No. 14-556

In the
Supreme Court of the United States

JAMES OBERGEFELL, ET AL.,
Petitioners,

v.

RICHARD HODGES, Director,
Ohio Department of Health, et al.,
Respondents.

BRITTANI HENRY, ET AL.,
Petitioners,

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 AMICI CURIAE CHRIS KLUWE, BRENDON AYANBADEJO, and SCOTT FUJITA IN SUPPORT OF PETITIONERS

TIMOTHY R. HOLBROOK
Associate Dean of Faculty
and Professor of Law
Emory University School of Law
1301 Clifton Road N.E.
Atlanta, GA 30322
(202) 507-4500

JOHN A. DRAGSETH
Counsel of Record
Fish & Richardson P.C.
60 South 6th Street
Suite 3200
Minneapolis, MN 55402
(612) 335-5070
dragseth@fr.com

Counsel for Amici Curiae

2015 – Bachman Legal Printing ■ (612) 339-9518 ■ 1-800-715-3582 ■ Fax (612) 337-8053

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

OTHER AUTHORITIES

INTEREST OF THE AMICI CURIAE[1]

Chris Kluwe was previously an NFL punter, and is currently a widely-read author and general gadfly. He majored in political science and history at UCLA. Chris contributes to a number of popular publications, particularly on the issue of civil rights, and drew broad attention for his open letter on the sports website Deadspin regarding a Maryland state delegate's effort to silence marriage equality advocacy in violation of the First Amendment (http://deadsp.in/NZo1id). He has discussed his views on equality on *The Colbert Report*, *The Ellen DeGeneres Show*, *The Nerdist* podcast, and in the documentary *The Last Barrier*.

Brendon Ayanbadejo was previously a linebacker and three-time Pro Bowler for the Super Bowl Champion Baltimore Ravens. The child of a Nigerian father and Irish-American mother, he was taunted over his parents' right to be married when growing up in the Lathrop Holmes housing project on Chicago's West Side, and sees today's marriage equality battle as the 21st century version of the fight for racial equality. His advocacy for civil rights gained attention when the Maryland delegate mentioned above, writing on state letterhead, urged the Ravens to "take the necessary action . . . to inhibit such expressions from your employees" (http://yhoo.it/SqSVYp). Upon noting that his

---

[1] 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 curiae* or their counsel made a monetary contribution to its preparation or submission. *Amici* understand that Petitioners and Respondents have both consented to the filing of amicus briefs in this appeal.

parents' marriage would have been illegal in 16 states before *Loving v. Virginia*, Brendon stated that he would not be silent on this issue of equality, conscience, and public importance. The team then won the Super Bowl.

Scott Fujita is a former linebacker who went from a walk-on at UC-Berkeley (where he graduated with honors) to a starter with the Super Bowl Champion New Orleans Saints. He was named the Saints' 2009 "Man of the Year" for his contributions on the field and in the community. Scott is a member of the Board of Directors for Team Gleason (www.teamgleason.org), which seeks to improve the lives of patients living with ALS and ultimately find solutions to stop that terrible disease. Scott's adoptive father is an in internment camp-born Japanese-American, from which Scott has come to understand the importance of treating others as equals and with true compassion, regardless of their current lot in life.

Dear Honorable Justices,

Two years have passed since we last talked, in *Hollingsworth v. Perry*. That case raised the issue of whether Californians had a right to marriage equality, and although you did not reach the ultimate issue, your ruling led to the legalization of gay marriage across the state. The ruling led to great joy for thousands who had been wanting to marry the person they loved—sometimes waiting for decades. Such marriages confirmed the legitimacy of their loving relationships—no different than those of their straight friends and neighbors—and gave them all-important rights like the ability to control healthcare decisions, the ability to obtain certain benefits, and rights upon the death of their spouses. It also gave them the ability to refer to their "husband" or "wife," and not have to use some derived, and lesser, term. For opponents of marriage equality, the outcome of *Hollingsworth* was no doubt frustrating, but as a practical matter, their lives have not changed—their lives have not been diminished in any recognizable manner. We know. We live there. We love the state and its people. California is better for your ruling.

We return in this brief because the issue of marriage equality is back before the Court, this time for the whole country, and its importance has not lessened one iota. We write because this Court rules best when it hears many views—not just those of particular special interests. We write because we have been active publicly in advocating for marriage equality as straight allies for the LGBT community, and we believe our experience with that community (oh, what a community!) has given us special insight. And we write because we must—we cannot be silent

on this important issue that centrally affects the lives of millions of Americans.

The More Things Change, the More They Stay the Same

In the last two years, much has changed in the areas of marriage equality and recognition of the lesbian, gay, bisexual, and transgender (LGBT) community. When we last chatted, 38% of Americans lived in a state that had marriage equality, while today 70% do.[2] The needle on public attitude to marriage equality has also moved—to an extent never seen before. In 1996, 27% of Americans felt that same-sex marriage should be valid, while the number had risen to 55% by mid-2014, according to the most recent Gallup poll. Nearly 8 in 10 young adults favors same-sex marriage. Justin McCarthy, "Same-Sex Marriage Support Reaches New High at 55%," Gallup, May 21, 2014 (available at http://goo.gl/YpORa6).

In our field of sports, the change has been great and very public—as with everything in sports. The NBA saw its first out gay player in Jason Collins. Despite rampant speculation to the contrary, his teammates were cool with him, his team performed well (making the playoffs and winning in the first round), and he has been a wonderful example of a classy person—technically, a classy gay person, but more properly just a classy person.

Likewise, the NFL saw its first openly gay player in Michael Sam—another truly classy person. For

---

[2] Casey Miller & Randy Yep, "Marriage Mosaic: Evolution of Gay Unions in the U.S.," Wall Street Journal.com, accessed Mar. 6, 2015 (available at http://graphics.wsj.com/gay-unions/?mod=e2tw).

about fifteen minutes, a sub-set of people freaked out when an ESPN camera caught him kissing his partner when he was drafted. But most saw a couple who was ecstatic about an important and happy moment in life, and appreciated that they should be able to react the same way a straight couple would without raising an eyebrow. That news lasted a few minutes, and Michael moved on to the NFL, where his first team did not do well, and his second did—but neither had any problems with his sexual orientation. He was another guy fighting to get a roster slot. In other words, the supposedly backward, macho group of professional male athletes was itself professional enough to treat these men properly and as equals—something that the U.S. laws can also certainly do.

Many states in addition to California have also moved from banning gay marriage to allowing it in the past two years. Of the five men whose names appear on the cover of this brief, four are straight and live in states that newly have marriage equality, and one (so ironically) is gay and lives in a state that does not allow him to marry and refuses to recognize his marriage legally performed and recognized in Illinois. The straight men can affirm, without question, that the introduction of gay marriage around them has been a great, direct, and life-improving action for their gay friends. And for their straight friends and acquaintances, they can affirm that the change has had no effect (other than them having happier gay friends). No straight person in California or Minnesota (or any other state) has thought, "I'm going to have children out of wedlock now that marriage is cheapened." No one has thought, "Boy, it was one thing when the gay couple down the street was just living together, but a whole different thing now that they are married." If anything, the one change all of

this has had is that it has improved our own marriages, as our wives continue to appreciate that we are not one-dimensional meatheads, but have actual intelligent, emotional, and empathetic depth.

Our experiences—both in sports and in states with marriage equality—also put a lie to Respondents' excuses. Just as the speculation about how teammates would accept Jason Collins and Michael Sam was a canard, Respondents' speculations that lead to its "proceed cautiously" argument are made up and unsupported. Marriage equality is working just fine in the states that have it. It is perhaps the one single problem California does ***not*** have right now. The people of California—just like athletes on the University of Missouri football team, the Brooklyn Nets, the St. Louis Rams, and the Dallas Cowboys (and everywhere we have been in sports)—are, in the main, lovers of freedom, cognizant of the Golden Rule, and respectful of the rights of others.

Now, that is not to say that things have changed completely. There are many who are still opposed to marriage equality—and Respondents argue those people should be heard through the democratic process. That too is a canard, however, because those views, just like many others this Court has considered in the past (e.g., relating to race), do not have legitimacy under the Constitution. They are based on animus, bigotry, fear, intolerance, and small-minded prejudice—not on logic. Let's look, for some examples, at just a few of the comments on about Michael Sam to get a feel for what we are dealing with:

> I did not wanna see Michael Sam kiss his boyfriend like the freak

> Espn special: an hour of Michael Sam crying with his fag boyfriend
>
> Michael Sam is no hero, he's just a fag.
>
> It's sickening that Michael Sam has his own segment because he is gay. The espys are for sports not for faggots

Sean Newell, "Ugly America Responds to Michael Sam Kissing a Man on ESPN," Deadspin, May 10, 2014 (available at http://goo.gl/1zbipD); Jim Buzinski, Twitter Haters Out in Force for Michael Sam's ESPY," SB Nation: Outsports, July 17, 2014 (available at http://goo.gl/xjrB2P).

Outside the distorted world-view of these crazy commentators and their cohort, Michael Sam has handled himself precisely how any team or league would want their athletes to act. The attacks on him had no rational connection to anything he had done, but were instead an irrational reaction to his sexual orientation. But their ultimate basis is equally principled, and equally unprincipled, to more moderately-stated positions against equal rights for gay couples.

Is it really too hard to see the parallels between this and what people said of Jackie Robinson almost 70 years ago? Jackie Robinson was a singular athlete and singular man, but the slurs hurled against him sprang from the same place as the slurs hurled against Michael Sam. They are illegitimate views, wrongly-motivated, and used to take equal rights away from the minority. They led this Court to apply the Constitution properly in the area of race a half-century ago, and they should lead to proper application of the Constitution again today.

Perhaps the greatest difference between today's battle and that for racial equality (and we do not in any way lower the critical importance of that battle) is that the nation is much more ready for this change than it was for racial acceptance. We cite the numbers above—55% of Americans favor marriage equality. Moreover, essentially every court that has met this issue has ruled in favor of freedom and against arbitrary government intervention. And we know there is no boogeyman who can scare us back into "caution." Marriage equality works for gay people, and it does not hurt straight people. Same-sex marriage bans, however, have worked considerable harm to gays and lesbians and, more importantly, to their children, by treating them as second-class citizens and denying them all the rights that attend marriage. This Court has frequently put itself a step ahead of general society, in the spot where society ought to be, and the issue of marriage equality is no different.

The Law Always Has Always Protected The Rights of Those Most Attacked by the Majority

One thing that has not changed is the law and underlying Constitutional principles on the issue of marriage equality. While due process and equal protection doctrine have become a complex web of categories and definitions, the actual issue in this case is pretty straightforward: is there any ***legitimate*** reason to treat same-sex couples, and the children of those couples, negatively by denying the legal rights and respect that we afford opposite-sex couples? The answer to that question is abundantly clear: no. In America, if we don't like something but our dislike is based on nothing more than a gut feeling or prejudice,

we leave it alone. We each want to be able to live our lives free from interference fom others, particularly when that interference is rooted in ignorance or animus.

Government at times does have to categorize and treat people differently; in other words, there are times when the government does need to discriminate. Criminals are imprisoned because they injured someone, so they must be treated differently. But the government only does that when it has a good reason.

Here, there are no good reasons to treat LGBT persons as second-class citizens. Our society has done enough of that already. No one can deny that LGBT persons have been subject to discrimination in the distant and not-so-distant past. Their relationships have been criminalized. In other countries, they are routinely persecuted and murdered simply because they love someone of the same sex. Government officials have insultingly compared gays and lesbians to alcoholics and other diseases, ignoring that all of the major medical associations have long rejected the idea that somehow homosexuality is a medical affliction that needs to be treated.

The result—heightened rates of suicide among LGBT youth. With enough societal discrimination, they don't need state governments piling onto them all the more. Instead, they need this Court to recognize their inherent value as people and the value of their relationships.

Against this backdrop of historical discrimination, the states attempt to justify treating LGBT persons as second-class citizens, because they haven't faced enough discrimination and marginalization. The

states primarily justify these bans on encouraging straight couples to have children within marriage. While that is great, why on earth would straight couples change their decisions about children because gay people now can get married. The states don't explain how banning same-sex marriage couples encourages straight people to procreate responsibly.

That's because they can't. It is nonsensical and irrational. None of the states' arguments in support of same-sex marriage bans provide good reasons to treat our fellow LGBT citizens differently. At best, these arguments support having marriage recognized by the state, but they do not justify denying marriage to same-sex couples. Even if such "channeling" is a legitimate interest, it would only support having opposite-sex marriage, not banning same-sex marriage. No state has advanced a reason why same-sex marriage bans would have any impact on the procreation of straight persons.

As Judge Richard Posner on the U.S. Court of Appeals for the Seventh Circuit succinctly explained the lunacy of these positions: "Heterosexuals get drunk and pregnant, producing unwanted children; their reward is to be allowed to marry. Homosexual couples do not produce unwanted children; their reward is to be denied the right to marry. Go figure."

The procreation justification is also dishonest. Infertile couples can get married, so procreation cannot be a necessary requirement for marriages. It also ignores that same-sex couples are having children. If these bans are upheld, these children will be living in families that are treated as inferior to others, and it may impact their ability to get adequate health care coverage and other legal protections. If these marriage bans are "all about the children," then

these bans are throwing the children of LGBT persons under the school bus.

In making decisions on constitutionality, this Court sometimes arrives with a skepticism directed against the regulator, when the regulation is of a type that has traditionally been enacted with improper motivation (e.g., race-based laws), and a skepticism directed against the regulated when the field has traditionally been subject to benign laws (like basic economic regulation). *E.g., Romer v. Evans*, 517 U.S. 620, 634 (1996); *City of Cleburne v. Cleburne Living Cent.*, 473 U.S. 432, 440 (1985). The court in this case also suggested that somehow this issue is best left to the democratic, state-level processes. For historically discriminated groups, we know how well this works . . . the majority passes law to strip those disliked groups from their rights. This is the heart of what due process and equal protection are meant to protect against. Striking down laws that unjustifiably discriminate against people is what the courts are supposed to do. This Court should be incredibly skeptical of these bans. They treat honest, loving families harmfully with no added benefit to society. Indeed, LGBT couples fulfill all the obligations of other American citizens—e.g., they are naturalized, pay taxes, and serve in the military—yet they are denied the same rights, something plainly disallowed by the Fourteenth Amendment.

It is actually ironic that the states are working to keep same-sex couples from entering a flagging institution. Thousands of same-sex couples are fighting for the right to enter an institution that has been waning within the heterosexual community, with divorce on the rise and couples choosing to cohabitate instead of getting married. Those in favor

of marriage should be happy that same-sex couples are fighting for inclusion, breathing fresh life into marriage's faltering lungs.

CONCLUSION

America has an ideal—exhibited imperfectly in the original Constitution and more perfectly in the Fourteenth Amendment—that all should be treated equally for who they are. Institution of marriage equality broadly will not solve all our ills, but it's a good place to start, and we Americans are ready for it. The Court should reverse in these cases, and align them with the decisions of every other court of appeals.

Respectfully submitted.

TIMOTHY R. HOLBROOK
Associate Dean of Faculty
and Professor of Law
Emory University School
of Law
1301 Clifton Rd NE
Atlanta, GA 30322
(202) 507-4500

JOHN A. DRAGSETH
Counsel of Record
Fish & Richardson P.C.
3200 RBC Plaza
60 South 6th Street
Minneapolis, MN 55402
(612) 335-5070
dragseth@fr.com

Counsel for Amici

MARCH 2015