMENT

The State respectfully submits that these constitutional challenges to Texas's marriage laws are sufficiently important to warrant oral argument.

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

## Cases

**Constitutional Provisions and Statutes**



**Other Authorities**

Defendants-Appellants Rick Perry, Greg Abbott, and David Lakey (collectively, "the State") respectfully appeal the district court's preliminary-injunction order of February 26, 2014.

## Statement of Jurisdiction

The district court entered a preliminary injunction on February 26, 2014. The State filed a timely notice of appeal on February 27, 2014. This Court has jurisdiction to review the order under 28 U.S.C. § 1292(a)(1). The district court's subject-matter jurisdiction rested on 28 U.S.C. § 1331.

## Statement of the Issue

Does the Fourteenth Amendment deprive the States of their authority to define marriage as the union of one man and one woman?

## Statement of the Case

In 2005, the people of Texas voted by a 76 percent to 24 percent margin to amend their constitution to define marriage as "solely the union of one man and one woman." The amendment also prohibits the State and its subdivisions from creating or recognizing same-sex marriages. *See* Tex. Const. art. I, § 32. The Texas Family Code prohibits the issuance of marriage licenses to same-sex couples. Tex. Fam. Code § 2.001(b). It also provides that "[a] marriage between persons of the same sex or a civil union is contrary to the public policy of this state and is void," and prohibits recognition of out-of-state same-sex marriages or civil unions. *Id.* § 6.204(b).

The plaintiffs contend that these laws (collectively, Texas's marriage laws) violate the due-process and equal-protection clauses of the Fourteenth Amendment. The district court entered a preliminary injunction after holding that Texas's marriage laws fail rational-basis review and holding, in the alternative, that same-sex marriage qualifies as a "fundamental" substantive-due-process right. *See* ROA.1995-2042. The district court stayed its order pending appeal. *See* ROA.2042.

## SUMMARY OF THE ARGUMENT

This case is not about whether Texas should recognize same-sex marriage. It is about the question of who decides. There are rational, thoughtful arguments on both sides of the political debate about whether to legalize same-sex marriage. That debate should be allowed to continue among voters and within democratically elected legislatures. Under the United States Constitution, the decision belongs to the people of Texas and their elected representatives, not the federal courts.

Texas's marriage laws are rooted in a basic reality of human life: procreation requires a male and a female. Two people of the same sex cannot, by themselves, procreate. All the Equal Protection Clause requires is that Texas's marriage laws be rationally related to a legitimate state interest. Texas's marriage laws easily satisfy that standard. The State's recognition and encouragement of opposite-sex marriages increases the likelihood that naturally procreative couples will produce children, and that they will do so

in the context of stable, lasting relationships. By encouraging the formation of opposite-sex marriages, the State seeks not only to encourage procreation but also to minimize the societal costs that can result from procreation outside of stable, lasting marriages. Because same-sex relationships do not naturally produce children, recognizing same-sex marriage does not further these goals to the same extent that recognizing opposite-sex marriage does. That is enough to supply a rational basis for Texas's marriage laws.

The district court's contrary conclusion rests on a misapplication of rational-basis review. Rational-basis review does not require a precise means-end fit between a law and its stated objectives, and it does not require a State to produce evidence that a law will achieve its objectives. *See Heller v. Doe*, 509 U.S. 312, 320-21 (1993); *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993). Nor is a State required to show that same-sex marriage will undermine the State's interests in encouraging responsible environments for procreation; it is enough if one could rationally believe that opposite-sex marriages will advance the State's interests in procreation to a greater extent than same-sex marriages. The district court never denied that one could rationally hold this belief.

The district court's effort to make same-sex marriage into a "fundamental" substantive-due-process right is equally unavailing. *Washington v. Glucksberg*, 521 U.S. 702 (1997), forbids the recognition of such rights unless they are "deeply rooted in this Nation's history and tradition"—and same-sex marriage is not deeply rooted in this Nation's history and tradition. Quite

the opposite: the view of marriage deeply rooted in our history and tradition is that marriage can exist *only* between one man and one woman.

Finally, Texas's marriage laws do not conflict with any decision of the Supreme Court. The holdings of *Loving*, *Lawrence*, and *Windsor* stop well short of requiring same-sex marriage in all 50 States. The plaintiffs would like this Court to *extend* the holdings of those cases. But a court cannot extend those cases absent a showing that Texas's marriage laws conflict with *the Constitution*, and the plaintiffs have not presented an argument based on the Constitution. Their district-court briefing is a policy argument for why same-sex marriage should be legal, and while they attempt to create a legal veneer by discussing Supreme Court decisions, they cannot escape the fact that Texas's marriage laws: (1) do not conflict with any decision of the Supreme Court; (2) do not conflict with any language in the Constitution; and (3) do not conflict with any longstanding practice or tradition.

Although the Constitution does not require the State to permit same-sex marriage, the Constitution does provide the *process* to be used for resolving disagreements over issues such as same-sex marriage: federalism and democracy. The Framers established a government that leaves the vast majority of decisions with the States. *See* The Federalist No. 45, at 292 (James Madison) (Clinton Rossiter ed. 1961) ("The powers delegated by the proposed Constitution to the federal government, are few and defined. Those which are to remain in the State governments are numerous and indefinite."). And the Constitution imposes extensive supermajoritarian hurdles on those who seek

to create new constitutional rights. *See* U.S. Const. art. V. Some people may dislike federalism as a means for resolving our disagreements, because it permits one State to adopt policies that people in other States may disapprove. But the entire point of the Constitution's federalist structure is to enable States and citizens with different views on important matters to co-exist; our Constitution "is made for people of fundamentally differing views." *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

## ARGUMENT

Views on same-sex marriage are changing. They may continue to change. They may not. Those on both sides of the public debate believe passionately in their cause and seek to convince their fellow citizens of its merits. As important as this debate is for our nation, its outcome is not dictated by the Constitution, and it should not be resolved by the federal courts. A state does not violate the Equal Protection Clause when the distinctions drawn by its laws are rationally rooted in biology. The Due Process Clause does not afford rights that are not deeply rooted in the history and traditions of our nation. And no decision of the Supreme Court interpreting these constitutional provisions requires States to recognize same-sex marriages. Indeed, the only Supreme Court decision on point holds that same-sex marriage is not a constitutional right. *See Baker v. Nelson*, 409 U.S. 810 (1972).

Ending the vigorous civic debate on same-sex marriage by forcing all 50 States into a court-ordered, one-size-fits-all solution is not the resolution our

Constitution envisions. State recognition of same-sex marriage simply is not a matter on which the Constitution speaks. That does not make one side of the public debate right or wrong. It means only that the debate should continue. Nationwide resolution of the same-sex marriage question, if and when it takes place, should reflect the hearts and minds of the people of the several States, not the will of the federal courts.

## I. Texas's Marriage Laws Do Not Violate The Equal Protection Clause.

The equal protection clause forbids a State to "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV § 1. This does not require a State to confer equal treatment on things that are truly different from one another in relevant respects, and the district court did not deny that opposite-sex unions are the only type of human relationship that is biologically capable of producing children. Instead, the court claimed that Texas has no "rational basis" for limiting marriage to opposite-sex couples because Texas allows infertile opposite-sex couples to marry, and because the State has not shown that same-sex marriage will undermine the State's interests in procreation. *See* ROA.1064-75; ROA.2018-25. The district court misapplied rational-basis review.

First, rational-basis review allows States to enact over-inclusive or under-inclusive laws. *See Heller*, 509 U.S. at 321 ("[C]ourts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not

fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality.") (citation and internal quotation marks omitted); *Hayden v. Paterson*, 594 F.3d 150, 171 (2d Cir. 2010) ("[R]ational basis review allows legislatures to act incrementally and to pass laws that are over (and under) inclusive.").

Second, rational-basis review does not require a State to produce evidence that a law will achieve its objectives. *See Heller*, 509 U.S. at 320 ("A State . . . has no obligation to produce evidence to sustain the rationality of a statutory classification."); *Beach Commc'ns*, 508 U.S. at 315 (holding that a legislative decision "is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data").

Third, rational-basis review does not allow courts to invalidate a law by weighing evidence or resolving disputed questions of fact. The mere *existence* of disagreement on an empirical question is enough to establish a "reasonably conceivable state of facts that could provide a rational basis." *Beach Commc'ns*, 508 U.S. at 313; *see also Nat'l Paint & Coatings Ass'n v. City of Chicago*, 45 F.3d 1124, 1127 (7th Cir. 1995) ("[T]o say that such a dispute exists—indeed, to say that one may be *imagined*—is to require a decision for the state."); *Steffan v. Perry*, 41 F.3d 677, 685 (D.C. Cir. 1994) ("It is hard to imagine a more deferential standard than rational basis.").

The district court's rational-basis analysis violates each of these precepts of rational-basis review—all of which have been established in binding Supreme Court precedent. It contradicts *Heller* by demanding a precise means-

ends fit between the goal of encouraging responsible procreation and the decision to withhold marriage from same-sex couples. *See* ROA.2021 (rejecting the State's procreation-focused rationale because the State recognizes marriages involving "post-menopausal women, infertile individuals, and individuals who choose to refrain from procreating."). It violates *Heller* again by faulting the State for failing to produce "evidentiary support" for its claims. *See* ROA.2019 ("Defendants have not provided any evidentiary support for their assertion that denying marriage to same-sex couples positively affects childrearing.").[1] And it ignores *Beach Communications* by purporting to resolve disputed empirical questions and relying on findings of fact entered by other district courts. *See* ROA.2019 ("Plaintiffs presented an abundance of evidence and research, confirmed by our independent research, supporting the proposition that the interests of children are served equally by same-sex parents and opposite-sex parents.") (quoting *Varnum v. Brien*, 763 N.W.2d 862, 899 (Iowa 2009)). The district court never so much as mentioned *Heller* or *Beach Communications*, even though the State cited each case repeatedly before the district court. *See* ROA.1607-08. But the problems with the district court's rational-basis analysis go beyond its disregard of binding Supreme Court precedent.

[1] The Defendants did not make this assertion in the district court, much less seek to support it with evidence. The district court's mistaken attribution of this argument to the State is difficult to explain.

The district court's rational-basis discussion appears to rest on a belief that those who oppose same-sex marriage are irrational or prejudiced—when the disagreements actually arise from differences in value judgments and differing views over the answers to disputed empirical questions. *See* Bruce A. Ackerman, *Beyond Carolene Products*, 98 Harv. L. Rev. 713, 739 (1985) ("It is simply self-congratulatory to suppose that the members of our own persuasion have reached their convictions in a deeply reflective way, whereas those espousing opinions we hate are superficial."). That assumption is held by some (though not all) proponents of same-sex marriage, and it undergirds the all-too-common accusations that opponents of same-sex marriage are motivated by "animus" and that traditional marriage laws serve only to "demean" same-sex couples. *See, e.g.*, Pls.' Prelim. Inj. Mot., ROA.119, 121, 157, 159; Prelim. Inj. Order, ROA.1996, 2034-35.

Neither side of the same-sex marriage debate wants to demean people, and neither side wants to undermine the institution of marriage. The two sides often fail to understand each other's arguments—and come to see the other side as irrational or immoral—because each side starts with different assumptions about the nature and primary purpose of marriage. Indeed, by asking the court to strike down Texas's marriage laws, the plaintiffs "are really seeking to have the Court resolve a debate between two competing views of marriage." *United States v. Windsor*, 133 S. Ct. 2675, 2718 (2013) (Alito, J., dissenting). What *is* marriage? What is its nature? What are its purposes? Why ought the State to recognize it? People genuinely disagree about the an-

swers to these questions, and it is that disagreement—not a desire to discriminate against anyone or to undermine the institution of marriage—that underlies the same-sex marriage debate. Under one view, marriage is primarily defined as a public solemnization of the mutual love and commitment between two people. For many who hold this view, the sex of the two people involved has no relevance to whether a consensual, loving relationship should qualify as a "marriage." Indeed, from the perspective of one who views marriage this way, it is easy to see how there seems to be no legitimate reason to deny same-sex couples access to the legal institution of marriage.

Under the competing view, marriage is inextricably linked to the biological complementarity between men and women. On this view, marriage is the creation of a unique legal union between two people who on their own cannot reproduce but who together can be the source of new life. For those who view marriage this way, the legal institution of marriage exists primarily to encourage the orderly propagation of the human race by channeling naturally procreative heterosexual activity into stable, responsible relationships. As worthy a purpose as the public affirmation of love and commitment is, that aspect of marriage does not define the institution for those who hold this view.

The procreation-focused view of marriage is not as widely held as it once was. But that does not make it irrational. It has been predominant in our society for most of its history, and it is reflected in the language often used by the Supreme Court to describe marriage, including in one of the Court's

seminal civil rights cases, on which the plaintiffs place great weight. *See, e.g.*, *Loving v. Virginia*, 388 U.S. 1, 12 (1967) ("Marriage is . . . fundamental to our very existence and survival."); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) ("[M]arriage and procreation are fundamental to the very existence and survival of the [human] race."). For those who hold this view, same-sex marriage is a contradiction in terms. No equal-protection claim arises at all, because marriage by its very nature requires the presence of a man and a woman, the inherently complementary and necessary building blocks of human life.

Both of these understandings of marriage are rational. And the people of a sovereign State must choose which view will govern them. Texans have chosen the traditional view. By deeming that choice irrational and unconstitutional, the district court arrogated to itself the authority to resolve the complex sociological, philosophical, and political question of the nature and primary purpose of marriage. And not only did the court resolve that question, it did so by declaring the procreation-centered view of marriage to be irrational. There is no basis for such a ruling.

Regardless of one's perspective on the nature of marriage, the biological facts that distinguish opposite-sex couples from same-sex couples justify Texas's marriage laws under rational-basis review. Opposite-sex relationships have the potential to produce unique externalities that do not result from same-sex relationships, which makes unique regulation of opposite-sex relationships eminently rational. As compared to the relative stability of a

marriage, sexual activity among opposite-sex couples who are not engaged in stable relationships is more likely to result in costs that must be borne by society. It is a basic fact of life that human beings are often governed by their passions. And when the product of those passions can be a child, the State's interest in steering those passions toward a responsible and stable outlet could hardly be stronger. Same-sex couples feel passion and love for one another as well. But children are not the immediate and direct result. To the contrary, the children of same-sex couples are generally the result of the lengthy reflection and financial investment required to seek out physician-assisted fertilization, surrogate parents, or adoption. The State's decision to regulate opposite-sex relationships through marriage flows from a recognition of the costs imposed on society when the procreative power of those relationships is used irresponsibly, not from a desire to demean or harm anyone.

The objection may be raised that not all opposite-sex marriages produce children. Some couples are infertile; some are deliberately childless. But rational-basis review does not require a perfect fit between means and ends; the Supreme Court has so held many times in cases that the district court ignored. *See, e.g.*, *Heller*, 509 U.S. at 321; *Dandridge v. Williams*, 397 U.S. 471, 485 (1970) ("[A] State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect."). It is enough if the State can show that opposite-sex relationships are more likely than same-sex relationships to produce children—indeed, it is enough if one could ra-

tionally speculate that opposite-sex relationships *might* be more likely than same-sex relationships to produce children. *See Beach Commc'ns*, 508 U.S. at 315 ("[L]egislative choice … may be based on rational speculation unsupported by evidence or empirical data."). The plaintiffs do not deny that one could rationally hold this belief; they do not even deny that opposite-sex couples are more likely than same-sex couples to create new offspring. That concedes that Texas's marriage laws survive rational-basis review. And in all events, the plaintiffs and the district court are wrong to assert that recognizing infertile or childless opposite-sex marriages fails to advance the State's interest in encouraging stable environments for procreation. By recognizing and encouraging the lifelong commitment between a man and woman—even when they do not produce offspring—the State encourages others who *will* procreate to enter into the marriage relationship.

Opposite-sex couples often cannot help but produce offspring, which makes encouraging the formation of stable legal unions between men and women a uniquely acute concern for society—and therefore for the State. Regulation and promotion of opposite-sex marriages increases the likelihood that children will be born into stable environments where they are raised by their mother and their father. It is surely rational to believe that this is good for the children's well-being. And it is also good for the State, because it increases the likelihood that parents, rather than society, will bear the cost of raising these children. Recognizing same-sex marriage does not further this goal to the same extent. And opposite-sex marriage advances this interest

even when one of the partners to the marriage is infertile or the woman is beyond childbearing years. By encouraging faithfulness and monogamy between a fertile person and an infertile opposite-sex spouse, these marriages—even though infertile—serve to channel both spouses' sexuality into a committed relationship rather than toward sexual behavior that, for the fertile spouse at least, may result in costs that are ultimately borne by society.

The district court argued that recognizing same-sex marriage will do nothing to *undermine* the State's interests in promoting responsible procreation, but that is irrelevant when conducting rational-basis review. A State can rationally conclude that recognizing same-sex marriages will not further those interests—or that it will not further these interests to the same extent as opposite-sex marriage. Legal marriage is in some ways a government subsidy, and a State may reserve its subsidies for behaviors that are most likely to generate the positive externalities that the State seeks to promote. *See Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 572 (1998); *Rust v. Sullivan*, 500 U.S. 173, 193 (1991) (government may employ selective subsidies "to encourage certain activities it believes to be in the public interest"); *Harris v. McRae*, 448 U.S. 297, 315 (1980) (states may use "unequal subsidization" to encourage "activity deemed in the public interest").

This is not to say—or even to suggest—that same-sex marriages do not generate any benefits for society. Some have argued, for example that the recognition of same-sex marriage will produce economic benefits, such as increasing household wealth. *See, e.g.*, William N. Eskridge, *The Case for Same-*

*Sex Marriage* 68 (1st ed. 1996). As stated above, there are arguments legislatures can consider in deciding whether same-sex marriage should be legal. But on rational-basis review, it is enough to show that opposite-sex marriages produce *some* societal benefits *to a greater extent* than same-sex marriages—indeed, it is enough if one could rationally believe that this *might* be the case. Whatever the benefits of same-sex marriage, there is no question that opposite-sex marriages produce different and unique societal benefits related to procreation—and that opposite-sex marriages advance those interests to a greater extent than same-sex marriages. On rational-basis review, a State does not violate the Equal Protection Clause by choosing to pursue some societal benefits over others. *See Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955) ("The legislature may select one phase of one field and apply a remedy there, neglecting the others" without violating equal protection).

This is all part and parcel of the procreation-focused view of marriage. The State does not provide legal benefits to—and impose financial burdens like community property and spousal maintenance on—married couples simply to recognize their love and commitment to one another. Instead, the primary purpose of legal marriage in Texas is to generate positive externalities (and avoid negative externalities) for society by encouraging responsible behavior among naturally procreative couples, not to publicly recognize the love and commitment of two people. This procreation-centered perspective on marriage is assuredly rational, and the view that marriage inherently re-

quires a man and a woman has been a bedrock of society for thousands of years in every corner of the globe. While it is embraced by many religious people, it long pre-dates Christianity or any other modern religion. And this view continues to be held by many thoughtful and distinguished scholars as well as millions of ordinary Americans. *See, e.g.*, Witherspoon Institute, *Marriage and the Public Good: Ten Principles* (2008), http://bit.ly/1zkm0al (signed by over 70 scholars); Institute for American Values, *Marriage and the Law: A Statement of Principles* (2006), http://bit.ly/1qEhf7u (signed by more than 100 scholars).

The district court's failure to understand why so many of his fellow Americans oppose same-sex marriage should not have led the district court to declare their beliefs irrational. Instead, it should have led the court to read some of the many reasoned defenses of traditional marriage—none of which the court so much as acknowledged (let alone refuted). *See, e.g.*, Sherif Girgis, Robert P. George & Ryan T. Anderson, *What Is Marriage?*, 34 Harv. J.L. & Pub. Pol'y 245 (2011); George W. Dent, Jr., *Traditional Marriage: Still Worth Defending*, 18 BYU J. Pub. L. 419 (2004); *see also* Jonathan Haidt & Jesse Graham, *When Morality Opposes Justice: Conservatives Have Moral Intuitions That Liberals May Not Recognize*, 20 Social Justice Research 98, 111–12 (2007) ("[O]n the issue of gay marriage it is crucial that liberals understand the conservative view of social institutions. Conservatives generally believe … that human beings need structure and constraint to flourish, and that social institutions provide these benefits. … These are not crazy ideas."); Jesse

Graham, Jonathan Haidt & Brian Nosek, *Liberals and Conservatives Rely on Different Sets of Moral Foundations*, 96 Journal of Personality and Social Psychology 1029 (2009). On rational-basis review, the plaintiffs' burden is to negate *every conceivable rationale* that might be offered for a law—and that requires them (at the very least) to refute every defense that has been offered for traditional marriage, as well as scholars (such as Haidt) who defend the *rationality* of those who support traditional marriage. *See Beach Commc'ns*, 508 U.S. at 315 ("[T]hose attacking the rationality of the legislative classification have the burden to negative every conceivable basis which might support it.") (internal quotations omitted). One does not refute arguments by ignoring them.

More importantly, it is not possible to "refute" the idea that the legal institution of marriage is the State's way of reducing the societal costs associated with unregulated and irresponsible heterosexual activity and encouraging mothers and fathers to join together in caring care for the children their relationships tend to produce. The plaintiffs and the district court may *disagree* with that understanding of the purpose of marriage, but that is a normative value judgment and it does not supply a basis for a constitutional holding. Normative disagreements abound in other areas of law, and this does not lead one side to declare the other "irrational." Some believe, for example, that the primary purpose of tort law is deterring negligent behavior by tortfeasors; others emphasize the corrective-justice concerns of ensuring compensation for accident victims. Some believe that antitrust law should pursue

economic efficiency and consumer welfare; others think it should protect "small dealers and worthy men" from competitive market forces. Some believe that food law should pursue libertarian aims; others think it should promote nutrition or ensure the ethical treatment of animals. People who disagree over these issues do not call their opponents' views "irrational" or "unconstitutional." Instead, they recognize that their opponents are proceeding from a different normative framework that emphasizes certain values over others—and they further recognize that rational people can disagree over which values should take priority. Those who support traditional marriage deserve similar courtesy from their fellow participants in the ongoing democratic debate about same-sex marriage.

The district court did not apply heightened scrutiny to the plaintiffs' equal-protection claims, but the plaintiffs are likely to argue for it. There is no need to remand this question to the district court, as heightened scrutiny is impermissible for many reasons. First, neither the Supreme Court nor this Court has ever held that sexual orientation is a "suspect classification" that triggers heightened scrutiny, and the overwhelming weight of appellate authority rejects the idea. *See, e.g.*, *Cook v. Gates*, 528 F.3d 42, 62 (1st Cir. 2008); *Scarbrough v. Morgan Cnty. Bd. of Educ.*, 470 F.3d 250, 261 (6th Cir. 2006); *Lofton v. Sec'y of Dept. of Children and Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2004); *Walmer v. Dep't of Defense,* 52 F.3d 851, 854 (10th Cir. 1995); *Steffan v. Perry*, 41 F.3d at 704.

Second, the arguments for suspect-class status are *weaker* now than they were at the time of these appellate-court rulings. The political influence of the gay-rights movement has only grown since the time of the many court decisions rejecting suspect-class status. The movement's many recent successes are well known. To cite just two examples, Congress repealed the military's "Don't Ask, Don't Tell" policy, and recently the President signed an executive order prohibiting sexual-orientation discrimination by federal contractors. More and more elected officials—including the President—are announcing their support for same-sex marriage, and Attorney General Holder and several state attorneys general took the extraordinary step of refusing to defend traditional marriage laws in court. In the current climate, the claim that same-sex couples "lack substantial political power" cannot be taken seriously, particularly when courts rejected this claim decades ago, when the gay-rights movement was less influential than it is today. *See* ROA.1061; *see also Ben-Shalom v. Marsh*, 881 F.2d 454, 466 (7th Cir. 1989) ("In these times homosexuals are proving that they are not without growing political power. It cannot be said they have no ability to attract the attention of the lawmakers.") (internal quotation marks omitted).

Third, even if one were to accept the plaintiffs' contention that they qualify as a "suspect class," Texas's marriage laws *still* would not receive heightened scrutiny because they do not classify based on sexual orientation. All persons in Texas—regardless of sexual orientation—are subject to the same definition of marriage, and the plaintiffs are as free to marry an oppo-

site-sex spouse as anyone else in the State. And all persons in Texas—regardless of their sexual orientation—are ineligible to marry a same-sex spouse. A law that applies equally to everyone does not discriminate or deny "equal protection" simply because some group of people wants to violate it. *See McCullen v. Coakley*, 134 S. Ct. 2518, 2534 (2014) (facially neutral buffer zone is "neither content nor viewpoint based," even though the only speech affected would come from one particular viewpoint); *see also Reynolds v. United States*, 98 U.S. 145 (1878); *Emp't Div., Dep't of Human Res. of Or. v. Smith,* 494 U.S. 872, 878 (1990). Texas's marriage laws may result in a disparate impact on people of a certain sexual orientation, but disparate-impact claims are not cognizable in equal-protection law. *See Washington v. Davis*, 426 U.S. 229, 242 (1976).

*Loving v. Virginia* does not change the fact that Texas's marriage laws apply equally to everyone. *Loving* struck down Virginia's anti-miscegenation law, and although Virginia defended its law by arguing that it applied equally to members of all races, the Court nevertheless invalidated the statute because it contained an explicit racial classification. *See* 388 U.S. at 8-9. Racial classifications are unconstitutional—even when the statute purports to impose a uniform rule—and a State can no more defend an anti-miscegenation statute on the ground that it applies to everyone than it could defend a segregation ordinance on these grounds. *See Loving*, 388 U.S. at 8 ("[W]e reject the notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth

Amendment's proscription of all invidious racial discriminations."); *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (rejecting "separate but equal."). *Loving* confirmed, however, that *only* statutes with racial classifications will generate equal-protection problems if the law otherwise applies equally to everyone. *See Loving*, 388 U.S. at 9 ("In these cases, involving distinctions not drawn according to race, the Court has merely asked whether there is any rational foundation for the discriminations, and has deferred to the wisdom of the state legislatures. In the case at bar, however, we deal with statutes containing racial classifications, and the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race.").

Texas's marriage laws do not deny the plaintiffs the equal protection of the laws. They make rational distinctions for legitimate reasons, and the Equal Protection Clause does not prohibit such distinctions. The procreation-centered view of marriage on which Texas law rests is no less rational than the alternative view of marriage espoused by the plaintiffs and the district court. The district court disagreed with Texas voters' view of the nature and purposes of marriage, but that disagreement cannot support a constitutional holding.

## II. Texas's Marriage Laws Do Not Violate The Due-Process Clause.

The district court held that same-sex marriage is a "fundamental" constitutional right, but the court admitted that there is no language in the Constitution establishing this right. ROA.2027. So the district court relied on the controversial doctrine known as "substantive due process." *See* John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 18 (1980) ("'[S]ubstantive due process' is a contradiction in terms—sort of like 'green pastel redness.'"); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections On Free-Form Method In Constitutional Interpretation*, 108 Harv. L. Rev. 1221, 1297 n.247 (1995) (acknowledging that the "basic linguistic point" that "substantive due process [is] an oxymoron … has great force"). Because "substantive due process" has no textual pedigree in the Constitution and because of its association with long-discredited rulings such as *Dred Scott v. Sanford*, 60 U.S. 393 (1856), and *Lochner*, 198 U.S. 45, the Supreme Court has strictly limited the situations in which this court-created doctrine may be used to strike down democratically enacted laws. First, a substantive due process right must be "deeply rooted in this Nation's history and tradition." *See Glucksberg*, 521 U.S. at 703. Second, courts must apply a "careful description" of the alleged right when undertaking the historical inquiry. *See id.* This means that judges cannot declare a right that is *not* "deeply rooted in this Nation's history and tradition" (such as a right to same-sex marriage) to *be* "deeply rooted in this Nation's history and tradition" by boosting the lev-

el of generality at which the right is defined. *See id.*; U.S. Const. art. V; Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 Utah L. Rev. 665; Frank H. Easterbrook, *Abstraction and Authority*, 59 U. Chi. L. Rev. 349 (1992).

The district court applied a very different version of substantive due process. Without any mention of *Glucksberg* or its requirement that substantive-due-process rights be "deeply rooted" in history and tradition, the district court claimed that the due-process clause protects the "right to marry the partner of [one's] choosing." ROA.2029; ROA.1049. This defies *Glucksberg* (and the Constitution) in two respects. First, the "right to marry the partner of [one's] choosing" is *not* deeply rooted in this Nation's history and tradition. The States have always imposed restrictions on one's choice of marriage partner, forbidding not only same-sex marriages but also non-consensual marriages, marriages between close relatives, and marriages involving persons below the age of consent.

Second, the plaintiffs and the district court violate *Glucksberg*'s "careful description" requirement, by defining their proposed "fundamental right" at an impermissibly high level of abstraction. The question is not whether a "right to marry" is deeply rooted in this Nation's history and tradition, but whether the right to marry a same-sex partner has that pedigree. It does not, and the plaintiffs and the district court do not argue otherwise. Their only response to *Glucksberg* has been to ignore it.

There is also no stopping point to this abstraction maneuver. If courts and litigants can create a constitutional right to same-sex marriage by defining it as part of a more general "right to marry," then *any* conduct that has been traditionally prohibited can become a constitutional right simply by redefining it at a higher level of abstraction—perhaps as part of a "right to be let alone" or a "freedom not to conform." *See Bowers v. Hardwick*, 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting); *Michael H. v. Gerald D.*, 491 U.S. 110, 141 (1989) (Brennan, J., dissenting). Perhaps the plaintiffs will respond by saying that courts need not take the abstraction maneuver *that* far; they should engage in abstraction only to the extent necessary to constitutionalize the rights that they want (such as a right to same-sex marriage) and no further. But that would only confirm the utter arbitrariness of their approach to substantive due process.

The Tenth Circuit used the same abstraction fallacy in its recent decision disapproving Utah's marriage laws: It declared a generalized "right to marry" to be "deeply rooted" in history and tradition, and then announced that this "deeply rooted" right includes the right to marry any person of one's choice, including a same-sex partner. *See Kitchen v. Herbert*, No. 13-4178, 2014 WL 2868044, at *11 (10th Cir. June 25, 2014). The Tenth Circuit acknowledged *Glucksberg*'s "careful description" requirement, but argued that it could disregard *Glucksberg*—at least in cases involving challenges to a State's marriage laws—because some pre-*Glucksberg* cases (*Loving*, *Zablocki*, and *Turner*) had "discussed the right to marry at a broader level of generali-

ty." *Id.* at *12. According to the Tenth Circuit, those rulings allow federal courts to ignore *Glucksberg* and impose same-sex marriage on the States because the opinions did not go out of their way to explicitly reiterate what the Supreme Court had already held in *Baker v. Nelson*—that the "right to marry" can extend only to opposite-sex couples. That is not a valid excuse for refusing to follow the Supreme Court's instructions in *Glucksberg*. The discussion of the "right to marry" in *Loving*, *Zablocki*, and *Turner* proceeded in general terms because no one had argued (or even thought) that this right could extend to same-sex couples—not because the justices were inviting future courts to impose same-sex marriage on the States. No one contends that *Loving*, *Zablocki*, or *Turner* established a constitutional right to same-sex marriage, which means that any discussion of the "right to marry" in those cases *must* be interpreted to refer only to opposite-sex marriage—the only type of "marriage" that was known to exist at the time of those decisions. And even if the Tenth Circuit were correct to find significance in the fact that *Loving*, *Zablocki*, and *Turner* described the "right to marry" in generalized terms, *Glucksberg* put an end to the past practice of using abstraction to invent "fundamental rights" that have no basis in constitutional text or historical practice. *See Glucksberg*, 521 U.S. at 720, 725; McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 Utah L. Rev. 665. One cannot disregard the Supreme Court's rejection of a methodology by pointing to earlier opinions that deploy the repudiated methodology.

The Tenth Circuit also invoked *Lawrence* as an excuse to ignore *Glucksberg*, but *Lawrence* did not establish a fundamental liberty interest and did not apply heightened scrutiny (as even the Tenth Circuit acknowledged). *See Kitchen*, 2014 WL 2868044, at *20; *Seegmiller v. LaVerkin City*, 528 F.3d 762, 771 (10th Cir. 2008) ("[N]owhere in *Lawrence* does the Court describe the right at issue in that case as a fundamental right or a fundamental liberty interest"); *see also Williams v. Attorney Gen. of Ala.*, 378 F.3d 1232, 1236 (11th Cir. 2004). *Lawrence* therefore gives no leverage to the plaintiffs' efforts to make same-sex marriage into a fundamental right subject to heightened scrutiny. The Tenth Circuit's opinion also leads to the staggering conclusion that *every* restriction on the right to marry must be subject to strict scrutiny. It is not clear how other longstanding restrictions on the right to marry could survive that standard—and the Tenth Circuit did not explain how they could.

Finally, the district court and the Tenth Circuit's approach to "substantive due process" violates Article V of the Constitution. Each of their rulings creates a constitutional right that has no textual basis in the document, *see* ROA.2027 ("[T]he right to marry is not explicitly mentioned in the text of the Constitution"), and that is not "deeply rooted in this Nation's history and tradition." In doing this, the district court and the Tenth Circuit are using "substantive due process" to enforce rights that some judges believe *should* be protected by the Constitution, but that lack sufficient popular support to be codified as an Article V amendment to the Constitution. Yet Article V protects the opponents of same-sex marriage—and the opponents of all

novel and proposed "constitutional" rights—by imposing extensive super-majoritarian hurdles in the path of those who wish to remove issues like same-sex marriage from the political process. The district court and the Tenth Circuit allowed the supporters of same-sex marriage to circumvent those constitutional protections by declaring that same-sex marriage has now become a constitutional right—even though everyone agrees that same-sex marriage was *not* a constitutional right when the Fourteenth Amendment was ratified and remains incapable of obtaining the supermajoritarian assent that Article V requires. *See Ullmann v. United States*, 350 U.S. 422, 428 (1956) ("Nothing new can be put into the Constitution except through the amendatory process.").

Lawyers and judges sometimes proceed as if constitutional provisions exist only to limit the power of the political branches. But the Constitution's allocation of powers necessarily limits the interpretive authority of the judiciary, and there *is* a point at which "interpretation" crosses the line into constitutional amendment by judicial decree. Reasonable jurists can debate exactly where this boundary falls, but it is surely the case that a substantive right to marry a same-sex partner—which has no textual basis whatsoever in the Constitution *and* no historical pedigree—is a de facto constitutional amendment imposed under the guise of constitutional "interpretation."

## III. The Plaintiffs' Claims Are Foreclosed By *Baker v. Nelson*.

Even if one believes that the Supreme Court should ultimately require the States to permit same-sex marriages, the district court's preliminary injunction should still be vacated because *Baker v. Nelson* remains a binding precedent on this issue. In *Baker*, the Minnesota Supreme Court rejected a claim of a right to same-sex marriage under the federal constitution. 409 U.S. 810. On appeal, a unanimous U.S. Supreme Court—three years after *Loving v. Virginia*—held that a claimed constitutional right to same-sex marriage did not even present a substantial federal question. *Id.* This kind of summary disposition was common when, prior to 1988, the Supreme Court was required to hear all appeals from state supreme court rulings presenting federal constitutional questions. *See* 28 U.S.C. § 1257 (1988). It is well-established that this kind of "[s]ummary disposition of an appeal, . . . either by affirmance or by dismissal for want of a substantial federal question, *is a disposition on the merits*." *Hicks v. Miranda*, 422 U.S. 332, 344 (1975) (quoting C. Wright, Law of Federal Courts 495 (2d ed. 1970) (emphasis added)). Indeed, the district court acknowledged that summary dispositions by the Supreme Court are "precedential and binding on lower courts." ROA.2009 (citing *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (per curiam)). But it held that "subsequent doctrinal and societal developments since 1972 compel this Court to conclude that the summary dismissal in *Baker* is no longer binding." ROA.2009.

Federal district courts have no authority to declare that a ruling of the Supreme Court has been overruled *sub silentio* by later "doctrinal developments." *See Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) ("If 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, 237-38 (1997) (same). There is no doubt that *Baker* is "the case which directly controls," as it involved precisely the same issue presented by the plaintiffs in this case. The district court did not present an argument to the contrary. Indeed, the district court did not cite or acknowledge the Supreme Court's instructions in *Rodriguez de Quijas* and *Agostini*—even though both cases were cited and explained in detail in the State's brief. The plaintiffs also ignored the State's reliance on *Rodriguez de Quijas* and *Agostini*—apparently assuming that the Supreme Court's explicit instructions in those cases can be ignored so long as there are opinions from other federal district courts ignoring those cases. *See* ROA.1727-29.

Even if one were to entirely ignore *Rodriguez de Quijas* and *Agostini*—as the district court did—the district court was wrong to assert that *Windsor* overruled or even undermined *Baker*. If anything, *Windsor* reinforced *Baker* by emphasizing the need to safeguard the States' "historic and essential authority to define the marital relation" free from "federal intrusion." 133 S. Ct. at 2692; *see also id.* at 2689-90 ("By history and tradition the definition

and regulation of marriage . . . has been treated as being within the authority and realm of the separate States."). It was precisely *because* the *Windsor* Court regarded marriage law as "a virtually exclusive province of the States" that it deemed DOMA's refusal to recognize New York's decision to permit same-sex marriage an impermissible "federal intrusion on state power." *Id.* at 2680, 2692 (internal quotation marks omitted).

The district court also erred by suggesting that *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), undermines *Baker*. *See* ROA.2010. Appellate jurisdiction must exist *before* an appellate court can even consider whether a substantial federal question exists. *See John v. Paullin,* 231 U.S. 583, 585 (1913) ("[I]f … its appellate jurisdiction was not properly invoked, no Federal question was before it for decision."); *United States. v. Mendoza,* 491 F.2d 534, 536 (5th Cir. 1974) (describing appellate jurisdiction as a threshold issue). Because the Supreme Court held in *Hollingsworth* that the petitioners lacked standing to appeal, the Court lacked authority to opine on whether the plaintiffs had presented a substantial federal question.

Finally, even if post-*Baker* Supreme Court rulings have established that alleging a constitutional right to same-sex marriage now presents a "substantial" federal question, no post-*Baker* decision has overruled *Baker*'s conclusion that same-sex marriage is not a constitutional right. *That* holding on the merits remains binding on every federal court, and the district court provided no justification for disregarding it.

## IV. The Plaintiffs' Claims Find No Support In The Text Or History Of The Fourteenth Amendment.

The plaintiffs' and the district court's interpretation of the Fourteenth Amendment contradicts not only the original understanding of the amendment but also more than a century of post-ratification history. *See, e.g., Hernandez v. Robles*, 855 N.E.2d 1, 8 (N.Y. 2006) ("[I]t was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex."). Yet the district court completely ignored this defect in the plaintiffs' claim. Some may believe that judges should entirely ignore history when interpreting constitutional provisions. But we find it hard to believe that any court would accept the notion that history is irrelevant to constitutional interpretation; no jurist of which we are aware has ever espoused such a view. *See Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 294 (1963) (Brennan, J., concurring) ("[T]he line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers."); *Colgrove v. Battin*, 413 U.S. 149, 176 (1973) (Marshall, J., dissenting) ("When a historical approach is applied to the issue at hand, it cannot be doubted that the Framers envisioned a jury of 12 when they referred to trial by jury."); *Nat'l Labor Relations Bd. v. Noel Canning*, No. 12-1281, 2014 WL 2882090, at *9 (U.S. June 26, 2014) ("There is a great deal of history to consider here.").

Perhaps the plaintiffs will acknowledge that the history counts as a strike against their proposed interpretation of the Fourteenth Amendment, but will argue that this is outweighed by other considerations. The problem with that approach is that there is nothing else that could establish a constitutional right to same-sex marriage. There is no textual argument on which to rely—the Fourteenth Amendment requires "due process" (not "due substance") and marriage laws based on rational distinctions that apply equally to everyone do not deny the "equal protection of the laws." And none of the Supreme Court decisions plaintiffs cite establishes a constitutional right to same-sex marriage. The holdings of *Loving*, *Lawrence*, and *Windsor* stop well short of requiring same-sex marriage in all 50 States. The plaintiffs would like this Court to *extend* the holdings of those cases, but a court cannot extend those holdings absent a showing that Texas's marriage laws conflict with *the Constitution*, and the plaintiffs have not presented any argument based on the Constitution itself. For all of their discussion of Supreme Court cases and doctrinal jargon, the plaintiffs cannot escape the fact that Texas's marriage laws: (1) do not conflict with any decision of the Supreme Court; (2) do not conflict with any language in the Constitution; and (3) do not conflict with any longstanding practice or tradition. Indeed, the plaintiffs do not even argue that any such conflict exists.

In light of all of this, how can the district court conclude that Texas's marriage laws are *un-constitutional*? One possibility is to rely on the fact that past Supreme Court justices have been willing to create new constitutional

rights without any textual warrant in the Constitution and without any basis in longstanding practice or tradition. *Lochner v. New York* is the paradigm for this approach to judging—and while *Lochner* has been repudiated, the Supreme Court has issued other *Lochner*-type decisions that have not been overruled. *See* John Hart Ely, *The Wages of Crying Wolf*, 82 Yale L.J. 920 (1973). Perhaps the plaintiffs will contend that until the Supreme Court overrules every last one of its *Lochner*-esque rulings, the federal courts have free rein to emulate *Lochner*'s methodology by pushing aside democratically enacted legislation in the name of rights that have no textual footing in the document but that judges nevertheless believe *should* be protected from legislative interference.

This type of argument confuses a lower court's duty to *obey the decisions* of the Supreme Court with a duty to *emulate the methodology* of living-constitutionalism—and to extend that methodology into new domains. When the Supreme Court uses the doctrine of substantive due process to nullify democratically enacted legislation, those decisions must be respected and obeyed, but they are not a license for federal courts to expand this atextual doctrine into new areas. Otherwise, there is no need to show that a proposed constitutional right to same-sex marriage has any pedigree beyond the support that it currently enjoys among federal judges. This is how the plaintiffs have argued their case from the outset: same-sex marriage should be a constitutional right simply because decisions from other federal courts sup-

port that idea—not because Texas's marriage laws conflict with constitutional text.

That approach to substantive due process destroys not only popular sovereignty but also the idea of a government of laws and not of men. The Constitution cannot be changed through court decisions, yet the district court's reasoning fails to acknowledge *any* constitutional limits on the interpretive powers of the judiciary. If that is how our judicial system operates, then sovereignty resides not in the people, not in the officials they elect or the laws those officials pass, and not even in the text of the Constitution, but in the federal judiciary—a judiciary that derives its powers not from the consent of the governed, but from the judges' own beliefs about what morality and justice require.

## V. Legalization Of Same-Sex Marriage Through Democratic Processes Is Far Preferable To Legalization Through Judicial Decree.

Even members of this Court who believe that the judiciary has the *power* to require the States to adopt same-sex marriage should nevertheless refrain from doing so and allow the democratic debate on same-sex marriage to continue in the States.

First, same-sex marriage has not existed long enough to generate reliable data regarding its effects. Allowing the States to decide whether (and for how long) to proceed with same-sex marriage will help policymakers determine

whether it is in fact good policy. Court-ordered same-sex marriage will forever establish a constitutional rule, making it harder to study the effects of same-sex marriage (because it will no longer be possible to compare outcomes in the States that permit the practice with outcomes in the other States), and disabling legislatures from changing course if it turns out that same-sex marriage has some negative or unintended side effects. This is one of the principal reasons that constitutional federalism exists—and it would be frustrated by a nationwide rule requiring same-sex marriage. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."); *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) ("[T]he theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear."). Issues are often more complex than judges and lawyers think, and their legal training gives them no comparative advantage in resolving the complex value judgments and empirical questions that go into deciding questions such as whether same-sex marriage should be legal. *See* Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution*, 65 Fordham L. Rev. 1269, 1292 (1997) ("[A]n essential element of responsible judging is a respect for the opinions and judgments of others,

and a willingness to suspend belief, at least provisionally, in the correctness of one's own opinions.").

Second, same-sex marriage would find more public acceptance and legitimacy if it were legalized by democratically elected legislatures rather than imposed by a judicial order. *See* Michael W. McConnell, *The Constitution and Same-Sex Marriage*, Wall St. J. (March 21, 2013), on.wsj.com/1mknYDB ("Change that comes through the political process has greater democratic legitimacy."). As one of the leading academic proponents of same-sex marriage has explained:

> In a representative democracy such as ours, most important political decisions should be made by the political branches, primarily Congress and secondarily the Executive. Judicial review in a democracy is exceptional and should be deployed by unelected judges only when there is a clear inconsistency between a statute or regulation and the Constitution.

William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 Vand. L. Rev. 593, 630 (1992) (footnotes omitted).

Finally, the judicial imposition of same-sex marriage would reinforce perceptions of the federal judiciary as a political institution that creates and enforces constitutional rights according to societal trends. This is a dangerous path to take—even for those who believe that same-sex marriage is good policy. If a right to same-sex marriage can be constitutionalized by judicial decree, then almost any policy can become constitutionalized through the courts. That will cause interest groups to increase their demands for judges

who will impose their preferred policies from the bench, and the already-dysfunctional judicial-confirmation process will become further poisoned as ideological conformity overrides considerations of legal ability. Indeed, jurists who envision a modest or restrained role for the judiciary in resolving our nation's disputes—such as Oliver Wendell Holmes, Learned Hand, or Henry Friendly—will likely become un-appointable. As the federal judiciary moves to constitutionalize more areas of American public policy, the focus of judicial appointments shifts away from finding jurists of ability and distinction, and toward finding judges who will impose policies that the President and Senate are unable to attain through the democratic process.

Those of a liberal or progressive persuasion should be especially troubled by this prospect. Rule by judges is two-way street, and the judge-empowering interpretative methodologies employed by the district court have historically been used by the Supreme Court to invalidate many laws favored by liberals and progressives. *Lochner*, 198 U.S. at 64; *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (striking down federal minimum-wage and maximum-hours regulations for poultry workers); *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936) (invalidating minimum-wage law for women); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996); *Bd. of Tr. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001). Some people assume that doctrines like substantive due process will be used only to invalidate laws that they dislike, but there is no mechanism to ensure that will happen. Once "substantive due

process" is severed from history and tradition—as in the district court's ruling—then there is no way to control how it will be used by future courts.

## VI. This Court Should Rule Even If The Supreme Court Grants Certiorari In *Kitchen v. Herbert*.

It is possible that the Supreme Court will grant certiorari in *Kitchen v. Herbert*, 2014 WL 2868044, before this Court decides the appeal. If that happens, the State respectfully requests that this Court nevertheless rule promptly on the appeal and not stay the proceedings. The Supreme Court's consideration of these issues will benefit from a thoughtful opinion from this Court, even if this Court disagrees with the State's arguments. And the district court's preliminary injunction against the State's marriage laws—even though it has been stayed—is a continuing affront to the State's sovereignty and its legality should be resolved as soon as possible. Finally, there is no guarantee that *Kitchen* will produce a ruling on the merits, as there are jurisdictional issues lurking in that case and the justices may decide to avoid the merits as they did in *Hollingsworth v. Perry*, 133 S.Ct. 2652.

It is also crucial that this Court correct the district court's rational-basis analysis. It has become all too common for federal district courts to misapply the rational-basis standard, either by demanding that a State support its laws with evidence, or by requiring a precise means-end fit between the law and the State's asserted goal. It would be a mistake for this Court to allow the faulty rational-basis analysis in the district court's opinion to stand—even if

one thinks the Supreme Court is likely to resolve the same-sex marriage issue by the end of its next term.

## Conclusion

The preliminary injunction should be vacated, and the case remanded with instructions to enter judgment for the defendants.

Respectfully submitted.

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Counsel also certifies that on July 28, 2014, this brief was transmitted to Mr. Lyle W. Cayce, Clerk of the United States Court of Appeals for the Fifth Circuit, via the court's CM/ECF document filing system, https://ecf.ca5.uscourts.gov/.

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