Case No. 14-50196

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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 Texas Department of State Health Services,

Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Texas, San Antonio Division

BRIEF OF *AMICI CURIAE* 23 SCHOLARS OF FEDERALISM AND JUDICIAL RESTRAINT IN SUPPORT OF DEFENDANTS-APPELLANTS AND SUPPORTING REVERSAL OF THE DISTRICT COURT

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 28.2.1, the undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of 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.

APPELLANTS:

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 Texas Department of State Health Services.

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Amici Curiae 23 Scholars of Federalism and Judicial Restraint are individuals who have no parent corporation or any publicly held corporation that owns 10% or more of stock.

/s/ D. John Sauer
D. John Sauer
Attorney of record for Amici Curiae Scholars of Federalism

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Amici curiae are 23 professors and scholars whose areas of study include American constitutional law and government. They have a particular interest in the role of the Supreme Court and the federal courts in maintaining the constitutional system. They hold a variety of views about theories of constitutional interpretation and about the issue of same-sex marriage. They have in common, however, the belief that constitutional questions should be resolved in a way that is healthy for the political system as a whole. They also share an appreciation for the ways in which the Supreme Court and this Court have recognized that the responsible exercise of judicial authority requires careful consideration of the significant consequences of the courts' role for the larger political system. The interest of *amici* in this case stems from their professional judgment that the disposition of such cases will have especially important implications for federalism and for the capacity of political institutions to mediate divisive cultural disputes. They believe that these

[1] This brief is filed with the consent of all parties, pursuant to Federal Rule of Appellate Procedure 29(a). No party or party's counsel authored this brief in whole or in part or financially supported this brief, and no one other than amici curiae, its members, or its counsel contributed money intended to fund preparing or submitting this brief. Counsel for *amici curiae* may submit a grant application to the Alliance Defending Freedom to cover part of the cost of preparing this brief, but no such application has been submitted at the time of this filing.

implications counsel that the Court exercise prudent restraint in its resolution of this case. Accordingly, *amici* have filed this brief in support of Appellants and requesting reversal.

SUMMARY OF THE ARGUMENT

This Court should tread with "the utmost care" when confronting novel expansions of liberty and equality interests. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). Principles of federalism and judicial restraint urge this Court to exercise caution when considering novel constitutional claims in areas of contentious social dispute. Seven principles of federalism and judicial restraint, repeatedly emphasized in the Supreme Court's cases, all counsel that this Court should not impose a federally mandated redefinition of marriage on the States.

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 emphasized the States' authority to define and regulate the marriage relation without interference from federal courts. "Consistent with this allocation of authority, the Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations," including "the definition of

marriage." *Id.* at 2691. This principle of federalism counsels against a federal judicial intrusion into a traditional enclave of state authority.

Second, out of respect for the States' role as laboratories of democracy, this Court should be loath to short-circuit democratic experimentation in domestic social policy. State democratic processes, not federal courts, are the fundamental incubators of newly emerging conceptions of liberty. The democratic process is fully capable, and better equipped than the federal judiciary, to mediate and resolve such "difficult and delicate issues." *Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623, 1637 (2014) (plurality opinion of Kennedy, J.). "Democracy does not presume that some subjects are either too divisive or too profound for public debate," *id.* at 1638, and neither should this Court.

Third, this Court should exercise caution before upholding new constitutional claims in the "unchartered" territory of substantive due process, where "guideposts for responsible decisionmaking … are scarce and open-ended." *Glucksberg*, 521 U.S. at 720. In the specific context of the definition of marriage, the "unchartered" nature of inquiry raises particular concerns about how to draw any principled boundary for the institution of marriage. Guideposts for federal courts seeking to define the boundaries of marriage will be "scarce and open-ended" as new claims for inclusion arise, beyond those of same-sex couples. *Id.*

Fourth, this Court should be reluctant to redefine marriage in the absence of a close nexus between the asserted constitutional claim and the central purpose of an express constitutional provision. Redefining marriage to include same-sex relationships does not fall within the "clear and central purpose" of any express constitutional provision, *Loving v. Virginia*, 388 U.S. 1, 10 (1967), and thus it should be considered with great caution and restraint.

Fifth, this Court should consider that the definition of marriage is currently the subject of active debate and legal development in the States. "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). Both Supreme Court case law and judicial prudence counsel against short-circuiting such ongoing debate and legal development in the States.

Sixth, this Court should prefer incremental change to sweeping and dramatic change when confronting claims extending the definition of constitutional rights. Imposing a federally mandated redefinition of marriage on the States 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 varying levels of legal recognition for same-sex relationships.

Seventh, this Court should consider whether redefining marriage to include same-sex relationships 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 reaffirmed in democratic enactments adopted by a majority of States over the past 15 years. The redefinition of marriage to include same-sex couples, by contrast, is of novel vintage.

Because all seven of these well-established guideposts for the exercise of judicial restraint point in the same direction, this Court should not hold that the federal Constitution requires the State of Texas to redefine marriage to include same-sex couples.

ARGUMENT

I. Seven Principles of Federalism and Judicial Restraint Counsel This Court to Exercise the "Utmost Care" When Considering Novel Constitutional Claims, and These Principles Uniformly Counsel Against Requiring the States to Redefine Marriage.

From time to time, the federal courts have been called upon to consider contentious issues of social policy. 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. Indeed, "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) (emphasis added) (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)).

Seven 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 federally mandated redefinition of marriage on the State of Texas or other States, 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"). Given the long-standing and pivotal importance of federalism in our governmental structure, the Supreme Court was unwilling to permit a federal encroachment upon the States' traditional authority to define marriage.

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 against imposing a federally mandated redefinition of marriage on the States.

B. This Court Should Respect the Role of the States as Laboratories of Democracy and Defer to the Democratic Processes of the States.

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.

Such concern would make little sense if the Constitution requires a particular definition of marriage in the first instance. The *Windsor* ruling presupposes the possibility of different definitions of marriage under state-law in accord with disparate democratic results. Thus, the Court described New York's legalization of same-sex marriage as "*responding* 'to the initiative of those who [sought] a voice in shaping the destiny of their own times,'" rather than reflecting a federal constitutional command. *Id*. at 2692 (emphasis added) (quoting *Bond*, 131 S.Ct. at 2364).

Citing the same sentence from *Bond*, the Supreme Court recently reaffirmed the capacity of democratic majorities to address even the most "difficult and delicate issues." *Schuette v. Coalition to Defend Affirmative Action*, 134 S.Ct.

1623, 1636 (2014) (plurality opinion of Kennedy, J.). The plurality opinion in *Schuette* emphasized that the democratic "process is impeded, not advanced, by court decrees based on the proposition that the public cannot have the requisite repose to discuss certain issues." *Id*. at 1637. "It is demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds." *Id*. In cases where the public seeks to resolve debates of such magnitude, the Court should avoid a judgment which would effectively "announce a finding that the past 15 years of state public debate on this issue have been improper." *Id*. Rather, "the Constitution foresees the ballot box, not the courts, as the normal instrument for resolving differences and debates" about such challenging issues. *Id.* at 1649 (Breyer, J., concurring in the judgment).

The plurality opinion in *Schuette* expressed confidence in state democratic processes to mediate and address a divisive question of race relations—an issue no less "profound" and "divisive" than the definition of marriage. *Id.* at 1638 (plurality opinion of Kennedy, J.). The *Schuette* plurality observed that the democratic process was fundamental to development of conceptions of liberty: "[F]reedom does not stop with individual rights. Our constitutional system embraces, too, the right of citizens to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course of their own

times and the course of a nation…." *Id.* at 1636. Thus, the plurality reasoned, "[w]ere the Court to rule that the question addressed by Michigan voters is too sensitive or complex to be within the grasp of the electorate … that holding would be an unprecedented restriction on the exercise of a fundamental right … to speak and debate and learn and then, as a matter of political will, to act through a lawful electoral process." *Id.* at 1637.

Just like the respondents in *Schuette*, the plaintiffs in this case "insist that a difficult question of public policy must be taken from the reach of the voters, and thus removed from the realm of public discussion, dialogue, and debate in an election campaign." *Id.* As the plurality concluded in *Schuette*, this Court should conclude that plaintiffs' position "is inconsistent with the underlying premises of a responsible, functioning democracy." *Id.* Just as the democratic process is capable of mediating and addressing sensitive issues of race relations, it is also capable of addressing the issue of the definition of marriage: "Democracy does not presume that some subjects are either too divisive or too profound for public debate." *Id.* at 1638.

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" is especially apparent when a party seeks to recast a longstanding fundamental right in light of some "new perspective." *Windsor*, 133 S.Ct. at 2689. It is particularly difficult to establish precise boundaries for any such 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," and must be "carefully refined by concrete examples … deeply rooted in our legal tradition." *Glucksberg*, 521 U.S. at 722. 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.

Similarly, the asserted redefinition of marriage to include same-sex couples raises similar 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 personal relationships—including those whose cultures or religions may favor committed relationships long disfavored in American law—are likewise entitled to enjoy marital recognition. *See, e.g.*, *Brown v. Buhman*, 947 F. Supp. 2d 1170, 1223-24 (D. Utah 2013) (recognizing a substantive due process right to "religious cohabitation" in which persons in "polygamous relationships" represent themselves to the public as married). As such cases continue to arise, guideposts for decisionmaking in this "unchartered" area will be no less scarce and open-ended than in *Osborne*, *Glucksberg*, and *Collins*.

D. This Court Should Hesitate To Redefine Marriage When There Is No Close Nexus Between the Claim Asserted and the Central Purpose of a Constitutional Provision.

In considering new applications 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.

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, redefining the institution of marriage to encompass same-sex couples 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* and similar cases.

E. This Court Should Not Constitutionalize an Area That Is Currently the Subject of Active 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 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 "both similarity and diversity in their approaches to decision of what all agree is a perplexing question." *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). "As [was] evident from the Court's survey of state court decisions" in *Cruzan*, "no national consensus has yet emerged on the best solution for this difficult and sensitive problem." *Id.*

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, 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 through the democratic process. 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 one of "active political debate." *Hollingsworth*, 133 S. Ct. at 2659.

The extent of this debate is broader than the question of the definition marriage. It includes 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 imposing a federal redefinition of marriage upon the States. "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.

F. This Court Should Favor Incremental Change Over Sweeping and Dramatic Change In Addressing Novel Constitutional Claims.

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 a federally mandated redefinition of 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 to same-sex couples forms of legal recognition other than marriage. Constitutional prudence dictates 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.

G. The Relative Novelty of Same-Sex Marriage Weighs Against the Mandatory Redefinition of Marriage to Include Same-Sex Couples.

In confronting new constitutional claims, the Supreme Court considers the novelty of the asserted claim, 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 claim is relatively novel, such novelty counsels against its recognition. By contrast, if the government's attempt to restrict a right is novel, in the face of a long tradition of unfettered exercise of that 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 710 ("In almost every State—indeed, in almost every western democracy—it is a crime to assist a suicide."); *id.* 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 extending constitutional protection when the governmental restriction at issue 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).

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), the 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 little 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 impose a federally mandated redefinition of marriage on

the State of Texas or other States, and should instead allow the definition of marriage to be settled through the democratic processes of the States.

Respectfully submitted this the 1st day of August, 2014.

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CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for the Amicus Curiae Scholars of Federalism and Judicial Restraint, furnishes the following in compliance with Fed. R. App. P Rule 32(a)(7):

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Dated: August 1, 2014

/s/ D. John Sauer

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Attorney for *Amici Curiae*

CERTIFICATE OF SERVICE

I hereby certify that on August 1, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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