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

IN THE
In the Supreme Court of the United States

JAMES OBERGEFELL, *et al.*,
Petitioners,

v.

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

[*Additional Captions on Inside Cover]*

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICUS CURIAE* PROFESSOR W. BURLETTE CARTER IN SUPPORT OF NEITHER PARTY

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

VALERIA TANCO & SOPHY JESTY, *et al.*,

Petitioners,

v.

WILLIAM HASLAM, GOVERNOR OF TENNESSEE, *et al.*,

Respondents.

APRIL DEBOER, *et al.*,

Petitioners,

v.

RICHARD SNYDER, GOVERNOR OF MICHIGAN, *et al.*,

Respondents.

GREGORY BOURKE & TIMOTHY LOVE, *et al.*,

Petitioners,

v.

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

Respondent

.QUESTIONS PRESENTED

1. Does the Fourteenth Amendment require a state to license a marriage of two people of the same sex?

2. Does the Fourteenth Amendment require a state to recognize a marriage of two people of the same sex when their marriage was lawfully licensed and performed out-of-state?

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THE INTERESTS OF *AMICUS CURIAE*[1]

Amicus Curiae, W. ("Willieta") Burlette Carter, is a Professor of Law at the George Washington University Law School in Washington, D.C. Any reference to the "George Washington University" is for identification purposes only.

Amicus seeks to offer new historical evidence of Gay, Lesbian, Bisexual and Transgender ("GLBT") and American history to this Court. Moreover, she seeks to offer arguments and observations that have not been previously made but are important to this Court's consideration of the questions presented.

Amicus has taught Evidence for more than twenty years and Trusts and Estates for more than a decade. She also taught Civil Procedure for more than a decade and developed a course on Women, Money and Law.

Amicus is the author of a law review article on *United States v. Windsor*, 570 U.S. 12, 133 S. Ct. 2675 (2013). W. Burlette Carter, *The Federal Law of Marriage: Deference, Deviation and DOMA*, 21 Am. U. J. Gender Soc. Pol'y & L. 705-795 (2013). That article was one of the first to consider the decision

I.

[1]Respondents filed a blanket consent for all *amicus briefs* pursuant to Rule 37. Petitioners have granted specific consent for the filing of this brief. . *Amicus* presents this brief on her own behalf and at her own cost. No counsel for a party authored the brief in whole or in part; no counsel or party made a monetary contribution intended to fund the preparation or submission of the brief; no person or entity, other than the *amicus curiae,* made any monetary contribution to the preparation or submission of this brief.

and offered additional historical evidence regarding federal involvement in marriage policy that had not previously been presented to the Court.

Amicus also has in progress a series of books surveying how American newspapers, from 1723 to 1910, dealt with those who crossed gender lines. These works include extensive discussion of sexual minorities and same sex marriages. Section II of this brief borrows heavily from Volumes 1 and 2 of these manuscripts.[2]

And finally, *Amicus* is a lineal descendant of black African chattle slaves who were held in America and whose condition was the driving force behind the adoption of the Civil War Amendments to the U.S. Constitution. [3] As the history of her people has been discussed by others at various times in the national litigation, she seeks to offer fresh perspectives.

SUMMARY OF THE ARGUMENT

The history of American black African chattle slaves (hereinafter "black chattle slaves") is a history intricately tied up with the struggle of African-Americans not only to gain freedom from discrimination in the United States, but also to

I.

[2]"*Strange:" Sexual Minorities, Cross-Dressers and Others in the American News, 1723-1910, Vols. 1 (1723-1792) & 2 (1793-1865) (unpublished manuscript on file with author).*

[3]I refer to these slaves as "American black African" as opposed to "African-American" because at the time many deemed them not to be citizens of the United States, and they were expressly declared not to be so in *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

protect their families and to control their own procreative potential. The chattle slaves were a unique class of servants, in that their *persons* were property. They were not bound by contract (indenture), by virtue of war, or by virtue of conviction of an alleged crime. Not all blacks in America were chattle slaves.

Despite the Fourteenth Amendment's broad language, those financially invested in slavery argued that the Amendment only assured what they termed "political equality," not what they termed "social equality." Worried about the effect of the Civil War Amendments, some states passed legislation to reinforce racial segregation in education, public accommodations, marriage, and other aspects of life.

Both before the nation's founding and at the time of the adoption of the Fourteenth Amendment, Americans knew about sexual minorities and had heard of attempted same sex marriages. They did not, however, understand *why* people would be attracted to a person of the same biological sex. Regularly, newspapers offered alternative explanations and, efforts to avoid punishment, ostracism, or loss of economic advantage, sexual minorities themselves often denied their statuses. The "closeting" came at the high price of personal freedom and denied all members of the GLBT community acceptance of their intimate and family relationships. It also made it difficult for society to learn about and to recognize sexual minorities as a distinct group, suffering from discrimination, and entitled to protections.

The only kind of marriage recognized in the eighteenth and nineteenth centuries in England and

the United States was heterosexual marriage. Women – or those presumed to be so – were regularly "caught" in same sex marriages in England first and later in America. Inevitably, one in the couple lived as a man, and thereby gained for the couple, access to the economic rights that men had. By contrast, gay men were rarely caught living long term as heterosexual couples, although cross-dressing did occur. Gay couples would have lost economic advantages if one posed long term as a wife.

GLBT persons also married the opposite sex, thereby gaining social acceptance and access to the presumed "gold standard" for parenthood, *i.e.*, a biological relationship to children. If they married well, gay men, through coverture, gained title to their wives' property and lesbians gained financial support in a world that offered few means for an unmarried woman to achieve financial stability.

Because they could not be easily identified and could not, therefore, be segregated as a class, white GLBT persons, and especially gay men, occupied every level of economic and social power in America and across the globe. As America lacked firm class structures other than race and gender, gay men were able to ascend to positions of power. The rights and privileges of sexual minorities depended heavily upon whether they were identifiable or belonged to other groups that were oppressed – and upon class.

America did not punish sodomy as had England, but resistance to same sex couplings did exist and vagrancy laws in some locations punished cross-dressing. On the other hand, one finds

remarkable stories of acceptance between the colonial and Civil War Amendments periods.

Because in western nations, same sex marriages were inevitably accomplished by deception in the home forum, the place of ceremony rule did not apply to them. Moreover, such marriages were viewed as against public policy. Stories about same-sex couples from these periods show them struggling against opposition to maintain their relationships and live their lives.

The incidents of marriage were designed around procreation with biology being a key factor in defining who could get married (males to females) and who was a legal parent. Likely because local jurisdictions had the responsibility of supporting mothers and children when families failed, deference was given to them in determining marital incidents. While rooted in stereotypes, marriage's design also offered a regime that shifted the costs of procreation onto private shoulders. This regime penalized men who, due to poverty (or group discrimination which created poverty), could not afford to support a spouse whose economic earning potential would be crippled by 'teens of births and legal restrictions on earning power.

Federal courts that have struck down same-sex marriage bans should have given greater attention to Tenth Amendment, federalism, and court access concerns. These cases involve significant issues of the construction of state law, the taxing and spending powers of the states, potential federal commandeering of state machinery, the state's power as *parens patriae*, the rights of biological parents and their children and the people's right to

decide the direction of their government. Those courts did not properly assess either the reasons for marital incidents nor what costs the incidents were intended to offset. No governmental parties in these cases have the same interests as the highest state judiciaries. Similarly, governmental actors do not have interests identical to those of private citizens who are not represented, but have important interests in this litigation. Indeed, the domestic relations exception has long directed parties of interest away from federal courts and yielded an entirely separate bar that practices primarily in the state, not federal, courts.

This Court should consider separating the question of (1)the essential adult family relationship rights that through history and traditionally have come to be associated with marriage on the one hand, from (2)the allocation of the financial incidents of marriage, the role biology and procreation should play in that allocation, and the execution of the state's traditional role as *parens patriae* on the other. This approach is consistent with conflict of laws principles and federalism, respects the taxing and spending rights of the states and it reflects a faith in the people that the Constitution requires. The Court could also apply dual standards of review, intermediate scrutiny for state choices with respect to the first set of rights, rational basis for the second.

The Court should give direction to the lower federal courts on future cases involving domestic relations that similarly raise significant issues of the interpretation of state law and risk putting federal judges in the position of commandeering the machinery of the state. One option is to direct

federal courts that in all domestic relations cases, they should, on their own motion, consider the federalism question, including the potential impact upon state sovereignty, the viability of the state as a forum for relief, the possibility of certifying important questions of state law to the state's highest court, the other interests that might be overlooked in a federal forum etc. Such an approach would ensure that states can play their proper role under our federalist system and that all citizens receive the promise of due process and equal protection, not merely those who federal judges happen to know and those who federal judges rightly love.

THE ARGUMENT

I. A NOTE ON THE AMERICAN BLACK AFRICAN CHATTLE SLAVES AND THE FOURTEENTH AMENDMENT

During the colonial period, there were four main types of bondage in America. The first type was bondage by contract or "indenture." Indentured servants could be of any race and contracts ranged from a few years to virtual imprisonment The second type of "slavery" was imposed as punishment for crimes or other prohibited conduct. In addition to serious crimes, running away before an indenture term could lead to a term extension as a punishment.[4] Third, there was slavery by virtue of

I.

[4]John Punch, who some have alleged is a relative of American President Barack Obama, received such a sentence. While some have said that Punch received a

being captured as a prisoner of war. And fourth there was slavery by virtue of being of African descent or "black," commonly called Negro or African chattle slavery. By the time of the Fourteenth Amendment, the overwhelming number of black slaves in America were chattle slaves. By the 1850 census, blacks outnumbered whites in many of the southern states.

Chattle slavery first reached the colonies in 1619. A Dutch man o' war pulled into Virginia harbor and sold to Captain John Smith and the Virginians twenty "negars." John Smith, *Generall Historie of Virginia* (1626 and 1632), 126. Later, the British brought the international slave trade to the colonies, giving an exclusive charter to the Royal African Company formed by the Stuarts and led by James, Duke of York. The British were late, for the Portuguese, Spanish, Dutch and others had long participated in the slave trade. The trade could not have continued and prospered without some Africans agreeing to facilitate it, and exercising an intra-group class oppression very similar to that exercised by the British and by people in other parts of the world.

The black chattle slaves were not "immigrants." They did not come to America

III.

---

longer sentence than his two white runaway counterparts *because* he was black, surviving notes of the proceedings provide no reason *why* Punch was sentenced to a longer term. Henry McIllwaine, *Minutes of the Council and General Court of Colonial Virginia, 1622-32; 1670-1676* (Richmond, Colonial Press, 1924) July 9, 1640, 466-67.

voluntarily. They did not come to America to seek a better life.[5]

Lord Mansfield spoke of these chattle slaves in *Somerset v. Stewart* 98 Eng. Rep. 499 (1772). James Somerset was a black male slave purchased in Africa, brought to Jamaica, and then sold again to a Virginian. When his slaveholder took him to England, he escaped. Captain Knowles, upon Stewart's request, captured Somerset. English abolitionists led by Granville Sharp engineered the filing of a writ of *habeas corpus* against Knowles, requiring that Somerset be produced and requiring a hearing as to his release.

Counsel for Knowles argued that slavery was enforceable in England. He noted the fact that "villeanage," had once existed in England, though long since abandoned. Counsel for Somerset argued that slavery was not valid under the common law. 98 Eng. Rep. at 505.

In resolving the matter, Lord Mansfield recognized the difference between chattle slaves and other types of slaves under English law. Although he noted that "Contract for sale of a slave is good here," he then added "[b]ut here the person of the slave himself is immediately the object of inquiry; which makes a very material difference." *Somerset*, 98 Eng. Rep. at 509. He also noted, "Mr. Stewart advances no claim in contract; he rests his whole demand on the right to the negro as a slave . . . ." *Id.* He characterized the claim of Stewart as arguing that

I.

[5]Chattle slavery was also practiced in the Caribbean. Jamaica and Barbados in particular were key midpoints in the African slave trade.

the slaves were "goods and chattles; and as such, saleable and sold." *Id.* at 510.

Slave labor had significant financial value to American planters. Recognizing this fact, Lord Mansfield valiantly sought to avoid deciding the case. He encouraged Stewart to moot it by releasing Somerset, suggesting they agree to an indenture. He suggested that Stewart might seek damages in the Court of Common Pleas. He said the parties might appeal to Parliament on the basis of the commercial value of the case. *Id.* at 509. No one would budge. Indeed, the case was so sensitive that experienced lawyers took a back seat. The lead speaker of the five for Somerset, Francis Hargrave, was arguing his very first case at bar.

Forced to decide the issue, Lord Mansfield determined that black chattle slavery, as practiced in America, was contrary to the law of England. "So high an act of dominion must be recognized by the law of the country where it is used," and "I cannot say that case is allowed or approved by the law of England, and therefore the black must be discharged." *Id.* Of course, ironically, England had accelerated and funded the slavery in America.

Stewart's counsel had argued that if England did not recognize black chattle slavery, it would be deluged with slaves. One of Somerset's counsel, John Alleyne, accurately pointed out that the restrictions on slaves were so severe – as was white people's view of them – that the feared result was not likely. *Id.* at 502.

With their financial investment threatened by increasing runaways and rebellions and, later, facing a growing abolitionist movement, states

economically dependent upon slavery tightened restrictions to maintain the system. These restrictions should be well known to this Court. It was a crime to teach a slave to read or write; to assist a slave or suspected slave to run away; to allow a black person on a ship if he might be a slave. Under Fugitive Slave Acts, if slaves ran away and were captured, they had to be returned to the masters. Under some statutes, runaways could be killed and if a slave were accidentally killed in "discipline," there was no crime. The slaves could not legally marry and had no legal rights to their children. Male chattle slaves had no rights of patriarchy; female chattle slaves or children had no rights to protection. Chattle slaves could not legally resist the sexual advances of masters (of any orientation), nor had they any right to protect loved ones against those advances. Chattle slaves could not talk back to or strike a white person.

In 1662, when mulatto" (mixed-race) children began to appear, Virginia sensed a threat to the slave system. It then declared that the servant status of a person would follow "the condition of the mother." 2 *Statutes at Large, Being a Collection of All the Laws of Virginia, from the First Session of the Legislature* 170 (1823). Other colonies followed suit. This approach not only allowed mulatto children to be offered for sale, it also exempted white men taking liberties with slave women from the obligations of fatherhood, even denying the role, if a white father wished to assume it. Such a rule was not needed, of course, to enslave the children fathered by black male slaves. Some states extended this "condition of the mother" rule not only to black

chattle slaves but also to Indian slaves and other servants.

Jurisdictions and persons dependent upon slavery also began to circumscribe the rights of free blacks. They banned interracial marriages. Free blacks risked being captured and enslaved if they traveled too far from familiar territory. Such kidnappings led some states to pass laws prohibiting the conduct. 1 *A Digest of the Laws of Pennsylvania from the Year One Thousand Seven Hundred to the Sixth Day of June One Eight Hundred and Eighty Three* §165, 433 *(John & Frederick C. Brightly, 11ed rev 1700-1783)* (passed in 1860). The appearance of statutes directed at free blacks demonstrates how much strict racial separation and identifiability of the race, was essential to maintaining the slave system.

All of these restrictions led to a unique domestic relations law for the black chattle slaves. Thus, in *Dred Scott*, Justice Catron referred to Scott's slaves as "parts of his family in name and in fact . . . ." *Dred Scott v. Sandford*, 60 U.S. 393, 527 (1857). Being in the master's "family" gave Dred Scott no legal rights of inheritance, protection, support, or freedom. It simply gave the master a right of control. When black chattle slaves were sold, their masters regularly changed their last names to indicate the new ownership. Thus, *Dred Scott* was legally the property of the Scotts. So it is too with *Amicus*'s family names. After slavery ended, such changes made it extremely difficult for slaves sold away, and their descendants, to find their relatives, and that struggle continues today.

When the Court in *Dred Scott* declared slaves not to be citizens and that slavery was a "domestic relation" and "municipal" in nature vis a vis the federal government, 60 U.S. at 501, it was seeking to shield a state's "right" to slavery from federal control. The Thirteenth, Fourteenth and Fifteenth Amendments were largely intended to reverse *Dred Scott* and to place slavery under *federal* control. The Thirteenth Amendment also freed other bound persons, except those bound by virtue of punishment for a crime.

Acceptance of the new Civil War Amendments was a condition for the return of the states that seceded from the Union. When they could not narrow the terms of the amendments, slaveholding states passed laws to undercut their effects. *The Freedmen*: *Laws in the Southern States Concerning Them*, New York Times, June 10, 1866, 6. They also attempted to couch them narrowly. They said that the Amendments ensured so-called "political equality" but not "social equality." They may have borrowed the notion from *Dred Scott*. *Compare Dred Scott*, 60 U.S. at 502 (distinguishing political and social equality). James Doolittle, a year before the ratification of the Fourteenth Amendment, described the schools of thought on equality. He stated that the John C. Calhoun school held that Negroes had no rights the white man was bound to respect and that the Charles Sumner school held that "negroes . . . have not only a right to their liberty and person and property, but a right to be placed upon an equal footing of political equality, including the right of suffrage and to hold office, and as a matter to follow

inevitably social equality." Cong. Globe, 40th Cong. 2d Sess. 1379 (1868).

As a result of the Civil War Amendments, the slaves were able to marry each other. Theoretically, they also had the right to vote and to protect their children and families. But a broad recognition of black citizenship rights took more than 100 years and followed a violent campaign against blacks and others who fought for civil rights under law. Fifteen years after this court determined that racial segregation violated the equal protection clause *Brown v. Board of Education*, this *Amicus* and other children like her were still attending segregated elementary schools in South Carolina and other states. *Brown v. Board of Education*, 347 U.S. 483 (1954). Race relations have changed by leaps and bounds since the time of the Fourteenth Amendment, but still today, race remains a salient decider of rights and privileges and the identifiability of blacks as a minority remains and important factor in that allocation.

II. BEFORE THE FOURTEENTH AMENDMENT, AMERICANS KNEW ABOUT SAME SEX MARRIAGE ATTEMPTS, BUT MOST NOT UNDERSTAND *WHY* PEOPLE WOULD WANT TO MARRY SOMEONE OF THE SAME SEX[6]

I.

[6]Most of the factual discussion and analysis of the sources relating to early same sex marriages and history of GLBT persons comes from the author's unpublished manuscript. W. Burlette Carter "*Strange*:" *Sexual Minorities, Cross-Dressers and Others Outed in the News*,

It has been widely assumed that early Americans could not have conceived of same-sex marriages. The contrary is so. [7]

In 1724, the *New England Courant* reported that two women had tried to marry in England according to the "Rules of the Fleet," but onlookers realized that they were both women, one dressed as a man.[8] They informed the priest, who denied a marriage certificate because they were both of the same sex. The entire text of the *Courant* article reads:

III.

1723-1910, Volumes 1 and 2 (unpublished manuscripts, February 28, on file with author).

[7]The facts in this section are taken from the author's unpublished manuscript, *"Strange," Sexual Minorities, Crossdressers and Others "Outed" in the American News, 1723-1910*, Vols. 1 and 2. The newspapers referenced here are self-authenticating under Federal Rule of Evidence 902(6). Scanned copies of them are admissible over best evidence objections through Rule 1003, absent some evidence that the copy does not correctly reflect the text. Over hearsay objections, statements in them are admissible as statements in ancient documents under Rule 803(16), even at multiple levels. Depending on the nature of the statements, they might also be admissible through a combination of 803(16) and other hearsay exceptions.

[8]Fleet Marriages were clandestine marriages performed in or in the vicinity of Fleet Prison. Until the 1753 marriage act imposed strict ceremonial requirements, these marriages were sometimes deemed valid under British law, although not fully compliant.

LONDON, APRIL 13

> Yesterday was 7-Night the following merry Adventure happen'd within the Rules of the Fleet; Three Women came in Cloaks to a Publick House and demanded a private Chamber, and a minister being sent for, the eldest of the three Women aforesaid undressed herself and put on Man's Apparel, and was presently married to one of the other Women, and demanded a Certificate of such their Marriage. The People of the House seeing no Man go into the Room, and suspecting a Trick, consulted with the Parson, who refused his Certificate till the inspected Person was search'd, who appear'd to be the eldest of the three Women. Its [sic] alleged the aforesaid Woman was in Debt, and made use of this Strategem to disappoint her Creditors.

London, April 13, New England Courant, August 24-31, 1724, 2. The *Courant* was then "[p]rinted and sold by Benjamin Franklin" of Union Street, Boston, Massachusetts. Franklin was then eighteen.

In 1747, the *Boston Weekly Post-boy* ran a story about Englishwoman Mary Hamilton who was arrested and charged under vagrancy statutes for repeatedly marrying women. The *Baltimore Patriot and Mercantile Advertiser* reached back to pick up the same story in 1826. "Friday, November 28,"

Boston Weekly Post-boy, February 16, 1747, 1; "Ludicrous Crime," *Boston Patriot and Mercantile Advertiser*," December 28, 1826, 2.

Readers of the *New York Evening Post* in 1749 would have learned of a female silver seller in England, dressed as a man, who was charged with theft. Allegedly, after her arrest, she ingratiated herself to amused police by bragging about marrying a series of women, and, as she claimed, stealing "everything but their virtue." *London, July 11, 1749*, New York Evening Post, October 2, 1749, 2.

In 1751, readers of the *Boston Evening Post* and the *New York Evening Post* would have known about a Grenadier and her "wife" who were arrested and jailed in France "having been discovered to be of the same sex. The papers would express astonishment that both parties knew their sexes before the marriage. *Breda (in Flanders) May 21*, Boston Evening Post, August 19, 1751, 1; Breda (in Flanders) May 21, *New York Post*, August 26, 1751, 2.

In 1759, readers of the *Boston Evening Post* would have learned about an unnamed female soldier was discovered to have a "wife" in Scotland. *London*, Boston Evening Post, April 13, 1759, 2. In 1760, readers of the *New York Gazette* and the *New Hampshire Gazette* would have known about Sally Paul, arrested for marrying a woman while posing as a man and prosecuted in England on vagrancy charges. *London, April 1760*, New Hampshire Gazette, July 4, 1760, 2; *London, April 1760*, New York Gazette, June 23, 1760, 1. In 1766, readers in at least four states would have seen the story of James How a/k/a Mary East and his "wife." *E.g.*,

Entertainment, The Female Husband . . . , The New York Gazette, October 20, 1766, 2; *From a Late London Paper . . . ,* Newport Mercury, October 27-November 3, 1766; *The Female Husband . . . ,* Connecticut Gazette, December 5, 1766, 1; *The Female Husband . . . ,* Boston Post-boy and Advertiser, November 17, 1766, 1.[9] In 1786, a year before the Constitution was drafted, readers in three states learned that in France, a person, thought to be a male, was later discovered at death to be anatomically a female – and that "she" had once been married to a woman. *Paris*, February 14, New Haven Gazette and Connecticut Magazine, April 27, 1786, 84; *Paris,* February 14, Essex Journal, May 17, 1786, 2; *Paris*, February 14, Daily Advertiser, April 20, 1786, 2.

While American papers reported on prosecutions for consensual sodomy in other countries, they contain very few references to arrests or prosecutions in America, confirming that this country took a different approach than did England. *Lawrence v. Texas*, 539. U.S. 558, 568, 123 S. Ct. 2472 (2003). But there are a few references to marriages presumed to be between men. For example, in 1787, the very year that the Constitution was drafted, American readers in four states would have seen the story of Francis Suirs and Mary Bessom. French authorities declared their eighteen-month marriage "null and void" for want of the opposite sex. The papers reported that Bessom claimed "he" was brought up as a girl and claimed

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[9]Stories about female couples were often described as "Entertainment," but most commonly in the nineteenth century

not to know (what papers called) "his real sex." Said the article (apparently paraphrasing the letter source which contrasted the approach to earlier times), "the illegality of the contract is simply pronounced null and void, and the parties permitted to make each, a more suitable match." *E.g.*, New Hampshire Spy, July 10, 1787, 298; *Foreign Advices, London, April 20*, New York Packet, July 13, 1787, 2; *Extract of a Letter from Islington, April 11*, Pennsylvania Packet and Daily Advertiser, July 13, 1787, 2; *England*, *London, April 20*, Vermont Gazette, July 30, 1787, 2; *June 2,* Vermont Journal and Universal Advertiser, August 27, 1787, 1. (Although unclear, it may be that this couple was actually seeking the dissolution of the marriage. The story demonstrates the sexual minorities couples faced.)

Some of these cases may have involved transgender individuals, but while important today, in historical context, the fact is not material to society's characterization of the marriage. Biology – and social construction around it – was destiny and all of these marriages would have been considered "same sex" marriages. But arguing against transgender status for all are the reasons that lesbians would have cross-dressed as they sought to marry other women. In these days, women were deprived of the basic right to earn a living. Society prescribed that a free woman's way to economic stability was to *marry a man*. That not being desirable, cross-dressing afforded a lesbian family the opportunity to have one person who could take the jobs men could take and earn what men could earn. Many of these women performed heroically in

the military and in other difficult and sometimes unpleasant jobs. For single women, cross-dressing also offered the opportunity to meet more women. Some stories indicate that the brides did not find out that their husbands were "female" until after the wedding.

After the ratification of the Constitution in 1789, American papers continued to reference same sex marriages. In 1794, in a "farrago" (a confusing story) published in *The Eagle* – a newspaper loosely associated with Dartmouth College, did so. The farrago makes fun of gay men who pretend to be heterosexual and court women, when in fact they have no interest. It states that if such a man were to marry, the result would be a marriage between two women and continues, "A contract in matrimony between two females, is absurd and not good in law." *E.g.*, *From the Eagle; the Farrago, 'My Aunt Peg'*, Hartford Gazette, March 13, 1794, 1. Between 1794 and 1801, the farrago appeared in newspapers in at least five states. *From a Boston Publication Entitled the Tablet, the Farrago, 'My Aunt Peg*,' Federal Intelligencer and Baltimore Daily Gazette, November 14, 1795, 1; *From the Eagle; the Farrago. No. XVI*, Massachusetts Spy, March 13, 1794, 1; *From the Eagle; the Farrago. No. XVI*, New Hampshire Journal or Farmer's Weekly Museum, March 14, 1794, 1; *My Aunt Peg*, Middlebury Mercury, November 14, 1804, 4.

Though tongue in cheek, the farrago is extremely important. It confirms that in 1794 people knew about same sex marriage attempts and that marriage was generally deemed to be exclusively heterosexual. It also tells us what we have long

known: that gay men were marrying women. Heterosexual marriage offered community acceptance through self-suppression and conformity and, if a man married well, he also gained, through coverture, possession of a wife's financial assets and the ability to exploit an established family's name and resources. Through marriage, men could establish a biological link to children. Women who revealed that their husbands were seeing other *men* risked social embarrassment and their own financial security and that of their children.

Similar stories appear in newspapers into the 1900s. Overwhelmingly, American newspaper reports of same sex marriages involve women. The reason is likely, as stated earlier, that women had more to gain through pretending a legal heterosexual marriage. But notably, in 1834, newspapers reported the marriage of J. Munson and Henry Allen, who lived in Maine. The two were successful businessmen, one working for the other. Failing to get Allen's father's support, the two went to Canada to marry. Allen dressed as a woman for the ceremony. These two were clearly not seeking financial gain. Whether they ever returned to the United States is unknown, but their flight to Canada suggests that they had to go where they were not known in order to marry. The story was carried in at least six American states, some saying that "it savors not a little of old romance." *E.g.*, *Marriage Extraordinary*, Baltimore Patriot & Mercantile Advertiser, March 27, 1834, 2; *Marriage Extraordinary*, Adams Sentinel, March 34, 1834, 3. The distribution of the story confirms that some viewed the matter as a private choice, but of course

here, the state did not have to provide financial benefits. And it may also reveal to some degree the hand of the GLBT community in the newspaper business.

III. AMERICA HAS A LONG HISTORY OF DISCRIMINATION AGAINST SEXUAL MINORITIES

Lacking contrary evidence, this Court concluded in *Lawrence v. Texas* that "there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter." *Lawrence v. Texas*, 539 U.S. at 568. That appears to be true of sodomy, however, the country has had a long history of discrimination when behavior other than sodomy is considered and when sexual minorities other than gay men are included.

Throughout the eighteenth and nineteenth centuries, there are numerous stories of resistance to couples living together as married people would – usually women or transgender persons – even when the state was providing no support. For example, in 1842, a person named McGarahan was arrested in Albany, New York for marrying a woman. *A Curious Case of Female Deception*, Ottawa Free Trader, December 9, 1842, 2. And, in 1854, six years before the start of the Civil War, Alfred Guelph, biologically female, was separated from "her" wife upon the wife's father's demand. *A Female Husband*, Evening Star, November 14, 1853, 1. While these are too numerous to name within the Court's page limits, one finds stories of couples running from place to place in order to be together and to escape those who

preferred traditional marriages. Parents often objected because any ostracism that fell on their children also fell on them. Sometimes, they grieved the possible loss of an opportunity for grandchildren and, especially when female couples were involved, parents were upset that the "husband" could never support their daughter financially.

Moreover, both the English and early Americans used vagrancy statutes to enforce gendered clothing requirements. George Kelf was arrested in England in 1726 for wearing men's clothes. *Foreign Affairs*, American Weekly Mercury, October 6-13, 1726, 2-3 (citing the *London Journal*, July 2, 1726). In 1822, a young person named "Benjamin" was arrested in New York for wearing a woman's dress and a green bonnet. Middlesex Gazette, December 19, 1822, 3. In 1829, two people who offered their names Anne Thorogood and Emma Shepherd were chastised for "masquerading" in the "wrong" clothes. *Bow Street Masquerading*, Salem Gazette, October 9, 1829, 2. Emma Snodgrass and Harriet French were arrested in 1853 for wearing men's clothes. *Women in Male Attire*, Richmond Dispatch, January 6, 1853, 2. In 1858, a man was arrested at the Springfield, Massachusetts train depot for wearing female clothes. *A Mysterious Visitor*, Lowell Daily Citizen & News, May 12, 1858, 2 (reporting story from Springfield Republican, May 11, 1858). And, in 1870, hotel guests reported an unnamed "Man," another guest, who put on "female attire" and went out at night. By the time police sought him out, he had disappeared. *Not Exactly a Ghost but Something Not Easily Explained*, Morning Republican, January 29, 1870, 1.

An early English source of these cross-dressing vagrancy penalties appears to be the "Black Act," designed originally to nab poachers who disguised themselves by painting their faces black. *See P. Rogers, The Waltham Blacks and the Black Act*, 18 Historical J., 3 (1974), 465-486 and citations therein.[10] In her biography, Sally Paul reported that the act was used to prosecute her for marrying a woman. *See* Sally Paul, *The Life and Imaginations of Sally Paul*, (London, S. Hooper, 1760), 43; *see* also discussion, of Paul at p. 17.[11] Because a cross-dressing female husband gained access to a bride's property under the doctrine of coverture, she not only had violated the act, she also had committed fraud.

IV. HISTORY SUPPORTS A LIBERTY AND PRIVACY INTEREST IN THE TRADITIONAL AND ENDURING FAMILY RELATIONSHIPS SHARED BY MARRIED ADULTS

It goes without saying that originally, the founders would not have approved of same sex marriages. Such marriages were not consistent with the common law. Moreover, the structure of marriage in earlier times offered gay men few financial or social benefits, and there was no

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[10]Rogers notes that the act, was adopted 1722, was extended several times. *Id.*

[11]A rare copy of Paul's book is digitally available on Rice University Fondren Library Website, Digital Scholarship Archive (March 3, 2015, 8:00 a.m.), http://scholarship.rice.edu/handle/1911/26764.

alternative model for publicly acknowledged intimacy. And finally, as *Amicus* has shown, many people would not have understood *why* people would wish to marry someone of the same sex.

Advocates have offered different theories under which this Court might find a right to same sex marriage. Some plaintiffs here have suggested that this Court apply an "emerging awareness" theory that takes into account new knowledge about sexual minorities that most early Americans did not have. Deboer Pltf. Merits Brief at 58. *Amicus* finds emerging awareness doctrines a bit disconcerting as a general rule. First, identifiable minorities often are blocked from political power and, therefore, cannot control "emerging" public conversation about themselves. The theory seems to assumes that the "emerging awareness" will always be helpful. Second, *whose* emerging awareness matters. If it is merely the emerging awareness of federal judges, then the people have no say, and once again, the notion poses risks. And finally, *amicus* doubts that *Loving v. Virginia,* 388 U.S. 1 (1967), was not the product of such, although some other gains like school desegregation might have been. Miscegenation had been with America since the first slave was dragged off a ship. Here there is no similar extensive record of long-term state recalcitrance because the GLBT community, occupying levels with race and gender privileges, went in and out of resistance usually as economic interests dictated. Identifiability made blacks more cohesive as a target and as a class and thus economic interests more consistently pointed toward resistance. Claims that gays and lesbians lacked political power are

demonstrably untrue. Nor was the resistance to same-sex marriage driven primarily by discrimination in *amicus'* view. And finally, unlike the case in race, the alleged bevy of financial interests being denied through marriage (and the notion is questionable) were not designed so that one group could oppress the other. *See, e.g.,* discussion of *Loving* and *Naim* at p. 34. Thus, application of emerging awareness doctrines as a general theory of discrimination for all minorities would be a huge mistake.

More appropriate would be to use emerging awareness theories to embrace the relationships as valid first, and then to recognize that the GLBT community cannot fully have privacy and liberty and cannot participate fully in public acts of citizenry until they have security in their private, intimate relationships. Unlike being black, gay and lesbian sexual orientation, at least, is necessarily *relational*. *The Federal Law of Marriage*, 771-791.

At a minimum then the court *must* require each state to recognize the GLBT adult family relationships in *some* form. But at the most it could only require every state to recognize *marriage* as embracing those aspects that have long been known by history and tradition as essential to marriage, such as recognized intimacy, public recognition as a family, inheritance, spousal shares regarding marital assets etc. These seem to be best characterized as a matter of due process and privacy under the Fourteenth Amendment. But it would have to leave to the people decisions relating to the contours of incidents that can be altered more frequently and, as well, *parens patriae* jurisdiction.

In other words, the Court needs place GLBT couples them in a position to openly participate without risking their families or jobs. It should not fight the battles for them. A theory that "marriage" is better than other alternative options would be based on the view that if they are not "married" they will be more easily targeted and that other approaches lack the national uniformity needed to give the desired protection. But even if a state were to abandon marriage, the rights would still exist. The Court could also apply dual standards of review, a stricter standard for the traditional and enduring family rights, rational basis for the rights based on statute.

The Court might be surprised to find that a 1778 case from Lord Mansfield is instructive on the question of privacy. *DaCosta v. Jones* involved the Chevalier D'Eon, a French diplomat who sought refuge in London after he grew out of sorts with the French government. Apparently, he had occasionally dressed as a woman and, after his dispute, someone began to release that information. Spotting an opportunity, Londoners began to draw insurance polices the value of which depended upon the Chevalier's *true* sex.

One participant claimed he had proven the Chevalier was a woman, but the other party would not pay up. A lawsuit was tried before Lord Mansfield. In *Da Costa v. Jones*, 2 Cowp. 729 (1778), Lord Mansfield declared that such wagers by outsiders on the personal life of a third person were void. The case is known for establishing the rule that one who purports to be an insurance policy owner must personally have an "insurable interest."

But A*micus* suggests that the case also recognizes a right to privacy. Lord Mansfield stated, "The question is upon the sex of a person, to the appearance of all the world, a man; and who, for reasons of his own, thinks proper to keep his sex a secret." He said that the case was "indecent in itself and manifestly a gross injury to a third person; therefore, ought not to be endured." He spoke of the Chevalier being subjected to ridicule and called the affair "monstrous." 2 Cowp. at 736. And so, *DaCosta* became a part of the common law. If Lord Mansfield could have imagined such a notion of privacy in 1778, surely the founders and those ratifying the Fourteenth Amendment could have.

V. THE TENTH AMENDMENT AND FEDERALISM, TRADITIONAL DEFERENCE TO STATE TAXING AND SPENDING POWERS, AND JUDICIAL ACCESS CONCERNS REQUIRE THAT STATES HAVE A FAIR OPPORTUNITY TO DECIDE THE ALLOCATION OF THE INCIDENTS OF MARRIAGE AND TO EXERCISE THEIR *PARENS PATRIAE* POWERS

A. The People Have A Right To Prioritize Both Natural Procreation And Preserving Relationships With Biological Parents In Marriage Policy

The United States has long resisted social regimes that would fund childbirth with tax dollars

irrespective of marital status. Instead, it has insisted that private parties bear most of the costs, and it has used marriage to accomplish that goal. Those federal courts that have struck down marriage bans have summarily interpreted state laws as not designed to support natural procreation. *Amicus* suggests that those courts have misunderstood both the costs of procreation and the choices states are making. Nor is the rejection of procreation necessary to provide plaintiffs with the relief to which they are entitled.

A married couple's financial sacrifice in childbirth is not merely the time spent giving birth. It also is the financial opportunities lost as the couple plans, or is surprised by, one child, and then another and perhaps another. It is not possible for a woman – married or unmarried – to maintain optimal earning power through childbirths (as compared to nonpregnant persons). Rightly or wrongly, the law incentivizes naturally procreating women to marry merely by failing to provide another support alternative. Moreover, marriage ties the biological parent to the child. Some, like Judge Richard Posner, famously, have questioned this balance as appropriate, but the choice is the people's to make. Others would think it odd to equate a couple who could become pregnant from one thoughtless, unprotected fifteen minute encounter (and thereby cost taxpayers), to a couple who in 365 straight days of tumble-out-of-bed unprotected sex – even with multiple partners – would still not face the financial obligations of an unplanned pregnancy, a partner with suddenly reduced earning potential, and the need for a bigger apartment and an educational fund.

Pregnancy and childbirth also yield substantial medical bills even if a couple has insurance. These costs are not deductible for most people, and, in marriage, they are borne by the couple. By contrast, couples and individuals who adopt receive a federal tax *credit* of more than $13,000 to offset the cost of the adoption, including attorneys fees and travel. 26 U.S.C. §23. They also can better manage income losses because the child only comes when they are ready for it.

Consider also that, in the United States, benefits are tied to work. If spouses take turns losing income to care for a child, then neither one progresses forward and both could end up in lower level positions. At least one party usually needs a consistent work record in order to maintain healthcare, retirement, and other benefits for the family.

Moreover, the heterosexual couple is biologically imbalanced; thus, only one person takes the economic hit repeatedly. the party who does not ends up with all of the economic power in the family. The overwhelming majority of states in the U.S. – and those in these cases – are "separate property states," that is each spouse owns what he or she earns. Marital incidents have been used to adjust for that biological imbalance, although many argue, the power during marriage has not shifted enough. Surely same sex couples also allocate childcare, but the impact of multiple pregnancies from sex, tends to be a uniquely heterosexual problem. And when families fail, it becomes a societal problem.

Amicus has dealt in *The Federal Law of Marriage* with how the various federal benefits of

marriage (that is, before the federal government rearranged them irrespective of the states after *Windsor*) actually are tied to procreation. W. Burlette Carter, *The Federal Law of Marriage* at 767-779. She also criticized the use of the GAO report to assert the alleged financial benefits of marriage are in the thousands. S*ee Carter*, *Id.* at 776-777. One can find similar provisions giving marriage benefits at the state level and similar logic to support many of them.

The federal courts, in thinking about benefits, seemed to weigh same sex marriage against heterosexual marriage. That is not the balance states have historically struck. In deciding marriage's benefits, states have tended to weigh *married* procreators against *unmarried* procreators. A decision to ignore channeling procreation and tying biological parents to their children goes against long established history and tradition and may even result in violations of the rights of biological parents. And once the link between procreation and marriage is abandoned, it is fair to ask why *unmarried* parents should not receive a larger share of the state's coffers. The notion marriage is so financially attractive to heterosexual couples that anyone but deadbeats would forego it was made up in a lonely lawyer's mind.

That marriage is available to older persons who cannot have children does not defeat its general effect. No system is perfect. Moreover, second marriage spouses often do not benefit financially from marriage. Indeed, older spouses dependent on social security benefits lose them when they marry, Law assumes there is a new supporter in town.

Older spouses often use prenuptial agreements or other waivers to override some of the marital incidents that would shut out children of a prior relationship from support or inheritances.

B. The Actions of the Federal Courts in Same Sex Marriage Cases Raise Grave Federalism Concerns

In 2011, this Court underscored the importance of federalism to our system of government. It held that federalism is so important that an individual American, not merely a state, has standing to raise it. *Bond v. United States*, 131 Sup. Ct. 2355, (2011). The national cases raise difficulties under federalism principles.

Federal courts have proceeded to interpret complicated questions of state law without giving state courts as much as a glance, except to issue injunctions. They have risked commandeering the machinery of the state. They have declined to stay proceedings to facilitate appeals, actions that might have been simple courtesies in other contexts. Their actions have created massive confusion among various state actors facing conflicting signals within the state and from state and federal actors and have interfered with the ability of states to control their employees. They have risked interfering with state taxing and spending powers by directing the award of marital incidents funded from state coffers. Their processes have also imposed substantial litigation costs on states. And as I discuss below, controversial questions that involve the rights of other parties have been overlooked.

C. The Actions of the Federal Courts in Same Sex Marriage Cases Raise Court Access and Right to Be Heard Concerns

Since 1857, this Court has directed contestants in domestic relations cases to take their claims to state courts. *Barber v. Barber*, 62 U.S. 582 (1859). It is a judicially created exception. *Marshall v. Marshall*, 547 U.S. 293 (2006). As a result of this Court's insistence, an entire private bar practicing almost exclusively in *state* courts as grown up. To justify the ban on bumps and baby carriages, federal courts have claimed that states are "specialists" in family relations law. *Ankenbrandt v. Richards*, 504 U.S. 689, 700 (1992). But when those, whom federal judges knew and rightly loved, called upon them, federal judges proclaimed a newfound expertise.

Both married heterosexual persons and unmarried heterosexual parents have an interest in these cases. Federal courts are reallocating state tax dollars and determining how states will govern procreation and parenting. State courts might well have considered these persons' perspectives; they are well accustomed to balancing them. But these persons have no discernable advocates in the federal cases even though, married women and unmarried parents have faced discrimination in marriage policies for as long as same sex couples have. Moreover, with respect to claims of sexism asserted by some, the largest group that has suffered from historical sexism in marriage is married heterosexual women. Their interests are not the

same as lesbian women and nor of gay men (who benefitted to a large degree from sexism and may lack standing on the issue.) Nor can the alleged sexism in marriage be assessed by only looking at the needs of same-sex couples versus opposite sex ones.

Today, in state cases, the rights of these groups are being litigated as some same sex couples and their supporters seek to overturn the presumption of biology in parenthood. *Compare* A.H. v. M.P., 447 Mass. 828; 857 N.E.2d 1061 (Mass 2006). (refusing to ignore biological tie and give parental rights under a "de facto parent" doctrine.) States disagree on reproductive technologies, some not having embraced them. Drafters of uniform laws seek to recast family relationships in the guise of noncontroversial legislation.

Even in *Loving v. Virginia*, the Virginia state courts had a full opportunity to express the motives and reasoning behind their approach, no matter how flawed. In fact, it had that opportunity *twice*. *See Naim v. Naim*, 197 Va. 80, 87 S.E.2d 749 (1955) (upholding ant miscegenation statute), *remanded* 350 U.S. 981 (requesting clarification from Supreme Court of Virginia), *aff'd* 197 Va. 734; 90 S.E.2d 849 (1956) (refusing to clarify) *appeal dismissed* 350 U.S. 985 (1956) (for want of properly presented federal question).

VI. THE RESOLUTION OF QUESTION 2, DEPENDS ON THE RESOLUTION OF QUESTION 1, BUT IF STATES MUST RECOGNIZE FOREIGN MARRIAGES, THEY NEED NOT PROVIDE THE SAME

INCIDENTS AS THE PLACE OF CEREMONY AND THEY RETAIN THEIR *PARENS PATRIAE* POWERS

Question 2 asks whether one state must respect the same sex marriages licensed in another state. Historically, the "place of ceremonies rule" which holds that a marriage is good if good where celebrated was not applied to same sex marriages because those marriages were either not good in the place made or were considered against public policy.

One could argue that our understandings have changed but there is another wrinkle. The place of ceremonies rule has never required that the *incidents* of marriage also be applied even if the marriage was recognized and it has never overcome *parens patriae* powers. Joseph Story and Melvin Madison Bigelow, Commentaries on the Conflict of Laws, Foreign and Domestic (1834), 184-226 (discussing marriage); *id.* at 227-274 (discussing incidents to marriage, *e.g.*, property rights etc.) and cases therein. *See also* cases cited in Carter, *The Federal Law of Marriage*, 719-20 & nn. 42-43. The reason for this is probably because in both England and America the locality – the parish, community etc. – was financially responsible for providing those incidents and for taking care of children without stable parents. Thus, if this Court finds a constitutional right to marriage, the incidents of the marriage and decisions falling with a state's *parens patriae* powers would still fall within local control.

VII. CONCLUSION

At a minimum, this Court should require all states to establish a procedure for recognizing same sex adult family relationships. It might find that the procedure should be exactly the same afforded to similarly situated others, whatever it is called. However this court decides, states will must retain the ability to determine how marital incidents will operate within marriage, to what groups they will apply, to consider procreation and biology in that process, and to exercise their *parens patriae* powers. The Court should instruct the federal courts to conduct a specific federalism inquiry in domestic relations cases to determine whether or not allowing the case to proceed will create unnecessary entanglement in state operations, require the resolution of complex issues of state law, deny others the opportunity to be heard or whether the federalism would otherwise be better served by allowing the cases to proceed in the state courts first.

Respectfully Submitted,

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