IN THE
Supreme Court of the United States

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JAMES OBERGEFELL, et al.,
*Petitioner*,
v.
RICHARD HODGES, Director, Ohio Department of Health, et al.,
*Respondents.*

**On Writ of Certiorari To The United States Court of Appeals For The Sixth Circuit**

# BRIEF OF *AMICUS CURIAE* STATE OF SOUTH CAROLINA IN SUPPORT OF RESPONDENTS

This Court has recognized that, in interpreting the Constitution, it must "look first to evidence of [its] original understanding." *Alden v. Maine*, 527 U.S. 706, 741 (1999). To those who drafted and ratified the Fourteenth Amendment, and to those who publicly stated its meaning and purpose at that time, it was unimaginable marriage was not the exclusive province of the states to define. Nor did the framers and their contemporaries conceive that the definition of marriage consisted of anything other than the union between man and woman. Indeed, the framers insisted upon leaving untouched those state laws depriving women of basic rights upon marriage to a man. Surely then, those state laws exclusively defining marriage as between a man and woman were hands off under the Amendment's original meaning. While undoubtedly there are applications of the Fourteenth Amendment unforeseen by its drafters, same-sex marriage is not one. No evidence exists that the Amendment imposed a different meaning upon states than their longstanding marriage definition. This is not a case where judicial construction relies upon an evolving concept of the Amendment beyond its historical foundation to create a new constitutional right. *See Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 847 (1992). To the contrary, the Joint Committee on Reconstruction's adoption of the Amendment, ". . . undercuts [that] . . . the framers intended to constitutionalize . . . more general rights of fairness, content of which would change over time as mores and conditions change." Maltz, *The Fourteenth Amendment As Po-litical Compromise,* 45 Ohio St. L. J. 933, 969 (1984).

In fact, contemporaneously with the Amendment's ratification, and reflective of its original meaning, same-sex marriage was categorically rejected. Such was perceived as not procreating children nor promoting families. Family life was of paramount importance to the Fourteenth Amendment framers, particularly because slave families had been so disrupted by their masters. Where there is a "longstanding and still extant societal tradition withholding the very right" being sought, the Fourteenth Amendment will not supply that right. *See Michael H. v. Gerald D.,* 491 U.S. 110, 127, n. 6 (1989) (opinion of Scalia, J.). As a result, a construction "contrary to the intentions of the Framers of the Fourteenth Amendment" must be rejected. *City of Richmond v. J.A. Croson Co.,* 488 U.S. 469, 490-91 (1989).

After the Amendment's adoption, the traditional marriage definition was considered untouched. This Court endorsed the traditional definition in *Murphy v. Ramsey,* 114 U.S. 15, 45 (1885). Legal treatises agreed. And, almost one hundred years later in *Baker v. Nelson,* 409 U.S. 810 (1972), the Court rejected same-sex marriage as mandated by the Fourteenth Amendment. The Amendment's text has not changed. Nor should its interpretation.

The Fourteenth Amendment certainly proscribes laws banning interracial marriage – a product of the Jim Crow era – and part of the State-sponsored racial discrimination the Amendment sought to extinguish. *See Loving v. Virginia*, 388 U.S. 1 (1967). However, apart from those blatantly racial enactments, the institution of marriage ". . . has long been regarded as a virtually exclusive province of the states." *Sosna v. Iowa,* 419 U.S. 393, 404 (1979). *Sosna* noted that "cases decided . . . [for] more than a century bear witness" that domestic relations is a state, not a federal domain. *Id.* This Court's deference to the states regarding marriage reflects the genius of the framers of the Amendment, who insisted that state marriage laws remain intact to protect families. But the framers were also clear that each state could design marriage

laws as it saw fit. Such deference preserves dual sovereignty, and upholds the Tenth Amendment.

Thus, whether to employ the traditional marriage definition, universally used in 1787 and 1868, or to expand "marriage" to same-sex couples, remains for the State and its people. The Fourteenth Amendment does not interfere. As Justice Holmes declared, "[t]he Fourteenth Amendment, itself a historical product, did not destroy history for the State and substitute mechanical compartments of law all exactly alike." *Jackman v. Rosenbaum Co.,* 260 U.S. 22, 31 (1922). Drafters of the Amendment sought to remove badges of slavery. Therefore, the provision ". . . was regarded by its framers and ratifiers as declaratory of the previously existing law and Constitution." Graham, *Our "Declaratory" Fourteenth Amendment*, 7 Stan. L. Rev. 3, 5 (1954). Put simply, the Amendment, coexisting with the Tenth Amendment, was not intended to withdraw the State's power to define marriage as its citizens desire. To the contrary.

Preservation of federalism is particularly crucial for marriage, "an institution more basic in our civilization than any other." *Williams v. North Carolina*, 317 U.S. 287, 303 (1942). Moreover, "[t]he marriage relation creates problems of large social importance." *Id.* at 298. Thus, the State possesses a "large interest" in regulating the institution. *Id.* Only recently, in *U.S. v. Windsor*, 133 S.Ct. 2675 (2013), the Court reaffirmed State sovereignty in defining marriage – a power traced to the Founding – and one "'reserved to the States. . . .'" *Id.* at 2680 (*quoting Ohio ex rel. Popovici v. Agler*, 280 U.S. 379, 383-84 (1930)). In *Windsor*, federalism insulated New York's marriage definition from federal interference.

As in *Windsor,* the four states involved here, as well as many others, including South Carolina, have a constitutionally protected power to define marriage, the essence of federalism. *Windsor* emphasized that "marriage laws vary in some respects from State to State." *Id*. at 2681. Thus, federalism allows fifty different definitions of marriage in fifty different states. Accordingly, equal respect for the marriage laws of Ohio, Tennessee, Kentucky and Michigan should be given, as *Windsor* gave New York's. Such deference, in the form of federalism, "secures to citizens the liberties that derive from the diffusion of sovereign power." *Shelby County v. Holder,* 133 S.Ct. 2612, 2623 (2014) (internal quotations omitted).

Neither in 1868, nor now, does the Fourteenth Amendment compel a "one size fits all" for state marriage laws. Now, as then, the Tenth Amendment and federalism are foundational rocks upon which our Constitution rests. This foundation should not be rent asunder. If so, dual sovereignty is dead.

*Loving* is irrelevant. That case, and other marriage decisions, such as *Zablocki v. Redhail,* 434 U.S. 374 (1978) and *Turner v. Safley,* 482 U.S. 78 (1987) involved traditional marriage. Using race to define marriage, as in *Loving,* crosses the Fourteenth Amendment line. But using the traditional definition of marriage, accepted everywhere at the time of the Amendment's adoption in 1868, as well as when *Loving* was decided in 1967, does not. The common law prohibited same-sex marriage, but permitted interracial marriages between man and woman. Such racial prohibitions were the product of statute in the "era of Jim Crow racism." James, *Shades of Brown: The Law of Skin Color,* 49 Duke L. J. 1487, 1511 (2000).

Scholars document that the Fourteenth Amend-ment framers intended to prohibit laws banning interracial marriage. *Id.* Indeed, contemporaneously with the Fourteenth

Amendment's adoption, in *Burns v. State,* 48 Ala. 195, 197 (1872), the Alabama Supreme Court so concluded. Thus, Petitioners' reliance upon *dicta* in *Loving* – a racial discrimination case – to support same-sex marriage, foreign to all when the Fourteenth Amendment was ratified, is ill-founded and counter-historical. In characterizing marriage as "fundamental," *Loving* did not open the constitutional door requiring that States define marriage in non-traditional ways.

Furthermore, the traditional family, with the husband as unquestioned head, was the foundation of the Fourteenth Amendment framers' world. The framers deeply believed the family was the "primary unit of social and political action at the time. . . ." Farnsworth, *Women Under Reconstruction: The Congressional Understanding,* 94 Nw. U. L. Rev. 1229, 1236 (2000). One senator feared giving women the vote would disturb "'. . . the family circle, which is even of higher obligation than the obligation of Government.'" *Id.*, (*quoting Cong. Globe,* 42nd Cong., 2d Sess. 845 (1872)). Thus, Section Two of the Amendment eliminated women from the franchise.

Having this mindset, the Amendment's framers certainly did not intend to dismantle, but fought to preserve, state marriage laws. Indeed, skeptical congressmen insisted that these remain unaffected by the Amendment. Many feared that state disabilities placed upon married women, such as property ownership, would be undermined by an earlier Amendment draft. However, such concerns were allayed in the Amendment's final wording. Thus, the Amendment was subsequently passed and ratified, allowing states ultimately to abolish these disabilities themselves. While no one could reasonably argue that those disabilities are constitutional under this Court's more recent decisions, the framers' insistence upon maintaining them vividly illustrates their intent to ensure that state marriage laws are virtually the exclusive province of the states. In light of the then overriding importance of traditional marriage as the family foundation, "[t]he idea that . . . the framers and ratifiers of the Fourteenth Amendment thought they were enshrining same-sex marriage into the Constitution is utterly implausible. . . ." Zoeller, *Duty to Defend and the Rule of Law*, 90 Ind. L. J. 513, 550 (2015). Indeed, at that time, authorities concluded that same-sex marriage had no validity.

State authority to define marriage should not now be destroyed by a ruling without basis in history or constitutional law. Reliance upon *Loving,* or gender discrimination cases, or a disregard of longstanding deference to the States in their domestic relations,[1] is unwarranted given the Fourteenth Amendment's history.

[1] Federal question jurisdiction is lacking for domestic relations. *See Jones v. Brennan,* 465 F.3d 304 (7th Cir. 2006); *Wilkins v. Rogers,* 581 F.2d 399 (4th Cir. 1978); *Barber v. Barber,* 62 U.S. 582, 602 (1858) (opinion of Daniel, J.). Scholars agree. *See* Harbach, *Is The Family A Federal Question?*, 660 Wash. & Lee L. Rev. 131, 146 and cases collected at n. 59 (2009); Calabresi, *The Gay Marriage Cases and Federal Jurisdiction* (October 2, 2014), Nw. L. & Econ. Research Paper No. 14-18 (Available at http://dx.doi.org/10.2139/SSM.2505515).

Certainly, this Court's Fourteenth Amendment decisions go well beyond the Amendment's overriding original purpose of banning racial discrimination. Nevertheless, not one decision of this Court undercuts the State's power to define marriage as traditionally defined, and as was universally defined in 1868. Cases such as *Romer v. Evans*, 517 U.S. 620 (1996), invalidating discrimination against homosexuals, provide no basis to alter a State's longstanding definition of marriage, one long accepted by this Court. As Justice O'Connor wrote in *Lawrence v. Texas,* 539 U.S.

558, 585 (2003), (O'Connor, J., concurring), "preserving the traditional institution of marriage" is a "legitimate State interest . . .," one unrelated to "mere moral disapproval of an excluded group."

Reversal here obliterates a right reserved to the states by the Tenth Amendment. Each State should continue to define marriage as appropriate, as it has since "the Nation's beginning." *Windsor,* 133 S.Ct. at 2691.