NOS. 14-556, 14-562, 14-571, 14-574

IN THE

Supreme Court of the United States

JAMES OBERGEFELL, ET AL.,
AND BRITTANI HENRY, ET AL.,
Petitioners,

v.

RICHARD HODGES, DIRECTOR,
OHIO DEPARTMENT OF HEALTH, ET AL.,
Respondents.

[Consolidated Case Captions Listed on Inside Cover]

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

BRIEF OF AMICUS CURIAE STATE OF ALABAMA IN SUPPORT OF RESPONDENTS

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VALERIA TANCO, ET AL.,
Petitioners,

v.

WILLIAM EDWARD "BILL" HASLAM, ET AL.,
Respondents.

APRIL DEBOER, ET AL.,
Petitioners,

v.

RICHARD SNYDER, ET AL.,
Respondents.

GREGORY BOURKE, ET AL., AND TIMOTHY LOVE, ET AL.,
Petitioners,

v.

STEVE BESHEAR, GOVERNOR OF KENTUCKY,
Respondent.

QUESTIONS PRESENTED

1. Does the Fourteenth Amendment require a State to license a marriage between two people of the same sex?

2. Does the Fourteenth Amendment require a State to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out of state?

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INTRODUCTION AND INTEREST OF AMICUS CURIAE

Alabama is among the majority of States that, absent recent federal-court intervention, would continue to define marriage as the union of a man and a woman. *See Strange v. Searcy*, 135 S. Ct. 940 (2015). The decision below correctly held that the States remain free to follow that traditional definition of marriage. This Court should affirm the court of appeals' decision and, in so doing, uphold the constitutionality of Alabama law.

But this case is about more than marriage. It is also about the proper role of the federal courts in scrutinizing state policy decisions. The presumption is that state laws are constitutional. And they should be subject to searching federal-court review only if they differentiate based on a suspect classification or impact a fundamental right.

Absent either circumstance, the Constitution's guarantees of equal protection and due process allow no more searching judicial review than this: courts must verify that the challenged law is rationally related to a legitimate state interest. *See Heller v. Doe*, 509 U.S. 312, 319-20 (1993). Rational-basis review is highly deferential. It constitutes a "paradigm of judicial restraint," under which courts have no "license . . . to judge the wisdom, fairness, or logic of legislative choices." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313-14 (1993).

Petitioners cannot overcome this deferential standard. They do not challenge an ad-hoc govern-

ment decision or a novel law. *Cf. City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 447-50 (1985); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534-38 (1973). Instead, they challenge an institution that has been accepted from time immemorial by diverse cultures. *See* G. Robina Quale, *A History of Marriage Systems* 2 (1988) ("Marriage, as the socially recognized linking of a specific man to a specific woman and her offspring, can be found in all societies."); Claude Lévi-Strauss, *The View From Afar* 40-41 (1985) (similar). If the traditional definition of marriage is not a rational basis for legislative action, it is hard to imagine what is. Put another way, if rational-basis review invalidates traditional marriage, it seems likely that few other laws would be safe from the federal courts.

Indeed, accepting Petitioners' arguments would render rational-basis review virtually indistinguishable in key respects from heightened scrutiny. And it would enable federal courts, through mere disagreement with the wisdom or utility of state policy, to overturn scores of state laws that afford government benefits or impose government costs on some (but not all) citizens. That result would undermine federalism, liberty, and our Nation's democratic processes.

SUMMARY OF ARGUMENT

The Court should affirm the court of appeals for three reasons, in addition to those highlighted in Respondents' briefs.

1. Because man-woman marriage laws do not impermissibly discriminate based on a suspect classification or infringe a fundamental right, the Court must apply rational-basis review. Those laws easily satisfy that deferential standard. First, the States have a legitimate interest in promoting ties of kinship between children and both of their biological parents because, in general, those parents together are best suited to provide optimal care for their children. Second, man-woman marriage laws are rationally related to this interest. Marriage relationships between men and women, by design, provide children with both their biological mother and their biological father. In contrast, children raised in same-sex households are necessarily raised without one or both biological parents in the home. Thus, because redefining marriage to include same-sex couples would not further the States' legitimate interest in connecting children to both of their biological parents, man-woman marriage laws plainly withstand rational-basis review.

2. Petitioners respond with rational-basis arguments that are flawed and, if accepted, would significantly alter that deferential form of review. Petitioners' arguments distort rational-basis review in at least five ways. First, they would allow the party challenging a law to reformulate the States' articulated interests. This, however, contradicts the well-established principle that those challenging a law bear the burden to negate every conceivable basis for it. Second, Petitioners would require a precise fit between legislative means and ends. But it is sufficient if those who fall within a legislative classification

generally possess traits that bear a rational relationship to a legitimate legislative purpose. Third, Petitioners demand that the States produce evidence and empirical data that persuasively demonstrate the challenged law's rationality. Yet rational-basis review does not subject legislative judgments to courtroom-style factfinding; rather, laws are constitutional so long as their bases are at least arguable. Fourth, Petitioners seek to empower federal courts to balance the benefits and harms associated with a challenged legislative classification. This, however, would permit the courts to substitute their judgment for that of the legislature and deny proper deference to the democratic process. Fifth, Petitioners invite the judiciary to engage in the speculative task of divining voters' motivations and invalidating laws based on conjecture. But under rational-basis review, it is irrelevant which reasons actually motivated the voters because it is simply not feasible for judges to discern what was in the minds of the electorate. Taken together, these flaws in Petitioners' rational-basis arguments reveal that they are actually arguing a form of heightened scrutiny.

3. Finally, adopting Petitioners' invitation to push rational-basis review far beyond its deferential parameters would require this Court to ignore the democratic and liberty-protecting principles that form the basis of those constraints. Petitioners' version of rational-basis review would threaten a host of unrelated state laws that afford benefits or impose costs on some (but not all) citizens. It would also jeopardize the liberty of Americans to choose their

destiny through the ballot box instead of the courtroom.

ARGUMENT

I. Man-Woman Marriage Laws Are Rationally Related to Legitimate Government Purposes.

The rational-basis test is the only test that matters here. Respondents ably demonstrate that man-woman marriage laws neither infringe on a fundamental right nor rest on a suspect classification. *See* DeBoer Resp'ts Br. at 46-57; Obergefell Resp'ts Br. at 36-51. Without a suspect classification or fundamental right, the Court must apply rational-basis review to determine whether state marriage laws comport with the Constitution.

Man-woman marriage laws easily pass that test. As the Alabama Supreme Court recently acknowledged, one of the many legitimate state interests underlying man-woman marriage laws is the goal of "recognizing and encouraging the ties between children and their biological parents." *Ex parte State ex rel. Ala. Policy Inst.*, No. 1140460, 2015 WL 892752, at *30 (Ala. Mar. 3, 2015). Those laws reinforce the man-woman marriage institution, which developed and continues to exist as a vital social means of connecting children to both of their biological parents by connecting mothers and fathers to each other. *See*, *e.g.*, *United States v. Windsor*, 133 S. Ct. 2675, 2718 (2013) (Alito, J., dissenting) ("[T]here is no doubt that, throughout human history and across many cultures, marriage has been viewed as an . . . institu-

tion . . . inextricably linked to procreation and biological kinship."); Kingsley Davis, *Introduction: The Meaning and Significance of Marriage in Contemporary Society*, *in* Contemporary Marriage: Comparative Perspectives on a Changing Institution 1, 7-8 (Kingsley Davis ed., 1985) ("[T]hrough [marriage], . . . society normally holds the biological parents responsible for each other and for their offspring."); *see also* Brief of Amici Curiae Marriage Scholars at 4-13.

This governmental interest satisfies both prongs of the rational-basis test. The government's interest in promoting ties of kinship between children and both of their biological parents is (1) legitimate and (2) rationally related to traditional marriage laws.

First, promoting ties between children and both of their biological parents is, at the very least, a legitimate government interest. In general, that setting is the optimal environment for childrearing. *See, e.g.*, D. Paul Sullins, *Emotional Problems among Children with Same-Sex Parents: Difference by Definition*, 7 Brit. J. of Educ., Soc'y & Behav. Sci. 99, 113-14 (2015); Brief of Amici Curiae Organizations that Promote Biological Parenting at 5-24. Every child "has an inborn nature that joins together the natures of two adults," and the child's biological parents are uniquely positioned to show the child "how to recognize and reconcile . . . the[se] qualities within [her]self." J. David Velleman, *Family History*, 34 Philosophical Papers 357, 370-71 (Nov. 2005).

Moreover, biological parents have a natural inclination to care for their children "because they . . . recognize them as a part of themselves that should

be preserved and extended." Don Browning & Elizabeth Marquardt, *What About the Children? Liberal Cautions on Same-Sex Marriage, in* The Meaning of Marriage 29, 36 (Robert P. George & Jean Bethke Elshtain eds., 2006) (discussing kin altruism); *see also* 1 William Blackstone, *Commentaries* *435 (recognizing the "insuperable degree of affection" for one's natural children "implant[ed] in the breast of every parent"). For these reasons, this Court has repeatedly recognized that biological parents are best suited to raise their offspring. *See Troxel v. Granville*, 530 U.S. 57, 68 (2000) (presuming that the "natural bonds of affection lead parents to act in the best interests of their children") (quoting *Parham v. J.R.*, 442 U.S. 584, 602 (1979)); *see also Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2582 (2013) (Sotomayor, J., dissenting) (noting that "the biological bond between a parent and a child is a strong foundation" for "a stable and caring relationship").

Second, traditional marriage laws are rationally related to this interest. The relevant inquiry here is not, as Petitioners claim, whether *excluding* same-sex couples from marriage furthers the States' interest in encouraging biological mothers and fathers to jointly raise their children. Instead, the government establishes the requisite relationship between its interest and the means chosen to achieve that interest when "the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not[.]" *Johnson v. Robison*, 415 U.S. 361, 383 (1974). Therefore, the relevant question is whether a law defining marriage as the union of a man and a woman furthers legitimate interests that

would not be advanced, or advanced to the same degree, by allowing same-sex couples to marry.[1]

Under this analysis, man-woman marriage laws satisfy rational-basis review. Sexual relationships between men and women—and only such relationships—have the ability to provide children with both their biological mother and their biological father in a stable family unit. By contrast, sexual relationships between individuals of the same sex do not. Children raised in those settings are *necessarily* disconnected from one or both of their biological parents. Thus, as a matter of irreducible biology, same-sex couples cannot advance the States' legitimate interest to encourage childrearing by both biological parents.

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[1] *See, e.g.*, *Andersen v. King County*, 138 P.3d 963, 984 (Wash. 2006) (plurality opinion) ("[T]he correct inquiry under rational basis review is whether allowing opposite-sex couples to marry furthers legitimate governmental interests."); *Morrison v. Sadler*, 821 N.E.2d 15, 23 (Ind. Ct. App. 2005) ("The key question in our view is whether the recognition of same-sex marriage would promote all of the same state interests that opposite-sex marriage does . . . ."); *id.* at 29 (noting that the proper analysis is "whether allowing same-sex marriage would further the State's interest in encouraging 'responsible procreation' by opposite-sex couples, not on whether that interest would be harmed"); *Standhardt v. Superior Ct.*, 77 P.3d 451, 463 (Ariz. Ct. App. 2003) (upholding the challenged man-woman marriage laws because "the State does not have the same interest in sanctioning marriages between couples who are incapable of procreating as it does with opposite-sex couples"); *see also Vacco v. Quill*, 521 U.S. 793, 799 (1997) ("The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.") (internal quotation marks and citation omitted).

Simply put, it is rational for the States to afford legal recognition to the relationships of man-woman couples. *See Vance v. Bradley*, 440 U.S. 93, 109 (1979) (stating that a law may "dr[aw] a line around those groups . . . thought most generally pertinent to its objective"). The "commonsense distinction," *Heller*, 509 U.S. at 326, that society has historically drawn between same-sex couples and man-woman couples with respect to marriage "is neither surprising nor troublesome from a constitutional perspective." *Nguyen v. INS*, 533 U.S. 53, 63 (2001). Although other relationships may have societal value, the line between traditional man-woman marriages and other relationships is a rational one.

II. Petitioners' Rational-Basis Arguments Are Flawed and, If Accepted, Would Push That Deferential Constitutional Standard Closer to Heightened Scrutiny.

To hold that the traditional institution of marriage is so irrational as to be constitutionally impermissible would turn the rational-basis test on its head. And that is precisely what Petitioners suggest that this Court do. Accepting Petitioners' arguments would dramatically alter rational-basis review by embracing five foundational flaws, each of which is discussed below.

A. Petitioners Erroneously Reformulate the Interests That the States Assert.

Petitioners erroneously recast the States' articulated interests and attack different government purposes than what the States themselves have prof-

fered. *See, e.g.*, Obergefell Pet'rs Br. at 55-56 (claiming that the States' interest is to reduce the number of children raised outside of families headed by married couples). Yet this litigation tactic contravenes well-established principles of rational-basis review. That deferential standard requires courts to evaluate the legitimacy of the States' interests *as the States present them*, not as reformulated by the challenging parties. *See Johnson*, 415 U.S. at 377 (observing that the challenger "state[d] too broadly the [legislature's] objective").

"The burden is on the one attacking the legislative arrangement to negative *every conceivable basis* which might support it, whether or not the basis has a foundation in the record." *Heller*, 509 U.S. at 320-21 (emphasis added) (internal quotation marks omitted). It follows, then, that every interest the States offer must be evaluated on its own terms. When parties challenging a law restate an interest presented by the government, they merely add another "conceivable basis" to the list that they have the burden to negate. The interests as originally presented by the government remain. Challenging parties may not, through their own sleight of hand, avoid their burden to refute the States' articulated interests.

This is no trivial concern. Here, Petitioners improperly cast the States' interest as attempting to reduce the number of children raised outside of families headed by married couples. *See* DeBoer Pet'rs Br. at 35-37; Obergefell Pet'rs Br. at 55-56. Petitioners then argue that man-woman marriage laws are fatally underinclusive because they do not include children adopted or otherwise raised by same-sex

couples. *See* DeBoer Pet'rs Br. at 35-37; Obergefell Pet'rs Br. at 55-56. In fact, however, the States assert a more specific purpose—one that Petitioners ignore—namely, an interest in maximizing the number of children born and raised in homes where both a biological mother and a biological father are present. *See* DeBoer Resp'ts Br. at 28; DeBoer Resp'ts Br. in Supp. of Cert. at 29-30.

The States' actual interest—promoting child-rearing by both biological parents—shows that man-woman marriage laws are not underinclusive. Because children reared in same-sex households are necessarily raised without at least one of their biological parents, redefining marriage to include same-sex couples would not serve that interest at all.

B. Petitioners Erroneously Require a Precise Fit Between Means and Ends.

Petitioners also erroneously argue that man-woman marriage laws are irrational because the States permit marriage between infertile man-woman couples who will not have their own biological children. *See* Obergefell Pet'rs Br. at 57-58; DeBoer Pet'rs Br. at 35. But rational-basis review does not require this kind of narrow tailoring.

It is enough if those who fall within the legislative classification generally possess traits that bear a rational relationship to a legitimate legislative purpose. *See Metro Broad., Inc. v. FCC*, 497 U.S. 547, 579-83 (1990) (stating that a classification is constitutional even under heightened scrutiny if it advances its underlying objective "in the aggregate").

Every subset of a legislative classification need not directly advance the government's interest. *See Nguyen*, 533 U.S. at 70 (noting that even under heightened scrutiny a law need not "be capable of achieving its ultimate objective in every instance"). And, at the same time, a legislative classification need not include every group that might implicate the law's purposes. *See Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974) ("[E]very line drawn by a legislature leaves some out that might well have been included."). Rational-basis review thus rejects "mathematical nicety." *Heller*, 509 U.S. at 321; *see also Armour v. City of Indianapolis, Ind.*, 132 S. Ct. 2073, 2083 (2012) (noting that under rational-basis review the government need not "draw the perfect line [ ]or even . . . draw a line superior to some other line it might have drawn"); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 813 (1976) (noting that even if the government "might have furthered its underlying purpose more artfully, more directly, or more completely," that "does not warrant a conclusion that the method it chose is unconstitutional").

Important policy reasons underlie the judiciary's toleration of imperfect fits between ends and means. In particular, "[t]he problems of government are practical ones" that often require "rough accommodations" of competing interests. *Heller*, 509 U.S. at 321. Laws thus result from compromises large and small among voters and elected officials representing different constituencies, from different parties, with differing philosophical principles. Such a give-and-take process does not admit of mathematical nicety because compromise is rarely precise. Accordingly, "courts are compelled under rational basis review to

accept a legislature's generalizations even when there is an imperfect fit between means and ends." *Id.*

Man-woman marriage laws easily meet this rational-relationship standard. Only man-woman couples are capable of furthering the States' interest in promoting dual biological parentage, and the vast majority of married man-woman couples do in fact produce their own biological children.[2] In contrast, same-sex couples can *never* further this interest because they cannot provide a child with both her biological mother and her biological father. There is thus a substantial relationship between the ends pursued and the means chosen here.

Moreover, that some man-woman couples are intentionally or unintentionally infertile does not render the challenged laws fatally overinclusive. Many of those couples will nevertheless further the States' interest in connecting children to both their biological mother and their biological father in stable family units.[3] For instance, numerous man-woman cou-

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[2] *See* Anjani Chandra et al., *Fertility, Family Planning, and Reproductive Health of U.S. Women: Data from the 2002 National Survey of Family Growth*, Centers for Disease Control and Prevention 108 tbl.69 (Dec. 2005), *available at* http://www.cdc.gov/nchs/data/series/sr_23/sr23_025.pdf (showing that 6,925 of 7,740—nearly 90%—of married women between the ages of 40 and 44 have given birth).

[3] Petitioners' infertility arguments suffer from a foundational flaw: they assume that States could enact laws requiring proven fertility as a prerequisite to marriage. But government-imposed premarital inquisitions about procreative intentions and fertility would unquestionably impinge upon constitution-

ples who do not plan to have children experience unintended pregnancies or simply change their minds. *See Standhardt*, 77 P.3d at 462; Lawrence B. Finer & Mia R. Zolna, *Unintended Pregnancy in the United States: Incidence and Disparities, 2006*, 84 Contraception 478, 481 tbl.1 (2011) (indicating that unintended pregnancies account for nearly half of all births in the United States). And some man-woman couples who believe that they are infertile discover otherwise or remedy their infertility through medical advances. *See Standhardt*, 77 P.3d at 462. Thus, including man-woman couples who think they are infertile, or who do not presently plan to procreate, still furthers the States' interest in maximizing the number of children raised by both of their biological parents.

C. Petitioners Erroneously Demand That the States Produce Evidence and Empirical Data.

Petitioners additionally contend that the States' asserted interests lack rational foundation because they have not shown that children especially benefit from being raised by their biological parents, *see* Tanco Pet'rs Br. at 47-48, or "that the inclusion of same-sex couples among those eligible to marry has . . . had a negative effect on the stability of the institution as a whole," DeBoer Pet'rs Br. at 43. Petitioners would thus require the States to demonstrate the rationality of their legislative arrangements with evidence and empirical data.

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ally protected privacy rights. *See Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965).

Petitioners' fixation with empirical justification for the State's interest flouts the rational-basis test. Under rational-basis review, the States have "no obligation to produce evidence to sustain the rationality of a statutory classification." *Heller*, 509 U.S. at 320. They may assert interests "based on rational speculation unsupported by evidence or empirical data," and their laws must be upheld "if there is any reasonably conceivable state of facts" that could support them. *Id.* Rational-basis review thus does not "subject" States' legislative choices "to courtroom factfinding." *Id.* "Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function." *Beach Commc'ns*, 508 U.S. at 315 (internal quotation marks omitted). "[T]he very fact that [the policy questions at issue here] are 'arguable' is sufficient, on rational-basis review, to 'immuniz[e]' the [legislative] choice from constitutional challenge." *Id.* at 320.

D. Petitioners Erroneously Seek Judicial Balancing.

Petitioners' primary arguments against the challenged marriage laws boil down to a balancing of interests and harms. They assert that man-woman marriage laws are irrational because the benefits produced by those laws are outweighed by the alleged harm that they cause to same-sex couples and the children they are raising. *See* DeBoer Pet'rs Br. at 31-33; Bourke Pet'rs Br. at 46-51. This argument is problematic for a number of reasons.

First, the States need not demonstrate that the exclusion of any particular group is necessary to promote their interests. Instead, as discussed above, rational-basis review is satisfied so long as the inclusion of the challenging group would *not further* the States' articulated interests. *See Johnson*, 415 U.S. at 383; *supra*, at 7-8.

Second, rational-basis review does not focus on the harm to the objecting group that is not included. Indeed, courts applying that deferential standard uphold laws that maintain a rational distinction even if those laws "work[ ] to the disadvantage of a particular group." *Romer v. Evans*, 517 U.S. 620, 632 (1996).

Third, balancing the harms and benefits of a statutory classification is the province of the legislature, not the federal courts. A court cannot declare a law unconstitutional under the rational-basis test on the grounds that "the legislature misunderstood the facts." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 469 (1981). Instead, the rational-basis test requires only that "the question" be "'at least debatable.'" *Id.* (quoting *United States v. Carolene Prods. Co.,* 304 U.S. 144, 154 (1938)). Even if the court is convinced that its balance of the competing interests is "correct," "it is up to legislatures, not courts, to decide on the wisdom and utility of legislation." *Id.* (quoting *Ferguson v. Skrupa*, 372 U.S. 726, 729 (1963)).

E. Petitioners Erroneously Invite Courts to Peer into Voters' Minds in Search of Animus.

Finally, Petitioners argue that the States' asserted interest should not matter because, in fact, the traditional marriage laws at issue here were motivated by impermissible animus. *See* DeBoer Pet'rs Br. at 45-47. This argument is misplaced. Under the rational-basis test, "it is entirely irrelevant for constitutional purposes" which reasons "actually motivated the legislature." *Beach Commc'ns*, 508 U.S. at 314-15; *see also United States v. O'Brien*, 391 U.S. 367, 383 (1968) ("It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.").

Indeed, it is impossible to identify a single or predominant motivation for most pieces of legislation. *See Palmer v. Thompson*, 403 U.S. 217, 224 (1971) ("[I]t is extremely difficult for a court to ascertain the motivation, or collection of different motivations, that lie behind a legislative enactment."). This is particularly true for voter-enacted measures like those at issue here.[4] Voters, like legislators, are in-

[4] *See Clarke v. City of Cincinnati*, 40 F.3d 807, 815 (6th Cir. 1994) (discussing "the difficulty of ascertaining what motivated" the voters who approved a popularly enacted law) (internal quotation marks omitted); *S. Alameda Spanish Speaking Org. v. City of Union City, Cal.*, 424 F.2d 291, 295 (9th Cir. 1970) (divining "the true motive" of the voters on a topic that implicates competing "social values" would require "a probing of the private attitudes of the voters," which "would entail an intolerable invasion of . . . privacy").

fluenced by a bewildering array of thoughts, interests, priorities, and pressures, all of which "mak[e] it impossible to pin down any one consideration . . . as motivating them." *DeBoer v. Snyder*, 772 F.3d 388, 409 (6th Cir. 2014). It is simply not feasible for judges to discern what was in the minds of the electorate.

In any event, under any fair reading of our Nation's history, state laws defining marriage as the union of a man and a woman are not plagued by impermissible animus. They merely "formalized a definition that every State had employed for almost all of American history, and [they] did so in a province the States had always dominated." *Bishop v. Smith*, 760 F.3d 1070, 1109 (10th Cir. 2014) (Holmes, J., concurring). As this Court recognized in *Windsor*, until very recently, "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." *Windsor*, 133 S. Ct. at 2689.

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Petitioners say they are applying rational basis review, but they are really arguing a form of heightened scrutiny in an attempt to force "the party seeking to uphold [the challenged laws]"—namely, the government—to "carry the burden" of demonstrating their constitutionality. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982). Petitioners reformulate the States' interest to avoid the biologically irreducible point that recognizing a same-sex marriage does not link children with both of their biological parents. Similarly, Petitioners' arguments about

underinclusiveness, overinclusiveness, empirical evidence, and balancing all bear the classic hallmarks of heightened scrutiny. *See Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 883 (1990) (characterizing as a "balancing test" the strict-scrutiny analysis that applies to some free-exercise claims). Their briefs thus implicitly concede that man-woman marriage laws survive real rational-basis review.

III. Accepting Petitioners' Rational-Basis Arguments Would Have Far-Reaching Effects.

Adopting Petitioners' invitation to push rational-basis review far beyond its deferential parameters would require this Court to ignore the democratic and liberty-protecting principles that form the basis of those constraints. More specifically, Petitioners' view of the law would "give[ ] the federal courts . . . power to impose upon the States their views of what constitutes wise . . . social policy." *Dandridge v. Williams*, 397 U.S. 471, 485-86 (1970). That unwarranted shift in government power threatens to override important federalism principles, reduce individual liberty, and subvert the democratic process.

A. Petitioners' Form of Rational-Basis Review Threatens a Host of Unrelated State Policies.

Embracing Petitioners' rational-basis arguments would render constitutionally suspect a host of unrelated state laws that afford government benefits or impose government costs on some (but not all) citizens.

For example, Alabama (like many other States) prohibits age discrimination in hiring, firing, compensation, and other terms of employment, but it exempts employers with fewer than 20 employees. *Compare* Ala. Code § 25-1-20(2), *with* Cal. Gov't Code § 12926(d) (excluding from the State's employment-discrimination prohibition employers with less than five employees). Although this exemption is a rational means of insulating small businesses from additional economic burdens, the State would be hard pressed, under Petitioners' intensified version of rational-basis review, to adequately justify the exact line it has drawn. For what persuasive justification does the State have for believing that a 20-employee business implicates the government objectives in a materially different way than a 19-employee business? And how would the State justify "harming" every small-business employee who is denied the benefit?

Similarly, Petitioners' probing version of rational-basis review threatens: (1) means-tested tax-credit programs that cut off eligibility at a certain level of income, *see, e.g.*, Ala. Code § 16-6D-4(2) (providing a means-tested tax-credit scholarship program for eligible students); Minn. Stat. § 290.0671 (providing a means-tested refundable tax credit for "working famil[ies]"); and (2) historic-preservation laws that draw a line around a particular historic area and impose preservation requirements on property owners, *see, e.g.*, Ala. Code §§ 11-68-1 *et seq.*; Ariz. Rev. Stat. §§ 41-861 *et seq.* Moreover, many other laws in areas of traditional state concern would also become ripe targets for litigation

if Plaintiffs' view of rational-basis analysis were to prevail.

B. Petitioners' Form of Rational-Basis Review Undermines the Democratic Process.

A heightened form of rational-basis review undermines the democratic process. The deference of the rational-basis inquiry reflects that the legitimacy of American law derives from its connection to the will of the people as expressed through their elected representatives. *See Bond v. United States*, 131 S. Ct. 2355, 2364 (2011) (noting that "all governmental powers are derived" from the people). And it recognizes that most contentious social and economic issues should be resolved by that process. Here, the people of many States, through direct democracy, have exercised their freedom to "shap[e] the destiny of their own times" on marriage. *Windsor*, 133 S. Ct. at 2692. In affirming the man-woman definition, they concluded that the traditional definition would best serve their communities. The Court should uphold their right to do this.

When the Court invokes a suspect class or fundamental right to overturn a democratically enacted policy, it appeals to foundational principles that are, necessarily, more important than the voters' countervailing policy views. Not so when the Court cannot tie its decision to a deep-rooted constitutional principle. The kind of rational-basis review that Petitioners propose—without regard to fundamental rights or suspect classes—would come at a cost to

the liberty of Americans to choose their destiny through the ballot box instead of the courtroom.

CONCLUSION

The Court should affirm the court of appeals.

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