Case Nos. 14-1167(L), 14-1169, 14-1173

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

TIMOTHY B. BOSTIC, et al.,

Plaintiffs-Appellees,

and

JOANNE HARRIS, JESSICA DUFF, CHRISTY BERGHOFF, AND VICTORIA KIDD, on behalf of themselves and all others similarly situated,

Intervenors,

v.

GEORGE E. SCHAEFER, III, in his official capacity as the Clerk of Court for Norfolk Circuit Court,

Defendant-Appellant,

and

JANET M. RAINEY, in her official capacity as State Registrar of Vital Records, et al.,

Defendant-Appellant,

and

MICHÈLE B. MCQUIGG, in her official capacity as Prince William County Clerk of Circuit Court, et al.,

Intervenor/Defendant-Appellant.

On appeal from the United States District Court for the Eastern District of Virginia, Norfolk Division

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Brief of the Institute for Marriage and Public Policy as Amicus Curiae in Support of Defendants-Appellants and Reversal

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Amicus Curiae the Institute for Marriage and Public Policy is a non-profit corporation which has no parent corporation. It issues no stock, and therefore, no publicly held company owns 10 percent or more of its stock.

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Amicus curiae the Institute for Marriage and Public Policy is a nonprofit, nonpartisan organization dedicated to strengthening marriage as a social institution. Working with scholars, public officials and community leaders, the Institute seeks to promote thoughtful, informed discussion of marriage and family policy at all levels of American government, academia, and civil society.

SUMMARY OF ARGUMENT

This Court should tread with "the utmost care" when confronting newly asserted liberty and equality interests. Principles of federalism and judicial restraint urge this Court to exercise caution when considering the expansion of constitutional rights in areas of contentious social dispute. Eight principles of federalism and judicial restraint, repeatedly emphasized in the Supreme Court's cases, all counsel against the recognition of a federal constitutional right to same-sex marriage.

First, out of deference to the States as separate sovereigns in our system of federalism, this Court should be reluctant to intrude into areas of traditional state concern, especially the law of marriage and domestic relations. In *United States v. Windsor*, 133 S. Ct. 2675 (2013), and other cases, the Supreme Court repeatedly

[1] No party's counsel authored the brief in whole or in part, and no one other than the amicus curiae, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief. This brief is filed with consent of all parties; thus no motion for leave to file is required. *See* Fed. R. App. P. 29(a).

emphasized the States' authority to define and regulate the marriage relation without interference from federal courts.

Second, out of respect for the States' role as laboratories of democracy, this Court should be loath to short-circuit democratic experimentation in areas of social policy. State democratic processes, not federal courts, are the fundamental incubators of newly emerging conceptions of liberty.

Third, the scarcity of guideposts for judicial decisionmaking in the unchartered territory of substantive due process should make this Court circumspect about enshrining new liberty and equality interests, such as the asserted right to same-sex marriage.

Fourth, this Court should be reluctant to recognize a new constitutional right in the absence of a close nexus between the new constitutional right and the central purpose of an express constitutional provision. The right of same-sex marriage does not stand in close relation to the central purpose of any express constitutional provision.

Fifth, this Court should decline to exercise a new constitutional right where there is no established or clearly emergent national consensus in favor of the requested right. At this time, no national consensus in favor of same-sex marriage can be discerned. In fact, the majority of States to consider the issue within the past 15 years have opted to enact the traditional definition of marriage.

Sixth, this Court should consider that the asserted right to same-sex marriage is currently the subject of active, multi-sided debate and legal development in the States. The Supreme Court typically refuses to short-circuit such ongoing debate and legal development in the States. Same-sex marriage is currently the subject of intense debate and rapid legal development in the States, and this development trends in divergent directions.

Seventh, this Court should prefer incremental change to sweeping and dramatic change when confronting claims to novel constitutional rights such as same-sex marriage. Recognizing a constitutional right to same-sex marriage would constitute a sweeping change. It would impliedly invalidate the recently adopted policies of over 30 States favoring the traditional definition of marriage, and it would short-circuit the incremental approach favored by the States that have adopted intermediate levels of legal recognition for same-sex relationships.

Eighth, this Court should consider whether the right to same-sex marriage is novel within our Nation's history and tradition, or conversely, whether the government's attempt to restrict the right is novel. In this case, there has been a long tradition favoring the traditional definition of marriage, which has been recently reaffirmed in democratic enactments adopted by a majority of States.

Because all eight of these well-established guideposts for the exercise of judicial restraint point in the same direction, this Court should decline to recognize a constitutional right to same-sex marriage in this case.

ARGUMENT

I. Eight Principles of Federalism and Judicial Restraint Call For Courts to Exercise the "Utmost Care" When Considering Novel Constitutional Rights, and They Uniformly Counsel Against the Recognition of a Federally-Mandated Right To Same-Sex Marriage.

From time to time, the federal courts have been called upon to consider contentious issues of social policy, such as interracial marriage, contraceptive use, abortion rights, assisted suicide, the death penalty, sexual privacy, gun control, and now the redefinition of marriage. When called upon to decide such volatile issues, the Supreme Court treads with "the utmost care." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992)); *see also District Attorney's Office for the Third Judicial Dist. v. Osborne*, 557 U.S. 52, 73 (2009) (same).

The need for "the utmost care" is particularly compelling in cases involving the assertion of new liberty and equality interests. "The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field." *Collins*, 503 U.S. at 125. Such "judicial self-restraint" is a touchstone of the Supreme Court's exercise of reasoned judgment in such cases: "A decision of this Court which radically departs from [America's political

tradition] could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint." *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833, 849 (1992) (plurality opinion) (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)).

Eight guideposts of judicial restraint, repeatedly invoked in the Supreme Court's cases, counsel for the exercise of "the utmost care" and "judicial self-restraint" in this case. These principles uniformly counsel that this Court should not impose a redefinition of marriage by recognizing a federally mandated right to same-sex marriage, but should allow the issue of same-sex marriage recognition to continue to be worked out through the democratic process.

A. Federalism and Deference to the States as Sovereigns and Joint Participants in the Governance of the Nation Urge Judicial Self-Restraint, Especially In Matters of Traditional State Concern.

"[O]ur federalism" requires that the States be treated as "residuary sovereigns and joint participants in the governance of the Nation." *Alden v. Maine*, 527 U.S. 706, 748 (1999) (Kennedy, J.); *see also Bond v. United States*, 131 S. Ct. 2355, 2364 (2011) (recognizing "the integrity, dignity, and residual sovereignty of the States"). "By 'splitting the atom of sovereignty,' the founders established 'two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are

governed by it.'" *Alden*, 527 U.S. at 751 (quoting *Saenz v. Roe*, 526 U.S. 489, 504 n.17 (1999)); *see also Printz v. United States*, 521 U.S. 898, 920 (1997).

Federalism, which "was the unique contribution of the Framers to political science and political theory," rests on the seemingly "counter-intuitive ... insight of the Framers that freedom was enhanced by the creation of two governments, not one." *United States v. Lopez*, 514 U.S. 549, 575-76 (1995) (Kennedy, J., concurring). Federalism, combined with the separation of powers, creates "a double security ... to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself." *Id.* at 576 (quoting The Federalist No. 51, at 323 (C. Rossiter ed. 1961) (J. Madison)).

Over the long run, federal intrusion into areas of state concern tends to corrode the unique security given to liberty by the American system of dual sovereignties. "Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory." *Lopez*, 514 U.S. at 577 (Kennedy, J., concurring). In such circumstances, "[t]he resultant inability to hold either branch of the government answerable to the citizens is more dangerous even than devolving too much authority to the remote central power." *Id.*

For these reasons, the Supreme Court is generally averse to projecting its authority into areas of traditional state concern. *See, e.g., Osborne*, 557 U.S. at 73 n.4 (rejecting a substantive due process claim that would have "thrust the Federal Judiciary into an area previously left to state courts and legislatures." 557 U.S. at 73 n.4; *see also, e.g., Poe*, 367 U.S. at 503 (Frankfurter, J.).

Family law, including the definition of marriage, is a quintessential area of traditional state concern. "One of the principal areas in which this Court has customarily declined to intervene is the realm of domestic relations." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004); *see also Boggs v. Boggs*, 520 U.S. 833, 850 (1997) ("[D]omestic relations law is primarily an area of state concern"); *Mansell v. Mansell*, 490 U.S. 581, 587 (1989) ("[D]omestic relations are preeminently matters of state law"); *Moore v. Sims*, 442 U.S. 415, 435 (1979) ("Family relations are a traditional area of state concern"); *Sosna v. Iowa*, 419 U.S. 393, 404 (1975) (observing that a State "has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created") (quoting *Pennoyer v. Neff*, 95 U.S. 714, 734-35 (1878)).

Concern for federalism and the traditional authority of the States to define marriage was critical to the Supreme Court's decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013). Invalidating a provision of federal law that denied recognition under federal law to same-sex marriages that were valid under state

law, the Supreme Court emphasized that "[r]egulation of domestic relations an area that has long been regarded as a virtually exclusive province of the States." *Id.* at 2691 (quoting *Sosna*, 419 U.S. at 404). "The recognition of civil marriages is central to state domestic relations law applicable to its residents and citizens," and "[t]he definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations." *Id.* "Consistent with this allocation of authority, the Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations." *Id.*

As the Supreme Court noted in *Windsor*, this deference to the States on matters such as the definition of marriage is particularly appropriate for the federal courts. "In order to respect this principle, the federal courts, as a general rule, do not adjudicate issues of marital status even when there might otherwise be a basis for federal jurisdiction." *Id.* "Federal courts will not hear divorce and custody cases even if they arise in diversity because of 'the virtually exclusive primacy … of the States in the regulation of domestic relations.'" *Id.* (quoting *Ankenbrandt v. Richards*, 504 U.S. 689, 714 (1992) (Blackmun, J., concurring in the judgment)).

Thus, in *Windsor*, the Supreme Court placed primary emphasis on the fact that the States' authority to define and regulate marriage is one of the deepest-rooted traditions of our system of federalism. "The significance of state responsibilities for the definition and regulation of marriage dates to the Nation's

beginning…." *Id.* Foremost in the Supreme Court's analysis was its recognition that "[b]y history and tradition the definition and regulation of marriage … has been treated as being within the authority and realm of the separate States." *Id.* at 2689. The federal provision at issue in *Windsor* was infirm, according to the Court, because it failed to respect the State's "historic and essential authority to define the marital relation," and thus "depart[ed] from this history and tradition of reliance on state law to define marriage." *Id.* at 2692. Although the Court found it "unneccesary to decide" whether the "intrusion on state power" effected by the federal government's adoption of its own definition of marriage for purposes of federal law "is a violation of the Constitution because it disrupts the federal balance," it nevertheless found "[t]he State's power in defining the marital relation [to be] of central relevance in [the] case quite apart from principles of federalism." *Id.*; *see also id.* at 2697 (Roberts, C.J., dissenting) ("The dominant theme of the majority opinion is that the Federal Government's intrusion into an area 'central to state domestic relations law applicable to its residents and citizens' is sufficiently 'unusual' to set off alarm bells"). Indeed, given the long-standing and pivotal importance of federalism in our governmental structure outlined above, the Court's reliance on the primary role of the States over domestic relations law in reaching the holding it did was all but compelled.

Thus, deference of the federal government and federal courts to state laws relating to "the definition and regulation of marriage," *id.* at 2689 (majority opinion), which was critical to the Supreme Court's decision in *Windsor*, counsels this Court to exercise "the utmost care" and "judicial self-restraint" in this case.

B. This Court Must Respect the Role of the States as Laboratories of Democracy in the Development of Emerging Conceptions of Liberty and Equality.

Second, the Supreme Court has "long recognized the role of the States as laboratories for devising solutions to difficult legal problems." *Oregon v. Ice*, 555 U.S. 160, 171 (2009). "This Court should not diminish that role absent impelling reason to do so." *Id.* Thus, at times when "States are presently undertaking extensive and serious evaluation" of disputed social issues, "the challenging task of crafting appropriate procedures for safeguarding liberty interests is entrusted to the 'laboratory' of the States in the first instance." *Glucksberg*, 521 U.S. at 737 (O'Connor, J., concurring) (ellipses and quotation marks omitted) (quoting *Cruzan v. Dir., Mo. Dept. of Health*, 497 U.S. 261, 292 (1990) (O'Connor, J., concurring)). In such cases, "the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear." *Lopez*, 514 U.S. at 581 (Kennedy, J., concurring). "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." *New State Ice Co. v. Liebmann,* 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

In *Windsor*, the Supreme Court asserted the same respect for the States as laboratories of democracy. The Court noted that "until recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage." *Windsor*, 133 S. Ct. at 2689. It observed that "a new perspective, a new insight" on this issue had emerged in "some States," leading to recognition of same-sex marriages in those States but not others. *Id.* This action was "a proper exercise of sovereign authority within our federal system, all in the way that the Framers of the Constitution intended." *Id.* at 2692. "The dynamics of state government in the federal system are to allow the formation of consensus" on such issues. *Id.*

Windsor reasoned that one key deficiency of the Defense of Marriage Act was that it sought to stifle just such innovation in the States as laboratories of democracy. *Windsor* took issue with the fact that "the congressional purpose" in enacting the bill was "to influence or interfere with state sovereign choices about who may be married." *Id.* at 2693. "The congressional goal was to put a thumb on the scales and influence a state's decision as to how to shape its own marriage laws." *Id.* (quotation marks omitted). Such purposeful stifling of state-level

innovation was, in the Court's view, inconsistent with the States' role as laboratories of democracy.

Thus, as the Supreme Court emphasized in *Windsor* and numerous other cases, the state political processes, not federal courts, are fundamental incubators of emerging and evolving national values and conceptions of liberty. *See id.* at 2692-93.

C. The Scarcity of Clear Guideposts for Decisionmaking in the Unchartered Territory of Substantive Due Process Calls for Judicial Restraint.

Third, particular caution is appropriate when the courts are called upon to constitutionalize newly asserted liberty and equality interests. "As a general matter, the [Supreme] Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Collins*, 503 U.S. at 125 (Stevens, J.); *see also Osborne*, 557 U.S. at 72 (same); *Glucksberg*, 521 U.S. at 720 (same). In *Glucksberg*, the Supreme Court reasserted the necessity of "rein[ing] in the subjective elements that are necessarily present in due-process judicial review," through reliance on definitions of liberty that had been "carefully refined by concrete examples involving fundamental rights found to be deeply rooted in our legal tradition." 521 U.S. at 722.

The scarcity of "clear guideposts for responsible decisionmaking" creates challenges, both for determining whether a new constitutional right should be recognized at all, and for defining the precise contours of that right. "[T]he outlines of the 'liberty' specially protected by the Fourteenth Amendment" are "never fully clarified, to be sure, and perhaps not capable of being fully clarified." *Id.* Thus, *Glucksberg* expressed concern, that "what is couched as a limited right to 'physician-assisted suicide' is likely, in effect, a much broader license, which could prove extremely difficult to police and contain." *Id.* at 733.

A similar concern is at work in this case. The request for constitutional recognition of same-sex marriage raises concerns about how to draw principled boundaries for marriage as a distinct, highly valued social institution. If the boundaries of marriage are to be constitutionalized, federal courts will inevitably be called upon to determine whether other persons in committed personal relationships—including those whose cultures or religions may favor committed relationships long disfavored in American law—are likewise entitled to enjoy marital recognition. As these cases arise, guideposts for decisionmaking in this area will be no less scarce and open-ended than in *Osborne*, *Glucksberg*, and *Collins*.

D. This Court Should Hesitate To Recognize a New Right To Same-Sex Marriage Where There Is No Close Nexus Between the Right Asserted and the Central Purpose of a Constitutional Provision.

In considering new assertions of constitutional rights, the Supreme Court acts with maximal confidence, so to speak, when recognizing an equality or liberty interest that has a close nexus to the core purpose of an express constitutional provision. A paradigmatic example is *Loving v. Virginia*, 388 U.S. 1 (1967). Invalidating "a statutory scheme adopted by the State of Virginia to prevent marriages between persons solely on the basis of racial classifications," *Loving* emphasized from the outset that the reasons for its decision "seem to us to reflect the central meaning of th[e] constitutional commands" of the Fourteenth Amendment. *Id.* at 2. "The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States." *Id.* at 10. "[R]estricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause." *Id* . at 12. Loving repeatedly stressed that laws against interracial marriage were repugnant to this "central meaning" and "clear and central purpose" of the Fourteenth Amendment. *See id.* at 6, 9, 10, 11. "To deny this fundamental freedom [to marry] on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive to the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law." *Id.* at 12.

Likewise, in invalidating the District of Columbia's ban on possession of operable handguns for self-defense, the Supreme Court devoted extensive historical analysis to establishing that "the inherent right of self-defense has been central to the Second Amendment right." *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008). *Heller* repeatedly emphasized that the right of self-defense was the "central component" of the freedom guaranteed by the Second Amendment. *Id.* at 599; *see also id.* at 630 (describing "self-defense" as "the core lawful purpose" protected by the Second Amendment); *id.* at 634 (holding that firearm possession is the "core protection" of an "enumerated constitutional right").

Similarly, in recognizing substantive restrictions on the applicability of the death penalty, the Supreme Court has frequently emphasized that the central purpose of the Eighth Amendment is to codify "the basic precept of justice that punishment for a crime should be graduated and proportioned to the offense." *Roper v. Simmons*, 543 U.S. 551, 560 (2005) (quotation marks and brackets omitted) (quoting *Atkins v. Virginia*, 536 U.S. 304, 311 (2002) (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910))).

In this case, by contrast, the right to redefine the institution of marriage so that it encompasses same-sex relationships cannot be viewed as falling within the "central meaning" or the "clear and central purpose" of the Fourteenth Amendment, or any other constitutional provision. *Loving*, 388 U.S. at 2, 10.

Even if the asserted interest is defined broadly as the freedom to marry whom one chooses—a definition which begs the question as to how "marriage" is to be defined, which lies within the State's traditional authority—this liberty interest still lacks the same close and direct nexus to the core purpose of Fourteenth Amendment as was present in *Loving*.

E. This Court Should Not Recognize a Novel Right To Same-Sex Marriage in the Absence of an Established or Emerging National Consensus in Favor of the Right.

When confronted with claims for novel constitutional rights, the Supreme Court carefully considers whether it can discern an established or emerging national consensus in favor of the new right. For example, the absence of a national consensus was critical to the Court's cautious approach in the right-to-die cases involving the refusal of life-prolonging medical care for incompetent patients and physician-assisted suicide. *See Glucksberg*, 521 U.S. at 710 ("In almost every State—indeed, in almost every western democracy—it is a crime to assist a suicide."); *Cruzan*, 497 U.S. at 269-77, 277 (reviewing the law of many States regarding the right to refuse life prolonging medical care, and concluding that "these cases demonstrate both similarity and diversity in their approaches to decision of what all agree is a perplexing question"); *id.* at 292 (O'Connor, J., concurring) ("As is evident from the Court's survey of state court decisions, no

national consensus has yet emerged on the best solution for this difficult and sensitive problem.") (citation omitted).

By contrast, where a national consensus in favor of a new liberty or equality interest can be discerned, the Court has weighed such consensus in favor of recognizing the expanded right. For example, at the time the Court invalidated Connecticut's ban on marital contraceptive use in *Griswold v. Connecticut*, 381 U.S. 479 (1965), several Justices remarked that the prohibition was directly at odds with actual social practices in other States, and indeed, within Connecticut itself. *See, e.g., Griswold*, 381 U.S. at 498 (Goldberg, J., concurring); *id.* at 505-06 (White, J., concurring in the judgment); *see also Poe*, 367 U.S. at 501-02 (plurality opinion); *id.* at 554 (Harlan, J., dissenting).

Similarly, "evidence of national consensus" is the touchstone of the Supreme Court's Eighth Amendment jurisprudence, *Roper*, 543 U.S. at 564, and objective standards for discerning such consensus are well developed. "We have pinpointed that the 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.'" *Atkins*, 536 U.S. at 312 (quoting *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989)). Moreover, an emerging national consensus may be discerned from a persistent, uniform trend in a single direction, even if the laws of a minority of States are not yet in accord with that trend. *Roper*, 543 U.S. at 566 (quoting *Atkins*, 536 U.S. at 315). *Loving* also

discerned a uniform trend, noting that many States had repealed their bans on interracial marriage within the previous 15 years, leaving only 16 States (almost all in the deep South) with such bans on the books. 388 U.S. at 6 n.5.

Likewise, considering the question of sexual privacy in *Lawrence v. Texas*, 539 U.S. 558 (2003), the Supreme Court relied, in large part, on a clearly discernible national consensus against the criminalization of consensual same-sex sexual relations, supported by a uniform trend of abolishing such restrictions in the minority of States that had retained them. "It was not until the 1970's that any State singled out same-sex relations for criminal prosecution, and only nine States have done so.... Over the course of the last decades, States with same-sex prohibitions have moved toward abolishing them." *Id.* at 570. At the time of *Lawrence*, only 13 States retained prohibitions against consensual sodomy, of which only four enforced their laws "only against homosexual conduct." *Id.* at 573. Moreover, "[i]n those States where sodomy is still proscribed, ... there is a pattern of nonenforcement with respect to consenting adults acting in private." *Id.* These trends reflected an "emerging awareness" that sexual privacy merits constitutional protection. *Id.* at 571-72.

By contrast, no such national consensus in favor of redefining marriage to encompass same-sex relationships can be discerned at this time. In contrast to the four States that still criminalized same-sex relations at the time of *Lawrence*, there

are currently over 30 states whose laws still define marriage as the union of one man and one woman. Moreover, all of these definitions have been enacted in the last 15 years, and all were adopted principally for the purpose of clarifying that marriage does not include same-sex relationships. And, in contrast to *Lawrence*, there is no pattern of non-enforcement of these marriage laws—these States do not issue marriage licenses to same-sex couples.

F. This Court Should Not Constitutionalize an Area That Is Currently the Subject of Active, Multi-Sided Debate and Legal Development in the States.

Further, this Court should be hesitant to adopt a new constitutional norm when not only is there no national consensus on the issue, but the issue is currently the subject of active, multi-sided debate and legal development in the States. For example, a compelling consideration in *Glucksberg* was the ongoing state-level consideration and legal development of the issue of physician- assisted suicide, through legislative enactments, judicial decisions, and ballot initiatives. *See* 521 U.S. at 716-19. *Glucksberg* observed that "the States are currently engaged in serious, thoughtful examinations of physician-assisted suicide and other similar issues." *Id.* at 719. "Throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society." *Id.* at 735; *see also id.* at 737 (O'Connor, J., concurring).

The Supreme Court's reluctance to interfere with ongoing debate and legal development in the States played a key role in *Cruzan* and *Osborne* as well. *Cruzan* conducted an extensive survey of recent developments in the law surrounding right-to-die issues that had occurred in the previous fifteen years. 497 U.S. at 269- 77. It was telling, not only that these developments failed to reveal a national consensus, but also that they reflected an ongoing "diversity in their approaches to decision." *Id.* at 277. *Cruzan* prudently declined to "prevent States from developing other approaches for protecting an incompetent individual's liberty interest in refusing medical treatment." *Id.* at 292 (O'Connor, J., concurring).

Similarly, *Osborne* reviewed the diverse and rapidly developing approaches to the right of access to DNA evidence that were then current in the States, observing that "the States are currently engaged in serious, thoughtful examinations" of the issues involved. 557 U.S. at 62 (quoting *Glucksberg*, 521 U.S. at 719). *Osborne* emphasized that "[t]he elected governments of the States are actively confronting the challenges DNA technology poses to our criminal justice systems and our traditional notions of finality.... To suddenly constitutionalize this area would short-circuit what looks to be a prompt and considered legislative response." Id. at 72-73. To "short-circuit," *id.* at 73, would have been inappropriate because it would have "take[n] the development of rules

and procedures in this area out of the hands of legislatures and state courts shaping policy in a focused manner and turn[ed] it over to federal courts applying the broad parameters of the Due Process Clause." *Id.* at 56.

The active debate and development of state law in cases like *Glucksberg*, *Cruzan*, and *Osborne* contrasts with the status of state law in cases where the Supreme Court has seen fit to recognize new fundamental liberty or equality interests. In *Lawrence*, for example, the Court discerned a very strong trend away from criminalization of consensual same-sex relations, with no discernible trend in the other direction. 539 U.S. at 571-72. In *Loving*, the Court also observed a strong trend toward decriminalization of interracial marriage, with no discernible counter-trend of States adopting new restrictions on the practice. 388 U.S. at 6 n.5. In *Griswold*, there was no significant debate in the Nation about whether the use of marital contraceptives should be criminalized. 381 U.S. at 498 (Goldberg, J., concurring).

In this case, it is beyond dispute that the issue of same-sex marriage is the subject of ongoing legal development and "earnest and profound debate," *Glucksberg* , 521 U.S. at 735, in state legislatures, state courts, and state forums for direct democracy. "The public is currently engaged in an active political debate over whether same-sex couples should be allowed to marry." *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2659 (2013). Over the past few years, to be sure, several

States have opted to recognize same-sex marriages. But over the past 15 years, over 30 States have enacted laws adopting the traditional definition of marriage. As recently as 2012, the voters of North Carolina approved the traditional definition of marriage by a margin of 61 to 39 percent. The issue is not one of national consensus, but of "active political debate." *Hollingsworth*, 133 S. Ct. at 2659.

And the extent of this debate is broader than the question of marriage. It encompasses various other forms of legal recognition for same-sex relationships, some of which encompass many, or virtually all, of the legal incidents of marriage. This state of affairs counsels against the recognition of a constitutional right to same-sex marriage. "The question is whether further change will primarily be made by legislative revision and judicial interpretation of the existing system, or whether the Federal Judiciary must leap ahead—revising (or even discarding) the system by creating a new constitutional right and taking over responsibility for refining it." *Osborne*, 557 U.S. at 74.

G. This Court Should Favor Incremental Change Over Sweeping and Dramatic Change In Addressing Novel Constitutional Rights.

The Supreme Court's jurisprudence of constitutional rights strongly favors incremental change, and actively disfavors radical or sweeping change. Confronted, in *Cruzan*, with "what all agree is a perplexing question with unusually strong moral and ethical overtones," the Court emphasized the necessity

of proceeding incrementally in such cases: "We follow the judicious counsel of our decision in *Twin City Bank v. Nebeker*, 167 U.S. 196, 202 (1897), where we said that in deciding 'a question of such magnitude and importance ... it is the [better] part of wisdom not to attempt, by any general statement, to cover every possible phase of the subject.'" *Cruzan*, 497 U.S. at 277-78 (ellipsis and brackets added by the Cruzan Court). *See also, e.g., Heller*, 554 U.S. at 635 ("[S]ince this case represents this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field.").

One notable exception to the Supreme Court's preference for incremental change was *Roe v. Wade*, 410 U.S. 113 (1973), which invalidated at a stroke the abortion laws of most States. But *Roe* was widely criticized for abandoning an incremental approach and failing to show appropriate deference to state-level democratic developments. "The political process was moving in the 1970s, not swiftly enough for advocates of swift, complete change, but majoritarian institutions were listening and acting. Heavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict." Ruth Bader Ginsberg, Some Thoughts on Autonomy and Equality in Relation to *Roe v. Wade*, 63 N.C. L. REV. 375, 385-86 (1985).

In this case, it is beyond dispute that the constitutional enshrinement of a right to same-sex marriage would impose sweeping, rather than incremental,

change. It would impliedly invalidate the recent, democratically adopted policies of over 30 States. Moreover, numerous States have opted for a more incremental approach, affording forms of legal recognition other than marriage to same-sex relationships. Considerations of constitutional prudence dictate that this incremental, democratic process should be allowed to continue. One prominent supporter of same-sex marriage has expressed this very insight. "Barring gay marriage but providing civil unions is not the balance I would choose, but it is a defensible balance to strike, one that arguably takes 'a cautious approach to making such a significant change to the institution of marriage' ... while going a long way toward meeting gay couples' needs." Jonathan Rauch, A 'Kagan Doctrine' on Gay Marriage, New York Times (July 2, 2010), available at http://www.nytimes.com/2010/07/03/opinion/03rauch.html.

H. This Court Should Consider the Novelty of the Right to Same-Sex Marriage as Weighing Against Constitutional Recognition.

In confronting new constitutional rights, the Supreme Court considers the novelty of the asserted right, in light of the Nation's history and tradition. "History and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry." *Lawrence*, 539 U.S. at 572 (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)); *see also Glucksberg*, 521 U.S. at 721. If the asserted right is relatively novel, such novelty counsels against premature recognition of the right. By contrast, if the

government's attempt to restrict the right is novel, in the face of a long tradition of unfettered exercise of the right, such a tradition weighs in favor of recognition.

The Supreme Court is most unwilling to recognize a new constitutional right when both the tradition of restricting the right has deep roots, and the decision to restrict it has recently been consciously reaffirmed. Such was the case in *Glucksberg*, which noted that prohibitions on assisted suicide had been long in place, and that recent debate had caused the States to reexamine the issue and, in most cases, to reaffirm their prohibitions. See *Glucksberg*, 521 U.S. at 716 ("Though deeply rooted, the States' assisted suicide bans have in recent years been reexamined and, generally, reaffirmed.").

The Supreme Court is also averse to recognizing a constitutional right when the right is so newly asserted that there is no clearly established tradition on one side or the other. In *Osborne*, the asserted right of access to DNA evidence was so novel, due to the recent development of DNA technology, that there was yet no tradition in favor of or against it. "There is no long history of such a right, and 'the mere novelty of such a claim is reason enough to doubt that "substantive due process" sustains it.'" *Osborne*, 557 U.S. at 72 (square brackets omitted) (*quoting Reno v. Flores*, 507 U.S. 292, 303 (1993)). *Cruzan* presented a similar case in which, due to the recent development of life-prolonging medical technology, legal

consideration of the right to refuse such care had only recently "burgeoned" during the 12 years prior to this Court's decision. 497 U.S. at 270.

Likewise, in *Loving*, the Supreme Court's invalidation of bans on interracial marriage represented the recovery, not the rejection, or our Nation's legal tradition. The so-called "antic-miscegenation" laws, adopted only in certain States, were in derogation of the common law. Interracial marriage was fully valid at common law. *See* James Schouler, *A Treatise on the Law of Domestic Relations* 29 (2d ed. 1874); Joel Prentiss Bishop, *Commentaries on the Law of Marriage and Divorce, and Evidence in Matrimonial Suits* §§ 29, 68, 213, 223, at 25, 54, 168, 174 (1852). As the California Supreme Court held in 1875, the simple absence of any "law or regulation at the time in the Territory of Utah interdicting intermarriage between white and black persons" established the validity of a marriage contracted in Utah, and such a marriage remained valid when the family relocated to California. *Pearson v. Pearson*, 51 Cal. 120, 124-25 (1875). Furthermore, laws prohibiting interracial marriage were inconsistent, not only with the common law, but also with the original understanding of the Fourteenth Amendment. *See, e.g., Debates at Arkansas Constitutional Convention*, at 377, 502-04 (remarks of Miles Langley & James Hodges); *Bonds v. Foster*, 36 Tex. 68, 69-70 (1872) (holding that Texas's "law prohibiting such a marriage [was] abrogated by the 14th Amendment"); *see generally* David R. Upham, *Interracial Marriage and the Original Understanding*

of the Privileges or Immunities Clause 38-55 (Draft Jan. 14, 2014), *available at* http://ssrn.com/abstract=2240046.

On the flip side, the Supreme Court has acted with greater confidence in recognizing a new right when the governmental attempt to restrict that right was novel, in the face of a long tradition of unfettered exercise of the right. Such was the case in *Griswold*, where the concept of criminal prosecution for the marital use of contraceptives had almost no antecedents in American law, and where there was a longstanding *de facto* practice of availability and use of contraceptives in marriage. *See Griswold*, 381 U.S. at 498 (Goldberg, J., concurring); *id.* at 505 (White, J., concurring in the judgment). Justice Harlan's dissent from the jurisdictional dismissal in *Poe v. Ullman* likewise emphasized the "utter novelty" of Connecticut's criminalization of marital contraception. 367 U.S. at 554 (Harlan, J., dissenting) (emphasis in original).

Lawrence confronted a very similar state of affairs as did *Griswold*. By 2003, conceptions of sexual privacy had become so firmly rooted that Texas's attempt to bring criminal charges against the petitioners for consensual sodomy had become truly anomalous. *Lawrence*, 539 U.S. at 571, 573. Even the handful of States that retained sodomy prohibitions exhibited a "pattern of non-enforcement with respect to consenting adults acting in private." *Id.* at 573.

Again, in *Romer v. Evans*, 517 U.S. 620 (1996), this Court repeatedly emphasized the sheer novelty of the challenged provision's attempt to restrict the access of homosexuals to the political process. *Romer* noted that the state constitutional amendment at issue was "an exceptional ... form of legislation," which had the "peculiar property of imposing a broad and undifferentiated disability on a single named group." *Id.* at 632. *Romer*'s conclusion that "[i]t is not within our constitutional tradition to enact laws of this sort," drew support from its recognition that the "disqualification of a class of persons from the right to seek specific protections from the law is unprecedented in our jurisprudence." *Id.* at 633.

Legal recognition of same-sex relationships in the United States today bears no resemblance to the state of criminal enforcement of sodomy laws in *Lawrence*, or to the state of criminal penalties for the marital use of contraception in *Griswold*. Rather, this case bears closest resemblance to *Glucksberg*, where there had been a longstanding previous tradition prohibiting physician-assisted suicide, and where the policy against physician-assisted suicide had been the subject of recent active reconsideration, resulting in a reaffirmation of that policy in the majority of States. So also here, there has been a longstanding previous tradition of defining marriage as the union of one man and one woman. *Windsor*, 133 S. Ct. at 2689 ("For marriage between a man and a woman no doubt had been thought of

by most people as essential to the very definition of that term and to its role and function throughout the history of civilization."). Likewise, the policy of defining marriage as the union of a man and a woman has recently been reexamined and reaffirmed, during the past 15 years, in the majority of States. This reaffirmation of the traditional definition of marriage cannot plausibly be viewed as a novel intrusion into an area of liberty previously thought sacrosanct, as in *Griswold*. Rather, this trend represents conscious reaffirmation of an understanding of marriage that was already deeply rooted. *Compare Glucksberg*, 521 U.S. at 716.

CONCLUSION

In sum, in the exercise of "the utmost care" and "judicial self-restraint," this Court should decline to recognize a constitutional right to same-sex marriage and allow the issue of the definition of marriage to be settled through the democratic processes of the States.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,784 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that on April 4, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system, which will send notification of such filing on all registered users, including:

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