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

[See Next Page For Other Consolidated Cases]

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

BRIEF AMICUS CURIAE OF THE STATE OF HAWAII IN SUPPORT OF PETITIONERS

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VALERIA TANCO, et al.,

Petitioners,

v.

BILL HASLAM, Governor of Tennessee, et al.,

Respondents.

———♦———

APRIL DEBOER, et al.,

Petitioners,

v.

RICK SNYDER, Governor of Michigan, et al.,

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———♦———

GREGORY BOURKE, et al.,

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INTERESTS OF THE AMICUS CURIAE

Amicus Curiae State of Hawaii has a strong interest in the promotion and protection of the civil rights of persons without regard to sexual orientation. In that vein, Hawaii has long had legislation prohibiting discrimination in public accommodations on the basis of sexual orientation. In 2013, Hawaii legislatively eliminated its former restriction limiting marriage to different sex couples, and extended the right to marry to same sex couples.

Hawaii believes that the right of a same sex couple to marry should be extended to persons *throughout the United States*, as a matter of fairness and equality, and for the benefit of the couple and any children raised by the couple. Hawaii believes that if the "liberty" protected by the Due Process Clause means anything, it is the liberty to love and commit to the person one chooses (regardless of gender), with the legal and social benefits and responsibilities attendant to that commitment. Furthermore, Hawaii has a strong interest in assuring that the marriages of Hawaii same sex couples are recognized throughout the United States were they to travel or move to other states. Accordingly, Hawaii submits this amicus brief urging this Court to hold that the fundamental right to marry under the Due Process Clause includes same sex couples.

SUMMARY OF THE ARGUMENT

This amicus brief presents a unique Due Process argument, not made by the parties or their amici, focused on the "existence and survival" element underlying the fundamental right to marry.

The rationale and logic of existing Supreme Court precedent require that the fundamental right to marry under the Due Process Clause include same sex couples. This Court has ruled many times that marriage is a fundamental right because it is 1) essential to the pursuit of happiness, and 2) important to our "existence and survival." Because *same sex* marriage is also essential to the pursuit of happiness and important to our "existence and survival," the fundamental right to marry must extend to same sex couples as well.

Same sex marriage, of course, easily satisfies the pursuit of happiness prong, as the vast majority of same sex couples express a desire to marry their partner if it were legal. Opponents, however, would deny that same sex marriage is important to "existence and survival" because only different sex couples naturally and biologically procreate. That theory is fundamentally flawed because this Court's determination that marriage is important to "existence and survival" was *not* focused on the biological capacity to procreate. Indeed, biological procreation can, and often does, occur outside of marriage, and this Court stated that "marriage," without mentioning "procreation," was fundamental to existence and survival.

This Court's reference to marriage being fundamental to "existence and survival" was referring not to a couple's biological ability to procreate, but rather to the *institution of marriage*, which provides that a couple undertake and fulfill *legal and social responsibilities*: 1) to *each other*, for the *couple's* mutual benefit and survival, and 2) *jointly* to *any children* they may have, for the children's survival. Where children are involved, marriage ensures that such children are raised and nurtured by *two* parents, in a committed legal relationship.

It is in this *legal and social commitment* sense (not natural procreative capacity), which benefits both the couple and their children, that marriage promotes the "existence and survival" of human beings in a modern society. Because *same sex* couples are equally capable of taking on those legal and social commitments to each other, and to any children they may have – and they and their children benefit from those responsibilities being fulfilled – *same sex* marriages are just as fundamental to existence and survival as marriages of different sex couples.

Indeed, because *Windsor* determined that denying full marriage status to same sex couples *demeans* them, and *humiliates* and *financially harms* their children, this Court *already* recognizes marriage's importance to their and their children's "existence and survival."

In sum, because same sex marriage, like different sex marriage, is important to both the pursuit of

happiness, and to the couple's and their children's existence and survival, same sex marriage easily satisfies the two foundational elements that caused this Court to declare marriage to be a fundamental right. Consequently, this Court's *existing* precedents command the inclusion of same sex couples within the fundamental right to marry.

History and tradition cannot justify excluding same sex couples from the fundamental right to marry; this is especially true when the reasons marriage is a fundamental right apply to same sex couples. Accordingly, bans on same sex marriage violate the Due Process Clause.

ARGUMENT

Amicus Curiae State of Hawaii agrees with arguments made in the multi-state Amicus brief to be filed by Massachusetts, et al., but submits its own brief in support of Petitioners to make the following unique argument – focusing on "existence and survival" – explaining why the fundamental right to marry under the Due Process Clause necessarily includes same sex couples. Hawaii is not aware of this particular argument having been made by any of the parties in these cases, or their amici. Hawaii's then-Governor initially made this argument in 2012 and throughout the Hawaii same sex marriage case of *Jackson v. Abercrombie*, 9th Cir. Appeal Nos. 12-16995 & 12-16998.

I. The Fundamental Right to Marry Under the Due Process Clause Includes Same Sex Couples Because Such Marriages Are Essential to the Orderly Pursuit of Happiness and Fundamental to our Existence and Survival.

This Court has unanimously declared that:

> The freedom to marry has long been recognized as one of the vital personal rights essential to the ***orderly pursuit of happiness*** by free men.
>
> Marriage is one of the "basic civil rights of man," fundamental to our very ***existence and survival***. To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without ***due process of law***.

Loving v. Virginia, 388 U.S. 1, 12 (1967). *See also Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (quoting the same "orderly pursuit of happiness" and "existence and survival" elements from *Loving*, and stating that "the right to marry is of fundamental importance for *all individuals*."); *Turner v. Safley*, 482 U.S. 78, 95 (1987) ("[T]he decision to marry is a fundamental right"); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974) ("freedom of personal choice in matters of marriage . . . is one of the liberties

protected by the Due Process Clause"). Although *Loving* found a Due Process violation only as to marriage restrictions on the basis of race, *Loving* unambiguously found that marriage itself was a fundamental right. And it did so because marriage was "essential to the orderly pursuit of happiness," and "fundamental to our very existence and survival." Therefore, if same sex marriage, too, satisfies these very same two underlying rationales that this Court has used to justify marriage being a fundamental right, then that right necessarily should extend equally to same sex couples.

There is, of course, no reason to believe that marriage for same sex couples is not "essential to the *orderly pursuit of [such couple's] happiness*." *See*, *e.g.*, G. Herek, et al., *Demographic, Psychological, and Social Characteristics of Self-Identified Lesbian, Gay, and Bisexual Adults in a US Probability Sample*, 7 Sexuality Res. & Soc. Policy 176, Table 8 (2010) (88.4% of gay men and 88.6% of lesbians, currently in a same sex relationship, would be somewhat, fairly, or very likely to marry their current partner if it were legal).

Thus, the remaining issue is whether same sex marriage, like different sex marriage, is also "fundamental to our very *existence and survival*." Although some might argue that only *different sex* marriage is "fundamental to our very existence and survival," because only different sex couples naturally and biologically procreate, that theory is fundamentally flawed. First, the underlying premise is no longer

true, because adoption, as well as now-common modern technologies, allow same sex couples to procreate as well.

Most importantly, the Supreme Court's reference to marriage being fundamental to existence and survival could *not* have been focused on the biological ability to procreate. This is clear because mere biological procreation can occur outside of marriage, and often does. And the Court said that "marriage" – not "procreation" – was fundamental to our very existence and survival.[1] Clearly then, it was something other than biological procreative capacity that caused this Court to deem marriage fundamental to existence and survival.

Instead, when the Supreme Court referred to marriage as fundamental to "existence and survival," it was referring not to a couple's biological ability to procreate per se, but rather to the *institution of marriage*, which provides that a couple undertake ***legal and social responsibilities and obligations*** 1) to ***each other*** for the *couple's* mutual benefit and survival, *see Griswold v. Connecticut*, 381 U.S. 479,

[1] Although this Court has also ruled that "procreation," *too*, is fundamental to our "very existence and survival of the race," *Skinner v. State of Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942), what matters is that this Court has concluded that "*marriage*" itself – separate and apart from *procreation* – is fundamental to our very existence and survival. *See Loving*, supra; *Zablocki*, 434 U.S. at 386 ("the decision to *marry* has been placed on the *same level of importance* as decisions relating to *procreation* [and] *childbirth*.").

486 (1965) (marriage is a "*bilateral loyalty*"); *Turner*, 482 U.S. at 95 (marriage is an "expression[ ] of emotional support and public commitment"), and 2) ***jointly*** to ***their children***. Where children are involved, the institution of marriage ensures that such children are raised by ***two*** parents who, in a committed legal and social relationship, will work ***together*** to protect the health, safety, and welfare of their children, and develop them into responsible members of society. *Cf. Lehr v. Robertson*, 463 U.S. 248, 256-57 (1983) ("The institution of marriage has played a critical role . . . in defining the legal entitlements of family members. . . . In recognition of that role, and [to] serv[e] the best interests of children, state laws almost universally express an appropriate preference for the formal family.").

It is ***in that legal and social commitment sense*** (not natural procreative capacity), that the institution of marriage promotes the "existence and survival" of human beings in a modern society.[2] Indeed, even opponents agree that children benefit

[2] "[T]he relationship of love and duty in a recognized family unit is an interest in liberty entitled to constitutional protection." *Lehr*, 463 U.S. at 258. "*Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring.*" *Id.* at 260. "When an unwed father demonstrates a full commitment to the responsibilities of parenthood *by 'com[ing] forward to participate in the rearing of his child,'* his interest in personal contact with his child acquires substantial protection under the due process clause. . . . But *the mere existence of a biological link does not merit equivalent constitutional protection.*" *Id.* at 261.

from the stability marriage offers. Marriage provides the couple with mutual obligations, both legal and social, of support for *one another*, and provides significant support for the safety, welfare, and development of *any children* the couple may have by providing *two* parents – *in a committed legal and social relationship* – to *together* protect, feed, clothe, educate, and develop their children into decent and productive members of society. *See Zablocki*, 434 U.S. at 384 (focusing not on procreation but on marriage's importance as "the foundation of family and society, without which there would be neither civilization nor progress," and on marriage's tie to "establish[ing] a home and *bring[ing] up* children," as opposed to merely giving birth to children). It is those *legal and social responsibilities and obligations to each other and jointly to any children*, not biological procreative capacity, that make marriage "fundamental to our very *existence and survival*."

Because *same sex* couples are equally able to undertake those same legal and social responsibilities and obligations to each other, and to any children they may have – and they and their children benefit from those responsibilities being fulfilled – *same sex* marriages are equally fundamental to our existence and survival. Thus, same sex marriage satisfies both prongs of this Court's rationale for deeming marriage a fundamental right: 1) it is essential to the pursuit of happiness, *and* 2) it is fundamental to our existence and survival.

Moreover, natural procreative capacity is clearly not the essence of marriage, given that states generally grant couples who have no intent, or are physically unable, to have children the same legal ability to enter into marriage. Furthermore, the U.S. Supreme Court has treated *as separate and distinct*, the decision to *marry*, versus the decision to *procreate*. *See Zablocki*, 434 U.S. at 386 ("the decision to *marry* has been placed on the *same level of importance* as decisions relating to *procreation* [and] *childbirth*.").[3]

Once it is understood that it is those *legal and social obligations* of a couple in a marriage *to each other* and *to their children* that make marriage fundamental to "our very existence and survival," it becomes clear that there is no reason to exclude same sex couples from the fundamental right to marry this Court has long recognized. For same sex couples, like heterosexual couples, benefit from the legal and social responsibilities of mutual support *for each other* that marriage provides. And, the *children* of same sex couples, too, will benefit just as strongly (as children of different sex couples) from the legal and social responsibilities (resulting from marriage) that their parents will *jointly* have *to them* to *together* protect them, and develop them into responsible adults. *See Zablocki*, 434 U.S. at 384 (marriage is fundamental because it is the "foundation of family and society";

[3] In any event, same sex couples can, and frequently do, procreate (through adoption and new technologies).

the right "'to *marry, establish a home, and bring up children*' is a central part of the liberty protected by the Due Process Clause"). *See also* M. Lamb, *Placing Children's Interests First: Developmentally Appropriate Parenting Plans*, 10 Va. J. Soc. Pol'y & L. 98, 99 (2002) ("there is substantial consensus today that children are better off psychologically and developmentally in two rather than single-parent families"); M. Lamb, *Mothers, Fathers, Families, and Circumstances: Factors Affecting Children's Adjustment*, Applied Developmental Science, 16:2, 98, 104 (2012) ("children and adolescents with same-sex parents probably would benefit if their parents could choose to marry and solidify their family and parental ties").

Indeed, preventing same sex couples from marrying *undermines* "existence and survival" by lessening those couples' obligations (both legal and social) to care for each other. And, where children are involved, barring marriage undercuts *the children's* "survival" by weakening the bond between their parents who ideally should *together* protect and nurture their children. Moreover, as this Court determined recently, denying full recognition of same sex marriages "demeans the couple," and "humiliates" and "financial[ly] harm[s]" their children. *United States v. Windsor*, 133 S. Ct. 2675, 2694, 2695 (2013). Thus, this Court has *already* recognized that denying same sex couples full marriage status undermines their and their children's existence and survival.

To argue that even though marriage is a fundamental right, *same sex* marriage is not, is thus inconsistent with existing Supreme Court precedent, and otherwise highly problematic. Most importantly, as explained above, the *reasons* marriage is a fundamental right – its importance to the pursuit of happiness and to "our very existence and survival," *Loving*, *Zablocki* – apply *equally* to same sex couples. That, by itself, requires including same sex couples within the fundamental right to marry recognized by this Court.

II. History and Tradition Cannot Justify Excluding Same Sex Couples from the Fundamental Right to Marry.

Because this Court made clear in *Lawrence v. Texas*, 539 U.S. 558 (2003), that "neither *history nor tradition* could save a law prohibiting miscegenation from constitutional attack," 539 U.S. at 577-78, the history or tradition of excluding same sex couples from marriage cannot justify that exclusion today. In fact, interracial marriage was banned in 30 states as of 1952, *see Loving*, 388 U.S. at 6 n.5, and *41 states* at some point in their history banned it. Yet despite that clear history and tradition of excluding interracial couples from marriage, the Supreme Court in *Loving* had no trouble finding interracial marriage to be a fundamental right. As *Lawrence* recognized, "[h]istory and tradition are the starting point *but not* in all

cases *the ending point of the substantive due process inquiry.*" 539 U.S. at 572.[4]

It is especially inappropriate to rely upon an historical or traditional practice of excluding certain groups from a right when the principal *reasons* for recognizing the right as fundamental – which are part of that tradition – would *include* the excluded groups. As demonstrated earlier, the reasons this Court recognizes marriage as a fundamental right – marriage being essential to the "orderly pursuit of happiness," and fundamental to our very "existence and survival," as well as being the "foundation of family and society," and furthering the "establishment of a home and bringing up of children" – apply equally well to same sex couples.

Finally, to allow tradition and history to single-handedly restrict the scope of a fundamental right would mean that longstanding discriminatory practices, once widely accepted in the nation, would escape Due Process scrutiny simply because those practices were longstanding, and once widely accepted. Upholding such an interpretation would severely weaken the

[4] And by overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986), *Lawrence*, in recognizing a Due Process right to same sex intimate relations, made extending the fundamental right to marry to same sex couples even more compelling. *Cf. Lawrence*, 539 U.S. at 604 (Scalia, and Thomas, JJ., dissenting) ("Today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in *marriage* is concerned.").

substantive protections enshrined in the Due Process Clause. *See Lawrence*, 539 U.S. at 577-78 (adopting Justice Stevens' position in *Bowers* that "the fact that the governing majority in a State has *traditionally* viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; *neither history nor tradition* could save a law prohibiting miscegenation from constitutional attack.").

Ultimately, because same sex marriages, like different sex marriages, are "essential to the orderly pursuit of happiness," and "fundamental to our very existence and survival," this Court's precedents virtually dictate inclusion of same sex couples within the fundamental right to marry this Court has long recognized.

Opponents must therefore demonstrate that their same sex marriage bans are narrowly tailored to serve a compelling state interest. *See Reno v. Flores*, 507 U.S. 292, 301-02 (1993) ("'due process of law' . . . include[s] a substantive component, which forbids the government to infringe certain 'fundamental' liberty interests at all . . . unless the infringement is narrowly tailored to serve a compelling state interest."). Because they cannot do so, state same sex marriage prohibitions violate the Due Process Clause.

CONCLUSION

This Court has repeatedly recognized marriage to be a fundamental right under the Due Process Clause

because it is important: 1) to the pursuit of happiness, and 2) to human existence and survival. *See Loving*, *Zablocki*, supra. Because the marriage of same sex couples unequivocally furthers these two purposes, *existing* precedent requires that same sex marriage, too, fall within the fundamental right to marry. The Due Process Clause thus invalidates prohibitions on same sex marriage. Only by granting petitioners a right to marry that fully respects petitioners' promises of loving, will the promise of *Loving* be truly fulfilled.

Dated: Honolulu, Hawaii, March 3, 2015.

Respectfully submitted,

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