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

In The
Supreme Court of the United States

JAMES OBERGEFELL, ET AL., AND BRITTANI HENRY, 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., AND TIMOTHY LOVE, 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 HISTORIANS OF MARRIAGE AND THE AMERICAN HISTORICAL ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

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

2) 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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BRIEF OF HISTORIANS OF MARRIAGE AND THE AMERICAN HISTORICAL ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICI CURIAE*[1]

Amici are the American Historical Association (AHA) and leading historians of American marriage, family, and law whose research documents how the

[1] This brief is filed with the written consent of all parties through letters of consent on file with the Clerk. No counsel for either party authored this brief in whole or in part, nor did any party or other person make a monetary contribution to the brief's preparation or submission.

institution of marriage has functioned and changed over time. The AHA is the largest professional organization in the United States devoted to the study and promotion of history and historical thinking. It is a non-profit membership organization, founded in 1884 and incorporated by Congress in 1889 for the promotion of historical studies. The AHA provides leadership to the discipline on such issues as academic freedom, access to archives, professional standards, and the centrality of history to public culture. The appended List of Scholars identifies the individual *amici*. App. 1a-4a.

This brief, based on decades of study and research by *amici*, aims to provide accurate historical perspective as the Court considers state purposes for marriage. Contrary to the Sixth Circuit's premise below, procreation and the rearing of biological children have never been the exclusive (or even predominant) purpose of marriage—a multifaceted institution that has, over time, shed several discriminatory elements, in part through this Court's intervention. Based on their historical perspective, *amici* support Petitioners' position that the important and varied interests that states have in marriage warrant inclusion of same-sex couples within that institution.[2]

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[2] The historical discussion in this brief is supported by *amici*'s collective scholarship, whether or not expressly cited, including: PETER W. BARDAGLIO, RECONSTRUCTING THE HOUSEHOLD: FAMILIES, SEX, AND THE LAW IN THE NINETEENTH-CENTURY SOUTH (1995); NORMA BASCH, FRAMING AMERICAN DIVORCE (1999) and IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND

PROPERTY IN 19TH CENTURY NEW YORK (1982); STEPHANIE COONTZ, THE SOCIAL ORIGINS OF PRIVATE LIFE: A HISTORY OF AMERICAN FAMILIES, 1600-1900 (1988) and MARRIAGE, A HISTORY (2006); NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION (2000); REBECCA L. DAVIS, MORE PERFECT UNIONS: THE AMERICAN SEARCH FOR MARITAL BLISS (2010); TOBY L. DITZ, PROPERTY AND KINSHIP: INHERITANCE IN EARLY CONNECTICUT (1986); LAURA F. EDWARDS, GENDERED STRIFE AND CONFUSION: THE POLITICAL CULTURE OF RECONSTRUCTION (1997); SARAH BARRINGER GORDON, THE SPIRIT OF THE LAW: RELIGIOUS VOICES AND THE CONSTITUTION IN MODERN AMERICA (2010), and THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH-CENTURY AMERICA (2002); MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA (1985); HENDRIK HARTOG, MAN & WIFE IN AMERICA, A HISTORY (2000) and SOMEDAY ALL THIS WILL BE YOURS: A HISTORY OF INHERITANCE AND OLD AGE (2012); JILL ELAINE HASDAY, FAMILY LAW REIMAGINED (2014); ELLEN HERMAN, KINSHIP BY DESIGN: A HISTORY OF ADOPTION IN THE MODERN UNITED STATES (2008); MARTHA HODES, WHITE WOMEN, BLACK MEN: ILLICIT SEX IN THE 19TH CENTURY SOUTH (1997); LINDA K. KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES: WOMEN AND THE OBLIGATIONS OF CITIZENSHIP (1998); ALICE KESSLER-HARRIS, IN PURSUIT OF EQUITY: WOMEN, MEN, AND THE QUEST FOR ECONOMIC CITIZENSHIP IN 20TH-CENTURY AMERICA (2001); JAN ELLEN LEWIS, THE PURSUIT OF HAPPINESS: FAMILY AND VALUES IN JEFFERSON'S VIRGINIA (1983); ELAINE TYLER MAY, HOMEWARD BOUND: AMERICAN FAMILIES IN THE COLD WAR ERA (1988) and BARREN IN THE PROMISED LAND (1995); STEVEN MINTZ, DOMESTIC REVOLUTIONS: A SOCIAL HISTORY OF AMERICAN FAMILY LIFE (1988); ELIZABETH H. PLECK, CELEBRATING THE FAMILY: ETHNICITY, CONSUMER CULTURE, AND FAMILY RITUALS (2000) and NOT JUST ROOMMATES: COHABITATION AFTER THE SEXUAL REVOLUTION (2012); CAROLE SHAMMAS, A HISTORY OF HOUSEHOLD GOVERNMENT IN AMERICA (2002); MARY L. SHANLEY, MAKING BABIES, MAKING FAMILIES (2001) and JUST MARRIAGE (2004);

INTRODUCTION AND SUMMARY OF ARGUMENT

Throughout American history, marriage has served multiple state interests and has evolved to reflect social and legal changes. The historical record contradicts attempts to cast marriage as serving any single, overriding purpose. And it contradicts attempts to present marriage as a static institution so rooted in "tradition" as to insulate it from constitutional challenge.

The assertion of Respondents and the Sixth Circuit below that marriage laws derived from biological imperatives and were grounded exclusively in a state interest in procreation cannot be reconciled with the multitude of interests that led the American colonies and early states to enact marriage laws. By authorizing and regulating marriage, states have pursued political, economic, social, and legal interests, while also recognizing the important personal nature of marriage. Those interests have included complementing the state's governance of the population; creating stable households; fostering social order; increasing economic benefit to individuals; minimizing public support of the indigent, vulnerable and dependent (including the

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AMY DRU STANLEY, FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION (1998); BARBARA YOUNG WELKE, LAW AND THE BORDERS OF BELONGING IN THE LONG NINETEENTH CENTURY UNITED STATES (2010) and 2 LAW, PERSONHOOD AND CITIZENSHIP IN THE LONG 19TH CENTURY, CAMBRIDGE HISTORY OF AMERICAN LAW (2008).

very young, the very old, and the disabled); and facilitating property transmission.

Other historical features of marriage laws undermine the notion that their sole purpose was a state interest in responsible procreation. Procreative ability has never been a requirement of marriage; no state has ever prevented the infertile or elderly, nor those who have no intention to have children, from marrying. Indeed, American society has long viewed sexual intimacy and romance within marriage in ways untethered to procreation, highlighting the importance of a "love-match" between the couple who will consent to marry. Since the colonial era, moreover, non-biological children have formed an important component of American families. States have long extended support obligations beyond biological progeny, and adopted children have long been accorded equivalent legal status.

Equally devoid of credence is the notion that civil marriage is so deeply entrenched in tradition that it resists competing constitutional imperatives. To the contrary, marriage has remained a vital institution because it is not static. Marriage has retained its basis in voluntary and mutual consent, as well as in love and economic partnership, while states have, over time, altered many of its dimensions to adapt to economic change and to shifting social and sexual mores. Courts and legislatures have used their power over marriage to lessen inequality between spouses and to lift rules restricting eligibility to marry. Laws and traditions enforcing gender hierarchy (through coverture) and white supremacy (through anti-miscegenation laws)

have been overturned. Today, in part from this Court's actions, those "traditional" restrictions are readily accepted as unconstitutional.

That marriage remains a vital and relevant institution testifies to the law's ability to recognize the need for change, rather than adhere rigidly to values or practices of earlier times. As this Court now considers whether the right to marriage extends to same-sex couples, it should be mindful that laws governing marriage have evolved—in some cases through decisions of this Court—as this Nation has recognized the injustice of restricting some citizens from exercising equal marriage rights. Enabling couples of the same sex to enjoy full rights to marriage choice would continue and comport with these historical trends.

ARGUMENT

I. MARRIAGE HAS SERVED MULTIPLE PURPOSES BEYOND PROCREATION THROUGHOUT AMERICAN HISTORY.

Marriage is a capacious and complex institution. Though religion, sentiment, and custom may color an individual's understanding of marriage, marriage as a civil institution in the United States has served a number of complementary purposes—political, social, economic, legal, and personal. Over this Nation's history, states have recognized that marriage serves to facilitate the state's regulation of the population; to create stable households; to foster social order; to increase economic welfare and minimize public support of the indigent or vulnerable; to legitimate

children; to assign providers to care for dependents; to facilitate the ownership and transmission of property; and to compose the body politic. COTT, *supra* note 2, at 2, 11-12, 52-53, 190-194, 221-224.

The basis of marriage is voluntary consent between the couple, their free choice of one another for love (a value explicitly enshrined in American ideals since the era of the American Revolution), and the couple's acknowledged right to create a private haven in their home are all aspects of the personal liberty associated with marriage. In licensing marriages, states affirm that a couple's marital vows also produce economic benefit, residential stability, and social good, whether or not biological children ensue. Consequently, the attempt to rank procreation or rearing of biological children as the core interest of marriage defies the historical record.

A. Marriage Historically Has Served Important Political And Economic Purposes.

1. Marriage developed in relation to governance.

Civil marriage in Western political culture has been closely intertwined with sovereigns' efforts to govern their people. In Western Europe, when sovereigns wrested control over marriage from ecclesiastical authorities, they sought to create governable subgroups by treating male household heads effectively as their delegates, each of whom ruled his own household. MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND

FAMILY IN THE UNITED STATES AND WESTERN EUROPE 23-34 (1989); Sarah Hanley, *Engendering the State: Family Formation and State Building in Early Modern France*, 16 FRENCH HISTORICAL STUDIES 4, 6-15 (1989); Mary L. Shanley, *Marriage Contract and Social Contract in 17th-Century English Political Thought*, 32 THE FAMILY IN POLITICAL THOUGHT 79, 81 (J.B. Elshtain ed., 1982).

Laws creating and regulating civil marriage were among the first passed by the American colonies after declaring independence from Great Britain. When those colonies formed a republic, marriage and governance remained linked, and that connection reflected the republican principles of the new nation. Influenced by Montesquieu's *The Spirit of the Laws*, Revolutionary-era statesmen believed that the only marriage form consistent with and suitable for their republican form of government was consent-based monogamy. Anne M. Cohler, *Montesquieu's Comparative Politics and the Spirit of American Constitutionalism*, 23 EIGHTEENTH-CENTURY STUDIES 343. Revolutionary spokesmen even modeled a citizen's voluntary allegiance to the new United States on an individual's voluntary choice of a marriage partner. COTT, *supra* note 2, at 15-17, 21-23; Jan Lewis, *The Republican Wife: Virtue and Seduction in the Early Republic*, 44 WM. & MARY Q. 3d ser. 689, 695-99, 706-710 (1987).

James Wilson, a Revolutionary-era jurist, saw consent—more than even cohabitation—as the essence of marriage. His lectures on law of 1792 spoke of marriage as a civil contract, in which "the agreement of the parties, the essence of every

rational contract, is indispensably required." 2 THE WORKS OF JAMES WILSON 600 (Robert G. McCloskey, ed., 1967). The individual's ability to consent to marriage in early America was a mark of the free person in possession of basic civil rights—a fact illustrated in the history of slavery in the United States. Slaves could not contract valid marriages because they lacked the ability to consent fully and freely, owing all to their masters.

Until the early twentieth century, married men's citizenship and voting rights were seen as tied to their headship of and responsibilities for their families. Anglo-American legal doctrine made a married man the head of his household. In return for his legal obligation to control and support his wife, dependent children, dependent relatives, and others—*e.g.*, orphans, apprentices, servants and slaves—the married man became their public representative. In turn, a wife's subordinate status in the marital relationship was consistent with her inferior citizenship and inability to vote. SHAMMAS, *supra* note 2, *at* 24-25; STANLEY, *supra* note 2, at 7-12, 181-82; KERBER, *supra* note 2, at 11-15; 2 WELKE, LAW, PERSONHOOD AND CITIZENSHIP, *supra* note 2, at 345-50.

Social and legal changes eroded the rule that the male is the head of household who exercises dominion over his wife and other dependents. But the historical link between marriage and civic governance persists. Federal and state laws channel obligations and many benefits to individuals through marital status. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-353R, *Defense of Marriage Act:*

Update to Prior Report (2004); *see also United States v. Windsor*, 133 S. Ct. 2675, 2683 (2013); *Turner v. Safley*, 482 U.S. 78, 96 (1987) (voiding restriction on prison inmate marriages in part because "marital status often is a precondition to the receipt of government benefits").

2. Marriage has created public order and economic benefits.

In early America, legal marriages served public order by establishing governable and economically viable households. MARY BETH NORTON, FOUNDING MOTHERS AND FATHERS 27-56, 96-137 (1996) (paternal power over families governing social and economic order). A household managed food, clothing, and shelter for all its members. Marriage organized households and figured largely in property ownership and inheritance, matters of civil society important to public authorities. *E.g.*, 1 GEORGE ELLIOTT HOWARD, A HISTORY OF MATRIMONIAL INSTITUTIONS CHIEFLY IN ENGLAND AND THE UNITED STATES 121-226 (1904) (colonial precedents); *id.* at 388-497 (early state marriage laws).

Today, state governments retain strong economic interests in marriage. States offer financial advantages to married couples on the premise that their households promise social stability and economic benefit to the public, and thus minimize public expense for indigents. The marriage bond obliges the mutually consenting couple to support one another, which is not the case for unmarried couples. In addition, states have sought to limit the public's responsibility for children by looking to married

couples to provide support for minor dependents. That historically has included but not been limited to the married couple's biological children.

The responsibilities for governance in early America extended to all children within the household, whether they were adopted, step-, or biological children, and even extended to unrelated members of the household such as apprentices and slaves. *See* p. 9, *supra*. Further, states currently impose a separate legal obligation on individual parents to support biological children, which applies regardless of the parents' marital status. LAURA W. MORGAN, CHILD SUPPORT GUIDELINES: INTERPRETATION AND APPLICATION § 1.07 (2d ed. 2013); Douglas W. Allen and Margaret Brinig, *Chart 3: Child Support Guidelines*, 45 Fam. L.Q. 498, 498-99 (Winter 2012).

The economic dimension of the marriage-based family took on new scope when federal government benefits expanded during the twentieth century. As noted above (p. 10, *supra*), state and federal governments now channel many economic benefits through marital relationships. Federal benefits such as veterans' survivors' benefits and immigration preferences are available to legally married spouses, but not to unmarried partners.

B. Marriage Has Always Been About More Than Childbearing.

The Sixth Circuit and Respondents below "start[ed] from the premise that governments got into the business of defining marriage, and remain in the business of defining marriage, not to regulate love

but to regulate sex, most especially the intended and unintended effects of male-female intercourse." *DeBoer v. Snyder*, 772 F.3d 388, 404 (6th Cir. 2014); *see also* Br. of Defendants-Appellants 25, *Tanco v. Haslam*, No. 14-5297 (6th Cir. May 7, 2014), ECF No. 32 ("Biology alone . . . provides a rational explanation for Tennessee's decision not to extend marriage to same-sex couples."). But that premise is historically flawed. Although state interests in authorizing and regulating marriage have surely related in part to children, those interests have never been limited to procreation or the rearing of the couple's biological children (intended or otherwise).

1. Neither eligibility for marriage nor sexual intimacy within marriage has turned on the ability to procreate.

In licensing marriage, state governments have bundled legal obligations together with social rewards to encourage couples to choose committed relationships over transient ones, whether or not children will result. Sexual intimacy in marriage has always been presumed, but couples' ability or willingness to produce progeny has never been necessary for valid marriage in any state. Men or women known to be sterile have not been prevented from marrying. Post-menopausal women are not barred from marrying, nor is divorce mandated after a certain age. 3 HOWARD, *supra*, at 3-160; GROSSBERG, *supra* note 2, at 108-110.

To be sure, the Anglo-American common law and many early state statutes made impotence or other debility preventing sexual intimacy a reason for

annulment or divorce. Thus, the inability to have sexual relations could invalidate a marriage, but sterility or infertility did not. Annulment for sexual incapacity depended, moreover, upon a complaint by one of the marital partners, and if neither spouse objected, a non-sexual marriage remained valid in the eyes of the state. CHESTER G. VERNIER, AMERICAN FAMILY LAWS: A COMPARATIVE STUDY OF THE FAMILY LAW OF THE FORTY-EIGHT AMERICAN STATES 1 (grounds for annulment), 2 (grounds for divorce) (1931 and 1932).

The notion that marriage historically has been dedicated to the procreation and welfare of children rather than to the relationship of the adult couple presents a false dichotomy. Adults' intentions for themselves have been central to marriage in the history of the United States. Romantic and sexual attachment, companionship and love, as well as economic partnership, were no less intrinsic to marriage than the possibility of children. Even when it has been clear that no children would result, couples married for love, companionship, and stability. Lewis, *supra*, at 695-699, 706-710.

By the 1920s, when contraception became readily available in influential sectors of American society, marital sexual intimacy was increasingly acknowledged to be a value in itself quite separable from reproduction. JOHN D'EMILIO AND ESTELLE B. FREEDMAN, INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA 239-274 (1988); ANDREA TONE, DEVICES AND DESIRES: A HISTORY OF CONTRACEPTIVES IN AMERICA (2001). Intentionally non-procreative marriages became prevalent enough that social

scientists coined the term "companionate marriage" to refer to them (though the term is used more generally now). Dr. M.M. Knight, for example, used this new term in 1924 to acknowledge that "[w]e cannot reestablish the old family, founded on involuntary parenthood, any more than we can set the years back or turn bullfrogs into tadpoles." M.M. Knight, *The Companionate and the Family*, 10 J. SOC. HYGIENE 258, 267 (1924); *see also* CHRISTINA SIMMONS, MAKING MARRIAGE MODERN 113-134 (2009); DAVIS, *supra* note 2, at 21-53.

In the late 1930s, the American Medical Association embraced contraception as a medical service and soon thereafter most states legalized physicians' dispensing of birth control to married couples. The Supreme Court struck down Connecticut's ban on married couples' use of birth control in 1965. *Griswold v. Connecticut*, 381 U.S. 479 (1965). More recently, reproductive technologies have multiplied methods to bring wanted children into being, with or without biological links to the parents who intend to rear them. SHANLEY, MAKING BABIES, *supra* note 2, at 76-147.

2. Non-biological children have long been integral to the American family.

Far from viewing the marital relationship as one centered on procreation, state laws have long encouraged married couples to incorporate non-biological children into the family structure. Historically, marriages in which step-parents took responsibility for non-biological children were common because of early deaths of a biological

parent. Families also sometimes took in orphans. HARTOG, SOMEDAY, *supra* note 2, at 169-205. The historical trend in state laws has been to equalize the rights of legally adopted children with those of biological children.

The very first "First Family," established by the "Father of our Country," George Washington, supplied the nation with a non-biological family model: he was assumed to be sterile, since he and his wife Martha had no children, but she brought two children from her first marriage into their marital household. LORRI GLOVER, FOUNDERS AS FATHERS: THE PRIVATE LIVES AND POLITICS OF THE AMERICAN REVOLUTIONARIES 17 (2014) (noting historians' speculation that a bout with smallpox in 1751 left Washington infertile). Washington's inaugural address initially included a reference (later deleted) to his own lack of offspring. PAUL F. BOLLER, JR., PRESIDENTIAL INAUGURATIONS 4 (2001). George and Martha Washington also raised their grandchildren after her son died in the Revolutionary War.

This willingness to include non-biological children in the marital family then and now suggests states have not promoted a favored status for biologically based parenting among the public purposes of marriage. To the contrary, American history suggests that states have intended to recognize intentional and deliberate parenting as much as "accidental" procreation. HERMAN, *supra* note 2, at 203-204, 292-293.

II. MARRIAGE HAS CHANGED TO REJECT DISCRIMINATORY RULES AND RESTRICTIONS.

Like other successful civil institutions, marriage has evolved to reflect societal changes and judicial recognition of legal rights. Adjustments in key features of marital eligibility, roles, duties, and obligations have kept marriage vigorous and appealing. These changes—whether settled by legislatures or courts—were not readily welcomed by everyone. Some opponents at first fiercely resisted features of marriage that we now take for granted. Notably, changes in gender-based rules and elimination of racial restrictions in marriage mark the institution's path toward the present.

A. Marriage Laws Have Changed To Reflect Changing Understandings Of Spouses' Respective Roles and Rights.

Adopted from Anglo-American common law, early American marriage laws treated men and women unequally and asymmetrically. Those laws rested on the legal fiction that the married couple composed a single unit, which the husband represented legally, economically and politically. As James Wilson asserted in 1792: "The most important consequence of marriage is, that the husband and the wife become, in law, only one person: the legal existence of the wife is consolidated into that of the husband." 2 WILSON, *supra*, at 601.

This doctrine of marital unity or coverture required a husband to support his wife and family, and a wife to obey her husband. Because her

husband represented her publicly, a married woman could not own or dispose of property, earn money, have a debt, make a valid contract, or sue or be sued under her own name. Because the two were considered one person, neither spouse could testify for or against the other in court or commit a tort against the other. 2 WILSON, *supra*, at 602-03; KERBER, *supra* note 2, at 11-15; HARTOG, SOMEDAY, *supra* note 2, at 105-09.

Coverture reflected the degree to which marriage was understood to be an economic arrangement. Marriage-based households were fundamental economic units in early America. But by the mid-1800s, the notion that married women lacked economic and legal personhood began to clash with societal realities. Women's rights advocates began to demand rights for wives to property and wages. Courts and legislatures saw advantages in treating spouses' assets separately: a wife's property could keep a family solvent if a husband's creditors claimed his assets, and employed married women could support their children if their husbands were profligate. In response, states began unraveling the requirements of marital unity. BASCH, IN THE EYES OF THE LAW, *supra* note 2, at 113-161; Richard H. Chused, *Married Women's Property Law: 1800-1850*, 71 GEO. L.J. 1359 (1982-1983). By 1900, most states enabled wives to keep and control their own property and earnings; by the 1930s, wives in many states could act as economic individuals. 3 VERNIER, *supra*, at 24-30 (1935); HARTOG, MAN & WIFE, *supra* note 2, at 110-135, 287-308.

Dismantling coverture however, was extremely controversial. Opponents of change contended that coverture was the essence of marriage. To eliminate it was blasphemous and unnatural; the marriage bargain was governed by laws of "Divine origin" and subordination was "the price which female wants and weakness must pay for their protection." BASCH, IN THE EYES OF THE LAW, *supra* note 2, at 154 (quoting prominent New York opponent).

As a result, certain gender-based discriminatory rules persisted. For example, government benefit programs in the 1930s adopted the expectation that the husband was the economic provider and the wife his dependent. The 1935 Social Security Act significantly differentiated between husbands and wives with respect to entitlement to benefits. KESSLER-HARRIS, *supra* note 2, at 132-141. When plaintiffs challenged such spousal sex differentiation in the 1970s, the Supreme Court found discrimination between husband and wife in Social Security and veterans' entitlements unconstitutional. *See Califano v. Goldfarb*, 430 U.S. 199 (1977); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Frontiero v. Richardson*, 411 U.S. 677 (1973). Since then, federal benefits channeled through marriage have been gender-neutral.

Of all the legal features of marital unity, the husband's right of access to his wife's body lasted longest. Not until the 1980s did most states, including the Respondent States, end husbands' complete exemption from prosecution for rape of their wives. HASDAY, FAMILY LAW REIMAGINED, *supra* note 2, at 119; Jill Elaine Hasday, *Contest and Consent: A*

Legal History of Marital Rape, 88 CALIF. L. REV., 1375-1505 (Oct. 2000); *see, e.g.*, 1985 H 475 (Ohio); MICH. COMP. LAWS ANN. § 750.520l (West 1988); TENN. CODE ANN. § 39-13-507 (Supp. 1989); 1990 Ky. Laws H.B. 38 (Ch. 448).

B. Race-Based Restrictions On Marriage Eligibility Have Been Eliminated.

In a number of instances, state marriage laws created and enforced inequalities that were declared "natural" and right at the time, although today the laws seem patently unfair and discriminatory. GROSSBERG, *supra* note 2, at 70-74, 86-113, 144-145; 3 VERNIER, *supra*, at 183-209. Starting from slavery, these race-based restrictions on marriage survived into the latter part of the twentieth century.

As noted above (p. 8-9, *supra*), slaves were unable to marry under the laws of slaveholding states because they lacked basic civil rights and thus were unable to give the free consent required for lawful marriage. A slave's obligatory service to the master also made it impossible to fulfill the legal obligations of marriage. Margaret Burnham, *An Impossible Marriage: Slave Law and Family Law*, 5 LAW & INEQ. 187 (1987-1988). Where slaveholders permitted, slave couples wed informally, creating families of great value to themselves and to the slave community. HERBERT G. GUTMAN, THE BLACK FAMILY IN SLAVERY AND FREEDOM 1750-1925 (1976). Those unions were not respected by slaveholders, however, who dissolved families with impunity when they sold or moved slaves. WALTER JOHNSON, SOUL BY SOUL: LIFE INSIDE THE ANTEBELLUM SLAVE MARKET 19

(1999); WALTER JOHNSON, RIVER OF DARK DREAMS: SLAVERY AND EMPIRE IN THE COTTON KINGDOM 14 (2013) (half of interstate slave sales broke up a nuclear family); STEVEN DEYLE, CARRY ME BACK: THE DOMESTIC SLAVE TRADE IN AMERICAN LIFE, *passim* (2005) (pervasive disruption of slave families by sale).

After emancipation, many former slaves welcomed the ability to marry their chosen partner as a civil right. It constituted an important expression of their newly gained freedom. Laura Edwards, *The Marriage Covenant is the Foundation of All our Rights*, 14 LAW & HIST. REV. 81 (1996).

Even after slavery ended, however, race-based discrimination in marriage persisted—and even proliferated—in the form of nullification and/or criminalization of marriages of whites to persons of color. Those measures served to deny public approval to those who chose to love across the color line. By preventing interracial relationships from ever gaining the status of marriage, and thus conflating them with "illicit sex," state courts sought to delegitimize them altogether. PEGGY PASCOE, WHAT COMES NATURALLY: MISCEGENATION LAW AND THE MAKING OF RACE IN AMERICA 22-40, 56-74 (2009).

As many as 41 states and U.S. territories banned and/or criminalized marriage across the color line for some period, including each of the Respondent States. DAVID H. FOWLER, NORTHERN ATTITUDES TOWARDS INTERRACIAL MARRIAGE: LEGISLATION AND PUBLIC OPINION IN THE MIDDLE ATLANTIC AND THE STATES OF THE OLD NORTHWEST, *1780-1930* (1987) (Appendix); *see also* Ky. Const., art. VIII, § 6; Ch. 19, 1822 Tenn. Acts 22; MICH. REV.

STAT. 1838; OHIO REV. STAT. § 6987; PASCOE, WHAT COMES NATURALLY 343 n.43. States north and south adopted similar prohibitions, and in fifteen states (mainly in the West), marriages between whites and additional categories of nonwhites (such as Indians, Chinese and "Mongolians") were also prohibited. PASCOE, WHAT COMES NATURALLY 77-108; *see, e.g.*, *Perez v. Lippold*, 198 P.2d 17, 18 (Cal. 1948) (striking down law that prohibited "marriages of white persons with negroes, Mongolians, members of the Malay race, or mulattoes" which had been in effect since 1872); Laws of the Territory of Nev. 1861, Ch. 32 (1861); 1867 Idaho Terr. Gen. Laws ch. 11, § 3, at 72.

Defenders of these laws insisted that permitting cross-racial couples to marry would fatally degrade the institution of marriage, for marriages across the color line were against nature, and against the Divine plan (as some opponents argue today against same-sex marriage). In Tennessee, for example, the court opined that "natural as well as municipal law" mandated marriage, but cross-racial marriages were "revolting" and "unnatural." *State v. Bell*, 66 Tenn. 9, 11 (1872); PASCOE, WHAT COMES NATURALLY 69-73.

Slowly but unmistakably, social and legal opinion began to see these laws as inconsistent with principles of equality and damaging to society. Still, race-based marriage restrictions remained in force in more than thirty states when this Court in 1923 recognized the right to marry as a fundamental right. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *see also Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942). Even at the time of this Court's decision in *Loving v. Virginia*, 388 U.S. 1 (1967), 16

states restricted interracial marriages. *Id.* at 6. Only after the *Loving* Court struck down Virginia's "Racial Integrity" law, thereby invalidating all remaining state anti-miscegenation laws, were such restrictions on the basic freedom to choose one's spouse finally laid to rest.

C. Courts Have Played An Instrumental Role In Changes To Marriage Laws.

Several of the fundamental changes discussed above did not result from what the Sixth Circuit described as "allow[ing] state democratic forces to fix the problems as they emerge and as evolving community mores show they should be fixed." *DeBoer*, 772 F.3d at 407. Instead, judicial review has often led to the recognition that traditional or discriminatory views of marriage (and marriage-related laws) must give way in the face of evolving understandings of race and gender embodied in constitutional guarantees under the Fourteenth Amendment.

Loving is perhaps the most obvious example, but not the only one. Twenty years before *Loving*, the California Supreme Court struck down a similar anti-miscegenation law. *Perez*, 198 P.2d 17. In both *Perez* and *Loving*, proponents of the laws made many of the same arguments now being advanced by Respondents and adopted by the Sixth Circuit below in the defense of the bans on same-sex marriage: *e.g.*, that biology justifies the restrictions; that the Constitution does not address restrictions on marriage; that the question of who can marry should be left to the political process; and that the restrictions have been

widely accepted and are supported by tradition. *See, e.g.*, Br. on Behalf of Appellee, *Loving v. Virginia* (No. 395), 1967 WL 93641, at *4-7, 31-38, 40-49; *Perez*, 198 P.2d at 40, 43, 44, 46 (Shenk, J., dissenting).

As noted above, this Court also held unconstitutional gender-based distinctions relating to marriage. It prohibited asymmetrical treatment of husbands and wives under Social Security and veterans' benefit laws. *Califano*, 430 U.S. 199; *Weinberger*, 420 U.S. 636; *Frontiero*, 411 U.S. 677. Similarly, this Court held that unequal treatment of spouses in divorce proceedings—a law requiring husbands, but not wives, to pay alimony—could not withstand constitutional scrutiny. *Orr v. Orr*, 440 U.S. 268, 278-83 (1979).

These cases establish that state laws rooted in "traditional" notions about marriage are not immune from judicial review, particularly when they interfere with equality and individual liberty. When such laws contradict constitutional mandates, this Court has not abdicated its role in deference to the "democratic process." Instead, it has found such laws unconstitutional.

* * * * *

Throughout American history, the rights to marry and to choose one's spouse have been profound exercises of the individual liberty central to the American polity and way of life. The past century has witnessed societal and constitutional emphasis on freedom in choice of marital partner and freedom from racial and gender-based restrictions in marriage. Recognizing the right of individuals of the

same sex to marry is the next step in this historical trend.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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