No. 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 WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF CONFLICT OF LAW SCHOLARS AS *AMICI CURIAE* SUPPORTING PETITIONERS AND REVERSAL

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QUESTION PRESENTED

The *amici* will address the second question presented by these cases:

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

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INTEREST OF AMICI CURIAE[1]

The *amici* are the following scholars who teach and write in the field of conflict of laws:

- Lea Brilmayer, Howard M. Holtzmann Professor of International Law at Yale Law School;

- Stephen Burbank, David Berger Professor for the Administration of Justice at the University of Pennsylvania Law School;

- Herma Hill Kay, Barbara Nachtrieb Armstrong Professor of Law at the University of California, Berkeley School of Law;

- Erin O'Hara O'Connor, Milton R. Underwood Chair in Law at Vanderbilt Law School;

- Kermit Roosevelt, Professor of Law at the University of Pennsylvania Law School;

- Joseph William Singer, Bussey Professor of Law at Harvard Law School; and

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, that no such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief, and that no person other than *amici*, their members, or their counsel made such a monetary contribution. Petitioners' letter consenting to the filing of this brief has been filed with the Clerk. The Respondents have given blanket consent to the filing of *amicus curiae* briefs in support of either party.

- Tobias Barrington Wolff, Professor of Law at the University of Pennsylvania Law School.[2]

The *amici* submit this brief because they believe that conflict of laws principles will assist the Court in analyzing the second question presented in these cases: whether the Fourteenth Amendment forbids a state from refusing to recognize the marriage of a same-sex couple performed in another jurisdiction, solely because the spouses are of the same sex.

INTRODUCTION AND SUMMARY OF ARGUMENT

I. A state has no legitimate interest in singling out married same-sex couples for hostile treatment in interstate disputes. Even if this Court were to conclude that the Constitution permits states to discriminate against same-sex couples in their own marriage laws, the common law of conflicts and decisions of this Court together make clear that states may not discriminate against same-sex couples who have validly married in another state.

Common law courts have adjudicated disputes over the recognition of out-of-state marriages since the founding of the Republic. In cases involving interracial marriages, consanguineous marriages (e.g., marriages of first cousins or an uncle and a niece), marriages following adultery and divorce, and

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[2] Institutional affiliations are provided for identification purposes only.

other contested relationship categories, courts have had to determine what interests can justify denying recognition to an out-of-state marriage that was valid where performed but would be prohibited locally. Three potential justifications for targeting disfavored couples emerge from that common law tradition: enforcement of criminal prohibitions on forbidden sexual conduct; expression of moral disapproval toward disfavored couples; and the desire to discourage couples from migrating to the state.

None of these interests may be constitutionally applied to a married same-sex couple. *Lawrence v. Texas*, 539 U.S. 558 (2003), forbids states from criminalizing sexual intimacy and committed relationships of adult same-sex couples. *Romer v. Evans*, 517 U.S. 620 (1996), *Lawrence*, and *United States v. Windsor*, 133 S. Ct. 2675 (2013), all reject moral disapproval as a justification for antigay discrimination. And the constitutional principles recognized in *Saenz v. Roe*, 526 U.S. 489 (1999), prevent a state from structuring its marriage policies for the purpose of deterring the migration of couples it regards as undesirable. These decisions leave states with no legitimate reason to target the marriages of same-sex couples for hostile treatment in their choice of law rules.

II. If a state permits same-sex couples to marry locally, then there is no legitimate reason for the state to deny recognition to the marriage of a same-sex couple performed in another state. When two states have the same policy on the core question of who is allowed to marry, discrimination against

the out-of-state marriage would be invalid under the Full Faith and Credit Clause, *Hughes v. Fetter*, 341 U.S. 609, 612-13 (1951), and would constitute arbitrary discrimination under the Equal Protection Clause, *Romer*, 520 U.S. at 633.

If this Court holds that the Fourteenth Amendment prohibits states from discriminating against same-sex couples in their own marriage laws, the imperative for the Court to address this interstate recognition issue will remain. The degree of hostility that married same-sex couples have encountered in the interstate arena has been unprecedented. In constitutional amendments, ballot measures, and statutes, states have targeted same-sex couples and carved them out of well-established conflicts doctrines. Even following a recognition of their equal right to marry, same-sex couples will be at risk of continued hostility if this Court does not make clear that states may not discriminate against couples who have married in another jurisdiction.

ARGUMENT

I. A State Has No Legitimate Reason To Deny Recognition To A Validly Married Couple Solely Because The Spouses Are Of The Same Sex.

If states retain some ability to discriminate against same-sex couples in their local marriage laws — an assumption that *amici* entertain here solely for purposes of argument — they nonetheless have no legitimate interest in denying recognition to same-sex couples who are validly married in other states.

The common law has recognized three interests that states can rely upon in targeting disfavored couples for hostile treatment in interstate marriage disputes: enforcement of criminal prohibitions on forbidden sexual conduct or cohabitation; expression of moral disapproval; and a desire to dissuade undesirable couples from migrating to the state. Prior decisions of this Court make clear that none of these interests is constitutionally permissible when used to discriminate against same-sex couples.[3]

A. The Regulation Of Intimate Sexual Conduct Is Not A Legitimate Basis For Refusing To Recognize Out-of-State Marriages of Same-Sex Couples.

The principal governmental interest that states have relied upon when refusing to recognize an out-of-state marriage has been the regulation of intimate sexual conduct. Throughout much of the development of American common law, marriage was the only avenue for noncriminal sexual activity: marriage laws operated in tandem with prohibitions on fornication or adultery to give an exclusive legitimacy to marital sex. When states used their criminal laws to prohibit particular types of couples from engaging in any form of sexual intimacy, courts frequently concluded that they must interpret their laws on the recognition of out-of-state marriages in

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[3] The arguments in this Part build on research first collected and analyzed in Tobias Barrington Wolff, *Interest Analysis in Interjurisdictional Marriage Disputes*, 153 U. Pa. L. Rev. 2215 (2005).

line with that local policy. Whether a court granted or denied recognition to an out-of-state marriage, the primary concern was the manner in which the request for recognition implicated the regulation of sexual conduct within the jurisdiction. Where giving effect to a nonconforming marriage would undermine a state's restrictions on sexual conduct, courts usually concluded that they must deny such requests. Where giving effect to a marriage would not derogate from any conduct restriction, courts often found that the state had no interest in denying recognition.

This relationship between out-of-state marriages and regulation of sexual conduct was given voice most directly in criminal prosecutions. When a couple married in one jurisdiction, moved or returned to another jurisdiction where an intimate relationship between the two was forbidden, and then offered the marriage as a defense to a subsequent criminal prosecution, the clash between the marriage and the state's conduct restrictions was starkly presented. In most cases, states refused to recognize the marriage as an affirmative defense to the prosecution because doing so would directly undermine the prohibition on intimate conduct.

The decision of the Supreme Court of Tennessee in *State v. Bell*, 66 Tenn. 9 (1872), is one of the more frequently cited criminal cases on this question, perhaps because of the stark terms in which it casts the need for marriage recognition doctrine to track the local jurisdiction's conduct restrictions. *Bell* involved the criminal prosecution of the husband in an interracial marriage for

violation of Tennessee's fornication law. The husband and wife had been married in Mississippi, which had no anti-miscegenation statute at the time, and had then come to Tennessee, where interracial relationships were categorically prohibited. The husband sought to interpose the Mississippi marriage as a defense to the prosecution, invoking the general rule that the law of the place of celebration should govern the effect given to a marriage. The court refused, warning of the hordes of "unnatural" couplings that might invade the state:

> Extending [sic] the rule to the width asked for by the defendant, and we might have in Tennessee the father living with his daughter, the son with the mother, the brother with the sister, in lawful wedlock, because they had formed the relations in a State or country where they were not prohibited. The Turk or Mohammedan, with his numerous wives, may establish his harem at the doors of the capitol, and we are without remedy. Yet none of these are more revolting, more to be avoided, or more unnatural than the case before us.

Id. at 9-11. As the Tennessee court explained some years later, the refusal to recognize an interracial marriage as a defense to a criminal prosecution was necessary to give effect to "the very pronounced convictions of the people of this state [in the criminal code] as to the demoralization and debauchery

involved in such alliances." *Pennegar v. State*, 10 S.W. 305, 307 (Tenn. 1889).

Courts in other states routinely offered similar explanations when refusing to recognize a marriage as a defense to a criminal prosecution or similar enforcement action — in miscegenation cases, prosecutions involving bigamy, and consanguineous marriage cases.[4] The requirement in many

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[4] *See, e.g.*, *State v. Tutty*, 41 F. 753, 761-62 (S.D. Ga. 1890) (denying effect to a D.C. interracial marriage offered as a defense to criminal prosecution for interracial fornication in Georgia); *Kinney v. Commonwealth*, 71 Va. (30 Gratt.) 858, 866 (1878) (refusing to recognize an out-of-state marriage as a defense in an anti-miscegenation prosecution because doing so would undermine laws of the jurisdiction that "prohibit[ed] and punish[ed] such unnatural alliances with severe penalties"); *United States ex rel. Devine v. Rodgers*, 109 F. 886, 888 (E.D. Pa. 1901) (refusing to recognize a marriage between an uncle and his niece as a defense against deportation because "a continuance of the relation . . . would at once expose the parties to indictment in the criminal courts, and to punishment by fine and imprisonment in the penitentiary"); *People v. Ezeonu*, 588 N.Y.S.2d 116, 118 (Sup. Ct. Bronx County 1992) (denying effect to a husband's purported second marriage in Nigeria as a defense to a statutory rape charge involving a thirteen-year-old girl in New York); *State v. Brown*, 23 N.E. 747, 750 (Ohio 1890) (refusing to read an exception for validly married couples into a statute criminalizing sex between an uncle and his niece because the state is "not bound, upon principles of comity, to permit persons to violate our criminal laws . . . because they have assumed, in another state or country where it was lawful, the relation which led to the acts prohibited by our laws"); *Pennegar*, 10 S.W. at 308 (denying effect to a second marriage by a couple who married following the wife's divorce for adultery in a previous marriage, because "their return to this State, and cohabiting as man and wife" violated Tennessee's "lewdness" statute and threatened "public morals, peace, and [the] good order of society"); *see also Commonwealth v. Lane*, 113 Mass. 458, 461-62 (1873) (preventing the prosecution of a (continued…)

jurisdictions that the state prove actual cohabitation before a couple could be convicted for miscegenation similarly revealed the concern with regulation of intimate conduct that lay at the core of these prosecutions. *See* Andrew Koppelman, *Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges*, 153 U. Pa. L. Rev. 2143, 2151 n.36 (2005) (collecting cases illustrating this phenomenon).

There are a few cases in which courts allowed criminal defendants to shield themselves from prosecution through the invocation of a nonconforming marriage. *See, e.g.*, *State v. Ross*, 76 N.C. 242, 246-47 (1877) (recognizing an out-of-state interracial marriage as a defense in a criminal prosecution for fornication and adultery, despite the invalidity of the marriage in the local jurisdiction); *State v. Graves*, 307 S.W.2d 545, 550 (Ark. 1957) (permitting the husband and parents of an underage bride to invoke marriage as a defense to criminal prosecution for delinquency of a minor, despite deliberate evasion of Arkansas marriage laws). But the paucity of such exceptions in the criminal context proves the rule, and even in these cases the state's interest in reinforcing its local restrictions on intimate conduct loomed large in the conflicts

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Massachusetts man who was divorced on grounds of adultery and then traveled to New Hampshire to evade a local restriction and marry his former lover, because the relationship was not prohibited under the criminal laws of Massachusetts); *State v. Fenn*, 47 Wash. 561, 565 (1907) (arriving at a similar conclusion for a Washington citizen who traveled to British Columbia to remarry shortly following a local divorce).

analysis. *See Ross*, 76 N.C. at 246 ("However revolting to us and to all persons . . . [an interracial] marriage may appear, such cannot be said to be the common sentiment of the civilized and Christian world."); *id.* at 247 ("The only evil which could be avoided by [denying effect to the marriage] is that the people of this State might be spared the bad example of an unnatural and immoral but lawful cohabitation."); *see also Graves*, 307 S.W.2d at 554 (Smith, J., concurring) ("It was at first my inclination to . . . [say] that although the validity of this marriage would be recognized in this state our policy against underage marriages should prevent the couple from living together until attaining the age at which they might have been married in Arkansas.").

Outside the context of criminal prosecution, in contrast, courts frequently gave effect to marriages that would violate local restrictions on intimate conduct, provided that the purpose for which the marriage was invoked would not introduce prohibited conduct into the state. The issue arose most frequently in disputes over inheritance and probate, where one party made claims on an estate that depended on the validity of the decedent's out-of-state marriage. A court can give effect to a marriage in administering an estate without licensing any prospective violations of the jurisdiction's criminal code. Many courts explained that the state had no weighty interest in denying effect to an out-of-state marriage in such a case, precisely because the invocation of the marriage in probate did not interfere with local conduct restrictions. In the absence of any argument about the regulation of intimate conduct within the

jurisdiction, these courts concluded, the state had no reason to frustrate the private reliance interests of the parties or to depart from the general rule of comity that calls for the recognition of marriages that were valid where performed.

The California Court of Appeal produced one of the leading statements of this proposition in the case of *In re Dalip Singh Bir's Estate*, 188 P.2d 499 (Cal. Dist. Ct. App. 1948). *Dalip Singh Bir* involved the probate of the California holdings of a native of India who died intestate in California, leaving two wives in India who both made claims on the estate as widows. Both women had lawfully married the decedent in India, but the trial court in California refused to recognize the validity of the more recently celebrated marriage, concluding that local law only permitted the court to give effect to one of the marriages. The appeals court reversed, concluding that there was no good reason to deny effect to the marriage when doing so would not interfere with any restrictions on the regulation of intimate conduct within California: "The decision of the trial court was influenced by the rule of 'public policy' [against polygamous marriages]; but that rule, it would seem, would apply only if decedent had attempted to cohabit with his two wives in California. Where only the question of descent of property is involved, 'public policy' is not affected." *Id.* at 502; *see also Royal v. Cudahy Packing*, 190 N.W. 427, 427-28 (Iowa 1922) (recognizing validity of "Mohammadan" marriage performed in Syria and granting worker's compensation award to a widow, even though the "deceased could have had four wives" under the law of the place where the marriage was celebrated).

Many other common law courts reached the same conclusion. The Mississippi Supreme Court held in 1948 that interracial marriages should be given effect in probate proceedings, despite that state's anti-miscegenation laws, because the "manifest and recognized purpose of" those laws "was to prevent persons of Negro and white blood from living together in this state" and, where there is no request for in-state cohabitation, "to permit one of the parties to such a marriage to inherit property . . . costs no violence" to the policy. *Miller v. Lucks*, 36 So. 2d 140, 142 (Miss. 1948). In New York, the Court of Appeals gave effect to the Rhode Island marriage of an uncle and niece in probate, even though the marriage was prohibited in New York. That court found nothing in the positive law of New York that declared such out-of-state marriages so "void" as to require exclusion of the relationships altogether when the forbidden intimacy would not be given prospective sanction. *See In re May's Estate*, 114 N.E.2d 4, 7 (N.Y. 1953). The Maryland Court of Appeals came to a similar conclusion when it confronted a Rhode Island niece-uncle marriage. *Fensterwald v. Burk*, 98 A. 358, 360 (Md. 1916). Even when states declined to give effect to out-of-state marriages in probate cases, they frequently identified the criminal prohibition on intimate conduct as the source of the weighty policy statement that required that result. *See, e.g.*, *Catalano v. Catalano*, 170 A.2d 726, 728 (Conn. 1961) (refusing to give effect to a marriage between an uncle and his niece in a probate action because such incest carries a penalty of ten years imprisonment and "[t]his relatively high penalty clearly reflects the strong

public policy of this state"); *Rhodes v. McAfee*, 457 S.W.2d 522, 524 (Tenn. 1970) (refusing to give effect to the marriage of a stepfather and his stepdaughter in an action for dower, because "where the same facts which statutorily prohibit the marriage are also made a penal violation, such is indicative of the pronounced conviction of the people of this State regarding such marriages").

In states where the legislature has not criminalized the intimate conduct of particular couples, though forbidding the couple from marrying within the jurisdiction, some courts have taken the absence of a conduct regulation to indicate that the state has little or no interest in denying effect to a valid marriage from another state. The Supreme Court of Kansas issued a decision to that effect in 1981, for example, in a probate case involving a marriage between first cousins. "Although our statutes prohibit first cousin marriages and impose criminal penalties where such marriages are contracted in Kansas," the court explained:

> [W]e cannot find that a first cousin marriage validly contracted elsewhere is odious to the public policy of this state. The reason for the inclusion of first cousins in [the Kansas marriage prohibition] has become less compelling in recent years as evidenced by the legislature's omission of sexual intercourse between first cousins in the definition of incest.

In re Estate of Loughmiller, 629 P.2d 156, 161 (Kan. 1981).[5]

Throughout these interstate marriage disputes, the reinforcement of state laws prohibiting disfavored intimate conduct has been the dominant pragmatic interest that states have relied upon in denying recognition to out-of-state marriages that were valid where performed. Thus, in an interstate dispute involving a married same-sex couple, the principal question is whether a state has any legitimate interest grounded in the enforcement of prohibitions on sex or intimate conduct that could support denying recognition to a valid out-of-state marriage.

After this Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), the answer to that question is no. In *Lawrence*, the Court held that states may neither criminalize sexual intimacy

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[5] The Supreme Court of Ohio is the only court of which we are aware that has come to a different conclusion, and it did so by rejecting one of its own precedents that had previously embraced the argument. *See In re Estate of Stiles*, 391 N.E.2d 1026, 1027 (Ohio 1979) ("One of the purposes of the new Criminal Code . . . was to decriminalize certain unlawful sexual behavior and leave the parties to whatever chastisement society would impose without making them criminally liable. . . . We do not believe that the General Assembly intended to change the state's public policy so as to favor fornication, adultery, rape of one spouse by the other, sodomy, fellatio, homosexuality and some forms of incest."), *distinguishing Mazzolini v. Mazzolini*, 155 N.E.2d 206, 208 (Ohio 1958) ("It will thus be seen that first-cousin marriages in this state are not made void by explicit provision to that effect. Moreover, . . . sexual relations between cousins are not incestuous.").

between adult same-sex couples nor prohibit those couples from sharing "a personal bond that is more enduring." *Id.* at 567. When *Lawrence* overruled *Bowers v. Hardwick*, 478 U.S. 186 (1986), it extirpated from the landscape of American constitutional law the idea that states may condemn same-sex couples as "revolting," "to be avoided," or "unnatural," *Bell*, 66 Tenn. at 11, and subject them to criminal prosecution or categorical exclusion. It thus foreclosed the common-law argument that states can deny recognition to a married same-sex couple in order to "expose [the couple] to indictment in the criminal courts, and to punishment by fine and imprisonment in the penitentiary" for sharing their lives together, *Rodgers*, 109 F. at 888, or "prohibit[] and punish[]" their relationship "with severe penalties" as an "unnatural alliance[]." *Kinney*, 71 Va. (30 Gratt.) at 866. Same-sex couples are "free as adults to engage in [private sexual or intimate] conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution." *Lawrence*, 539 U.S. at 564. That freedom eliminates the primary basis for denying recognition to a valid out-of-state marriage.

B. The Expression of Moral Disapproval Is Not A Legitimate Basis For Discriminating Against The Out-of-State Marriages of Same-Sex Couples.

The other principal state interest that courts have invoked in discriminating against valid out-of-state marriages has been the jurisdiction's desire to express moral disapproval toward certain types of

forbidden relationship. At common law, this symbolic or expressive interest typically was offered in tandem with a state's more pragmatic desire to exclude the relationship from the jurisdiction altogether. States claimed broad power to regulate private sexual intimacy during the periods that gave rise to most interstate marriage disputes. As a consequence, courts often did not delineate the independent work that each of these state interests performed when refusing to give effect to an out-of-state marriage. Rather, the expression of moral disapproval served as a symbolic counterpoint to a state's use of the criminal code to exclude the relationship from the state altogether.

Expressions of moral disapproval appear most frequently in discussions of incest and consanguinity. Joel Prentiss Bishop, the nineteenth-century treatise author on whom many courts relied in early marriage disputes, offered the following account of the general rule:

> Should there be, as occasionally may happen, a country or State permitting marriages which by the common voice of civilized nations are vicious past toleration, such marriages, though solemnized under the protection of its laws, would not be within the protection of the law of nations because lacking the general favor essential. . . . [Such a marriage] must be contrary also to the common voice of Christendom. The familiar illustrations, perhaps the only ones of which a writer can speak with

> absolute assurance, are polygamous marriages and those of excessively near consanguinity.

1 Joel Prentiss Bishop, New Commentaries on Marriage, Divorce and Separation §§ 857-58 (Cambridge Univ. Press 1891) (citation omitted).[6]

In particular, when courts drew distinctions between marriages that were "void," "absolutely void," or "void *ab initio*" and those that were merely "prohibited" — as with consanguineous marriages within a primary blood line (siblings; parents and children) versus those in a secondary bloodline (first cousins; an uncle and a niece) — they frequently relied upon arguments from morality to account for the state's interest in banishing the "void" marriages from the state, often invoking the language of natural law and Christian doctrine. In *Beggs v. State*, 55 Ala. 108, 112 (1876), for example, the Alabama Supreme Court explained: "Incestuous marriages are prohibited — are void *ab initio* . . . . Not only are they prohibited, but those entering into them incur severe penalties . . . The incestuous marriage contravenes the voice of nature, degrades

[6] The term "law of nations," as used by Bishop, encompassed what we now describe as the conflict of laws in domestic disputes. *See generally* William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 Harv. L. Rev. 1513 (1984) (discussing the incorporation of principles from the law of nations into domestic conflict of laws doctrine).

the family, offends decency and morals, and is absolutely interdicted."[7]

In a more modern formulation, the Supreme Court of Arkansas, quoting Professor Leflar, has framed the inquiry in terms of the level of "social alarm" that a disfavored marriage would produce. *See Etheridge v. Shaddock*, 706 S.W.2d 395, 396 (Ark. 1986) (quoting Robert Leflar, American Conflicts Law § 221 (3d ed. 1977)). Similar assertions appeared in some miscegenation cases, *see, e.g.*, *Eggers v. Olson*, 231 P. 483, 484 (Okla. 1924) ("The amalgamation of the races is not only unnatural, but is always productive of deplorable results. The purity of the public morals, the moral and physical development of both races, and the highest advancement of civilization, under which the

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[7] *See also Garcia v. Garcia*, 127 N.W. 586, 589 (S.D. 1910) ("Incestuous marriages as spoken of by Bishop and referred to by the authorities as being an exception to the [*lex locis*] rule embrace only such marriages as are incestuous according to the generally accepted opinion of Christendom, which relates only to persons in direct line of consanguinity, and brother and sisters, and does not embrace cousins."); *In re May's Estate*, 114 N.E.2d at 7 (concluding that a marriage between an uncle and his niece "was not in the direct ascending or descending line of consanguinity" and so "was not offensive to the public sense of morality to a degree regarded generally with abhorrence and thus was not within the inhibitions of natural law"); *Campione v. Campione*, 107 N.Y.S.2d 170, 171 (Sup. Ct. Queens County 1951) (marriage between an uncle and his niece "is not universally condemned" and so recognition "is not precluded by reason of moral turpitude"); *In re Estate of Stiles*, 391 N.E.2d at 1027 (marriage between an uncle and his niece is "shocking to good morals" and "unalterably opposed to a well defined public policy") (citation omitted).

two races must work out and accomplish their destiny, all require that they should be kept distinctly separate."), and in a special class of bigamy cases that arose in states that prohibited a person who had been divorced by reason of adultery from marrying his or her paramour during the lifetime of the jilted spouse, *see, e.g.*, *Pennegar v. State*, 10 S.W. at 308 ("[The prohibition] is expressive of a decided State policy not to permit . . . the public decency to be affronted, by being forced to witness the continued cohabitation of the adulterous pair, . . . and believing that the moral sense of the community is shocked and outraged by such an exhibition, we will not allow such parties to shield themselves behind a general rule of the law of marriage . . . .").

Arguments grounded in moral condemnation are unavailable here, for this Court has repeatedly held that moral disapproval of same-sex couples provides no legitimate basis for antigay discrimination. In *Romer v. Evans*, 517 U.S. 620 (1996), the Court struck down a state constitutional amendment that excluded gay, lesbian and bisexual people from generally available state-law protections, holding that the law was "inexplicable by anything but animus toward the class it affects" and therefore had no "rational relationship to legitimate state interests." *Id.* at 632. In *Lawrence*, Justice O'Connor found that "[m]oral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause" when applied to the intimate lives of same-sex couples "because legal classifications must not be 'drawn for the purpose of disadvantaging the group burdened by the law.'" *Lawrence*, 539 U.S. at 583 (O'Connor, J., concurring

in the judgment) (quoting *Romer*, 517 U.S. at 633). The majority recognized the equal protection argument as a "tenable" basis for decision, *id.* at 574, when it repudiated the holding in *Bowers*, 478 U.S. at 196, that same-sex intimacy could be condemned as "immoral and unacceptable." And in *United States v. Windsor*, 133 S. Ct. 2675 (2013), the Court held that "moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality," provides no legitimate basis for discriminating against validly married same-sex couples and denying them the legal benefits that would be available to similarly situated opposite-sex couples. *Id.* at 2693 (quoting House Report on the Defense of Marriage Act, H.R. Rep. No. 104-664, p. 16 (1996)).

Just as *Lawrence* eliminates the pragmatic common law interest for refusing to recognize the marriages of same-sex couples, so *Romer*, *Lawrence* and *Windsor* eliminate the expressive argument that the common law recognized for denying recognition to disfavored relationships. The Fourteenth Amendment prohibits States from relying upon either justification to target married same-sex couples for hostile treatment in interstate disputes.

C. States May Not Structure Their Laws To Dissuade Unwanted Citizens From Migrating To Their Territory.

At common law, a few courts suggested that a state's desire to dissuade a couple in a disfavored relationship from moving to the state might justify

denying recognition to their marriage. Unlike the interests in conduct regulation and moralistic expression, which account for a large proportion of the analysis in interstate marriage disputes at common law, the desire to dissuade couples from migrating to the state is often implicit. This is not surprising, since the desire to dissuade a couple from moving to the state was effectively subsumed within the criminal regulations that prevented them from living as a couple once they arrived. Nonetheless, there are some notable exceptions in which courts made their intent to deter migration explicit.

In one early anti-miscegenation case, the Supreme Court of Virginia embraced the view that the denial of any effect to an out-of-state marriage could play a useful role in dissuading unwanted couples from migrating to the state. Affirming the criminal prosecution of the husband in an interracial couple who had married in Washington, D.C., the court opined that, "[i]f the parties desire to maintain the relations of man and wife, they must change their domicile and go to some state or country where the laws recognize the validity of such marriages." *Kinney*, 71 Va. (30 Gratt.) at 870. And in *State v. Ross*, where the North Carolina Supreme Court recognized the valid marriage of an interracial couple as a defense to a criminal prosecution despite the existence of a local anti-miscegenation policy, the dissenting judge left no doubt about the function that he believed that local law should serve in dissuading undesirable couples from coming to his state:

> [I]ndividuals who have formed relations which are obnoxious to our laws can

> find their comfort in staying away from us. . . . It is courteous for neighbors to visit and it is handsome to allow the visitor family privileges and even to give him the favorite seat; but if he bring his pet rattlesnake or his pet bear or spitz dog famous for hydrophobia, he must leave them outside the door. And if he bring small pox the door may be shut against him.

Ross, 76 N.C. at 250 (Reade, J., dissenting).

Since it is now clear that states cannot prevent gay and lesbian couples from forming households and sharing intimacy, the desire of some states to dissuade gay couples from migrating may emerge as an independent justification for refusing to give effect to a valid out-of-state marriage. That desire finds expression in popular discussions of the marriage issue, where it is not unusual to hear those who resist the idea of marriage between gay couples fret that, if states give effect to such marriages, gay couples will be more likely to relocate or travel to the state and become a visible presence. This desire to dissuade married gay couples from joining the community as a visible presence echoes what have been called "no promo homo" arguments. *See* William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. Rev. 1327 (2000) (detailing the evolution of antigay arguments). Some states have structured their laws and policies to forbid government institutions from promoting any sympathetic treatment of gay people

or gay issues, particularly in employment and educational settings. *See id.* at 1356-62 (discussing government programs structured to exclude or disadvantage gay people). It is not hard to imagine states offering sanitized variations on these arguments in interstate marriage disputes. "We cannot forbid gay couples from moving to our state," the argument might go, "but we can encourage them to move elsewhere by denying them access to benefits that would otherwise serve as an inducement for them to migrate to our communities."

In *Saenz v. Roe*, 526 U.S. 489 (1999), this Court made clear that any such policy of dissuading migration is categorically illegitimate under the National Citizenship Clause of the Fourteenth Amendment. In striking down a California welfare restriction designed to dissuade residents of less supportive states from moving to California to take advantage of its more generous benefits, the Court explained that the National Citizenship Clause embodies a right on the part of citizens to relocate freely within the United States without being subject to penalty or dissuasion. *Id.* at 492-96. Distinguishing the special class of cases in which states have placed limits on the appropriation of "portable" benefits, *see Sosna v. Iowa*, 419 U.S. 393 (1975) (access to divorce); *Vlandis v. Kline*, 412 U.S. 441 (1973) (reduced tuition at state-run educational institutions), the Court held that a bare desire to deter unwanted citizens from migrating to a state "would be unequivocally impermissible." *Saenz*, 526 U.S. at 506.

Following *Saenz*, a state may not structure its legal entitlements — including its policies regarding out-of-state marriages — for the purpose of deterring undesirable couples from migrating to its borders. The right that *Lawrence* recognizes for gay couples to form a household and share private intimacy is accompanied by a right to move freely around the country in choosing where to establish that household. A state cannot assert any interest to the contrary in an interstate marriage dispute.

II. If A State Permits Same-Sex Couples To Marry, Denying Recognition To A Couple Solely Because They Were Married Out Of State Would Constitute Arbitrary Discrimination.

If a state permits same-sex couples to marry locally, whether as the consequence of a constitutional ruling or legislative action, there is no legitimate reason for the state to deny recognition to the marriage of a same-sex couple performed in another state. If Ohio permits same-sex couples to marry, for example, and a same-sex couple marries in Maryland and then seeks recognition of the marriage in Ohio, Ohio cannot deny recognition to the couple simply because the laws of Maryland were used to celebrate their union rather than the substantively identical laws of Ohio. States may differ in the "incidents" that they attach to a legal marriage — for example, the nature of spousal property rights, or the scope of the marital privilege against giving hostile testimony — and states typically apply their own law to both local and

foreign marriages to determine such questions. *See* Restatement (2d) Conflict of Laws §284 ("A state usually gives the same incidents to a foreign marriage, which is valid under the principles stated in § 283, that it gives to a marriage contracted within its territory."). On the core question of who is allowed to marry, however, if two states have the same policy, the only explanation for a difference in treatment would be discrimination against the out of state marriage, which would be invalid under the Full Faith and Credit and Equal Protection Clauses.

The Court set forth this principle in *Hughes v. Fetter*, 341 U.S. 609 (1951), a case involving a rare instance of discrimination against a substantively identical out-of-state law. In *Hughes*, the administrator of an estate sued in Wisconsin state court under an Illinois wrongful death statute. The Illinois statute was similar in all material respects to the Wisconsin wrongful death law. *Id.* at 612 n.11. Nonetheless, the state court "'dismiss[ed] the complaint on the merits'" under "a local public policy against Wisconsin's entertaining suits brought under the wrongful death acts of other states." *Id.* at 610. The dismissal was based solely on the fact that the claimant was invoking the law of another state, and the Court found this discrimination to be "forbidden by the national policy of the Full Faith and Credit Clause." *Id.* at 613. Because Wisconsin maintained no "antagonism against wrongful death suits in general," *id.* at 612, there was no legitimate reason to refuse to give effect to the Illinois statute.

The same principle controls the enforcement of marriage laws in interstate disputes. If local law prohibits showing "antagonism against [the marriages of same-sex couples]", *id.*, then local courts cannot show antagonism toward the substantively identical marriage laws of other states. Denying recognition to a same-sex couple solely because they were married under another state's law would be an offense against comity unsupported by any legitimate interest in the conflict of laws, violating the Full Faith and Credit Clause and constituting arbitrary discrimination under the Equal Protection Clause.

This proposition ought to be self-evident. Choice of law regularly begins with the truism that there is no conflict to resolve when the laws of two states are identical in all relevant respects. *See* Robert A. Leflar, *The Torts Provisions of the Restatement (Second)*, 72 Colum. L. Rev. 267, 274-75 (1972) ("When there is no conflict between the laws of the concerned states, there is no need to make a choice between the states as to which law governs. There is no conflict of laws, therefore no choice-of-law problem."). *Hughes* is an unusual ruling because the hostility that Wisconsin exhibited toward the laws of sister states in that case was a rare phenomenon. If this Court rules that the Fourteenth Amendment prohibits states from discriminating against same-sex couples in their local marriage laws, then no recognition issue should ever arise.

Nonetheless, the issue merits explicit attention because of the hostility that married same-sex couples have encountered in the interstate arena.

That hostility has been unprecedented in the history of U.S. marriage law. In a sharp departure from the common law, unwelcoming states have refused to recognize the valid marriages of same-sex couples in multistate disputes for any purpose and under any circumstance. There is thus reason for concern that some states may continue to exhibit hostility toward same-sex couples in interstate disputes in the absence of clear guidance from this Court.

Many of the states that have prohibited same-sex couples from marrying have also enacted laws or constitutional provisions specifically drafted to single out same-sex couples in interstate disputes and deny them the more nuanced treatment that state choice-of-law rules afford to other couples. When Louisiana amended its constitution in 2004 to deny "marriage or the legal incidents thereof" to "any member of a union other than the union of one man and one woman," it mandated that "No official or court of the state of Louisiana shall recognize any marriage contracted in any other jurisdiction which is not the union of one man and one woman." La. Const. art XII, § 15. Virginia amended its constitution in 2006 to forbid "th[e] Commonwealth and its political subdivisions" from treating the marriage of a same-sex couple as "valid" if performed locally or from "recogniz[ing]" the marriage if performed in another state. Va. Const. art. I, § 15-A.[8] These states have

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[8] *See generally* Andrew Koppelman, *Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges*, 153 U. Pa. L. Rev. 2143, 2165-94 (2005) (collecting state law provisions).

carved same-sex couples, and them alone, out of well-established conflicts doctrines.

California provides a stark illustration of the phenomenon. Decades ago, the California Supreme Court concluded that "the *lex loci contractus* governs as to the validity of [a] marriage" in all cases, even when the parties have acted "with the avowed purpose of evading our laws relating to marriage." *McDonald v. McDonald*, 58 P.2d 163, 164 (Cal. 1936). When California enacted the measures known as Proposition 22 and Proposition 8 in 2000 and 2008, it made same-sex couples a singular exception to that generous recognition rule, mandating that the marriages of same-sex couples were neither valid nor "recognized" in California for any purpose. *See* Cal. Fam. Code § 308.5 (Proposition 22); Cal. Const. art I, § 7.5 (Proposition 8).

These hostile state-law provisions received federal encouragement when Congress amended the Full Faith and Credit Act in conjunction with the Defense of Marriage Act. *See* 28 U.S.C. § 1738C. That law is also unprecedented. It purports to grant states the power to deny recognition not just to out-of-state marriages but also to final judgments that involve a claim of right based on the marriage of a same-sex couple. *See* Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act is Unconstitutional*, 83 Iowa L. Rev. 1, 15-18 (1997) (describing the effect of § 1738C on final judgments). As this Court has explained, the Full Faith and Credit Act prohibits a state from ignoring the judgment of a sister state merely because it has a

substantive disagreement with the law underlying the judgment. *See Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233-34 (1998) (full faith and credit permits no public policy exception to the recognition of judgments). Section 1738C is the only occasion on which Congress has ever singled out a class of people and excluded their final judgments from the "nationally unifying force" of the Full Faith and Credit Clause — the provision that "altered the status of the several states as independent foreign sovereignties, each free to ignore rights and obligations . . . established by the judicial proceedings of the others, by making each an integral part of a single nation, in which rights judicially established in any part are given nation-wide application." *Magnolia Petroleum v. Hunt*, 320 U.S. 430, 439 (1943).

In the years since same-sex couples began entering into valid and legal marriages, some interstate disputes have arisen involving divorce. When married same-sex couples who live in hostile states have sought access to family court for the purpose of securing a divorce, many have been denied that right. Hostile states have refused to "recognize" the existence of the marriage even for the limited purpose of presiding over its dissolution. *See, e.g.*, *In re Marriage of J.B. and H.B.*, 326 S.W.3d 654 (Tex. App. 2010) (holding that the trial court lacked subject matter jurisdiction to consider a petition for divorce filed by a married same-sex couple); *Kern v. Taney*, 11 Pa. D. & C. 5th 558, 576 (Pa. Com. Pl.

2010) (holding that the court was "without subject matter jurisdiction to grant a divorce" to a lesbian couple married in Massachusetts).[9]

Instead, couples have been relegated to annulment proceedings, subjecting them to the indignity of a declaration that their marriages never existed and the denial of the tangible protections of formal divorce. *See, e.g.*, *Atwood v. Riviotta*, No. 1CA-CV 12-0280, 2013 WL 2150021, at *1 (Ariz. Ct. App. May 16, 2013) (permitting annulment, not divorce, because "an action to annul a marriage is based on the premise that the marriage is void"); *In re Marriage of J.B. and H.B.*, 326 S.W.3d at 667 (permitting annulment, not divorce, because annulment "establishes that the parties to the ostensible but void marriage were never married for purposes of Texas law"). The rare exceptions have occurred in states that did not expressly address the recognition issue when excluding same-sex couples from marriage. *See Christiansen v. Christiansen*, 253 P.3d 153, 156 (Wyo. 2011) (permitting divorce of

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[9] *See also In re Marriage of Ranzy and Chism*, No 49D12-0903-DR-014654 (Ind. Super. Ct. Sept. 4, 2009) (finding lack of subject matter jurisdiction to grant a petition for divorce of a same-sex couple married in Canada); *available at* http://www.scribd.com/doc/20720679/Order-on-Petition-for-Dissolution-of-Marriage-in-Re-Marriage-of-Tara-Ranzy-and-Larissa-Chism; *O'Darling v. O'Darling*, 188 P.3d 137 (Okla. 2008) (affirming portion of trial court order that vacated divorce decree where petitioner failed to disclose that both parties were women). *See generally* Herma Hill Kay, *Same Sex Divorce in the Conflict of Laws*, 15 King's College L.J. 63 (2004) (exploring the range of challenges that same-sex couples confront in seeking divorce).

married couple because Wyoming law "prevents a same-sex couple from entering into a marital contract in Wyoming" but "does not speak to recognition of a same-sex marriage validly entered into in" another jurisdiction); *Port v. Cowan*, 44 A.3d 970, 977-79 (Md. 2012) (identifying repeated failure of state legislature to deny recognition to out-of-state marriages of same-sex couples as basis for entertaining divorce proceeding).

Even at the height of Jim Crow segregation and the era of anti-miscegenation laws, hostile states did not exhibit this level of antagonism and lack of comity. As detailed in Part I, *supra*, many states that prohibited interracial couples from marrying nonetheless recognized interracial marriages for some purposes when they had been validly performed in other states. *See also Pearson v. Pearson*, 51 Cal. 120, 124-25 (1875) (in probate proceeding, recognizing the validity of a marriage performed in the Utah territory between a white man and a black woman, despite California's anti-miscegenation statute and even though the woman had the status of a slave at the time of the union and hence was legally disabled from marrying at all). The degree of hostility that same-sex couples have encountered in interstate disputes is at odds with the common law. "It is not within our constitutional tradition to enact laws of this sort." *Romer*, 520 U.S. at 633; *see also Windsor*, 133 S. Ct. at 2693 (concluding that "unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage" calls for close constitutional scrutiny).

If this Court concludes that the Fourteenth Amendment prohibits states from discriminating against same-sex couples in their own marriage laws, then the Full Faith and Credit Clause and the Fourteenth Amendment prohibit states from discriminating against same-sex couples solely because they married in another state. This resolution of the interstate recognition question is the necessary consequence of a ruling in favor of same-sex couples on the local law question.

CONCLUSION

The common-law history of interstate marriage recognition and the decisions of this Court in *Hughes*, *Romer*, *Saenz*, *Lawrence* and *Windsor* together make clear that there is no legitimate basis for a state to single out same-sex couples who have been validly married in another state and deny them recognition. The Fourteenth Amendment prohibits such discrimination. *Amici* urge this Court to hold that the constitutional requirement for equal treatment of same-sex couples controls in interstate marriage disputes.

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