

IN THE

Supreme Court of the United States

ON WRITS OF CERTIORARI TO THE UNITED STATES

COURT OF APPEALS FOR THE SIXTH CIRCUIT

**BRIEF OF AMICI CURIAE CAMPAIGN FOR
SOUTHERN EQUALITY AND EQUALITY
FEDERATION IN SUPPORT OF PETITIONERS**

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JAMES OBERGEFELL, *et al.*,
AND BRITTANI HENRY, *et al.*,
Petitioners,

v.

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

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SUMMARY OF ARGUMENT

Laws have a teaching effect in American communities. The laws surveyed in this brief, which are the product of a political process that targets gay people¹ as a vulnerable minority, teach that gay people are to be condemned, and that they, and their children, are undeserving of basic freedoms and protections. These lessons ripple across the social fabric of our nation, forcing gay Americans and their families to navigate the daily harms and stigma inflicted by state laws that deny them dignity and the right to participate in civic life through the institution of marriage.

The central ground for the Sixth Circuit's decision to uphold the challenged same-sex marriage bans is its assertion that federal courts should deferentially allow each state to decide whether there should be any such marital right within its territory. *DeBoer v. Snyder*, 772 F.3d 388, 396 (6th Cir. 2014) ("And all come down to the same question: Who decides? Is this a matter that the National Constitution commits to resolution by the federal courts or leaves to the less expedient, but usually reliable, work of the state democratic process?").

But this Court's jurisprudence dictates a "more searching judicial inquiry" when the "political processes ordinarily to be relied upon to protect minorities" have been "curtail[ed]." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). The four-factor framework of *Carolene Products* has been adopted by this Court in determining when a law disadvantages a "suspect class," the trigger for heightened scrutiny.²

This brief addresses the fourth factor of *Carolene Products* – whether the minority group has been "relegated to a . . . position of political powerlessness" – and demonstrates that the Sixth Circuit's conclusion in *DeBoer* is based on a false premise. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 433 (1985) ("a continuing antipathy or prejudice" requires a "need for more intrusive oversight by the judiciary"). Even where a class comprises half the population in raw numbers and has achieved substantial political success, heightened scrutiny is appropriate where the class discrimination persists as a result of the political process. *See Frontiero v. Richardson*, 411 U.S. 677, 686-87 (1973). Gay Americans, who comprise only an estimated 3.5% of the nation's population,³ do not possess the political power to protect their constitutional rights through the democratic process as suggested by the Sixth Circuit's decision.

In the context of the lives of the politically powerless – including gay Americans – this Court has a proud tradition of exercising its Constitutional authority when a controlling majority "identifies persons by a single trait and then denies them the possibility of protection across the board." *Romer v. Evans*, 517 U.S. 620, 633 (1996). Indeed, in the past, when political majorities disregarded the constitutional rights of political minorities, this Court has intervened to protect them. *See Loving v. Virginia*, 388 U.S. 1, 2 (1967); *Brown v. Bd. of Educ.*, 347 U.S. 483, 487-88 (1954). This judicial role is consistent with the goals of the Framers and this Court, who never countenanced yielding the adjudication of constitutional rights to "the superior force of an interested and overbearing majority." *The Federalist* No. 10. (James Madison).

The laws at issue in these cases impose a "broad and undifferentiated disability" solely on gay Americans. *Romer*, 517 U.S. at 632. In the face of such discriminatory laws, it is the federal judiciary's role to uphold the promise of equality. As the federal trial court in Mississippi recently noted in this very context, "[T]he courts do not wait out the political process when constitutional rights are being violated, especially when the political process caused the constitutional violations in the first place."⁴

To be sure, a majority of Americans now support marriage equality.⁵ An estimated 65% of Americans report having a family member or close friend who is openly gay, and with this familiarity comes personal support and acceptance.⁶ But in many states, there has been strong, even fierce, political resistance to this emerging acceptance, with the purposeful erection of state constitutional barriers to marriage and legislation in other areas to thwart the equal opportunities of gay Americans.

The assertion of political power has been most pronounced in states where significant numbers of gay Americans – and their children – live. One in three gay Americans live in the South.⁷ The percentage of same-sex couples raising children is highest in the Southern states:⁸ Arkansas (30%),⁹ Mississippi (29%),¹⁰ Louisiana (27%),¹¹ and Kentucky (23%).¹²

As the factual examples in this brief make clear, political opposition to the rights of gay Americans stubbornly remains. Accordingly, a decision by this Court that splits the resolution of the two questions presented in the cases under review will create chaos and uncertainty and will cause further entrenchment of political opposition to the rights of gay Americans. Waiting an indeterminable period for political will to match the private courage and dignity of gay Americans, as the Sixth Circuit posits in *DeBoer*, is not a solution to a constitutional problem.

* No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici*, or their counsel, made a monetary contribution intended to fund its preparation or submission. The respondents have filed blanket waivers with the Court consenting to the submission of all *amicus* briefs. The petitioners' consents are submitted herewith.

1. The term “gay” as used herein refers to lesbians, gay men, and people in same-sex relationships.

2. *See, e.g., San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973). The four factors are (1) whether the class has suffered a history of discrimination; (2) whether the subject's trait bears any relation to his or her ability to contribute to society; (3) whether the discrimination is based on “obvious, immutable, or distinguishing characteristics that define them as a discrete group,” and (4) whether the group is politically powerless. *See, e.g., Bowen v. Gilliard*, 483 U.S. 587, 602 (1987); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440-41 (1985).

3. Gary J. Gates, *How Many People Are Lesbian, Gay, Bisexual, and Transgender* (The Williams Institute, April 2011), available at <http://williamsinstitute.law.ucla.edu/research/censuslgbt-demographics-studies/how-many-people-are-lesbian-gaybisexual-and-transgender/>.

4. *Campaign for Southern Equality v. Bryant*, 2014 WL6680570 at *33 (S.D. Miss. Nov. 25, 2014).

5. According to a recent Public Religion Research Institute poll, 54% of Americans favor or strongly favor marriage equality. Robert P. Jones, Public Religion Research Institute, *Attitudes on Same-Sex Marriage by State* (Feb. 10, 2015). A May 21, 2014 Gallup poll shows 55% support for marriage equality nationwide. Justin McCarthy, *Same-Sex Marriage Support*, May 21, 2014, available at <http://www.gallup.com/poll/169640/same-sex-marriage-support-reaches-new-high.aspx>. A 2013 poll shows 53% support. Alex Lundry, TargetPoint Consulting, *ENDA National Poll Results* (Sept. 16, 2013).

6. Public Religion Research Institute, *Survey* (Feb. 26, 2014), <http://publicreligion.org/research/2014/02/2014-lgbt-survey/>.

7. Gary J. Gates, et al., *The LGBT Divide: A Data Portrait of LGBT People in Midwestern, Mountain & Southern States* (The Williams Institute, Dec. 2014), <http://williamsinstitute.law.ucla.edu/lgbtdivide/#/ethnicity>.

8. The national average is 19%. Gary J. Gates, *LGB Families and Relationships: Analyses of the 2013 National Health Interview Survey* (The Williams Institute, Oct. 2014).

9. Gary J. Gates, *Same-Sex Couples in Arkansas: A Demographic Summary* (The Williams Institute, Oct. 2014).

10. Gary J. Gates, *Same-Sex Couples in Mississippi: A Demographic Summary* (The Williams Institute, Dec. 2014).

11. Gary J. Gates, *Same-Sex Couples in Louisiana: A Demographic Summary* (The Williams Institute, Oct. 2014).

12. Gary J. Gates, *Same-Sex Couples in Kentucky: A Demographic Summary* (The Williams Institute, June 2014).