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 1       IN THE SUPREME COURT OF THE UNITED STATES

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 3   JAMES OBERGEFELL, ET AL.,            :

 4       Petitioners                      :   No. 14-556

 5     v.                                 :

 6   RICHARD HODGES, DIRECTOR,            :

 7   OHIO DEPARTMENT OF HEALTH,           :

 8   ET AL.                               :

 9   - - - - - - - - - - - - - - - - - - x

10   and

11   - - - - - - - - - - - - - - - - - - x

12   VALERIA TANCO, ET AL.,               :

13       Petitioner                       :   No. 14-562

14     v.                                 :

15   BILL HASLAM, GOVERNOR OF             :

16   TENNESSEE, ET AL.                    :

17   - - - - - - - - - - - - - - - - - - x

18   and

19   - - - - - - - - - - - - - - - - - - x

20   APRIL DEBOER, ET AL.,                :

21       Petitioner                       :   No. 14-571

22     v.                                 :

23   RICK SNYDER, GOVERNOR OF             :

24   MICHIGAN, ET AL.                     :

25   - - - - - - - - - - - - - - - - - - x
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 1  and

 2  - - - - - - - - - - - - - - - - - x

 3  GREGORY BOURKE, ET AL.,                :

 4      Petitioner                        :   No. 14-574

 5      v.                                :

 6  STEVE BESHEAR, GOVERNOR               :

 7  OF KENTUCKY, ET AL.                   :

 8  - - - - - - - - - - - - - - - - - x

 9              Washington, D.C.

10              Tuesday, April 28, 2015

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12      The above-entitled matter came on for oral

13  argument before the Supreme Court of the United States

14  at 10:02 a.m.

15  APPEARANCES:

16  MARY L. BONAUTO, ESQ., Boston, Mass.; on behalf of

17      Petitioners on Question 1.

18  GEN. DONALD B. VERRILLI, JR., ESQ., Solicitor General,

19      Department of Justice, Washington, D.C.; for United

20      States, as amicus curiae, supporting Petitioners on

21      Question 1.

22  JOHN J. BURSCH, ESQ., Special Assistant Attorney

23      General, Lansing, Mich.; on behalf of Respondents on

24      Question 1.

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1   C O N T E N T S

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 1            P R O C E E D I N G S

 2                (10:02 a.m.)

 3        CHIEF JUSTICE ROBERTS:        We'll hear argument

 4   this morning in Case No. 14-556, Obergefell v. Hodges

 5   and the consolidated cases.

 6        Ms. Bonauto.

 7        ORAL ARGUMENT OF MARY L. BONAUTO

 8      ON BEHALF OF PETITIONERS ON QUESTION 1

 9        MS. BONAUTO:        Mr. Chief Justice, and may it

10   please the Court:

11        The intimate and committed relationships of

12   same-sex couples, just like those of heterosexual

13   couples, provide mutual support and are the foundation

14   of family life in our society.  If a legal commitment,

15   responsibility and protection that is marriage is off

16   limits to gay people as a class, the stain of

17   unworthiness that follows on individuals and families

18   contravenes the basic constitutional commitment to equal

19   dignity.

20        Indeed, the abiding purpose of the

21   Fourteenth Amendment is to preclude relegating classes

22   of persons to second-tier status.

23        JUSTICE GINSBURG:        What do you do with the

24   Windsor case where the court stressed the Federal

25   government's historic deference to States when it comes
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1   to matters of domestic relations?

2   MS. BONAUTO: States do have primacy over

3   domestic relations except that their laws must respect

4   the constitutional rights of persons, and Windsor

5   couldn't have been clearer about that. And here we have

6   a whole class of people who are denied the equal right

7   to be able to join in this very extensive government

8   institution that provides protection for families.

9   CHIEF JUSTICE ROBERTS: Well, you say join

10   in the institution. The argument on the other side is

11   that they're seeking to redefine the institution. Every

12   definition that I looked up, prior to about a dozen

13   years ago, defined marriage as unity between a man and a

14   woman as husband and wife. Obviously, if you succeed,

15   that core definition will no longer be operable.

16   MS. BONAUTO: I hope not, Your Honor,

17   because what we're really talking about here is a class

18   of people who are, by State laws, excluded from being

19   able to participate in this institution. And if Your

20   Honor's question is about does this really draw a sexual

21   orientation line --

22   CHIEF JUSTICE ROBERTS: No. My question is

23   you're not seeking to join the institution, you're

24   seeking to change what the institution is. The

25   fundamental core of the institution is the opposite-sex

1 relationship and you want to introduce into it a

2 same-sex relationship.

3   MS. BONAUTO: Two points on that, Your

4 Honor. To the extent that if you're talking about the

5 fundamental right to marry as a core male-female

6 institution, I think when we look at the Fourteenth

7 Amendment, we know that it provides enduring guarantees

8 in that what we once viewed as the role of women, or

9 even the role of gay people, is something that has

10 changed in our society. So in a sense, just as the

11 Lawrence court called out the Bowers court for not

12 appreciating the extent of the liberty at stake, in the

13 same vein here, the question is whether gay people share

14 that same liberty to be --

15   JUSTICE KENNEDY: The problem --

16   MR. BURSCH: -- able to form family

17 relationships.

18   JUSTICE KENNEDY: One -- one of the problems

19 is when you think about these cases you think about

20 words or cases, and -- and the word that keeps coming

21 back to me in this case is -- is millennia, plus time.

22 First of all, there has not been really time, so the

23 Respondents say, for the Federal system to engage in

24 this debate, the separate States. But on a larger

25 scale, it's been -- it was about -- about the same time

1   between Brown and Loving as between Lawrence and this

2   case. It's about 10 years.

3   And so there's time for the scholars and the

4   commentators and -- and the bar and the public to -- to

5   engage in it. But still, 10 years is -- I don't even

6   know how to count the decimals when we talk about

7   millennia. This definition has been with us for

8   millennia. And it -- it's very difficult for the Court

9   to say, oh, well, we -- we know better.

10   MS. BONAUTO: Well, I don't think this is a

11   question of the Court knowing better. When we think

12   about the debate, the place of gay people in our civic

13   society is something that has been contested for more

14   than a century. And in this -- in the last century,

15   immigration exclusions, the place of gay people in

16   public employment and Federal service, these are all

17   things that have been contested and -- and you can --

18   you can say 10 years of marriage for Massachusetts, but

19   it's also in the 1970s that the Baker case from

20   Minnesota reached this Court, and that's over 40 years

21   ago.

22   And it was over 20 years ago that the Hawaii

23   Supreme Court seemed to indicate that it would rule in

24   favor of marriage, and the American people have been

25   debating and discussing this. It has been exhaustively

1   aired, and the bottom line is that gay and lesbian

2   families live in communities as neighbors throughout

3   this whole country. And we have seen this --

4   JUSTICE ALITO: You argue in your -- you

5   argue in your brief that the primary purpose of the

6   Michigan law limiting marriage to a man and a woman was

7   to demean gay people; is that correct?

8   MS. BONAUTO: The Michigan -- the Michigan

9   statute and amendment certainly went out of their way to

10   say that gay people were in some sense antithetical to

11   the good of society. They wrote that --

12   JUSTICE ALITO: And did -- did you say in

13   your brief that the primary purpose of that was to

14   demean gay people?

15   MS. BONAUTO: I think it has that effect,

16   Your Honor. I do. Now, at the same time --

17   JUSTICE ALITO: Is that true just in

18   Michigan or is that true of -- of every other State that

19   has a similar definition of marriage?

20   MS. BONAUTO: Well, if we're talking about

21   the States that have constitutional amendments, many of

22   them are similar. There are a few States that have just

23   statutes and didn't have amendments, and there's some,

24   of course, that had none of the above.

25   But even if there's not a purpose to demean,

1   I think the common commonality among all of the

2   statutes, whether they were enacted long ago or more

3   recently, is that they encompass moral judgments and

4   stereotypes about gay people. Even if you think about

5   something 100 years ago, gay people were not worthy of

6   the concern of the government and the -- and -- and

7   moral judgments about --

8   JUSTICE ALITO: Well, how do you account for

9   the fact that, as far as I'm aware, until the end of the

10   20th century, there never was a nation or a culture that

11   recognized marriage between two people of the same sex?

12   Now, can we infer from that that those nations and those

13   cultures all thought that there was some rational,

14   practical purpose for defining marriage in that way or

15   is it your argument that they were all operating

16   independently based solely on irrational stereotypes and

17   prejudice?

18   MS. BONAUTO: Your Honor, my position is

19   that times can blind. And if you think about the

20   example of sex discrimination and what it -- again, I

21   assume it was protected by the Fourteenth Amendment, but

22   it took over 100 years for this Court to recognize that

23   a sex classification contravened the Constitution.

24   But then, in short order, between Reed and

25   Craig v. Boren, we went from a rational-basis approach

1   to -- to heightened scrutiny, acknowledging that this

2   kind of discrimination is invidious. And in the same

3   vein here, we have a foundation of Romer, of Lawrence,

4   of Windsor --

5   JUSTICE GINSBURG: And an institution --

6   JUSTICE ALITO: I don't really think you

7   answered my question.

8   MS. BONAUTO: I'm sorry.

9   JUSTICE ALITO: Can we infer that these

10   societies all thought there was a rational reason for

11   this and a practical reason for this?

12   MS. BONAUTO: I don't know what other

13   societies assumed, but I do believe that times can blind

14   and it takes time to see stereotypes and to see the

15   common humanity of people who had once been ignored or

16   excluded. And I do believe --

17   JUSTICE GINSBURG: But you wouldn't be

18   asking for this relief if the law of marriage was what

19   it was a millennium ago. I mean, it wasn't possible.

20   Same-sex unions would not have opted into the pattern of

21   marriage, which was a relationship, a dominant and a

22   subordinate relationship. Yes, it was marriage between

23   a man and a woman, but the man decided where the couple

24   would be domiciled; it was her obligation to follow him.

25   There was a change in the institution of

1   marriage to make it egalitarian when it wasn't

2   egalitarian. And same-sex unions wouldn't -- wouldn't

3   fit into what marriage was once.

4   MS. BONAUTO: That's correct. I mean, for

5   centuries we had -- we had and -- and Europe had this

6   coverture system where a woman's legal identity was

7   absorbed into that of her husband and men and women had

8   different prescribed legal roles. And again, because of

9   equality and changing social circumstances, all of those

10   gender differences in the rights and responsibilities of

11   the married pair have been eliminated. And that, of

12   course, is a system in which committed, same-sex couples

13   fit quite well.

14   JUSTICE SOTOMAYOR: Could you --

15   CHIEF JUSTICE ROBERTS: Coverture was not --

16   coverture was not a universal aspect of marriage

17   around -- around the world. And there again, if you

18   look at the basic definition, it is between a man and a

19   woman. It does not always say between a man and a woman

20   in which the woman is subordinate in legal respects. So

21   I'm not sure it's still again a fair analogy to your

22   situation.

23   MS. BONAUTO: Well, Your -- Your Honor, the

24   thing about marriage is that it's controlled and

25   regulated by the States. The States create the

1   definition of civil marriage and certainly are

2   accountable for those definitions and any exclusions

3   which follow. And, of course, we all know there were

4   exclusions in cases like Loving and Zablocki and Turner

5   where in each case with prisoners, the people behind on

6   their child support payments, with a mixed-race couple

7   who wanted to be able to join this institution, and even

8   though some of those exclusions were quite traditional,

9   they could not --

10   JUSTICE SCALIA: Well, it was -- not all

11   societies banned mixed-race marriages. In fact, not

12   even all States in this country banned. But I don't

13   know of any -- do you know of any society, prior to the

14   Netherlands in 2001, that permitted same-sex marriage?

15   MS. BONAUTO: As a legal matter, Your Honor?

16   JUSTICE SCALIA: As a legal matter.

17   MS. BONAUTO: I -- I am not. I am not.

18   At --

19   JUSTICE SCALIA: For millennia, not -- not a

20   single other society until the Netherlands in 2001, and

21   you're telling me they were all -- I don't know what.

22   MS. BONAUTO: No. What I'm saying is

23   setting -- taking that tradition as it is, one still

24   needs -- the Court still needs a reason to maintain that

25   tradition when it has the effect --

1   JUSTICE SOTOMAYOR: Well, may I ask a --

2   JUSTICE SCALIA: Well, the -- the issue, of

3   course, is -- is -- is not whether there should be

4   same-sex marriage, but who should decide the point.

5   MS. BONAUTO: Yes, and we --

6   JUSTICE SCALIA: And you're -- you're asking

7   us to -- to decide it for this society when no other

8   society until 2001 ever had it. And how many States

9   have -- have voted to have same-sex marriage or their

10   legislature or -- or by referendum? I think it's 11,

11   isn't it?

12   MS. BONAUTO: Yes. But I would also count

13   the State courts that interpret their Constitutions.

14   JUSTICE SCALIA: Well, yes, that -- the

15   State courts will agree with you. But once again,

16   that's not the people deciding it. It's -- it's judges

17   deciding it.

18   JUSTICE SOTOMAYOR: Now, counselor, in -- in

19   terms of this millennium, what's been the status or the

20   view of gay people in most of those countries? Have

21   they been subject to the kinds of discrimination that

22   they were subject to here? Were they welcomed into the

23   worldwide community? Was it free of discrimination?

24   MS. BONAUTO: Well, if you're speaking of

25   the world, not every legal system around the world has

1 the kind of system with its explicit constitutional

2 guarantees for all persons of liberty and equality, and

3 that immediately sets the United States off from so many

4 other countries. And of course there are now, I don't

5 know if it's 17 or 18 countries that actually do

6 authorize marriage for same-sex couples in Europe, in

7 South America, New Zealand.

8   JUSTICE ALITO: But there have been cultures

9 that did not frown on homosexuality. That is not a

10 universal opinion throughout history and across all

11 cultures. Ancient Greece is an example. It was -- it

12 was well accepted within certain bounds. But did they

13 have same-sex marriage in ancient Greece?

14   MS. BONAUTO: Yeah. They don't -- I don't

15 believe they had anything comparable to what we have,

16 Your Honor. You know, and we're talking about --

17   JUSTICE ALITO: Well, they had marriage,

18 didn't they?

19   MS. BONAUTO: Yeah, they had -- yes. They

20 had some sort of marriage.

21   JUSTICE ALITO: And they had -- and they had

22 same-sex relations, did they not?

23   MS. BONAUTO: Yes. And they also were able

24 to --

25   JUSTICE ALITO: People like Plato wrote in

1   favor of that, did he not?

2   MS. BONAUTO: In favor of?

3   JUSTICE ALITO: Same-sex -- wrote

4   approvingly of same-sex relationships, did he not?

5   MS. BONAUTO: I believe so, Your Honor.

6   JUSTICE ALITO: So their limiting marriage

7   to couples of the opposite sex was not based on

8   prejudice against gay people, was it?

9   MS. BONAUTO: I can't speak to what was

10 happening with the ancient philosophers. What I feel

11 like --

12   JUSTICE KENNEDY: But it's -- you -- you

13 said that, well, marriage is different because it's

14 controlled by the government. But from a historical --

15 from anthropological standpoint, Justice Scalia was very

16 careful to talk about societies. Justice Alito talked

17 about cultures. If you read the -- about the Kalahari

18 people or -- or ancient peoples, they didn't have a

19 government like this. They made it themselves and it

20 was man and a woman.

21   MS. BONAUTO: There were certainly prior

22 to -- there were marriages prior to the United States

23 forming and we recognize that. But when our nation did

24 form into this union in 1787 and then when it affirmed

25 the Fourteenth Amendment in 1868, that's when we made --

1   our nation collectively made a commitment to individual

2   liberty and equality.

3   JUSTICE BREYER: Well, what -- maybe you're

4   doing that, but I would like to hear the precise answer

5   to the question you've been asked several times.

6   MS. BONAUTO: Okay.

7   JUSTICE BREYER: And to me, it takes the

8   form, the opposite view has been the law everywhere for

9   thousands of years among people who were not

10   discriminating even against gay people, and suddenly you

11   want nine people outside the ballot box to require

12   States that don't want to do it to change what you've

13   heard is change what marriage is to include gay people.

14   Why cannot those States at least wait and see whether in

15   fact doing so in the other States is or is not harmful

16   to marriage?

17   Now, that same question has been put in

18   many, many ways in the briefs on our subject. You've

19   received it in three or four different ways. I would

20   like to know, so I can hear and understand it, just what

21   your response is.

22   MS. BONAUTO: Okay. And I apologize if I

23   haven't.

24   In our system, you know, with the Fourteenth

25   Amendment, which again is -- sets forth principles that

1   we all are governed by and govern our lives, and you

2   look at examples like coverture. Okay? Even if it was

3   not universal, it was still something that was wide --

4   widespread in this nation for a very, very long time,

5   and that change in marriage was deeply unsettling to

6   people.

7   Likewise, even if race was not used as a

8   basis for discriminating in every single State as a

9   matter of law by criminal law and constitutional law, it

10 was incredibly pervasive. And again, changing that, as

11 Virginia resisted in the Loving case, resisted and said

12 please, wait and see, 80 percent of the American public

13 was with Virginia on that. But again, it was the

14 question of the individual liberty of the person to do

15 something that was considered a profound change in its

16 time.

17   JUSTICE ALITO: Suppose we rule in your

18 favor in this case and then after that, a group

19 consisting of two men and two women apply for a marriage

20 license. Would there be any ground for denying them a

21 license?

22   MS. BONAUTO: I believe so, Your Honor.

23   JUSTICE ALITO: What would be the reason?

24   MS. BONAUTO: There'd be two. One is

25 whether the State would even say that that is such a

1 thing as a marriage, but then beyond that, there are

2 definitely going to be concerns about coercion and

3 consent and disrupting family relationships when you

4 start talking about multiple persons.

5   But I want to also just go back to the

6 latency question for a moment, if I may. Because --

7   JUSTICE SCALIA: Well, I didn't understand

8 your answer.

9   JUSTICE ALITO: Yes. I hope you will come

10 back to mine. If you want to go back to the earlier

11 one --

12   MS. BONAUTO: No, no.

13   JUSTICE ALITO: -- then you can come back to

14 mine.

15   MS. BONAUTO: Well, that's what -- I mean,

16 that is -- I mean, the State --

17   JUSTICE ALITO: Well, what if there's no --

18 these are 4 people, 2 men and 2 women, it's not -- it's

19 not the sort of polygamous relationship, polygamous

20 marriages that existed in other societies and still

21 exist in some societies today. And let's say they're

22 all consenting adults, highly educated. They're all

23 lawyers.

24   (Laughter.)

25   JUSTICE ALITO: What would be the ground

1   under -- under the logic of the decision you would like

2   us to hand down in this case? What would be the logic

3   of denying them the same right?

4   MS. BONAUTO: Number one, I assume the

5   States would rush in and say that when you're talking

6   about multiple people joining into a relationship, that

7   that is not the same thing that we've had in marriage,

8   which is on the mutual support and consent of two

9   people. Setting that aside, even assuming it is within

10 the fundamental --

11   JUSTICE ALITO: But -- well, I don't know

12 what kind of a distinction that is because a marriage

13 between two people of the same sex is not something that

14 we have had before, recognizing that is a substantial

15 break. Maybe it's a good one. So this is no -- why is

16 that a greater break?

17   MS. BONAUTO: The question is one of --

18 again, assuming it's within the fundamental right, the

19 question then becomes one of justification. And I

20 assume that the States would come in and they would say

21 that there are concerns about consent and coercion. If

22 there's a divorce from the second wife, does that mean

23 the fourth wife has access to the child of the second

24 wife? There are issues around who is it that makes the

25 medical decisions, you know, in the time of crisis.

1   I assume there'd be lots of family

2   disruption issues, setting aside issues of coercion and

3   consent and so on that just don't apply here, when we're

4   talking about two consenting adults who want to make

5   that mutual commitment for as long as they shall be. So

6   that's my answer on that.

7   And just if I may turn for a moment to the

8   wait and see for a moment. Wait and see by itself has

9   never been considered a legitimate justification, a

10   freestanding justification under the Fourteenth

11   Amendment. And what we're talking about here with

12   waiting and seeing is we're talking about -- we're

13   talking about the Petitioners being denied marriage.

14   And we're talking about a second class status being

15   tried as a matter of the Constitution --

16   JUSTICE KENNEDY: Well, part of wait and

17   see, I suppose, is to ascertain whether the social

18   science, the new studies are accurate. But that -- it

19   seems to me, then, that we should not consult at all the

20   social science on this, because it's too new. You think

21   -- you say we don't need to wait for changes. So it

22   seems to me that if we're not going to wait, then it's

23   only fair for us to say, well, we're not going to

24   consult social science.

25   MS. BONAUTO: Well, two points on that, if I

1   may. In terms of waiting, I do think the effect of

2   waiting is not neutral, it does consign same-sex couples

3   to this outlier status, and there will be profound

4   consequences that follow from that.

5   But then setting that aside vis-à-vis the

6   social science, there have been trials, of course in the

7   Michigan case, in Arkansas, in Florida about adoption

8   bans. These issues have been aired repeatedly, and

9   there is, as you all have heard, a social science

10   consensus that there's nothing about the sex or sexual

11   orientation of the parent, is it is going to affect

12   child outcomes? And this isn't just research about gay

13   people. It's research about, you know, again, what is

14   the effect of gender, it goes for 50 years.

15   CHIEF JUSTICE ROBERTS: You're -- you're

16   quite right that the consequences of waiting are not

17   neutral. On the other hand, one of the things that's

18   truly extraordinary about this whole issue is how

19   quickly has been the acceptance of your position across

20   broad elements of society. I don't know what the latest

21   opinion polls show.

22   The situation in Maine, I think, is -- is

23   characteristic. In 2009, I guess it was by referendum,

24   whatever, they banned gay marriage. In 2012, they

25   enacted it as law. I mean, that sort of quick change

1   has been a characteristic of this debate, but if you

2   prevail here, there will be no more debate. I mean,

3   closing of debate can close minds, and -- and it will

4   have a consequence on how this new institution is -- is

5   accepted. People feel very differently about something

6   if they have a chance to vote on it than if it's imposed

7   on them by -- by the courts.

8   MS. BONAUTO: Well, there's a few points

9   there, and I hope I get them all. With respect to

10   Maine, one thing that separates Maine from the States

11   that we're talking about here is that there wasn't a

12   constitutional amendment in place that really largely

13   shuts down the process. It is extraordinarily difficult

14   to amend the Constitution, and an opinion poll is not a

15   measure in any way of what a legislature is going to do

16   in terms of approving an amendment to go out to the

17   voters. So there -- there are some serious structural

18   problems that did not apply in a place like Maine.

19   And in terms of acceptance, when I think

20   about acceptance, I think about the nation as a whole,

21   and the -- and there are places where, again, there are

22   no protections, virtually no protections for gay and

23   lesbian people in employment, in parenting. You know,

24   the Michigan Petitioners, for example, are not allowed

25   to be parents of their own children, the children that

1   the State of Michigan has placed with them and approved

2   of their adoptions.

3   JUSTICE SCALIA: Miss -- Miss Bonauto,

4   I'm -- I'm concerned about the wisdom of this Court

5   imposing through the Constitution a -- a requirement of

6   action which is unpalatable to many of our citizens for

7   religious reasons. They are not likely to change their

8   view about what marriage consists of. And were -- were

9   the States to adopt it by law, they could make

10   exceptions to what -- what is required for same-sex

11   marriage, who has to honor it and so forth.

12   But once it's -- it's made a matter of

13   constitutional law, those exceptions -- for example, is

14   it -- is it conceivable that a minister who is

15   authorized by the State to conduct marriage can decline

16   to marry two men if indeed this Court holds that they

17   have a constitutional right to marry? Is it conceivable

18   that that would be allowed?

19   MS. BONAUTO: Your Honor, of course the

20   Constitution will continue to apply, and right to this

21   day, no clergy is forced to marry any couple that they

22   don't want to marry. We have those protections.

23   JUSTICE SCALIA: But -- but right to this

24   day, we have never held that there is a constitutional

25   right for these two people to marry, and the minister is

1   -- to the extent he's conducting a civil marriage, he's

2   an instrument of the State. I don't see how you could

3   possibly allow that minister to say, I will only marry a

4   man and a woman. I will not marry two men. Which means

5   you -- you would -- you could -- you could have

6   ministers who -- who conduct real marriages that -- that

7   are civilly enforceable at the National Cathedral, but

8   not at St. Matthews downtown, because that minister

9   refuses to marry two men, and therefore, cannot be given

10   the State power to make a real State marriage. I don't

11   see any -- any answer to that. I really don't.

12   JUSTICE SOTOMAYOR: Counselor, there have

13   been antidiscrimination laws in various States; correct?

14   MS. BONAUTO: Yes, Your Honor.

15   JUSTICE SOTOMAYOR: Antidiscrimination laws

16   regarding gay people.

17   MS. BONAUTO: Correct.

18   JUSTICE SOTOMAYOR: And in any of those

19   States, have ministers been forced to do gay marriages?

20   MS. BONAUTO: Of course not, Your Honor.

21   And --

22   JUSTICE SCALIA: They are laws. They are

23   not constitutional requirements. That was the whole

24   point of my question. If you let the States do it, you

25   can make an exception. The State can say, yes, two men

1   can marry, but -- but ministers who do not believe in --

2   in same-sex marriage will still be authorized to conduct

3   marriages on behalf of the State. You can't do that

4   once it is a constitutional proscription.

5   MS. BONAUTO: If one thing is firm, and I

6   believe it is firm, that under the First Amendment, that

7   a clergyperson cannot be forced to officiate at a

8   marriage that he or she does not want to officiate at.

9   And since there were several other questions, if I may.

10   JUSTICE SCALIA: He's not being required to

11   officiate. He's just not given the State's power,

12   unless he agrees to use that power in -- in accordance

13   with the Constitution. I don't -- seems to me you

14   have to -- you have to make that exception. You can't

15   appoint people who will then go ahead and violate the

16   Constitution.

17   MS. BONAUTO: I think if we're talking about

18   a government individual, a clerk, a judge, who's

19   empowered to authorize marriage, that is a different

20   matter that they are going to have to follow through,

21   unless, again, a State decides to make some exceptions.

22   In Connecticut, after the court permitted marriage, it

23   did actually pass a law to do deal with implementation

24   issues, including these kinds of liberty issues.

25   JUSTICE SCALIA: Because it was a State law.

1   That's my whole my point. If it's a State law, you can

2   make those exceptions. But if it's a constitutional

3   requirement, I don't see how you can. And every State

4   allows ministers to marry people, and their marriages

5   are effective under State law. That will not be the

6   case if, indeed, we hold, as a constitutional matter,

7   that the State must marry two men.

8   JUSTICE KAGAN: Ms. Bonauto, maybe I'm just

9   not understanding Justice Scalia's question, but for

10 example, there are many rabbis that will not conduct

11 marriages between Jews and non-Jews, notwithstanding

12 that we have a constitutional prohibition against

13 religious discrimination. And those rabbis get all the

14 powers and privileges of the State, even if they have

15 that rule, most -- many, many, many rabbis won't do

16 that.

17   MS. BONAUTO: That's precisely --

18   JUSTICE BREYER: It's called Congress shall

19 make no law respecting the freedom of religion --

20   MS. BONAUTO: So, yes --

21   JUSTICE BREYER: -- but that --

22   MS. BONAUTO: -- can I --

23   JUSTICE BREYER: -- it leaves this

24 question --

25   MS. BONAUTO: Yes.

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1            JUSTICE BREYER:            -- open?

2            MS. BONAUTO:            Yes.  And I will just say very

3   briefly --

4            JUSTICE SCALIA:            Well, you -- you --

5            MS. BONAUTO:            And I need to --

6            JUSTICE SCALIA:            -- you agree with that --

7            MS. BONAUTO:            -- reserve my time, if I may.

8            JUSTICE SCALIA:            -- then?  You agree that --

9   that ministers will not have to conduct same-sex

10  marriages?

11           MS. BONAUTO:            If they do not want to, that

12  is correct.  I believe that is affirmed under the First

13  Amendment.

14           And I will say before I sit down, if I may

15  reserve my time, Your Honor, that in terms of the

16  question of who decides, it's not about the Court versus

17  the States.  It's about the individual making the choice

18  to marry and with whom to marry, or the government.

19           CHIEF JUSTICE ROBERTS:            Thank you, counsel.

20           (Interruption.)

21           CHIEF JUSTICE ROBERTS:            General, would you

22  like to take a moment?

23           GENERAL VERRILLI:            I will.  Thank you,

24  Mr. Chief Justice.

25           Actually, Mr. Chief Justice, if the Court is
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1   ready.

2   CHIEF JUSTICE ROBERTS: Well, we're ready.

3   Okay.

4   JUSTICE SCALIA: It was rather refreshing,

5   actually.

6   (Laughter.)

7   ORAL ARGUMENT OF DONALD B. VERRILLI, JR.

8   ON BEHALF OF UNITED STATES, AS AMICUS CURIAE,

9   SUPPORTING PETITIONERS ON QUESTION 1

10   GENERAL VERRILLI: Mr. Chief Justice, and

11   may it please the Court:

12   The opportunity to marry is integral to

13   human dignity. Excluding gay and lesbian couples from

14   marriage demeans the dignity of these couples. It did

15   demeans their children, and it denies the -- both the

16   couples and their children the stabilizing structure

17   that marriage affords.

18   Now, the Respondents' principal argument,

19   and what we've been discussing this morning so far, is

20   whether this issue of -- whether this discrimination

21   should persist is something that should be left to the

22   political process or whether it should be something

23   decided by the Court. And I'd like to make three points

24   about that, if I could.

25   First, the -- I think it's important to

1   understand that if this Court concludes that this issue

2   should be left to the political process, what the Court

3   will be saying is that the demeaning, second-class

4   status that gay and lesbian couples now inhabit in -- in

5   States that do not provide for marriage is consistent

6   with the equal protection of the laws. That is not a

7   wait-and-see. That is a validation.

8   And second, to the extent that the thought

9   is that this can be left to the political process

10 because this issue will take care of itself over time,

11 because attitudes are changing, what I respectfully

12 submit to the Court is that although no one can see the

13 future perfectly, of course, that it seems much more

14 likely to me that the outcome that we're going to end up

15 with is something that will approximate the nation as a

16 house divided that we had with de jure racial

17 segregation. You may have many States, perhaps most

18 States, in which gay couples can live with equal dignity

19 and status, but you will have a minority of States in

20 which gay couples will be relegated to demeaning,

21 second-class status, and I don't know why we would want

22 to repeat that history.

23   And third --

24   CHIEF JUSTICE ROBERTS: But, General, I --

25 I'm sorry. Go ahead.

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 1           GENERAL VERRILLI:          And third, I want to

 2    expand on what Ms. Bonauto said, that -- that -- and I

 3    think you, Mr. Chief Justice, you did recognize this,

 4    that the decision to leave this to the political process

 5    is going to impose enormous costs that this Court

 6    thought were costs of constitutional stature in Windsor.

 7    Thousands and thousands of people are going to live out

 8    their lives and go to their deaths without their States

 9    ever recognizing the equal dignity of their

10    relationships.

11           JUSTICE KENNEDY:          Well, you could have said

12    the same thing 10 years ago or so when we had Lawrence.

13    Haven't we learned a tremendous amount since -- well,

14    since Lawrence, just in the last 10 years?

15           GENERAL VERRILLI:          Yes.  And, Your Honor, I

16    actually think that's quite a critical point that goes

17    to the questions that Your Honor was asking earlier.  I

18    do think Lawrence was an important catalyst that has

19    brought us to where we are today.  And I think what

20    Lawrence did was provide an assurance that gay and

21    lesbian couples could live openly in society as free

22    people and start families and raise families and

23    participate fully in their communities without fear.

24           And there are -- two things flow from that,

25    I think.  One is that has brought us to the point where
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1   we understand now, in a way even that we did not fully

2   understand in Lawrence, that gay and lesbian people and

3   gay and lesbian couples are full and equal members of

4   the community. And what we once thought of as necessary

5   and proper reasons for ostracizing and marginalizing gay

6   people, we now understand do not justify that kind of

7   impression.

8   CHIEF JUSTICE ROBERTS: The difference, of

9   course, is Lawrence, the whole argument is the State

10   cannot intrude on that personal relationship. This, it

11   seems to me, is -- is different in that what the

12   argument is is the State must sanction. It must approve

13   that relationship. They're two different questions.

14   GENERAL VERRILLI: It is different, I agree.

15   And I -- and it leads to the second thing I think that

16   the -- that the Lawrence catalyzed for our society, was

17   it put gay and lesbian couples, gay and lesbian people,

18   in a position for the first time in our history to be

19   able to lay claim to the abiding promise of the

20   Fourteenth Amendment in a way that was just impossible

21   when they were marginalized and ostracized.

22   And you're right, Mr. Chief Justice, this is

23   about equal participation, participation on equal terms

24   in a State-conferred -- a State-conferred status, a

25   State institution. That is different than Lawrence, but

1   I do think that what Lawrence has allowed us to see is

2   that the justifications for excluding gay and lesbian

3   couples from equal participation in this institution

4   just hold up.

5   And I do think -- and the Court has raised

6   this question about whether what we are talking about

7   here is a -- is a fundamental change in the nature of

8   marriage. And I think the answer to that question is

9   that this case can be decided by thinking about marriage

10   in exactly the way the States -- the Respondent States

11   and other States define marriage now.

12   And I think it's important to think about it

13   this way. Heterosexual couples can enter marriage, and

14   they can have families through biological procreation.

15   They can have families through assisted reproduction.

16   They can have families through adoption, or they can not

17   have families at all.

18   JUSTICE ALITO: What do you think --

19   GENERAL VERRILLI: And I --

20   JUSTICE ALITO: -- are the essential

21   elements of marriage as it exists today?

22   GENERAL VERRILLI: Well, I think the

23   essential elements of marriage are the ones that are --

24   that -- the -- the obligations of mutual support and

25   responsibility and the benefits surrounding marriage

1   that State law provides to ensure that there is an

2   enduring bond, that enduring bond that continues over

3   time and lasts, hopefully, till death do us part,

4   through the end of life. And that -- and with -- and --

5   and, certainly, childrearing is bound up in that.

6   But what I would suggest, Justice Alito, is

7   the that way childbearing -- bearing is bound up in that

8   is quite different than what my friends on the other

9   side will say.

10   JUSTICE ALITO: Well, let's -- let's think

11   about two groups of two people. The first is the

12   same-sex couple who have been together for 25 years, and

13   they get married either as a result of a change in State

14   law or as a result of a Court decision. The second two

15   people are unmarried siblings. They've lived together

16   for 25 years. Their financial relationship is the same

17   as the -- the same-sex couple. They share household

18   expenses and household chores in the same way. They

19   care for each other in the same way.

20   Is there any reason why the law should treat

21   the two groups differently?

22   MS. BONAUTO: Well, I'm not sure that the

23   law would -- the -- the law allows 100 percent of

24   heterosexual people to enter into a marriage that's

25   consistent with their sexual orientation, and in these

1   States, it forbids 100 percent of gay and lesbian people

2   from entering into a marriage that's consistent with

3   their sexual orientation --

4   JUSTICE ALITO: Well, as far as --

5   GENERAL VERRILLI: -- and justifies that

6   difference.

7   JUSTICE ALITO: As far as the -- the

8   benefits that Federal law confers on married people,

9   such as in Windsor, the effect on estate taxes, what

10   would be the reason for treating those two groups

11   differently?

12   GENERAL VERRILLI: Well, I -- I -- I'm not

13   entirely sure there would be, but, of course, marriage

14   is something more fundamental than that. It is an

15   enduring bond between two people.

16   And to get back to the point about

17   childrearing, I do think this is quite important. I

18   mean, I -- I understand, and in part of their

19   wait-and-see and caution argument, that Respondents

20   are -- that what Respondents are saying here is that

21   they -- that they want to exercise an attitude of

22   caution because of concern about the welfare of children

23   raised in same-sex married households.

24   But there's a quite significant problem with

25   that rationale, and it's this: Right now, today,

1   hundreds of thousands of children are being raised in

2   same-sex households. That number is only going to grow.

3   All of the evidence so far shows you that there isn't a

4   problem, and what the -- and the States' argument really

5   is quite ironic in this respect that it's going to deny

6   marriage, the State --

7   JUSTICE SCALIA: That -- that's quite a

8   statement. All of the evidence shows there is no

9   problem.

10   GENERAL VERRILLI: Well, I --

11   JUSTICE SCALIA: All of the evidence shows

12   there's not a problem.

13   GENERAL VERRILLI: I -- I think all of the

14   leading organizations that have filed briefs have said

15   to you that there is a consensus in that, and --

16   JUSTICE SCALIA: Well, I think some of

17   the -- some of the briefs contradicted that.

18   GENERAL VERRILLI: But -- but even beyond

19   that, I think the more fundamental point, and the point

20   I'm trying to drive at here, is that you have hundreds

21   of thousands of children raised in same-sex households

22   now. And what Respondents' position and Respondents'

23   caution argument leads you to is the conclusion that

24   those hundreds of thousands of children don't get the

25   stabilizing structure and the many benefits of marriage.

1   CHIEF JUSTICE ROBERTS: Counsel, I'd like to

2 follow up in a line of questioning that Justice Scalia

3 started.

4   We have a concession from your friend that

5 clergy will not be required to perform same-sex

6 marriage, but there are going to be harder questions.

7 Would a religious school that has married housing be

8 required to afford such housing to same-sex couples?

9   GENERAL VERRILLI: I guess what I'd -- I'd

10 like to make three points about that, if I could,

11 Mr. Chief Justice.

12   CHIEF JUSTICE ROBERTS: Well, the first

13 part --

14   GENERAL VERRILLI: And I will -- and I'll go

15 right at the question you asked.

16   The first one is, of course, this Court's

17 ruling addresses what the States must do under the

18 Fourteenth Amendment.

19   And the -- and the second point is that when

20 you get to a question like the one Your Honor asked,

21 that is going to depend on how States work out the

22 balance between their civil rights laws, whether they

23 decide that there's going to be civil rights enforcement

24 of discrimination based on sexual orientation or not,

25 and how they decide what kinds of accommodations they

1   are going to allow under State law.

2   And they could well -- you know, different

3   states could strike different balances.

4   CHIEF JUSTICE ROBERTS: What about

5   Federal -- it's a Federal question if we make it a

6   matter of constitutional law.

7   GENERAL VERRILLI: But the question of

8   what -- how States use their enforcement power is up to

9   the States.

10   CHIEF JUSTICE ROBERTS: Well, you have

11   enforcement power, too.

12   GENERAL VERRILLI: Right. And --

13   and -- well, that's certainly true, but there is no

14   Federal law now generally banning discrimination based

15   on sexual orientation, and that's where those issues are

16   going to have to be worked out.

17   And I guess the third point I would make,

18   Your Honor, is that these issues are going to arise no

19   matter which way you decide this case, because these

20   questions of accommodation are going to arise in

21   situations in States where there is no same-sex

22   marriage, where there are -- and, in fact, they have

23   arisen many times. There -- there are these commitment

24   ceremonies.

25   For example, in the New Mexico case in which

1   this Court denied cert just a few months back, that did

2   not arise out of a marriage. That arose out of a

3   commitment ceremony, and the -- and these, you know,

4   commitment ceremonies are going to need florists and

5   caterers.

6   JUSTICE ALITO: Well, in the Bob Jones case,

7   the Court held that a college was not entitled to

8   tax-exempt status if it opposed interracial marriage or

9   interracial dating. So would the same apply to a

10   university or a college if it opposed same-sex marriage?

11   GENERAL VERRILLI: You know, I -- I don't

12   think I can answer that question without knowing more

13   specifics, but it's certainly going to be an issue.

14   I -- I don't deny that. I don't deny that, Justice

15   Alito. It is -- it is going to be an issue.

16   JUSTICE KENNEDY: Let me ask one question.

17   I see your time is going out. I'm interested in your

18   comments on Glucksberg, which says what we should have

19   to define a fundamental right in its narrowest terms.

20   A lot of the questions that we're -- we're

21   asking your colleague in the earlier part of the

22   argument were -- had -- had that in mind, I think.

23   What -- what do we do with the language of Glucksberg

24   that says we have to define it in a narrow way?

25   GENERAL VERRILLI: Justice Kennedy, forgive

1   me for answering the question this way.

2   We do recognize that there's a profound

3   connection between liberty and equality, but the United

4   States has advanced only an equal protection argument.

5   We haven't made the fundamental rights argument under

6   Glucksberg. And therefore, I'm not sure it would be

7   appropriate for me not having briefed it to comment on

8   that.

9   JUSTICE KENNEDY: Well, can you tell me why

10   you didn't make the fundamental argument?

11   GENERAL VERRILLI: Well, because we think --

12   well, because we think while we do see that there is, of

13   course, this profound connection, we do think that for

14   reasons like the ones implicit in the Chief Justice's

15   question, that this issue really sounds in equal

16   protection, as we understand it, because the question is

17   equal participation in a State conferred status and

18   institution. And that's why we think of it in equal

19   protection terms.

20   And if I could just in the -- in the little

21   time that I have left, I'd like to suggest this, that

22   what the Respondents are ultimately saying to the Court

23   is that with respect to marriage, they are not ready

24   yet. And yes, gay and lesbian couples can live openly

25   in society, and yes, they can raise children. Yes, they

1   can participate fully as members of their community.

2   Marriage, though, not yet. Leave that to be worked out

3   later. But the Petitioners -- the Petitioners, these

4   gay and lesbian couples are --

5   JUSTICE SCALIA: Or not. Or not. I mean,

6   that's not what they are saying. They are saying leave

7   it to the people. It will be worked out later or not.

8   GENERAL VERRILLI: But what these gay and

9   lesbian couples are doing is laying claim to the promise

10   of the Fourteenth Amendment now. And it is emphatically

11   the duty of this Court, in this case, as it was in

12   Lawrence, to decide what the Fourteenth Amendment

13   requires.

14   And what I would suggest is that in a world

15   in which gay and lesbian couples live openly as our

16   neighbors, they raise their children side by side with

17   the rest of us, they contribute fully as members of the

18   community, that it is simply untenable -- untenable to

19   suggest that they can be denied the right of equal

20   participation in an institution of marriage, or that

21   they can be required to wait until the majority decides

22   that it is ready to treat gay and lesbian people as

23   equals. Gay and lesbian people are equal. They deserve

24   equal protection of the laws, and they deserve it now.

25   Thank you.

1   CHIEF JUSTICE ROBERTS: Thank you, General.

2   Mr. Bursch.

3   ORAL ARGUMENT OF MR. JOHN J. BURSCH

4   ON BEHALF OF THE RESPONDENTS ON QUESTION 1

5   MR. BURSCH: Thank you, Mr. Chief Justice,

6 and may it please the Court:

7   Respondents are not saying we're not ready

8 yet. Respondents are really echoing the questions

9 that -- that Justice Breyer was asking.

10   This case isn't about how to define

11 marriage. It's about who gets to decide that question.

12 Is it the people acting through the democratic process,

13 or is it the Federal courts? And we're asking you to

14 affirm every individual's fundamental liberty interest

15 in deciding the meaning of marriage. And I think this

16 whole case really turns on the questions that Justice

17 Scalia asked.

18   JUSTICE SOTOMAYOR: I'm sorry. Nobody is

19 taking that away from anybody. Every single individual

20 in this society chooses, if they can, their sexual

21 orientation or who to marry or not marry. I suspect

22 even with us giving gays rights to marry that there's

23 some gay people who will choose not to. Just as there's

24 some heterosexual couples who choose not to marry. So

25 we're not taking anybody's liberty away.

1   MR. BURSCH: But we're talking about the

2 fundamental liberty interest in deciding the question of

3 what marriage means, and to get that --

4   JUSTICE BREYER: I don't know that

5 that's -- I mean, leaving that to the side, I thought

6 that I heard the answer to the question being given in

7 respect to tradition of 2000 years, and to the

8 democratic ballot box and so forth was quite simple.

9 What I heard was, one, marriage is fundamental. I mean,

10 certainly that's true for 10,000 years. And marriage,

11 as the States administer it, is open to vast numbers of

12 people who both have children, adopt children, don't

13 have children, all over the place.

14   But there is one group of people whom they

15 won't open marriage to. So they have no possibility to

16 participate in that fundamental liberty. That is people

17 of the same sex who wish to marry. And so we ask, why?

18 And the answer we get is, well, people have always done

19 it. You know, you could have answered that one the same

20 way we talk about racial segregation.

21   Or two, because certain religious groups do

22 think it's a sin, and I believe they sincerely think it.

23 There's no question about their sincerity, but is a

24 purely religious reason on the part of some people

25 sufficient?

1   And then when I look for reasons three, four

2   and five, I don't find them. What are they? So -- so

3   therefore, I'm asking -- there I put a long question,

4   but it gives you an opening to say what all of those

5   reasons are.

6   MR. BURSCH: Justice Breyer, those answers

7   one and two are not our answers.

8   JUSTICE BREYER: Good.

9   MR. BURSCH: Our answer number one is that

10   the marriage institution did not develop to deny dignity

11   or to give second class status to anyone. It developed

12   to serve purposes that, by their nature, arise from

13   biology.

14   Now, imagine a world today where we had no

15   marriage at all. Men and women would still be getting

16   together and creating children, but they wouldn't be

17   attached to each other in any social institution.

18   Now, the -- the marriage view on the other

19   side here is that marriage is all about love and

20   commitment. And as a society, we can agree that that's

21   important, but the State doesn't have any interest in

22   that. If we're trying to solve that social problem I

23   just described, where there's no marriage, we wouldn't

24   solve it by saying, well, let's have people identify who

25   they are emotionally committed to and recognize those

1   relationships.

2   JUSTICE KAGAN: Mr. Bursch, I -- I

3   understand that argument. It's the principal argument

4   that you make in -- in your briefs, that same-sex

5   marriage doesn't advance this State interest in

6   regulating procreation.

7   Let's just assume for the moment that that's

8   so. Obviously, same-sex partners cannot procreate

9   themselves. But is there -- in addition to that, are

10   you saying that recognizing same-sex marriage will

11   impinge upon that State interest, will harm that State

12   interest in regulating procreation through marriage?

13   MR. BURSCH: We are saying that, Your Honor.

14   Now, obviously, under a rational basis,

15   that's not a question that you need to decide, but --

16   but even leaving that aside --

17   JUSTICE GINSBURG: How could that -- how

18   could that be, because all of the incentives, all of the

19   benefits that marriage affords would still be available.

20   So you're not taking away anything from heterosexual

21   couples. They would have the very same incentive to

22   marry, all the benefits that come with marriage that

23   they do now.

24   MR. BURSCH: Justice Kagan and Justice

25   Ginsburg, it has to do with the societal understanding

1 of what marriage means. This is a much bigger idea than

2 any particular couple and what a marriage might mean to

3 them or to their children. And when you change the

4 definition of marriage to delink the idea that we're

5 binding children with their biological mom and dad, that

6 has consequences. So, you know, for example, a

7 reasonable --

8   JUSTICE SOTOMAYOR: You don't do that.

9   MR. BURSCH: If I could --

10   JUSTICE SOTOMAYOR: That's the problem.

11   MR. BURSCH: If -- if I could --

12   JUSTICE SOTOMAYOR: Marriage doesn't do that

13 on any level. How many married couples do fathers with

14 the benefits or the requirements of marriage walk away

15 from their children?

16   MR. BURSCH: Justice --

17   JUSTICE SOTOMAYOR: So it's not that the

18 institution alone does it and that without it that

19 father is going to stay in the marriage. He made a

20 choice.

21   MR. BURSCH: Justice --

22   JUSTICE SOTOMAYOR: I would say that it

23 could -- I could -- it should be gender-neutral. Some

24 mothers do the same thing.

25   But my point is that I'm not sure how I get

1   to the point that Justice Breyer is making: How does

2   withholding marriage from one group, same -- same-sex

3   couples, increase the value to the other group?

4   MR. BURSCH: Justice Sotomayor, there's all

5   kinds of societal pressures that are already delinking

6   that reason that the State, again, is for marriage,

7   keeping kids and their biological moms and dads together

8   whenever possible.

9   JUSTICE SCALIA: Excuse me. Do -- do you

10   have to answer that question?

11   MR. BURSCH: Under rational basis, we don't.

12   JUSTICE SCALIA: Is -- is it your burden to

13   show that it -- it -- it will harm marriage between a

14   man and woman if -- if you allow two men or two women to

15   marry? Is that your burden? I thought your burden was

16   simply to show that -- that the State's reason for this

17   institution is a reason that has nothing to do, that is

18   inapplicable to same-sex couples.

19   MR. BURSCH: Justice Scalia, you're exactly

20   right, and that's why we -- we prevail.

21   JUSTICE KAGAN: Yes, but I don't think

22   that --

23   MR. BURSCH: But -- but I want to answer

24   your question.

25   JUSTICE KAGAN: -- that's right, Mr. Bursch.

1   I don't think that that's right. I think before

2   something as fundamental to a society and to individuals

3   as marriage, before an exclusion of this kind can be

4   made in that institution, the State needs some reason

5   for that exclusion.

6   MR. BURSCH: And that's why I'd like to

7   answer.

8   JUSTICE KAGAN: And I've given you an -- a

9   real opportunity to tell me what that reason is.

10   MR. BURSCH: Yes, I -- I --

11   JUSTICE KAGAN: What is the reason for the

12   exclusion rather than the reason for the noninclusion?

13   MR. BURSCH: Well, first, it wasn't a reason

14   for an exclusion. It was a definition to solve a

15   particular problem. But the reason why there's --

16   there's harm if you change the definition because, in

17   people's minds, if marriage and creating children don't

18   have anything to do with each other, then what do you

19   expect? You expect more children outside of marriage.

20   Now, I want to give you a -- a hypothetical.

21   Imagine two couples --

22   JUSTICE KAGAN: But do you think -- do you

23   think that that's what it would do, Mr. Bursch, that if

24   one allowed same-sex marriage, one would be announcing

25   to the world that marriage and children have nothing to

1   do with each other?

2   MR. BURSCH: Not -- not in the abstract,

3   Your Honor. That kind of example --

4   JUSTICE KAGAN: Well, not in the abstract,

5   not in the concrete.

6   MR. BURSCH: Well, let me give you an

7   example. We're -- we're talking about something that's

8   going to change the meaning of the institution over

9   generations. And -- and, you know, you have things like

10   no-fault divorce where we tweaked what marriage means,

11   and it had consequences over the long term that some

12   people didn't expect.

13   I want you to think about two couples that

14   are identically situated. They've been married for five

15   years, and they each have a 3-year-old child. One grows

16   up believing that marriage is about keeping that couple

17   bound to that child forever. The other couple believes

18   that that marriage is more about their emotional

19   commitment to each other, and if that commitment fades,

20   then they may not stay together.

21   A reasonable voter, which is what we're

22   talking about here, could believe that there would be a

23   different outcome if those two marriages were influenced

24   by those two different belief systems. Ideas matter,

25   Your Honors, and -- and, you know, the out-of-wedlock

1   birthrate --

2   JUSTICE KENNEDY: But that -- that assumes

3   that same-sex couples could not have the more noble

4   purpose, and that's the whole point. Same-sex couples

5   say, of course, we understand the nobility and the

6   sacredness of the marriage. We know we can't procreate,

7   but we want the other attributes of it in order to show

8   that we, too, have a dignity that can be fulfilled.

9   MR. BURSCH: And Justice --

10   JUSTICE KENNEDY: And -- and -- but you

11 argued in your brief, and Justice Kagan was quite

12 correct to -- to say that you're saying that this harms

13 conventional marriage. That was the argument you made

14 in your brief as I understood it.

15   MR. BURSCH: Justice Kennedy, to be

16 perfectly clear, the State of Michigan values the

17 dignity and worth of every human being, no matter their

18 orientation or how they choose to live their life.

19 That's not what this case is about.

20   Our point is that when you change something

21 as fundamental as the marriage definition, as Chief

22 Justice Roberts was saying, the dictionary definition

23 which has existed for millennia, and you apply that over

24 generations, that those changes matter. And it's not

25 unreasonable --

1   JUSTICE BREYER: I'm sure that's true. But

2   I mean, the -- the fact is that -- that X percent, a

3   very high percent of opposite-sex people don't have

4   children and everybody knows they can't, and a very --

5   and a high -- certain percentage, I'm sure probably

6   pretty of high of those who get married, of same-sex

7   people who get married do have children.

8   So -- so where is this going?   I mean, what

9   are these two couples to do with it? I mean --

10   MR. BURSCH: Well, we're -- we're --

11   JUSTICE KENNEDY: -- how do we get from what

12   I just said --

13   MR. BURSCH: Right. We're -- we're

14   concerned --

15   JUSTICE KENNEDY: -- to some kind of

16   rational or -- or important distinction?

17   MR. BURSCH: What -- we're concerned about

18   all the children, children of opposite-sex couples and

19   children of same-sex couples. There are 72 million

20   children in this country. If this Court ensconces in

21   the Constitution a new definition of marriage and it

22   reduces the rate that opposite-sex couples stay

23   together, bound to their children, because of that

24   different understanding, even a 1 percent change --

25   JUSTICE BREYER: Well, what -- what

1 evidence --

2   MR. BURSCH: -- is many, many children.

3   JUSTICE BREYER: -- is there of that?

4   MR. BURSCH: A reasonable voter, again,

5 looking at the two couples that I just described, one

6 believing that marriage is all about staying with their

7 kids, the other one believing it's all about emotion and

8 commitment, could have different results. And it's

9 reasonable to believe that.

10   JUSTICE SOTOMAYOR: But the problem is that

11 even under a rational-basis standard, do we accept a

12 feeling? I mean, why is -- why as -- and I think

13 Justice Kagan put the argument quite clearly, with

14 something as fundamental as marriage, why would that

15 feeling, which doesn't make any logical sense, control

16 our decision-making?

17   MR. BURSCH: It doesn't make any logical

18 sense to you that if people think love is -- or a

19 marriage is more about love and commitment than about

20 staying bound to your child forever, that there might be

21 different consequences when people are --

22   JUSTICE KAGAN: But I do think,

23 Mr. Bursch --

24   JUSTICE SOTOMAYOR: My problem is that I

25 think people who get into marriage think that,

1   heterosexual couples.

2   MR. BURSCH: I -- I think everyone thinks

3   that.

4   JUSTICE SOTOMAYOR: Everybody has their own

5   vision of what marriage is, but what the State confers

6   is certain obligations --

7   MR. BURSCH: Yes.

8   JUSTICE SOTOMAYOR: -- and they are willing

9   to accept those. Whether or not that couple stays

10   together, they are bound to that child. They have to

11   support the child, they have to care for him or her.

12   Some people choose voluntarily, meaning they just choose

13   because they don't want to, but that happens in --

14   whether it's same-sex or heterosexual couples.

15   MR. BURSCH: Right. But -- but what you're

16   describing are different ways that people think about

17   marriage, and certainly it's a harm to a child of an

18   opposite-sex couple if they get divorced as opposed to

19   stay together forever. I mean, I think we can all agree

20   that, in general, that we want kids to stay bound to

21   their biological mother and father whenever possible.

22   That's the whole definition.

23   And what I hear are lots of other --

24   JUSTICE SOTOMAYOR: No, I -- I think they

25   should be bound to their parent, because there's a lot

1 of adopted children and they are not go thinking of

2 biological moms and dads.

3   MR. BURSCH: Oh, sure. That's a completely

4 different situation.

5   JUSTICE SOTOMAYOR: You know, well --

6   MR. BURSCH: Right. I mean, that -- that's

7 a situation where the child doesn't have their

8 biological mom and dad anymore for whatever reason, and

9 so that's a different State interest.

10   JUSTICE KAGAN: Mr Bursch, suppose --

11 suppose this: Suppose that there's a State with a very

12 procreation-centered view of marriage of the kind that

13 you're talking about. And it -- you know, so emotional

14 commitment and support, all of these, the State thinks

15 are not the purpose of marriage and they want their

16 marriage licenses to be addressed only to the things

17 which serve this procreation purpose. And so they say,

18 Well, we're not giving marriage licenses to any -- to

19 anybody who doesn't want children. So when people come

20 in and ask for a marriage license, they just ask a

21 simple question: Do you want children? And if the

22 answer is no, the State says, no marriage license for

23 you. Would that be constitutional?

24   MR. BURSCH: Well, that would cut against

25 the State's interest as you've just described it

1   because even people --

2   JUSTICE KAGAN: No, the State has -- the

3   State has this -- it's not a perfect correlation, but

4   the State says that the best -- the best way to promote

5   this procreation-centered view of marriage is just to

6   limit marriage to people who want children. So that's

7   what it does. Would that be constitutional?

8   MR. BURSCH: But, Justice Kagan, even people

9   who come into a marriage thinking they don't want to

10   have children often end up with children. And that

11   State's interest isn't binding those--

12   JUSTICE KAGAN: No, but this State --

13   JUSTICE KENNEDY: But what is your --

14   JUSTICE KAGAN: What you said --

15   JUSTICE KENNEDY: What is your answer to the

16   question?

17   CHIEF JUSTICE ROBERTS: Justice Kennedy.

18   JUSTICE KENNEDY: What is your answer to the

19   question?

20   MR. BURSCH: Would it be constitutional?

21   JUSTICE KENNEDY: Yes.

22   MR. BURSCH: I think it would be an

23   unconstitutional invasion of privacy to ask the

24   question.

25   JUSTICE KAGAN: To ask if you want children

1 is an unconstitutional invasion of privacy?

2   MR. BURSCH: I -- I think that would be the

3 case, yes, just like it would be unconstitutional --

4   JUSTICE GINSBURG: Suppose a couple, a

5 70-year-old couple comes in and they want to get

6 married.

7   (Laughter.)

8   JUSTICE GINSBURG: You don't have to ask

9 them any questions. You know they are not going to have

10 any children.

11   MR. BURSCH: Well, a 70-year-old man,

12 obviously, is still capable of having children and you'd

13 like keep that within the marriage.

14   But leaving that aside, what you're talking

15 about, Justice Ginsburg, is -- is a tailoring issue

16 under rational basis, which we submit applies here.

17 Vance and Heller both say that overinclusiveness is not

18 something you need to worry about.

19   But even if you applied some kind of

20 heightened scrutiny, you know, again, many people get

21 married thinking that they can't have kids or won't have

22 kids, and they end up with children, and that the

23 inclusion of those couples advances the State's interest

24 because of this greater idea.

25   JUSTICE KAGAN: No, but you're -- but you're

1   the one who said that rational basis, pure rational

2   basis, applies. And this is a State --

3   MR. BURSCH: Yes.

4   JUSTICE KAGAN: -- that's decided that it so

5   wants this procreation-centered view of marriage, that

6   it's going to exclude people who don't want children.

7   It's going to exclude people who can't have children.

8   And the question is, would that be constitutional? And

9   it seems to me it flows directly from your argument that

10   it would be constitutional.

11   But the problem is that we hear about those

12   kinds of restrictions, and every single one of us said

13   that can't be constitutional. And I'm suggesting that

14   the same might be true here.

15   MR. BURSCH: That -- that it can't be

16   constitutional to keep the marriage definition that, as

17   several Justices have mentioned, has been rationally

18   applied for millennia in every culture.

19   JUSTICE KAGAN: To keep the marriage

20   definition as -- as you have described it as so

21   procreation-centered, that a State can exclude everybody

22   that does not serve that purpose for that reason alone.

23   And that's the reason you've given.

24   MR. BURSCH: That -- that's the primary

25   interest. But if you're concerned about the -- the

1   overinclusiveness, the underinclusiveness, you know,

2   the -- the Plaintiffs' definition of marriage, other

3   definition of marriages suffer from that same flaw.

4   You know, so, for example, the -- the

5   Plaintiffs' definition also excludes relationships,

6   families that have already been discussed this morning

7   that might benefit from having State-recognized

8   marriage. It also includes people who have no real

9   emotional love or commitment towards each other. They

10   get married for other reasons. So if those are the

11   reasons why the State's definitions --

12   JUSTICE ALITO: If the reason --

13   MR. BURSCH: -- are invalid --

14   JUSTICE ALITO: -- the reason for marriage

15   is to provide a lasting bond between people who love

16   each other and make a commitment to take care of each

17   other, I'm not -- do you see a way in which that logic

18   can be limited to two people who want to have sexual

19   relations --

20   MR. BURSCH: It -- it -- can't be.

21   JUSTICE ALITO: -- why that would not extend

22   to larger groups, the one I mentioned earlier, two men

23   and two women, or why it would not extend to unmarried

24   siblings who have the same sort of relationship?

25   MR. BURSCH: It would be overinclusive and

1   underinclusive. And the underlying point there is that

2   the State doesn't have an interest in love and emotion

3   at all. You know, if Justice Kagan and I have a close

4   friendship, the government doesn't regulate when that

5   friendship begins or ends. But the government's sole

6   interest in these cases isn't about love. It's about

7   binding children to their biological --

8   JUSTICE BREYER: That's fine.

9   MR. BURSCH: -- moms and dads --

10   JUSTICE BREYER: I'd like to go -- to -- to

11   direct that. I -- because I think we can accept that

12   kind of definition, and simply point out that many gay

13   people want to have children, and they do.

14   MR. BURSCH: Sure.

15   JUSTICE BREYER: So it's -- I'm not certain

16   how that works here, but I'll think about it.

17   The other thing I -- that you will have a

18   view on, and will be helpful to me, is there is an

19   argument being made, if not by the government -- and I'd

20   like your response to it -- that after all, marriage is

21   about as basic a right as there is; that the

22   Constitution and Amendment Fourteen does say you cannot

23   deprive a person of liberty, certainly of basic liberty,

24   without due process of law; and that to take a group of

25   people where so little distinguishes them from the

1   people you give the liberty to, at least in terms of

2   a -- of a good reason for not to, and you don't let them

3   participate in this basic institution, that that

4   violates the Fourteenth Amendment.

5   Now, the reason that I'm interested in that

6   is we don't get into this more scholastic effort to

7   distinguish between rational basis and middle tier and

8   some higher tier and so forth. And it's not going to

9   get into all these questions of balancing free religion

10   rights versus gay rights and so forth. We'd avoid that

11   in this case. And perhaps that's wise, if not legally

12   required, which it may be. And so I'd like your

13   response to that aspect of the other side's argument.

14   MR. BURSCH: I think with respect to the

15   right of privacy which you identify, this Court already

16   answered that -- that question in its majority opinion

17   in Windsor when you said that the limitation of

18   marriage --

19   JUSTICE BREYER: It wasn't a right of

20   privacy. What I said was that the right to be married

21   is as basic a liberty, as basic a fundamental liberty,

22   not the right of privacy, the right to be married, which

23   has existed for all of human civilization, that that is

24   the right which is fundamental. And, therefore, when a

25   State offers that to almost everyone, but excludes a

1   group -- I'm just repeating myself, but that -- I -- I

2   want that question answered to the best of your ability,

3   please.

4   MR. BURSCH: I'm using right to privacy

5   interchangeably with the fundamental right that you're

6   speaking about. And in Windsor, this Court said that

7   the limitation of marriage to opposite-sex couples has

8   always been thought to be fundamental. And so under

9   the -- the Glucksberg test, that's dispositive. Now,

10   you could change that --

11   JUSTICE BREYER: All right. Suppose I don't

12   accept, for argument's sake, your notion that the right

13   of privacy and the right to be married are the same

14   thing. Okay. Now, we'll deal with my hypothetical,

15   please. And my hypothetical is they are different

16   things.

17   MR. BURSCH: Sure.

18   JUSTICE BREYER: And on that assumption, I

19   would like to know what you think of the argument.

20   MR. BURSCH: I think Windsor compared with

21   Glucksberg is dispositive on that because the limitation

22   on the fundamental right --

23   JUSTICE SOTOMAYOR: I -- I -- you know, the

24   problem is that I don't actually accept your starting

25   premise. The right to marriage is, I think, embedded in

1   our constitutional law. It is a fundamental right.

2   We've said it in a number of cases.

3   The issue is you can't narrow it down to

4   say, but is gay marriage fundamental? Has

5   black-and-white marriage been treated fundamentally?

6   The issue was starting from the proposition of, is the

7   right to marry fundamental? And then is it compelling

8   for a State to exclude a group of people?

9   MR. BURSCH: And, Justice --

10   JUSTICE SOTOMAYOR: And that, for me, is

11   as -- as simple as the question gets.

12   MR. BURSCH: Justice Sotomayor, I'm not

13   arguing with you or Justice Breyer about how broadly or

14   narrowly we should be defining the fundamental marriage

15   right. I'm simply pointing out that under this Court's

16   long-established precedent in the fundamental rights

17   area, which is designed to create a balance where

18   Federal courts aren't always interfering with the State

19   democratic process, that in Windsor, you already

20   answered that question. It doesn't matter how broadly

21   or narrowly we define it. What's been fundamentally

22   understood as a limitation is the opposite sex nature of

23   marriage.

24   CHIEF JUSTICE ROBERTS: Counsel, I'm -- I'm

25   not sure it's necessary to get into sexual orientation

1 to resolve the case. I mean, if Sue loves Joe and Tom

2 loves Joe, Sue can marry him and Tom can't. And the

3 difference is based upon their different sex. Why isn't

4 that a straightforward question of sexual

5 discrimination?

6   MR. BURSCH: Two reasons. All of this

7 Court's landmark precedents in this area in sexual

8 discrimination law have always involved treating classes

9 of men and women differently. And that's not what we

10 have here.

11   But -- but even more fundamentally than

12 that, this Court has recognized in Nguyen v. INS that

13 it's appropriate to draw lines based on sex if it's

14 related to biology. And if you'll indulge me just for a

15 minute, the Nguyen case really is important here.

16 You'll recall that's the case where you had a law that

17 determined citizenship of children born to divorced

18 or -- or unmarried individuals overseas. And the law

19 said if it was the child of a citizen mother, then they

20 automatically had citizenship, but if it was the father,

21 then the father had to, one, prove paternity and, two,

22 make child support payments up to age 18. And that's an

23 obvious sex discrimination. And the Court said --

24   JUSTICE GINSBURG: Well, the Court -- the --

25 the Court -- the Court's rationale for that was we know

1   who the mother is. We're fearful that the father is

2   claiming to be the father for some benefits that he's

3   going to get from that status, but we can't be sure he

4   is the father.

5   MR. BURSCH: Right. Justice Ginsburg, that

6   was the justification for the prove the parenthood. But

7   I would like to -- to quote from the opinion about the

8   second interest, the -- the child support.

9   The Court said that the government had an

10 important interest in ensuring an opportunity to have a

11 meaningful parent-child relationship between that

12 biological father and a child. And the law

13 substantially advanced that interest, and this is why,

14 and I'm going to quote.

15   "It is almost axiomatic that a policy which

16 seeks to foster the opportunity for meaningful

17 parent-child bonds to develop has a close and

18 substantial bearing on the governmental interest in the

19 actual formation of that bond."

20   And that is the exact same interest that the

21 Respondents are advancing here when they talk about the

22 definition of marriage, which from --

23   JUSTICE GINSBURG: It's not -- it -- in the

24 Nguyen case, the father could get the status of a

25 parent. He just had to do some things that the mother

1 didn't have to do. It wasn't difficult.

2   Here it's a total exclusion.   And in the

3 Nguyen case, the -- the father was complaining that he

4 shouldn't have to do anything other than what a mother

5 did, and the Court said, yeah, you do have to do

6 something. It's not much.

7   MR. BURSCH: But -- but the gist of the

8 Court's opinion, Justice Ginsburg, was that the State

9 had an interest in the biological father-child bond, not

10 only improving it, but also ensuring that it sustained.

11 It advanced the exact same interest that the States have

12 when they try to inextricably bind kids to their

13 biological moms and dads. And -- and if you change that

14 meaning, over the long haul, it has consequences. You

15 know, I -- I started to say a few minutes ago that the

16 out-of-wedlock birth rate in this country has gone from

17 10 percent to 40 percent Percent from 1970 to today.

18 And I think everybody would agree that that's not a good

19 result for children. And to the extent that you're

20 changing the meaning of marriage --

21   JUSTICE SOTOMAYOR: But that wasn't changed

22 because of the recent gay marriages.

23   MR. BURSCH: No. I'm not saying that at

24 all.

25   JUSTICE SOTOMAYOR: In Massachusetts, we've

1   got data that it's -- the rates have remained constant

2   since they changed their laws.

3   MR. BURSCH: Right. But as several Justices

4   have noted, you know, that's a very short time frame.

5   The whole idea of same-sex marriage --

6   JUSTICE KENNEDY: But -- but you're the one

7   that brought the statistic up, and under --

8   MR. BURSCH: Right. But listen --

9   (Laughter.)

10   JUSTICE KENNEDY: And -- and under your

11   view, it would be very difficult for same-sex couples to

12   adopt some of these children. I -- I think the argument

13   cuts quite against you.

14   MR. BURSCH: Well, what -- what I'm

15   talking --

16   JUSTICE KENNEDY: And -- and it goes back to

17   the basic point where you began where you had some

18   premise that only opposite-sex couples can have a

19   bonding with the child. That's -- that was very

20   interesting, but it's just a wrong premise.

21   MR. BURSCH: No. That's not my premise.

22   The premise is that we want to encourage children to be

23   bonded to their biological mother and father. We don't

24   deny at all -- disagree at all that same-sex couples can

25   be bonded to their children. We hope that's the case.

1   JUSTICE KAGAN: Well, you see, this is what

2   I think is -- is difficult for some people with your

3   argument, is that it's hard to see how permitting

4   same-sex marriage discourages people from being bonded

5   with their biological children. So if you would explain

6   that to me.

7   MR. BURSCH: Because if you're changing the

8   meaning of marriage from one where it's based on that

9   biological bond to one where it's based on emotional

10   commitment, then adults could think, rightly, that this

11   relationship is more about adults and not about the

12   kids. Not the case with the Plaintiffs in this case.

13   We all agree that they are bonded to their kids and have

14   their best interest at heart.

15   But when we're talking about, Justice

16   Kennedy, over decades, when laws change, when societal

17   views on marriage change, there are consequences to

18   that. And -- and what this comes down to is whether

19   you -- not whether you agree or disagree with me or a

20   reasonable voter on when that could happen. It's

21   whether, in drawing these policy lines -- you know,

22   every marriage definition excludes and includes some

23   people. You know, the possible harm is when you change

24   that definition, is that something --

25   JUSTICE BREYER: It's the same point. What

1   directly is your response to the fact that if we assume

2   a basic purpose of marriage is to encourage an emotional

3   and rearing bond between parents and children, that

4   allowing gay people to marry will weaken it? After all,

5   some non-gay couples have children, many, and some

6   don't. And some gay people marry and have children, and

7   some don't. So what's the empirical connection? That's

8   what I have a problem with in your argument.

9   MR. BURSCH: Justice Breyer, it's relatively

10   simple. If you de-link marriage from creating children,

11   you would expect to have more children created outside

12   the bonds of marriage. And a reasonable voter -- that's

13   government conduct; right? If -- if -- right now, take

14   a --

15   JUSTICE BREYER: What's the empirical part

16   of what you just said? If you believe that marriage

17   is -- you -- I just heard you say it, but I didn't

18   follow it.

19   MR. BURSCH: Right. Because you're changing

20   slightly the State's interest. You're -- you're talking

21   about the State's interest in bonding parents and

22   children generally. And if that was the interest that

23   motivated this -- this definition to come into being,

24   there would be a different answer to that. Just like

25   if --

1   JUSTICE BREYER: But I've never heard of a

2   State that said, it is our State policy that we don't

3   like adoption. I've heard of many States who say it's

4   very important to treat adopted children the same way

5   that you treat natural children. I've never heard the

6   contrary.

7   MR. BURSCH: Yes, we -- we agree.

8   JUSTICE BREYER: So if your argument depends

9   upon that, I'm stuck.

10   MR. BURSCH: Let me be very clear about

11   that. We love adoption. Adopted parents are heroic.

12   There you are talking about children who have, for

13   whatever reason, death, disability, abuse, have already

14   been separated from their biological mom and dad, and so

15   when we're talking about adoption, that's an entirely

16   different social issue that gets solved with different

17   State interests. What we're talking about here is that

18   world where there is no marriage --

19   JUSTICE KAGAN: But, you know, they are

20   connected, right? Because if you think about --

21   MR. BURSCH: Oh, they're related. Sure.

22   JUSTICE KAGAN: If you think about the

23   potential -- who are the potential adoptive parents,

24   many of them are same-sex parents who can't have their

25   own children, and truly want to experience exactly the

1   kind of bond that you're talking about. So how does it

2   make those children better off by preventing that from

3   happening?

4   MR. BURSCH: Well, we allow someone

5   regardless of their sexual orientation to adopt.

6   That's, again, a very different --

7   JUSTICE KAGAN: Yes. But you, yourself, are

8   saying that the marriage -- the -- the recognition of

9   marriage helps the children, aren't you? I mean, you'd

10 rather have -- the whole basis of your argument is that

11 you want children in marital households.

12   MR. BURSCH: Correct. We -- we want it to

13 be the glue. That's correct.

14   JUSTICE KAGAN: More -- more adopted

15 children and more marital households, whether same sex

16 or other sex seems to be a good thing.

17   MR. BURSCH: Well, that -- that's a policy

18 argument, and reasonable people can disagree simply and

19 compassionately.

20   JUSTICE KAGAN: Well, I'm just asking based

21 on your policy how it's not a good thing. I'm not

22 trying to put words in your mouth. I'm just saying

23 if -- if -- it just seems to me inexplicable given what

24 you've said are your policy interests.

25   MR. BURSCH: Because if you change the

1 societal meaning of what marriage is -- and society has

2 already started to move away from what we always

3 understood marriage to be, that linkage between kids and

4 their biological mom and dad. The more that link is

5 separated, the more likely it is that when you've got an

6 opposite-sex couple, that link will not be maintained,

7 because it's more adult-centric, and it's less

8 child-centric.

9   You've got more kids being raised without

10 their biological mom and dad. You have more kids being

11 raised without both parents, you know, typically,

12 without a father, though that's not always the case.

13 And it's not unreasonable for the people in thinking

14 about the possible consequences of changing a

15 definition, which has existed, as Justice Kennedy said,

16 for millennia, might have real consequences. To say

17 otherwise is to say that it's irrational for a person to

18 think that changing an idea about something will have no

19 effect about -- on how people think about that idea.

20   JUSTICE GINSBURG: We have changed our idea

21 about marriage is the point that I made earlier.

22   Marriage today is not what it was under the

23 common law tradition, under the civil law tradition.

24 Marriage was a relationship of a dominant male to a

25 subordinate female.

1   That ended as a result of this Court's

2   decision in 1982 when Louisiana's Head and Master Rule

3   was struck down. And no State was allowed to have such

4   a -- such a marriage anymore. Would that be a choice

5   that a State should be allowed to have?

6   MR. BURSCH: No.

7   JUSTICE GINSBURG: To cling to marriage the

8   way it once was?

9   MR. BURSCH: No. Absolutely not, because

10   there the State didn't have a legitimate interest in

11   making anyone subservient to anyone else. But here the

12   State's entire interest springs out of the fact that we

13   want to forever link children with their biological mom

14   and dad when that's possible.

15   And, you know, I want to get back to this

16   point of line drawing, and the marriage definition that

17   the Plaintiffs and the Federal government proposed. You

18   know, and how, no matter where you draw the lines,

19   they're going to leave someone out, too. And what they

20   are asking you to do is to take an institution, which

21   was never intended to be dignitary bestowing, and make

22   it dignitary bestowing. That's their whole argument.

23   And when you do that, tens of thousands of other

24   children who don't meet their definition will likewise

25   be left out and suffer those exact same dignitary harms.

1   When you're talking about a spectrum of

2   marriage definitions, different places to draw the line,

3   and potential harms on both sides, that is the

4   quintessential place for the democratic process to work.

5   And there's another harm --

6   JUSTICE KENNEDY: Just in -- just in

7   fairness to you, I don't understand this not dignity

8   bestowing. I thought that was the whole purpose of

9   marriage. It bestows dignity on both man and woman in a

10 traditional marriage.

11   MR. BURSCH: It's supposed to --

12   JUSTICE KENNEDY: It's dignity bestowing,

13 and these parties say they want to have that -- that

14 same ennoblement.

15   MR. BURSCH: Sure.

16   JUSTICE KENNEDY: Or am I missing your

17 point?

18   MR. BURSCH: I think you're missing my

19 point. If we go back to that world where marriage

20 doesn't exist and the State is trying to figure out how

21 do we link together these kids with their biological

22 moms and dads when possible, the -- the glue are

23 benefits and burdens, but not necessarily dignity.

24   You know, dignity may have grown up around

25 marriage as a cultural thing, but the State has no

1   interest in bestowing or taking away dignity from

2   anyone, and certainly it's not the State's intent to

3   take dignity away from same-sex couples or -- or from

4   anyone based on their sexual orientation.

5   JUSTICE KENNEDY: Well, I think many States

6   would be surprised, with reference to traditional

7   marriages, they are not enhancing the dignity of both

8   the parties. I'm puzzled by that. But you have another

9   point to make.

10   MR. BURSCH: Well, the -- the main point

11   there is -- is the State's don't intend to bestow

12   dignity, but if you turn it into a dignity bestowing

13   institution, then other family structures and children

14   who are excluded from their definition would suffer a

15   dignitary harm. You know, so you can't draw the line

16   there.

17   And -- and when you're talking about

18   balancing harms and the importance of letting people

19   decide the most fundamental of questions, how do we

20   define marriage in our society, it has other, you know,

21   important things to think about as well.

22   You know, one of those is that when people

23   have to act through the democratic process, it forces

24   neighbors to sit down and civilly discuss an issue and

25   try to persuade each other through reason, love and

1   logic. And we have already seen that happen in eleven

2   States, and if you read some accounts, that could happen

3   in many more very quickly. When you enact social change

4   of this magnitude through the Federal courts, it's

5   cutting off that dialogue and it's saying one group gets

6   their definition and the other is maligned as being

7   irrational or filled with animus. And that's not the

8   way that our democratic process is supposed to work and

9   there are long-term harms to our country and to that

10   fundamental liberty interest to govern ourselves. All

11   the things that this Court talked about in -- in the

12   Schuette decision, if you take away that dynamic, if

13   it's a court-imposed definition as opposed to one

14   enacted to the people through the democratic process.

15   JUSTICE KAGAN: Of course -- I mean, of

16   course, Mr. Bursch, we don't live in a pure democracy;

17   we live in a constitutional democracy. And the

18   constitutional -- the Constitution imposes limits on

19   what people can do and this is one of those cases -- we

20   see them every day -- where we have to decide what those

21   limits are or whether the Constitution speaks to

22   something and prevents the democratic processes from

23   operating purely independently; isn't that right?

24   MR. BURSCH: It is right. But, Justice

25   Kagan, as we discussed in our brief and as we've seen in

1   the argument here today, you know, there isn't a

2   constitutional limit that tells people, one, the

3   marriage definition that they've had for millennia is so

4   irrational that it's unconstitutional. We haven't seen

5   that under this Court's sex discrimination jurisprudence

6   that these laws shouldn't -- should be struck down.

7   Under the fundamental rights doctrine, Windsor already

8   resolved that --

9   JUSTICE KAGAN: No, but that's the question,

10   is whether there are these equality limits or whether

11   there are these liberty limits.

12   So let's go back to the liberty limits that

13   you were just talking about.

14   MR. BURSCH: Sure.

15   JUSTICE KAGAN: Now, the right to marry.

16   We've had -- we had Loving. We had Zablocki. We had

17   Turner. In all of these cases what we've talked about

18   is a right to marry. We didn't try to define the right

19   more particularly: Is there a right to interracial

20   marriage? Is there a right to marry if you're a

21   prisoner? We just said there's a right to marry, that

22   is fundamental and that everybody is entitled to it

23   unless there's some good reason for the State to exclude

24   it -- exclude them. So why shouldn't we adopt the exact

25   same understanding here?

1   MR. BURSCH: Well, you walked through those

2   same cases that you just mentioned, you know, Skinner,

3   Maynard, Griswold, Loving, Zablocki -- reemphasize

4   Loving itself -- every single one of those talked about

5   marriage in the context of men and women coming together

6   and creating children, procreative interest.

7   JUSTICE KAGAN: Well, they were dealing then

8   with men and women coming together, but the question

9   was, well, there might be a black woman and a -- and a

10 black man or a white woman or a black woman and a white

11 man and -- and there was no inquiry into whether that

12 was a traditional form of marriage. If there had been

13 such an inquiry in this country, they would have come up

14 pretty short.

15   MR. BURSCH: Right. And historically, that

16 wasn't part of the tradition, and more importantly,

17 invidious discrimination --

18   JUSTICE KAGAN: Historically, it was not a

19 part of the tradition, that's right. And the Court

20 said --

21   MR. BURSCH: Can I finish the answer?

22   JUSTICE KAGAN: -- irrelevant that that's

23 not a part of the tradition because --

24   MR. BURSCH: Right.

25   JUSTICE KAGAN: -- because there's no good

1   reason for it not to be part of the next tradition.

2   MR. BURSCH: Because invidious

3   discrimination based on race had absolutely nothing to

4   do with the States' interest in linking children to

5   their biological --

6   JUSTICE KAGAN: But Loving was very

7   clearly -- Loving was very clearly not just a racial

8   case, that -- it also was a -- a liberty case?

9   MR. BURSCH: Yes.

10   JUSTICE KAGAN: And in, indeed, Loving was

11   exactly what this case is. It's a case which shows how

12   liberty and -- and equality are intertwined, wasn't it?

13   MR. BURSCH: No. Because in Loving, if the

14   couple could not get married, they could not have --

15   they could not enjoy private intimacy at all because it

16   was subject to criminal prosecution and jail time. And

17   in fact, all of these cases that we've been talking

18   about where this Court recognized a fundamental right to

19   marriage, there were other laws that prohibited

20   nonmarital cohabitation --

21   JUSTICE SOTOMAYOR: Well, what -- what did

22   that have to do with prisoners? If the States' interest

23   is in fostering procreation between natural parents,

24   the -- it seems to me that the prison who -- at issue

25   did that. It said you can get married if there's a

78

1   child on the way. And that would foster the -- or -- or

2   promote the interest.

3   We, instead, said, that's not enough.   The

4   fundamental right to marry does bestow an important --

5   an important connection that we can't deprive the

6   prisoner of, even if the prisoner at least at the moment

7   and presumably those serving life sentences, have no

8   chance of procreation.

9   MR. BURSCH: Justice Sotomayor, as you're

10   well aware, this Court actually decided two prisoner

11   cases. One was Taylor, the one I think you were

12   referring to; the other is Butler. This Court in Taylor

13   said even someone in prison who has an expectation of

14   getting out someday has a right to consummate their

15   marriage. In Butler, you said when someone's serving a

16   life sentence, it's appropriate for the State to deny

17   them the opportunity to marry because they never had

18   that opportunity. So even there, you -- you were tying

19   the State interest that we're asserting here to

20   marriage.

21   And -- and let -- let's take away all laws

22   regarding cohabitation and -- and intimacy outside of

23   marriage so that there is no criminal conduct, the

24   underlay for all those things.

25   If the State today decided to have no

1   marriage, as some States have proposed, that wouldn't

2   violate a fundamental right. The fundamental right at

3   stake in those cases was the right to be left alone, not

4   the right, as Chief Justice Roberts intimated in the

5   first part of this argument, to force the government to

6   come into your home and recognize something and -- and

7   to give you benefits. Those are two very different

8   things.

9   And -- and you can draw the analogy to the

10   abortion context. And I'm reluctant to bring that up,

11   but, you know, in Roe v. Wade and Casey, this Court says

12   the government cannot interfere in that private choice.

13   That's a fundamental right. In Maher, the Court says

14   but a woman cannot force the government to come

15   participate in that by paying for it.

16   Likewise here.   Lawrence said the government

17   cannot interfere in private, intimate conduct. Our

18   position is that the Court cannot, as a constitutional

19   matter, say but yes, you can force the State into these

20   relationships by -- by forcing them to recognize and

21   give benefits to anyone. That's not the way that our

22   fundamental rights doctrine works.

23   So, Justice Kagan, you know, to get back to

24   your point again about how the Constitution does put

25   limits, there haven't been any identifiable limits here

1   that -- that defeat the States' interest. You would

2   have to somehow change one of those doctrines. You'd

3   have to change your fundamental rights doctrine. You'd

4   have to change equal protection doctrine. And when you

5   change those, you also change the balance between the

6   Federal courts and the people voting in the democratic

7   process.

8   JUSTICE KAGAN: See, to me it seems as

9   though you are doing something very different that we've

10   never done before, which is you are defining

11   constitutional rights in terms of the kinds of people

12   that can exercise them. And I don't think we've really

13   ever done that. Where we've seen a constitutional

14   right, we have not defined it by these people can

15   exercise it, but these people can't, especially in a

16   case where the claims are both rights-based and

17   equality-based.

18   I mean, it would be like saying in Lawrence,

19   well, there's only a right to intimate activity for

20   heterosexual people and not a right to intimate sexual

21   activity for gays and lesbians. And, of course, we

22   didn't do that. Once we understood that there was a

23   right to engage in intimate activity, it was a right for

24   everybody.

25   MR. BURSCH: Absolutely. But that's the

 1   State's whole point, is that we're not drawing

 2   distinctions based on the identity, the orientation, or

 3   the choices of anyone. The State has drawn lines, the

 4   way the government has always done, to solve a specific

 5   problem. It's not meant to exclude.

 6   JUSTICE KAGAN: Well, it must be --

 7   MR. BURSCH: It's not meant to take away

 8   dignity.

 9   JUSTICE KAGAN: It must be --

10   MR. BURSCH: But that's why you're drawing

11   distinctions based on sexual orientation in these laws.

12   Oh, gosh, no, because the -- the State doesn't care

13   about your sexual orientation. What the State cares

14   about is that biological reality.

15   JUSTICE KAGAN: I'm not asking about -- I'm

16   not asking about your reasons and whether you have any

17   or not. But whether you have any or not, you are

18   drawing distinctions based on sexual orientation.

19   That's what -- that's what these laws do.

20   MR. BURSCH: No. A statute that facially

21   classified based on sexual orientation would look very

22   different. What these statutes do is they have

23   disparate impact, and you would have to demonstrate them

24   under Washington v. Davis and Feeney that there's some

25   animus that motivates this. And this Court has said

1 repeatedly in Ling and O'Brien and other contexts --

2   JUSTICE GINSBURG: It is not to start an

3 impact. It's leaving a group out altogether. It's not

4 that more of this group and less of that group.

5   MR. BURSCH: Right. But as you said in --

6 in Bray v. Alexandria, a 100 percent impact doesn't

7 necessarily mean animus. We still have to determine

8 a -- a discriminatory intent.

9   JUSTICE KAGAN: What did -- what did we say

10 in Bray? Something about if you prevent people from

11 wearing yarmulkes, you know that it's discrimination

12 against Jews. Isn't that what we said in Bray? Same

13 thing here.

14   MR. BURSCH: The Bray v. Alexandria case

15 that I was talking about was the one that affected

16 abortion and your ability to have that, which on

17 its surface affects 100 percent of women.

18   JUSTICE KAGAN: Sorry, the case that I'm

19 talking about said what I said.

20   MR. BURSCH: Right.

21   (Laughter.)

22   JUSTICE BREYER: Should I read anything

23 other than -- I'll certainly go back and read Windsor

24 again and I'll certainly go and read Glucksberg again.

25 I do recall the cases, at least generally, and I don't

1   believe there's anything in those cases that says the

2   basic liberty or right to be married is a right that

3   extends only to opposite-sex couples. Those -- those

4   weren't really issues in the case as they are here, so

5   I'm surprised if this Court actually wrote that, but --

6   but if it did write that and you can immediately call

7   that page to mind, I'll doubly look at it. And I just

8   doubt it's there, but I'll look at it.

9   MR. BURSCH: I apologize for not having the

10   page cite, but --

11   JUSTICE BREYER: No, no. That's quite all

12   right. I'll read the whole opinion.

13   MR. BURSCH: Yeah. You will find in Windsor

14   that the Court majority said it's the limitation of

15   marriage to opposite-sex couples that has always been

16   thought fundamental.

17   JUSTICE BREYER: It's the limitation, fine.

18   Okay.

19   MR. BURSCH: Yes. You know, so what -- what

20   we're talking about here is having to --

21   JUSTICE SCALIA: Well, that was then and

22   this is now.

23   JUSTICE BREYER: How could the limitation --

24   the right has -- the fundamental right has to be a right

25   to marry and you said it's the limitation --

1   MR. BURSCH: This Court acknowledged --

2   JUSTICE SCALIA: Did Justice Breyer join

3   that opinion that said that?

4   MR. BURSCH: I -- I believe he did.

5   JUSTICE SCALIA: My Lord. Well, I --

6   JUSTICE BREYER: Sometimes, you know,

7   context matters. I'll go in.

8   MR. BURSCH: If I could briefly continue.

9   CHIEF JUSTICE ROBERTS: Sure.

10   JUSTICE BREYER: I'm surprised we have this

11   case in front of us if that -- I mean, if it's been so

12   clearly decided, but --

13   CHIEF JUSTICE ROBERTS: Do you want wrap up,

14   counsel?

15   MR. BURSCH: I -- I do want to wrap up.

16   Your Honors, these are obviously very

17   emotional issues where reasonable people can disagree.

18   This Court has never assumed that people have act out of

19   animus when they're voting in the democratic process.

20   The -- the States generally, Michigan

21   specifically, has -- has no animus. It doesn't intend

22   to take away dignity from anyone. We respect all

23   parents, and we hope that they love their children.

24   But this Court taking this important issue

25   away from the people will have dramatic impacts on the

1   democratic process, and we ask that you affirm.

2   CHIEF JUSTICE ROBERTS: Thank you, counsel.

3   Ms. Bonauto, you have three minutes

4   remaining.

5   REBUTTAL ARGUMENT OF MARY L. BONAUTO

6   ON BEHALF OF THE PETITIONERS ON QUESTION 1

7   MS. BONAUTO: First, I just want to say that

8   the idea that the ideas of marriage will change is a

9   false dichotomy. Right now, different-sex couples can

10   choose to marry and rear children. They can choose to

11   marry at 70 or 90 because of their commitment to one

12   other. We honor both marriages. It is only same-sex

13   couples who are foreclosed from marrying under either

14   vision.

15   Second, we agree that these restrictions

16   are, in fact, linked to gender. There's official

17   classification here, and they are sex linked in an

18   additional way, and that is ideas about what is a proper

19   relationship for a man to have, a real man or a real

20   woman, and that is obviously not with a person of the

21   same sex.

22   I hear that Michigan loves adoption, and, in

23   fact, Michigan has placed intensely vulnerable children

24   with these petitioners who have nurtured them to a

25   healthy childhood. Does Michigan deny the marriage

1 because they didn't conceive those children together,

2 when Michigan would let other adoptive parents who are a

3 different-sex couple marry? No. Michigan is drawing a

4 line because it does not approve of the adult

5 relationship, no matter what the protestations they

6 follow.

7   Next, we hear a line it's not disrespectful

8 because it's drawn based on biology. I have to say one

9 casualty of the marriage litigation is an impoverished

10 view of what is marriage and what is the role of

11 biological procreation. The State's entire premise here

12 is that if same-sex couples marry, then different-sex

13 couples won't and have their children in a marriage.

14 Those two could not be further apart. People make their

15 own decisions. It is beyond attenuated.

16   And the idea also that there are other

17 people who raise children -- and good for them, it's

18 something, of course, that I hope policymakers would

19 support. But it's adult relationships that we're

20 talking about at the foundation here are different adult

21 relationships, and telling same-sex couples who have

22 made that commitment to one another and have committed

23 to raising children that they can't is what is

24 stigmatizing.

25   And then, if I may, my -- my last point is

1   that the only way I can really understand Michigan's

2   points about procreation and biology and so on is when I

3   look, for example, at page 31 of their brief. And they

4   say that what they care about is people who have

5   children together staying together and providing a

6   long-term, stable situation for their children.

7   That interest applies full force in this

8   context, because by denying marriage to same-sex

9   couples, you are denying not only the protection for the

10   adults, which is independently important, you are

11   denying those protections and that security that would

12   come from having married parents.

13   So with that, thank you.

14   CHIEF JUSTICE ROBERTS: Thank you, counsel.

15   The Court will take a brief break and return

16   to the bench in five minutes for argument on the second

17   question presented.

18   (Short break at 11:32 a.m.)

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