No. 14-136

In the Supreme Court of the United States

SALLY HOWE SMITH, IN HER OFFICIAL CAPACITY AS COURT CLERK FOR TULSA COUNTY, OKLAHOMA,
Petitioner,

v.

MARY BISHOP, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF MASSACHUSETTS, CALIFORNIA, CONNECTICUT, DELAWARE, HAWAII, ILLINOIS, IOWA, MAINE, MARYLAND, NEW MEXICO, NEW YORK, OREGON, PENNSYLVANIA, VERMONT, AND WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF *AMICI CURIAE*

Amici States Massachusetts, California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, New Mexico, New York, Oregon, Pennsylvania, Vermont, and Washington file this brief to urge the Court to grant the petition filed by Sally Howe Smith (No. 14-136) as a matter of right pursuant to Supreme Court Rule 37.4.[1] Although we do not agree on the merits with those who defend bans on marriage between same-sex couples, we do agree that the time has come for the Court to resolve this issue on a nationwide basis.

The *Amici* States have a compelling interest in ensuring that all citizens have equal opportunity to participate in civic society. To that end, each of the *Amici* States has pursued efforts to eliminate invidious discrimination, including that based on sexual orientation. Most have laws prohibiting discrimination in employment, housing, education, and the provision of government services and benefits. In addition, each has eliminated restrictions against gay men and lesbians from serving as foster parents or adopting children, and has prohibited the use of sexual orientation as a basis for denying custody or visitation. Many *Amici* States have ended the exclusion of same-sex couples from civil marriage. Others have ceased to defend their exclusionary marriage laws.

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[1] In accordance with Supreme Court Rule 37.2(a), counsel of record for all parties received notice at least ten days prior to the due date of *amici curiae's* intention to file this brief.

The *Amici* States file this brief based on our shared belief that marriage equality advances many important governmental interests, as well as our shared interest in guarding against the evils of discrimination. In our experience, discrimination inflicts profound harm on individuals, communities, and society overall, especially when codified into law and affirmed by courts. That harm is not contained within the borders of States with exclusionary marriage laws. The lives of our residents are affected by the refusal to honor their marriages, and the unequal treatment of same-sex relationships demeans gay and lesbian couples nationwide.

SUMMARY OF ARGUMENT

The time has come to end the exclusion of same-sex couples from the institution of marriage. Twenty jurisdictions currently permit same-sex couples to marry, and they contain nearly half of the Nation's population.[2] Some estimates suggest that as many as 200,000 same-sex couples have already wed in the United States.[3] Yet many of these couples experience few, if any, of the benefits, protections, or obligations

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[2] These jurisdictions are California, Connecticut, Delaware, the District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington.

[3] *See, e.g.,* Steven Petrow, *Changing Society Through the Etiquette of Same-Sex Weddings*, N.Y. Times, June 24, 2013, http://www.nytimes.com/2013/06/24/booming/changing-society-through-the-etiquette-of-same-sex-weddings.html?pagewanted= all (approximately 200,000 same-sex unions as of 2013).

that flow from civil marriage, because they reside within the thirty-one States that currently ban such unions. Thousands of other couples anxiously await the chance to wed the partner of their choosing in their home States.

The Court should settle this important issue to ensure equal access to marriage because the continued exclusion of gay and lesbian couples from the institution of marriage is unconstitutional and the harm suffered by these couples and their families is significant. Marriage is a core organizing feature of our civic society, and the categorical exclusion of same-sex couples demotes them to the type of second-class status that our Constitution does not permit. Same-sex couples and their families are harmed legally, economically, and socially by being denied access to critical rights ranging from intestate inheritance to guaranteed access to healthcare benefits to joint filing of tax returns. They also suffer physical and psychological harm as a result of their second-class status.

In addition to the unconstitutional denial of rights suffered by same-sex couples and their families, there are practical considerations that warrant the Court's intervention. The legal uncertainties attending marriage between couples of the same sex—a concern unknown to other married couples—affect important life decisions about jobs, education, and other personal matters whenever they involve the possibility of moving or traveling out of State. These inconsistencies are a significant concern for the *Amici* States and our residents and can be resolved only if the Court

intervenes to protect the right of same-sex couples to marry in *all* States.

Finally, the argument that the debate over legal recognition of marriages between same-sex couples should be allowed to continue in state legislatures and popular elections ignores the fundamental nature of the right at issue and unfairly minimizes the deprivation that same-sex couples and their families suffer. Moreover, the consequences of permitting same-sex couples to marry are well understood in those States that have embraced marriage equality. Ten years ago, same-sex couples were permitted to wed for the first time in the United States. While that historic moment reflected a significant advance toward equality for gay men and lesbians, it did not fundamentally change the institution of marriage. To the contrary, including same-sex couples has strengthened the institution and benefitted individuals, families, and communities. After a decade of experience with marriage equality, it is clear that there is no need for further "experimentation."

Accordingly, we join in asking the Court to grant certiorari in order to end the unjustified and unconstitutional discrimination that millions of Americans continue to suffer as a result of the exclusion of same-sex couples and their families from marriage.

ARGUMENT

I. THE SUBSTANTIAL DEPRIVATION THAT RESULTS FROM EXCLUDING SAME-SEX COUPLES AND THEIR FAMILIES FROM MARRIAGE MERITS THE COURT'S INTERVENTION

Although the regulation of civil marriage has traditionally, and properly, been left to the States, this Court also has played an important role in protecting the basic rights of individuals to enter (and even exit) marriage. *See Turner v. Safley*, 482 U.S. 78 (1987) (protecting the right of inmates to marry); *Zablocki v. Redhail*, 434 U.S. 374 (1978) (protecting the right of persons with child support obligations to marry); *Boddie v. Connecticut*, 401 U.S. 371 (1971) (protecting the right of indigent spouses to obtain a divorce); *Loving v. Virginia*, 388 U.S. 1 (1967) (protecting the right of interracial couples to marry). Indeed, it is settled law that state marriage restrictions are subject to constitutional guarantees of due process and equal protection. *United States v. Windsor*, 133 S. Ct. 2675, 2691 (2013) ("State laws defining and regulating marriage, of course, must respect the constitutional rights of persons."). As set forth below, the substantial—and unconstitutional—deprivation that results from state laws that categorically exclude same-sex couples and their children from the institution of marriage merits the Court's intervention once again.

A. Marriage Is At The Center Of A Vast Framework Of State And Federal Laws

As numerous state and federal courts have recognized, the institution of civil marriage serves as a core organizing feature of civic life. Significant legal, economic, and social benefits and protections are exclusively reserved for married couples and their families. *See, e.g.*, *Wolf v. Walker*, 986 F. Supp. 2d 982, 987 (W.D. Wis. 2014) ("[C]ountless government benefits are tied to marriage, as are many responsibilities . . . [and] these practical concerns are . . . part of the reason that marriage is exalted as a privileged civic status."); *Latta v. Otter*, -- F. Supp. 2d -- (D. Idaho May 13, 2014) ("From the deathbed to the tax form, property rights to parental rights, the witness stand to the probate court, the legal status of 'spouse' provides unique and undeniably important protections."); *Griego v. Oliver*, 316 P.3d 865, 888 (N.M. 2013) ("Innumerable statutory benefits and protections inure to the benefit of a married couple."); *Varnum v. Brien*, 763 N.W.2d 862, 873 (Iowa 2009) ("Other obstacles presented by the inability to enter into a civil marriage include numerous nongovernmental benefits of marriage that are so common in daily life they often go unnoticed, such as something so simple as spousal health club memberships."); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 955 (Mass. 2003) ("The benefits accessible only by way of a marriage license are enormous, touching nearly every aspect of life and death."). Indeed, it would be difficult to overestimate the role that the institution of marriage plays in modern civic life. The disparity that results when an entire class of citizens is categorically excluded from marriage is therefore substantial.

Most, if not all, States have hundreds of laws relating to marriage or marital benefits. In addition, more than 1,000 federal laws address marital or spousal status. The many benefits, protections, and obligations enshrined in these laws touch upon nearly every aspect of life. Civil marriage confers numerous property rights and protections on spouses, including tenancy by the entirety, homestead protections, inheritance in the absence of a will, entitlement to earned wages of a deceased spouse, the right to administer a deceased spouse's estate, and eligibility to continue a deceased spouse's business. Spouses also have rights to share in a variety of employment-related benefits, including health insurance, retirement and pension benefits, and family and medical leave. Married couples also can file joint income tax returns and take advantage of special deductions, credits, and exemptions.

Spouses also qualify for a variety of unique legal protections, including evidentiary rights in civil and criminal cases, and the right to pursue wrongful death and loss of consortium claims. Married couples also benefit from the presumption of legitimacy and parentage of children born into the marriage, and the presumed authority to make medical and other sensitive decisions for an incompetent or disabled spouse. When married couples separate or divorce, they benefit from predictable (and enforceable) rules regarding support, alimony, and the division of property.

The institution of marriage also benefits children in a variety of tangible and intangible ways, both during and after marriage:

> [M]arital children reap a measure of family stability and economic security based on their parents' legally privileged status that is largely inaccessible, or not as readily accessible, to nonmarital children. Some of these benefits are social, such as the enhanced approval that still attends the status of being a marital child. Others are material, such as the greater ease of access to family-based State and Federal benefits that attend the presumptions of one's parentage.

Goodridge, 798 N.E.2d at 956-57. Children whose parents are married simply have a better chance of living healthy, financially secure, and stable lives. In the event of separation or divorce, the children of married couples are also protected by predictable rules regarding custody, visitation, support, and removal to another State.

B. Denying Same-Sex Couples Access To Marriage Creates Second-Class Families

States that refuse to permit same-sex couples to marry create two classes of families: those who have access to the far-reaching benefits and protections that civil marriage affords, and those who do not. As discussed above, the effects of second-class status are easy to identify and arise in almost all aspects of life. In certain States, some or all of the rights and responsibilities of marriage are available to same-sex couples in the form of domestic partnerships or civil unions, but not the privileged status of being married. Even then, the disparity is significant and causes real harm.

Second-class status affects nearly every aspect of the wellbeing of gay and lesbian couples and their children, including their mental and physical health. It is well-established that married people enjoy greater physical and psychological health and greater economic prosperity than unmarried persons. In addition, recent studies indicate that gay men and lesbians benefit when marriage is made available to them.[4] Children also benefit when their parents can marry and are harmed by being denied the privileged status that marriage confers. As this Court recently recognized:

> The differentiation [between same-sex and different-sex relationships] demeans the couple . . . [a]nd it humiliates tens of thousands of children now being raised by same-sex couples. [It] makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.

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[4] For example, one study reported that gay men and lesbians living in States with inclusive or protective policies are significantly less likely to suffer from psychiatric disorders than their counterparts living in States without such policies. Mark L. Hatzenbuehler, et al., *State-Level Policies and Psychiatric Morbidity in Lesbian, Gay, and Bisexual Populations*, 99(12) Am. J. Pub. Health 2275 (Dec. 2009). Another more recent study concluded that gay men experience a statistically significant decrease in medical care visits, mental health visits, and mental health care costs following the legalization of same-sex marriage. Mark L. Hatzenbuehler et al., *Effect of Same-Sex Marriage Laws on Health Care Use and Expenditures in Sexual Minority Men: A Quasi-Natural Experiment*, 102(2) Am. J. Pub. Health 285 (Feb. 2012).

Windsor, 133 S. Ct. at 2694 (citation omitted). Time and time again, same-sex couples and their families suffer the indignity of being reminded that, despite being united by an equally solemn commitment, they do not share the same status as neighbors and friends whose marriages are given legal effect.

In sum, civil marriage creates economic and health benefits, stabilizes households, forms legal bonds between parents and children, assigns providers to care for dependents, and facilitates property ownership and inheritance. Marriage thus provides stability for individuals, families, and the broader community. Accordingly, the *Amici* States—indeed all States—have a strong interest in encouraging and strengthening marriage because these private relationships assist in maintaining public order, health, and welfare. The significant denial of rights that results when same-sex couples and their families are categorically excluded from the institution of marriage (or their marriages are denied recognition) thus serves both to harm those families and to undermine broader governmental interests. That deprivation merits the Court's intervention.

II. THE LEGAL UNCERTAINTIES RESULTING FROM SOME STATES' REFUSAL TO HONOR THE MARRIAGES OF SAME-SEX COUPLES FURTHER MERIT THE COURT'S INTERVENTION

Married same-sex couples and their families reside throughout the country, in States that do and do not honor their marriages. The variation in state law creates a significant divide among families. For those couples that live in, move to, or even travel through

States that do not recognize their marriages, their lives are more complicated (and often more costly), their legal status is uncertain, and their families are left vulnerable. The problems created by some States' unconstitutional refusal to either allow or recognize marriages between same-sex couples merit the Court's intervention.

The thirty-one States that do not permit marriage between couples of the same sex have varying legal rules regarding these relationships. Three offer some rights and obligations for same-sex couples, while the remaining twenty-eight offer no protection or recognition.[5] Colorado and Nevada allow for civil unions or domestic partnerships with most (if not all) of the rights and protections of marriage. Wisconsin permits far more limited domestic partnerships. The others do not permit or recognize any type of relationship between same-sex couples. As a result, one's legal status may vary significantly from place to place. Consider a same-sex couple traveling across the country. That couple could undergo several status changes in one day, beginning in the morning as legal strangers, eating lunch as domestic partners, and concluding the night as a married couple. Other scenarios are equally convoluted. For example, what if only one spouse travels to a State that does not honor

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[5] Eight States (including Colorado and Nevada) have constitutional amendments prohibiting marriages between same-sex couples, while twenty States have constitutional amendments prohibiting all forms of legal relationships between them. Three States—Indiana, West Virginia, and Wyoming—have state statutes that restrict access to marriage.

his or her marriage? Does the spouse at home remain married while the traveling spouse does not?

As a further example, what happens to a married same-sex couple that wishes to divorce but has relocated to a State that does not honor its marriage in the first place? State courts have reached varying conclusions on whether they have jurisdiction to resolve such matters. *See, e.g., Christiansen v. Christiansen*, 253 P.3d 153 (Wyo. 2011) (finding jurisdiction); *In re Marriage of J.B. and H.B.*, 326 S.W.3d 654 (Tex. App. 2010) (finding lack of jurisdiction). Though not a preferred outcome, divorce allows for an orderly dissolution of the union, divides marital assets, and can protect children by protecting the role of each parent. If this process is not available, both the spouses and their children are harmed. No other group of married couples suffers such indignity or confusion.[6]

The effects of this legal uncertainty are of great concern to the *Amici* States and our residents. Generally speaking, different-sex married couples do not worry about a change in status when they cross state lines. Once they are married, they stay married, wherever they may go. For same-sex couples, though, the potential change in legal status can prove a significant impediment to making important life decisions and to exercising their fundamental right to move between States. *See, e.g., Saenz v. Roe*, 526 U.S.

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[6] In Arkansas, Colorado, Indiana, Michigan, Utah, and Wisconsin, some couples have married but do not know whether their licenses are valid. The uncertain status of these particular marriages is yet another reason to grant the petition.

489, 498 (1999) ("[T]he 'constitutional right to travel from one State to another' is firmly embedded in our jurisprudence.") (citing *United States v. Guest*, 383 U.S. 745, 757 (1966)). A spouse in a same-sex marriage may turn down a new job or a promotion if it requires a transfer to a State that does not recognize his or her marriage. Same-sex spouses may decline to pursue educational opportunities for the same reason. In other circumstances, a sick parent or relative may require care in another State, but concern for loss of marital status and its attendant rights may dissuade individuals from relocating, potentially placing greater stress on other relatives or burdening the family's financial resources. These are not desirable outcomes for States or for individuals and families.[7]

Certainly this is not the first time in our Nation's history that marriage rules have differed among the States. In fact, some rules regarding consanguinity, age of consent, and recognition of common-law marriage continue to vary. But, there are fundamental differences between the legal uncertainties that currently attend marriages between same-sex couples and all other variations. It is exceedingly rare for so many marriages categorically to be denied recognition by so many States. In addition, we live in a uniquely fast-paced and highly mobile society, where people routinely (and easily) travel across state borders, frequently relocate for jobs or education, and often grow up, attend school, and begin careers in separate locations. The effects of the categorical exclusion of

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[7] In some circumstances, restricting the movements of same-sex couples and their families also harms business operations by stymieing the efficient allocation of human resources.

same-sex couples from marriage in some States are significant and felt across state lines. The impact of these exclusionary rules warrants the Court's intervention here, even if the lack of uniformity in state laws did not necessitate intervention in the past.

III. STATES DO NOT NEED MORE TIME TO "EXPERIMENT" WITH MARRIAGE EQUALITY OR STUDY ITS EFFECTS

Opponents of marriage between same-sex couples argue that the debate over legal recognition of same-sex relationships should be allowed to continue and that States should be permitted to serve as laboratories of experimentation. These arguments ignore the fundamental nature of the right at issue and unfairly minimize the deprivation that same-sex couples and their families suffer by their exclusion from the vast framework of protections, benefits, and obligations conferred by civil marriage. Moreover, marriage equality has been a reality for a decade and the evidence is clear: allowing same-sex couples to wed strengthens the institution of civil marriage.

As a preliminary matter, it is not true that there are two different and equally valid views of marriage being debated in this country. Though opponents of marriage equality sometimes characterize the debate in slightly different ways, they generally argue that popular views of marriage fall into "child centric" and "adult centric" categories. *See, e.g.*, Petition for Writ of Certiorari at 5, *Herbert v. Kitchen*, No. 14-124 (filed Aug. 5, 2014). In this dichotomy, the "child centric" view posits that the primary purpose of marriage is to channel the procreative potential of different-sex couples into a marital union to ensure that children are raised by

their biological parents. The supposed "adult centric" view of marriage, on the other hand, is concerned primarily with personal autonomy and the feelings and desires of adult spouses.

This argument presents a false choice. In all States, couples enter into marriage for similar reasons: to publicly commit their love to one another; to raise a family together; and to pool economic and other resources. When couples marry—wherever the ceremony may take place—they generally make the same types of vows: to honor, to cherish, and to care for one another in good times and bad. And, all States promote marriage because it furthers important governmental interests by creating economic and health benefits, stabilizing households, forming legal bonds between parents and children, assigning providers to care for dependents, and facilitating property ownership and inheritance. The universal nature of these interests is evidenced by the fact that all States confer the same basic benefits, protections, and obligations on married couples.

More importantly, the suggestion that equal access to a core legal and social institution should be preceded by continued debate or experimentation ignores the fundamental nature of the right at issue. It also unfairly minimizes the deprivation that same-sex couples and their families suffer by their exclusion. These cases are not about rules of eligibility for a single governmental benefit, or laws that differentiate between two similar groups in a regulated industry. *See*, *e.g.*, *Johnson v. Robison*, 415 U.S. 361 (1974); *FCC v. Beach Communications, Inc.*, 508 U.S. 307 (1993). These cases are about the right to access a core civic

institution that spans nearly every aspect of life and death. Hundreds of benefits, protections, and obligations—codified in both state and federal law—are completely unavailable to millions of Americans because of their sexual orientation. Simply put, these Americans are categorically ineligible to participate fully and equally in civic society.

Even if concern for the unintended consequences of permitting same-sex couples to marry were a legitimate consideration here, the Court need not worry that its intervention is being sought "too soon." Based on our collective experience, the *Amici* States can attest that marriage equality has invigorated the institution. After more than ten years of marriage equality, we understand its implications: more couples who love one another are free to marry; more children are able to enjoy the benefits and protections that attend their parents' marital relationship; more families enjoy the privileged status and security conferred by civil marriage; and more communities benefit from the stability marriage facilitates. The institution has not suffered or been fundamentally altered. Nor has marriage equality diminished the privileged status of marriage in our society.

It is time for marriage equality nationwide.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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