No. 14-556

In the Supreme Court of the United States

BRITTANI HENRY ET AL.,

Petitioners,

v.

RICHARD HODGES, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE OHIO DEPARTMENT OF HEALTH,

Respondent.

JAMES OBERGEFELL ET AL.,

Petitioners,

v.

RICHARD HODGES, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE OHIO DEPARTMENT OF HEALTH,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Ohio's constitution and laws prohibit the State from recognizing same-sex marriages licensed in other States. Does Ohio's prohibition on state recognition of out-of-state, same-sex marriages violate either the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment?

2. A same-sex couple living in New York obtained a New York adoption order for an Ohio-born child. Ohio offered to list one of the couple's names on an amended Ohio birth certificate, but declined to list both names because Ohio law permits only married couples to jointly adopt and prohibits Ohio officials from recognizing out-of-state, same-sex marriages. May these New York Plaintiffs bring a claim under 42 U.S.C. § 1983 alleging that Ohio's refusal to list both of their names on an amended birth certificate violates the Full Faith and Credit Clause? If so, did Ohio's actions comport with that clause?

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INTRODUCTION

For over a decade now, the many States that make up this Nation have been engaged in a profound and emotional policy debate about the meaning of marriage and whether it should be changed to encompass same-sex relationships. Legislators have expressed their views on that important question in the halls of government; citizens have expressed their views in the voting booth. Different States continue to reach different answers through good-faith deliberation. That debate continues. This is as it should be in our federalist system. As the Court said just last Term, "[f]reedom embraces the right, indeed the duty, to engage in a rational, civic discourse in order to determine how best to form a consensus to shape the destiny of the Nation and its people." *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1637 (2014) (plurality op.).

The decision below, by contrast, intensifies a legal debate on a different question. The Sixth Circuit resolved not whether it is a good idea for a State to permit same-sex marriage through democratic channels, but whether the Fourteenth Amendment immediately commands that result for all fifty States. The court answered this legal question in favor of democracy: "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." Pet. App. 69a. Far better for our country, the court explained, "to allow change through the customary political processes, in which the people, gay and straight alike, become the heroes of their own stories by meeting each other not as ad-

versaries in a court system but as fellow citizens seeking to resolve a new social issue in a fair-minded way." *Id.*

To reach this conclusion, the Sixth Circuit invoked nearly every conceivable way to think about the constitutional question—ranging from original public meaning to an evolving-rights approach, from our present national values to an international perspective. Pet. App. 22a-63a. The court found it undisputed that the Fourteenth Amendment did not originally contain a right to same-sex marriage, given that all States followed marriage's traditional definition until 2003. Pet. App. 30a-32a. But its analysis did not end there. It added that the "animus" concerns justifying judicial intervention against the novel laws in *United States v. Windsor*, 133 S. Ct. 2675 (2013), and *Romer v. Evans*, 517 U.S. 620 (1996), did not justify judicial intervention here. Traditional marriage laws could be retained for reasons other than bigotry. Indeed, "[i]t is no less unfair to paint the proponents of the measures as a monolithic group of hate-mongers," the court stated, "than it is to paint the opponents as a monolithic group trying to undo American families." Pet. App. 45a. Similarly, "[f]reed of federal-court intervention, thirty-one States would continue to define marriage the old-fashioned way." Pet. App. 59a. It was at least too early in the day, the court felt, for a national consensus to have evolved into a new constitutional right.

Petitioners in these two cases from Ohio (and Petitioners in similar cases from Michigan, Kentucky, and Tennessee) seek review of the Sixth Circuit's

Fourteenth Amendment holding. Some (as in the Michigan case) ask whether the Fourteenth Amendment requires a State to *license* same-sex marriage within its borders. Others (as in these Ohio cases) ask whether the Fourteenth Amendment requires a State to *recognize* a same-sex marriage licensed in another State. Respondent Richard Hodges, the Director of the Ohio Department of Health ("Ohio" or "State"), agrees with Petitioners that the question presented under the Fourteenth Amendment warrants the Court's consideration at this time, in both the licensing and recognition contexts.

The present status quo is unsustainable. If, as Ohio believes, the Sixth Circuit correctly interpreted the Fourteenth Amendment, the status quo is unfair to the many States (and the citizens of those States) who would, but for a federal order mandating the opposite, continue to resolve the delicate policy question in favor of traditional marriage. *Latta v. Otter*, ___ F.3d ___, 2014 WL 4977682, at *11 (9th Cir. Oct. 7, 2014); *Baskin v. Bogan*, 766 F.3d 648, 672 (7th Cir. 2014); *Bostic v. Schaefer*, 760 F.3d 352, 384 (4th Cir. 2014); *Kitchen v. Herbert*, 755 F.3d 1193, 1229-30 (10th Cir. 2014). If, as Petitioners believe, the Sixth Circuit was mistaken, the present status quo is unfair to gays and lesbians living in the States making up that circuit and the other circuits that still permit States to retain marriage's traditional definition. Pet. App. 69a; *see also, e.g.*, *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 870-71 (8th Cir. 2006). The country deserves a nationwide answer to the question—one way or the other. For its part, Ohio

asks the Court to answer the legal question in favor of a dynamic view that permits the democratic debate over proper policy to continue now and going forward, rather than a wooden view that takes that policy question out of the hands of this generation and all future generations.

Ohio respectfully disagrees with Petitioners, however, over whether the Court should grant review of their second question presented. That question concerns a claim under the Full Faith and Credit Clause by one of the same-sex couples who have filed this petition. A New York couple who adopted an Ohio child in a New York court seeks to have both of their names listed on an amended Ohio birth certificate based on the out-of-state order. For at least three reasons, the Court should decline review of that full-faith-and-credit question.

For one, the question raises a difficult preliminary issue: Does 42 U.S.C. § 1983 create a vehicle through which plaintiffs can assert full-faith-and-credit claims in federal court? The only circuit expressly to consider that complicated preliminary question in a published decision has held that § 1983 does *not* create such a vehicle. *See Adar v. Smith*, 639 F.3d 146, 153 (5th Cir. 2011) (en banc). The lack of lower-court precedent on this initial procedural question counsels in favor of further percolation in the lower courts before this Court steps in.

For another, Petitioners mistakenly identify a circuit split on the merits of their full-faith-and-credit question. As the Fifth Circuit noted, its decision in *Adar* and the Tenth Circuit's decision on which Peti-

tioners rely for their conflict claim, *Finstuen v. Crutcher*, 496 F.3d 1139 (10th Cir. 2007), are easily reconcilable. *Adar* (like this case) did not involve a State's refusal to recognize an out-of-state adoption decree as valid; it merely involved the manner in which a State would keep its own state records in light of that recognized decree. *See* 639 F.3d at 157. *Finstuen*, by contrast, involved a state law that prohibited a State and its state courts from giving any recognition at all to an out-of-state adoption decree. *See* 496 F.3d at 1142; *cf. Adar v. Smith*, 132 S. Ct. 400 (2011) (denying certiorari).

For a third, this full-faith-and-credit question was barely considered by the district court (when holding for Plaintiffs) or the circuit court (when holding for Ohio). The district court found it "unnecessary to reach Plaintiffs' arguments based on the Full Faith and Credit Clause" because of its Fourteenth Amendment holding, Pet. App. 148a, and merely noted in an endnote that it agreed with Petitioners, Pet. App. 153a-58a n.i. Unsurprisingly, therefore, the Sixth Circuit did not *expressly* consider this question when reversing the district court. *See* Pet. App. 22a-69a.

In sum, the Court should grant review over whether the Fourteenth Amendment encompasses a right to same-sex marriage so that it can affirm the Sixth Circuit's judgment. The Court should deny review over whether the Full Faith and Credit Clause requires a State to maintain its state birth records in any particular manner.

COUNTERSTATEMENT

A. Ohio's Lawmakers And Citizens Decided To Retain Marriage's Traditional Definition In Ohio's Statutes And Constitution

Like every State until recently, Ohio has long followed, and continues to follow, the traditional legal and societal definition of marriage as between a "male" and a "female." 1 Ohio Laws 31, 31 (1803). Ohio law thus authorizes government officials to issue marriage licenses only to opposite-sex couples who are no more closely related than second cousins. *See* Ohio Rev. Code §§ 3101.01(A), 3101.05.

Like most (if not all) state courts, moreover, Ohio courts have long followed the general "*lex loci contractus*" or "place of celebration" rule as the starting point for determining whether to recognize a marriage licensed in another State. This choice-of-law rule directs Ohio courts generally to recognize marriages that were lawful in the State in which they were performed and to decline to recognize marriages that were unlawful there. *See, e.g.*, *Mazzolini v. Mazzolini*, 155 N.E.2d 206, 208 (Ohio 1958); *Seabold v. Seabold*, 84 N.E.2d 521, 522-23 (Ohio Ct. App. 1948). Under this dichotomy, Ohio courts will recognize even some marriages that could not have been licensed in Ohio, so long as those marriages are merely "voidable" and not absolutely "void." *See Mazzolini*, 155 N.E.2d at 208-09; *In re Stiles Estate*, 391 N.E.2d 1026, 1027 (Ohio 1979); *State v. Brown*, 23 N.E. 747, 750 (Ohio 1890). A marriage will be deemed "void" (and not recognized) if it is, among other things, "unalterably opposed to a well defined

public policy" of the State. *Mazzolini*, 155 N.E.2d at 208.

In 2004, as the debate over same-sex marriage grew in the democratic sphere and the courts, Ohioans decided to retain the traditional definition of marriage. They did so both through legislative action and through a constitutional amendment.

Legislative Action. In 2004, Ohio's lawmakers became concerned that if they did not pass legislation stating the legislature's position on same-sex marriage, they would be abdicating to the courts their duty to clarify Ohio's public policy on this issue. *See Obergefell* Doc.41-6, Becker Decl. Ex. E, PageID#340 (statement of Rep. Seitz: "I am not willing to leave it to our courts to define what Ohio's public policy might be."); *id.* at PageID#351 (statement of Rep. Grendell: "I'm going to vote that the people of Ohio deserve to have their representatives decide the public policy of this state."). Ohio's General Assembly thus clarified Ohio's public policy in an amendment to its marriage statute. 150 Ohio Laws pt. III 3403, 3403-07 (2004) (Sub. H.B. No. 272). Specifically, Ohio's legislature amended the State's marriage laws to provide:

> (C)(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.

> (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.

Ohio Rev. Code § 3101.01(C). The legislation disavowed any intent to prohibit extending non-marital benefits to same-sex relationships or any intent to affect the private contracts of same-sex couples. *Id.* § 3101.01(C)(3)(a)-(b).

On February 6, 2004, after the Act passed Ohio's General Assembly, Governor Robert Taft signed it into law. When doing so, the governor emphasized that the law's purpose was not to discriminate against any Ohioans, but "to reaffirm existing Ohio law with respect to our most basic, rooted, and time-honored institution: marriage between a man and a woman." *Obergefell* Doc.41-8, Becker Decl. Ex. G, PageID#428.

Constitutional Action. Around the time that Ohio's General Assembly adopted these clarifications, private litigants were elsewhere challenging similar statutes under their own state constitutions. *See, e.g.*, *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (invalidating, under state constitution, statutory marriage definition). Ohio's citizens decided to define marriage a second time, this time in the Ohio Constitution, to ensure that the courts would respect their democratic choices when interpreting that state constitution. Specifically, Ohio's citizens amended their constitution to retain the traditional definition of marriage, and to confirm

that the constitution did not permit Ohio courts to recognize out-of-state, same-sex marriages. The amendment passed with over three million votes, by a margin of 61.7% in favor and 38.3% against. *See* Ohio Sec'y of State, State Issue 1: November 2, 2004, *available at* http://www.sos.state.oh.us/sos/elections/Research/electResultsMain/2004ElectionsResults/04-1102Issue1.aspx (last visited Dec. 10, 2014).

The Ohio Constitution now provides: "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." Ohio Const. art. XV, § 11. Supporters of same-sex marriage, in addition to bringing legal challenges against this provision in the courts, remain in the process of challenging it in the democratic sphere—by attempting to place a repeal of the provision on the ballot. *See, e.g.*, Ohio Ballot Board, Pending Statewide Ballot Issues, *available at* http://www.sos.state.oh.us/LegnAndBallotIssues/BallotBoard.aspx (last visited Dec. 10, 2014).

B. Petitioners, Many Plaintiffs Across Two Lawsuits, Challenged Ohio's Refusal To Recognize Same-Sex Marriages Performed In Other States

The suits at issue in these two cases were brought in the Southern District of Ohio. Both suits challenge Ohio's constitutional and statutory bans pro-

hibiting the State from granting *recognition* of same-sex marriages licensed in other States. Neither suit challenges the constitutional and statutory bans prohibiting the State from *licensing* same-sex marriages within Ohio's own borders.

1. *Obergefell v. Hodges*

The first suit was originally brought by James Obergefell and John Arthur, a Cincinnati couple. *See Obergefell* Doc.33, Second Am. Compl., PageID#209. At the time of the suit, Arthur (who has since passed away) tragically suffered from amyotrophic lateral sclerosis ("ALS") and was in hospice care. *Id.* The couple flew to Maryland, a state that licenses same-sex marriage; wed inside the jet while it sat on the tarmac; and returned to Cincinnati the same day. *Id.* Bringing an as-applied challenge to Ohio law, Obergefell and Arthur sought a temporary restraining order and an injunction against the Director of the Ohio Department of Health (now, Richard Hodges) and the Registrar for the Cincinnati Health Department Office of Vital Records that would require them to identify Arthur as married and Obergefell as his spouse on Arthur's death certificate. *Id.* at PageID#212. The district court granted a temporary restraining order to these Plaintiffs, eventually extending the order until final judgment. *Obergefell* Doc.13, Order, at PageID#105; *Obergefell* Doc.19, Order, at PageID#115.

Subsequently, two additional plaintiffs joined the suit. Plaintiff David Michener married William Ives in Delaware under the law of that State, and Ives later died unexpectedly. *Obergefell* Doc.33, Second

Am. Compl., PageID#209. Michener sought similar as-applied relief requiring Ohio to list Ives as married and Michener as his spouse on Ives's death certificate. *Id.* at PageID#212-13. The district court granted Michener a temporary restraining order as it did for Obergefell and Arthur. *Obergefell* Doc.23, Order, PageID#136-37.

The second additional Plaintiff, Robert Grunn, is a funeral director who planned on serving same-sex couples and sought to represent the interests of his unknown future clients in this litigation. *Obergefell* Doc.33, Second Am. Compl., PageID#214-15. He requested an injunction permitting him to list future clients who entered into same-sex marriages in other States as married on death certificates. *Id.* at PageID#217. The State moved to dismiss Grunn for lack of standing. The district court denied the motion, holding that Grunn had third-party standing to represent the interests of hypothetical clients. *Obergefell* Doc.54, Order, PageID#826-34.

The parties agreed that a trial was unnecessary to resolve this lawsuit. *See* Order Establishing Case Management Plan (Aug. 13, 2013). Plaintiffs instead sought a permanent injunction by presenting expert declarations. *See* Docs.41-47, Decls., PageID#275-710. Ultimately, the district court granted the injunction as applied to the particular Plaintiffs and as applied to the particular death-certificate context. *See* Doc.66, Decl. J. & Permanent Inj., PageID#1095. The court grounded the injunction in the Fourteenth Amendment's Due Process and Equal Protection Clauses. Pet. App. 217a.

Starting with due process, the court conceded that, at that time, "most courts [had] not found that a right to same-sex marriage is implicated in the fundamental right to marry." Pet. App. 172a. It distinguished those cases from this one, however, by suggesting that this case triggered the "right not to be deprived of one's already-existing legal marriage." Pet. App. 173a. It held that Ohio's constitutional and statutory ban on recognizing out-of-state marriages violated this "right to remain married." Pet. App. 174a; *see* Pet. App. 174a-82a.

The district court next held that Ohio's refusal to recognize same-sex marriage violated equal protection. Pet. App. 185a-212a. When doing so, the court suggested that Ohio law would recognize *all* out-of-state, opposite-sex marriages that were lawful where performed even if they would have been unlawful if performed in Ohio. Pet. App. 190a-92a (citing, among others, *Mazzolini*, 155 N.E.2d at 208). And, despite binding Sixth Circuit precedent to the contrary, the court held that sexual-orientation classifications should be subject to heightened scrutiny. Pet. App. 192a-203a. Alternatively, it held that Ohio lacked a rational basis for its alleged recognition distinction between same-sex and opposite-sex marriages licensed by other States. Pet. App. 204a-12a. The court emphatically asserted that the millions of citizens and legislators who voted to retain marriage's traditional definition could have had only one "primary purpose"—"to disparage and demean the dignity of same-sex couples in the eyes of the State and the wider community." Pet. App. 212a.

2. *Henry v. Hodges*

The *Henry* Plaintiffs—four same-sex couples married in States that permit those marriages, the adopted son of one of those couples, and an adoption agency—filed suit on the heels of the *Obergefell* decision. *Henry* Doc.1, Compl., PageID#4-10.

Three of the four couples are women who married in other States—New York (Brittani Henry and LB Rogers), California (Nicole and Pam Yorksmith), and Massachusetts (Kelly Noe and Kelly McCracken). *Id.* at PageID#4-7. At the litigation's start, Brittani Henry, Nicole Yorksmith, and Kelly Noe each had conceived an unborn child through artificial insemination and expected to deliver the child in Ohio. *Id.* These women sought to have their partners' names (in addition to their own) listed on the children's birth certificates. *Id.* Under Ohio law, a woman's husband is deemed the natural father of the child (and is listed on the "father" portion of the birth certificate) even if the child was conceived through artificial means. Ohio Rev. Code § 3111.95(A); *Henry* Doc.1, Compl., PageID#5-7; *Henry* Doc.19-4, Sample Birth Certificate, PageID#617. But because Ohio does not recognize same-sex marriages, the complaint alleged, this presumption does not apply to the non-birth-mother partner in a same-sex marriage from another State. *Henry* Doc.1, Compl., PageID#5-7. Ohio thus does not list the mother's partner on the birth certificate.

The fourth couple, men married and living in New York (Joseph Vitale and Robert Talmas), have adopted an Ohio child under an order from a New York

probate court. *Id.* at PageID#8. The couple sought an amended Ohio birth certificate identifying both of them as the child's parents. *Id.* They asserted that Ohio would amend an adopted child's birth certificate to list both spouses when those spouses are in an out-of-state, opposite-sex marriage. *Id.* Because Ohio does not recognize same-sex marriages, however, the New York adoptive couple cannot have *both* individuals listed on the amended birth certificate. *Id.* The final Plaintiff, Adoption S.T.A.R., was the adoption agency for Vitale and Talmas. *Id.* It challenged Ohio's birth-certificate laws on behalf of future clients. *Id.* at PageID#9-10.

The *Henry* complaint alleged two counts. On behalf of *all* Plaintiffs, the complaint asserted that the State's refusal to list both same-sex partners on the birth certificates violated the Fourteenth Amendment. *Id.* at PageID#16. On behalf of *solely* the New York Plaintiffs, the complaint asserted that the State's refusal to list both men on an amended birth certificate violated the Full Faith and Credit Clause by failing to "recognize" the New York adoption decree. *Id.* The complaint sought similar as-applied relief as that requested in *Obergefell*—an injunction requiring Ohio to list both couples' names on their children's birth certificates. *Id.* at PageID#16-18. The *Henry* Plaintiffs relied on the same declarations from *Obergefell*. *Henry* Doc.17-1, Gerhardstein Decl., PageID#133. While their complaint sought relatively narrow relief, their briefing switched gears by asking for facial invalidation of Ohio's refusal to recognize out-of-state, same-sex marriages in all contexts with-

in the State. *See, e.g.*, Doc.18-2, Proposed Order, PageID#602.

The district court granted broader relief, enjoining Ohio's Director of the Department of Health and his "officers, agents, and employees" from "denying same-sex couples validly married in other jurisdictions all the rights, protections, and benefits of marriage provided under Ohio law." Doc.29, Decl. J. & Permanent Inj., PageID#860. Its reasoning tracked its *Obergefell* decision. Pet. App. 123a-48a.

At the outset, the court rejected the argument that the facial relief Plaintiffs' briefing requested was improper. Pet. App. 120a-23a. "Despite the limited relief pursued by the Plaintiffs in" *Obergefell*, the court reasoned, that case had "intentionally expressed the facial invalidity of Ohio's marriage recognition ban . . . ." Pet. App. 120a.

Turning to Plaintiffs' due-process arguments, the court found that this case implicated three "fundamental rights": (1) the right to marry on which it had declined to rely in *Obergefell*, Pet. App. 123a-28a; (2) the "right to remain married" on which it had relied in *Obergefell*, Pet. App. 128a, and (3) the parenting rights of the couples, Pet. App. 129a. It held that "strict scrutiny" applied to the "right to marry and the right to parental authority," but that intermediate scrutiny applied to the right to marriage recognition. Pet. App. 129a-30a. The court then balanced the burdens on same-sex couples against the state interests. It described the uses to which a birth certificate might be put, ranging from registering for school to obtaining a passport. Pet. App. 132a-34a.

And it found the State's interests "vague, speculative, and/or unsubstantiated." Pet. App. 134a.

The court next held that Ohio's refusal to recognize out-of-state, same-sex marriages violated equal protection. It stated that, under Ohio law, opposite-sex spouses are both listed as parents on birth certificates in cases of artificial insemination and adoption. Pet. App. 138a-40a (citing Ohio Rev. Code §§ 3111.95, 3705.12(A)(1)). Because same-sex marriages are not recognized, however, the birth mother's partner will not be listed, Pet. App. 139a, and only one name of a same-sex couple adopting a child out-of-state is listed, Pet. App. 140a. The court then said, as it did in *Obergefell*, that heightened scrutiny applied to these sexual-orientation classifications, Pet. App. 140a-44a, and that, regardless, Ohio lacked even a rational basis for maintaining the traditional definition of marriage, which could only be explained by animus, Pet. App. 144a-47a.

The district court addressed side matters in endnotes. With respect to the New York Plaintiffs' full-faith-and-credit claim, it departed from the Fifth Circuit by summarily suggesting that the claim could be brought under 42 U.S.C. § 1983 and that the Full Faith and Credit Clause required Ohio to list both adoptive parents on its birth records. Pet. App. 153a-58a n.i (rejecting *Adar v. Smith*, 639 F.3d 146 (5th Cir. 2011) (en banc)). The court also found that Adoption S.T.A.R. lacked standing (a decision that entity did not appeal). Pet. App. 158a-60a n.ii.

C. The Sixth Circuit Held That The Issue Of Same-Sex Marriage Should Be Resolved In The Democratic, Not The Judicial, Arena

The Director of the Ohio Department of Health appealed the Ohio cases to the Sixth Circuit. The Sixth Circuit decided them along with similar ones out of Michigan (considering its prohibition on the in-state licensing of same-sex marriage), Kentucky (considering its prohibition on both licensing and recognition), and Tennessee (considering its prohibition only on recognition). Pet. App. 16a-22a.

Starting from a bird's-eye view of these cases, the court identified all of them as "com[ing] down to the same question: Who decides? Is this a matter that the National Constitution commits to resolution by the federal courts or leaves to the less expedient, but usually reliable, work of the state democratic processes?" Pet. App. 16a. It answered that question in favor of democracy, holding that the Fourteenth Amendment required States neither to *license* same-sex marriage within their borders nor to *recognize* the same-sex marriages performed in other States.

In-State Licensing. The court offered seven rationales why the Fourteenth Amendment does not require States to license same-sex marriage. *First*, the court viewed itself as bound by *Baker v. Nelson*, 409 U.S. 810 (1972), which rejected any equal-protection or due-process right to same-sex marriage. Pet. App. 24a. *United States v. Windsor*, 133 S. Ct. 2675 (2013), fully comported with *Baker*, the Sixth Circuit reasoned, because it invalidated Section 3 of

the federal Defense of Marriage Act based on that provision's "unprecedented intrusion into the States' authority over domestic relations." Pet. App. 25a. That constitutional premise "runs the other way" in these cases challenging the very state authority that *Windsor* sought to vindicate. *Id.*

Second, the court found it undisputed that the Fourteenth Amendment's original meaning did not include a right to same-sex marriage—a factor that is relevant to "[a]ll Justices, past and present." Pet. App. 30a. That original meaning was supported by an unbroken historical practice of the States—which, until 2003, all followed marriage's traditional definition. Pet. App. 32a (citing *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014)).

Third, the court held that the traditional definition of marriage comported with the traditional application of rational-basis review. Pet. App. 32a-41a. It identified two "plausible" reasons for that definition—all that was required under this deferential standard of review. For one, the court found it rational to recognize that marriage was adopted "not to regulate love but to regulate sex, most especially the intended and unintended effects of male-female intercourse." Pet. App. 33a. This need to regulate opposite-sex relationships originated not from "society's laws or for that matter any one religion's laws," but from "nature's laws"—the fact that only those types of relationships produce offspring. Pet. App. 34a. For another, while the meaning of marriage continues to change, the court found it rational for a State to "wish to wait and see before changing a norm that

our society (like all others) has accepted for centuries." Pet. App. 36a. "Even today," the court reasoned, "the only thing anyone knows *for sure* about the long-term impact of redefining marriage is that they do not know." Pet. App. 37a.

Fourth, the court rejected the view that the many state reaffirmations of traditional marriage were triggered by the unlawful "animus" against gays and lesbians that invalidated the United States' refusal to recognize same-sex marriage under federal law, *Windsor*, 133 S. Ct. at 2693, or Colorado's statewide removal of municipal protections against sexual-orientation discrimination, *Romer v. Evans*, 517 U.S. 620, 632 (1996). Pet. App. 41a-47a. The court detailed the concern leading to these reaffirmations—"that the courts would seize control over an issue that people of good faith care deeply about." Pet. App. 42a. The court was also troubled by a holding that would necessarily require the judiciary to conclude that the millions of citizens and legislators who still support the traditional definition of marriage harbor nothing but bigoted animus toward gays and lesbians. Pet. App. 45a.

Fifth, the court explained why same-sex marriage was not included within the fundamental "right to marry." Pet. App. 47a-51a. As a matter of history, same-sex marriage did not exist in any State until 2003. Pet. App. 48a. As for *Loving v. Virginia*, 388 U.S. 1 (1967), it held only that *traditional* marriage amounted to a fundamental right—which *Baker* (coming four years *after Loving*) makes clear. Pet. 48a-49a. Nor had this Court ever applied strict scru-

tiny to other traditional limits on marriage, whether they be limits on divorce, on the number of those who can enter a marriage, or on the age and family relationship of those who may do so. Pet. App. 50a-51a.

Sixth, the court rejected heightened equal-protection scrutiny for sexual-orientation classifications. Pet. App. 51a-58a. Marriage's traditional definition arose well before laws targeting gays and lesbians, so prejudice against same-sex couples could not explain the laws. Pet. App. 53a. Further, "local, state, and federal governments" had not "historically disenfranchised the suspect class, as they did with African Americans and women." Pet. App. 56a.

Seventh, the court turned to an evolving-meaning approach to constitutional interpretation to confirm that no right to same-sex marriage currently existed. Pet. App. 58a-63a. That approach looks to changing *societal* values rather than *judicial* values, but, "[f]reed of federal-court intervention, thirty-one States would continue to define marriage the old-fashioned way." Pet. App. 59a. Nor had any international consensus developed on this topic. Pet. App. 61a.

Out-Of-State Recognition. The Sixth Circuit's resolution of the in-state licensing question, it said, went "a long way toward answering" the out-of-state recognition question involved in these Ohio cases. Pet. App. 63a. No plaintiff made any claim that the refusal to recognize out-of-state marriage violated the Full Faith and Credit Clause because that clause had never been interpreted to "'require a State to apply another State's law in violation of its own legiti-

mate public policy.'" Pet. App. 64a (quoting *Nevada v. Hall*, 440 U.S. 410, 422 (1979)). Because the court found it constitutional (and so "legitimate") to retain marriage's traditional definition, a State could apply that definition to all individuals living within its borders, whether or not they entered a marriage in another State. *Id.* *Windsor* reaffirmed this point because it made clear that "'[e]ach state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders.'" Pet. App. 65a (quoting 133 S. Ct. at 2691).

Nor did the refusal to recognize out-of-state same-sex marriage trigger the animus concerns from *Windsor* and *Romer*. Petitioners misunderstood Ohio law on this subject when they suggested that "Ohio would recognize as valid *any* heterosexual marriage that was valid in the State that sanctioned it." Pet. App. 66a. "*Mazzolini*," the court noted, "stated that a number of heterosexual marriages . . . would not be recognized in the State, even if they were valid in the jurisdiction that performed them." Pet. App. 67a.

Judge Daughtrey, dissenting, echoed the arguments of the circuit courts holding that the Fourteenth Amendment includes a right to same-sex marriage. Pet. App. 72a-106a. The dissent did not distinguish between in-state licensing and out-of-state recognition of same-sex marriages. *See id.*

ARGUMENT

I. PETITIONERS' FIRST QUESTION RAISES AN IMPORTANT ISSUE DIVIDING THE CIRCUIT COURTS THAT THIS COURT SHOULD REVIEW NOW

Ohio agrees with Petitioners that the question whether the Fourteenth Amendment includes a right to same-sex marriage warrants this Court's attention. But, of course, Ohio disagrees with Petitioners on the answer. Ohio thus believes that the Court should review the issue whether the Fourteenth Amendment requires a State to recognize out-of-state, same-sex marriages, and, like the Sixth Circuit, hold that it does not.

A. A Square Circuit Conflict Exists Over Whether The Fourteenth Amendment Includes A Right To Same-Sex Marriage

As Petitioners recognize (at 19-27), a circuit conflict now exists among the Fourth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits about whether (and, if so, how) the Fourteenth Amendment encompasses a right to same-sex marriage.

Two circuits (the Fourth and Tenth) relied on substantive due process to require the States to license (and recognize) same-sex marriage. *See Bostic v. Schaefer*, 760 F.3d 352, 375-84 (4th Cir. 2014); *Kitchen v. Herbert*, 755 F.3d 1193, 1208-29 (10th Cir. 2014). These courts initially held that same-sex marriage fell within the fundamental "right to marry" protected by due process. *See Bostic*, 760 F.3d at 375-77; *Kitchen*, 755 F.3d at 1208-18. They then held that state marriage laws retaining marriage's

traditional definition could not survive the "strict scrutiny" applicable as a result of their conclusion that same-sex marriage qualified as a fundamental right. *See Bostic*, 760 F.3d at 377-84; *Kitchen*, 755 F.3d at 1218-29.

Another two (the Seventh and Ninth) relied on equal protection to find a right to same-sex marriage under the Fourteenth Amendment. *See Latta v. Otter*, ___ F.3d ___, 2014 WL 4977682, at *4-10 (9th Cir. Oct. 7, 2014); *Baskin v. Bogan*, 766 F.3d 648, 665 (7th Cir. 2014). The Ninth Circuit held that sexual-orientation classifications should be subject to heightened equal-protection scrutiny. *See Latta*, 2014 WL 4977682, at *3-4. It then held that the traditional definition of marriage classified on the basis of sexual orientation and could not survive the heightened scrutiny that correspondingly applied. *See id.* at *5-11. The Seventh Circuit, too, suggested that heightened scrutiny should apply because gays and lesbians qualify as a suspect class, *see Baskin*, 766 F.3d at 655, although it found that the States did not even have a rational basis for retaining the traditional definition of marriage, *see id.* at 656.

Finally, two circuits (the Sixth and Eighth) rejected the argument that the Fourteenth Amendment encompasses a right to same-sex marriage. The decision below, as noted, rejected both substantive-due-process and equal-protection rationales for such a right. Pet. App. 22a-69a. The Eighth Circuit likewise held (in 2006) that the Equal Protection Clause did not invalidate a Nebraska constitutional provision retaining the traditional definition of mar-

riage, concluding that rational-basis review applied to this question and that Nebraska had a rational basis for its provision. *See Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 864-69 (8th Cir. 2006). Further adding to the disagreement, dissenting judges from the Fourth and Tenth Circuits would have reached the same conclusions as the Sixth Circuit on the due-process and equal-protection issues. *See Bostic*, 760 F.3d at 389-98 (Niemeyer, J., dissenting); *Kitchen*, 755 F.3d at 1233-40 (Kelly, J., concurring in part and dissenting in part).

B. Given The Circuit Conflict, The Court Should Review The Fourteenth Amendment Question In The Licensing And Recognition Contexts

Given the circuit split, the Court should review whether the Fourteenth Amendment includes a right to same-sex marriage. It should ideally do so in two contexts. The Court should review a case (like the Michigan or Kentucky cases) involving whether the Fourteenth Amendment requires a State to *license* same-sex marriage within its borders. And it should review a case (like the Ohio cases) involving whether the Fourteenth Amendment requires a State to *recognize* out-of-state, same-sex marriages.

To be sure, as the Sixth Circuit held, the *licensing* question necessarily "goes a long way toward answering" whether the Fourteenth Amendment requires a State to *recognize* a same-sex marriage licensed in a different State. Pet. App. 63a. Indeed, to the extent any circuit unanimity is evident over anything touching same-sex marriage, it is that, at the least, these

licensing and recognition issues should be resolved the *same* way. No circuit judges have suggested that the Fourteenth Amendment would permit a State to retain marriage's traditional definition for purposes of marriage licensing but prohibit it from refusing to recognize out-of-state same-sex marriages. The decision below, for example, noted that, "[i]f it is constitutional for a State to define marriage as a relationship between a man and a woman, it is also constitutional for the State to stand by that definition with respect to couples married in other States or countries." *Id.*; *see also, e.g.*, *Kitchen*, 755 F.3d at 1232 (Kelly, J., concurring in part and dissenting in part). Nor have circuit judges suggested the opposite—that a State could refuse to recognize out-of-state, same-sex marriages while being forced to license same-sex marriage within the State. The Ninth Circuit, for example, suggested in a footnote that "[b]ecause we hold that Idaho and Nevada may not discriminate against same-sex couples in administering their own marriage laws, it follows that they may not discriminate with respect to marriages entered into elsewhere." *Latta*, 2014 WL 4977682, at *10 n.19.

While the constitutional arguments in both contexts likely rise or fall together, review in the recognition context is useful to bring final resolution on that issue and to consider a few arguments applicable in that context. In these Ohio cases, for example, the district court relied on a law-review article to hold that Petitioners had a "right to remain married" (one distinct from the "right to marry") that would require Ohio to *recognize* out-of-state, same-sex mar-

riages even if it did not require Ohio to *license* those marriages. Pet. App. 174a; *see* Pet. App. 128a.

The district court's view was mistaken for the reasons the Sixth Circuit identified. It was undisputed that the Full Faith and Credit Clause did not require States to recognize out-of-state, same-sex marriages. *See* Pet. App. 64a (citing *Nevada v. Hall*, 440 U.S. 410, 422 (1979)). And this Court has held that where a particular provision of the Constitution "'provides an explicit textual source of constitutional protection,' a court must assess a plaintiff's claims under that explicit provision and 'not the more generalized notion of substantive due process.'" *Conn v. Gabbert*, 526 U.S. 286, 293 (1999) (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989)). Nevertheless, the Court should grant review in a recognition case to resolve the issue definitively in that context.

In sum, Ohio agrees that the Court should grant review over the question whether the Fourteenth Amendment requires the States to license in-state same-sex marriages and to recognize out-of-state same-sex marriages. But Ohio disagrees with Petitioners on the answer. As the Sixth Circuit said, the judiciary should leave this question for democratic resolution (where it has been throughout our Nation's history).

For completeness, Ohio notes that it raised some *specific* challenges to the district court's judgments in these two cases that were mooted by the Sixth Circuit's *general* resolution of the Fourteenth Amendment question for all Petitioners in all cases. Ohio, for example, argued that one Plaintiff in the *Oberge-*

fell case (Robert Grunn, the funeral director) lacked standing to obtain an injunction directed toward hypothetical clients, relief that was broader than the as-applied relief granted to the other Plaintiffs in that case. *See* Br. of Appellant at 52-58, in *Obergefell v. Hodges*, No. 14-3057 (6th Cir. Apr. 10, 2014). Ohio also argued that the district court erred by granting broader injunctive relief in *Henry* than could be provided in the context of that case. Br. of Appellant at 19-23, *Henry v. Hodges*, No. 14-3464 (6th Cir. June 10, 2014). And, apart from any right to same-sex-marriage recognition, Ohio argued that the *Henry* Plaintiffs had no due-process right to be listed on a birth certificate. *Id.* at 35-37. If the Court opted to review the general Fourteenth Amendment question, some or all of those fact-specific arguments could become relevant (likely on remand) depending on the Court's resolution.

II. PETITIONERS' SECOND QUESTION RAISES AN UNDEVELOPED ISSUE THAT THIS COURT SHOULD DECLINE TO REVIEW AT THIS TIME

Ohio disagrees with Petitioners, by contrast, over whether the Court should grant review of the second question that they present. That question asks whether Ohio violated the alleged full-faith-and-credit rights of the New York Plaintiffs by agreeing to place only one of their names on an amended Ohio birth certificate under state law. The Court should deny review of this question because (1) it would require the Court to resolve a difficult preliminary issue; (2) it does not involve a deep circuit divide like the first question; and (3) it was barely addressed by

either of the lower courts (whether in agreeing with Petitioners or with Ohio). The Court should instead allow for additional percolation in the lower appellate courts on this subsidiary question. Review now would, in the end, only divert the Court from the more far-reaching constitutional questions that all of the cases out of the Sixth Circuit present.

A. Petitioners' second question would require the Court to resolve a thorny preliminary issue about the proper scope and meaning of 42 U.S.C. § 1983. It is not at all clear that the New York Plaintiffs may use a § 1983 suit in federal court as a vehicle for asserting their full-faith-and-credit claim. As the Fifth Circuit has held, § 1983 "has no place in the [Full Faith and Credit Clause's] orchestration of intercourt comity," and so full-faith-and-credit violations "are not subject to declaratory or injunctive relief in federal courts." *Adar v. Smith*, 639 F.3d 146, 151-52 (5th Cir. 2011) (en banc); *see id.* at 151-57. In *Adar*, an unmarried same-sex couple adopted a Louisiana child in New York, and, like here, Louisiana could place only one of the couple's names on an amended birth certificate under state law. *Id.* at 149-50. The same-sex couple brought a § 1983 suit to enforce the Full Faith and Credit Clause with respect to their New York adoption decree, but the Fifth Circuit held that a State's full-faith-and-credit obligations did not "give[] rise to a right vindicable in a § 1983 action." *Id.* at 153.

There is much support for this view. Among other things, § 1983 requires the violation of a *federal* right. *See Golden State Transit Corp. v. City of Los*

Angeles, 493 U.S. 103, 106 (1989). The Full Faith and Credit Clause, however, does not create federal rights. It instead directs courts to "'enforce the rights'" created by *other* laws—most commonly, the preclusion laws of a State in which the particular judgment arises. *Howlett v. Rose*, 496 U.S. 356, 381 (1990) (citation omitted). The clause, in other words, "'only prescribes a rule by which courts, Federal and state, are to be guided when a question arises in the progress of a pending suit as to the faith and credit to be given by the court to the public acts, records, and judicial proceedings of a State other than that in which the court is sitting.'" *Thompson v. Thompson*, 484 U.S. 174, 182-83 (1988) (citation omitted). Perhaps for that reason, the Court long ago said that the assertion of a full-faith-and-credit violation does not establish federal-question jurisdiction under 28 U.S.C. § 1331. *See Minnesota v. N. Secs. Co.*, 194 U.S. 48, 72 (1904). It is difficult to see how the Full Faith and Credit Clause creates a federal *right* for purposes of § 1983 if it does not even create a federal *question* for purposes of § 1331.

Regardless, the Fifth Circuit remains the only circuit to issue a published decision *expressly* considering this preliminary issue about the scope of § 1983. *Cf. Stewart v. Lastaiti*, 409 F. App'x 235, 235-36 (11th Cir. 2010) (holding that the trial court properly dismissed a § 1983 full-faith-and-credit claim for lack of subject-matter jurisdiction). The lack of lower-court analysis on the issue, which can only be described as a difficult one, shows that this Court

would benefit from more consideration in the lower courts before having to decide how to resolve it.

The only authority that Petitioners cite (at 30)—*Finstuen v. Crutcher*, 496 F.3d 1139 (10th Cir. 2007)—does not show a circuit split on this procedural question. To be sure, *Finstuen* relied on the Full Faith and Credit Clause to invalidate a state statute that prohibited Oklahoma from granting *any* recognition to out-of-state adoptions by same-sex couples. But, as the Fifth Circuit noted, *see Adar*, 639 F.3d at 157, *Finstuen* did not even cite § 1983 once, let alone consider whether it provides a vehicle for asserting full-faith-and-credit claims in federal court. *See* 496 F.3d at 1143-56. Further, even if this issue presents a (non-waivable) jurisdictional question rather than a (waivable) merits question, this Court has repeatedly indicated that "[w]hen a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed." *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1448 (2011) (citing cases). *Finstuen* is thus not even binding on this question in the Tenth Circuit. It illustrates no circuit split on the question.

B. Petitioners also mistakenly identify a circuit split on the actual merits of their full-faith-and-credit question presented. That no split exists on the merits confirms that the Court should decline to review Petitioners' second question at this time.

In reversing the district court's judgment, the Sixth Circuit aligned itself with the Fifth Circuit's *Adar* decision, which, as noted, involved nearly iden-

tical facts. Louisiana had declined to place both names of a same-sex couple who had adopted a Louisiana child in a New York court on its state birth records. 639 F.3d at 149-50. *Adar*, in addition to holding that § 1983 does not permit full-faith-and-credit claims, held that Louisiana had not violated the Full Faith and Credit Clause in any event. *Id.* at 158-61. That was because Louisiana had "not refused to recognize the *validity* of the New York adoption decree" and did indeed recognize "the parental relationship of [the same-sex couple] with [the child]." *Id.* at 159. The State simply refused to keep its internal records in a manner that violated its own law. In that respect, "the New York adoption decree [could not] compel within Louisiana 'an official act within the exclusive province of that state.'" *Id.* at 160 (quoting *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 235 (1998)). Identical analysis applies here.

To allege a split, Petitioners rely (at 30) on the Tenth Circuit's decision in *Finstuen*. But that case is distinguishable on the merits as well. The Oklahoma laws at issue in *Finstuen* prohibited state courts from giving *any* effect to out-of-state adoption decrees. 496 F.3d at 1142. The Louisiana laws at issue in *Adar*, by contrast, did not undermine the validity of an adoption decree; rather, it refused to enforce the decree by issuing a state record in a manner that violated state law. *Adar*, 639 F.3d at 157 (distinguishing *Finstuen* on these grounds). The Full Faith and Credit Clause requires States to recognize out-of-state judgments; it does not dictate how States keep

their own state records. *Cf. Adar v. Smith*, 132 S. Ct. 400 (2011) (denying certiorari).

This case is like *Adar*, not *Finstuen*. Petitioners provide no basis for suggesting (at 30-31) that Ohio laws require it to refuse to recognize the New York adoption decree. Indeed, their briefing below cited Ohio cases agreeing that Ohio courts generally recognize out-of-state adoption decrees in disputes between the birth mother and the adoptive parents. *See, e.g.*, *In re Bosworth*, No. 86AP-903, 1987 WL 14234, at *2 (Ohio Ct. App. July 16, 1987). So Petitioners are simply mistaken to suggest (at 31) that the Sixth Circuit's decision undermines their ability to "safeguard their children" or leaves them at risk if they "step foot in Ohio with their adopted child." Indeed, New York law itself recognizes the *adoption decree*, not the names listed on a *birth certificate*, as establishing the legal relationship of parent and child. *See* N.Y. Dom. Rel. Law § 117(1)(c).

C. Finally, confirming the subsidiary nature of this question, it was barely considered by either of the lower courts in the proceedings below. That fact, too, illustrates that the Court should decline review.

For its part, the district court found it "unnecessary to reach Plaintiffs' arguments based on the Full Faith and Credit Clause" because of its broader holding requiring Ohio to recognize same-sex marriages under the Fourteenth Amendment. Pet. App. 148a. And while it stated that it agreed with Petitioners, *id.*, it relegated its analysis to an endnote. Pet. App. 153a-58a n.i. Not surprisingly, therefore, the Sixth Circuit did not separately and expressly consider this

full-faith-and-credit question when reversing the district court. *See* Pet. App. 22a-69a.

In sum, Petitioners' second question requires the Court to review a preliminary § 1983 issue that is both difficult and largely unconsidered by the circuit courts. The circuit courts also do not disagree on the merits of the actual question presented, which was barely considered by either of the lower courts. All told, then, the Court should decline their request to consider that question now.

CONCLUSION

The Court should grant review of the first question presented to affirm the Sixth Circuit's judgment below; it should deny review of the second question presented.

Respectfully submitted,

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