CASE SUMMARY: *OBERGEFELL V. HODGES*

On January 16, 2015, the Supreme Court granted certiorari in *DeBoer v. Snyder*,[1] a case in which the Sixth Circuit upheld laws in Kentucky, Tennessee, Ohio, and Michigan banning same-sex marriage and the recognition of out-of-state same-sex marriages.[2] And on June 26, 2015, the Court reversed the Sixth Circuit's holding in *Obergefell v. Hodges*.[3]

This Case Summary proceeds as follows: Part I details the factual background and district court proceedings for the four predicate cases in *DeBoer v. Snyder*. Then, Part II discusses the Sixth Circuit's decision, which consolidated all four cases for joint decision in a single opinion. Part III outlines the arguments made by the petitioners and respondents on appeal to the Supreme Court. Finally, Part IV discusses the majority and dissenting opinions in the Supreme Court's decision in *Obergefell v. Hodges*.

I. DISTRICT COURT DECISIONS

The Sixth Circuit's decision in *DeBoer* was a consolidation of four district court cases, each of which struck down the state law at issue.[4] Because each case varies slightly in its factual and procedural background, they are examined below individually.

A. Obergefell v. Wymyslo[5]

There were two relevant laws in *Obergefell v. Wymyslo*—the first was a law passed by Ohio lawmakers in 2004 that stated as follows:

> (1) Any marriage between persons of the same sex is against the strong public policy of this state. Any marriage between persons of the same sex shall have no legal force or effect in this state and, if attempted to be entered into in this state, is void ab initio and shall not be recognized by this state.
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> (2) Any marriage entered into by persons of the same sex in any other jurisdiction shall be considered and treated in all respects as having no legal force or effect in this state and shall not be recognized by this state.[6]

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1 135 S. Ct. 1040 (2015).

2 DeBoer v. Snyder, 772 F.3d 388, 396, 399, 421 (6th Cir. 2014), *rev'd sub nom.* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

3 *Obergefell*, 135 S. Ct. at 2608.

4 *DeBoer*, 772 F.3d at 396–99.

5 962 F. Supp. 2d 968 (S.D. Ohio 2013), *rev'd sub nom.* DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014).

6 OHIO REV. CODE ANN. § 3101.01(C)(1)-(2) (LexisNexis, LEXIS through the 131st Gen. Assemb.).

The second was a constitutional amendment passed by Ohio voters that same year, which stated as follows:

> Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage.[7]

Plaintiffs in *Obergefell v. Wymyslo* were multiple same-sex couples whose out-of-state marriage licenses were not recognized by the state of Ohio[8] and a licensed funeral home director who was responsible under Ohio statute for filling out death certificates that are "required for burial, cremation, insurance, probate, and other purposes after the death of a spouse."[9] Shortly after the Supreme Court's decision in *United States v. Windsor*,[10] the plaintiffs filed suit against the Director of the Ohio Department of Public Health in his official capacity, raising an as-applied constitutional challenge to the Ohio law banning the state from recognizing out-of-state same-sex marriages.[11] The petitioners alleged that the law "violate[d] federal constitutional guarantees of due process, equal protection, and the right to travel," as well as the Full Faith and Credit Clause.[12]

The United States District Court for the Southern District of Ohio granted a permanent injunction for the plaintiffs to be recognized as spouses on their deceased partners' death certificates.[13] In its due process analysis, the district court established a fundamental "right to remain married," and found that the state could not satisfy heightened scrutiny.[14] In its equal protection analysis, the court held that heightened scrutiny applies to sexual orientation classifications because homosexuals have faced a history of severe and pervasive discrimination, sexual orientation does not bear on an individual's ability to contribute to society, homosexuals are "lacking in the political power to expand their civil rights," and sexual orientation is an immutable characteristic.[15] Further, the court held that the law could not survive even under rational basis

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7 OHIO CONST. art. XV, § 11.

8 Brief for Petitioners at 6–9, *Obergefell*, 135 S. Ct. 2584 (No. 14-556) [hereinafter *Obergefell* Petitioners' Supreme Court Brief].

9 *Id.* at 8.

10 133 S. Ct. 2675, 2696 (2013).

11 *Obergefell* Petitioners' Supreme Court Brief, *supra* note 8, at 12.

12 *Id.* at 14.

13 Obergefell v. Wymyslo, 962 F. Supp. 2d 968, 973, 978, 997–98 (S.D. Ohio 2013).

14 *Id.* at 978.

15 *Id.* at 987–91.

scrutiny because the legitimate reasons provided by the state were pretexts for discrimination.[16]

B. DeBoer v. Snyder[17]

DeBoer challenged a number of Michigan laws. In 1996, Michigan lawmakers enacted a new law and amended four others to reassert the state's policy toward excluding same-sex marriage.[18] The new law declared that "[m]arriage is inherently a unique relationship between a man and a woman," and that "[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."[19] Additionally, the law stated that "marriage contracted between individuals of the same sex is invalid in this state."[20] The amendments to existing law involved (1) defining marriage as a civil contract "between a man and a woman";[21] (2) prohibiting the recognition of "a marriage contracted between individuals of the same sex, which marriage is invalid in this state";[22] and (3) "adding gender-based prohibitions to the existing consanguinity limitations."[23] Additionally, Michigan voters approved an amendment to the state constitution in 2004 that stated: "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."[24]

The *DeBoer* plaintiffs were a same-sex couple that had adopted three children, but did not share custody of the children because they could not be legally married under Michigan law.[25] They first filed a challenge to the state's adoption laws, yet when this failed, the district court allowed to the plaintiffs to amend their complaint to specifically challenge the

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[16] *Id.* at 991, 993.

[17] 973 F. Supp. 2d 757 (E.D. Mich. 2014), *rev'd*, 772 F.3d 388 (6th Cir. 2014).

[18] Brief for Petitioners at 8, *DeBoer*, 973 F. Supp. 2d 757 (No. 14-571) [hereinafter *DeBoer* Petitioners' District Court Brief].

[19] MICH. COMP. LAWS § 551.1 (Westlaw through P.A. 2015, No. 130 of 2015 Reg. Sess., 98th Leg.).

[20] *Id.*

[21] § 551.2 (Westlaw).

[22] § 551.271(2) (Westlaw).

[23] Brief for Petitioners at 7–8, DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014) (No. 14-571) [hereinafter *DeBoer* Petitioners' Circuit Court Brief]. The Michigan Code places restrictions on the ability to marry based on consanguinity and gender. *See* §§ 551.3–551.4 (Westlaw) (listing persons men and women are prohibited from marrying, including a prohibition of a man marrying another man and a woman marrying another woman).

[24] MICH. CONST. art. I, § 25.

[25] DeBoer v. Snyder, 973 F. Supp. 2d 757, 759–60 (E.D. Mich. 2014), *rev'd*, 772 F.3d 388 (6th Cir. 2014).

same-sex marriage laws.[26] Suing the Governor and the Attorney General of the State of Michigan in their official capacities, the plaintiffs alleged that the Michigan laws prohibiting same-sex marriage and the recognition of out-of-state same-sex marriages were unconstitutional on due process, equal protection, and federalism grounds.[27]

The United States District Court for the Eastern District of Michigan found for the plaintiffs and enjoined the state from enforcing both the constitutional amendment and the applicable same-sex marriage laws.[28] In doing so, the court held that the Michigan laws were unconstitutional on equal protection grounds because they did not meet rational basis scrutiny.[29] The plaintiffs' due process claims were not addressed.

In holding that the laws failed rational basis scrutiny, the court rejected the state's proffered justifications. First, the court dismissed the state's evidence that same-sex marriage impedes the goal of "optimal child-rearing" because child-rearing is not a prerequisite for marriage, the same-sex marriage ban disadvantages children in same-sex marriages, and the state does not similarly ban opposite-sex couples from marrying when their children may be exposed to other "'sub-optimal' developmental outcomes."[30] Therefore, there was "no logical connection between banning same-sex marriage and providing children with an 'optimal environment' or achieving 'optimal outcomes.'"[31] The court also rejected the state's argument that the court should "wait and see" if new studies confirm the state's suspicions, stating that "any deprivation of constitutional rights calls for prompt rectification."[32] The court dismissed the preservation of traditional marriage as a justification for the same-sex marriage bans because tradition alone cannot meet rational basis review and traditional marriage is based on "moral disapproval of redefining marriage to encompass same-sex relationships."[33] Finally, the court rejected the state's argument that federalism allows states to define marriage, holding that a "ballot-approved measure" is not due deference if it "raises a constitutional question."[34]

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[26] *DeBoer* Petitioners' Circuit Court Brief, *supra* note 23, at 9.

[27] *Id.*

[28] *DeBoer*, 973 F. Supp. 2d at 775.

[29] *Id.* at 768–69.

[30] *Id.* at 770–72.

[31] *Id.* at 772.

[32] *Id.* (quoting Watson v. Memphis, 373 U.S. 526, 532–33 (1963)).

[33] *Id.* at 772–73.

[34] *Id.* at 773–75.

C. Bourke v. Beshear[35]

Two types of laws were at issue in *Bourke*. The first was a series of statutes passed by Kentucky lawmakers in 1998 that made same-sex marriage and the recognition of same-sex marriage illegal.[36] These statutes declared "marriage between members of the same sex . . . against Kentucky public policy,"[37] expressly prohibited same-sex marriages, and provided that "[a] marriage between members of the same sex which occurs in another jurisdiction shall be void in Kentucky."[38] The second law was a constitutional amendment passed by Kentucky voters in 2004 that stated as follows: "Only a marriage between one man and one woman shall be valid or recognized as a marriage in Kentucky. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized."[39]

The *Bourke* plaintiffs included two same-sex couples who were denied marriage licenses by the state of Kentucky and four same-sex couples whose out-of-state marriage licenses were not recognized by the state of Kentucky.[40] Shortly after *Windsor* was announced, the *Bourke plaintiffs* filed suit against the Governor and the Attorney General of Kentucky in their official capacities, alleging that Kentucky's ban on same-sex marriage and its failure to recognize out-of-state same-sex marriages violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[41]

The United States District Court for the Western District of Kentucky held that the applicable laws were unconstitutional because they violated the Equal Protection Clause.[42] Although the court applied rational basis review,[43] it listed three rationales for potentially applying heightened scrutiny: (1) "the right to marry is a fundamental right" based on Supreme Court precedent,[44] (2) the ban on same-sex marriage

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[35] 996 F. Supp. 2d 542 (W.D. Ky. 2014), *rev'd sub nom.* DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014).

[36] *Id.* at 545.

[37] KY. REV. STAT. ANN. § 402.040(2) (West, Westlaw through 2015 Reg. Sess.).

[38] § 402.045(1) (Westlaw). Kentucky also statutorily defined marriage to exclude and void same-sex marriages. *See* §§ 402.020(1)(d), 402.005 (Westlaw) (defining marriage based on distinctions of sex as well as prohibiting and voiding marriages between members of the same sex).

[39] KY. CONST. § 233A.

[40] Brief for Petitioners at 7–10, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (No. 14-574) [hereinafter *Bourke* Petitioners' Supreme Court Brief] (*Bourke v. Beshear* was a consolidated case of *Obergefell v. Hodges*).

[41] *Id.* at ii, 7.

[42] *Bourke,* 996 F. Supp. 2d at 544.

[43] *Id.* at 549.

[44] *Id.* at 548–49.

"demeans one group by depriving them of rights provided for others,"[45] and (3) homosexual individuals are either a suspect or quasi-suspect class.[46]

Ultimately, the court held that determining the level of scrutiny was irrelevant because the laws failed to meet even rational basis scrutiny.[47] In so holding, the court rejected the argument that the laws were rationally related to the state's interest in "preserving the state's institution of traditional marriage" or its interests in "responsible procreation and childrearing, steering naturally procreative relationships into stable unions, promoting the optimal childrearing environment, and proceeding with caution when considering changes in how the state defines marriage."[48] The court attempted to reassure advocates of traditional marriage that their religious beliefs would not be infringed except when, as in this case, those beliefs interfere with constitutionally-protected rights. In addition, the court stated that its holding did not violate federalism principles because federalism cannot justify constitutional violations; thus, the court's decision did not protect a new right, but the well-established right to equal protection of the law.[49]

D. Tanco v. Haslam[50]

Tanco involved a challenge to two Tennessee laws. The first was a 1996 Tennessee statute that prohibited same-sex marriage,[51] reinforced the "'historical institution' and traditional definition of marriage,"[52] and provided that any out-of-state marriage that is not permitted in Tennessee "shall be void and unenforceable in this state."[53] The statute further provided that the "marriage licensing laws reinforce, carry forward, and make explicit the long-standing public policy of this state to recognize the family as essential to social and economic order and the common good and as the fundamental building block of our society."[54] In 2006, Tennessee

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[45] *Id.* at 551.

[46] *Id.* at 548–49.

[47] *Id.* at 549.

[48] *Id.* at 552–53.

[49] *Id.* at 555–56.

[50] 7 F. Supp. 3d 759 (M.D. Tenn. 2014), *rev'd sub nom.* DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014).

[51] TENN. CODE ANN. § 36-3-113 (LEXIS, LexisNexis through 2015 Reg. Sess.).

[52] Brief for Respondents at 2–3, *Tanco*, 7 F. Supp. 3d 759, (No. 14-562) [hereinafter *Tanco* Respondents' District Court Brief].

[53] § 36-3-113; *see also* Brief for Petitioners at 7–8, *Tanco*, 7 F. Supp. 3d 759 (No. 14-562) [hereinafter *Tanco* Petitioners' District Court Brief] (characterizing the Tennessee statute as a denial of marital dignity and privileges for same-sex couples).

[54] § 36-3-113.

reaffirmed these principles when voters passed an amendment to the state constitution. The amendment provided as follows:

> The . . . relationship of one (1) man and one (1) woman shall be the only legally recognized marital contract in this state. . . . If another state or foreign jurisdiction issues a license for persons to marry and if such marriage is prohibited in this state by the provisions of this section, then the marriage shall be void and unenforceable in this state.[55]

Plaintiffs in the *Tanco* case were three same-sex couples who received out-of-state marriage licenses.[56] Suing the Governor, the Commission of the Department of Finance and Administration, and the Attorney General of Tennessee, all in their official capacities, the plaintiffs alleged that the laws prohibiting the authorization and recognition of same-sex marriage were unconstitutional under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, that the laws violated the right to interstate travel, and that the laws discriminated against the plaintiffs based on their sex and sexual orientation.[57]

The United States District Court for the Middle District of Tennessee granted the preliminary injunction, enjoining the state from enforcing the same-sex marriage laws.[58] In its analysis, the court found that the plaintiffs were likely to prevail on their due process and equal protection claims based on the "thorough and well-reasoned" decisions of other district courts that struck down same-sex marriage bans even under rational basis scrutiny.[59]

II. SIXTH CIRCUIT OPINION

All four predicate cases were consolidated and certified for appeal by the Sixth Circuit in *DeBoer v. Snyder*.[60] The Sixth Circuit examined these cases in light of the following question: "Does the Fourteenth Amendment to the United States Constitution prohibit a state from defining marriage as a relationship between one man and one woman?"[61] According to the Sixth Circuit, this issue was fundamentally about an even simpler question: "Who decides—federal courts or the democratic process? [62] Ultimately, the court reversed each lower-court decisions, finding that this issue was properly decided by each state's political process.[63]

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55 TENN. CONST. art. XI, § 18.

56 *Tanco*, 7 F. Supp. 3d at 762.

57 *Tanco* Petitioners' District Court Brief, *supra* note 53, at (ii), 2–3.

58 *Tanco*, 7 F. Supp. 3d at 771–72.

59 *Id.* at 768.

60 772 F.3d 388 (6th Cir. 2014).

61 *Id.* at 396.

62 *Id.*

63 *Id.* at 421.

A. Issue One: The Licensing Provisions

The first issue examined by the Sixth Circuit was: "Does the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment require states to expand the definition of marriage to include same-sex couples?"[64] The court provided a number of justifications for its holding that the Fourteenth Amendment does not require states to license same-sex marriage.

First, the court relied on the Supreme Court's opinion in *Baker v. Nelson*,[65] in which the Court issued a one-line order dismissing a homosexual couple's claim that Minnesota's refusal to grant them a marriage license violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment, stating that the issue did not raise a "substantial federal question."[66] Second, the court looked at the original meaning of the Fourteenth Amendment to find that it did not recognize a right to same-sex marriage.[67] Third, the court found two rational bases for the same-sex marriage bans: (1) that "a reasonable first concern of any society is the need to regulate male-female relationships and the[ir] unique procreative possibilities" and "[o]ne way to pursue this objective is to encourage couples to enter lasting relationships through subsidies and other benefits and to discourage them from ending such relationships through these and other means";[68] and (2) that it is rational for a state to "wait and see before changing a norm that our society (like all others) has accepted for centuries."[69] Fourth, the court found that state constitutional amendments were not the results of discriminatory animus toward homosexuals.[70] Fifth, the court rejected the application of heightened scrutiny in sex discrimination cases because there is no "fundamental right to marry" under the test in *Washington v. Glucksberg*,[71] and because homosexual individuals are not a "discrete and insular class without political power."[72] Finally, the court examined national and international precedents to find that there is no overwhelming consensus regarding the "evolving meaning" of marriage.[73]

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64 *Id.* at 399.
65 409 U.S. 810 (1972).
66 *DeBoer*, 772 F.3d at 400 (quoting *Baker*, 409 U.S. at 810).
67 *Id.* at 403.
68 *Id.* at 404–05.
69 *Id.* at 406.
70 *Id.* at 408.
71 *Id.* at 411 (citing Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).
72 *Id.* at 413.
73 *Id.* at 416–17.

B. Issue Two: The Recognition Provisions

The second issue considered was: "Does the Constitution prohibit a State from denying recognition to same-sex marriages conducted in other States?"[74] The court examined this question in light of the Full Faith and Credit Clause and the right to travel.

Under its analysis of the Full Faith and Credit Clause, the Sixth Circuit found that the Clause had never required "a State to apply another State's law in violation of its own legitimate public policy."[75] Because of its holding on the first issue, the court held that the non-recognition provisions did not violate the Full Faith and Credit Clause.[76] Further, the court found it persuasive that some states, such as Ohio, did not recognize certain out-of-state heterosexual marriages.[77]

Under its analysis of the constitutional "right to travel," the Sixth Circuit found that none of the challenged state laws prohibited homosexuals from traveling in or out the state, and that those married same-sex couples who traveled into the state are treated "like other citizens of that State," whose same-sex marriages were also prohibited under state law.[78] Thus, the non-recognition laws did not violate the right to travel.[79] The court's opinion closed with the following remark:

> This case ultimately presents two ways to think about change. One is whether the Supreme Court will constitutionalize a new definition of marriage to meet new policy views about the issue. The other is whether the Court will begin to undertake a different form of change—change in the way we as a country optimize the handling of efforts to address requests for new civil liberties.
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> If the Court takes the first approach, it may resolve the issue for good and give the plaintiffs and many others relief. But we will never know what might have been. If the Court takes the second approach, is it not possible that the traditional arbiters of change—the people—will meet today's challenge admirably and settle the issue in a productive way? In just eleven years, nineteen States and a conspicuous District, accounting for nearly forty-five percent of the population, have exercised their sovereign powers to expand a definition of marriage that until recently was universally followed going back to the earliest days of human history. That is a difficult timeline to criticize as unworthy of further debate and voting. When the courts do not let the people resolve new social issues like this one, they perpetuate the idea that the heroes in these change events are judges and lawyers. Better in this instance, we think, to allow change through the customary political processes, in

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74 *Id.* at 418.

75 *Id.* (quoting Nevada v. Hall, 440 U.S. 410, 422 (1979)).

76 *DeBoer*, 772 F.3d at 418.

77 *Id.* at 419–20.

78 *Id.* at 420 (quoting Saenz v. Roe, 526 U.S. 489 (1999)).

79 *Id.*

> which the people, gay and straight alike, become the heroes of their own stories by meeting each other not as adversaries in a court system but as fellow citizens seeking to resolve a new social issue in a fair-minded way.[80]

III. PARTIES' ARGUMENTS

On January 16, 2015, the Supreme Court granted certiorari in *DeBoer v. Snyder*, limiting its inquiry to two questions:

1. Does the Fourteenth Amendment require a state to license marriage between two people of the same sex?
2. Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state?[81]

A. Issue One: The Licensing Provisions

1. The Petitioners' Argument

In their brief, the *DeBoer* petitioners primarily focused on the licensing provisions arguing that the Fourteenth Amendment requires states to license same-sex marriages.

First, they asserted that the Court is required to act in any case in which law violates constitutional rights and causes injury.[82] They cited legal, economic, social, and psychological harm stemming from the refusal of the state to license a same-sex marriage when a same-sex couple has children, or when a same-sex partner dies.[83] This injury was compounded by requiring the same-sex couples to "wait and see" if state consensus builds in their favor.[84]

Second, a state's ban on licensing same-sex marriages could not survive any level of scrutiny.[85] They cited two reasons for this failure to meet even rational basis scrutiny: (1) these laws were not enacted for a legitimate purpose, but instead were enacted "out of prejudice, fear, animus, or moral disapproval of a particular group," and (2) the means chosen to meet this purpose were not "logically and plausibly related to [a] legitimate purpose . . . [and] proportional to the burdens imposed."[86]

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[80] *Id.* at 420–21.

[81] DeBoer v. Snyder, 135 S. Ct. 1040 (2015).

[82] Brief for Petitioners at 27, 29, Obergefell v. Hodges, 135 S. Ct. 2584 (No. 14-571) [hereinafter *DeBoer* Petitioners' Supreme Court Brief] (*DeBoer v. Snyder* was consolidated with *Obergefell v. Hodges*).

[83] *Id.* at 26.

[84] *Id.* at 29.

[85] *Id.* at 32, 42.

[86] *Id.* at 30 (citing City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446 (1985); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 533 (1973); Romer v. Evans, 517 U.S. 620, 632 (1996)).

They further contended that the state's burden on "the important personal interests of 'marriage, family life, and the upbringing of children'" were not justified by the state's given purposes.[87] The following justifications provided by the state were also challenged: that such laws encourage procreation in marriage; that such laws encourage the "optimal environment" for children—namely, the "mother-father family"; and that it is necessary for the state to "'wait and see' how marriage by same-sex couples will affect children, or the institution."[88]

Third, such a ban should receive heightened scrutiny under the Equal Protection Clause because the law targeted sexual orientation.[89] Petitioners contended that homosexual individuals satisfy all four requirements for a classification that warrants heightened scrutiny: (1) they have suffered "a history of invidious discrimination"; (2) they have "characteristics that distinguish the group's members [and] bear no relation to their ability to contribute to society";[90] (3) they are a minority group that has lacked political power;[91] and (4) they have "obvious, immutable, or distinguishing characteristics that define [them] as a discrete group."[92]

Finally, the petitioners argued that such laws banning same-sex marriage should receive heightened scrutiny because marriage is a fundamental right that is separate and distinct from the right to procreate.[93] They relied on Supreme Court precedent showing individuals have the "freedom of personal choice in matters of marriage and family life"[94] and the "freedom to marry."[95] To them, this was a case about marriage generally, rather than same-sex marriage specifically, and *Windsor* and *Lawrence* support the idea that same-sex partners have the same marriage rights as opposite-sex partners.[96]

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87 *Id.* at 32–33 (quoting M.L.B. v. S.L.J., 519 U.S. 102 (1996)).

88 *Id.* at 35, 38–39, 42.

89 *Id.* at 50.

90 *Id.* at 50–51.

91 *Id.* at 52–53.

92 *Id.* at 52 (quoting Bowen v. Gilliard, 483 U.S. 587, 602 (1987)).

93 *Id.* at 57, 62.

94 *See id.* at 56 (quoting Cleveland Bd. of Ed. v. LaFleur, 414 U.S. 632, 639–40 (1974)).

95 *Id.* (citing Loving v. Virginia, 388 U.S. 1, 11–12 (1967)).

96 *DeBoer* Petitioners' Supreme Court Brief, *supra* note 82, at 56–58, 60.

2. The Respondents' Arguments

The *Tanco*, *DeBoer*, and *Bourke* respondents also addressed the licensing provisions, mainly arguing that "the Fourteenth Amendment allows a state to define marriage in the traditional way."[97]

First, there is a rational basis for a state making laws that support the traditional view of marriage, because "marriage cannot be divorced from its procreative purpose,"[98] and laws banning same-sex marriage "increas[e] the likelihood that when children are born, they will be born into stable family units."[99] Under rational basis review, laws are given a presumption of constitutionality, and this presumption is even stronger when the law at issue was "passed by the citizens themselves at the ballot box."[100] In addition, the laws of the various states were enacted rationally, rather than out of a discriminatory animus.[101]

Further, the respondents presented a number of reasons to support the conclusion that a state's traditional definition of marriage does not warrant heightened scrutiny. First, same-sex marriage was not a fundamental right because it was neither "deeply rooted in this Nation's history and tradition" nor "'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [it] were sacrificed.'"[102] As the *DeBoer* respondents argued, even if there is a fundamental right to marriage, "[t]he petitioners seek something quite different here: a due-process right to an *expanded* definition of marriage they prefer—the right of two consenting partners to marry regardless of 'the gender of the partners.'"[103] Second, based on Supreme Court precedent,[104] homosexuals

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[97] Brief for Respondents at 36, Obergefell v. Hodges, 135 S. Ct. 2584 (No. 14-562) [hereinafter *Tanco* Respondents' Supreme Court Brief] (*Tanco v. Haslam* was consolidated with *Obergefell v. Hodges*).

[98] *Id.* at 39.

[99] *Id.*

[100] *Id.* at 38 (citing Heller v. Doe, 509 U.S. 312 (1993); Gregory v. Ashcroft, 501 U.S. 452 (1991)).

[101] Brief for Respondents at 30–31 *Obergefell*, 135 S. Ct. 2584 (No. 14-574) [hereinafter *Bourke* Respondents' Supreme Court Brief] (*Bourke v. Beshear* was consolidated with *Obergefell v. Hodges*); Brief for Respondents at 28, *Obergefell*, 135 S. Ct. 2584 (No. 14-571) [hereinafter *DeBoer* Respondents' Supreme Court Brief] (*DeBoer v. Snyder* was consolidated with *Obergefell v. Hodges*); *Tanco* Respondents' Supreme Court Brief, *supra* note 97, at 39–41.

[102] *Bourke* Respondents' Supreme Court Brief, *supra* note 101, at 17 (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

[103] *DeBoer* Respondents' Supreme Court Brief, *supra* note 101, at 21 (quoting *DeBoer* Petitioners' Supreme Court Brief, *supra* note 82, at 60).

[104] The Court has established four factors used to identify whether a specific characteristic qualifies as a suspect class: "(1) inability to attract the attention of lawmakers; (2) a history of unequal treatment; (3) an obvious, immutable or distinguishing trait; and (4) bearing no relation to their ability to perform or contribute to society." *Bourke* Respondents' Supreme Court Brief, *supra* note 101, at 20 (citing City of Cleburne v. Cleburne Living Ctr.,

do not constitute a suspect or quasi-suspect class because (1) "[g]ays and lesbians as a class clearly have the ability to attract the attention of lawmakers";[105] (2) "[t]he social discrimination experienced by homosexual persons is distinguishable from the systematic governmental discrimination experienced by recognized protected classes";[106] and (3) "[p]etitioners have not established that gays and lesbians have obvious, immutable, or distinguishing traits,"[107] and immutable characteristics alone do not make a protected class.[108]

The respondents also argued that, although sex is a protected class, the same-sex marriage laws did not discriminate on the basis of sex, because they "appl[ied] equally to members of both genders."[109] Additionally, sexual orientation is not recognized as a protected class and, even if it were, the laws at issue did not discriminate on the basis of sexual orientation because they prevented both homosexuals and heterosexuals from marrying a person of the same sex.[110]

Finally, the respondents contended that the decision to define marriage traditionally should be left up to the states.[111] They stated that because "[n]othing in the Fourteenth Amendment's text or history requires a state to license a marriage between two people of the same sex," the Constitution leaves this decision to each state to decide.[112] Contrary to the petitioners' assertions, "*Windsor* confirm[ed] that these decisions should be made on the local level, and—once made—the federal government lacks authority to interfere with that decision."[113]

B. Issue Two: The Recognition Provisions

1. The Petitioners' Arguments

The petitioners in *Tanco*, *Obergefell*, and *Bourke* focused primarily on the recognition provisions in their briefs, arguing that the non-recognition bans were unconstitutional under the Equal Protection Clause.

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473 U.S. at 441, 445 (1985); Lyng v. Castillo, 477 U.S. 635, 368 (1986); Frontiero v. Richardson, 411 U.S. 677 (1973); San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973)).

[105] *Id.*

[106] *Id.* at 23.

[107] *Id.* at 24.

[108] *Id.* at 20, 24–25.

[109] *Id.* at 26–27; *DeBoer* Respondents' Supreme Court Brief, *supra* note 101, at 54–55.

[110] *Bourke* Respondents' Supreme Court Brief, *supra* note 101, at 25–26; *DeBoer* Respondents' Supreme Court Brief, *supra* note 101, at 53; *Tanco* Respondents' Supreme Court Brief, *supra* note 97, at 41–42.

[111] *Bourke* Respondents' Supreme Court Brief, *supra* note 101, at 11; *DeBoer* Respondents' Supreme Court Brief, *supra* note 101, at 14; *Tanco* Respondents' Supreme Court Brief, *supra* note 97, at 47.

[112] *DeBoer* Respondents' Supreme Court Brief, *supra* note 101, at 14.

[113] *Bourke* Respondents' Supreme Court Brief, *supra* note 101, at 11.

First, the non-recognition laws should be subject to strict scrutiny because they infringe upon the fundamental "right to marry" under the Fourteenth Amendment.[114] To this end, citing a series of Supreme Court decisions, including *Loving v. Virginia*,[115] *Meyer v. Nebraska*,[116] *Griswold v. Connecticut*,[117] *Lawrence v. Texas*,[118] and *M.L.B. v. S.L.J.*,[119] the petitioners proposed that "[c]hoices about marriage, family life, and the upbringing of children are among associational rights . . . of basic importance in our society *[and are] sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect*."[120] This right was further entrenched for same-sex couples that were married in another state, because "once a couple has married, privacy, autonomy, and associational rights attach to the marital relationship, protecting it from unjustified state intrusion."[121]

Second, the petitioners argued that the non-recognition laws should receive strict scrutiny because they infringe upon a same-sex couple's fundamental "right to travel" under the Fourteenth Amendment.[122] Even if the law did not treat out-of-state same-sex married couples differently than in-state same-sex couples, it imposed a burden on these couples that was high enough to warrant strict scrutiny, which this law did not satisfy.[123]

Third, the Court should apply *Windsor's* "careful consideration," because, like DOMA in *Windsor*, the "design, purpose, and effect" of the non-recognition laws is to impose inequality.[124] Although these principles were adopted in the context of federal law in *Windsor*, they are equally

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[114] Brief for Petitioners at 17, Obergefellv. Hodges, 135 S. Ct. 2584 (2015) (No. 14-562) [hereinafter *Tanco* Petitioners' Supreme Court Brief] (*Tanco v. Haslam* was a consolidated case of *Obergefell v. Hodges*).

[115] 388 U.S. 1 (1967).

[116] 262 U.S. 390 (1923).

[117] 381 U.S. 479 (1965).

[118] 539 U.S. 558 (2003).

[119] 519 U.S. 102 (1996).

[120] *Tanco* Petitioners' Supreme Court Brief, *supra* note 114, at 18–20 (quoting *M.L.B.,* 519 U.S. at 116) (citing *Lawrence,* 539 U.S. at 574; *Loving,* 388 U.S. at 12; *Griswold,* 381 U.S. at 485–86; *Meyer,* 262 U.S. at 399).

[121] *Id.* at 21.

[122] *Id.* at 23–24.

[123] *Id.* at 29.

[124] *Obergefell* Petitioners' Supreme Court Brief, *supra* note 8, at 20, 28 (quoting United States v. Windsor, 133 S. Ct. 2675, 2689, 2692 (2013)); *Tanco* Petitioners' Supreme Court Brief, *supra* note 114, at 30–31 (quoting *Windsor*, 133 S. Ct. at 2689, 2692); *see also Bourke* Petitioners' Supreme Court Brief, *supra* note 40, at 54 (describing the careful consideration *Windsor* applied to DOMA's purpose and effect).

applicable in the state law context.[125] Fourth, the Court should apply heightened scrutiny because the non-recognition laws discriminate on the basis of sex and sexual orientation.[126]

Finally, the petitioners contended that a state's interest in enacting the non-recognition laws cannot satisfy even rational basis review because there could be no legitimate state interest for such laws.[127] To this end, the non-recognition laws were not justified by (1) the state's interest in the welfare of children, because they actually harmed children and "[t]he benefits of being raised by married parents do not differ depending on the sex of those parents";[128] (2) the state's democratic process, because it "put up for popular vote" the constitutional rights of a specific group;[129] or (3) the state's interest in maintaining federalism, because the non-recognition laws "effectively create[d] two nations"[130] and "cooperation among states is an essential feature of horizontal federalism."[131]

2. The Respondents' Arguments

The *Tanco*, *Obergefell*, and *Bourke* respondents focused on the non-recognition laws mainly arguing that "[t]he Fourteenth Amendment does not require a state to recognize an out-of-state same-sex marriage."[132]

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[125] *Tanco* Petitioners' Supreme Court Brief, *supra* note 114, at 30; *see also Bourke* Petitioners' Supreme Court Brief, *supra* note 40, at 25, 53 (arguing that heightened scrutiny should apply to Kentucky's same-sex marriage laws).

[126] *Bourke* Petitioners' Supreme Court Brief, *supra* note 40, at 32, 38; *Obergefell* Petitioners' Supreme Court Brief, *supra* note 8, at 41, 48; *Tanco* Petitioners' Supreme Court Brief, *supra* note 114, at 34, 39.

[127] *Bourke* Petitioners' Supreme Court Brief, *supra* note 40, at 39, 51; *Obergefell* Petitioners' Supreme Court Brief, *supra* note 8, at 49–50; *Tanco* Petitioners' Supreme Court Brief, *supra* note 114, at 46.

[128] *Tanco* Petitioners' Supreme Court Brief, *supra* note 114, at 47–48; *see also Bourke* Petitioners' Supreme Court Brief, *supra* note 40, at 50 (arguing that the marriage ban denied children stability based on the sexual orientation of their parents); *Obergefell* Petitioners' Supreme Court Brief, *supra* note 8, at 58–59 (noting research has rejected a difference in the stability offered by same-sex couples and arguing that the denial of recognition leaves children of these unions unprotected).

[129] *Tanco* Petitioners' Supreme Court Brief, *supra* note 114, at 46; *see also Bourke* Petitioners' Supreme Court Brief, *supra* note 40, at 40 (asserting as a foundational premise that certain constitutional protections should not be subject to the democratic process); *Obergefell* Petitioners' Supreme Court Brief, *supra* note 8, at 52 (noting the unequal treatment of marriage recognition resulting from the state democratic processes).

[130] *Tanco* Petitioners' Supreme Court Brief, *supra* note 114, at 46–47.

[131] *Id.* at 56.

[132] *Tanco* Respondents' Supreme Court Brief, *supra* note 97, at 10, 26; *see also Bourke* Respondents' Supreme Court Brief, *supra* note 101, at 35, 41 (asserting that the Fourteenth Amendment does not compel recognition of out-of-state same-sex marriages); Brief for Respondents at 35–36, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (No. 14-556) [hereinafter *Obergefell* Respondents' Supreme Court Brief] (same).

In support of this argument, the respondents first noted that states have historically had the ability to reject out-of-state marriage licenses.[133] Citing *Nevada v. Hall*[134] and *Pacific Employers Insurance Co. v. Industrial Accident Commission*,[135] the respondents contended that "the Full Faith and Credit Clause does not require a state to apply another state's law in violation of its own legitimate public policy,"[136] nor does it "demand 'subserviency' from a state."[137]

Second, substantive due process did not compel states to recognize out-of-state same-sex marriages because there is neither a fundamental right to marry nor a fundamental right to remain married.[138] What the petitioners desired was not the right to "marriage" as described in the Court's prior decisions, because "the union of one man and one woman has been the definition of marriage throughout the United States since its founding"[139] and "the Court's reason for deeming the right to marry fundamental has undoubtedly been based on the procreative capacity of that man-woman relationship."[140] In addition, there is no "right to 'remain married,'"[141] because "[t]he Due Process Clause requires States not to deprive citizens of their fundamental rights, but it does not impose affirmative obligations on States to act."[142]

Third, the non-recognition laws did not violate the right to travel found in the Privileges and Immunities Clause of Article IV, Section Two of the Constitution or the Privileges or Immunities Clause of the Fourteenth Amendment because same-sex couples within a state were also ineligible for marriage.[143] Therefore, the laws did not infringe on any of the three components of the right to travel.[144]

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[133] *Obergefell* Respondents' Supreme Court Brief, *supra* note 132, at 37; *Tanco* Respondents' Supreme Court Brief, *supra* note 97, at 11; *see also Bourke* Respondents' Supreme Court Brief, *supra* note 101, at 36 (noting Kentucky's adherence to non-recognition of same-sex marriages licensed in other states).

[134] 440 U.S. 410 (1979).

[135] 306 U.S. 493 (1939).

[136] *Bourke* Respondents' Supreme Court Brief, *supra* note 101, at 38 (quoting *Hall*, 440 U.S. at 422); *Tanco* Respondents' Supreme Court Brief, *supra* note 97, at 11 (quoting *Hall*, 440 U.S. at 422) (citing *Pac. Emp. Ins.*, 306 U.S. at. 504).

[137] *Tanco* Respondents' Supreme Court Brief, *supra* note 97, at 11.

[138] *Id.* at 23–24; *see also Obergefell* Respondents' Supreme Court Brief, *supra* note 132, at 37 (arguing that same-sex marriage falls outside of the scope of recognized rights).

[139] *Tanco* Respondents' Supreme Court Brief, *supra* note 97, at 19.

[140] *Id.* at 18; *see also Bourke* Respondents' Supreme Court Brief, *supra* note 101, at 9 (noting the state's interest in facilitating procreation).

[141] *Tanco* Respondents' Supreme Court Brief, *supra* note 97, at 7.

[142] *Id.* at 26.

[143] *Id.* at 33, 35–36.

[144] *Tanco* Respondents' Supreme Court Brief, *supra* note 97, at 33–35 (citing Saenz v. Roe, 526 U.S. 489, 501–02 (1999)) (noting that the three components of the right to travel include "the right of a citizen of one State to enter and to leave another State without

Fourth, federalism demands that states be allowed to enact non-recognition standards,[145] an argument that was bolstered, rather than undermined, by the Court's opinion in *Windsor*.[146]

Finally, the respondents argued that the non-recognition laws did not discriminate on the basis of sex and were not subject to heightened scrutiny based on sexual orientation classification.[147] Consequently, the non-recognition laws were constitutional because they "rationally promote important state interests."[148]

IV. SUPREME COURT OPINION

In a 5-4 decision, the Court reversed the Sixth Circuit, holding that the Constitution requires states to issue marriage licenses to same-sex couples and to recognize a same-sex couple's out-of-state marriage license.[149] Justice Kennedy authored the majority opinion joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan.[150]

The majority's opinion asserted the importance of marriage throughout the course of time, beginning with a recitation of the history of marriage and a confirmation of "[t]he centrality of marriage to the human condition."[151] the Court stated that this "lifelong union . . . always has promised nobility and dignity to all persons," and, contrary to the Respondents' contentions, the Petitioners did not seek to 'demean' marriage, but rather, "respect . . . its privileges and responsibilities."[152] The majority focused on how the institution of marriage has evolved over time.[153] This evolution, the majority declared, coincides with the evolution of homosexual rights in America, which began with the American

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impediment," "the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State," and the right to be treated like other citizens of that state).

[145] *Obergefell* Respondents' Supreme Court Brief, *supra* note 132, at 19; *Tanco* Respondents' Supreme Court Brief, *supra* note 97, at 14.

[146] *Bourke* Respondents' Supreme Court Brief, *supra* note 101, at 10–11; *Obergefell* Respondents' Supreme Court Brief, *supra* note 132, at 11.

[147] *Bourke* Respondents' Supreme Court Brief, *supra* note 101 at 16, 28; *Obergefell* Respondents' Supreme Court Brief, *supra* note 132, at 50; *Tanco* Respondents' Supreme Court Brief, *supra* note 97, at 41.

[148] *Obergefell* Respondents' Supreme Court Brief, *supra* note 132, at 51–52; *see also Bourke* Respondents' Supreme Court Brief, *supra* note 101, at 35 (concluding that the statutes were narrowly tailored amd therefore satisfied even heightened scrutiny); *Tanco* Respondents' Supreme Court Brief, *supra* note 97, at 32 (connecting the law to rational state interests).

[149] Obergefell v. Hodges, 135 S. Ct. 2584, 2607–08 (2015).

[150] *Id.* at 2591.

[151] *Id.* at 2594.

[152] *Id.* (noting petitioners also "need[ed]" the privileges and responsibilities of marriage).

[153] *Id.* at 2595.

Psychiatric Association declassifying homosexuality as a mental disorder and eventually led to increased public tolerance of homosexual behavior.[154] To further bolster this evolution, the majority relied on the dramatic shift from its 1986 holding in *Bowers v. Hardwick*, which upheld a Georgia law criminalizing homosexual sodomy,[155] to its 1996 decision in *Romer v. Evans*, which struck down a state constitutional amendment that prevented the state from protecting an individual against sexual orientation discrimination,[156] and its 2003 holding in *Lawrence v. Texas*, which overruled *Bowers*.[157] This, of course, culminated in the Court striking down the Defense of Marriage Act ("DOMA") in *United States v. Windsor*, which spurred many of the petitioners' claims in this suit.[158]

The Court found its primary justification for striking down state same-sex marriage bans in the Due Process Clause of the Fourteenth Amendment, which protects to "certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs."[159] The Court asserted that the limits of these rights are based on the Court's "reasoned judgment" over the years, and although "[h]istory and tradition guide and discipline this inquiry," they "do not set its outer boundaries."[160] Remarking that society long regarded interracial and inter-class marriages to be prohibited, the Court reasoned that the definition of marriage is subject to revision again by perceived popular opinion.

The Court cited a number of cases to support its assertion that "the right to marry is protected by the Constitution"[161] and found four propositions that demonstrate why this right should be applied to same-sex couples: (1) decisions about marriage are "inherent in the concept of individual autonomy";[162] (2) marriage is a "two-person union unlike any other";[163] (3) marriage helps promote families and protect children; and (4) marriage is fundamental to our social order.[164] The majority strayed from traditional due process analysis by admitting that, while its holding in *Washington v. Glucksberg* generally mandates that a fundamental right

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[154] *Id.* at 2596.

[155] *Obergefell*, 135 S. Ct. at 2596 (citing Bowersv. Hardwick, 478 U.S. 186,196(1986)).

[156] *Id.* (citing Romer v. Evans, 517 U.S. 620, 635–36 (1996)).

[157] *Id.* (citing Lawrence v. Texas, 539 U.S. 558, 578 (2003)).

[158] *Id.* at 2597 (citing United States v. Windsor, 133 S. Ct. 2675, 2696 (2013)).

[159] *Id.*

[160] *Id.* at 2598.

[161] *Id.*

[162] *Id.* at 2599 (relying on previous cases to hold that decisions regarding contraception, family relationships, procreation, and childrearing are inherent in the concept of individual autonomy).

[163] *Id.*

[164] *Id.* at 2600–01.

be "defined in a most circumscribed manner,"[165] the right to marry has never been considered in anything other than its "comprehensive sense."[166]

The majority's Equal Protection Clause analysis resembled the penumbras language used in *Griswold v. Connecticut*.[167] The Court found that the Due Process and Equal Protection Clauses are "connected in a profound way," and thus "[t]his interrelation of the two principles furthers our understanding of what freedom is and must become."[168] Under this analysis, law adapts to public policy; hence, as social acceptance of same-sex relationships has grown, so must the law to protect these relationships.

In closing, the majority justified its override of the democratic process by stating that, although more debate could be had on this issue, there had already been enough deliberation.[169] Although "the Constitution contemplates that democracy is the appropriate process for change,"[170] this is no longer true when the Court discovers a new fundamental right. The majority asserted that religious individuals are still free to wholeheartedly advocate for traditional marriage and will not be persecuted for doing so.[171] However, no express methods of protection were addressed. Finally, the majroity confronted the recognition bans, which were found unconstitutional because "the disruption caused by the recognition bans is significant and ever-growing."[172] And, every state is now required to issue same-sex marriage licenses.[173]

Four pointed dissenting opinions were filed. First, Chief Justice Roberts argued that the Court was not the proper body to decide the legality of same-sex marriage. While he conceded that there may be strong policy reasons for allowing same-sex marriage, he argued that the legal justifications were lacking.[174] In his words, the majority's decision was "an act of will, not legal judgment."[175] Roberts noted that although the majority attempted to bolster its decision based on history and tradition, it did nothing of the sort, and instead represented only "the unprincipled tradition of judicial policymaking" that is reminiscent of *Lochner v. New*

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165 *Id.* at 2602 (citing Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

166 *Id.*

167 *See* Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (concluding that penumbras of the Bill of Rights create a right of privacy).

168 *Obergefell*, 135 S. Ct. at 2602–03.

169 *Id.* at 2605.

170 *Id.*

171 *Id.* at 2607.

172 *Id.*

173 *Id.* at 2607–08.

174 *Id.* at 2611 (Roberts, C.J., dissenting).

175 *Id.* at 2612.

York.[176] In addition, Roberts expressed strong doubts about the majority's promise that individual religious liberties will be preserved after its decision, and stated that the "most discouraging aspect" of the majority's opinion was its characterization of those in favor of traditional marriage as bigoted and disrespectful.[177] Roberts's dissent closed with the following poignant remark:

> If you are among the many Americans—of whatever sexual orientation—who favor expanding same-sex marriage, by all means celebrate today's decision. Celebrate the achievement of a desired goal. Celebrate the opportunity for a new expression of commitment to a partner. Celebrate the availability of new benefits. But do not celebrate the Constitution. It had nothing to do with it.[178]

Next, Justice Scalia argued that the majority's opinion posed a threat to American democracy. In his opening remarks, he stated, "[t]oday's decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court."[179] He argued that the Court's decision prematurely eliminated public debate, despite the fact that the same-sex marriage debate displayed "American democracy at its best," and instead enabled the Court to act as a super-legislature.[180] Scalia criticized the Court's conclusion on the grounds that it represented only the majority's personal views about the propriety of same-sex marriage, rather than the view of the American people either today or at the Founding.[181] In closing, Scalia characterized the majority's analysis as "pretentious," because it claimed to have "discovered in the Fourteenth Amendment a 'fundamental right' overlooked by every person alive at the time of ratification, and almost everyone else in the time since."[182]

Next, Justice Thomas disputed the majority's understanding of the word "liberty" and its use of substantive due process, arguing that the Court's analysis "distort[s] our Constitution, . . . ignores the text, [and] inverts the relationship between the individual and the state in our Republic."[183] Although Thomas fundamentally disagreed with the use of substantive due process in general,[184] he argued that the petitioners' claims should fail even under such analysis because they had not been deprived of "liberty," which has historically been defined as "freedom from

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176 *Id.* at 2616 (citing Lochner v. New York, 198 U.S. 45 (1905)).
177 *Id.* at 2626
178 *Id.*
179 *Id.* at 2627 (Scalia, J., dissenting).
180 *Id.* at 2627–29.
181 *Id.* at 2628.
182 *Id.* at 2629–30.
183 *Id.* at 2631 (Thomas, J., dissenting).
184 *Id.*

physical restraint."[185] He further argued that even if a broader definition of liberty were conceded, it represented "individual freedom *from* governmental action, not . . . a right *to* a particular governmental entitlement."[186] Like Roberts, Thomas saw the majority's opinion as a threat to religious freedom that is guarded only by a "weak gesture toward religious liberty."[187] Finally, Thomas criticized the majority's focus on advancing the dignity of same-sex couples because "[t]he flaw in that reasoning, of course, is that the Constitution contains no 'dignity' Clause, and even if it did, the government would be incapable of bestowing dignity. Human dignity has long been understood in this country to be innate."[188]

Finally, Justice Alito criticized the majority's characterization of marriage as "promot[ing] the well-being of those who choose to marry."[189] He stated that "[t]his understanding of marriage, which focuses almost entirely on the happiness of persons who choose to marry, is shared by many people today, but it is not the traditional one."[190] Instead, he argued that the traditional definition of marriage is intended to encourage procreation in the context of long-lasting familial units, and expressed strong reservations about the ability of such a changed definition of marriage to successfully promote this interest.[191] Finally, Justice Alito asserted that the majority's opinion promoted two injustices: first, it usurped power from the people and dangerously increased the scope of the Court's power; second, by equating same-sex marriage bans with interracial marriage bans, the majority's opinion could "be used to vilify Americans who are unwilling to assent to the new orthodoxy."[192]

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185 *Id.* at 2633.
186 *Id.* at 2634.
187 *Id.* at 2638.
188 *Id.* at 2639.
189 *Id.* at 2641 (Alito, J., dissenting).
190 *Id.*
191 *Id.* at 2641–42.
192 *Id.* at 2642.