Nos. 14-556, 14-562, 14-571 & 14-574

IN THE

Supreme Court of the United States

APRIL DEBOER, *et al.*,

Petitioners,

v.

RICHARD SNYDER, *et al.*,

Respondents.

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

BRIEF OF THE HUMAN RIGHTS CAMPAIGN AND ____ AMERICANS AS AMICI CURIAE SUPPORTING PETITIONERS*

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v.

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Respondents.

BRITTANI HENRY, *et al.,*

Petitioners,

v.

RICHARD HODGES, *et al.*,

Respondents.

JAMES OBERGEFELL, *et al.,*

Petitioners,

v.

RICHARD HODGES, *et al.*,

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TIMOTHY LOVE, *et al., AND GREGORY BOURKE, et al.*

Petitioners,

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Respondents.

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INTEREST OF AMICI[1]

The Human Rights Campaign, the largest civil rights organization working to achieve equality for lesbian, gay, bisexual, and transgender people in the United States,[2] together with more than __ Americans from across this country, respectfully submit this brief as amici curiae in support of Petitioners. Amici have come together for the sole purpose of urging the Court to reverse the Sixth Circuit's judgment below.

STATEMENT

Forty-five years ago in Minneapolis, two gay men sought a license to marry each other. Not surprisingly, their request was denied. To everyone but them, the recognition

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[1] Pursuant to Supreme Court Rule 37.3, amici curiae certify that counsel of record of all parties received timely notice of the intent to file this brief in accordance with this Rule [and they have consented to the filing of this brief.] Pursuant to Rule 37.6, amici also certify that no counsel for a party authored this brief in whole or in part and that no person or entity, other than amici or their counsel, has made a monetary contribution to its preparation or submission. A complete list of amici is included as Appendix A at ___. A description of the method by which names of amici were collected is included as Appendix B at ___.

[2] Although laws forbidding same-sex marriage fall most directly and onerously on gay people, it should be noted that to the extent a bisexual or transgender person seeks to marry a person of the same sex, these laws would also harm them. This brief generally uses the word "gay" to refer to anyone in the LGBT (lesbian, gay, bisexual, and transgender) community who might seek to marry a person of the same sex.

that they sought was utterly unthinkable at the time. Following the denial of their appeal by the Minnesota Supreme Court, this Court, under its then mandatory appellate jurisdiction, dismissed the appeal for "want of a substantial federal question." *Baker* v. *Nelson*, 409 U.S. 810, 810 (1972).

Fourteen years later, in 1986, in a case brought by a "practicing homosexual," this Court upheld the constitutionality of a Georgia statute that made it a crime for a gay person to engage in certain consensual acts of sexual intimacy, prescribing a sentence of "imprisonment for not less than one nor more than 20 years." *Bowers* v. *Hardwick*, 478 U.S. 186, 188, n.1 (1986). In upholding that law, the *Bowers* Court dismissed the plaintiff's argument as "at best, facetious," *id.* at 194–95, even as the dissent cautioned that "[n]o matter how uncomfortable a certain group may make the majority of this Court, . . . '[m]ere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty,'" *id*. at 212 (Blackmun, J., dissenting) (second alteration in original).

Seventeen years later, the Court revisited the issue in *Lawrence* v. *Texas*, 539 U.S. 558 (2003), this time striking down a Texas statute under the Due Process Clause and explaining that *Bowers* "misapprehended the claim of liberty there presented to it." *Id*. at 567. Acknowledging that *Bowers* had provided "an invitation to subject homosexual persons to discrimination both in the public and in the private spheres," *id.* at 575, the Court in *Lawrence* could not have been more emphatic: "*Bowers* was not correct when it was decided, and it is not correct today," *id.* at 578. In overruling

Bowers, the Court observed a fundamental truth about human nature: "[T]imes can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom." *Id.* at 579.

Times truly can blind. Within the lifetimes of most Americans, it would have been inconceivable to any gay person, almost anywhere in this country, that they would be able to "affirm their commitment to another before their children, their family, their friends, and their community" through civil marriage. *United States* v. *Windsor*, 133 S. Ct. 2675, 2689 (2013). "It seems fair to conclude 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." *Id.*

How did this change happen and why so fast? What cured the "blindness" of prior generations in failing to see that their gay brothers, sisters, colleagues and neighbors have the same human need for love and commitment as everyone else? In large part, the reason for this "sea change" in attitudes toward gay people, Transcript of Oral Argument at 106–09, *United States* v. *Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307), is the fact that until recently, many Americans simply did not realize that they knew anyone who was gay. Because of the sting of social disapproval and the persistence of discrimination in nearly every facet of everyday existence, for most of the twentieth century and continuing even today, many gay people have lived their lives "in the closet" so as

not to risk losing a job, a home, or the love and support of family and friends. And without the benefit of knowing and understanding the lives of gay people living openly and with dignity in their communities, many Americans failed to see that gay people and their families have the same aspirations to life, liberty, and the pursuit of happiness as everyone else.

Over time, as more gay Americans "came out" to their family and friends, the "limitation of lawful marriage to heterosexual couples, which for centuries had been deemed both necessary and fundamental, came to be seen . . . as an unjust exclusion." *Windsor*, 133 S. Ct. at 2689. Perhaps the paradigmatic example of this phenomenon is the experience of the Senator from Ohio, Rob Portman, who supported the Ohio marriage bans at issue in this case based on his "faith tradition that marriage is a sacred bond between a man and a woman," but then changed his mind upon learning that his own son is gay. Rob Portman, *Gay Couples Also Deserve Chance To Get Married*, Columbus Dispatch, Mar. 15, 2013.

The continuing exclusion of gay couples from civil marriage is itself a manifestation of this principle that "times can blind us to certain truths." *Lawrence*, 539 U.S. at 579. Today, we can see that discrimination against gay people in civil marriage—whether it takes the form of a statute limiting marriage to straight couples, a state law refusing to recognize the valid marriages of gay couples from out of state, or a state constitutional amendment mandating the exclusion of gay couples from marriage—"once thought [to be] necessary and proper," really "serve[s] only to oppress." *Lawrence*, 539 U.S. at 579.

ARGUMENT

This Court recognized and reinforced this greater understanding of gay people and their lives in *United States* v. *Windsor*, 133 S. Ct. 2675 (2013), which held that Section 3 of the Defense of Marriage Act ("DOMA") was unconstitutional. Since *Windsor*, more than forty federal district court opinions and four circuit courts have held that the U.S. Constitution requires that gay people be allowed to marry, *see Marriage Litigation*, Freedom to Marry, http://www.freedomtomarry.org/litigation/ (last visited Feb. 9, 2015); only one federal circuit court and two district courts have held to the contrary.[3] This remarkable degree of consensus among the courts is no coincidence—it is based on "the beginnings of a new perspective," *Windsor*, 133 S. Ct. at 2689, and is mandated by the logic of *Windsor* itself, which enshrines the unique protections our Constitution affords minority groups from discriminatory treatment.

At the heart of *Windsor* is the principle that gay people have dignity, and that the Constitution mandates that this dignity be respected equally under the law. *See, e.g.*, *id.* at 2696 (DOMA "is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and *dignity*." (emphasis added)); *id*. at 2693 ("[I]nterference with the *equal dignity* of same-sex marriages

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[3] *DeBoer* v. *Snyder*, 772 F.3d 388 (6th Cir. 2014); *Conde-Vidal* v. *Garcia-Padilla*, No. 14-cv-1253, 2014 WL 5361987 (D.P.R. Oct. 21, 2014); *Robicheaux* v. *Caldwell*, 2 F. Supp. 3d 910 (E.D. La. 2014).

. . . was more than an incidental effect of [DOMA]." (emphasis added)). The Court reiterated in *Windsor* that laws that discriminate against gay people based on a "bare desire to harm" or merely a "want of careful, rational reflection" about other people's human dignity are inconsistent with the principles of due process and equal protection guaranteed to all Americans by the Constitution. *See id.* at 2693–94; *Romer* v. *Evans*, 517 U.S. 620, 634–35 (1996); *City of Cleburne, Tex.* v. *Cleburne Living Ctr.*, 473 U.S. 432, 446–48 (1985); *U.S. Dep't of Agric.* v. *Moreno*, 413 U.S. 528, 534–35 (1973); *see also Bd. of Trs. of Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring).

The "design, purpose, and effect of [a challenged law] should be considered as the beginning point in deciding whether it is valid under the Constitution." *United States* v. *Windsor*, 133 S. Ct. 2675, 2689 (2013). In the context of laws that discriminate against a class of persons, this Court has held that the constitutional term known as "animus" constitutes an impermissible basis for legislation under the Equal Protection Clause. *Id.* at 2693–94; *Romer* v. *Evans*, 517 U.S. 620, 632–35 (1996); *see also City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985); *U.S. Dep't of Agric.* v. *Moreno*, 413 U.S. 528, 534–35 (1973). At times using the word "animus," *see, e.g.*, *Romer*, 517 U.S. at 632, at times using other words or phrases like "negative attitudes," "fear," "bias," or the "bare . . . desire to harm a politically unpopular group," the Court has made it clear that it will set aside laws the very purpose of which is to discriminate against a group of citizens simply because of who they are. *See Cleburne*, 473 U.S. at 448–50; *Palmore* v. *Sidoti*, 466 U.S. 429, 432–33 (1984); *Moreno*, 413 U.S. at 534–35.

In order to find that a law reflects such constitutionally impermissible animus, it is not necessary for a court to conclude that animus was the only motivating factor for the law, or that the law's supporters were subjectively prejudiced, bigoted or homophobic. *See Vill. of Arlington Heights* v. *Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–67 (1977) (plaintiff not required to prove challenged action "rested solely . . . on discriminatory purposes"; court may look to "circumstantial" evidence such as "effect of the state action" and "historical background"). While one of the dictionary definitions of the word "animus" is "a usually prejudiced and often spiteful or malevolent ill will," *Animus Definition*, Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/animus (last visited Feb. 9, 2015), a subjective inquiry into legislator or voter "malevolence" is not required for purposes of constitutional jurisprudence. This Court did not find that the citizens of Colorado who voted for Amendment 2 in *Romer*, or that the members of Congress who supported DOMA in *Windsor* were individually prejudiced, bigoted or motivated by hatred and ill will. *Windsor*, 133 S. Ct. at 2693–94; *Romer*, 517 at 634–35. The very fact that there was substantial objective evidence of unconstitutional animus directed toward gay people was enough. *Windsor*, 133 S. Ct. at 2693–94. That makes sense since no human being can ever know what was in the heart or mind of another. *Windsor* makes it clear that such an intrusive inquiry is not only unnecessary, but beside the point.

In addition to the presence of "a bare desire to harm," animus can also be present when there is an "unconscious failure to extend to a minority the same recognition of

humanity, and hence the same sympathy and care, given as a matter of course to one's own group." Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 Harv. L. Rev. 1, 7–8 (1976). "Prejudice, we are beginning to understand, rises not from malice or hostile animus alone. It may result as well from insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves." *Bd. of Trs. of Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring). Thus, when a classification has been chosen "'because of,' [and] not merely 'in spite of,' its adverse effects upon an identifiable group," a court must determine whether the statute serves some purpose beyond a mere desire to harm the targeted group. *Pers. Adm'r of Mass.* v. *Feeney*, 442 U.S. 256, 279 (1979).

While this Court has never attempted to catalogue systematically all the circumstances that indicate the existence of constitutionally impermissible animus, there are several objective factors that have been considered by this Court to be relevant. They include: (1) the law's text; (2) the political and legal context of its passage, including the legislative proceedings and history and evidence that can be gleaned from the sequence of events that led to passage; (3) the law's real-world impact or effects; and (4) the government's failure to offer legitimate objectives for the law along with means that truly advance those objectives. *See, e.g.*, *Windsor*, 133 S. Ct. at 2693–94; *Romer*, 517 U.S. at 634–35; *Cleburne*, 473 U.S. at 448; *Arlington Heights*, 429 U.S. at 266–68; *Moreno*, 413 U.S. at 536–38. As discussed below, because each and every one of these factors is present

here, there is more than sufficient basis for this Court to conclude that the design, purpose, and effect of the laws at issue in Kentucky, Michigan, Ohio, and Tennessee are "not to further a proper legislative end but to make [gay people] unequal to everyone else." *Romer*, 517 U.S. at 635.

I. THE TEXT OF THE LAWS

Impermissible animus is evident in the plain language of the laws at issue themselves.[4] Tennessee, for example, asserts the importance of "the family as essential to social and economic order," but then specifically excludes gay families as if gay couples were not just as capable as straight couples of functioning as families. Tenn. Code Ann. § 36-3-113(a); *see* Brian Powell et al., *Public Opinion, the Courts, and Same-Sex Marriage: Four Lessons Learned*, 2 Social Currents 3, 5 (2015) ("The patterns here are unequivocal. Americans who oppose same-sex marriage typically do not count same-sex couples as a family.").

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[4] The text, legislative context, impact, and thin justifications with respect to the laws in Kentucky, Michigan, Ohio, and Tennessee are not materially different than those of other states' analogous laws that have recently been the subject of litigation. *See, e.g. Baskin* v. *Bogan*, 766 F.3d 648, 664 (7th Cir. 2014); *Bostic* v. *Schaefer*, 760 F.3d 352, 368 (4th Cir. 2014); *Kitchen* v. *Herbert*, 755 F.3d 1193, 1198 (10th Cir. 2014); *Campaign for S. Equal.* v. *Bryant*, --- F. Supp. 3d. ---, No. 3:14-cv-818, 2014 WL 6680570, at *5, *23 (S.D. Miss. Nov. 25, 2014); *Brenner* v. *Scott*, 999 F. Supp. 2d 1278, 1284 (N.D. Fla. 2014); *Latta* v. *Otter*, 19 F. Supp. 3d 1054, 1082 (D. Idaho 2014).

Similarly, the statutory language of Michigan's law prohibits marriages between gay people because Michigan has a "special interest" in promoting not only "the stability and welfare of society," but "children" as well:

> Marriage is inherently a unique relationship between a man and a woman. As a matter of public policy, this state has a special interest in encouraging, supporting, and protecting that unique relationship in order to promote, among other goals, the stability and welfare of society and its children.

Mich. Comp. Laws Ann. § 551.1. This statutory language employs familiar tropes of characterizing gay people as "other," implying that recognizing gay relationships through marriage would not only threaten society and "the common good," but the next generation as well. *See, e.g.*, George Chauncey, *Why Marriage Became a Goal* 47 (2004) ("[A]nti-gay activists also played to voters' fears by reviving other demonic stereotypes of homosexuals . . . . [S]tates and cities [were 'flooded'] with antigay hate literature that depicted homosexuals as sex-crazed perverts who threatened the nation's children and moral character.").

Not surprisingly, all four states (Kentucky, Michigan, Ohio, and Tennessee) legally characterize marriages between gay people as contrary to "public policy." Ky. Rev. Stat. Ann. § 402.040(2); Mich. Comp. Laws Ann. § 551.1; Ohio Rev. Code Ann. § 3101.01(C)(3); Tenn. Const. art. 11, § 18; Tenn. Code Ann. § 36-3-113. Tennessee's statute, for example, provides that "[a]ny policy, law or judicial

interpretation that purports to define marriage as anything other than the historical institution and legal contract between one (1) man and one (1) woman is contrary to the public policy of Tennessee." Tenn. Code Ann. § 36-3-113(c). The Tennessee law further suggests that allowing gay couples to share in "the unique and exclusive rights and privileges" of marriage would somehow disrupt "the common good." Tenn. Code Ann. § 36-3-113(a).

Indeed, like DOMA itself, Ohio's constitutional amendment is actually called "the *Defense* of Marriage Amendment," *State* v. *Mays*, No. 99150, 2014 WL 888375, at *2 (Ohio Ct. App. Feb. 28, 2014) (emphasis added), and the analogous Tennessee amendment is called the "Tennessee Marriage *Protection* Amendment," Steven Hale, *Obama May Have Evolved on Same-Sex Marriage, but Most Tennessee Democrats Haven't*, Nashville Scene (May 17, 2012), http://www.nashvillescene.com/nashville/obama-may-have-evolved-on-same-sex-marriage-but-most-tennessee-democrats-havent/Content?oid=2872675 (emphasis added). This Court's observation in *Windsor* thus applies with equal force here: "[w]ere there any doubt of [DOMA's] far-reaching purpose [to express moral disapproval of gay people], the title of the Act confirms it: The Defense of Marriage." *United States* v. *Windsor*, 133 S. Ct. 2675, 2693 (2013).

Two of the four states whose laws are at issue explicitly define marriage by the class of people (gays and lesbians) who are excluded. Ky. Rev. Stat. Ann. § 402.020(1)(d) ("Marriage is prohibited and void . . . [b]etween members of the same sex."); Mich. Comp. Laws

Ann. § 551.1 ("A marriage contracted between individuals of the same sex is invalid in this state."). This, of course, is entirely gratuitous since both the Kentucky and Michigan statutory codes already limit marriage to a man and a woman.

But that is not all. Adding insult to injury, the statutes explicitly refuse to give any legal effect to the marriages of gay couples validly entered into in other states. The Tennessee statute, for example, provides that: "If another state or foreign jurisdiction issues a license for persons to marry, which marriages are prohibited in this state, any such marriage shall be void and unenforceable in this state." Tenn. Code Ann. § 36-3-113(d). A Kentucky statute similarly articulates that state's refusal even to recognize the divorce of a gay couple legally wed elsewhere: "(1) A marriage between members of the same sex which occurs in another jurisdiction shall be void in Kentucky. (2) Any rights granted by virtue of the marriage, *or its termination*, shall be unenforceable in Kentucky courts." Ky. Rev. Stat. Ann. § 402.045 (emphasis added).

These non-recognition provisions constitute novel departures from the states' traditional practice of recognizing marriages which were valid where celebrated. In Tennessee, for example, prior to the passage of the Tennessee "mini-DOMA," the standard recognition rule was to recognize any out-of-state marriage unless the relationship would have subjected one or both parties to criminal prosecution. *See, e.g.*, *Rhodes* v. *McAfee*, 457 S.W.2d 522, 524 (Tenn. 1970). Prior to the passage of its "mini-DOMA," Michigan had adopted a version of the Uniform Marriage and Divorce Act which provides in pertinent part that "[a]ll marriages

heretofore contracted by residents of this state [] who were . . . legally competent to contract marriage . . . are hereby declared to be and remain valid and binding marriages . . . ." Mich. Comp. Laws. Ann. § 551.271. Similarly, a Kentucky court had recognized an out-of-state marriage between a thirteen-year-old girl and a sixteen-year-old-boy even though that marriage would have been illegal in Kentucky. *See Mangrum* v. *Mangrum*, 220 S.W.2d 406, 407–08 (Ky. Ct. App. 1949). *See also Howard* v. *Cent. Nat'l Bank of Marietta*, 152 N.E. 784, 785 (Ohio Ct. App. 1926).

This longstanding principle of reciprocal marriage recognition, according to a leading conflict of laws treatise, "provides stability in an area where stability (because of children and property) is very important, and it avoids the potentially hideous problems that would arise if the legality of a marriage varies from state to state." William M. Richman & William L. Reynolds, *Understanding Conflict of Laws* § 119(a) (3d ed. 2002). These laws thus represent an "unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage," *Windsor*, 133 S. Ct. at 2693, from other states. Laws like these, that do not fit "within our constitutional tradition," require "careful consideration to determine whether they are obnoxious to the constitution[]." *Romer* v. *Evans*, 517 U.S. 620, 633 (1996).

Perhaps most importantly, the laws of three of the four states at issue further demonstrate impermissible animus in the sense that they go far beyond merely banning marriages between gay people. They also explicitly prohibit state and local governments from providing even specific, discrete benefits to gay couples in particular situations such as the

right to make healthcare decisions for one's partner in case of medical emergency, or to participate as a family member in a state health insurance plan. Ky. Const. § 233A; Mich. Const. art. 1, § 25; Ohio Const. art. XV, § 11; *see also Opinion of the Attorney General*, Ky. Op. Att'y Gen., No. OAG 07-004, 2007 WL 1652597, at *10–11 (June 1, 2007) (finding that Ky. Const. § 233A renders unconstitutional certain state universities' health insurance coverage for "domestic partners" of faculty).

Ohio's constitution, for example, not only prohibits gay couples from marrying, but also prevents them from receiving any of the benefits available to married couples under any circumstances whatsoever: "This state . . . shall not create or recognize a legal status for relationships of unmarried individuals that *intends to approximate the design, qualities, significance or effect of marriage*." Ohio Const. art. XV, § 11 (emphasis added). The Michigan constitution bars any form, however limited or discrete, of "civil union" or other form of non-marital relationship recognition for gay people:

> To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage *or similar union for any purpose*."

Mich. Const. art. 1, § 25 (emphasis added); *see also* Ky. Const. § 233A ("A legal status identical or substantially

similar to that of marriage for unmarried individuals shall not be valid or recognized.").

As a practical matter, what these provisions mean is that gay couples are permanently disabled from obtaining any meaningful form of recognition whatsoever for their families through the normal political process. *See, e.g.*, *Nat'l Pride at Work, Inc.* v. *Governor of Mich.*, 748 N.W.2d 524, 538–43 (Mich. 2008) (finding that Michigan amendment barred public employers from "providing health-insurance benefits to their employees' qualified same-sex domestic partners" in part because it "prohibits the recognition of unions similar to marriage 'for any purpose.'"). *But see* Minneapolis, Minn. Code tit. 7, ch. 142 (granting relationship recognition and benefits to "two non-married but committed adult partners"). By enshrining discrimination in the state constitution, these provisions have fixed the status quo of discrimination in stone, requiring another statewide referendum in order to change it. The same, of course, was true for the Colorado amendment at issue in *Romer*: "Amendment 2 alters the political process so that a targeted class is [deprived of equal protection of the laws]. . . absent the consent of a majority of the electorate through the adoption of a constitutional amendment. . . . Amendment 2 singles out one form of discrimination and removes its redress from consideration by the normal political processes." *Evans* v. *Romer*, 854 P.2d 1270, 1285 (Colo. 1993) (en banc); *accord Romer*, 517 U.S. at 631 (because of Amendment 2, gay and lesbian Coloradans' only form of redress was "enlisting the citizenry of Colorado to amend the State Constitution . . . .").

II. THE HISTORICAL AND POLITICAL CONTEXT

The political, historical, and legislative background of a law is also significant to evaluating its validity under the Constitution. *See, e.g.*, *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 448–50 (1985) (zoning decision failed rational basis review because it "appears . . . to rest on an irrational prejudice" and "mere negative attitudes, or fear . . . are not permissible bases" for government action); *Palmore* v. *Sidoti*, 466 U.S. 429, 433–34 (1984) (reversing lower court's child custody decision, based solely on possible reactions to parents' race, because "[p]rivate biases may be outside the reach of the law, but the law cannot . . . give them effect"); *Plyler* v. *Doe*, 457 U.S. 202, 224–27 (1982) (holding state law unconstitutional and rejecting purported bases for law as irrational, concluding that "[t]he state must do more than justify its classification with a concise expression of an intention to discriminate."); *U.S. Dep't of Agric.* v. *Moreno*, 413 U.S. 528, 534–35 (1973) (holding federal statute unconstitutional under rational basis review where legislative history demonstrated "a bare . . . desire to harm a politically unpopular group").

Part of determining whether animus may be driving particular government action against a minority group requires consideration of the historical treatment of that group. As this Court itself has recognized, gay men and lesbians in this country have been subject to long-standing discrimination. *See, e.g.*, *United States* v. *Windsor*, 133 S. Ct. 2675, 2693 (2013) ("The history of DOMA's enactment and its own text demonstrate that interference with the equal

dignity of same-sex marriages . . . was more than an incidental effect of the federal statute."); *Lawrence* v. *Texas*, 539 U.S. 558, 571 (2003) ("for centuries there have been powerful voices to condemn homosexual conduct as immoral."); *Bowers* v. *Hardwick*, 478 U.S. 186, 192–94 (1986) (describing history of laws in United States criminalizing consensual homosexual acts). "Perhaps the most telling proof of animus and discrimination against homosexuals in this country is that, for many years and in many states, homosexual conduct was criminal." *Windsor* v. *United States*, 699 F.3d 169, 182 (2d Cir. 2012), *aff'd*, 133 S. Ct. 2675 (2013). Even the Sixth Circuit recognized as much, noting "the lamentable reality that gay individuals have experienced prejudice in this country, sometimes at the hands of public officials, sometimes at the hands of fellow citizens." *DeBoer* v. *Snyder*, 772 F.3d 388, 413 (6th Cir. 2014). "'[But] [t]he past is never dead. It's not even past.' That is as true here as anywhere else." *Campaign for S. Equal.* v. *Bryant*, --- F. Supp. 3d. ---, No. 3:14-cv-818, 2014 WL 6680570, at *24 (S.D. Miss. Nov. 25, 2014) (quoting William Faulkner, Requiem for a Nun 92 (1951)). As a matter of both logic and common sense, this historical practice of discriminating against gay people cannot be divorced from the reasons why these laws were enacted in the first place.

The political or legislative history of the law's passage is also relevant. The laws at issue here were all enacted during two periods approximately a decade apart. Most of the statutory provisions, dating from the period 1996–1998, were passed following the Hawaii Supreme Court's decision in *Baehr* v. *Lewin*, 852 P.2d 44 (Haw. 1993). *See* Ky. Rev. Stat. Ann. §§ 402.005, 402.020(1)(d), 402.040(2), 402.045

(all passed in 1998); Mich. Comp. Laws Ann. § 551.1 (passed in 1996); Tenn. Code Ann. § 36-3-113 (passed in 1996). Thus, like DOMA itself, these statutes, frequently referred to as "mini-DOMAs," were enacted "as some States were beginning to consider the concept of same-sex marriage, and before any State had acted to permit it." *Windsor*, 133 S. Ct. at 2682 (citing *Baehr*, 852 P. 2d at 44).

The state constitutional amendments, on the other hand, were generally enacted ten years later in response to similar developments after the Massachusetts Supreme Judicial Court's 2003 decision in *Goodridge* v. *Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003), holding that limiting marriage only to straight couples violated the Massachusetts constitution. *See* Ky. Const. § 233A (2004); Mich. Const. art. 1, § 25 (2004); Ohio Const. art. XV, § 11 (2004); Tenn. Const. art. 11, § 18 (passed by the state legislature in 2004 and Tennessee voters in 2006). "In 2004 alone, thirteen states passed referenda barring same-sex marriage," referenda that were placed on the ballots to "inspire religious conservatives to vote [and] make gay marriage more salient in voter choices between political candidates[.]" Michael Klarman, *From the Closet to the Altar: Courts, Backlash, and the Struggle for Same-Sex Marriage* 105–06 (2014). *See also DeBoer*, 772 F.3d at 408 ("[I]f there was one concern animating the initiatives, it was the fear that the courts would seize control over an issue that people of good faith care deeply about.").

This backlash to the *Goodridge* decision in Massachusetts is corroborated by the contemporaneous legislative record. A Kentucky State Senator, for example, explained that the state constitutional amendment introduced

in 2004 would make it clear that "no one, no judge, no mayor, no county clerk, will be able to question [the citizens of Kentucky's] beliefs in the traditions of stable marriages and strong families." *Bourke* v. *Beshear*, 996 F. Supp. 2d 542, 551 n.15 (W.D. Ky. 2014). A Tennessee State Representative, one of the sponsors of the bill to amend the state constitution, similarly explained:

> [U]nfortunately we do have a State Supreme Court that doesn't mind messing with our Constitution and going against the will of the people and not including them in their decisions. If we didn't have that kind of State Supreme Court here in Tennessee and we have already seen it in Massachusetts I would not be here with this piece of legislation.

Hearing on HJR 24[/SJR 31] Before the H. Comm. On Child. & Fam. Aff., 2005 Sess., 104th Gen. Assemb. (Tenn. Feb. 16, 2005). And the State Senator who sponsored the constitutional amendment in Michigan explained that "the citizens of Michigan . . . want to decide the marriage issue, not leave it up to the extremist Massachusetts judges[.]" S. Journal 92–69, Reg. Sess., at 1436–37 (Mich. 2004). Thus, as was the case with Amendment 2 in *Romer* v. *Evans*, which was introduced after several Colorado towns had enacted laws prohibiting discrimination against gay people, 517 U.S. 620, 623–24 (1996), the laws at issue here were all passed in a backlash against perceived advances or potential advances in obtaining civil rights protections for gay people elsewhere.

The impetus behind the introduction of these laws came, at least in part, from the understanding that giving people the opportunity to express disapproval for gay people would drive voters to the polls. In Kentucky, for example, the incumbent United States Senator "began attacking gay marriage to rescue his floundering campaign." Klarman, *supra*, at 110. State party leaders called his opponent, a forty-four-year-old bachelor who opposed the federal marriage amendment, "limp-wristed" and a "switch hitter," and "reporters began asking him if he was gay." *Id.* Both the incumbent Senator and the state ballot measure barring gay couples from civil marriage were victorious. *Id*.

Many of the statements made by legislators or voters favoring these laws conveyed either negative code words or outright disparagement of gay people and their families. The primary sponsor of Ohio's constitutional amendment purposely misled voters with erroneous messages such as "[s]exual relationships between members of the same sex expose gays, lesbians and bisexuals to extreme risks of sexually transmitted diseases, physical injuries, mental disorders and even a shortened life span." *Obergefell* v. *Wymyslo*, 962 F. Supp. 2d 968, 975 (S.D. Ohio 2013). In 2004, the Ohio Secretary of State declared that "'the notion [gay marriage] even defies barnyard logic'" because "'the barnyard knows better.'" *See* Phillip Morris, *Blackwell Puts His Prejudice on Display*, Plain Dealer, Oct. 26, 2004, at B9 (alteration in original). In Tennessee, a State Representative declared "'It'll be a sad day when queers and lesbians are allowed to get married.'" Beth Rucker, *Republicans Say Word 'Queer' Wasn't Best Choice to Describe Gays*, Assoc. Press, June 16, 2006. Meanwhile, a Kentucky State

Representative asserted that "'marriage is a sacred institution, ordained by God and should only be between a man and a woman'" because "'[i]n the Garden of Eden, it was Adam and Eve, not Adam and Steve.'" Bruce Schreiner, *Fight Over Constitutional Amendment Looms in House*, Assoc. Press., Mar. 23, 2004. These statements regarding the supposed moral inferiority of gay people are strikingly similar to Congress' moral condemnation of gay people found in the legislative history of DOMA, which this Court concluded was based on animus. *Windsor*, 133 S. Ct. at 2693–94.

III. THE IMPACT OF THE LAWS

A law can fail animus review when it "targets a narrowly defined group and then imposes upon it disabilities that are so broad and undifferentiated as to bear no discernible relationship to any legitimate governmental interest." Andrew Koppelman, Romer v. Evans *and Invidious Intent*, 6 Wm. & Mary Bill Rts. J. 89, 94 (1997); *cf. City of Boerne* v. *Flores*, 521 U.S. 507, 533 (1997). In such situations, the law's breadth may "outrun and belie any legitimate justifications that may be claimed for it." *Romer* v. *Evans*, 517 U.S. 620, 635 (1996).

In *Windsor*, this Court emphasized that Section 3 of DOMA "touches many aspects of married and family life, from the mundane to the profound . . . [and] divests married same-sex couples of the duties and responsibilities that are an essential part of married life and that they in most cases would be honored to accept were DOMA not in force."

United States v. *Windsor*, 133 S. Ct. 2675, 2694–95 (2013).[5] The *Windsor* Court catalogued many of the key injuries wrought by DOMA: it "prevent[ed]" access to "government healthcare benefits"; "deprive[d]" gay couples "of the Bankruptcy Code's special protections"; "prohibit[ed]" gay couples "from being buried together in veterans' cemeteries"; rendered "inapplicable" protections for the family members of United States officials, judges, and federal law enforcement officers; "br[ought] financial harm to children of same-sex couples . . . [by] rais[ing] the cost of health care for families by taxing health benefits provided by employers to their workers' same-sex spouses"; and "denie[d] or reduce[d] benefits allowed to families upon the loss of a spouse and parent, . . . [all of which] are an integral part of family security." *Id*.

It cannot be seriously disputed that these laws, by failing to grant equal rights and dignity to gay couples in Kentucky, Michigan, Ohio, and Tennessee, do exactly the same thing. Just as DOMA worked to "impose restrictions and disabilities" on gays and lesbians like Edith Windsor, the laws of these states alienate gay and lesbian couples from the scores of significant legal protections, "from the mundane to the profound," *id*. at 2692, 2694, that the states provide to their straight married residents. These bans are arguably even

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[5] *See also* Transcript of Oral Argument at 71, *United States* v. *Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307) ("Justice Ginsburg: [I]t's—as Justice Kennedy said, 1,100 statutes, and it affects every area of life . . . [DOMA says there are] two kinds of marriage, the full marriage, and then this sort of skim milk marriage.").

broader in scope than Colorado's Amendment 2 in *Romer*—they affect hundreds of state laws and regulations governing nearly every aspect of a married person's daily life. An illustrative, though not comprehensive, list of some of the more significant rights and benefits is discussed below:

Taxes. Kentucky, Michigan, Ohio, and Tennessee authorize married couples to file joint tax returns. Ky. Rev. Stat. Ann. § 141.016(1); Mich. Comp. Laws Ann. § 141.641(2); Ohio Rev. Code Ann. § 5747.08(E); Tenn. Dep't of Revenue, *Guidance for Tennessee's Hall Income Tax Return*, http://www.state.tn.us/revenue/taxguides/indincguide.pdf (last visited Feb. 9, 2015). Filing joint returns allows couples to reflect their financial interconnectedness, obviating the unnecessary complication and expense of filing taxes as if they lived separate financial lives.

In Kentucky, petitioners Gregory Bourke and Michael Deleon, like Edie Windsor before them, do not want whoever of them is the surviving spouse to pay an inheritance tax when the other passes away, Ky. Rev. Stat. Ann. §§ 140.070(1), 140.080(1)(a), and thus lose a significant portion of the savings they have accumulated over their 31-year relationship, which they want to pass on to their two children. *Bourke* v. *Beshear*, 996 F. Supp. 2d 542, 546–47 (W.D. Ky. 2014).

Benefits for Public Employees. Although public employees in these four states are entitled to participate in generous state retirement plans or receive generous death benefits, some of the most favorable benefits under those

plans are available only to the spouse of a retiree or deceased employee. *See, e.g.*, Mich. Comp. Laws Ann. § 38.31(2) (allowing employees to designate only spouses or other family members as beneficiaries); Ohio Pub. Emp. Ret. Sys., *Monthly Benefits*, https://www.opers.org/members/traditional/benefits/monthly.shtml (last visited Feb. 9, 2015) (limiting "qualified beneficiaries" to a surviving spouse, child, or dependent parent). And while public employees may also purchase health insurance for their families through a medical plan sponsored by the state, and an employee's spouse can join the plan, a gay partner is generally not allowed to do so. *See, e.g.*, Ohio Dep't of Admin. Servs., *State of Ohio Employee Benefits Guide 2013-2014* 7 (2013), *available at* http://das.ohio.gov/LinkClick.aspx?fileticket=Qq7ZC7W0XZg%3d &tabid=190 ("Examples of persons NOT eligible for coverage as a dependent include . . . Same-sex partners[.]"); State Grp. Ins. Program, Tenn. Dep't of Fin. & Admin*, 2015 Eligibility and Enrollment Guide* 2 (2014), *available at* http://www.tn.gov/ finance/ins/pdf/2015_guide_lg.pdf (only an employee's legal spouse or children are eligible for plan health care coverage and "a marriage from another state that does not constitute the marriage of one man and one woman is 'void and unenforceable in this state'").

In Tennessee, Dr. Valeria Tanco and Dr. Sophia Jesty, who were legally married in their then-home state of New York and who both now work for the University of Tennessee, would like to save money by combining their respective health insurance plans into a single family plan covering both of them as well as their baby daughter. The University, however, only allows married spouses to share family insurance coverage, and does not recognize them as

married. Univ. of Tenn., *2015 Insurance Annual/Open Enrollment Transfer* (2015), *available at* http://insurance.tennessee.edu/2015%20AE%20Employee%20Letter.pdf; *Tanco* v. *Haslam*, 7 F. Supp. 3d 759, 764 (M.D. Tenn. 2014).

Family and Parenthood. Gay couples are raising children together in Kentucky, Michigan, Ohio, Tennessee, and every other state in the Union. Yet legal barriers to the recognition of the relationship between gay parents, and between gay parents and their own children, deprive them of many significant rights and protections under state law. Kentucky, Michigan, and Ohio all prohibit gay partners from adopting children, as unmarried couples are not allowed to jointly adopt children in these states. Ky. Rev. Stat. Ann. § 199.470(2); Mich. Comp. Laws Ann. § 710.24; Ohio Rev. Code Ann. § 3107.03(A).

The Michigan case actually began because petitioners April DeBoer and Jayne Rowse both wanted to be able to jointly adopt the three children they are raising together, but were unable to do so because Mich. Comp. Laws. Ann. § 710.24 only allows married couples to adopt jointly. *DeBoer* v. *Snyder*, 973 F. Supp. 2d 757, 759–60 (E.D. Mich. 2014).

Healthcare Decisions. In Kentucky and Ohio, the law presumes that only spouses and family members are qualified to make medical decisions on behalf of one another. Ky. Rev. Stat. Ann. § 311.631(1) (in the absence of an advance healthcare directive, only a patient's legal or judicially appointed guardian, legal spouse, or relative are authorized to

make decisions); Ohio Rev. Code Ann. § 2133.08(B) (in the absence of an advance healthcare directive, only a patient's legal guardian, legal spouse, or relative may be appointed as surrogates). A similar, though less absolute presumption exists in Michigan and Tennessee. Mich. Comp. Laws Ann. § 700.5313(3)–(4) (in the absence of an advance health care directive, an incapacitated person's spouse is first in line to be a guardian capable of making medical decisions, and a non-relative cannot be appointed if a child, parent, or other relative is available); Tenn. Code Ann. § 68-11-1806 (same). Gay people are thus left without the security of having their spouse act on their behalf if they are incapacitated, even though one's spouse is often the best-qualified person to make such critical medical decisions.

Probate and Transfer of Assets. Estate law in each of the four states protects and provides for surviving spouses, but denies these rights to surviving gay and lesbian partners. Gay partners are prevented from obtaining the elective share a surviving spouse is entitled to take from the decedent's estate, which is property that can be used to support the surviving spouse even when the decedent's will makes no provision for such support. Ky. Rev. Stat. Ann. § 392.020; Mich. Comp. Laws Ann. § 700.2102; Ohio Rev. Code Ann. § 2106.01; Tenn. Code Ann. § 31-4-101. Additionally, gay partners are not included within the laws of intestate succession. Ky. Rev. Stat. Ann. § 391.010; Mich. Comp. Laws Ann. § 700.2103; Ohio Rev. Code Ann. § 2105.06; Tenn. Code Ann. § 31-2-104.

In Ohio, James Obergefell, who legally wed his late husband John Arthur on a medically-equipped plane as it sat

on the tarmac in Maryland shortly before he lost John to ALS, would simply like John's death certificate to be amended to accurately reflect the fact that John was married to James when he died. *Obergefell* v. *Wymyslo*, 962 F. Supp. 2d 968, 975–76 (S.D. Ohio 2013).

Duties. With rights, of course, come responsibilities. Gay couples in these states and others with similar bans are not only prohibited from receiving any of the benefits of marriage, but they are also exempt from any of its responsibilities. Marriage, after all, often matters most when "bad stuff" happens such as illness, death, or separation. But here, when a gay couple separates, there are no available options for legally sanctioned divorce, alimony, or child support. *See, e.g.*, Ky. Rev. Stat. Ann. § 530.050(3) (duty to provide support for "indigent spouse" or "minor child"); Mich. Comp. Laws Ann. § 552.16 (governs care, custody and support of children after a divorce); Ohio Rev. Code Ann. § 3105.10(A) (divorce only available for those in a "marriage"); Tenn. Code Ann. § 71-3-123 (allowing civil action against deserting spouse or parent).

In addition, in Michigan, Ohio, and Tennessee, gay state employees or officials are not required to disclose information about their partners for conflict of interest purposes. *See, e.g.*, Mich. Comp. Laws Ann. § 487.1511 (defining "Relative" for purposes of conflict of interest as "parent, child, sibling, spouse . . ."); Ohio Rev. Code Ann. § 102.02(A)(1) (requiring disclosure by state government officials of names under which a spouse conducts business); Tenn. Code Ann. §§ 2-10-115, 2-10-127, 2-10-129, 2-10-130

(requiring disclosures of conflicts of interest related to elected and appointed officials and their spouses).

IV. ABSENCE OF LEGITIMATE RATIONALES

The thinness of the states' proffered rationales for denying marriage to gay couples further demonstrates that they are nothing more than pretexts for discrimination rooted in stereotypical thinking about a disfavored group. Given that most of Congress' justifications for excluding gay and lesbian couples from the federal definition of marriage (*e.g.*, responsible procreation, caution, respect for the political process, cost-savings) were not sufficient to justify DOMA in *Windsor*, it is hard to see how the nearly identical justifications offered by Kentucky, Michigan, Ohio, and Tennessee could possibly be sufficient here. *See, e.g.*, *Baskin* v. *Bogan*, 766 F.3d 648, 659 (7th Cir. 2014) (Posner, J.) ("The denial of these federal benefits to same-sex couples brings to mind . . . *Windsor*, which held unconstitutional the denial of all federal marital benefits to same-sex marriages recognized by state law. The Court's criticisms of such denial apply with even greater force to Indiana's law." (citation omitted)).

In other words, the inability of the states defending these laws to offer justifications that are in any way rationally related to advancing legitimate governmental purposes is, in and of itself, an independent reason why these laws must be struck down. It is also further evidence that it was animus, rather than a legitimate governmental interest, that motivated these laws in the first place. *See, e.g.*, *Romer* v. *Evans*, 517 U.S. 620, 632 (1996) (a law is unconstitutional when it "lacks

a rational relationship to legitimate state interests" such that it "seems inexplicable by anything but animus toward the class it affects"); *City of Cleburne, Tex.* v. *Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985); *Baskin*, 766 F.3d at 666 ("[A]nimus. . . is further suggested by the state's inability to make a plausible argument for its refusal to recognize same-sex marriage.").

The states have asserted that barring gay couples from the right to marry and refusing to recognize the lawful marriages of gay couples performed elsewhere encourages "responsible" procreation among straight couples who can unintentionally become pregnant. But, as is explained in detail in the petitioners' briefs on the merits, "the only rationale that the states put forth with any conviction—that same-sex couples and their children don't *need* marriage because same-sex couples can't *produce* children, intended or unintended—is so full of holes that it cannot be taken seriously." *Baskin*, 766 F.3d at 656.

In its decision below, the Sixth Circuit was satisfied that this "responsible procreation" argument was sufficient to justify the challenged state laws under rational-basis review. *DeBoer* v. *Snyder*, 772 F.3d 388, 404–06 (6th Cir. 2014). But the question that the Sixth Circuit asked was whether it was rational to *include* opposite-sex couples within marriage. Instead, the question it should have asked was whether it was rational to *exclude* same-sex couples from marriage. After all, there are at least three different kinds of couples who might qualify for marriage: (1) fertile straight couples, (2) infertile straight couples, and (3) infertile gay couples. Assuming arguendo that the state's *only* interest in marriage

is to channel "responsible procreation" (which is clearly not the case in any event), it might make sense to draw a line between the first and second groups. But once the second group is allowed to marry, what sense does it make to draw the line between the second and third groups, who are identically situated for these purposes? After all, it is not as if the second group can "responsibly procreate" any better than the third group.

The other rationales offered by the states are equally deficient. While the states have argued that gay marriage bans satisfy rationality review on the ground that a state might wish to exercise "caution" or "wait and see" before "changing a norm . . . accepted for centuries," *DeBoer*, 772 F.3d at 406, acceding to an aversion to or fear of change by depriving individuals of constitutionally guaranteed rights is not a legitimate governmental objective. *See Lawrence* v. *Texas*, 539 U.S. 558, 577–78 (2003) (holding that "tradition" is not an acceptable justification for discrimination in any event); *Romer*, 517 U.S. at 634 ("[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." (alterations in original) (internal quotation marks omitted)).

Referring to the fact that marriage for gay people has been legal in Massachusetts since 2004, the Sixth Circuit asserted that "[e]leven years later, the clock has not run on assessing the benefits and burdens of expanding the definition of marriage." *DeBoer*, 772 F.3d at 406. But under this logic, when would the clock have run? In 2054, after 50 years? In

2104, after a century? In fact, although marriage between gay couples has been available for more than a decade in Massachusetts, there have been no adverse impacts on divorce rates or other metrics of the stability of marriage. *See* Nate Silver, *Divorce Rates Higher in States with Gay Marriage Bans*, FiveThirtyEight (Jan. 12, 2010, 9:12 AM), http://fivethirtyeight.com/features/divorce-rates-appear-higher-in-states/ (citing government data and noting that divorce rates in Massachusetts went *down* by 21 percent after the state legalized gay marriage).

Moreover, the Sixth Circuit failed to appreciate the true significance of the decades-long emergence of gay couples and families in American life. These relationships and families have not sprung up overnight, as if they were somehow the abstract creation of political activists. Rather, gay couples have been supporting each other, raising children together, and facing the same quotidian joys and burdens ("in sickness and in health") faced by other married couples for many years. Social science has been studying gay relationships and parenting for decades. *See, e.g.*, Brief Amicus Curiae of the American Sociological Association in Support of Respondent Kristin M. Perry and Respondent Edith Schlain Windsor, *Hollingsworth* v. *Perry*, 133 S. Ct. 2652 (No. 12-144) (2013), *United States* v. *Windsor*, 133 S. Ct. 2675 (No. 12-307) (2013); Brief Amici Curiae of the American Psychological Association et. al. on the Merits Supporting Affirmance, *United States* v. *Windsor*, 133 S. Ct. 2675 (No. 12-307) (2013). States and local governments, in addition to private employers, have been formally recognizing such relationships since at least 1984. *See, e.g.*, Craig W. Christensen, *If Not Marriage? On Securing Gay*

and Lesbian Family Values by a "Simulacrum of Marriage," 66 Fordham L. Rev. 1699, 1734–35 (1998). No state may excuse its failure to respect the equal dignity of its gay citizens on the ground that it has been caught unaware or that it needs an unspecified amount of additional time to see what might hypothetically happen in an imaginary world where straight couples' stability and sense of self-worth and commitment somehow depend on the continued existence of *de jure* discrimination against gay couples and their children.

Thus, at its essence, the appeal to "wait and see" or "go slow" is really most likely the result of an "instinctive mechanism to guard against people who appear to be different in some respects from ourselves." *Bd. of Trs. of Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 374 (Kennedy, J., concurring). Indeed, "assum[ing] that the Sixth Circuit is right about the voters in [Kentucky, Michigan, Ohio, and Tennessee], [t]here remains a distinct possibility that it may be wrong about voters elsewhere." *Campaign for S. Equal.* v. *Bryant*, --- F. Supp. 3d. ---, No. 3:14-cv-818, 2014 WL 6680570, at *33 (S.D. Miss. Nov. 25, 2014).

Some have argued that laws like these are permissible because they enshrine long-held religious or community values. *See, e.g.*, Brief Amicus Curiae of the Michigan Catholic Conference in Support of Appellants and Urging Reversal at 3–4, *DeBoer* v. *Snyder*, 772 F.3d 388 (No. 14-1341) (6th Cir. 2014). As discussed above, however, those values are themselves changing. The truth is that ours is a nation of many traditions and diverse moral values that must be accommodated. "Our obligation is to define the liberty of all, not to mandate our own moral code." *Lawrence*, 539 U.S.

at 571 (internal quotation marks omitted). But above all, one cannot enshrine in law discrimination that is constitutionally impermissible, even if many still believe—as more did before them—that the exclusion of gay people from the civic institution of marriage is justified. "The design of the Constitution is that preservation and transmission of religious beliefs . . . is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission." *Lee* v. *Weisman*, 505 U.S. 577, 589 (1992); *see also Lawrence*, 539 U.S. at 577–78 ("[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack." (quoting *Bowers* v. *Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting))). Indeed, to the extent that these laws are in fact based on a personal or religious conviction, no matter how sincerely held, that gay men and lesbians are somehow not worthy of the same treatment as straight people, that is precisely the animus against which the Constitution is designed to protect. *United States* v. *Windsor*, 133 S.Ct. 2675, 2693 (2013); *Lawrence*, 539 U.S. at 571.

Finally, it is not insignificant that petitioner James Obergefell from Ohio merely seeks to have the state correct the facts asserted on the death certificate of his late spouse, John Arthur. The two men were, in fact, married under the law of Maryland where their marriage was performed. It is absurd to contend that refusing to certify that a decedent was "married" to his spouse at the time of his death could possibly influence child rearing, or the willingness of straight couples

to marry, or even offend tradition. But actions speak louder than words. Ohio insists that there must be a blank space on Mr. Arthur's death certificate where Mr. Obergefell's name should be. Not content to deny these men the equal protection of the law in life, it also seeks to deny them dignity even in death. Ohio's decision to reject this reasonable request to correct a factually inaccurate death certificate speaks volumes about what is really going on, leaving no doubt that the true motivation behind these laws is constitutionally impermissible animus against gay people.

CONCLUSION

For all of the forgoing reasons, the Sixth Circuit's decision should be reversed.

Respectfully submitted,

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