No. 14-1341

In the
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

APRIL DEBOER; JANE ROWSE, individually and as parent and next friend of N.D.-R, R.D.-R and J.D.-R, minors,

Plaintiffs-Appellees,

v.

RICHARD SNYDER, in his official capacity as Governor of the State of Michigan; BILL SCHUETTE, in his official capacity as Michigan Attorney General,

Defendants-Appellants.

Appeal from the United States District Court
Eastern District of Michigan, Southern Division
Honorable Bernard A. Friedman

BRIEF FOR MICHIGAN DEFENDANTS-APPELLANTS

Bill Schuette
Attorney General

Aaron D. Lindstrom
Solicitor General
Co-Counsel of Record
P.O. Box 30212
Lansing, MI 48909
(517) 373-1110
LindstromA@michigan.gov

Kristin M. Heyse
Assistant Attorney General
Co-Counsel of Record

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

The issue presented in this case is simple: was it rational for the people of Michigan to define marriage as between one man and one woman? But this issue is also exceptionally important. It is so important that the people of Michigan amended their constitution to resolve it. Because of the importance of the issue and of the gravity of the plaintiffs' requested relief—asking a federal court to overturn a democratically enacted state constitutional amendment—the people of Michigan respectfully request that the State be afforded the opportunity to present oral argument and to address any questions the Court might have about this issue.

JURISDICTIONAL STATEMENT

Because the plaintiffs in this case asserted federal questions under 42 U.S.C. § 1983 (Compl., RE 1, Page ID ## 2 & 5; Am. Compl., RE 38, Page ID ## 725, 728, & 732), the district court had jurisdiction over this case under 28 U.S.C. § 1331.

The district court issued its final order and judgment disposing of all of parties' claims on March 21, 2014. (Findings of Fact & Conclusions of Law (hereinafter "Conclusions"), RE 151, Page ID # 3974; Judgment, RE 152, Page ID # 3975.) The State defendants filed a timely notice of appeal that same day. (Notice of Appeal, RE 153, Page ID # 3976.)

STATEMENT OF ISSUE PRESENTED

Is it rational for the people of a State to define marriage as the union of one man and one woman?

INTRODUCTION

In 2004, the people of Michigan considered and debated how marriage should be defined. Exercising their basic democratic power to enact laws, they concluded that "[t]o secure and preserve the benefits of marriage for our society and for future generations of children," marriage in Michigan would continue to consist only of "the union of one man and one woman." MICH. CONST. art. I, § 25. This case presents a narrow question: was that decision rational?

It was. Reasonable people of good will can disagree about the definition of marriage. In preserving marriage as between a man and a woman, a reasonable voter might have thought that it is beneficial when children are raised in a home with both a mom and a dad. Another reasonable voter might have thought that this definition encourages those couples with the inherent ability to have children (i.e., opposite-sex couples) to enter into a committed, exclusive relationship, for the benefit of any children they might have. Or a reasonable voter, even one who supports same-sex relationships, might choose not to change a fundamental building block of society.

By reaffirming the definition of marriage that has always existed in Michigan, Michigan's voters did not disparage other relationships or deny the obvious point that same-sex couples can provide loving homes. The voters acknowledged, among many reasons, that marriage has always been linked to procreation, a biological reality that exists only in opposite-sex couples.

Striking down Michigan's constitutional amendment, the district court rejected all of these points as not just wrong, but irrational. It concluded that out of the 2.7 million Michigan citizens who voted for the amendment, not a single one had a rational reason for the vote. The district court's decision, to use Justice Kennedy's recent words, demeans democracy. It denies each of those voters the dignity of a meaningful vote, labels each with the stigma of irrationality, and treats Michigan's electorate as incapable of deciding this profound and sensitive issue.

This appeal is not about approval or disapproval of same-sex relationships or sexual orientation. Nor is this appeal about a gay or lesbian individual's ability to be a parent. This case is not about single moms' and dads' ability to raise children. As a society, we wish that all

children had loving parents, no matter what their sexual orientation may be.

This appeal is also not about whether there is a fundamental right to same-sex marriage. The district court did not reach that issue, correctly recognizing that marriage is a topic left to the people to decide at the ballot box. Out of respect for democracy and to be consistent with the restrained and limited role of a federal court judging the rationality of a legislative choice left to the people, this Court should reverse.

STATEMENT OF FACTS AND PROCEEDINGS

I. The history of marriage in Michigan

Michigan's statutory marriage law dates back to 1846. RS 1846, Ch. 83, §§ 1–18. To be married, the statutes required "that the parties solemnly declare . . . that they take each other as husband and wife." RS 1846, Ch. 83, § 9. The people of Michigan reaffirmed this and other limitations in 1996: "Marriage is inherently a unique relationship between a man and a woman." MICH. COMP. LAWS § 551.1. As the statutes explain, "[a]s 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." *Id*.

In 2004, the people of Michigan reaffirmed this understanding of marriage by enacting a constitutional amendment defining marriage: "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. I, § 25.

II. The plaintiffs

April DeBoer and Jayne Rowse are an unmarried same-sex couple residing in Hazel Park, Michigan. (Conclusions, RE 151, Page ID # 3945.) They have lived together for eight years. (*Id*.) Both are nurses and state-licensed foster parents. (*Id*.) Each has adopted children with special medical needs: DeBoer has adopted child R, and Rowse has adopted both N and J. (*Id*.)

III. The lawsuit and trial proceedings

This case began as a challenge to Michigan's adoption laws, with the plaintiffs not even challenging Michigan's marriage amendment.

(Compl., RE 1, Page ID ## 5–7.) But when the district court concluded that Michigan's adoption laws had not caused any injury to the plaintiffs, the court did not dismiss the complaint for lack of standing. Instead—and on its own initiative—it "invit[ed] plaintiffs to seek leave to amend their complaint to include a challenge to [Michigan's marriage amendment]." (Conclusions, RE 151, Page ID # 3946.)

The plaintiffs accepted the court's invitation, adding a second count to their complaint that challenged the marriage amendment as violating both due process and equal protection. (Am. Compl., RE 38, Page ID # 730–33.) When the State moved to dismiss the amended complaint, the district court held a hearing on the motion at a Wayne State University Law School auditorium and then later denied dismissal. (Notice of Hr'g, RE 50, Page ID # 924; Op., RE 54, Page ID # 935.)

Next, the court denied the parties' cross motions for summary judgment. (Op. & Order, RE 89, Page ID # 2003.) The court recognized both that "[t]he underlying facts are not in dispute" and that under rational-basis review " '[t]he government has no obligation to produce evidence to support the rationality of its . . . [imposed] classifications

and may rely entirely on rational speculation unsupported by any evidence or empirical data.' " (Op. & Order, RE 89, Page ID ## 1997 & 2000 (quoting *Hadix v. Johnson*, 230 F.3d 840, 843 (6th Cir. 2000)). The court nonetheless concluded that "a triable issue of fact exists regarding whether the alleged rationales for the [Michigan marriage amendment] serve a legitimate state interest." (Op. & Order RE 89, Page ID # 2000).

The plaintiffs moved to bifurcate the trial. In Phase 1, the trial would focus on whether the State has a rational basis for defining marriage as the union of one man and one woman; if the State won on rational-basis review, then in Phase 2 the district court would consider whether heightened scrutiny should apply because the plaintiffs belonged to a quasi-suspect or suspect class. (Pls.' Mot. to Bifurcate, RE 100, Page ID ## 2029, 2027.) The district court granted the motion to bifurcate (Order, RE 105, Page ID # 2070), despite the fact—which it later expressly acknowledged—that "governing Sixth Circuit precedent does not consider gay, lesbian, bisexual or transgender persons to constitute suspect or quasi-suspect classes." (Conclusions, RE 151, Page ID # 3962.)

Before trial, the plaintiffs filed a motion in limine under *Daubert* to bar testimony by Sherif Girgis. The State responded by pointing out Girgis's qualifications—which include having his book on the definition of marriage cited by two U.S. Supreme Court justices in *United States v. Windsor*, 133 S. Ct. 2675, 2715, 2717 (2013) (Alito and Thomas, JJ., dissenting)—and by highlighting the relevance of his testimony, which would address philosophical and policy rationales for selecting the definition of marriage that Michigan's voters chose. (State Defs.' Resp., RE 134, Page ID ## 2682, 2688–91, & 2692–95.) The district court denied the plaintiffs' motion to exclude Girgis a week before the trial.

The trial on whether the voters of Michigan had a rational basis for defining marriage as between one man and one woman took eight days and focused on expert witnesses on social science. On the fifth day of trial, when it was time for the State to put on Girgis as its first witness, the district court reversed course and refused to qualify Girgis as an expert. (3/3/2014 Trial Tr., RE 157 at 37.)[1]

[1] Page ID numbers for the trial transcripts are not yet available because the transcripts will not be released until June.

IV. The district court's decision

The district court issued its opinion on Friday, March 21, 2014. Treating the question of rational basis as hinging on factual issues that could be resolved in a courtroom, the court concluded that the testimony of every one of the plaintiffs' expert witnesses was credible and gave weight to each. (Conclusions, RE 151, Page ID ## 3948 (Brodzinsky, a psychologist), 3950 (Rosenfeld, a sociologist), 3952 (Sankaran, a law professor), 3953 (Cott, a historian), & 3954 (Brown, a county clerk).) In contrast, the court decided that the testimony of every one of the State's witnesses was not credible and not entitled to any weight. (Conclusions, RE 151, Page ID ## 3956 (Regnerus, a sociologist), 3960–61 (Marks, a family studies professor, Price, an economist, and Allen, an economist).) The court characterized these experts as "clearly represent[ing] a fringe viewpoint that is rejected by the vast majority of their colleagues across a variety of social science fields." (Conclusions, RE 151, Page ID # 3960.) The court did, however, recognize that it was not possible to make any finding that the voters acted out of animus: "Since the Court is unable discern the intentions of each individual voter who cast their ballot in favor of the measure, it . . . cannot ascribe

such motivations to the approximately 2.7 million voters who approved the measure." (Conclusions, RE 151, Page ID # 3969.)

In its conclusions of law, the district court recognized that it was supposed to apply "the most deferential level of scrutiny, i.e., rational basis review," a level of review under which the government has " 'no obligation to produce evidence' " and under which the plaintiff can prevail only if " 'the government's actions were irrational.' " (Conclusions, RE 151, Page ID # 3963.) It then concluded that none of the State's suggestions for why voters might have enacted the amendment provided a rational basis for the amendment. (Conclusions, RE 151, Page ID # 3964.) Because it concluded the amendment failed rational-basis review, the court did not reach a decision whether the amendment "burdens the exercise of a fundamental right under the Due Process Clause" or whether "classifications based on sexual orientation are deserving of heightened scrutiny." (Conclusions, RE 151, Page ID ## 3961–62.)

The district court did not grant the State's request for a stay, even though the Supreme Court had already reversed a district court and the Tenth Circuit for denying a stay in similar circumstances. Order,

Herbert v. Kitchen, No. 13A687 (U.S. Jan. 6, 2014). As a result, county clerks across Michigan issued marriage licenses to more than 300 individuals on Saturday, March 22, 2014, the day after the opinion, until this Court intervened by granting the State's emergency motion for a stay pending appeal. (Order, RE 156, Page ID # 3982; Order, RE 162, Page ID # 4214.)

STANDARD OF REVIEW

The district court's conclusions of law are reviewed de novo. *Dillon v. Cobra Power Corp.*, 560 F.3d 591, 599 (6th Cir. 2009). While findings of adjudicative fact can be overturned only if they are clearly erroneous, *id.*, that standard is beside the point here because "[t]he underlying facts" in this case "are not in dispute." (Op. & Order, RE 89, Page ID ## 1997.) Instead, the only disputes at issue in this case concern questions of legislative fact.

There are "fundamental differences between adjudicative facts and legislative facts." FED. R. EVID. 201 advisory committee's note. "Adjudicative facts are simply the facts of the particular case." *Id.* "Legislative facts, on the other hand, are those which have relevance to legal reasoning and the lawmaking process, whether in the formulation

of a legal principle or ruling by a judge or court or in the enactment of a legislative body." *Id.*; *see also Dayco Corp. v. FTC*, 362 F.2d 180, 186 (6th Cir. 1966); *Langevin v. Chenango Court, Inc.*, 447 F.2d 296, 300 (2d Cir. 1971) (Friendly, C.J.) ("Adjudicative facts" are "facts about the parties and their activities, businesses, and properties, as distinguished from general facts which help the tribunal decide questions of law and policy and discretion.") (internal quotation marks and citation omitted).

Because of these differences, legislative facts are reviewed de novo. *See Lockhart v. McCree*, 476 U.S. 162, 168 n.3, 169 (1986) ("We are far from persuaded, however, that the 'clearly erroneous' standard of Rule 52(a) applies to the kind of 'legislative' facts at issue here."); *see generally Dunagin v. City of Oxford, Miss.*, 718 F.2d 738, 748–49 n.8 (5th Cir. 1983) (en banc) (plurality opinion of Reavley, J.); *see also*, *e.g.*, *United States v. Singleterry*, 29 F.3d 733, 740 (1st Cir. 1994) ("The clear error standard does not apply, however, when the fact-finding at issue concerns 'legislative,' as opposed to 'historical' facts."); *In re Asbestos Litig.*, 829 F.2d 1233, 1252 n.11 (3d Cir. 1987); *A Woman's Choice—E. Side Women's Clinic v. Newman*, 305 F.3d 684, 688 (7th Cir. 2002) (Easterbrook, J.). That is why "[t]rials are seldom desirable . . . on

legislative facts." *Drummond v. Fulton Cnty. Dep't of Family & Children's Servs.*, 563 F.2d 1200, 1210 (5th Cir. 1977).

SUMMARY OF ARGUMENT

This case is directly controlled by the U.S. Supreme Court's summary affirmance in *Baker v. Nelson*, 409 U.S. 810 (1972). Because that case addressed the precise issue presented here and has not been overturned by the U.S. Supreme Court, this Court has an obligation, as an intermediate appellate court, to follow that decision.

Wholly aside from *Baker*, this Court should recognize that its role in reviewing this sort of policy question is quite limited. Given that the district court's decision does not rest on the presence of a fundamental right that is enshrined in the Constitution or that has such deep roots in our history that it must be recognized under the substantive-due-process doctrine, this issue is a question properly left to the people through the democratic process. And as the U.S. Supreme Court recently emphasized in *Schuette v. BAMN*, 572 U.S. ___ (2014) (plurality by Kennedy, J.), our system of democracy is based on the premise that the people are capable of deciding even sensitive issues on "decent and rational grounds." *Id.*, slip op. at 17. As the Supreme

Court has also recognized (repeatedly), this particular issue—marriage—is an issue left to the people at the state level. This local control affords greater liberty to more people, as different States could choose to adopt different marriage definitions.

The only question at issue, then, is whether any conceivable reason supports the people's decision to retain the definition of marriage. Under the governing standards for rational-basis review, the people's decision must be given the benefit of the doubt—it must be upheld if their policy choice is at least debatable, and even if it is under-inclusive or over-inclusive (or both).

Defining marriage as between one man and one woman satisfies this test. The State has a legitimate interest in marriage precisely because of marriage's inherent connection to children. The vast majority of children born in Michigan (and the United States and the world) are born as a result of the sexual union of a man and a woman. Promoting marriage as between a man and a woman thus recognizes that every child should have the opportunity to know and have a relationship with his or her biological mother and father, and it increases the likelihood that the most common type of procreation will

occur in a long-term, committed relationship. It was reasonable for Michigan voters to think that this is a beneficial setting for children, and thus to link marriage to procreation—the biological fact that every child has a mother and a father.

Marriage has been a basic building block of societies all around the world across the span of history. Many voters, even those voters who may support same-sex relationships, may not have wished to alter the definition of marriage between a man and a woman.

The district court rejected these modest rationales by failing to properly apply rational-basis review. Instead of following the Supreme Court's guidance that rational bases are not subject to courtroom fact finding, the court required a trial and purported to resolve these important legislative policy decisions as if they were mere credibility determinations. Instead of recognizing that legislative decisions inherently involve generalizations, the district court departed from proper rational-basis review by rejecting plausible arguments on the grounds that the people's means (its definition of marriage) were not perfectly tailored to its desired end (promoting what is, in general, the ideal setting for raising children).

In the end, reasonable people could disagree about altering marriage to include same-sex couples. That is enough to satisfy rational-basis review. This Court should reverse.

ARGUMENT

I. The Supreme Court's decision in *Baker v. Nelson* controls this Court's decision.

The plaintiffs' equal-protection challenge fails as a matter of law for a simple reason: the U.S. Supreme Court rejected these same challenges decades ago, in *Baker v. Nelson*, 409 U.S. 810 (1972). In *Baker*, the plaintiffs asserted, just as here, "that the right to marry without regard to the sex of the parties is a fundamental right of all persons and that restricting marriage to only couples of the opposite sex is irrational and invidiously discriminatory." *Baker v. Nelson*, 291 Minn. 310, 312 (1971). The Minnesota Supreme Court rejected both of these contentions, and the U.S. Supreme Court summarily affirmed "for want of a substantial federal question." *Baker*, 409 U.S. at 810.

While this might not be the most exciting ground on which to resolve this case, it has other virtues: it is simple, legally correct, and respectful of this Court's modest role as an intermediate appellate

court. The Supreme Court has made clear that its dismissals for want of a substantial federal question "prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). Because *Baker* presented and necessarily decided the precise issues present in this case, this Court is bound by *Baker*.

The Supreme Court's decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013), did not overturn *Baker* and does not grant this Court the authority to disregard *Baker*. As this Court has recognized when sitting en banc, "the 'exhilarating opportunity' to anticipate the overruling of Supreme Court precedent should be resisted, because the Court generally bears responsibility for determining when its own cases have been overruled by later decisions." *United States v. Koch*, 383 F.3d 436, 439 (6th Cir. 2004) (en banc), *rev'd on other grounds*, 544 U.S. 995 (2005). The Supreme Court has been quite clear on this point: "We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. Rather, lower courts should follow the case which directly controls, leaving to this Court the prerogative of overruling its own

decisions." *Agostini v. Felton*, 521 U.S. 203, 237 (1997); *Song v. City of Elyria, Ohio*, 985 F.2d 840, 843 (6th Cir. 1993) ("summary dispositions have the same precedent[i]al value as other holdings and are binding on the lower courts until the Supreme Court decides otherwise").

II. The definition of marriage is a policy question to be decided by the people through the democratic process.

A. The people's right to vote reaches this issue, because there is no fundamental right to same-sex marriage.

"[F]or reasons too self-evident to warrant amplification here, we have often reiterated that voting is of the most fundamental significance under our constitutional structure." *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979); *see also Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (describing voting as "a fundamental political right, because [it is] preservative of all rights"). The right to vote, exercised indirectly by electing representatives or directly through ballot initiatives and referenda, is the fundamental right to govern ourselves. It is "a fundamental right held not just by one person but by all in common." *Schuette v. BAMN*, slip op. 16 (plurality opinion by Kennedy, J.).

We as a country have, in specific areas, tied our own hands by removing certain issues from the political process. Some rights are so fundamental that we have chosen to enshrine them in the Bill of Rights. *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."). Other rights are so fundamental—so "objectively, 'deeply rooted in this Nation's history and tradition' " and "so rooted in the traditions and conscience of our people as to be ranked as fundamental" that they are " 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed,' " *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (citations omitted)—that they too cannot be impaired by Congress or by a state.

The issue of same-sex marriage is not such a topic. It is not a topic the people have expressly addressed in the U.S. Constitution, thereby resolving it through the democratic process, nor is it a right deeply rooted in our Nation's history and tradition. To the contrary, as

the Supreme Court recognized in *Windsor*, "[i]t seems fair to conclude that, until recent years, many citizens had not even considered the possibility that two persons of the same sex might" marry. 133 S. Ct. at 2689; *accord*, 133 S. Ct. at 2715 (Alito, J., dissenting) ("It is beyond dispute that the right to same-sex marriage is not deeply rooted in this Nation's history and tradition."); *see also Hernandez v. Robles*, 7 N.Y.3d 338, 361 (2006) (plurality) ("Until a few decades ago, it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex."). And the reason that rights must "be deeply rooted in our legal tradition" to be recognized under a substantive-due-process theory is to protect democracy: "to rein in" the necessarily "subjective elements" of substantive-due-process review, *Glucksberg*, 521 U.S. at 722, so that rights will be recognized through the democratic process, rather than being created by federal courts. *See also id.* at 723 (rejecting the argument that assisted suicide was a fundamental right because accepting that proposition would require "revers[ing] centuries of legal doctrine and practice, and strik[ing] down the considered policy choice of almost every State").

Nor is it true that issues touching on sexual orientation are entitled to some higher level of scrutiny. The Supreme Court has never announced that sexual orientation creates a suspect class; quite the opposite, the Supreme Court has applied rational-basis review to sexual-orientation issues. *E.g.*, *Romer v. Evans*, 517 U.S. 620, 631 (1996) ("[I]f a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end."). This Court has properly followed the Supreme Court's lead by concluding that "homosexuality is not a suspect class," *Scarbrough v. Morgan County Bd. of Educ.*, 470 F.3d 250, 261 (6th Cir. 2006); *Davis v. Prison Health Servs.*, 679 F.3d 433, 438 (6th Cir. 2012)—decisions that are binding on this panel. Nine other circuits have reached the same conclusion. *E.g.*, *Cook v. Gates*, 528 F.3d 42, 61 (1st Cir. 2008); *Thomasson v. Perry*, 80 F.3d 915, 928 (4th Cir. 1996); *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004); *Peterson v. Bodlovich*, 215 F.3d 1330 (7th Cir. 2000); *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 866–67 (8th Cir. 2006); *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1113–14, 1113 n.9 (10th Cir. 2008); *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358

F.3d 804, 818 (11th Cir. 2004); *Steffan v. Perry*, 41 F.3d 677, 684 n.3 (D.C. Cir. 1994) (en banc); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989).

While same-sex marriage thus is not a fundamental right and does not involve a suspect class, it undeniably is an issue of great importance and sensitivity to many people. But the fact that this is a sensitive topic does not allow courts to "disempower the voters from choosing which path to follow." *Schuette v. BAMN*, 572 U.S. ___, slip op. 13 (2014) (plurality). As Justice Kennedy recently explained, "[i]t is demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds." *Id.* at 17 (discussing race-based preferences in university admissions). "Democracy does not presume that some subjects are either too divisive or too profound for public debate." *Id.* at 18. Quite the opposite, "[o]ur constitutional system embraces, too, the right of citizens to . . . act in concert to try to shape the course of their own times." *Id.* at 15–16. It would be "inconsistent with the underlying premises of a responsible, functioning democracy" to accept the argument that "a difficult question of public policy must be taken from

the reach of the voters, and thus removed from the realm of public discussion, dialogue, and debate in an election campaign." *Id.* at 16; *see also Washington v. Glucksberg*, 521 U.S. 702, 735 (1997) ("Our holding [regarding assisted suicide] permits this debate to continue, as it should in a democratic society.").

These principles provide an important framework for this Court's consideration of this case. The Supreme Court "has long held that 'a classification neither involving fundamental rights nor proceeding along suspect lines . . . cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.' " *Armour v. City of Indianapolis*, *Ind.*, 132 S. Ct. 2073, 2080 (2012) (quoting *Heller v. Doe*, 509 U.S. 312, 319–320 (1993)).

Here, the district court did not hold that same-sex marriage is a fundamental right or that it implicates a suspect class. Quite the opposite, it correctly assumed that same-sex marriage is an issue the people may address through legislation. (Conclusions, RE 151, Page ID # 3961 ("[T]he Court finds it unnecessary to address whether the [marriage amendment] burdens the exercise of a fundamental right

under the Due Process Clause.").) This part of the district court's approach was consistent with the fact that domestic-relations laws have always been a topic left to the people at the state level.

B. As *Windsor* reaffirmed, the definition of marriage is left to voters at the state level in our federalist system.

The Supreme Court has repeatedly and consistently recognized that the people at the state level, not the federal level, have authority over the definition of marriage. *E.g.*, *Pennoyer v. Neff*, 95 U.S. 714, 734–35 (1877) ("The State . . . has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved."); *Ex parte Burrus*, 136 U.S. 586, 593–94 (1890) ("The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not to the laws of the United States."); *Simms v. Simms*, 175 U.S. 162, 167 (1899) (same); *Haddock v. Haddock*, 201 U.S. 562, 575 (1906) ("No one denies that the states, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce."), *overruled on other grounds*, *Williams v. North Carolina*, 317 U.S. 287 (1942); *Loving v. Virginia*, 388 U.S. 1, 7 (1967)

("marriage is a social relation subject to the State's police power"); *Sosna v. Iowa*, 419 U.S. 393, 404 (1975) (noting that "domestic relations" are "an area that has long been regarded as a virtually exclusive province of the States" and quoting *Pennoyer* and *Simms*).

Windsor reaffirmed this basic point: "By history and tradition the definition and regulation of marriage . . . has been treated as being within the authority and realm of the separate States." 133 S. Ct. at 2689–90. *Windsor* specifically recognized that "[t]he definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the '[p]rotection of offspring, property interests, and the enforcement of marital responsibilities.' " *Id.* at 2691.

Indeed, when the majority in *Windsor* overturned the federal Defense of Marriage Act, it highlighted the fact that DOMA was an "unusual deviation from the usual tradition of recognizing *and accepting* state definitions of marriage," an aberration that conflicted with "the *unquestioned* authority of the States" over marriage. *Id.* at 2693 (emphasis added). Marriages recognized as valid under state law (such as, in *Windsor*, under New York law) were entitled to be treated

with dignity precisely because it was "a dignity conferred by the States in the exercise of their sovereign power." *Id.* The Court's entire equal-protection analysis rests on this premise of state-conferred dignity. *See id.* ("the congressional purpose [was] to influence or interfere with state sovereign choices about who may be married"); *id.* at 2694 (recognizing that DOMA affected "state-sanctioned marriages" that "the State has sought to dignify"); *id.* at 2695 ("marriages made lawful by the State"); *id.* at 2696 ("a status the State finds to be dignified and proper"); *id.* (referring to "those whom the State, by its marriage laws, sought to protect in personhood and dignity").

Applying this analysis requires respecting "state sovereign choices," and implicitly recognizes that States do in fact have a choice not to extend marriage to same-sex couples. Many "States in the exercise of their sovereign power" have chosen not to extend the boundaries of marriage. Other States have chosen to extend marriage to same-sex couples. If the people of a State choose, as the people of 33 states including Michigan have, to retain the definition of marriage they have always recognized, so that marriage is a union of one man and one woman, their decision is also entitled to respect.

In Michigan alone, roughly 2.7 million citizens (almost 60% of those who voted), exercising their right to vote on this issue, voted to retain Michigan's longstanding definition of marriage.[2] In the four States that comprise the Sixth Circuit, 8.6 million voters have reached the same conclusion and enacted similar amendments.[3] KY. CONST. § 233A; OHIO CONST. art. XV, § 11; TENN. CONST. art. XI, § 18. Respecting the dignity of individuals in a democracy includes not just preserving their liberty to engage in private conduct, *Lawrence v. Texas*, 539 U.S. 558, 578 (2003), but also their liberty to engage in self-government. *Burson v. Freeman*, 504 U.S. 191, 214 (1992) (Kennedy, J., concurring) ("Voting is one of the most fundamental and cherished liberties in our democratic system of government."); *see also* STEPHEN BREYER, *Active Liberty: Interpreting Our Democratic Constitution* 21 (Vintage Books 2005) ("[T]he Constitution [is] centrally focused upon active liberty, upon the right of individuals to participate in democratic self-government.").

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[2] http://ballotpedia.org/Michigan_Marriage_Amendment,_Proposal_2_ (2004).

[3] http://ballotpedia.org/Ohio_Issue_1,_the_Marriage_Amendment_ (2004); http://ballotpedia.org/Kentucky_Marriage_Amendment_(2004); http://ballotpedia.org/Tennessee_Same-Sex_Marriage_Ban,_ Amendment _1_ (2006).

Justice Kennedy's admonition on this point in *Schuette* is worth repeating: "It is demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds." 572 U.S. __, slip op. 17. To put this in perspective, more than 45 million American voters across the country have voted to retain the definition of marriage as between one man and one woman.[4] Respect for the dignity of these millions of voters, who must be presumed to be "decent and rational," should make courts reluctant to conclude that support for maintaining the definition of marriage is irrational. After all, a decision by this Court that there is no rational basis for Michigan's voters to have defined marriage as they did necessarily means that not only Michigan's voters, but more than 42 million other American citizens who have voted the same way, did not have among them a single conceivable rational basis for their votes.

While this authority of the people, exercised at the state level, is subject to "certain constitutional guarantees," *Windsor*, 133 S. Ct. at 2680, such as the prohibition against racial discrimination, *Loving*, 388 U.S. at 12 ("The Fourteenth Amendment requires that the freedom of

[4] http://ballotpedia.org/Marriage_and_family_on_the_ballot (linking to individual statistics by state).

choice to marry not be restricted by invidious racial discriminations."), the only constitutional guarantee at issue in this appeal is whether the voters complied with the Equal Protection Clause by having a rational basis for their votes.

Leaving issues of domestic law to the people at the state level makes sense, as it permits the people to address social issues at a more local level. *E.g.*, *Chandler v. Florida*, 449 U.S. 560, 579 (1981) (discussing States as laboratories of democracy); BREYER, *Active Liberty* 57 (Our country's federal structure "help[s] to secure more effective forms of *active* liberty, i.e., as facilitating meaningful citizen participation in government by preserving a more local decision-making process."). This freedom to vote has benefitted supporters of same-sex marriage, as they have succeeded in some States (such as Maine, Maryland, and Washington) in persuading voters through the democratic processes to redefine marriage to include same-sex relationships. But if the people of a given State choose not to alter a foundational building block of society or have other good-faith reasons for wanting to retain marriage as is, they should also have the freedom to make those choices. And by leaving this issue to the democratic processes, rather than engraving it

into the bedrock of constitutional law, *e.g.*, *Roe v. Wade*, 410 U.S. 113 (1973), the people can review their decisions concerning the definition of marriage and look for ways to resolve the issue through compromise and agreement, rather than through a judicial mandate.

C. Rational-basis review governs this issue and defers to the voters precisely to protect the democratic process.

As noted above, " 'a classification neither involving fundamental rights nor proceeding along suspect lines . . . cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.' " *Armour*, 132 S. Ct. at (quoting *Heller*, 509 U.S. at 319–320).

The rational-basis standard of review is not a mere bit of legal technicality. It is an important principle of judicial restraint and of separation of powers because it preserves the people's authority to govern themselves by making policy decisions. The Equal Protection Clause "is not a license for courts to judge the wisdom, fairness, or logic of [the voters'] choices." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993). To the contrary, "the courts have been very reluctant, as they should be in our federal system and with our respect for the

separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent [a State's] interests should be pursued." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 441–42 (1985). As the Fifth Circuit recently explained, "the rational basis test . . . affirms a vital principle of democratic self-government": "[t]he court may not replace legislative predictions or calculations of probabilities with its own, else it usurps the legislative power." *Planned Parenthood of Greater Texas Surgical Health Servs. v. Abbott*, __ F.3d __, 2014 WL 1257965, *7 (5th Cir. 2014).

That is why the Supreme Court has emphasized that "rational basis review" includes "a strong presumption of validity." *Beach Commc'ns*, 508 U.S. at 314–15. "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." *Id.* at 315 (internal quotation marks omitted). "This standard of review is a paradigm of judicial restraint." *Id.* at 314.

The limitations imposed on a court applying rational-basis review serve this important interest of restraining judicial invalidation of democratically enacted laws. Under rational-basis review, courts must

give the legislative body—here, the people themselves—the benefit of every doubt: "those attacking the rationality of the legislative classification have the burden 'to negative *every* conceivable basis which might support it.' " *Beach Commc'ns*, 508 U.S. at 315 (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)) (emphasis added). " 'States are not required to convince the courts of the correctness of their legislative judgments.' " *Heller*, 509 U.S. at 326. Quite the opposite: if " 'the question is at least debatable,' " then rational-basis review requires upholding the legislative judgment. *Id.* (quoting *W. & S. Life Ins. Co. v. State Bd. of Equalization of Cal.*, 451 U.S. 648, 674 (1981)).

The Supreme Court has been quite clear that these conceivable bases do not have to be proved by evidence at a trial: "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *Id.*; *Heller*, 509 U.S. at 320 ("A State, moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification."). And "[t]hese restraints on judicial review have added force 'where the legislature must necessarily engage in a process of line-drawing.' "

Beach Commc'ns, 508 U.S. at 315 (quoting *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980)). This added force applies here because setting the definition of marriage inherently requires line-drawing—lines such as age, number of participants, sex, consanguinity requirements, duration, and exclusivity. And as the Supreme Court has made clear, "[e]ven if [a] classification . . . is to some extent both underinclusive and overinclusive, and hence the line drawn by [the legislature or people] is imperfect, it is nevertheless the rule that in [rational basis review] 'perfection is by no means required.' " *Vance v. Bradley*, 440 U.S. 93, 108–09 (1979) (*quoting Phillips Chemical Co. v. Dumas Sch. Dist.*, 361 U.S. 376, 385 (1960)).

D. The district court failed to properly apply rational-basis review.

Simply recounting these limitations confirms that the district court did not properly apply rational-basis review. At the outset, it should not have required the State to submit to a trial. Even after expressly acknowledging that the adjudicative facts of the case were not in dispute—"[t]he underlying facts are not in dispute," it said—the district court nonetheless concluded that "a triable issue of fact exists

regarding whether the alleged rationales for the [marriage amendment] serve a legitimate state interest." (Op. & Order, RE 89, Page ID ## 1997, 1999; *see also* Conclusions, RE 151, Page ID # 3947 ("In setting the case for trial, the Court directed the parties to address a narrow legal issue: whether the [marriage amendment] survives rational basis review.").) But the rationales for the amendment are issues of legislative fact, not adjudicative fact, and the Supreme Court has made clear such rationales are not "triable" issues of fact: "a legislative choice is not subject to courtroom fact-finding." *Beach Commc'ns*, 508 U.S. at 315.

At the trial, the district court continued to treat possible rationales as questions of adjudicative fact. For example, the district court excluded the State's first witness (Sherif Girgis) under the rules of evidence for experts, as if he were going to testify about adjudicative facts. The district court thus refused to hear from Girgis on philosophical questions about marriage, even though Justices of the Supreme Court have cited Girgis's work on this precise issue without requiring him to qualify as an expert. *Windsor*, 133 S. Ct. at 2715 (Alito, J., dissenting, joined by Thomas, J.) (*citing* S. GIRGIS, R.

ANDERSON, & R. GEORGE, *What is Marriage? Man and Woman: A Defense* 53–58 (2012)).

The district court also acted as if debatable questions of social science were issues it could resolve through factual findings. (*See generally* Conclusions, RE 151, Page ID ## 3947–61 (purporting to make credibility determinations about social science studies).) But the Supreme Court has already indicated that it is "far from persuaded . . . that the 'clearly erroneous' standard of Rule 52(a) applies to the kind of 'legislative facts at issue here." *Lockhart*, 476 U.S. at 168 n.3 (addressing "social science studies" and citing *Dunagin*, 718 F.2d at 748 n.8 (plurality opinion of Reavley, J.)). As Judge Reavley pointed out, "[t]he writings and studies of social science experts on legislative facts are often considered and cited by the Supreme Court with or without introduction into the record or even consideration by the trial court." *Dunagin*, 718 F.2d at 748 n.8 (citing cases).

More fundamentally, "[t]here are limits to which important constitutional questions should hinge on the views of social scientists who testify as experts at trial." *Id.* "The social sciences play an important role in many fields, including the law, but other unscientific

values, interests and beliefs are transcendent." *Id.* Voters can act on "rational speculation," *Beach Commc'ns*, 508 U.S. at 315—perhaps another term for common sense—without being second-guessed by courts. The Equal Protection Clause does not impose a regime of "rule by social scientists." We do not have to accept their studies, all of which have limitations of one sort or another. *See Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) ("The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics.").

These examples—and others addressed in the next section—reveal that the district court did not remain true to the limitations of rational-basis review. Under a proper rational-basis review, Michigan's marriage amendment may be sustained on numerous grounds.

III. The people had numerous rational grounds for preserving the definition of marriage.

A. Encouraging opposite-sex couples to enter into a permanent, exclusive relationship within which to have and raise children—into a marriage—is a legitimate state interest.

The first question in considering whether it is rational to define marriage as between one man and one woman is to ask what the State's interest in marriage is in the first place. Why is it that Michigan—like

the other States and like countries around the world, throughout all of history—has thought it important to have laws relating to marriage, while leaving other relationships, like friendships, free from restrictions?

While most married people would consider the emotional connection to be a very important component of marriage, emotional connection alone does not explain the State's interest. Friendships and relationships, after all, can also demonstrate love and commitment (think of a soldier diving on a grenade to save his squad), yet no state or country has shown any interest in passing laws about what it takes to enter into a friendship, or what it takes to end one. Friendships and relationships do not have age, gender, number, or consanguinity limits—siblings can be friends, and groups of people can be friends. If marriage, like other friendships, were only about an emotional connection—if it were only about love, commitment, and companionship—then it would be unclear what interest (other than moral approval of that friendship) the State might have.

The State's interest in marriage springs from a feature of opposite-sex intimate relationships that is obviously different from

other relationships (including opposite-sex Platonic friendships and same-sex intimate relationships): the sexual union of a man and a woman produces something more than just an emotional relationship between two people—it produces the possibility, even the likelihood, of the creation of a third person.

In short, the State has an interest in encouraging men and women to marry because of its interest in procreation and the raising of children. This point is well established in the law. *E.g.*, *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (describing marriage as "fundamental to our very existence and survival"); *Skinner v. State of Okl. ex rel. Williamson*, 316 U.S. 535, 541 (1942) ("Marriage and procreation are fundamental to the very existence and survival of the race."); *Gard v. Gard*, 204 Mich. 255, 267 (1918) ("It has been said in many of the cases cited that one of the great purposes of marriage is procreation."); *Maynard v. Hill*, 125 U.S. 190, 211 (1888) ("[Marriage] is the foundation of the family and of society, without which there would be neither civilization nor progress."); *Baker v. Baker*, 13 Cal. 87, 103 (1859) ("[T]he first purpose of matrimony, by the laws of nature and society, is procreation."); *State v. Fry*, 4 Mo. 120, 126 (1835) (" '[M]arriage is a

compact between a man and a woman for the procreation and education of children.' ") (quoting Sir Francis Bacon, 6 Bacon Abr. 523, 530).

Given these legitimate interests in procreation and in the raising of children, the relevant rational-basis question is whether defining marriage as between a man and a woman advances those interests.

B. Michigan voters could rationally have concluded it is beneficial for children to be raised by both a mom and a dad.

It is certainly within the realm of rational speculation to believe that children benefit from being raised by both a mother and a father. Men and women are different, and having both a man and a woman as part of the parenting team could reasonably be thought to be a good idea.

The idea that men and women are different is not a controversial one, at least in the United States Reports. The Supreme Court has recognized that " '[t]he two sexes are not fungible; a community made up exclusively of one is different from a community composed of both.' " *Ballard v. United States*, 329 U.S. 187, 193 (1946). In *Ballard*, in the context of whether women needed to be included on juries, the Court recognized that "a distinct quality is lost if either sex is excluded." *Id.*;

see also, *e.g.*, *United States v. Virginia*, 518 U.S. 515, 533 (1996) (quoting *Ballard*); *Peters v. Kiff*, 407 U.S. 493, 504 n.12 (1972) (quoting *Ballard*). A rational person might think that "men and women are persons of equal dignity and they should count equally before the law" while also thinking that "they are not the same." Tr. of Oral Argument at 15, *Duren v. Missouri*, 439 U.S. 357 (1979) (argument by Ruth Bader Ginsburg). "There are differences between them that most of us value highly. . . . I think that we—perhaps all understand it when we see it and we feel it but it is not that easy to describe, yes, there is a difference." *Id*. If this principle—that both men and women have important viewpoints and contributions to make—is true in the context of a jury pool, it is at least rational to conclude it is also true in the context of a family.

It is also rational to think that moms and dads both might make important contributions to child raising. *E.g.*, *Dixon v. Houk*, 627 F.3d 553, 568 (6th Cir. 2010) (Cole, J., concurring) (approvingly identifying "lack of father figure" as a mitigating factor for punishment), *rev'd on other grounds*, *Bobby v. Dixon*, 132 S. Ct. 26 (2011); *United States v. Harris*, 2014 WL 819394 (7th Cir. Mar. 4, 2014) (same). Even the

plaintiffs' experts agree there are "average differences in the ways that mothers and fathers interact with their children." (2/25/14 Trial Tr., RE 143 (Part B) at 15 (Brodzinsky).) "Mothers tend to be more emotion focused," while "[f]athers, in turn, are more playful" and "a little bit more task-oriented in their interactions." (*Id.* at 15–16.) As another of the plaintiffs' experts acknowledged, "different sexes bring different contributions to parenting," and "there are different benefits to mothering versus fathering." (2/28/14 Trial Tr., RE 149 at 55 (Cott).) If, as the plaintiffs thus concede, mothers and fathers provide different benefits, it is hard to see how it could be irrational to encourage a structure that brings *both* sets of benefits to children.

One might also reasonably believe that it is beneficial for children to have a biological connection to both of their parents. The biological connection matters to parents: it matters to new parents at the maternity ward which child the nurse hands them. Similarly, children care who their biological parents are. Consider, for example, children who are adopted and who therefore do not know their biological parents. It is common for adopted children, even ones with wonderful, loving adoptive parents, to wonder who their biological parents are, to

wonder what the people who gave them their genes are like, and to try to learn more about them and to get to know them. The same type of questions will arise for many children raised in same-sex marriages. By definition, same-sex parents necessarily require the exclusion of at least one biological parent, and at least one legal parent who would have no biological connection to the child. A reasonable person might think that an intact biologically related family is, on average, beneficial for children, and therefore worth promoting.

These modest statements—that men and women are different and that having both a mother and a father benefits a child—are not outside the realm of rational speculation. A rational person could quite easily conclude that both statements are true—or at least debatable, *Heller*, 509 U.S. at 326—and accordingly that promoting marriage between men and women therefore benefits the children that quite commonly are born to opposite-sex couples. A rational person, in short, might think that " '[t]he optimal situation for the child is to have both an involved mother and an involved father.' " *Bowen v. Gilliard*, 483 U.S. 587, 614 (1987) (Brennan, J., dissenting) (stating that this principle is "underscored by considerable scholarly research").

A number of presumably rational jurists have already accepted these points. *E.g.*, *Hernandez v. Robles*, 7 N.Y.3d 338, 359–60 (2006) (plurality) ("Intuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like."); *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065, 1115 (D. Haw. 2012) (concluding that it is "at least debatable" that "other things being equal, it is best for children to be raised by their married biological parents or with two parents of opposite genders"); *In re Marriage of J.B. & H.B.*, 326 S.W.3d 654, 678 (Tex. App. 2010) ("The state also could have rationally concluded that children are benefited by being exposed to and influenced by the beneficial and distinguishing attributes a man and a woman individually and collectively contribute to the relationship.").

These are modest claims, not bold ones. Most people in this country would probably agree with them, or at least think they are within the realm of reasonable debate. They are not the types of beliefs that can fairly be characterized as irrational or ridiculous.

The district court rejected these arguments, but only by repeatedly failing to follow the strictures of rational-basis review. First,

it concluded that "the evidence adduced at trial disproved" the premise "that heterosexual married couples provide the optimal environment for raising children." (Conclusions, RE 151, Page ID # 3964.) Now that is a bold claim. For one, it asserts (based on the testimony of four of the plaintiffs' experts—a psychologist, a sociologist, a law professor, and a historian) that science has conclusively disproved the idea that the best scenario, on average, for raising children is for them to be raised by their biological mom and dad. For another, it rests on a legal premise—that these types of questions can be resolved by courtroom fact-finding—that is directly contrary to Supreme Court precedent. *E.g.*, *Beach Commc'ns*, 508 U.S. at 315 ("a legislative choice is not subject to courtroom fact-finding.").

The district court also thought that the State's "optimal child-rearing justification . . . is belied" by the fact that the State does not impose certain requirements—"the ability to have children" (fertility), a promise "to raise them in any particular family structure," or a promise to "achiev[e] certain 'outcomes' for children"—as prerequisites to marriage. (Conclusions, RE 151, Page ID # 3965.) In other words, the district court thought that by allowing infertile couples to marry,

Michigan had conceded that child-rearing is not really important to marriage. But the facts that not every marriage will result in children, or that some marriages might end in divorce, or that some married opposite-sex couples will not be great parents does not undermine the generalization that being in a family with a married mom and dad is, on average, the optimal environment for children. This argument by the district court strays from the principle that "courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends." *Heller*, 509 U.S. at 321. "A classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality." *Id.* (internal quotations omitted). Under rational-basis review, "[e]ven if the classification . . . is to some extent both underinclusive and overinclusive, and hence the line drawn by [the legislature] imperfect, it is nevertheless the rule that in a case like this 'perfect is by no means required.' " *Vance*, 440 U.S. at 108. In short, the fact that Michigan allows opposite-sex couples who, for various reasons, do not procreate to marry does not render its interest in marriage an irrational illusion.

Similarly, the district court thought the amendment was irrational because Michigan does not "exclude certain classes of heterosexual couples from marrying whose children persistently have had 'sub-optimal' development outcomes." (Conclusions, RE 151, Page ID # 3966.) Michigan's position, the court thought, would lead to an absurd result if taken "to its logical conclusion": the court thought it would mean that "only rich, educated, suburban-dwelling, married Asians may marry, to the exclusion of all other married heterosexual couples." (*Id.*)

The problem with this objection, like the last, is that it asks for narrow tailoring, which is not a feature of rational-basis review. Instead, legislative choices "are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific," *Heller*, 509 U.S. at 321. In other words, legislative bodies can make compromises and stop short of logical extremes; they can draw lines, saying "here, but no further."

The district court's next reason for finding it irrational to limit marriage to one man and one woman was that the definition "actually fosters the potential for childhood destabilization" for children being

raised by same-sex couples. (Conclusions, RE 151, Page ID # 3967.) But this criticism is another under-inclusion argument. While it is true that extending the boundaries of marriage (for example, to same-sex couples) might give some children being raised in those arrangements more stability, that does not mean it is irrational to accept the generalization that maintaining the definition of marriage will promote stability for the vast majority of children (that is, children born of opposite-sex couples). And consider what the logical extension of the district court's argument is: to eliminate this under-inclusion, *all* boundaries on marriage would be invalid because any given limitation could, with respect to particular children, make it less likely the adults raising them will stay together.

The district court's final objection is that "the 'optimal environment' justification . . . is simply not advanced by prohibiting same-sex couples from marrying." (Conclusions, RE 151, Page ID # 3967.) But this objection also departs from rational-basis review, because it asks the wrong question and therefore flips the burden of persuasion. Under rational-basis review, when "the inclusion of one group promotes a legitimate governmental purpose, and the addition of

other groups would not, we cannot say that the statute's classification of beneficiaries and nonbeneficiaries is invidiously discriminatory." *Johnson v. Robison*, 415 U.S. 361, 383 (1974). In this case, including opposite-sex couples within the definition of marriage directly advances the State's interest in encouraging those couples that can biologically procreate to care for their children. But extending marriage to same-sex couples would do nothing to advance that interest. It is an interest that simply does not implicate same-sex couples, who are differently situated as a matter of simple biology. *See Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 366–67 (2001) ("Under rational-basis review, where a group possesses 'distinguishing characteristics relevant to interests the State has the authority to implement,' a State's decision to act on the basis of those differences does not give rise to a constitutional violation.").

Given that including opposite-sex couples *does* advance this interest, it is not a valid objection under rational-basis review to ask whether it detracts from the interest to exclude others who do not advance the interest. Consider, for example, the situation in *Robison*. There, Congress sought to advance its interest in " 'enhancing and

making more attractive service in the Armed Forces of the United States.' " 415 U.S. at 382 (quoting 38 U.S.C. § 1651(1)). It did this by providing educational benefits to all military veterans, based on Congress's "judgment that such benefits would make military service more attractive to enlistees and draftees alike." *Id.* Even for draftees (i.e., those who did not volunteer to serve), the presence of educational benefits advanced the governmental interest because the benefits "may help induce a registrant either to volunteer for the draft or not seek a lower Selective Service classification." *Id.* But extending the benefits to a conscientious objector—someone who refuses to serve based on deeply held religious beliefs—would not advance the interest in encouraging service. Accordingly, the Court in *Robison* recognized that where including one group (enlistees and draftees) promotes a legitimate governmental purpose (encouraging military service) but adding another group (conscientious objectors) would not, a court cannot say the decision to give benefits to one but not the other is discriminatory. *Id.* at 383.

In any event, there is at least some cause to think that weakening the link between marriage and procreation (by no longer holding up the

intact marriage of a man and a woman as the ideal environment for raising children) could harm the State's interest in marriage. Without that definition, no institution in society would reinforce the idea, which even the plaintiffs' experts admit, that mothers and fathers have, in general, different parenting strengths. Further, weakening marriage's link to procreation might reduce the social norms that encourage husbands to stay with their wives and children, or for men and women to marry before having children.

In the end, it is at least debatable that defining marriage as between a man and a woman advances the State's interest in encouraging parents to stick together to care for and raise their children. And if it is at least debatable, then this Court has no authority to overturn the people's legislative choice. *Beach Commc'ns*, 508 U.S. at 320 ("The assumptions underlying these rationales may be erroneous, but the very fact that they are 'arguable' is sufficient, on rational-basis review, to 'immuniz[e]' the congressional choice from constitutional challenge.") (alteration in original).

C. It is rational to promote marriage in the setting where children naturally (biologically) come from—the union of a man and a woman.

It is a basic fact of biology that children come from the sexual union of a man and a woman. Because sexual interactions between a man and a woman produce children, the State has an interest in encouraging those sexual interactions to occur in long-term, committed relationships, so that the resulting children will be raised by both their mom and their dad.

Marriage between opposite-sex couples advances this interest. Promoting marriage as an institution encourages long-term, committed relationships. Promoting marriage between a man and a woman thus increases the likelihood that when children are born, both of their biological parents will be there to care for them and to prepare them to be mature members of society. *E.g.*, *Hernandez*, 7 N.Y.3d at 359 ("The Legislature . . . could find that an important function of marriage is to create more stability and permanence in the relationships that cause children to be born. It thus could choose to offer an inducement—in the form of marriage and its attendant benefits—to opposite-sex couples who make a solemn, long-term commitment to each other.").

Promoting marriage between opposite-sex couples is thus a rational means to advance the State's interest in caring for children, as a number of courts have recognized. *E.g.*, *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 867 (8th Cir. 2006) (recognizing that "defining marriage as the union of one man and one woman" is "rationally related to the government interest in 'steering procreation into marriage' "); *Andersen v. King Cnty.*, 158 Wash. 2d 1, 37 (2006) ("Under the highly deferential rational basis inquiry, encouraging procreation between opposite-sex individuals within the framework of marriage is a legitimate government interest furthered by limiting marriage to opposite-sex couples."). The voters' decision to tie marriage to opposite-sex couples, as it has been throughout all of human history, thus is not an act of bigotry or animus. It is a simple recognition that biology matters. *Nguyen v. INS*, 533 U.S. 53, 73 (2001) ("To fail to acknowledge even our most basic biological differences . . . risks making the guarantee of equal protection superficial, and so disserving it.").

Same-sex couples are not similarly situated to opposite-sex couples when it comes to producing children. Same-sex couples cannot produce a child unintentionally; they can only have a child through

deliberate medical procedures that require the participation of at least one person (someone of the opposite sex) outside the couple. Promoting marriage for opposite-sex unions directly advances the State's goal. It encourages the sexual relations that produce children to occur within a marriage relationship; extending marriage to same-sex unions would not promote that interest.

D. Citizens of a State may not wish to alter a central building block of society.

Marriage is a foundational institution, a basic building block of our society. This is not hyperbole. The Supreme Court, a body not known for exaggeration, has described marriage as "the foundation of the family and of society, without which there would be neither civilization nor progress," *Maynard v. Hill*, 125 U.S. 190, 211 (1888), as "an institution more basic in our civilization than any other," *Williams v. State of N. Carolina*, 317 U.S. 287, 303 (1942), and as "fundamental to the very existence and survival of the race," *Skinner v. State of Okl. ex rel. Williamson*, 316 U.S. 535, 541 (1942). It is a cornerstone embedded deeply not only in Michigan's and the Nation's history, but also in the history of countries around the world.

Voters, even those who approve of same-sex relationships, might not wish to alter the definition of this time-tested building block of society. A rational voter might worry about the law of unintended consequences, and might conclude that there is some risk that changing the definition of marriage to remove its inherent connection to procreation might undermine the value of marriage in the long term as an institution for linking parents to their biological children. A rational person might think, for example, that "[t]he long-term consequences of this change are not now known and are unlikely to be ascertainable for some time to come." *Windsor*, 133 S. Ct. at 2715 (Alito, J., dissenting). "At present, no one—including social scientists, philosophers, and historians—can predict with any certainty what the long-term ramifications of widespread acceptance of same-sex marriage will be." *Id.* at 2716.

One thing that we do know is that "it sometimes takes decades to document the effects of social changes . . . on children and society." *Windsor*, 133 S. Ct. at 2715 n.5 (Alito, J., dissenting). As Justice Alito observed, "sociologists have documented" this fact in the area of "the sharp rise in divorce rates following the advent of no-fault divorce." *Id.*

(citing J. WALLERSTEIN, J. LEWIS, & S. BLAKESLEE, *The Unexpected Legacy of Divorce: The 25 Year Landmark Study* (2000)). Proponents of no-fault divorce relied on studies conducted in the 1950s through 1970s about the effects of divorce on children—even while acknowledging, much like the plaintiffs' experts here, that the research was " 'new' and 'not definitive' "—to suggest that children were "far worse off in an intact but unhappy household than after a divorce." HELEN M. ALVAŔE, *The Turn Toward the Self in the Law of Marriage & Family: Same-Sex Marriage & Its Predecessors*, 16 STAN. L. & POL'Y REV. 135, 149 & n.61 (2005). "The hastiness of these [social science] judgments" has become evident in light of more recent research documenting the negative effects of divorce on children. *Id*. at 149–50.

The district court rejected this line of reasoning as "not persuasive," but did so by engaging in circular reasoning. (Conclusions, RE 151, Page ID # 3967.) Although recognizing that "[l]egislative and regulatory agencies often cite" a wait-and-see justification "when postponing decisions related to issues of public importance," the court concluded that this "calculus is fundamentally altered when constitutional rights are implicated because 'any deprivation of

constitutional rights calls for prompt rectification.' " (Conclusions, RE 151, Page ID # 3967 (quoting *Watson v. Memphis*, 373 U.S. 526, 532–33 (1963).) But the district court's reasoning assumes the very question to be decided: is it constitutional under the Equal Protection Clause for a State to define marriage as between a man and a woman? Its reasoning chases its own tail: Why is it irrational to wait and see? Because it violates a constitutional right. Why does it violate a constitutional right? Because it is irrational to wait and see. Why is it irrational to wait and see? Because it violates a constitutional right. And so on.

The district court's second objection on this point is that allowing a State to proceed with caution " 'would turn the rational basis analysis into a toothless and perfunctory review' because 'the state can plead an interest in proceeding with caution in almost any setting.' " (Conclusions, RE 151, Page ID # 3968.) But the fact that it is often rational to proceed with caution does not make it any less rational in a particular instance. The fact that it will almost always be prudent to look both ways before crossing the street is not a reason to stop looking.

E. *Loving v. Virginia* does not alter this analysis.

The Supreme Court's decision in *Loving* enforced the Fourteenth Amendment's ban on treating people differently because of their race. The Supreme Court properly struck down Virginia's ban on interracial marriage, recognizing that "[t]here can be no question but that Virginia's miscegenation statutes rest solely upon distinctions drawn according to race." *Loving v. Virginia*, 338 U.S. 1, 11 (1967). The Supreme Court recognized that the people of the United States had added the Equal Protection Clause specifically to eliminate racial discrimination: "it was the object of the Fourteenth Amendment to eliminate" "racial discrimination," *id*. It reiterated that "[t]here can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause." *Id*. at 12.

This case is quite different from *Loving*. Here, the people of the United States have not passed any constitutional amendment whose central meaning is to address sexual orientation. It is simply not an issue that has been resolved by the people at the federal constitutional level. Further, this Court has already recognized that sexual

orientation is not a suspect class under the Equal Protection Clause. *Davis*, 679 F.3d at 438.

Loving also quite properly concluded that the statutes violated the Due Process Clause of the Fourteenth Amendment because it denied Mr. and Mrs. Loving the fundamental right to marry "by invidious racial discrimination." *Id.* But in doing so, the Court was referring to marriage as it had always been understood—to marriage between one man and one woman. That is why the Court described marriage as " 'fundamental to our very existence and survival.' " *Id.* (quoting *Skinner*, 316 U.S. at 541 (1942), and citing *Maynard*, 125 U.S. 190 (1888)). *Loving*'s fundamental-rights analysis was premised on the idea that marriage is between one man and one woman and thus cannot be read as somehow discarding that requirement.

CONCLUSION AND RELIEF REQUESTED

In the end, same-sex marriage is "an issue over which people of good will may disagree." *Perry v. Brown*, 671 F.3d 1052, 1064 (9th Cir. 2012) (Reinhardt, J.). A decent and rational Michigan voter might have concluded, without taking leave of his or her senses, that marriage encourages men and women to care for the children they produce. The

voter might have thought that promoting marriage as the ideal for raising children both increases the likelihood that opposite-sex couples will have children within a marriage relationship and benefits children by making it more likely they will be raised by their biological parents. And having a child raised in that sort of environment is, at least most of the time, probably a good thing. The reasons are at least debatable, and that means this Court must reverse.

Justice Kennedy's recent plurality opinion in *Schuette* about the importance of democracy applies with equal force to this case:

> This case is not about how the debate about racial preferences should be resolved. It is about who may resolve it. There is no authority in the Constitution of the United States or in this Court's precedents for the Judiciary to set aside Michigan laws that commit this policy determination to the voters. Deliberative debate on sensitive issues such as racial preferences all too often may shade into rancor. But that does not justify removing certain court-determined issues from the voters' reach. Democracy does not presume that some subjects are either too divisive or too profound for public debate. [*Schuette*, slip op. at 18 (plurality opinion of Kennedy, J.) (citation omitted).]

Here, the people had many rational grounds for wishing to continue to define marriage as the union of one man and one woman. Their decision, made through the democratic process and without any

evidence of animus, should be respected. The decision of the district court should be reversed.

Respectfully submitted,

Bill Schuette
Attorney General

/s/ Aaron D. Lindstrom
Aaron D. Lindstrom
Solicitor General
Co-Counsel of Record
P.O. Box 30212
Lansing, MI 48909
(517) 373-1110
LindstromA@michigan.gov

Kristin M. Heyse
Assistant Attorney General
Co-Counsel of Record

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CERTIFICATE OF COMPLIANCE

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/s/ Aaron D. Lindstrom
Aaron D. Lindstrom
Solicitor General
Co-Counsel of Record
P.O. Box 30212
Lansing, MI 48909
(517) 373-1110
LindstromA@michigan.gov

CERTIFICATE OF SERVICE

I certify that on May 7, 2014, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

/s/ Aaron D. Lindstrom
Aaron D. Lindstrom
Solicitor General
Co-Counsel of Record
P.O. Box 30212
Lansing, MI 48909
(517) 373-1110
LindstromA@michigan.gov

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Defendants-Appellants, per Sixth Circuit Rule 28(c), 30(b), hereby designated the following portions of the record on appeal:

Description of Entry	Date	Record Entry No.	Page ID Number
Complaint	01/23/2012	R. 1	2, 5–7,
Amended Complaint	10/03/2012	R. 38	725, 728, 730–33,
Notice of Hearing	01/11/2013	R. 50	924
Opinion	07/01/2013	R. 54	935
Opinion & Order	10/16/2013	R. 89	1997, 1999, 2000, 2003
Plaintiffs' Motion to Bifurcate	11/24/2013	R. 100	2027, 2029,
Order	01/03/2014	R. 105	2070
State Defendants' Response	02/14/2014	R. 134	2682, 2688–95
Trial Transcript (2/25/2014)	03/13/2014	R. 143	(6, 10–11; 13–15)[5]
Trial Transcript (2/26/2014)	03/13/2014	R. 144	(41)
Trial Transcript (2/28/2014)	03/13/2014	R. 149	(55)

[5] Because the transcripts do not yet have page ID numbers, we are providing, in parentheses, the page numbers marked on the transcript.

Findings of Fact & Conclusions of Law	03/21/2014	R. 151	3946–69, 3974
Judgment	03/21/2014	R. 152	3975
Notice of Appeal	03/21/2014	R. 153	3976
Order	03/22/2014	R. 156	3982
Trial Transcript (3/3/2014)	03/26/2014	R. 157	(37)
Order	03/26/2014	R. 162	4214