No. 14-596

# In the Supreme Court of the United States

JONATHAN P. ROBICHEAUX, ET AL.,
*Petitioners,*

*v.*

DEVIN GEORGE, IN HIS OFFICIAL CAPACITY AS LOUISIANA STATE REGISTRAR AND CENTER DIRECTOR AT LOUISIANA DEPARTMENT OF HEALTH AND HOSPITALS, ET AL.,
*Respondents*

On Petition for a Writ of Certiorari Before Judgment to the U.S. Court of Appeals for the Fifth Circuit

## RESPONDENTS' BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT


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December 2, 2014

## QUESTION PRESENTED

Does the Fourteenth Amendment require the States to license or recognize same-sex marriages?

## PARTIES TO THE PROCEEDING

Petitioners are Jonathan P. Robicheaux, Derek Penton, Courtney Blanchard, Nadine Blanchard, Robert Welles, Garth Beauregard, Jacqueline M. Brettner, M. Lauren Brettner, Nicholas J. Van Sickels, Andrew S. Bond, Henry Lambert, R. Carey Bond, L. Havard Scott, III, Sergio March Prieto, and Forum for Equality Louisiana, Inc. Petitioners were plaintiffs in the district court and appellants in the court of appeals.

Respondents are Timothy A. Barfield, Jr., in his official capacity as Secretary of the Louisiana Department of Revenue, Kathy Kliebert, in her official capacity as Secretary of the Louisiana Department of Health and Hospitals, and Devin George, in his official capacity as Louisiana State Registrar. Respondents were defendants in the district court and appellees in the court of appeals.

James D. Caldwell, in his official capacity as Louisiana Attorney General, was originally named as a defendant but was dismissed on Eleventh Amendment grounds by the district court. As petitioners did not appeal his dismissal, he is no longer a party.

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## RESPONDENTS' BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT

### INTRODUCTION

Petitioners seek certiorari before judgment to review whether the Fourteenth Amendment compels Louisiana to adopt same-sex marriage. The district court correctly ruled it does not: our Constitution leaves this matter up to state citizens, who retain their "historic and essential authority to define the marital relation." *United States v. Windsor*, 133 S. Ct. 2675, 2692 (2013); App. a1. The case has been fully briefed in the Fifth Circuit and will be argued on January 9, 2015, alongside an appeal from Texas. *See Robicheaux v. Caldwell*, No. 14-31037 (5th Cir. Sept. 4 & 5, 2014); *De Leon v. Perry*, No. 14-50196 (5th Cir. Feb. 27, 2014).

Petitioners are right that the extraordinary mechanism of cert-before-judgment is appropriate here, however. Pet. 20; SUP. CT. R. 11. Louisiana's case squarely implicates a spiraling national controversy that has already nullified the marriage laws of over twenty States and spawned a four-to-one circuit split. Multiple petitions are pending before this Court, presenting the same issue in various forms. The

*Robicheaux* decision was the first federal ruling since *Windsor* to uphold a State's marriage laws; only the Sixth Circuit's *DeBoer* decision has joined it. *DeBoer v. Snyder*, __ F.3d __, 2014 WL 5748990 (6th Cir. Nov. 6, 2014). *Robicheaux* and *DeBoer* are the sole counterweights to a flood of decisions condemning the view that marriage is limited to male-female couples—a view that "until recent years … had been thought of by most people as essential to the very definition of [marriage] and to its role and function throughout the history of civilization." *Windsor*, 133 S. Ct. at 2689. If the Court elects to resolve this conflict now, Louisiana agrees with petitioners that the Court should review the decision in *Robicheaux* along with the Sixth Circuit's decision in *DeBoer*. Pet. 20.

Louisiana also agrees that this case is an ideal vehicle for deciding the issues. Pet. 20-25. The decision below resolved both the licensing and recognition issues. It is a final judgment. It has no standing defects. It properly resolved the issues on the basis of law, not facts. Louisiana's marriage laws present a clear choice for the traditional definition of marriage that is reflected consistently across Louisiana's family laws. And reviewing the Louisiana case along with one or more petitions from the Sixth Circuit will allow the Court to consider a wider range of marriage laws, defended by a wider array of legal arguments. Louisiana thus agrees with petitioners that—assuming the Court wishes to resolve the conflict now—"the decision below is uniquely appropriate for certiorari before judgment and consideration along with the Sixth Circuit ruling." Pet. 20.

On the merits, of course, the two sides part company. As the court below correctly concluded, nothing in the Fourteenth Amendment—and nothing in any of this Court's decisions—compels the States to adopt same-sex marriage. To the contrary, state citizens legitimately "address[ ] the

meaning of marriage through the democratic process." App. a1. In reaching that decision, the lower court simply followed the plain tracks laid down in *Windsor*, which praised "a statewide deliberative process that enabled … citizens to discuss and weigh arguments for and against same-sex marriage," and which taught that federal power cannot "influence or interfere with state sovereign choices about who may be married." 133 S. Ct. at 2692, 2693; App. a11. Paradoxically, however, an increasing number of federal courts have relied on *Windsor*, not to safeguard state sovereignty, but to override it. Those decisions are uniformly wrong. They interfere with state authority over marriage far more effectively than the federal law struck down by *Windsor* scarcely eighteen months ago. Consequently, those decisions do not apply *Windsor*; they subvert it. They do not enforce the Fourteenth Amendment; they "demean[ ] … the democratic process." *Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623, 1637 (2014) (plurality op. of Kennedy, J.).

This Court alone determines whether the time is ripe to settle this issue nationally. If it elects to do so now, Louisiana agrees with petitioners that it should grant certiorari before judgment in this case.

## STATEMENT

### A. LOUISIANA'S MARRIAGE LAWS

1. Since its admission into the United States, Louisiana has always defined civil marriage as the union of a man and a woman. *See Lynch v. Knoop*, 43 So. 252, 253 (La. 1907) ("In this state marriage is a formal declaration or contract by which a man and woman join in wedlock."); *LeBlanc v. Landry*, 7 Mart. (n.s.) 665, 666 (La. 1829) (marriage involves a "man" and a "woman"); LA. CIV. CODE art. 86 (providing that "[m]arriage is a legal relationship between a man and a

woman that is created by civil contract"). Consequently, Louisiana has never recognized marriage between persons of the same sex and does not accord such a marriage any civil effects. *See* LA. CIV. CODE art. 89 (providing "[p]ersons of the same sex may not contract marriage with each other"); *id.* art. 96 (providing "[a] purported marriage between parties of the same sex does not produce any civil effects").

2. Louisiana's definition of marriage is, of course, not unique. As this Court recently observed, "until recent years … 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." *Windsor*, 133 S. Ct. at 2689. This consensus began to shift in certain States two decades ago, partly as the result of decisions construing state constitutions to require same-sex marriage. *See Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993) (applying strict scrutiny to marriage laws under Hawaii Constitution); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 968 (Mass. 2003) (defining marriage in man-woman terms violates Massachusetts Constitution). Louisiana citizens responded to this movement, as the citizens of many other States did, by reaffirming their convictions about the nature of marriage. *See Windsor*, 133 S. Ct. at 2689 ("That belief [in man-woman marriage], for many who long have held it, became even more urgent, more cherished when challenged.").

3. In 1999 Louisiana clarified that same-sex marriage violates its "strong public policy," and "such a marriage contracted in another state shall not be recognized in this state for any purpose, including any right or claim as a result of the purported marriage." LA. CIV. CODE art. 3520(B). In 2004, by wide margins, Louisiana voters amended the state constitution to provide that:

> Marriage in the state of Louisiana shall consist only of the union of one man and one woman. No official or court of the state of Louisiana shall construe this constitution or any state law to require that marriage or the legal incidents thereof be conferred upon any member of a union other than the union of one man and one woman. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized. No official or court of the state of Louisiana shall recognize any marriage contracted in any other jurisdiction which is not the union of one man and one woman.

LA. CONST. art. XII, § 15.

4. In 2005, the Louisiana Supreme Court unanimously upheld this amendment against a state constitutional challenge. *Forum for Equality Louisiana PAC v. McKeithen*, No. 2004-2477 (La. 1/19/05); 893 So.2d 715 (upholding amendment under "single object" rule of La. Const. art. XIII, § 1). After surveying its legislative history, the court found that the amendment's object was not to effect a narrow "same-sex marriage ban," but instead to ensure that Louisiana's longstanding marriage definition was not vulnerable to challenge under the state constitution. *See id.* at 733-34 (reviewing concerns expressed to legislative committees that Louisiana's definition "would yield to provisions of the state constitution that might be found in conflict with it"). The court noted that the amendment left unmarried couples, whether same- or opposite-sex, free to arrange their affairs by contract: they could co-own property, leave their estates to each other, and designate each other to

"mak[e] critical life decisions … in cases of medical emergencies." *Id.* at 736 n.31.[1]

5. Finally, in 2013 the Louisiana Department of Revenue clarified its tax policies on same-sex marriage in response to IRS Revenue Ruling 2013-17. In that ruling, the IRS announced it would consider a validly-married same-sex couple to be married for federal tax purposes regardless of the couple's state of domicile. IRS REV. RULING 2013-17, at 10. In response, Louisiana issued Revenue Bulletin No. 13-024. The bulletin explained that, because Louisiana law prohibits recognition of same-sex marriages, persons in a same-sex marriage, regardless of their federal filing status, "may not file a Louisiana state income tax return as married filing jointly, married filing separately or qualifying widow." LA. REV. BULL. No. 13-024. Instead, each taxpayer "must file a separate Louisiana return as single, head of household, or qualifying widow, as applicable." *Id.*

This brief refers collectively to these provisions as "Louisiana's marriage laws."

### B. PROCEDURAL HISTORY

1. Petitioners are seven same-sex couples who wish to be married in Louisiana or who wish Louisiana to recognize their out-of-state marriages. They filed two separate lawsuits in the federal district court for the Eastern District of Louisiana, claiming that Louisiana's marriage laws violate their rights under the Equal Protection Clause and the Due

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[1] *See also id.* at 737 (Calogero, C.J., concurring) ("Nothing in the majority opinion would prohibit an unmarried couple from contracting to be co-owners of property, from designating each other agents authorized to make critical end of life decisions, or from leaving property to each other through wills. The majority opinion does not disturb or impair the fundamental contract and property rights possessed by all individuals, be they homosexual or heterosexual, married or unmarried.").

Process Clause of the Fourteenth Amendment. Specifically, they challenged (1) Louisiana's refusal to issue one of the couples a marriage license; (2) Louisiana's policy requiring persons in an out-of-state same-sex marriage to file Louisiana tax returns as single persons, and not jointly as married persons; and (3) Louisiana's refusal to allow both parties of a same-sex marriage to appear as parents on an amended Louisiana birth certificate. *See* Pet. 10; App. a2.[2] They named as defendants (respondents here) the state officials charged with administering the challenged laws, namely the Secretary of the Louisiana Department of Revenue, the Secretary of the Department of Health and Hospitals, and the Louisiana State Registrar (collectively, the "State" or "Louisiana"). App. a4.

2. The district court consolidated the lawsuits and the parties filed cross-motions for summary judgment. After oral argument and subsequent briefing, the district court rendered a final judgment on September 3, 2014. The court granted Louisiana's motion for summary judgment and denied petitioners' motion for summary judgment. App. a1, a32, a34-a35.

3. On September 4 and 5, petitioners timely appealed to the U.S. Fifth Circuit, App. a36-a47, where their appeals were docketed as *Robicheaux et al. v. Caldwell et al.*, No. 14-31037. The court granted Louisiana's motion for expedited briefing and set the case for argument before the same panel that would hear Texas's appeal in *De Leon v. Perry*, No. 14-51096. The two cases will be argued on January 9, 2015.

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[2] Petitioners also brought a First Amendment challenge to Louisiana Revenue Information Bulletin No. 13-024. App. a24. The district court rejected that claim, *id.*, and petitioners did not appeal.

## C. LOWER COURT DECISION

1. In his opinion upholding Louisiana's marriage laws, Judge Martin Feldman drew on *Windsor*'s "powerful reminder" that "'[t]he definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations[.]'" App. a11 (quoting *Windsor*, 133 S. Ct. at 2691). The court noted that *Windsor* "repeatedly and emphatically reaffirmed the longstanding principle" that the authority to define marriage "belongs to the states," App. a18, and analyzed petitioners' claims in light of that principle.

2. a. The court applied rational basis review to petitioners' equal protection claims. It reasoned that *Windsor* had "starkly avoid[ed]" applying heightened scrutiny, and, further, that "neither the Supreme Court nor the Fifth Circuit has ever before defined sexual orientation as a suspect class, despite opportunities to do so." App. a10 (citing *Windsor, supra; Romer v. Evans*, 517 U.S. 620 (1996); *Johnson v. Johnson*, 385 F.3d 503 (5th Cir. 2004)). The court also found that Louisiana's marriage laws did not constitute sex discrimination, noting "the plain reality that Louisiana's laws apply evenhandedly to both genders[.]" App. a15.

b. The court ruled that Louisiana's marriage laws rationally further two government interests. First, it found the laws were "directly related to achieving marriage's historically preeminent purpose of linking children to their biological parents." App. a16. Second, it found the laws further a legitimate interest in "ensuring that fundamental social change occurs by social consensus through democratic processes." App. a8-a9, a16-a17. Finally, the court found that Louisiana's laws were not inspired by "unconstitutional animus" against gays and lesbians, observing that "Louisiana unquestionably respected 'a statewide deliberative process that allowed its citizens to discuss and weigh arguments for

and against same-sex marriage.'" App. a17 & n.11 (quoting *Windsor*, 133 S. Ct. at 2689).

3. On due process, the court relied on the settled rule that a claimant must "provide a 'careful description' of the asserted fundamental right," and "establish it as 'deeply rooted in this Nation's history and tradition." App. a20 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997); *Malagon de Fuentes v. Gonzales*, 462 F.3d 498, 505 (5th Cir. 2006)). Again relying on *Windsor*, the court concluded that a "right to same-sex marriage" was not deeply rooted in our national history since "[t]he concept of same-sex marriage is 'a new perspective, a new insight,' nonexistent and even inconceivable until very recently." App. a21-22 (quoting *Windsor*, 133 S. Ct. at 2689). The court also ruled that Louisiana's laws did not infringe plaintiffs' right to intimate association, because that right does "'not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.'" App. a24 (quoting *Lawrence v. Texas*, 539 U.S. 558, 578 (2003)).

4. The court conceded that its decision diverged from nearly all federal rulings since *Windsor*. App. a15 n.9. That was true at the time.[3] Nonetheless, the court concluded the Constitution gave it no authority to "resolve the wisdom of same-sex marriage," but required leaving this issue to "the arena of the democratic process." App. a33.

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[3] *But see DeBoer*, 2014 WL 5748990 (upholding marriage laws of Kentucky, Michigan, Ohio, and Tennessee), *pet'ns for cert. filed sub nom. Henry v. Hodges*, No. 14-556 (U.S. Nov. 14, 2014); *Tanco v. Haslam*, No. 14-562 (U.S. Nov. 14, 2014); *DeBoer v. Snyder*, No. 14-571 (U.S. Nov. 16, 2014); *Love v. Beshear*, No. 14-574 (U.S. Nov. 16, 2014); *Conde-Vidal v. Garcia-Padilla*, __ F.Supp.3d __, 2014 WL 5361987 (D. Puerto Rico Oct. 21, 2014) (concluding "*Windsor* … reaffirms the States' authority over marriage"), *appeal docketed sub nom. Lopez-Aviles v. Rius-Armendariz*, No. 14-2184 (1st Cir. Nov. 13, 2014).

## REASONS FOR GRANTING THE PETITION

### I. THE LOUISIANA DECISION PROVIDES A CRUCIAL COUNTERPOINT TO THE MANY ERRONEOUS DECISIONS USURPING STATE AUTHORITY TO DEFINE MARRIAGE.

1. As petitioners correctly point out, Pet. 4, the issues presented in Louisiana's case are already the subject of a four-to-one split among the circuits. Panels of the Fourth, Seventh, Ninth, and Tenth Circuits have struck down the marriage laws of seven States under a variety of due process and equal protection theories.[4] Diverging from those circuits, a Sixth Circuit panel upheld the marriage laws of four States against similar constitutional challenges. *DeBoer*, 2014 WL 5748990, at *1, *26-*27. The disagreement among lower courts will deepen in coming months: appeals are pending in the First, Fifth, and Eleventh Circuits, and in the Arkansas and Louisiana Supreme Courts. *Lopez-Aviles, supra*; *Robicheaux v. Caldwell*, No. 14-31037 (5th Cir. Sept. 4 & 5, 2014); *De Leon v. Perry*, No. 14-50196 (5th Cir. Feb. 27, 2014); *Brenner v. Sec'y, Fla. Dept. of Health*, No. 14-14061 (11th Cir. Sept. 4, 2014); *Smith v. Wright*, No. 14-427 (Ark. Sup. Ct., May 12, 2014); *Costanza v. Caldwell*, No. 2014-CA-2090 (La. Sup. Ct. Oct. 31, 2014).[5]

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[4] *See Latta v. Otter*, __ F.3d __ 2014 WL 4977682 (9th Cir. Oct. 7, 2014) (sexual orientation discrimination); *id.* at *11 (Reinhardt, J., concurring) (fundamental rights); *id.* at *14 (Berzon, J., concurring) (sex discrimination); *Baskin v. Bogan*, 766 F.3d 648 (7th Cir.) (sexual orientation discrimination), *cert. denied*, 135 S. Ct. 316 (2014); *Bostic v. Schaefer,* 760 F.3d 352 (4th Cir.) (fundamental rights), *cert denied sub nom. Rainey v. Bostic*, 135 S. Ct. 308 (2014); *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir.) (fundamental rights), *cert. denied*, 135 S. Ct. 265 (2014).

[5] The Arkansas Supreme Court heard arguments in *Smith* on November 20, 2014. The Fifth Circuit has scheduled arguments in *Robicheaux* and *De Leon* for January 9, 2015. The Louisiana Supreme

2. If the Court determines the time is ripe to settle this issue, Louisiana agrees with petitioners that "the decision below is uniquely appropriate for certiorari before judgment and consideration along with the Sixth Circuit ruling." Pet. 20. Judge Feldman's decision in *Robicheaux* was the first post-*Windsor* federal ruling to uphold state marriage laws against constitutional attack. It now stands with the Sixth Circuit's decision in *DeBoer* as one of the only two post-*Windsor* rulings to conclude that the Constitution does not compel adoption of same-sex marriage but instead leaves the matter up to the democratic process of each State. *See* App. a1 (concluding that Louisiana legitimately "address[ed] the meaning of marriage through the democratic process"); *DeBoer*, 2014 WL 5748990, at *22 (urging deference to "democratic majorities deciding within reasonable bounds when and whether to embrace an evolving … societal norm").[6] If the Court chooses to review one of those decisions now, it should review both.

3. Petitioners are also correct that both *Robicheaux* and *DeBoer* emphasize that judges should defer to the democratic process on this issue. Pet. 19 (highlighting this common "theme"). Petitioners are wrong, however, to claim that *Robicheaux* "elevat[es] deference to democratic processes over judicial responsibility to protect the minority's constitutional rights." *Id.* To the contrary, Judge Feldman correctly found that the Constitution contains no "right" to enter into a same-sex marriage, and therefore his "judicial responsibility" was to defer to Louisianans' views about the nature of marriage. *See, e.g.,* App. a22 (concluding "[t]here is

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Court will likely schedule arguments in *Costanza* in the final week of January 2015.

[6] The decision upholding Puerto Rico's marriage laws in *Conde-Vidal* was not based on the merits but on the precedential force of *Baker v. Nelson*, 409 U.S. 810 (1972). *Conde-Vidal*, 2014 WL 5361987, at *10.

simply no fundamental right, historically or traditionally, to same-sex marriage"); App. a32 (right to enter into a same-sex marriage is a "new right" that "may or may not be affirmed by the democratic process"). Nor did Judge Feldman rely "primarily on dissents," as petitioners claim. Pet. 19. Rather, he relied primarily on *Windsor* itself, which gave the "powerful reminder" that "'[t]he definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations.'" App. a11 (quoting *Windsor*, 133 S. Ct. at 2691).

These merits disagreements aside, however, petitioners are correct that *Robicheaux* is an instructive "counter-balance" to the numerous decisions going the other way. Pet. 19. The Court's resolution of the conflict may well hinge on the degree to which *Windsor* affirmed the authority of States to decide whether to adopt same-sex marriage. *Robicheaux* powerfully suggests that the contrary federal rulings get *Windsor*'s teaching exactly backwards. *See, e.g.,* App. a10 (reasoning that *Windsor* required "careful consideration" of DOMA "because of Congress' odd intrusion on what the Court repeatedly emphasized was historical and essential state authority to define marriage") (citing *Windsor*, 133 S. Ct. at 2693)); App. a18 (reasoning that "*Windsor* repeatedly and emphatically reaffirmed" States' authority over domestic relations," including their "sovereign authority" to define marriage); *see also Windsor*, 133 S. Ct. at 2693 (condemning DOMA's "purpose to influence or interfere with state sovereign choices about who may be married"). *DeBoer* relied on a similar view of *Windsor*. *See* 2014 WL 5748990, at *20 (reading *Windsor* to override state authority "would require us to subtract key passages from the opinion and add an inverted holding"). Again, if the Court reviews one of those decisions now, it should review both.

4. a. Whether the Court should intervene now or await further development in the lower courts is a close question. Petitioners say more percolation would have "limited" value. Pet. 19. Admittedly, five circuits and twenty-one district courts have already weighed in. On the other hand, coming months will add the views of three circuits (the First, Fifth, and Eleventh) and two state supreme courts (Arkansas and Louisiana). The mix of lower court decisions may look quite different in six months. In any event, if the Court decides to act now, it makes sense to review more than one lower court decision, together with the widest possible range of state marriage laws. *See* III, *infra*. It could accomplish that by reviewing *Robicheaux* alongside *DeBoer*.

b. Louisiana is in a unique position with respect to the timing of review. Three weeks after Judge Feldman upheld Louisiana's marriage laws in *Robicheaux*, a Louisiana trial court invalidated those laws in *Costanza v. Caldwell*, No. 2013-0052 (La. 15th Jud. Dist. Ct. Sept. 24, 2014). Thus, the same Louisiana officials are *now* caught between the Scylla and Charybdis of conflicting state and federal rulings.[7] Louisiana thus has particular urgency in seeing this issue resolved. If the Court decides to intervene now, Louisiana would naturally want to defend *Robicheaux* in this Court on the strength of its own arguments. If the Court wants further percolation, however, Louisiana could proceed to vindicate its laws before the Fifth Circuit and the state supreme court. Decisions from those courts would provide the insights of ten additional judges. And if those courts issue conflicting decisions, that would create an additional reason for this

[7] No same-sex marriage licenses have been issued in Louisiana, however, because the *Costanza* decision was immediately stayed pending direct appellate review by the Louisiana Supreme Court. *See Costanza v. Caldwell*, No. 2014-2016 (La. 10/31/14); 2014 WL 5825169 (granting application for review).

Court to step in. *See, e.g., Hagen v. Utah*, 510 U.S. 399, 409 (1994) (granting certiorari "to resolve the direct conflict between … decisions of the Tenth Circuit and the Utah Supreme Court"); *State of Cal. v. Taylor*, 353 U.S. 553, 556 (1957) (granting certiorari "to resolve the conflict between the United States Court of Appeals and the California Supreme Court"). In any event, whether this Court intervenes now or later, Louisiana's case presents a "uniquely appropriate" vehicle for deciding the validity of state marriage laws. Pet. 20.

## II. THIS CASE IS AN IDEAL VEHICLE.

Petitioners are right that this case presents a "strong vehicle" for definitively settling the marriage challenges being litigated across the country. Pet. 20. If the Court intervenes now, the particular features of Louisiana's case make it an ideal vehicle for deciding whether state citizens can continue to make "sovereign choices about who may be married," *Windsor*, 133 S. Ct. at 2693, or whether the Constitution has already made those choices for them.

1. As petitioners point out, Judge Feldman's decision addresses both sides of the question: whether a State must license same-sex marriages and whether it must recognize out-of-state same-sex marriages. Pet. 17; App. a2 (addressing claims of "six same-sex couples who live in Louisiana and are validly married under the law of another state, [and] one same-sex couple who seeks the right to marry in Louisiana"). Of the other cases pending on certiorari, only the Kentucky case addresses both issues.[8] The Michigan case addresses

[8] *See Bourke v. Beshear*, 996 F.Supp.2d 542, 543 (W.D. Ky. 2014) (addressing whether Kentucky may decline to recognize marriages of "[f]our same-sex couples validly married outside Kentucky"); *Love v. Beshear*, 989 F.Supp.2d 536, 539 (W.D. Ky. 2014) (addressing whether Kentucky may decline to issue marriage licenses to "[t]wo same-sex couples who wish to marry in Kentucky").

only licensing, whereas the Ohio and Tennessee cases address only recognition.[9]

2. Procedurally, this case is also ideal for cleanly resolving the issues.

a. There are no standing problems, either at the trial or appellate level, because petitioners properly sued the Louisiana officials who enforce the challenged laws, App. a4, and those officials have actively defended those laws at all stages. *Cf. Hollingsworth v. Perry*, 133 S. Ct. 2652, 2662 (2013) (no appellate standing because defendant state officials did not appeal and initiative proponents had no Article III injury). Furthermore, the district court's ruling is a final judgment, not a preliminary ruling. App. a1 (ruling on cross-motions for summary judgment); *cf. Tanco*, 7 F.Supp.3d at 772 (granting motion for preliminary injunction but declining to "make a final ruling on the plaintiffs' claims").

b. The lower court properly resolved the issues as a matter of law, not facts. App. a4-a5 (finding issues appropriate for resolution on cross-motions for summary judgment). The record thus presents no thorny rabbit trails such as whether the lower court abused its discretion in

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[9] *See DeBoer v. Snyder*, 973 F.Supp.2d 757, 759 (E.D. Mich. 2014) (addressing right to marry of "an unmarried same-sex couple residing in … Michigan"); *Henry v. Himes*, 14 F.Supp.3d 1036, 1041-42 (S.D. Ohio 2014) (addressing whether Ohio must recognize same-sex marriages contracted in New York, California, and Massachusetts); *Obergefell v. Wymyslo*, 962 F.Supp.2d 968, 973 (S.D. Ohio 2013) (addressing whether "Ohio must recognize out-of-state marriages between same-sex couples on Ohio death certificates"); *Tanco v. Haslam*, 7 F.Supp.3d 759, 762 (M.D. Tenn. 2014) (addressing whether Tennessee must recognize marriages of "three, same-sex couples who lived and were legally married in other states before moving to Tennessee").

weighing expert evidence or assessing witness credibility.[10] The questions at issue here are not properly resolved by courtroom factfinding. *See, e.g., Heller v. Doe*, 509 U.S. 312, 320 (1993) (explaining that "[a] legislative choice is not subject to courtroom factfinding") (quotes omitted). Nor are they properly resolved by a court selecting among competing opinions of social scientists. Judge Feldman correctly rejected this approach. *See* App. a17 n.10 ("The contentious debate in social science literature about what is 'marriage' in today's world does not drive or inform the Court's decision."); *cf. DeBoer*, 973 F.Supp.2d at 761-768 (weighing methodology and credibility of competing social science experts). The record in *Robicheaux*, then, is particularly well-suited to deciding the broad questions of state sovereignty presented here.

3. On the merits, Louisiana's marriage and family laws cleanly pose the question whether a State may validly define marriage in terms of man-woman relationships.

a. The man-woman definition of marriage is reflected consistently and concretely across Louisiana law. Louisiana's family law rests on an array of presumptions linking man-woman marriage, parentage, and child protection.[11]

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[10] *Cf. DeBoer*, 973 F.Supp.2d at 761-768 (finding plaintiffs' experts "fully credible" and "highly credible" and according their testimony "great weight," while dismissing State's experts as "entirely unbelievable," "not worthy of serious consideration," and declining to accord their testimony "any significant weight"); *DeBoer*, 2014 WL 5748990, at *30-33 (Daughtrey, J., dissenting) (emphasizing competing expert testimony and district court's weighing of witness credibility); *see generally, e.g., General Elec. Co. v. Joiner*, 522 U.S. 136, 139 (1997) (abuse of discretion is proper appellate standard for reviewing "trial court's decision to admit or exclude expert testimony").

[11] *See, e.g.,* LA. CIV. CODE art. 185 & cmt. (b) (presumption that "husband of the mother" is the father of a child born during marriage is "among the strongest in the law"); *id.* art. 195 (similarly strong

Louisiana's adoption laws reinforce its marriage laws by allowing only validly married couples to adopt a child jointly.[12] Louisiana's regulation of reproductive technology does the same, providing, for instance, that a husband "may not disavow a child born to his wife as a result of an assisted conception to which he consented." LA. CIV. CODE art. 188.[13] Louisiana's laws thus present a clear and comprehensive policy choice in favor of man-woman marriage, evidencing its citizens' conviction that marriage is an institution whose shape and stability have profound social effects. *See, e.g., id.* art. 86 cmt (c) (the marriage contract "creates a social status that affects not only the contracting parties, but also their posterity and the good order of society"); *Windsor*, 133 S. Ct. at 2693 (state domestic relations laws have a "substantial societal impact … in the daily lives and customs of its people").

b. Additionally, what motivated Louisiana's marriage amendment is not in serious dispute. Two courts have found that Louisiana's citizens constitutionally defined marriage in 2004 —not out of animus towards gays and lesbians—but instead to prevent alteration of the marriage definition by

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presumption where man marries child's mother and acknowledges child); *and see, e.g., Gallo v. Gallo*, 2003-0794, p. 7 (La. 12/3/03); 861 So.2d 168, 173-74 (observing Louisiana courts have "zealously guard[ed] and enforce[d]" these presumptions to achieve the "fundamental ends" of "preservation of the family unit [and] avoidance of the stigma of illegitimacy").

[12] *See* LA. CHILD. CODE art. 1198 (single person "or a married couple jointly" may petition for agency adoption); *id.* art. 1221 (same for private adoption); *id.* art. 1243 (same for stepparent adoption); *see also, e.g., Adar v. Smith*, 639 F.3d 146, 162 (5th Cir. 2011) (en banc) (equal protection not violated by Louisiana's requiring adoption laws to track its marriage laws).

[13] *See also* LA. REV. STAT. 9:130 (parents may renounce rights to an IVF-conceived embryo only "in favor of another married couple").

state courts. *See Forum for Equality PAC*, 893 So.2d at 733-34 (marriage amendment's "main purpose" was not to effect a "same-sex marriage ban," but to prevent judicial alteration of marriage under state due process clause); App. a17 & n.11 (declining to find "animus" or "illicit motive on the basis of this record").[14] Furthermore, because the state supreme court has authoritatively interpreted the amendment's history, this Court need not enter into murky debates about what motivated the amendment. *Cf. Bourke*, 996 F.Supp.2d at 550-551 & n.15 (finding it "debatable" whether Kentucky legislative history "demonstrates an obvious animus against same-sex couples"); *Obergefell*, 962 F.Supp.2d at 975, 992-93 (reviewing legislative history and concluding Ohio provisions were motivated by animus).

## III. GRANTING MULTIPLE PETITIONS WILL PROVIDE THE BROAD SCOPE NECESSARY TO PROPERLY RESOLVE AN ISSUE THAT IMPACTS ALL FIFTY STATES.

Petitioners assert that reviewing this case along with others would allow the Court to address a "geographic range" of state marriage laws. Pet. 25. Louisiana agrees. The issue plainly demands consideration "in a wider range of circumstances" than those presented in any one case. *Gratz v. Bollinger*, 539 U.S. 244, 260 (2003).[15] Any decision will

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[14] Petitioners suggest animus may have been at work because the Louisiana Supreme Court said the amendment meant to guard marriage from "contemporary threats." Pet. 22. But the court explained that the perceived "threats" arose, not from gays and lesbians, but from expansive judicial interpretation of state constitutions. *See Forum for Equality PAC*, 893 So.2d at 733-34 (recounting legislative committee testimony).

[15] *See also, e.g., Roe v. Wade*, 410 U.S. 113 (1973) (decided with *Doe v. Bolton*, 410 U.S. 179 (1973)); *Van Orden v. Perry*, 545 U.S. 677 (2005) (decided with *McCreary County v. ACLU*, 545 U.S. 844 (2005); *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (granting petitions to review both Pennsylvania and Rhode Island statutes); *Carter v. Carter Coal Co*., 298 U.S. 238 (1936) (granting multiple cert-before-judgment petitions);

impact how two-thirds of the States define marriage, which is the "foundation" of their "broader authority to regulate the subject of domestic relations." *Windsor*, 133 S. Ct. at 2691. In light of that, granting multiple petitions makes good sense.

1. The variety of state approaches to this issue suggests that the Court should bring before it an array of marriage laws. The States have approached the question of same-sex partnerships in various ways that reflect "the beauty of federalism." *Bostic*, 760 F.3d 352, 398 (Niemeyer, J., dissenting). Some—like Louisiana—have declined to adopt either same-sex marriage or civil unions, others have adopted civil unions only, and others have defined marriage in their constitutions while leaving civil unions up to the legislative process.[16] Some have first declined same-sex marriage, only to accept it shortly afterwards.[17] Some have dealt with the issues through constitutional amendment, others through

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*Rickert Rice Mills v. Fontenot*, 297 U.S. 110 (1936) (same); *Taylor v. McElroy*, 360 U.S. 709, 710 (1958) (granting cert-before-judgment during "pendency" of similar case); *Porter v. Dicken*, 328 U.S. 252, 254 (1946) (granting cert-before-judgment due to "close relationship" to pending case); *Norman v. Baltimore & O.R. Co.*, 294 U.S. 240 (1935) (granting certiorari and cert-before-judgment petitions).

[16] *See*, *e.g.*, OHIO CONST. art. 15, § 11 (declining to adopt both same-sex marriage and civil unions); NEV. CONST. art I, § 221; Nev. Rev. Stat. § 122A.010 *et seq*. (adopting civil unions but not same-sex marriage); ARIZ. CONST. Art. XXX (declining to adopt same-sex marriage but leaving civil unions to legislative progress)

[17] For example, Maine rejected same-sex marriage by a popular vote of 53% to 47% in November 2009, only to accept it three years later by exactly the reverse popular vote. *See* Maine Bureau of Elections, Nov. 3, 2009, Referendum Tabulation (Question 1), *available at*: http://www.maine.gov/sos/cec/elec/2009/referendumbycounty.html; Maine Bureau of Elections, Nov. 6, 2012, Referendum Election Tabulations (Question 1), *available at:* http://www.maine.gov/sos/cec/elec/2012/tab-ref-2012.html.

statute, and others through a combination.[18] This diversity is exactly what one should expect. As this Court has explained, "[t]he dynamics of state government in the federal system are to allow the formation of consensus" on this emerging issue, one that "reflects both the community's considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality." *Windsor*, 133 S. Ct. at 2692, 2693.

2. The magnitude of the issues also counsels granting multiple petitions. The profoundly mistaken idea that the Constitution compels recognition of same-sex marriage would nullify the marriage laws of two-thirds of the States, and its effects would not stop even there. As this Court recently observed, "[t]he definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the '[p]rotection of offspring, property interests, and the enforcement of marital responsibilities.'" *Windsor*, 133 S. Ct. at 2692 (quoting *Williams v. North Carolina*, 317 U.S. 287, 298 (1942)). In other words, a decision constitutionalizing same-sex marriage would inevitably ripple out into state laws concerning: adoption, child custody, spousal privilege, taxation, inheritance, wills, health care directives, reproductive technology, employer benefits, divorce, alimony, and the division of marital assets. To adequately explore a question with this sweeping impact, the Court should have before it a range of state marriage laws, as well as counsel presenting a range of arguments in their defense.

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[18] *See* MICH. CONST. Art. I, § 25 (addressing marriage and civil unions through constitutional amendment); IND. STAT. 31-11-1-1 (addressing both through statute); TENN. CONST. art XI, § 18 (addressing marriage through constitutional amendment but leaving civil unions to be addressed through statute); HAW. CONST. Art. I, §23 (affirming legislative authority to enact or reject same-sex marriage).

3. Finally, the sheer number of issues counsels taking multiple petitions. The pending petitions ask: (1) whether States are compelled to license same-sex marriages by (a) the Equal Protection Clause or (b) the Due Process Clause; and (2) whether States are compelled to recognize out-of-state same-sex marriages by (a) Equal Protection Clause, (b) the Due Process Clause, (c) the Full Faith and Credit Clause, or (d) the constitutional right to travel. Those issues spawn numerous sub-issues, such as (1) whether the "right to marry" encompasses marrying someone of the same sex, and (2) whether man-woman marriage laws trigger heightened scrutiny because they (a) discriminate by sexual orientation, (b) discriminate by gender, or (c) express animus against gays and lesbians. This swath of issues may require separate briefing and argument.[19] In that event, it would make sense to have a range of experienced counsel with a variety of approaches, which granting multiple petitions would accomplish.

## CONCLUSION

The petition for certiorari before judgment should be granted.

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[19] *Cf., e.g., United States v. Windsor*, 133 S. Ct. 786 (2012) (mem.) (additional briefing and argument); *Hollingsworth v. Perry* 133 S. Ct 786 (2012) (mem.) (same); *United States v. Windsor*, 133 S. Ct. 815, 815-16 (2012) (mem.) (separate briefing schedules); *Nat'l Fed. of Indep. Bus. v. Sebelius*, 132 S. Ct 1618 (2012) (mem.) (allotting separate argument).

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