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

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

11

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.

25

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7 For the United States, as amicus curiae,

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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

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 MS. BONAUTO: -- 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.

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

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.

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

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

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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