No. 14-1341

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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

v.

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

Appeal from the United States District Court
Eastern District of Michigan, Southern Division
Civil Case No. 2:12-cv010385 (Honorable Bernard A. Friedman)

Brief of *Amici Curiae* United States Conference of Catholic Bishops; National Association of Evangelicals; The Church of Jesus Christ of Latter-day Saints; The Ethics & Religious Liberty Commission of the Southern Baptist Convention; and The Lutheran Church—Missouri Synod In Support of Defendants-Appellants and Supporting Reversal

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the undersigned states that none of the religious organizations that join this brief issues stock or has a parent corporation that issues stock.

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IDENTITY AND INTEREST OF *AMICI*[1]

The voices of millions of Americans are represented in the broad cross-section of faith communities that join in this brief. Our theological perspectives, though often differing, converge on a critical point: that the traditional husband-wife definition of marriage is vital to the welfare of children, families, and society. Faith communities like ours are among the essential pillars of this Nation's marriage culture. With our teachings, rituals, traditions, and ministries, we sustain and nourish both individual marriages and a culture that makes enduring marriages possible. We have the deepest interest in strengthening the time-honored institution of husband-wife marriage because of our religious beliefs and because of the profound benefits it provides children, families, and society. Our practical experience in this area is unequaled. In millions of ministry settings each day we see the benefits that married mother-father parenting brings to children. And we deal daily with the devastating effects of out-of-wedlock births, failed

[1] No party's counsel authored the brief in whole or in part, and no one other than the amici curiae, their members, or their counsel contributed money that was intended to fund preparing or submitting the brief. This brief is filed with the consent of all parties. Fed. R. App. P. 29 (a).

marriages, and the general decline of the venerable husband-wife marriage institution.

We therefore seek to be heard in the democratic and judicial forums where the fate of that foundational institution will be decided. People of faith and their religious organizations have "a fundamental right . . . to speak and debate and learn and then, as a matter of political will, to act through a lawful electoral process." *Schuette v. Coalition to Defend Affirmative Action*, No. 12-682, 2014 WL 1577512, at *15 (U.S. Apr. 22, 2014) (plurality op.) (Kennedy, J.). This brief is submitted out of a shared conviction that the People of Michigan did not transgress the United States Constitution by voting to preserve the husband-wife definition of marriage. Individual statements of interest are found in the attached Addendum.

INTRODUCTION

A common theme has arisen that those who oppose redefining marriage to include same-sex couples are motivated by "anti-gay animus," whether in the form of unthinking ignorance or actual hostility. Such aspersions, which take various forms, are often cast at people and institutions of faith.

The accusation is false and offensive. It is intended to suppress rational dialogue and democratic conversation, to win by insult and intimidation rather than by persuasion based on reason, experience, and fact. In truth, we support the husband-wife definition of marriage because we believe it is right and good for children, families, and society. Our respective faith traditions teach us that truth. But so do reason, long experience, and social fact.

We are among the "many religions [that] recognize marriage as having spiritual significance," *Turner v. Safley*, 482 U.S. 78, 96 (1987), indeed as being truly "sacred," *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965). For us, marriage "must be understood by precepts far beyond the authority of government to alter or define." *Town of Greece v. Galloway*, No. 12-696, 572 U.S. ___, slip op. at 23 (U.S. May 5, 2014) (plurality op.) (Kennedy, J.). Our respective religious doctrines hold that marriage between a man and a woman is sanctioned by God as the right and best setting for bearing and raising children. We believe that children, families, society, and our Nation thrive best when husband-wife marriage is upheld and strengthened as a cherished, primary

social institution. The lives of millions of Americans are ordered around the family and derive meaning and stability from that institution.

The value we place on traditional husband-wife marriage is also influenced by rational judgments about human nature and the needs of individuals and society (especially children) and by our collective experience counseling and serving millions of followers over countless years. For these reasons, too, we are convinced that traditional marriage is indispensable to the common good and our republican form of government.

As our faith communities seek to sustain and transmit the virtues of husband-wife marriage and family life, our teachings and rituals seldom focus on sexual orientation or homosexuality. Our support for the historic meaning of marriage arises from an affirmative vision "of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony," *Murphy v. Ramsey*, 114 U.S. 15, 44 (1885), and not from animosity toward anyone.

In this brief we demonstrate that Michigan's marriage amendment should not be overturned based on the spurious charge that religious organizations support such laws out of animus. Our faith

communities bear no ill will toward same-sex couples, but rather have marriage-affirming religious beliefs that merge with both practical experience and sociological fact to convince us that retaining the husband-wife marriage definition is essential. We further demonstrate that under Supreme Court jurisprudence the notion of "animus" holds limited relevance—and none here. Finally, we refute the suggestion that the Establishment Clause limits the fundamental right of persons and institutions of faith to participate fully in the democratic process. The fact that religious believers support Michigan's marriage laws by no stretch undermines their constitutional validity.

ARGUMENT

I. Michigan's Marriage Amendment Should Not Be Invalidated or Subjected to Closer Judicial Scrutiny Based on False Accusations of Animus.

The district court declared Michigan's constitutional amendment defining marriage as the union of a man and a woman unconstitutional because "upholding tradition and morality" failed rational basis review. *DeBoer v. Snyder*, __ F.Supp.2d ___, 2014 WL 1100794, at *12 (E.D. Mich. Mar. 21, 2014). The lower court properly declined plaintiffs' repeated invitation to find that Michigan voters who approved the

reaffirmation of husband-wife marriage were "motivated by animus toward lesbian, gay, bisexual and transgender individuals." *Id.* at 15. But we address plaintiffs' animus argument because we anticipate it will be reiterated on appeal.

We emphatically deny that religious support for marriage between a man and a woman is founded on prejudice or ignorance. Our faiths teach love and respect for all people. The understanding of marriage as a faithful union of man and woman predates by centuries the controversy over same-sex marriage,[2] and our support for it has nothing to do with disrespect toward any group.

Our support for traditional marriage stands on the affirmative belief that husband-wife marriage complements our human natures as male and female, promotes responsible procreation, and provides the best environment for children. These beliefs are echoed in numerous Supreme Court decisions holding that husband-wife marriage—"an institution more basic in our civilization than any other," *Williams v.*

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[2] *See, e.g.*, JOHN WITTE JR., FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION 17 (2d ed. 2012) (describing heterosexual monogamy as an idea "inherited from ancient Greece and Rome").

North Carolina, 317 U.S. 287, 303 (1942)—is "the most important relation in life" and "ha[s] more to do with the morals and civilization of a people than any other institution." *Maynard v. Hill*, 125 U.S. 190, 205 (1888).

Reducing religious support for traditional marriage to prejudice or bigotry ignores numerous rational "reasons . . . to promote the institution of marriage beyond mere moral disapproval of an excluded group." *Lawrence v. Texas*, 539 U.S. 558, 585 (2003) (O'Connor, J., concurring). We discuss some of these reasons below. They are supported by history, right reason, experience, common sense, and social science, and many courts have found those reasons persuasive. *See, e.g.*, *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 867-68 (8th Cir. 2006); *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006).

A. We Defend Traditional Marriage Out of Fidelity to Religious Beliefs That Include But Transcend Teachings About Human Sexuality, Not Out of Animus.

Let us first dispel the myth that hostility lies at the root of religious support for husband-wife marriage. Jesus expressed no disapproval or hostility when he taught, "Have you not read that he who made them from the beginning made them male and female, and

said, 'For this reason a man shall leave his father and mother and be joined to his wife, and the two shall become one flesh?'" *Matthew* 19:4-5 (RSV). Nor were the ancient Jewish scriptural texts that Jesus referenced based on animosity toward anyone. *See Genesis* 1:27, 2:23 (RSV).

Faith communities and religious organizations like *amici* have long histories of upholding traditional marriage for reasons that have nothing to do with homosexuality. Indeed, their support precedes by centuries the very idea of same-sex marriage. Many of this Nation's prominent faith traditions have rich religious narratives that extol the personal, familial, and social virtues of traditional marriage while barely mentioning homosexuality.

The Catholic Tradition. With a tradition stretching back two millennia, the Catholic Church recognizes marriage as a permanent, faithful, and fruitful covenant between a man and a woman that is indispensable to the common good.[3] Marriage has its origin, not in the will of any particular people, religion, or state, but rather, in the nature

[3] *See* CATECHISM OF THE CATHOLIC CHURCH ¶ 1601 (2d ed. 1994).

of the human person, created by God as male and female. When joined in marriage, a man and woman uniquely complement one another spiritually, emotionally, psychologically, and physically. This makes it possible for them to unite in a one-flesh union capable of participating in God's creative action through the generation of new human life. Without this unitive complementarity—and the corresponding capacity for procreation that is unique to such a union—there can be no marriage.[4] These fundamental Catholic teachings about marriage do not mention and have nothing to do with same-sex attraction.

The Evangelical Protestant Tradition. For five centuries the various denominational voices of Protestantism have taught marriage from a biblical view focused on uniting a man and woman in a divinely sanctioned companionship for the procreation and rearing of children and the benefit of society. One representative Bible commentary teaches: "Marriage . . . was established by God at creation, when God created the first human beings as 'male and female' (Gen. 1:27) and then said to them, 'Be fruitful and multiply and fill the earth' (Gen.

[4] *See id.* at ¶¶ 371-72.

1:28). . . . Marriage begins with a commitment before God and other people to be husband and wife for life," with "[s]ome kind of public commitment" being important so that society can "know to treat a couple as married and not as single."[5] Homosexuality is far from central to Evangelical teachings on marriage.

The Latter-day Saint (Mormon) Tradition. Marriage is fundamental to the doctrine of The Church of Jesus Christ of Latter-day Saints. A formal doctrinal proclamation on marriage declares that "[m]arriage between a man and a woman is ordained of God," that "[c]hildren are entitled to birth within the bonds of matrimony, and to be reared by a father and a mother who honor marital vows with complete fidelity," and that "[h]usband and wife have a solemn responsibility to love and care for each other and for their children."[6] Strong families based on husband-wife marriage "serve as the fundamental institution for transmitting to future generations the

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[5] ESV STUDY BIBLE 2543-44 (2008).

[6] THE FIRST PRESIDENCY AND COUNCIL OF THE TWELVE APOSTLES OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, THE FAMILY: A PROCLAMATION TO THE WORLD (Sept. 23, 1995), *available at* http://www.lds.org/topics/family-proclamation.

moral strengths, traditions, and values that sustain civilization."[7] Here again, homosexuality is remote from teachings about marriage and family.

* * *

In sum, our religious understandings of marriage are rooted in beliefs about God's will concerning men, women, children, and society, rather than in the narrower issue of homosexuality. Religious teachings may address homosexual conduct and other departures from the marriage norm, but such issues are a secondary and small part of religious discourse on marriage. Indeed, it is only the recent same-sex marriage movement that has made it more common for religious organizations to include discussions of homosexuality in their teachings on marriage. The contention that religious support for husband-wife marriage is rooted in anti-homosexual animus rests on a false portrayal of our beliefs.

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[7] The Church of Jesus Christ of Latter-day Saints, Newsroom, *The Divine Institution of Marriage* (Aug. 13, 2008), http://newsroom.lds.org/ldsnewsroom/eng/commentary/the-divine-institution-of-marriage.

B. We Also Defend Traditional Marriage to Protect Vital Interests in the Welfare of Children, Families, and Society.

Until the same-sex marriage controversy erupted, it was commonly accepted that children thrive best when reared by their mother and father. That truth, confirmed by millennia of human experience, cannot be negated by a trial the lower court never should have held. *See DeBoer*, 2014 WL 1100794, at *11 ("'The government [also] has no obligation to produce evidence to support the rationality of its . . . [imposed] classifications and may rely entirely on rational speculation unsupported by any evidence or empirical data.'" (quoting *Hadix v. Johnson*, 230 F.3d 840, 843 (6th Cir. 2000)); *see also FCC v. Beach Commc'ns*, 508 U.S. 307, 315 (1993) (when governed by rational-basis review, "a legislative choice is not subject to courtroom fact finding").

The district court erred, therefore, by narrowly focusing on recent sociology, as if States are constitutionally bound to defer to expert opinion.[8] On the contrary, States may protect values "spiritual as well

[8] Justice Kennedy expressed a more modest approach when he noted at oral argument in the Proposition 8 case that "[w]e have five years of information to weigh against 2,000 years of history or more."

as physical, aesthetic as well as monetary." *Berman v. Parker*, 348 U.S. 26, 33 (1954). The Constitution poses no bar on State lawmaking "simply because there is no conclusive evidence or empirical data." *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 63 (1973). And "[n]othing in the Constitution requires [Michigan] to accept as truth the most advanced and sophisticated [scientific] opinion." *Alberts v. California*, 354 U.S. 475, 501 (1957) (Harlan, J., concurring in the result). Judgments, rooted in long experience and common sense, that society needs husband-wife marriage and the security it gives children furnish a "reasonably conceivable state of facts that could provide a rational basis" for distinguishing between opposite-sex and same-sex couples. *Beach Commc'ns*, 508 U.S. at 313.

1. Procreation and Child-Rearing Ideally Occur Within a Stable Marriage Between a Man and a Woman.

Counseling millions of people over countless years gives us a unique perspective on the deeply personal, painful, and often fraught circumstances surrounding the breakdown of marriages and the costs of

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Transcript of Oral Argument at 21, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144).

child-rearing out of wedlock. That vast experience deserves this Court's consideration and respect, no less than the sociological studies that enthralled the district court. And that experience affirms the benefits of husband-wife marriage for the protection of children and the good of society.

a. Sex between men and women presents a social challenge. "[A]n orderly society requires some mechanism for coping with the fact that sexual intercourse commonly results in pregnancy and childbirth." *Morrison v. Sadler*, 821 N.E.2d 15, 25-26 (Ind. Ct. App. 2005) (internal quotation marks and citation omitted). Marriage provides "the important legal and normative link between heterosexual intercourse and procreation on the one hand and family responsibilities on the other. The partners in a marriage are expected to engage in exclusive sexual relations, with children the probable result and paternity presumed." *Id.* at 26 (internal quotation marks and citation omitted). Husband-wife marriage thus "protects child well-being . . . by

increasing the likelihood that the child's own mother and father will stay together in a harmonious household."[9]

b. Our own experience, as well as social science, teach that "family structure matters for children, and the family structure that helps children the most is a family headed by two biological parents in a low-conflict marriage."[10] Indeed, "[a] family headed by two married parents who are the biological mother and father of their children is the optimal arrangement for maintaining a socially stable fertility rate, rearing children, and inculcating in them the [values] required for politically liberal citizenship."[11]

Innate differences between men and women mean that "a child benefits from having before his or her eyes, every day, living models of

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[9] Maggie Gallagher, *(How) Will Gay Marriage Weaken Marriage As a Social Institution: A Reply to Andrew Koppelman*, 2 U. ST. THOMAS L.J. 33, 50-51 (2004).

[10] KRISTIN ANDERSON MOORE ET AL., CHILD TRENDS, MARRIAGE FROM A CHILD'S PERSPECTIVE: HOW DOES FAMILY STRUCTURE AFFECT CHILDREN AND WHAT CAN WE DO ABOUT IT? 1-2 (June 2002), http://www.childtrends.org/files/MarriageRB602.pdf.

[11] Matthew B. O'Brien, *Why Liberal Neutrality Prohibits Same-Sex Marriage: Rawls, Political Liberalism, and the Family*, 2012 BRIT. J. AM. LEG. STUD. 411, 414.

what both a man and a woman are like." *Hernandez*, 855 N.E.2d at 7; *see also Lofton v. Sec'y of Dep't of Children and Family Servs.*, 358 F.3d 804, 819 (11th Cir. 2004) ("[C]hildren benefit from the presence of both a father and mother in the home."). The critical role of mothers in child development has never been doubted. But a large and growing body of research demonstrates that fathers' contributions to child-rearing are equally important.[12] "The burden of social science evidence supports the idea that gender-differentiated parenting is important for human development and that the contribution of fathers to childrearing is unique and irreplaceable."[13]

2. Limiting Marriage to Male-Female Couples Furthers Powerful State Interests.

a. Children reared in family structures other than the stable husband-wife home with both biological parents "face higher risks of poor outcomes than do children in intact families headed by two

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[12] *See, e.g.*, W. BRADFORD WILCOX ET AL., WHY MARRIAGE MATTERS (2d ed. 2005).

[13] DAVID POPENOE, LIFE WITHOUT FATHER: COMPELLING NEW EVIDENCE THAT FATHERHOOD & MARRIAGE ARE INDISPENSABLE FOR THE GOOD OF CHILDREN & SOCIETY 146 (1996).

biological parents."[14] Such disadvantaged children bear a higher risk of experiencing poverty, suicide, mental illness, physical illness, infant mortality, lower educational achievement, juvenile delinquency, adult criminality, unwed teen parenthood, lower life expectancy, and reduced intimacy with parents.[15]

The connections between such social pathologies and family structure are anything but impersonal statistics to us. We know all too well the personal tragedies associated with unwed parenting and family breakdown. We have seen boys, bereft of their fathers or any proper male role model, acting out in violence, joining gangs, and engaging in other destructive social and sexual behavior. We have ministered to those boys in prisons where too many are consigned to live out their ruined lives. We have cared for and wept with victims left in their destructive wake. And we have seen young girls, deprived of the love and affection of a father, fall into self-destructive behavior that too often

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[14] MOORE, *supra* note 10, at 6.

[15] *See generally* Brief Amici Curiae of James Q. Wilson et al., Legal and Family Scholars In Support of Appellees at 41-43, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999), *available at* http://www.courts.ca.gov/documents/Legal_Family_Scholars_Amicus_Brief.pdf.

results in pregnancy and out-of-wedlock birth—thereby cruelly repeating the cycle.

The inescapable truth is that only male-female relationships can create children. Children need their mothers *and* fathers. And society needs mothers *and* fathers to raise their children. That is why society needs the institution of male-female marriage and why Michigan is right to specially protect and support it.

b. When it comes to marriage, the law is a teacher. "[L]aw is not just an ingenious collection of devices to avoid or adjust disputes and to advance this or that interest, but also a way that society makes sense of things."[16] By reserving marriage for the relationship between a man and a woman, the law encourages socially optimal behavior through an institution that supports and confirms the People's deep cultural understanding—and the sociological truth—that stable mother-father marital unions are best for children. "Recognizing same-sex relationships as marriages would legally abolish that ideal. No civil institution would reinforce the notion that men and women typically

[16] MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW: AMERICAN FAILURES, EUROPEAN CHALLENGES 7-8 (1987).

have different strengths as parents; that boys and girls tend to benefit from fathers and mothers in different ways."[17]

A gender-neutral definition of marriage changes its message and function by redirecting it to serve the interests of adults.[18] That change would harness the law for the self-interest of those in power (adults). "One may see these kinds of social consequences of legal change as good, or as questionable, or as both. But to argue that these kinds of cultural effects of law do not exist, and need not be taken into account when contemplating major changes in family law, is to demonstrate a fundamental lack of intellectual seriousness about the power of law in American society."[19] And we are convinced that transforming marriage into a relationship primarily directed at adults and their life choices will deepen the devastating effects America has suffered over the last

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[17] SHERIF GIRGIS, RYAN T. ANDERSON, & ROBERT P. GEORGE, WHAT IS MARRIAGE? 58 (2012).

[18] *See, e.g.*, Ralph Wedgwood, *The Fundamental Argument for Same-Sex Marriage*, 7 J. POL. PHIL. 225, 225 (1999) ("The basic rationale for marriage lies in its serving certain legitimate and important interests of married couples.").

[19] INSTITUTE FOR AMERICAN VALUES, MARRIAGE AND THE LAW: A STATEMENT OF PRINCIPLES 26 (2006).

half-century with the devaluing of marriage as a child-centered institution.

C. We Support Laws Protecting Traditional Marriage to Safeguard the Marriage Institution Against Judicial Redefinition.

Michigan's marriage amendment is one of dozens of State provisions reaffirming the man-woman definition of marriage based on democratic "reflection and choice."[20] Employing the same lawful process used to control university admissions, here "Michigan voters acted in concert and statewide to seek consensus and adopt a policy on a difficult subject." *Schuette*, 2014 WL 1577512, at *15. But adding the historic definition of marriage to their state charter is not a manifestation of animus toward any group. The amendment merely secured Michigan law against modification by State courts or a hasty legislative majority. *See Kitchen v. Herbert*, __ F.Supp.2d __, 2013 WL 6697874, at *5 (D. Utah Dec. 20, 2014) (State judicial decisions influenced the adoption of Utah's marriage amendment). Like laws banning assisted suicide, traditional marriage, "[t]hough deeply rooted . . . [has] in recent years

[20] THE FEDERALIST NO. 1, at 3 (Jacob E. Cooke ed., 1961) (Alexander Hamilton).

been reexamined and, generally, reaffirmed." *Wash. v. Glucksberg*, 521 U.S. 702, 716 (1997).

II. Michigan's Laws Reserving Marriage for a Man and a Woman Are Not Invalid Expressions of Animus.

We have summarized a few of the reasons why we support traditional marriage, none of which is based on hostility or animus. These reasons satisfy the Constitution. But we also want to underscore that allegations of animus play a sharply limited role in equal protection analysis.

A. Allegations of Animus Are Relevant *Only* When a Law Can Be Explained Solely By Animus with No Other Possible Rationale.

Judicial inquiry into animus is an exception to the rule that a law will not be declared unconstitutional "on the basis of an alleged illicit legislative motive." *United States v. O'Brien*, 391 U.S. 367, 383 (1968). Inquiring into animus when adjudicating an equal protection claim serves the limited purpose of "ensur[ing] that classifications are not drawn *for the purpose of* disadvantaging the group burdened by the law." *Romer v. Evans*, 517 U.S. 620, 633 (1996) (emphasis added). The plaintiff must show "that the decisionmaker . . . selected or reaffirmed a

particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

That a law challenged under the Equal Protection Clause allegedly suggests "'negative attitudes'" or "'fear'" toward a group is insufficient to strike it down. *Bd. Trustees Univ. Ala. v. Garrett*, 531 U.S. 356, 367 (2001). "Although such biases may often accompany irrational (and therefore unconstitutional) discrimination, *their presence alone does not a constitutional violation make*." *Id.* (emphasis added). Only naked animus—"unsubstantiated by factors which are properly cognizable"—may render legislation unconstitutional. *Id.* (internal quotation marks omitted); *see also Schuette*, 2014 WL at *16 ("The process of public discourse and political debate should not be foreclosed even if there is a risk that during a public campaign there will be those, on both sides, who seek to use racial division and discord to their own political advantage.").

B. Neither *Windsor* Nor *Romer* Justifies This Court in Construing Michigan's Marriage Laws As Expressions of Impermissible Animus.

These limits on the animus inquiry characterized the Supreme Court's approach to equal protection analysis in *Windsor* and *Romer*. *Windsor* struck down section 3 of the Defense of Marriage Act ("DOMA") as a "'discrimination[ ] of an unusual character'" requiring "careful consideration." *United States v. Windsor*, 570 U.S. ___, 133 S. Ct. 2675, 2693 (2013) (quoting *Romer*, 517 U.S. at 633). Only after concluding that Congress's definition of marriage was "unusual"—a "federal intrusion" on the States' "historic and essential authority to define the marital relation"—did the Court delve into "the design, purpose, and effect of DOMA" to determine whether the law was "motived by an improper animus or purpose." *Id.* at 2692-93. Its purpose, the Court found, was to "impose restrictions and disabilities" on rights granted by those States that, through a deliberative process, had chosen to recognize same-sex marriage. *Id.* at 2692.

Windsor affords no support for the decision below because the Michigan laws challenged here fundamentally differ from DOMA. State laws reaffirming the historic definition of marriage cannot remotely be

described as classifications of an "unusual character," especially when *Windsor* stressed that control of the marital relation lies within the "'virtually exclusive province of the States.'" *Id.* at 2691, 2693 (quoting *Sosna v. Iowa*, 419 U.S. 393, 404 (1975)). State laws on marriage being the norm, there is no warrant for the "or the inquiry into alleged animus. *Id.* at 2693.

Moreover, unlike DOMA, the Michigan amendment reaffirmed a pre-existing legal definition "[a]fter a statewide deliberative process" that "weigh[ed] arguments for and against same-sex marriage." *Id.* at 2689. Equal protection requires a different analysis "when the accusation [of discrimination] is based not on hostility" allegedly reflected in a newly enacted law, "but instead [is based] on the failure to act or the omission to remedy" what is perceived by some to be unjust discrimination. *Garrett*, 531 U.S. at 375 (Kennedy, J., concurring). Michigan's marriage amendment did not create new legal rights for married couples or impose any new burdens on same-sex couples. It merely reaffirmed and preserved the status quo.

Lastly, *Windsor* did not create an independent right to same-sex marriage by invalidating DOMA as a "federal intrusion" on the States'

"historic and essential authority to define the marital relation." 133 S. Ct. at 2692. *Windsor* nowhere supports invalidating Michigan's historical definition of marriage, much less announces a novel right to same-sex marriage under the rubric of equal protection. Not surprisingly, the Supreme Court's limited inquiry into animus has never produced a new constitutional right, given the injunction that "[i]t is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33 (1973).

Michigan's reaffirmation of the long-standing definition of marriage is anything but a "discrimination[ ] of an unusual character." *Windsor*, 133 S. Ct. at 2693. To the contrary, "until recent years, many citizens had not even considered the possibility that two persons of the same sex" could get married, "[f]or marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization." *Id.* at 2689. Thus, no inquiry into animus is justified. State laws defining marriage are the rule, as *Windsor* itself confirmed, and "[t]he limitation of lawful marriage to heterosexual

couples . . . for centuries had been deemed both necessary and fundamental." *Id.*

Romer likewise offers no support for inquiring into allegations that Michigan's marriage definition is based on animus. There too, the Court said, the challenged discrimination was "unusual"—indeed "unprecedented." *Romer*, 517 U.S. at 633. Animus fatally undermined the Colorado provision because "'all that the government c[ould] come up with in defense of the law is that the people who are hurt by it happen to be irrationally hated or irrationally feared.'" *Cook v. Gates*, 528 F.3d 42, 61 (1st Cir. 2008) (quoting *Milner v. Apfel*, 148 F.3d 812, 817 (7th Cir. 1998)). *Romer* held that "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.'" 517 U.S. at 635 (quoting *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

In brief, animus is irrelevant here because, in contrast with the laws in *Windsor* and *Romer*, Michigan's age-old marriage definition is neither unusual nor based on a desire "to harm a politically unpopular group." *Id.* One cannot fairly say that Michigan's husband-wife

definition of marriage was motivated by animus, much less that it was the *sole* motivation.

C. This Court Should Reject Arguments Invoking Animus as a Justification for Nullifying State Marriage Laws.

Accepting Plaintiffs' allegations that Michigan's marriage amendment implies animus against same-sex couples triggering heightened scrutiny—a conclusion nowhere authorized by Supreme Court precedent when a challenged classification is not "unusual"—would have serious consequences.

First, it would unavoidably brand Michigan voters as irrational or bigoted. Maligning their deeply held convictions would "demean[ ]" such voters, with "the resulting injury and indignity" of having their personal convictions condemned by a court and used to overturn laws they personally approved. *Windsor*, 133 S. Ct. at 2694, 2692; *see also Schuette*, 2014 WL 1577512, at *16 ("It is demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds.").

Condemning traditional marriage as irrational would be astounding, to say the least, given its venerable history and the fact

that Michigan's marriage amendment is virtually indistinguishable from laws in 33 States.

Second, such a decision would seriously distort the established framework for deciding equal protection claims, which assigns "different levels of scrutiny to different types of classifications." *Clark v. Jeter*, 486 U.S. 456, 461 (1988). Because sexual orientation does not characterize a suspect class and marrying a person of the same sex is not a fundamental right, "[a] century of Supreme Court adjudication under the Equal Protection Clause affirmatively supports the application of the traditional standard of review, which requires only that [State laws defining marriage] be shown to bear some rational relationship to legitimate state purposes." *Rodriguez*, 411 U.S. at 40. Applying a different standard here, based on alleged animus, when Michigan's law is not "unusual," would distort the well-settled equal protection framework.

Third, it would deny Michigan's marriage amendment the presumption of validity owed under rational basis review, thereby depriving Michigan voters of the benefits of federalism. For "[i]n the federal system States 'respond, through the enactment of positive law,

to the initiative of those who seek a voice in shaping the destiny of their own times.'" *Schuette*, 2014 WL 1577512, at *15 (quoting *Bond v. United States*, 564 U.S. __, 131 S. Ct. 2355, 2364 (2011)). Declaring the Michigan amendment to be an impermissible expression of animus would censor "Michigan voters [who] exercised their privilege to enact laws as a basic exercise of their democratic power." *Id.*

In the marriage context, this disenfranchisement would fall especially hard on faith communities, which by religious mission and tradition shoulder much of the burden of sustaining a vibrant marriage culture and supporting families and individuals when marriages fail. By declaring Michigan's marriage amendment unconstitutional, their strongly held values would no longer be reflected in the law—indeed, those values would be labeled illegitimate.[21]

The implications of such a declaration would seriously harm religious organizations and people of faith, given frequent comparisons

[21] Striking down State marriage laws for animus also would be unjustly one-sided. Laws protecting traditional marriage no more imply animus toward same-sex couples than laws redefining marriage imply animus toward people of faith.

between opposition to same-sex marriage and racism.[22] Because "the law can be a teacher," *Garrett*, 531 U.S. at 375 (Kennedy, J., concurring), a judicial decision declaring traditional marriage unconstitutional would render those who believe in traditional marriage social and political outcasts.[23] These indefensible results can be avoided only by following Justice Kennedy's admonition—that "courts may not disempower the voters from choosing which path to follow." *Schuette*, 2014 WL 1577512, at *14.[24]

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[22] *See* William N. Eskridge, Jr., *The History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1507 (1993) ("Just as white supremacy is the ideology that undergirds excluding different-race couples from the institution of marriage, homophobia is the ideology that undergirds excluding same-sex couples from that same institution.").

[23] *See* GIRGIS, ET AL., *supra* note 17, at 9 ("If civil marriage is redefined, believing what virtually every human society once believed about marriage—that it is a male-female union—will be seen increasingly as a malicious prejudice, to be driven to the margins of culture.").

[24] Recent decisions likewise suggest that avoiding tensions surrounding same-sex marriage is reason enough not to strike down Michigan's marriage amendment based on alleged animus. *See Schuette*, 2014 WL 1577512, at *14 (rejecting an interpretation of the Equal Protection Clause under which "[r]acial division would be validated, not discouraged"); *Town of Greece*, slip op. at 8 ("A test that would sweep away what has so long been settled would create new controversy and begin anew the very divisions along religious lines that the Establishment Clause seeks to prevent.") (citation omitted). And same-sex marriage is not more constitutionally sensitive than race or religion.

III. Michigan's Marriage Amendment Is Not Invalid Because It Was Informed by Religious and Moral Viewpoints.

We next address the district court's mistaken view that Michigan's Marriage Amendment was invalid because it reflected the beliefs of religious voters: "The same Constitution that protects the free exercise of one's faith in deciding whether to solemnize certain marriages rather than others, is the same Constitution that prevents the state from mandating adherence to an established religion . . . or 'enforcing private moral or religious beliefs without an accompanying secular purpose.'" *DeBoer*, 2014 WL 1100794, at *15 (quoting *Perry v. Schwarzenegger*, 704 F.Supp.2d 920, 930-31 (N.D. Cal. 2010) (citations omitted).

The suggestion that religious support for Michigan's marriage amendment casts doubt on its constitutionality finds no support in Supreme Court doctrine,[25] which teaches that "the Establishment

[25] Apart from other objections, the district court's reasoning conflicts with the interpretive rule that legislation is not judged by the private motivations of its supporters. *See Bd. Educ. Westside Cnty. Schs. (Dist. 66) v. Mergens*, 496 U.S. 226, 249 (1990). "A law conscripting clerics should not be invalidated because an atheist voted for it." *Washington v. Davis*, 426 U.S. 229, 253 (1976) (Stevens, J., concurring).

Clause must be interpreted 'by reference to historical practices and understandings.'" *Town of Greece*, slip op. at 7-8 (citation omitted). History shows that religion has powerfully contributed to the most formative political movements in our Nation's development—from the founding of our Nation[26] to the abolition of slavery,[27] the fight for women's suffrage,[28] and the civil rights movement.[29] That religious organizations and people of faith support laws protecting traditional marriage is wholly consistent with this familiar understanding of the place of religion in American public life.

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[26] "[T]he Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him." *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 212 (1963). Accordingly, they amended the Constitution to secure religious liberty as America's first freedom. *See* U.S. CONST. amend. 1.

[27] Lincoln's presidential speeches were "suffused with" religious references that inspired and sustained the fight to end slavery. WILLIAM LEE MILLER, LINCOLN'S VIRTUES 50 (2002).

[28] Susan B. Anthony argued that women's suffrage would bring moral and religious issues "into the political arena" because such issues were of special importance to women. Letter from Susan B. Anthony to Dr. George E. Vincent (Aug. 1904), *in* 3 IDA HUSTED HARPER, LIFE AND WORKS OF SUSAN B. ANTHONY, at 1294 (1908).

[29] Martin Luther King's best-known speeches and writings relied on biblical language and imagery. *See, e.g.*, Martin Luther King, I Have a Dream (1963), *in* I HAVE A DREAM: WRITINGS AND SPEECHES THAT CHANGED THE WORLD, at 105-06 (James Melvin Washington ed., 1992).

Given that understanding, "[t]he Establishment Clause . . . may not be used as a sword to justify repression of religion or its adherents from any aspect of public life." *McDaniel v. Paty*, 435 U.S. 618, 640-41 (1978) (Brennan, J., concurring in the judgment) (citations omitted); *see also Walz v. Tax Comm'n*, 397 U.S. 664, 670 (1970) (right to engage in "vigorous advocacy of legal or constitutional positions" belongs to "churches, as much as secular bodies and private citizens"). That rule applies with special force when a court pronounces the religious beliefs of voters legitimate when they approve same-sex marriage and ignorant or hateful when they oppose it. *See Larson v. Valente*, 456 U.S. 228, 244 (1982). Relying on the Establishment Clause to overturn laws like Michigan's marriage amendment is so thoroughly wrongheaded that a prominent advocate for same-sex marriage recently declared the argument "outside the space for legitimate disagreement." Roy T. Englert, Jr., *Unsustainable Arguments Won't Advance Case for Marriage Equality*, Nat'l L.J., Apr. 21, 2014, at 35.

Invalidating Michigan's marriage amendment *because* it received support from religious voters would also "impose a special disability upon those persons alone." *Romer*, 517 U.S. at 631. That burden would

violate their rights under the Free Exercise Clause by operating as a "religious gerrymander," indirectly "regulat[ing] . . . [political participation] because it is undertaken for religious reasons." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) (citations omitted). Such open hostility toward religion is "at war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion." *Illinois ex rel. McCollum v. Bd. Educ. Sch. Dist.*, 333 U.S. 203, 211-12 (1948); *see also Mergens*, 496 U.S. at 248 ("[The Constitution] does not license government to treat religion and those who teach or practice it . . . as subversive of American ideals and therefore subject to unique disabilities.") (internal quotation marks omitted).[30]

"[N]o less than members of any other group, [religious Americans must] enjoy the full measure of protection afforded speech, association, and political activity generally." *McDaniel*, 435 U.S. at 641 (Brennan, J., concurring in the judgment). Voters of every opinion may freely

[30] The district court's approach further implies a religious test for voters in considerable tension with the Constitution's ban on religious tests for federal officials. *See* U.S. Const. art. VI.

support laws reflecting moral judgments about what is best for society. *See Harris v. McRae*, 448 U.S. 297, 319-20 (1980); *McGowan v. Maryland*, 366 U.S. 420, 422 (1961). From criminal laws, to business and labor regulations, environmental legislation, military spending, and universal health care—law and public policy are constantly based on notions of morality. *See, e.g.*, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 257 (1964) (collecting decisions upholding federal laws where "Congress was legislating against moral wrongs"). Courts "surely would not strike down a law providing money to feed the hungry or shelter the homeless if it could be demonstrated that, but for the religious beliefs of the legislators, the funds would not have been approved." *Edwards v. Aguillard*, 482 U.S. 578, 615 (1987) (Scalia, J., dissenting).

Nullifying Michigan's marriage amendment because it reflects the views of some religious voters would place "an unprecedented restriction on the exercise of a fundamental right . . . to speak and debate and learn and then, as a matter of political will, to act through a lawful electoral process." *Schuette*, 2014 WL 1577512, at *15. Such a restriction would abridge the fundamental right of citizens to

participate fully in the process of self-government *as believers*. *See Brown v. Hartlage*, 456 U.S. 45, 56 (1982) ("[O]ur tradition of political pluralism is partly predicated on the expectation that voters will pursue their individual good through the political process, and that the summation of these individual pursuits will further the collective welfare.").

If applied consistently, the principle of striking down laws when they reflect controversial moral choices would mean the end of representative government as we know it. For "[c]onflicting claims of morality . . . are raised by opponents and proponents of almost every [legislative] measure." *Dandridge v. Williams*, 397 U.S. 471, 487 (1970). Perhaps this is why President Obama recognized that "to say that men and women should not inject their 'personal morality' into public policy debates is a practical absurdity."[31]

American citizens have fundamental constitutional rights to rely on and to freely express their religious beliefs when debating and making decisions about important matters of public policy like same-sex

[31] Barack Obama, Call to Renewal Keynote Address (June 28, 2006), *available at* http://www.nytimes.com/2006/06/28/us/politics/2006obamaspeech.html? pagewanted=all&_r=0.

marriage. Subjecting a law to greater judicial scrutiny because of the support it received from religious organizations and people of faith would burden the exercise of those essential democratic rights. Michigan's marriage amendment must be judged based on settled rules of law—not on a more demanding standard born of suspicion toward religion, religious believers, or their values.

CONCLUSION

Marriage, understood as the union of one man and one woman, remains a vital and foundational institution of civil society. The government's interests in continuing to encourage and support marriage are not merely legitimate but compelling. The societal ills caused by the deterioration of husband-wife marriage will only be aggravated if Michigan cannot reserve to marriage its historic and socially vital meaning.

DATED this 14th day of May, 2014.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 29(b) because it contains 6,994 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by transmitting a copy to her via e-mail on May 14, 2014.

I certify that the Clerk will handle service via the Court's electronic filing system.

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ADDENDUM—STATEMENTS OF INTEREST OF THE *AMICI*

The United States Conference of Catholic Bishops ("USCCB" or "Conference") is a nonprofit corporation, the members of which are the Catholic Bishops in the United States. The USCCB advocates and promotes the pastoral teaching of the U.S. Catholic Bishops in such diverse areas of the nation's life as the free expression of ideas, fair employment and equal opportunity for the underprivileged, protection of the rights of parents and children, the sanctity of life, and the nature of marriage. Values of particular importance to the Conference include the promotion and defense of marriage, the protection of the First Amendment rights of religious organizations and their adherents, and the proper development of the nation's jurisprudence on these issues.

The National Association of Evangelicals ("NAE") is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It serves 41 member denominations, as well as numerous evangelical associations, missions, nonprofits, colleges, seminaries, and independent churches. NAE serves as the collective voice of evangelical churches, as well as other church-related and independent religious ministries.

The Church of Jesus Christ of Latter-day Saints ("LDS Church") is a Christian denomination with over 14 million members worldwide. Marriage and the family are central to the LDS Church and its members. The LDS Church teaches that marriage between a man and a woman is ordained of God, that the traditional family is the foundation of society, and that marriage and family supply the crucial relationships through which parents and children acquire private and public virtue. Out of support for these fundamental beliefs, the LDS Church appears in this case to defend the traditional, husband-wife definition of marriage.

The Ethics and Religious Liberty Commission (ERLC) is the moral concerns and public policy entity of the Southern Baptist Convention (SBC), the nation's largest Protestant denomination, with over 46,000 churches and 16 million members. The ERLC is charged by the SBC with addressing public policy affecting such issues as marriage and family, the sanctity of human life, ethics, and religious liberty. Marriage is a crucial social institution. As such, we seek to strengthen and protect it for the benefit of all.

The Lutheran Church-Missouri Synod is the second largest Lutheran denomination in North America, with approximately 6,150 member congregations which, in turn, have approximately 2.4 million baptized members. The Synod believes that marriage is a sacred union of one man and one woman, *Genesis* 2:24-25, and that God gave marriage as a picture of the relationship between Christ and His bride the Church, *Ephesians* 5:32. As a Christian body in this country, the Synod believes it has the duty and responsibility to speak publicly in support of traditional marriage and to protect marriage as a divinely created relationship between one man and one woman.