Nos. 14-556, 14-562, 14-571 and 14-574

In The Supreme Court of the United States

JAMES OBERGEFELL, et al., *Petitioners,*
v.

RICHARD HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH, et al., *Respondents.*

VALERIA TANCO, et al., *Petitioners,*
v.

WILLIAM EDWARD "BILL" HASLAM, GOVERNOR OF TENNESSEE, et al., *Respondents.*

APRIL DEBOER, et al., *Petitioners,*
v.

RICK SNYDER, GOVERNOR OF MICHIGAN, et al., *Respondents.*

GREGORY BOURKE, et al., *Petitioners,*
v.

STEVE BESHEAR, GOVERNOR OF KENTUCKY, et al., *Respondents.*

On Writs Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF *AMICUS CURIAE* ALGIRDAS M. LIEPAS IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae is not related in any way to any of the parties in this matter. *Amicus Curiae* is not employed by, or associated with, any of the parties in these cases. *Amicus Curiae* is interested in these cases because he is a Christian, a husband and a father, and, as a Colorado and Wyoming attorney, cares about the people who come to him seeking help.

SUMMARY OF ARGUMENT

This brief presents two arguments: first, that the bans on same-sex marriage do not violate either the Equal Protection or Due Process Protections found in the Fourteenth Amendment to the United States Constitution. Specifically, if the state provisions from Ohio, Kentucky, Tennessee and Michigan ("Respondent States") defining marriage as between one man

[1] Pursuant to Supreme Court Rules 37.3 and 37.6, all parties have consented to the filing of this *amicus curiae* brief: A letter dated March 19th, 2015 from the Petitioners authorizing this brief is being filed with the Court contemporaneously with the brief and a blanket consent for the filing of *amicus curiae* briefs has been given by the Respondents in these cases. No counsel for any of the parties authored this brief in whole or in part, nor did anybody else participate in its drafting. In addition, no one has made a monetary contribution intended to fund the preparation or submission of this brief. All of the costs of preparing and submitting this brief have been paid by Algirdas M. Liepas and his wholly-owned professional corporation, Algirdas M. Liepas PC.

and one woman are declared to be unconstitutional, as the petitioners ("Petitioners") are requesting, the practical effect of such a decision will be to severely restrict the Respondent States as sovereigns from being able to effectively regulate this most important aspect of American society. OHIO CONST. art. XV, §11; OHIO REV. CODE ANN. §3101.01(C); KY. CONST. §233A; KY. REV. STAT. §§402.005, 402.040(2), 402.020(1)(d), 402.045(1); TENN. CONST. art. 11, §18; TENN. CODE ANN. §36-3-113; MICH. CONST. art. 1, §25; MICH. COMP. LAWS §§551.1, 551.2, 551.3, 551.4, 551.271, 551.272. For this reason, the actions of the Respondent States in creating a standard for recognized marriages is not only rationally related to a legitimate governmental purpose, but should be upheld even under increased levels of scrutiny.

Second, the interests of the Respondent States in regulating marriage within their borders is of such paramount importance that it can legally justify not recognizing same-sex marriages from other states. This does not violate the Full Faith and Credit Clause of the United States Constitution. U.S. CONST. art. IV, §1.

ARGUMENT

I. A STATE'S DEFINITION OF MARRIAGE AS BEING BETWEEN ONE MAN AND ONE WOMAN SHOULD BE PERMISSIBLE AND NOT A VIOLATION OF THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT.

A. The Competing Interests

These cases present an almost limitless number of interests that are important and must be addressed. Just from the District Court decisions in the cases below *Obergefell v. Wymslo*, 962 F. Supp. 2d 968 (S.D. Ohio 2014); *Henry v. Himes*, 14 F. Supp. 3d 1036 (S.D. Ohio 2014); *Love v. Beshear*, 989 F. Supp. 2d 536 (W.D. Ky. 2014); *Bourke v. Beshear*, 996 F. Supp. 2d 542 (W.D. Ky. 2014); *Tanco v. Haslam*, 7 F. Supp. 3d 759 (M.D. Tenn. 2014); *DeBoer v. Snyder*, 973 F. Supp. 2d 757 (E.D. Mich. 2014), briefs submitted by the Petitioners and *Amici*, along with the Sixth Circuit's decision in this matter *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), broad and diverse competing interests are identified. I suspect most will find it challenging to fully appreciate how wide and long and high and deep go these interests for the Petitioners and those living in the Respondent States. Consider just the following small sample of interests involved:

- This Court expressed its concern for the well-being of children in its *United States v. Windsor*, 133 S. Ct. 2675, 2694-95 (2013) decision and the parties have presented studies that support same-sex

couples raising children, *Obergefell v. Wymslo*, 962 F. Supp. 2d 968, 994 n. 20 (S.D. Ohio 2014); and other studies discouraging the raising of children by same-sex couples. *DeBoer v. Snyder*, 772 F.3d 388, 426-27 (6th Cir. 2014) (Daughtrey, J., dissenting).

- "Traditional marriage" being between one man and one woman is a concept going back centuries and is a fundamental building block of society, *Loving v. Virginia*, 388 U.S. 1, 12 (1967), while same-sex marriage is a relatively recent invention. *DeBoer v. Snyder*, 772 F.3d 388, 411 (6th Cir. 2014).

- The Bible takes a dim view of homosexuality[2] while a Federal District Court judge calls it a natural expression of a person's sexuality. *Obergefell v. Wymslo*, 962 F. Supp. 2d 968, 988 (S.D. Ohio 2014).

- Citizens professing to be people of faith contend their communities should reflect the collective beliefs of the community and preclude same-sex marriage, *Bourke v. Beshear*, 996 F. Supp. 2d 542, 554-56

[2] *See, for example,* Leviticus 18:1, 5 and 22 (New International Version 2010), which states as follows: "The LORD said to Moses, . . . Keep my decrees and laws, for the person who obeys them will live by them. I am the LORD. . . . Do not have sexual relations with a man as one does with a woman; that is detestable."

> (W.D. Ky. 2014), while others who also profess to be people of faith contend the beliefs of the community should not factor into the issue and same-sex marriage should be allowed. *See*, Brief of *Amici Curiae* President of the House of Deputies of the Episcopal Church, et al. at 34-36, *Obergefell et al. v. Hodges et al*., Nos. 14-556, 14-562, 14-571, 14-574 (U.S.).

Against this backdrop of competing interests we see the Petitioners in these cases seeking to further their interests and the States having to further and protect the interests of not just the Petitioners, but also all other persons residing within their borders.

Your *Amicus* contends the states are in the best position to protect all of the people living within their borders. Failing that, the people acting directly through a referendum is the next best option for taking into account all of these various interests. And the Sixth Circuit is correct in cautioning that Courts should be reluctant to step into this fray.

Be that as it may, from the review of the briefs and the decision below, considerable energy is expended regarding the consequences the Petitioners will experience if the bans on same-sex marriage are upheld, but the impact on State sovereignty if the bans are declared unconstitutional is addressed less. The analysis should start with this Court's decision in *Windsor*. *United States v. Windsor*, 133 S. Ct. 2675 (2013).

1. *Windsor* Viewed From A Different Perspective

In *Windsor*, this Court declared unconstitutional §3 of the Federal Defense of Marriage Act ("DOMA"), 110 Stat. 2419. *Windsor*, 133 S. Ct. at 2695-96. This section of DOMA provided a definition of marriage for Federal law purposes. *Id*. at 2682. It defined marriage as being only between one man and one woman. *Id. See, also*, 1 U.S.C. §7 (1996). In so doing, the Federal law paid no attention to state laws defining marriage. *Windsor*, 133 S. Ct. at 2692. Shortly after DOMA was enacted, several states started to redefine marriages to include same-sex marriages.

This Court in *Windsor* held that the several States determine the definition of marriage and the Federal government cannot substitute its judgment for that of the States. *Id*. at 2693. In *Windsor*, it declared §3 of DOMA unconstitutional, but left intact the remainder of DOMA. *Id*. at 2695.

The practical effect of *Windsor* is that it made clear the Federal government has to look to state law in order to determine issues concerning marriage. In other words, the states play the dominant role in determining what is "marriage." And when the state of New York along with several other states added same-sex marriage to their definition of marriage, the Federal Government was obligated to accept the definition of marriage from these states. Under these conditions, Federal law must adapt to the varying definitions of marriage established by the states, and

not impose its will upon some or all of the states. In short, issues pertaining to domestic relations are the primary responsibility of the states and not the Federal government. Had §3 of DOMA been upheld, Congress would have curtailed, in part, the states as sovereigns from acting in this area. Subject to constitutional limitations and those instances where a Federal interest may be involved, domestic relations law generally represents territory on which the Federal government may not tread.

2. State Sovereignty Over Domestic Relations: Will There Be Anything Left?

Next, if the definitions of marriage in these cases are struck down as unconstitutional, what will remain of the state's ability to regulate the definition of marriage? I submit to you the states will be left with very little, if any, ability to respond to the question "What is marriage?"

To illustrate, assume *arguendo*, the provisions defining marriage in these cases are set aside. This would mean both heterosexual and homosexual marriage could legally take place. This would have come as the result of a small group relative to the population overall, seeking redress through the courts, in order to re-define the definition of marriage to include their interests. This process would be entirely judicial and outside of the legislative and democratic processes of the Respondent States. In

this illustration, the proponents of same-sex marriage will have successfully elevated a relatively recent development concerning marriage to be on par with the definition of marriage that has existed for millennia. Under these circumstances, what will be left of state sovereignty to regulate the definition of marriage?

What power would a state have to resist a challenge from, say, polygamists? Would it be able to prohibit polygamist marriages outright? Could polygamists successfully argue by having more than two adults in the household, they would be more economically viable than a family of, say, just two adults? Would not the more economically viable polygamist family of one husband and five wives do a better job of providing for children than a struggling two-earner gay couple?

Would a state be able to approve some polygamist relationships but not others? For instance, could a state approve heterosexual polygamist marriages, but not homosexual polygamist marriages? Could the state be able to cap the number of spouses in a polygamist setting?

Continuing with the illustration, what if one state decided to remove *all* restrictions from their definition of marriage (*i.e.,* heterosexual, homosexual, polygamous, incestuous, marriage of minors etc.). Would the remaining forty-nine states be powerless to resist?

If the current definitions of marriage enacted by the Respondent States are declared unconstitutional under the Fourteenth Amendment, it is difficult to imagine how any state would then be able to regulate marriage and the extent to which its power would extend. Couple this with the *Windsor* ruling's prohibition on the Federal government venturing into this area, one cannot help but wonder, "What will fill this void?" If we allow our imagination to run wild, it will not be long before it shocks our conscience.[3]

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[3] Judge Feldman in *Robicheaux et al. v. Caldwell et al.,* 2 F. Supp. 3d 910 (E.D. La. 2014) made an interesting, if not somewhat troubling, observation concerning how marriages may appear in the future:

> Perhaps in a new established point of view, marriage will be reduced to contract law, and, by contract, anyone will be able to claim marriage. Perhaps that is the next frontier, the next phase of some "evolving understanding of equality," where what is marriage will be explored. And as plaintiffs vigorously remind, there have been embattled times when the federal judiciary properly inserted itself to correct a wrong in our society. But that is an incomplete answer to today's social issue. When a federal court is obliged to confront a constitutional struggle over what is marriage, a singularly pivotal issue, the consequence of outcomes, intended or otherwise, seems an equally compelling part of the equation. It seems unjust to ignore. And so, inconvenient questions persist. For example, must the states permit or recognize a marriage between an aunt and niece? Aunt and nephew? Brother/brother? Father and child? May minors marry? Must marriage be limited to only two people? What about a transgender spouse? Is such a union same-gender or male-female? All such unions would undeniably be

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In sum, the Respondent States in these cases validly enacted a definition of marriage either by their democratically elected representatives, or directly through a voter referendum, or both. This was done through a valid exercise of Respondent States' power to regulate marriage. If these statutory and/or constitutional provisions are overturned, and the Federal government after *Windsor* is unable to fill the void, how will the Respondent States, or any other state for that matter, ever be able to act to regulate this important area of life for the people living within its borders?

By enacting these definitions of marriage, the Respondent States have exercised their exclusive power as sovereigns to regulate the field of marriage. They have also made a value judgment as to what they believe is best for *all* of the people residing within their borders. Though not mentioned by the Petitioners, it is safe to conclude that the "indignities" they allege are also faced by unmarried heterosexual couples. In short, the Respondent States have made a value judgment of what they think is best for their people and the society in which they live. It appears to your *Amicus* that the fabric of American society is an intricate weave and if it is picked at long and hard enough, it could be reduced to nothing more than a tangled ball of yarn and thread.

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equally committed to love and caring for one another, just like the plaintiffs.

Id. at 925-26.

After balancing the competing interests at issues, I submit to you that the better result is to affirm the Sixth Circuit's decision in this case. Under the circumstances described above, the definition of marriage enacted by the Respondent States is appropriate regardless of the level scrutiny applied, whether it is rationally-related, intermediate or strict. If overturning the Respondent States' definition of marriage results in a substantial and significant loss of a sovereign state's ability to regulate the institution of marriage within its borders, the Respondent States are, in essence, being deprived of a fundamental attribute of their sovereignty. If a state will be facing a substantial loss of sovereignty over a subject as important as marriage and domestic relations, then regardless of the level of scrutiny applied, a state's definition of marriage, should be constitutionally permissible.

II. THE FULL FAITH AND CREDIT CLAUSE DOES NOT REQUIRE THE RESPONDENT STATES TO RECOGNIZE OUT-OF-STATE SAME-SEX MARRIAGES.

If a state may constitutionally provide that marriage shall only be between one man and one woman, then it should necessarily follow that a state must be able to restrict recognition of marriages from other states. The same potential perils that could befall a state if it is unable to define marriage in this way would happen if other states, in essence, redefine marriage for the first state. In the same way a

little yeast works through a whole batch of dough, if one state were to completely re-define the concept of marriage, and all of the other forty-nine had to respect the first state's marriages as legally valid, this would impair the ability of the other states to regulate marriages within their borders. This, too, would result in a loss of sovereignty for the other forty-nine states.

The Full Faith and Credit Clause, U.S. CONST. art. IV, §1, like any other constitutional provision, is not without limits or boundaries. As a general rule, the Court balances the competing interests of the forum state with those of the foreign state. If there exists in the forum state a statute or a public policy, and the governmental interests of the forum state exceed those of the foreign state, then the forum state will prevail. *Nevada v. Hall*, 440 U.S. 410, 421-22 (1979).

In these cases, the Respondent States have enacted a series of statutes and constitutional provisions defining marriage and the definition does not include same-sex marriages. These conflict with the laws of other states allowing for same-sex marriage. In addition §2 of DOMA, which was not before the Court in *Windsor*, should not be affected by that decision and should remain in full force and effect. *United States v. Windsor*, 133 S. Ct. 2675, 2682 (2013). Section 2 of DOMA provides that no State has to give effect to a same-sex marriage from another State. 28 U.S.C. §1738C.

The statutes and constitutional provisions at issue in these cases, along with §2 of DOMA, and the strong public policy provisions described in the previous section, should legally justify the Respondent States in not recognizing the same-sex marriages from other states.

CONCLUSION

This Court should find that the definitions of marriage adopted by the Respondent States do not violate the Fourteenth Amendment rights of the Petitioners. This Court should also find that the Respondent States are not required to recognize marriages from other states that conflict with their definition of marriage. Based on the foregoing, this Court should affirm the decision of the Sixth Circuit Court of Appeals in these cases.

Respectfully submitted,

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