

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 Petitioners : 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 Petitioners : No. 14-571

22 v. :

23 RICK SNYDER, GOVERNOR OF :

24 MICHIGAN, ET AL. :

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and

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GREGORY BOURKE, ET AL., :

 Petitioners : No. 14-574

 v. :

STEVE BESHEAR, GOVERNOR :

OF KENTUCKY, ET AL. :

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Washington, D.C.

Tuesday, April 28, 2015

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:39 a.m.

APPEARANCES:

DOUGLAS HALLWARD-DRIEMEIER, ESQ., Washington, D.C.; on behalf of Petitioners on Question 2.

JOSEPH F. WHALEN, Associate Solicitor General, Nashville, Tenn.; on behalf of Respondents on Question 2.

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

2 (12:29 p.m.)

3 CHIEF JUSTICE ROBERTS: We'll now hear our
4 argument on the second question presented in this case.

5 Mr. Hallward-Driemeier.

6 ORAL ARGUMENT OF DOUGLAS HALLWARD-DRIEMEIER

7 ON BEHALF OF THE PETITIONERS ON QUESTION 2

8 MR. HALLWARD-DRIEMEIER: Mr. Chief Justice,
9 and may it please the Court:

10 The Question 2 Petitioners are already
11 married. They have established those enduring
12 relationships, and they have a liberty interest that is
13 of fundamental importance to these couples and their
14 children.

15 A State should not be allowed to effectively
16 dissolve that marriage without a sufficiently important
17 justification to do so.

18 These Petitioners have built their lives
19 around their marriages, including bringing children into
20 their families, just as opposite-sex couples have done.
21 But the non-recognition laws undermine the stability of
22 these families, though the States purport to support
23 just such stability.

24 JUSTICE ALITO: I was somewhat surprised by
25 the arguments you made in your brief because they are

1 largely a repetition of the arguments that we just heard
2 with respect to Question 1.

3 I thought the point of Question 2 was
4 whether there would be a -- an obligation to recognize a
5 same-sex marriage entered into in another State where
6 that is lawful even if the State itself,
7 constitutionally, does not recognize same-sex marriage.
8 I thought that's the question in Question 2. Is -- am I
9 wrong?

10 MR. HALLWARD-DRIEMEIER: It is the question
11 in Question 2, and this Court's decisions establish that
12 there is not only a right to be married, but a right to
13 remain married; that there is a protected liberty
14 interest in the status of one's marriage once it has
15 been established under law.

16 JUSTICE SCALIA: Even -- even if that
17 marriage is -- is not lawful under -- under the
18 receiving State's law; right?

19 MR. HALLWARD-DRIEMEIER: That's right.
20 There is definitely --

21 JUSTICE SCALIA: Is that right? No
22 matter -- I mean, suppose -- well, let's say someone
23 gets married in a -- in a country that permits polygamy.
24 Does a State have to acknowledge that marriage?

25 MR. HALLWARD-DRIEMEIER: Well, of course,

1 the State could assert justifications for not doing so,
2 and I think there would be justifications --

3 JUSTICE SCALIA: Okay. So --

4 MR. HALLWARD-DREIMEIER: -- for not
5 recognizing such --

6 JUSTICE SCALIA: -- what would the
7 justification be? That it's contrary to the State's
8 public policy, I assume; right?

9 MR. HALLWARD-DRIEMEIER: Well, no, Your
10 Honor. I think that the justification would be that the
11 State doesn't have such an institution. The -- a
12 polygamous relationship would raise all kinds of
13 questions that the State's marriage laws don't address.

14 JUSTICE SCALIA: Well, it would be the same
15 argument. We don't have such an institution. Our
16 marriage in this State, which we constitutionally can
17 have because the second question assumes that the first
18 question comes out the way the United States does not
19 want it to come out, the State says we only have the
20 institution of heterosexual marriage. We don't have the
21 institution of same-sex marriage.

22 MR. HALLWARD-DRIEMEIER: No. The
23 institution is the institution of marriage, and the
24 experience of those States --

25 JUSTICE SCALIA: Well, you're saying that,

1 but the State doesn't. The State says the only
2 institution we have is heterosexual marriage.

3 MR. HALLWARD-DRIEMEIER: The -- the point
4 I'm making, Your Honor, I think is demonstrated by what
5 has happened in those States where, by court order,
6 States have had to permit same-sex couples to marry.

7 All that has happened under their laws is
8 that they have had to remove gender-specific language
9 and substitute it with gender-neutral language.

10 JUSTICE SOTOMAYOR: Now, could I -- could
11 I -- because I don't -- if you want to finish answering
12 Justice Scalia's --

13 MR. HALLWARD-DRIEMEIER: I was going to say
14 that -- that plural relationships raise all manner of
15 questions that are not addressed by this State's current
16 marriage laws.

17 JUSTICE ALITO: What if it's not a plural
18 relationship? What if one State says that individuals
19 can marry at the age of puberty? So a 12-year-old
20 female can marry. Would a State -- would another State
21 be obligated to recognize that marriage?

22 MR. HALLWARD-DRIEMEIER: I -- I think
23 probably not. But the State would have, in that
24 instance, a sufficiently important interest in
25 protecting the true consent of the married person.

1 And -- and most States don't recognize minors' ability
2 to consent, certainly not to something that is as
3 important as marriage.

4 But what we see, in fact, is that, quite in
5 contrast to the non-recognition laws at issue here, the
6 States do recognize the marriages of person who, by age,
7 would not have been able to marry within their own
8 States.

9 That is the long-standing practice of all of
10 the States, precisely because of the abomination, as it
11 was referred to in the old treatises, of the notion that
12 a -- persons could have a different marital state in
13 some jurisdictions than others.

14 JUSTICE SOTOMAYOR: Sir, how about the
15 co-sanguinity situation? Virtually all states would
16 recognize cousins through marriage getting married, but
17 there's at least one State that doesn't; right?

18 MR. HALLWARD-DRIEMEIER: Well, I --

19 JUSTICE SOTOMAYOR: Are you saying that that
20 State is --

21 MR. HALLWARD-DRIEMEIER: I think that
22 the -- that the constitutional test is the one that the
23 Court set forth in the Zablocki, which is does the State
24 have a sufficiently important interest not to recognize
25 it? And certainly in the case of incest, the State does

1 have a sufficiently important interest.

2 JUSTICE SOTOMAYOR: This is not incest.
3 They're not biologically tied.

4 MR. HALLWARD-DRIEMEIER: Well, the States
5 that I'm aware of that have the rules against cousin
6 marriage do so under their incest statutes, and they
7 simply define incest in a broad way that would encompass
8 cousins to marry.

9 At some point, certainly the familial
10 relationship is too extenuated that I don't think the
11 State would have a sufficiently important justification.

12 JUSTICE KENNEDY: But Justice Alito's
13 question points out, the assumption of his hypothetical
14 is -- and -- and of the way these cases are presented,
15 is that the State does have a sufficient interest so
16 that you need not allow the marriages in those -- in
17 that State.

18 So there is a sufficient interest, under our
19 arguendo assumption here, to -- to say that this is not
20 a fundamental right. But then suddenly, if you're out
21 of State it's different. Why -- why should the State
22 have to yield?

23 MR. HALLWARD-DRIEMEIER: Well, at the very
24 least, you would have to analyze differently the
25 interest that the State might assert for not allowing

1 couples to enter marriage versus the -- the interest
2 that they assert as related to a couple who is already
3 married.

4 For example, Kentucky has asserted that its
5 interest in only permitting opposite-sex couples to
6 marry is to increase the birthrate. Well, now apply
7 that theory to same-sex couples who are already married.
8 They are already married in the States where they were
9 married. They are already married in half the States in
10 the country.

11 Kentucky would have the Court believe that
12 it is a sufficiently important interest to have that
13 couple disregard their existing marriage vows and
14 obligations to each other to marry someone else in
15 Kentucky in order to procreate biologically even though
16 the couple may already have children together. That, I
17 would dare say, is not a rational justification, much
18 less a sufficiently important one.

19 JUSTICE SCALIA: Well, I think -- I think
20 what Kentucky is saying is that the long-term effects of
21 having same-sex couples in Kentucky will be, which
22 you -- you didn't agree with, but what -- what counsel
23 for Respondent argued in the prior case, will be a -- a
24 reduction in -- in -- in heterosexual marriages and a --
25 a reduction in the number of children born to those

1 marriages. I mean, that --

2 MR. HALLWARD-DRIEMEIER: Your Honor, this
3 Court has rejected that type of speculation as a basis
4 for drawing these distinctions before as it did in
5 Loving.

6 The State in Loving argued that it was too
7 soon to know what the effect of interracial marriages
8 would be and what the stigma would be on their children
9 if not the biological --

10 JUSTICE SCALIA: But we will not have
11 rejected it if we come out the way this question
12 presented assumes we have come out.

13 MR. HALLWARD-DREIMEIER: Well, the State --

14 JUSTICE SCALIA: Mainly, saying that it's
15 okay for a State not to permit same-sex marriage.

16 MR. HALLWARD-DRIEMEIER: The State asserts
17 that it has an interest in the -- the stability that
18 marriage provides for children. That interest does not
19 justify extinguishing marriages that already exist.

20 JUSTICE GINSBURG: May we clear this one
21 thing. If the Petitioner prevails in the first case,
22 then the argument is moot; right?

23 MR. HALLWARD-DRIEMEIER: That's -- that's
24 absolutely right, Your Honor.

25 JUSTICE GINSBURG: So you are supposing a

1 situation where the Plaintiffs do not prevail, and so a
2 State can retain its ban on same-sex marriage.

3 The question is has -- does it have to
4 recognize marriage from out of State? Would it make any
5 difference if the couple came from the State where there
6 is a ban on same-sex marriage, goes to a neighboring
7 State that allows it, and then comes right back home
8 again?

9 MR. HALLWARD-DRIEMEIER: No, Your Honor. I
10 don't think that there would be such a distinction.
11 And, in fact, none of these four States draws that kind
12 of line that Your Honor presupposes. And that's one of
13 the points that's so important here, is that as the
14 Court observed with respect to DOMA in Windsor, the
15 nonrecognition laws here are a stark departure from the
16 State's traditional practice of recognizing out-of-state
17 marriages even though they could not have been
18 celebrated within the State. It's precisely that
19 circumstance where the laws diverge that the issue
20 arises.

21 And the -- the three States that have this
22 issue, Tennessee, Ohio, and Kentucky, are, between them,
23 able to identify only 5 instances in which they did not
24 recognize a marriage that was valid outside the State,
25 even though it could not have been celebrated inside.

1 And those instances are incest, which we think the State
2 would have sufficiently important justification not to
3 recognize, miscegenation laws, not a precedent on which
4 I think the Court would want to rely in this instance,
5 or other interests that I think probably would not
6 survive today, such as the -- the rule against allowing
7 a divorced person to remarry.

8 So they're -- and -- and more importantly,
9 the most recent of those cases is from 1970. So the
10 rule that the States cite about their ability to
11 disregard, to effectively dissolve marriages that
12 already exist, around which people have already begun to
13 build their lives, is less applied than the Federal
14 government's own authority to define the --

15 CHIEF JUSTICE ROBERTS: Yes. But, again, I
16 think you're avoiding the presumption on which we're
17 starting, on the assumption, which is that the State's
18 policy for same -- supporting same-sex marriage is
19 sufficiently strong, that they are -- they can, as a
20 matter of public policy, prohibit that in their own
21 State. And yet you're saying it's somehow so much
22 weaker when you're talking about marriages from other
23 States.

24 MR. HALLWARD-DRIEMEIER: I -- I think there
25 are a couple of points that I'd like to make in order to

1 distinguish this situation from the -- the question in
2 the first case.

3 In the first case, it was very significant
4 that Respondents' counsel was emphasizing that he
5 thought it was merely rational basis scrutiny that would
6 apply. But that was to the question of whether people
7 should be allowed to marry in the first instance.

8 Our Petitioners on Question 2 are already
9 married. We know from Windsor, because the Court held,
10 that once married, a couple has a constitutionally
11 protected liberty interest in their marriage.

12 We also know from Windsor that where a -- a
13 sovereign disregards that marriage in a way that would
14 be extraordinary and out of character with tradition,
15 that that requires, at the very least, careful
16 consideration. And that's --

17 CHIEF JUSTICE ROBERTS: It certainly --

18 MR. HALLWARD-DRIEMEIER: -- what we have
19 here.

20 CHIEF JUSTICE ROBERTS: It certainly
21 undermines the State interest that we would, assuming
22 arguendo, have recognized in the first case, to say that
23 they must welcome in their borders people who have been
24 married elsewhere. It'd simply be a matter of time
25 until they would, in effect, be recognizing that within

1 the State.

2 MR. HALLWARD-DRIEMEIER: Well --

3 CHIEF JUSTICE ROBERTS: Because we live in a
4 very mobile society, and people move all the time.

5 MR. HALLWARD-DRIEMEIER: And -- and --

6 CHIEF JUSTICE ROBERTS: In other words, it
7 would kind of -- it -- one State would basically set the
8 policy for the entire nation.

9 MR. HALLWARD-DRIEMEIER: Well, of course,
10 there would be many fewer such couples raising children
11 within their borders than heterosexual couples who are
12 raising children who are not biologically linked to
13 them.

14 I have to say that I think that the
15 arguments that the State has made are so over and
16 underinclusive at the same time, that they leave the --
17 the feeling that it can only be pretext. And we know
18 that that's true, because the State not only can't draw
19 the lines that they are purporting to, they don't draw
20 the lines that they're -- would suggest, and they would
21 never draw the lines that they afford to --

22 CHIEF JUSTICE ROBERTS: Wait. I -- I've
23 lost you there. What -- what lines are you talking
24 about?

25 MR. HALLWARD-DRIEMEIER: A line, for

1 example, that limits marriage to those couples who are
2 able to procreate biologically without any assistance.
3 The States don't draw those lines. The States have laws
4 that treat adoptive relationships with the same legal
5 effect as biological ones. They actually have laws that
6 further support and -- and give greater stability --

7 JUSTICE SOTOMAYOR: I thought your --

8 MR. HALLWARD-DRIEMEIER: -- to marriages
9 that use --

10 JUSTICE SOTOMAYOR: -- your argument --

11 MR. HALLWARD-DRIEMEIER: -- assisted
12 reproduction.

13 JUSTICE SOTOMAYOR: -- would be different.

14 I thought that the States had never categorically passed
15 a law declaring that a particular kind of marriage was
16 against public policy.

17 MR. HALLWARD-DRIEMEIER: That -- that is
18 certainly another way in which --

19 JUSTICE SOTOMAYOR: No one of the four
20 States had ever done that?

21 MR. HALLWARD-DRIEMEIER: They -- they have
22 never done that. They've never --

23 JUSTICE SOTOMAYOR: Until the DOMA issue
24 came up.

25 MR. HALLWARD-DRIEMEIER: That -- that --

1 these laws are -- are out of character, unprecedented in
2 the language of Romer in many respects.

3 JUSTICE ALITO: You're saying that --

4 JUSTICE SOTOMAYOR: Well, they --

5 JUSTICE ALITO: You're saying that the laws
6 in some States, the States that you're referring to that
7 recognize only opposite-sex marriage are pretextual?

8 MR. HALLWARD-DRIEMEIER: The -- the -- their
9 -- their nonrecognition laws are pretextual, yes,
10 because the longstanding practice of these States is to
11 recognize marriages that are validly celebrated
12 elsewhere precisely because of --

13 JUSTICE ALITO: Well --

14 MR. HALLWARD-DRIEMEIER: -- the
15 fundamental --

16 JUSTICE ALITO: -- other than the
17 distinction -- we have the distinction between same-sex
18 marriage and opposite-sex marriage. What is the next
19 most dramatic variation that exists in the marriage laws
20 of the States?

21 MR. HALLWARD-DRIEMEIER: Well, at the time,
22 certainly interracial marriage when --

23 JUSTICE ALITO: At the present time, what
24 is --

25 MR. HALLWARD-DRIEMEIER: Well --

1 JUSTICE ALITO: -- most -- the next most
2 dramatic difference?

3 MR. HALLWARD-DRIEMEIER: Well, I -- I think
4 that, if I could, the -- the antimiscegenation laws
5 actually are the closest analogy, but what's different
6 between them, if I could -- because it goes to Justice
7 Sotomayor's question, and then I'll try to answer
8 yours -- is --

9 JUSTICE ALITO: Well -- well, I had asked a
10 simple question. At the present time, what is the next
11 most dramatic variation in the marriage laws of the
12 States?

13 MR. HALLWARD-DRIEMEIER: It probably is age.

14 JUSTICE ALITO: And what is the -- what --
15 what's the range?

16 MR. HALLWARD-DRIEMEIER: The -- the -- I
17 think it goes from 13 to 18. And -- but -- but as I
18 said before, the tradition of the States -- the issue
19 does not come up that much, but the tradition of the
20 States is to recognize a marriage that was entered into
21 by someone of an age that could not have been entered
22 within the State, because of the nature of the marriage
23 once it's established, recognizing that the fundamental
24 nature of that relationship is not one that the State
25 should put asunder.

1 JUSTICE ALITO: Well, I thought you answered
2 me earlier that a State could refuse to recognize a
3 marriage in -- contracted in another State where the
4 minimum age was puberty.

5 MR. HALLWARD-DRIEMEIER: Well, they -- they
6 could, and I do believe that if, in the individual case,
7 it was shown that it was because of lack of consent,
8 the -- the State could decide not to recognize the
9 marriage. But with respect to the categorical nature --

10 JUSTICE GINSBURG: It would have to be
11 shown, I think, the presumption would be in such a
12 State that someone age 13 can't consent.

13 MR. HALLWARD-DRIEMEIER: The age 13, I think
14 probably you're right, but if it is a matter of 15
15 instead of 16, that the courts probably would recognize
16 it, especially if, in reliance on their marriage, the --
17 the couple had already conceived of a child, it would do
18 no one any good to destroy that marriage and the stable
19 environment that it might provide for the children, just
20 as it does no one any good -- it certainly doesn't
21 advance the interests of the children of opposite-sex
22 couples to destroy the marriages that provide stability
23 to the children of same-sex couples who are already
24 married under the laws of other States.

25 CHIEF JUSTICE ROBERTS: I think your -- your

1 argument is pretty much the exact opposite of the
2 argument of the Petitioners in the prior case. The
3 argument that was presented against them is, you can't
4 do this, we've never done this before, recognized
5 same-sex marriage.

6 And now you're saying, well, they can't not
7 recognize same-sex marriages because they've never not
8 recognized marriages before that were lawfully performed
9 in other States.

10 MR. HALLWARD-DRIEMEIER: Well, what --

11 CHIEF JUSTICE ROBERTS: You've got to decide
12 one or the other if you win.

13 MR. HALLWARD-DRIEMEIER: No, I don't think
14 so at -- at all, Your Honor. And -- and I think that
15 what's -- what's essential and common between us is that
16 we recognize that the marriage that our Petitioners have
17 entered into is a marriage. It is that same
18 institution, that same most important relationship of
19 one's life that this Court has held out as
20 fundamental --

21 CHIEF JUSTICE ROBERTS: And maybe --

22 MR. HALLWARD-DRIEMEIER: -- in other cases.

23 CHIEF JUSTICE ROBERTS: -- I'm just
24 repeating myself, but we only get to the second question
25 if you've lost on that point already, if we've said

1 States do not have to recognize same-sex marriage as a
2 marriage.

3 So assuming you've lost on that, I don't see
4 how your argument gets -- you can't say that they are
5 not treating the marriage as a marriage when they don't
6 have to do that in the first place.

7 MR. HALLWARD-DRIEMEIER: Well, I -- I think
8 that that actually highlights one of the problems of
9 trying to decide the -- the two cases differently,
10 because, of course, deciding against Petitioners on
11 Question 1, even if the Court decides in favor of
12 Petitioners on Question 2, would forever relegate those
13 marriages to second class status and would raise all
14 kinds of questions whether those marriages could be
15 subjected to laws that are not quite so favorable as
16 opposite --

17 JUSTICE SCALIA: You're rearguing Question 1
18 now? Is that -- is that what you're doing?

19 MR. HALLWARD-DRIEMEIER: No. No. I'm
20 suggesting, though --

21 JUSTICE SCALIA: I thought you were.

22 MR. HALLWARD-DRIEMEIER: -- that even a win
23 on Question 2 does not fully validate our Petitioners'
24 marriages, but certainly we think that the State cannot
25 disregard them -- cannot effectively dissolve existing

1 marriages without a sufficiently important reason for
2 doing so.

3 This Court recognized in the Lawrence case
4 that marriage, procreation, family relationships,
5 childrearing are fundamental aspects of autonomy that
6 same-sex couples can enter into, can choose for purposes
7 of autonomy to the same extent as opposite-sex couples,
8 especially when those couples have done so, have
9 established a marriage, have brought children into --
10 I'd like to give an example, if I could, because I think
11 that it sort of brings home what's really happening.

12 Matthew Mansell and Johno Espejo married in
13 California in 2008. In 2009, they adopted two children.
14 Now, in reliance on the protection that is afforded by
15 marriage, Mr. Espejo was willing to give up his job to
16 give the primary caregiver of their children.
17 Mr. Mansell is the primary breadwinner. His job in an
18 international law firm was transferred from California
19 to Tennessee, and the cost of that transfer for that job
20 for them was the destruction of their family
21 relationships, all that they had relied on in building
22 their lives together.

23 And in support of that, the States offer
24 exactly nothing. There is no reason that the State
25 needs to disregard that marriage. No reason the State

1 needs to destroy the reliance that Mr. Espejo has had in
2 giving up his career to look after their children. They
3 are doing everything --

4 JUSTICE SCALIA: It would have been -- it
5 would have been the argument made with respect to the
6 first question; namely, that the existence of same-sex
7 marriages erodes, erodes the -- the feeling of society
8 regarding heterosexual marriages.

9 MR. HALLWARD-DRIEMEIER: As I said -- as I
10 said before, Your Honor, I -- I don't think that that
11 holds up because opposite-sex couples who have no
12 children, who may be beyond childbearing years, when
13 they move into these States, their marriages are
14 entitled to respect, and yet they are situated precisely
15 as our Petitioners are. Our couples, likewise, have
16 marriages. They may not be able to procreate
17 biologically together, but they are able to procreate
18 through assisted means, through adoption. They bring
19 children into their families just as opposite-sex
20 couples do. And when, in reliance on their own State
21 where they live, they move into these States, that
22 marriage is destroyed.

23 This Court relied on Federalism, the
24 vertical kind, in Windsor to identify something that was
25 highly unusual. In this case, it's horizontal

1 Federalism, I think, that identifies something that's
2 highly unusual. As part of a Federal form of government
3 in which the States are equal, the States have ceded
4 some form of their authority. And one is to -- to
5 recognize that when another State creates an enduring
6 relationship, encourages people to, in reliance on the
7 protections the law affords, to establish families, that
8 it is not that other States are simply free to disregard
9 that which those States have created.

10 In the corporate context, once a corporation
11 is established under the laws of one State, that
12 corporation exists in all other States. Certainly, the
13 families that our Petitioners have established are
14 entitled to at least that same respect.

15 I think that, Your Honor, it is quite
16 interesting to note that in the first argument, Michigan
17 was forced to argue some positions that I think are
18 quite astonishing, that the State could limit marriage
19 to couples who are capable of procreation without
20 assistance or indeed, that it could abolish marriage
21 altogether.

22 It's our clients who take marriage
23 seriously. They took vows to each other and bought into
24 an institution that, indeed, as this Court has said,
25 predates the Bill of Rights, that is the most important

1 and fundamental in their lives, and the State should
2 offer something more than mere pretext as ground to
3 destroy it.

4 JUSTICE GINSBURG: The State's rationale is
5 we -- we treat outsiders the same way we treat insiders.

6 MR. HALLWARD-DRIEMEIER: Well, thank you,
7 Your Honor. They -- they certainly have offered that,
8 but what the State ignores is that these so-called
9 outsiders are already married. The State, it's true,
10 says, well, we have same-sex couples in our State, and
11 we don't allow them to marry, so we're going to -- to
12 treat you the same way.

13 Well, they ignore that our clients have
14 already formed those relationships, and I think that it
15 would be, in terms of the interests that distinguish
16 between the two questions, it's -- it's helpful to think
17 again, perhaps, about heterosexual couples. We don't
18 think that a State could limit marriage to only those
19 couples who are capable of procreation. We don't think
20 it could preclude marriage by women who are 55, but it
21 would be quite a different and distinct constitutional
22 violation for the State to dissolve the marriages of
23 opposite-sex couples when the woman reaches 55.

24 I don't think that that's constitutionally
25 permissible. The States don't do that and, of course,

1 they never would do that, because the essential
2 protection against arbitrary laws is that the majority
3 has to live under the same laws that they would subject
4 the minority to. And there is no chance that the
5 majority would subject themselves to such a law as that.

6 I'd like to reserve the remainder of my
7 time.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.
9 Mr. Whalen.

10 ORAL ARGUMENT OF JOSEPH F. WHALEN

11 ON BEHALF OF THE RESPONDENTS ON QUESTION 2

12 MR. WHALEN: Mr. Chief Justice, and may it
13 please the Court:

14 The Fourteenth Amendment does not require
15 States with traditional marriage laws to recognize
16 marriages from other States between two persons of the
17 same sex.

18 JUSTICE SCALIA: What about Article IV? I'm
19 so glad to be able to quote a portion of the
20 Constitution that actually seems to be relevant. "Full
21 faith and credit shall be given in each State to the
22 public acts, records, and judicial proceedings of every
23 other State." Now, why doesn't that apply?

24 MR. WHALEN: Your Honor, this Court's cases
25 have made clear that the Court draws a distinction

1 between judgments between States and the laws of each
2 State. And the reason in part that the Court's
3 decisions have said that is that otherwise, each State
4 would be able to essentially legislate for every other
5 State.

6 JUSTICE SCALIA: Public acts? It would
7 include the act of marrying people, I assume.

8 MR. WHALEN: My understanding of this
9 Court's decisions as the reference in the Constitution
10 to public acts is that each State's laws.

11 JUSTICE SCALIA: So there -- there's nothing
12 in the Constitution that requires a State to acknowledge
13 even those marriages in other States that -- that are
14 the same.

15 MR. WHALEN: That's essentially correct,
16 Your Honor.

17 JUSTICE SCALIA: Really?

18 MR. WHALEN: Under this Court's decisions,
19 that's -- that's essentially right. There has been
20 under the jurisprudence with regard to Allstate
21 Insurance and Alaska Packers and so forth that
22 there's -- there's a minimal due process requirement to
23 decline to apply another State's substantive law.

24 JUSTICE SCALIA: We -- we can say the only
25 marriages we acknowledge in -- in New York are marriages

1 concluded in New York; is that possible?

2 MR. WHALEN: I'm sorry? I don't --

3 JUSTICE SCALIA: New York can say the only
4 marriages we acknowledge in New York are those marriages
5 that have been made under the laws of New York.

6 MR. WHALEN: Yes, Your Honor.

7 JUSTICE SCALIA: Really?

8 MR. WHALEN: If I'm understanding your -- if
9 I'm understanding your question correctly.

10 CHIEF JUSTICE ROBERTS: What case is that?
11 What case would you cite to support that proposition?

12 MR. WHALEN: I'm not sure if I understood
13 the question correctly, Your Honor.

14 JUSTICE BREYER: He said -- I mean, I
15 already have several cases to read. I might as well get
16 another one.

17 (Laughter.)

18 JUSTICE BREYER: What -- what is the case
19 that holds that the State of New York has the right to
20 recognize only marriages made in New York? And when --
21 if you marry in Virginia, New York has the
22 constitutional right to say, we treat you as if you
23 weren't married, whoever you are.

24 MR. WHALEN: I did -- I did misunderstand
25 the question. My understanding of the question was

1 whether New York could decline to recognize an
2 out-of-state marriage that did not comport with New
3 York's law.

4 JUSTICE SCALIA: That's not what I said.

5 JUSTICE GINSBURG: Because it is clear that
6 if the law of the two States is the same, that was used
7 against Fedder, the State cannot say we won't apply the
8 other State's law, even though it's the same as our own.

9 MR. WHALEN: Even though it's the same as
10 ours?

11 JUSTICE GINSBURG: Yes.

12 JUSTICE BREYER: Like New York. For
13 example, I happen to know has a law that a Federal judge
14 from Washington couldn't marry someone. I mean, you can
15 get married to your own wife, et cetera, but you can't
16 marry two other people, but the District of Columbia has
17 the opposite law. So if I marry two people in
18 Washington D.C. and they happen to move to New York, you
19 are saying that New York doesn't have to recognize that
20 marriage because it doesn't comport with the marriage of
21 New York; is that your point?

22 MR. WHALEN: Yes, Your Honor. I think
23 that's --

24 JUSTICE BREYER: And then what case says
25 that? I think there are a few people going to get

1 nervous about this.

2 (Laughter.)

3 MR. WHALEN: My -- my answer is based on
4 essentially this Court's decision in Nevada v. Hall,
5 because the State's own law sets its own policy and the
6 other State's law would be in conflict with that State's
7 policy.

8 JUSTICE BREYER: But here the policy would
9 be we distrust Federal judges from outside the State.
10 And even that, they would get away with, in your view,
11 because I'm next going to ask, and what is the
12 difference between that kind of policy and the policy
13 that says, well, we don't recognize the gay couple's
14 marriage for the reason that we fear that if gay couples
15 get married, even if they have children and adopt them,
16 and even if we allow people who are not gay to get
17 married and they don't have children, despite all that,
18 this policy, which I've had a little trouble
19 understanding, warrants not recognizing it? Did you
20 follow that question? It was a little complicated.

21 MR. WHALEN: I -- I probably did not, but
22 I'm going to try to answer. I -- I think the underlying
23 focus is not just that there's a policy, but that
24 there's a legitimate policy. And as this Court's
25 questions earlier indicated, I proceed now on the

1 assumption that the Court has decided the first question
2 in the State's favor, and is determined that, indeed,
3 the State's policy to maintain a traditional man-woman
4 definition of marriage is, indeed, legitimate, and we
5 obviously agree that it is, and the Court should so
6 decide. So --

7 JUSTICE SOTOMAYOR: So you don't see --

8 JUSTICE SCALIA: But none of this has
9 anything to do with Article IV, right? None of this has
10 anything to do with Article IV? Full faith and credit,
11 right?

12 MR. WHALEN: It -- full faith and credit
13 provides the background for the -- for the States to be
14 able to assert that, indeed, we have the right to
15 decline to recognize the out-of-state marriage based on
16 the out-of-state --

17 JUSTICE GINSBURG: You're --

18 MR. WHALEN: -- law --

19 JUSTICE GINSBURG: You're making a
20 distinction between judgments -- full faith and credit
21 applies to judgments. You can't reject a judgment from
22 a sister State because you find it offensive to your
23 policy, but --

24 MR. WHALEN: Yes, Your Honor.

25 JUSTICE GINSBURG: -- full faith and credit

1 has never been interpreted to apply to choice of law.

2 MR. WHALEN: Yes, Your Honor.

3 JUSTICE GINSBURG: That -- that's the
4 distinction.

5 MR. WHALEN: Yes, Your Honor. And -- and
6 so, in -- in essence, by deciding whether or not to
7 recognize another State's marriage, the -- the State is
8 deciding whether or not to recognize the other State's
9 law under which that marriage was performed.

10 JUSTICE SOTOMAYOR: I'm sorry. You don't
11 see a fundamental difference between creating a marriage
12 and recognizing a marriage? You don't think there's any
13 difference in terms of the rights of people? If States
14 regularly don't say that the prerequisites to marriage
15 in our State are not necessarily against public
16 policy -- and they have said it for age differences,
17 they have said it for a lot of things, why -- why would
18 the gay marriage issue be so fundamental that that can
19 lead them to exclude a whole category of people from
20 recognition?

21 MR. WHALEN: It goes, Your Honor, to the
22 essence of what I think, in fact, both -- both questions
23 before the Court today get at. And that is that -- the
24 fundamental notion of what marriage is. And -- and let
25 me answer the question, if I could, in this way. The --

1 the comparison between how States have operated with
2 regard to recognizing or not recognizing marriages
3 before, in other words, before there was any idea of
4 same-sex marriage, can't be compared at all to how
5 States are responding across the board with regard to
6 the phenomenon of same-sex marriage.

7 And here's the reason: Commentators have
8 observed that when all States are on the same page about
9 what marriage is, that's where the place of celebration
10 rule evolved from, that every State had the same
11 definition. Every State shared the same interest, and
12 so there was a liberal policy of recognizing marriages
13 from one State to the other because --

14 JUSTICE SOTOMAYOR: You think marriage --

15 JUSTICE SCALIA: That's just not --

16 JUSTICE SOTOMAYOR: -- decrees are closer to
17 laws?

18 MR. WHALEN: I'm sorry?

19 JUSTICE SOTOMAYOR: You think marriage
20 decrees are closer to laws than they are to judgments?

21 MR. WHALEN: I do --

22 JUSTICE SOTOMAYOR: I mean, you need to get
23 a judgment to divorce. And I think that, in my mind,
24 that makes the decree much closer to a judgment than it
25 does to a law.

1 MR. WHALEN: I -- I think that the -- the
2 performing of a marriage is closer to law is because, in
3 essence, when the marriage is performed, all the rights
4 that flow from that State's laws evolve to that couple.
5 And it's different than judgments and so does not
6 deserve the same kind of treatment that judgments would,
7 under the full faith and credit jurisprudence, because
8 of the reason that this Court drawn that distinction.

9 JUSTICE SOTOMAYOR: So what is an order
10 under the Constitution, or --

11 MR. WHALEN: I --

12 JUSTICE SOTOMAYOR: -- an act under the
13 Constitution that's not a judgment?

14 MR. WHALEN: I didn't catch the first part
15 of your question, Your Honor.

16 JUSTICE SOTOMAYOR: How do you separate out
17 the terms that Justice Scalia gave you? They're not all
18 judgments.

19 MR. WHALEN: No. I -- I --

20 JUSTICE SOTOMAYOR: Three different terms
21 were used, or four different terms were used.

22 MR. WHALEN: Acts, records, and judicial
23 proceedings is what I understand --

24 JUSTICE SOTOMAYOR: Acts --

25 MR. WHALEN: -- what I recall and that --

1 JUSTICE SOTOMAYOR: -- records --

2 MR. WHALEN: And my understanding of the
3 Court's jurisprudence has been that that refers to laws
4 and records and judgments of another State. And
5 marriages have always been treated as a conflict of law
6 matter throughout all the years -- in fact, it -- it
7 gives rise to the entire conflict of law doctrine on --
8 on which Petitioners rely here, which is Joseph Story's
9 Commentaries -- Commentaries on the Conflict of Laws.

10 CHIEF JUSTICE ROBERTS: This second --
11 outside of the present controversy, when was the last
12 time Tennessee declined to recognize a marriage from out
13 of state?

14 MR. WHALEN: Any marriage, Your Honor?

15 CHIEF JUSTICE ROBERTS: Any marriage.

16 MR. WHALEN: 1970 is the last one that I
17 could point to. That involved a stepfather and
18 stepdaughter.

19 I would -- I would hasten to add, though,
20 because of where -- what I was starting to describe with
21 regard to how we got to this point, while -- while
22 States were all playing along under the same definition
23 of marriage, what they confronted in an unprecedented
24 fashion was some States changing the rules of the game,
25 if I can extend the metaphor, and so --

1 CHIEF JUSTICE ROBERTS: Well, but they
2 weren't playing along with the same definition. There
3 have always been distinctions based on age and family
4 relationship. So they weren't playing along under the
5 same definition. And still, despite that, it apparently
6 is quite rare for a State not to recognize an
7 out-of-state marriage.

8 MR. WHALEN: It -- it was and is quite rare,
9 so long as we're talking about what marriage is, so long
10 as we're talking about the fundamental man and woman
11 marriage. And that -- and that's my point, is that as
12 soon as States were confronted with the reality that
13 some States were going to redefine marriage or expand
14 the definition of marriage to include same-sex couples
15 for the first time, then it's unsurprising that they
16 would determine, in keeping with their own laws, that
17 they would not recognize those other States' marriages
18 in -- in Tennessee.

19 JUSTICE ALITO: This second question puts
20 both you and Mr. Hallward-Driemeier in a very unusual
21 situation, because, first of all, we have to assume that
22 this first question has been decided against the
23 Petitioner, or we wouldn't get to the second question.

24 So we have to assume that we would hold that
25 a State has a sufficient reason for limiting marriage to

1 opposite-sex couples. And Mr. Hallward-Driemeier
2 acknowledged that a State could refuse to recognize an
3 out-of-state marriage if it has a very strong public
4 policy against that marriage, if it's a polygamous
5 marriage, if it's a -- a marriage of very young
6 individuals.

7 So the question is whether there could be
8 something in between. So there -- there's a -- a
9 sufficient reason to -- for the State to say, we're not
10 going to grant these licenses ourselves, but not a
11 strong enough reason for us not to recognize a marriage
12 performed out of state. I suppose that's possible,
13 isn't it?

14 MR. WHALEN: Well, let me answer it this
15 way, and hopefully I'll -- I'm answering your question
16 in doing so. Let me be clear. The -- the
17 justifications that have grown over time and the
18 requirement for a strong public policy reason to decline
19 to recognize a marriage have grown up around the
20 man-woman definition.

21 Our position is that so long as we're
22 talking about a marriage from another State that is not
23 the man-woman definition, that it is simply the State's
24 interest in maintaining a cohesive and a coherent
25 internal State policy with regard to marriage that

1 justifies not recognizing those marriages.

2 Otherwise, as -- as the question that was
3 put earlier indicated, any resident of the State could
4 go to another State, get married, come back and demand
5 to have their -- their marriage recognized.

6 JUSTICE SOTOMAYOR: That happens already.
7 People who are not permitted to be married in a lot of
8 States go and do that, and they come back to their home
9 States, and the home States follow the rule of marriage
10 celebration.

11 MR. WHALEN: And -- and, again, we're
12 talking about the fundamental distinction between
13 marriage as the States see it, the traditional
14 definition, and the same-sex marriages that other
15 States have --

16 JUSTICE SOTOMAYOR: Well, they have --

17 MR. WHALEN: -- have adopted.

18 JUSTICE SOTOMAYOR: The prerequisites are
19 always a State's judgment about marriage, about what
20 should be a recognized marriage.

21 MR. WHALEN: But, Your Honor, the -- the --

22 JUSTICE SOTOMAYOR: They make exceptions.

23 MR. WHALEN: -- the difference here, I
24 think, is -- is the -- the landscape that we find
25 ourselves in. Tennessee, Ohio, Kentucky, and other

1 States with a traditional definition of marriage have
2 done nothing here but stand pat. They have maintained
3 the status quo. And yet other States have made the
4 decision, and it certainly is their right and
5 prerogative to do so, to expand the definition, to
6 redefine the definition, and then to suggest that other
7 States that have done nothing but stand pat now must
8 recognize those marriages imposes a substantial burden
9 on the State's ability to self-govern.

10 JUSTICE GINSBURG: It is -- it is odd, isn't
11 it, that a divorce does become the decree for the
12 nation? A divorce with proper jurisdiction in one State
13 must be recognized by every other State, but not the act
14 of marriage.

15 MR. WHALEN: I -- I understand the point,
16 Your Honor, and, again, I think it falls within the
17 Court's recognition of a distinction between judgments
18 and laws. And here I think we're dealing only with
19 laws, and, again, it would allow one State initially --
20 literally one State, and now, a minority of States to
21 legislate fundamental State concern about marriage for
22 every other State quite literally. That's -- that's an
23 enormous imposition and an intrusion upon the State's
24 ability to decide for itself important public policy
25 questions and to maintain -- particularly when you're

1 talking about recognition. There -- there is an impact
2 that occurs when one State is asked to recognize another
3 State's same-sex marriage because of the fact that its
4 entire domestic relations policy has been built around
5 the expectation and the presumption that there is a
6 man-woman relationship. That -- in Windsor, this Court
7 recognized and observed that marriage is the foundation
8 of the State's ability to regulate domestic relations.

9 And to give you one concrete example that
10 is -- that it comes up in this case itself. One of the
11 incidents of marriage is the child -- the presumption of
12 parentage that comes with a marriage. And for the State
13 to be required to recognize another State's marriage
14 where there is a child of that marriage in a same-sex
15 situation would fundamentally alter the State's
16 definition of parentage, which I can tell you --

17 CHIEF JUSTICE ROBERTS: Well, I don't
18 understand your argument. I understand your argument
19 that it's a fundamental public policy question about
20 whether you're going to recognize same-sex marriage or
21 not. But I don't see the difficulty in following the
22 consequences of that under domestic relations law as
23 treating a couple as married. And it -- and so the
24 first question is a big step, but after that, it seems
25 to me that the question of how you apply the domestic

1 relations law is pretty straightforward.

2 MR. WHALEN: Well, it -- that's part of the
3 reason why I wanted to mention this in particular
4 because a large part of the Petitioners' focus has been
5 on the impact on the children that are involved.
6 And -- and I think it's important for the Court to
7 recognize that in many States -- and I can tell you in
8 Tennessee that the definition of parent has always been
9 biologically-based. That marital presumption of
10 parentage has its foundation in biology. It has its
11 foundation in the man-woman relationship.

12 So when and if a State were required to
13 recognize a same-sex marriage and so therefore, change
14 the pronouns and change the terminology to apply --

15 JUSTICE SOTOMAYOR: Oh, but you do that for
16 adoptions. What's -- what's the problem?

17 MR. WHALEN: Because --

18 JUSTICE SOTOMAYOR: This -- this is a really
19 big deal?

20 MR. WHALEN: It -- it is a big deal, Your
21 Honor, because you are changing the way the State
22 defines a parent. And in the adoption context, you have
23 to understand adoption and the traditional definition
24 of -- of marriage, they work in tandem. They work
25 together. And as Mr. Bursch described, the objective

1 with regard to marriage is to link children with their
2 biological parents. When that breaks down, then there's
3 adoption. And so yes, there's an effort to --

4 JUSTICE SOTOMAYOR: Do you think that a
5 State can fail to recognize the birth certificate of a
6 particular -- another State?

7 MR. WHALEN: I'm not --

8 JUSTICE SOTOMAYOR: Just that. Do you think
9 the word "records" in the Constitution includes birth
10 certificates?

11 MR. WHALEN: Yes.

12 JUSTICE SOTOMAYOR: So California without
13 any reason, no suspicion of fraud, no anything, could it
14 refuse to recognize another State's birth certificate?

15 MR. WHALEN: I -- I have to admit, Your
16 Honor, I -- I can't speak to that intelligently.

17 JUSTICE SOTOMAYOR: Records to me has to
18 have a meaning.

19 MR. WHALEN: Record has a meaning. It does,
20 Your Honor. The reason that I'm hesitant is that I know
21 that there -- there is disagreement in the -- in the
22 cases about exactly what the impact of that is between
23 whether that just means we have to acknowledge the
24 existence of the record for the evidentiary purposes, or
25 whether the effect of the record has to be acknowledged.

1 And as I stand here I can't speak to it.

2 JUSTICE SOTOMAYOR: I recognize that that's
3 an issue.

4 MR. WHALEN: Yes, Your Honor.

5 JUSTICE SOTOMAYOR: But if a birth
6 certificate were to be a record, don't you think a
7 marriage certificate -- it's an official act of a State.

8 MR. WHALEN: Well, the -- the marriage
9 certificate --

10 JUSTICE SOTOMAYOR: As a record.

11 MR. WHALEN: -- certifies -- and I guess it
12 goes exactly to the point. It certifies the fact that
13 there was a marriage. I think that the laws that
14 allowed that marriage to occur, when they are different
15 fundamentally with the laws of a State like Tennessee,
16 preclude the application of that same principle from one
17 State to the other.

18 With regard to the effect of requiring
19 recognition on a State, I think it's important also to
20 consider the fact that the Petitioners have complained
21 about the impact that it has when they move from one
22 State to the next with regard to the rights that they
23 enjoyed under the marriage as it was defined in New
24 York, for example, or California.

25 Federalism accommodates this situation. It

1 is the strength of our Federal structure to accommodate
2 the very difference of viewpoint and the very difference
3 in approach that this fundamental debate that we're
4 having about same-sex marriage generates. And so it
5 makes all the sense in the world, with respect to that,
6 to allow the Federal structure to do what it was
7 designed to do and to accommodate those different points
8 of view. And that is why we asked the Court to
9 determine that the Fourteenth Amendment does not come in
10 and then disrupt that balance and impose a duty on one
11 State to recognize the laws and recognize the marriage
12 of a different State because of the intrusion that it
13 would have on that State's public policy.

14 JUSTICE KAGAN: Mr. Whalen, just a quick
15 question.

16 MR. WHALEN: Yes, Your Honor.

17 JUSTICE KAGAN: You -- you acknowledge that
18 if the State loses on the first question, then the State
19 also loses on the second question? It's a fortiori?
20 That's --

21 MR. WHALEN: I do, Your Honor.

22 JUSTICE KAGAN: Okay.

23 MR. WHALEN: Yes, Your Honor. If there are
24 no further questions, we ask you to affirm.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 MR. WHALEN: Thank you.

2 CHIEF JUSTICE ROBERTS:

3 Mr. Hallward-Driemeier, you have five minutes left.

4 REBUTTAL ARGUMENT OF DOUGLAS HALLWARD-DRIEMEIER

5 ON BEHALF OF THE PETITIONERS ON QUESTION 2

6 MR. HALLWARD-DRIEMEIER: Thank you, Your

7 Honor.

8 If I may start with the assertion that
9 Tennessee law has always rooted parental relations in
10 biology, that is not so. Tennessee law -- and I'm going
11 to quote from chapter 361.1. -- I mean -- sorry. It's
12 68.3.306 referred to on page 15 of our reply. It
13 provides that a child born to a married woman as a
14 result of an artificial insemination with consent of the
15 married woman's husband, the father is deemed the
16 legitimate child of the husband and wife, though the
17 husband has no biological relationship with the child.

18 Tennessee, in other words, just as it does
19 with adoption, reinforces the bonds of parent and child
20 irregardless of biology, as long as the -- a
21 parent -- or as long as the couple is of opposite sexes.

22 The import of that for real people, like
23 Drs. Tanco and Jesty, is that they, who fell in love and
24 married while in graduate school in New York, as many
25 academic couples, were only able to find a position at a

1 same university in Tennessee. They moved there, and
2 Dr. Tanco has given birth to their daughter in
3 Tennessee.

4 Now, as a result of the nonrecognition laws,
5 when, as occurred last week, their daughter is
6 hospitalized, Tennessee would treat Dr. Jesty not as
7 mom, but as a legal stranger with no right to visit her
8 child, no right to make medical decisions for her.

9 These laws have real import for real people.
10 And although, I think that counsel was suggesting that
11 Federalism and allowing States to make different laws,
12 if you choose to get married in your State, just don't
13 move to ours. That's the cost of Federalism.

14 Well, Sergeant Dekoe and his husband,
15 Mr. Kostura, didn't have a choice. The United States
16 Army moved them to Tennessee, and given the location of
17 Army bases in this country, it's almost a certainty that
18 anyone serving in the Army for any length of time will
19 be stationed at some point in a State that would
20 dissolve their marriage as a matter of State law.

21 I want to get back, Justice Sotomayor, to
22 your comment about categorical and how unprecedented it
23 is, because even in the age of antimiscegenation laws,
24 the States would give effect, for some purposes,
25 interracial marriages such as for purposes of estate,

1 giving out the -- the proceeds after a death or -- or
2 otherwise.

3 Here, however, the State statutes provide
4 that a marriage shall be given no effect for any reason.
5 Even Jim Obergefell's husband's death certificate will
6 not reflect the fact that he was married or the name of
7 his husband. The State has no legitimate interest for
8 denying them the dignity of that last fact regarding his
9 life.

10 The real import of the State's argument is,
11 I believe, this: That even when same-sex couples are
12 married, they are not, in their view, married for
13 constitutional purposes; that the States can
14 discriminate against these marriages even in ways that
15 the Constitution would not permit the States to
16 disregard the marriages of opposite-sex couples.

17 I urge the Court not to enshrine in our
18 Constitution a second-class status of these Petitioners'
19 marriages.

20 Thank you very much.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.

22 Case is submitted.

23 (Whereupon, at 12:29 p.m., the case in the
24 above-entitled matter was submitted.)

25

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