No. 14-124

In the Supreme Court of the United States

GARY HERBERT ET AL.,
Petitioners
v.
DEREK KITCHEN ET AL.,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF *AMICI CURIAE* STEVEN G. CALABRESI, DANIEL O. CONKLE, MICHAEL J. PERRY, AND BRETT G. SCHARFFS

IN SUPPORT OF CERTIORARI AND OPPOSING A RULING BASED ON VOTERS' MOTIVATIONS

BRETT G. SCHARFFS*
Counsel of Record
DONLU D. THAYER
530 JRCB
Brigham Young University
Provo, Utah 84602
(801) 422-9025
scharffsb@law.byu.edu
*Admission pending

Counsel for Amici Curiae

QUESTION PRESENTED

Amici focus this brief on the following question:

Whether this Court should rule that a principal basis for laws defining marriage as between a man and a woman is animus, thereby questioning the motives of millions of Americans.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

IDENTITY OF *AMICI* [1] [2]

Steven G. Calabresi
Clayton J. and Henry R. Barber, Professor of Law
Northwestern University
Visiting Professor of Political Science, Brown University
Visiting Professor of Law, Yale University
Chairman, Board of Directors, The Federalist Society

Daniel O. Conkle
Robert H. McKinney Professor of Law
Indiana University Maurer School of Law

Michael Perry
Robert W. Woodruff Professor of Law
Emory University School of Law

Brett G. Scharffs
Francis R. Kirkham Professor of Law, Associate Director of the International Center for Law and Religion Studies, and Associate Dean for Faculty and Curriculum
J. Reuben Clark Law School, Brigham Young University

---

[1] Pursuant to Supreme Court Rule 37(3)(a), all parties have consented to the filing of this brief. Pursuant to Rule 37(6), *amici* affirm that no counsel for a party authored the brief in whole or in part and no person other than the *amici* or their counsel made a monetary contribution to this brief, excepting some work on the brief has been supported by research assistant funding at the J. Reuben Clark Law School of Brigham Young University.

[2] Affiliations listed are for identifying purposes only.

INTRODUCTION AND INTERESTS OF *AMICI*

Amici are a unique group. To the best of our knowledge, no prior group has filed a brief in this Court commenting on the sensitive issue of same-sex marriage while taking no position on the underlying question of whether the Fourteenth Amendment requires the states to recognize same-sex unions as marriages. *Amici* disagree with each other on whether the Tenth Circuit's ruling below invalidating Utah's Amendment defining marriage as between a man and a woman was correct.

This brief is filed because we all agree that this Court should grant review in this case to correct a common, but entirely mistaken, reading of this Court's decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013). Specifically, a number of lower courts following *Windsor* have stated or implied that state marriage amendments or laws are attributable to animus on the part of the legislators and voters who enacted them.

The accusation of animus is unfair and violates the integrity and aspirations of our shared political discourse. As Justice Kennedy explained in *Windsor*, many citizens who have supported marriage laws were merely affirming an understanding of marriage that "had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization." 133 S. Ct. 2675, 2689 (2013). The need to correct the misapplication of this Court's decision in *Windsor*—which misapplication ignores context and highlights animus—heightens the importance of the Court's decision of whether or not to hear this case.

There is little reason to believe that support of traditional marriage arises primarily or even substantially out of animus. Suggesting otherwise ignores the many voters responding to novel and rapid social changes. To characterize support of traditional marriage as being "born of animus" in fact ignores the counsel of a plurality of this Court from the previous term: "In the realm of policy discussions the regular give-and-take of debate ought to be a context in which rancor or discord based on [divisive accusations] are avoided, not invited." *Schuette v. BAMN*, 134 S. Ct. 1633, 1635 (2014) (Kennedy, J.).

In the Oklahoma case decided alongside the Utah case at the Tenth Circuit, Judge Holmes, concurring in the opinion invalidating Oklahoma's marriage law, explained why marriage laws are not rooted in animus, as he "endeavor[ed] to clarify the relationship between animus doctrine and same-sex marriage laws and to explain why the district court made the correct decision in declining to rely upon the animus doctrine." *Smith v. Bishop*, No. 14-136, Pet. App. 57a.

Regrettably, Judge Holmes' reasoning has not been heeded by counsel for same-sex couples in the Oklahoma case. They instead invoke legislative history allegedly containing animus as a reason to grant certiorari in that case. *See* Response Brief at 19, *Smith v. Bishop*, No. 14-136. The appeal to animus is unwarranted. As Justice Kennedy explained in a different context just last term, when voters decide controversial issues, it would be "demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent

and rational grounds." *Schuette v. BAMN*, 134 S. Ct. 1623, 1637 (2014). [3]

The Utah case is a superior vehicle for deciding the constitutionality of state marriage laws because both the majority and dissenting judges scrupulously avoid invoking animus as a ground of their decisions.

For these reasons, *amici* respectfully suggest that the Court should grant Utah's petition, and focus review of Utah's marriage laws on considerations that would not demean the democratic process.

REASONS FOR GRANTING THE PETITION

I. However this Court decides the constitutionality of Utah's Marriage Amendment, it should not impugn the motives of voters by attributing animus or any other type of hatred or hostility to the entire group of citizens who voted for the Marriage Amendment.

Framing an issue helpfully can be as important as the decision of whether or not to grant certiorari. Utah's petition, as well as the underlying Court of Appeals decision, makes the case a better choice for Supreme Court review. The Fourth Circuit's opinion in its same-sex marriage case claimed that Virginia's law was akin to a law "rest[ing] on an irrational prejudice." *See* App. Pet. at 68, *Schaefer v. Bostic*, No. 14-225. Counsel for the same-sex couples in Oklahoma's petition signal a strong desire to invoke animus ar-

---

[3] *Schuette* involved citizens who voted for a constitutional amendment prohibiting all sex- and race-based preferences in public education, public employment, and public contracting.

guments. Response Brief at 19-21, *Smith v. Bishop*, No. 14-136. In contrast, the opinions below in the Utah case do not rely on animus and Counsel for same-sex couples in this case, while continuing to make the animus argument, appear to have included it "on top of" an argument in favor of deciding this case in their favor on other grounds. *See* Response Br. at 30-31.

Focusing the issue presented in these cases on the subject of animus would be a mistake of historic consequence. This can be avoided either by only granting certiorari in this case or through a clear statement of the question presented.

A. The question presented is of immense national importance to millions of both supporters and opponents of same-sex marriage.

"Are we haters and bigots, or have our reasons been twisted and misconstrued?"

This question may soon be on the minds of many individuals who supported traditional marriage by voting for laws such as Utah's Amendment 3. This Court is poised to rule on whether our Constitution requires states to recognize same-sex marriage. As the Court is aware, care must be exercised in deciding this issue.

The question of bigotry is the wrong inquiry for a host of reasons. Attributing hatred to a group of voters who acted from a variety of motivations other than hatred will have the inevitable effect of tearing wider rather than mending the social strife over an issue of such enormous legal, political, and moral importance. The question facing this Court is simple:

Should it decide this issue in a way that attributes malice toward many, or charity for all?

Ironically, a decision based on animus would fan the flames of hatred and hostility toward the supporters of traditional marriage. Such a decision would embolden partisans to demean and dismiss other Americans as irrational bigots.[4] It would be unfortunate indeed were this Court to facilitate such destructive political rhetoric. A finding of group animus in this case would be a mistake of historic consequence.

Correctly attributing a collective intent to any group is always difficult, and it is impossible with an issue as deep and complex as same-sex marriage. Thinking upon the fact that millions of individuals each entered a ballot box and voted for traditional marriage should make it clear: even if this Court or Respondents could read minds, neither would find one unifying motive.

What Respondents in this case claim is more than simple clairvoyance. What they argue is even more objectionable. They maintain that this Court should extrapolate opinions stated by a few campaigners (while ignoring other statements) as reflecting the intent of more than half a million voters. Response Br. at 32-33.

---

[4] For Respondents, distinguishing an animus-based law from the people who advocate it is almost an afterthought. Respondents do argue that people of good faith may promote illegitimate and animus-based arguments. Response Brief at 33 n.3. This provides no comfort. To the average person, just as racist arguments almost always come from a racist, bigoted arguments almost always come from a bigot. Respondents' distinction, even if restated by this Court, would be lost in public discourse.

A victory won only by maligning or misrepresenting the motives of others is hardly a victory worth winning and is unlikely to achieve a stable resolution.

B. Both the majority and the concurrence below correctly avoided basing their judgments on animus, and correctly distinguished each case in which this Court has found animus.

The Tenth Circuit did not attribute hateful motives to citizens who voted in favor of a traditional definition of marriage. It properly rejected the notion that Utah voters chose to retain the state's legal definition of marriage for reasons of animus. The same panel subsequently ruled on a separate challenge to Oklahoma's marriage laws.

That decision also disavowed the accusation of animus. Judge Holmes, voting to strike down Oklahoma's traditional marriage law, wrote separately to explain why state marriage laws are not rooted in animus, and are different in important ways from the laws at issue in this Court's decisions in *Romer v. Evans*, 517 U.S. 620 (1996) and *United States v. Windsor*, 133 S. Ct. 2675 (2013).

Judge Holmes said: "[A] law falls prey to animus only where there is structural evidence that it is aberrational, either in the sense that it targets the rights of a minority in a dangerously expansive and novel fashion, *see Romer*, 517 U.S. at 631–35, or in the sense that it strays from the historical territory of the lawmaking sovereign just to eliminate privileges that a group would otherwise receive, see *Windsor*, 133 S. Ct. at 2689–95." *Smith v. Bishop*, No. 14-136, Pet. App. 72a.

Judge Holmes then examined Oklahoma's amendment, noting that it was not as "far-reaching" as the law at issue in *Romer*. *Id.* 74a. Rather than forbidding gays and lesbians from accessing "myriad rights," the concurrence stated that the amendment "only made explicit a tacit rule that until recently had been universal and unquestioned for the entirety of our legal history as a country: that same-sex unions cannot be sanctioned as marriages by the State." *Id.* 74a-75a.

Regarding this Court's decision in *Windsor*, the concurrence noted, "*Windsor* returned repeatedly to the fact that state legislatures are entrusted in our federalist system with drawing the boundaries of domestic-relations law—so long as those boundaries are consistent with the mandates of the federal Constitution." *Id.* 82a.

Judge Holmes stated that the only relevant question in a challenge to a state marriage law is whether the boundaries set by voters are "consistent with the mandates of the federal Constitution," not the motives millions of voters had in creating those boundaries: "Whether right or wrong as a policy matter, or even right or wrong as a fundamental-rights matter, this ancient lineage establishes beyond peradventure that same-sex marriage bans are not qualitatively unprecedented—they are actually as deeply rooted in precedent as any rule could be." *Id.* 76a.

As the Majority opinion stated in the Utah case:

"Lastly, appellants express concern that a ruling in plaintiffs' favor will unnecessarily brand those who oppose same-sex marriage as intolerant. We in no way endorse such a view and actively discourage any such reading of today's opinion. Although a majority's

'traditional[] view [of] a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice,' *Lawrence*, 539 U.S. at 577 (quoting Bowers, 478 U.S. at 216 (Stevens, J., dissenting)), for many individuals, religious precepts concerning intimate choices constitute 'profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives,' *id.* at 571. Courts do not sit in judgment of the hearts and minds of the citizenry. Our conclusion that plaintiffs possess a fundamental right to marry and to have their marriages recognized in no way impugns the integrity or the good-faith beliefs of those who supported Amendment 3." Pet. App. 75a.

II. Charging voters with bias will unnecessarily vilify those who disagree and will chill public debate.

A. The voters who approved Utah's Marriage Amendment without doubt acted from a number of motivations, many entirely unrelated to animus.

This Court's credibility is an important resource that should be carefully guarded and protected. Millions of citizens will be disappointed by any ruling made by this Court on these matters, but a decision attributing animus to millions of voters who understand their own minds and hearts will do irrevocable damage to the court's credibility. When others attributes a motive to you that you know you do not have, it is entirely natural that you should be dismissive of their conclusions, because you know their premises are false. It is wrong to say that the amendment would not have become law "but for" the irrational

prejudice, the animus, of voters. If voters acted without ill will towards their fellow citizens, being tainted with "animus" is likely to end, not start, productive discussions on the competing interests in this case.

Windsor's language stating that the Defense of Marriage Act lacks a legitimate purpose does not change this analysis. "In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder." *Nat'l Fed'n of Indep. Bus. v. Sebelius,* 132 S. Ct. 2566, 2577 (2012) (Roberts, C.J.). It may be, then, that the federal government has no legitimate purpose for a law, while a state might have legitimate purposes for an analogous law, and the people might have additional rational reasons for supporting the same law. Even voters of different states could have different reasons. *See* Transcript of Oral Argument at 54, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144) (indicating that counsel for the government was not prepared to assume that all states lack interests that could satisfy heightened scrutiny). Even if collective intent can be inferred for Congress, based upon legislative history, there is no analogue for attributing shared, common intent to millions of citizens across the nation who have voted on a myriad of proposals regarding same-sex marriage.

Many voters will vote on an issue as complex as same-sex marriage based upon multiple reasons. Here, we will briefly highlight four rationales that demonstrate the error in assuming the "but for" cause was animus.

1. Voters might have been concerned that courts have played too large a role in settling policy disputes. They could have supported the amendment,

then, to ensure "increase[d] opportunity for citizen involvement in democratic processes" by preserving for the people of the state the opportunity to decide a matter as central to state law as the meaning of marriage. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). Such voters would have understood that if they or their fellow citizens changed their minds, they would be free to repeat the process and vote in another election for a different result.

2. Voters also might have been concerned that a shift in the law of marriage would signal that there is nothing unique or uniquely beneficial about a child's being raised by her or his married biological parents. With high levels of divorce and a dramatic increase in the number of one-parent families over the past fifty years, a reasonable voter might conclude that a major change to the institution of marriage might further undermine an institution that is already weak.

3. The voters choosing to support the Utah Marriage Amendment might have been endorsing caution in decisions affecting a vital social institution. Changes in past decades to the understanding and practice of marriage and family life have had significant ramifications, some of which were not necessarily predictable at the time of adoption.

In the minds of many voters, marriage still is, as it historically has been, a social institution the very purpose of which is to link sexual activity and childbearing. Thus, if the laws regarding marriage change, voters might be concerned that the strength of the link will be affected.

A conservative attitude towards far-reaching social change does not reflect animus, rather, it reflects a conservative attitude. To adopt a conservative atti-

tude does not make a person a bigot; it means a person is cautious.

Many voters, then, while embracing positive advances in civil rights, remain cautious about supporting same-sex marriage. Same-sex marriage is thought of by millions of people, including some of the *amici* here, as the civil rights issue of our time. However, millions of other people, including other *amici*, are cautious about tinkering with a long-standing social institution.

4. Voters could have been motivated by concern that a change in the definition of marriage would eventually lead to conflicts between discrimination laws and the practices of religious organizations and individuals who understand marriage to be the union of a husband and wife. *See*, *e.g.* Brief of the Becket Fund for Religious Liberty*, Hollingsworth v. Perry*, No. 12-144.

Many religious believers understand marriage in this way and also believe that participating in any sexual relations outside of this setting is morally objectionable. Such believers may feel compelled by their faith commitments to decline to participate in or approve of morally objectionable behavior, whether the participants are members of the same sex or not. Their refusal to endorse same-sex marriage could take forms that could put them at odds with changing nondiscrimination principles.

As Professor Daniel Conkle, one of the *amici*, stated: "Needless to say, if the Court were to recognize a right to same-sex marriage by characterizing opponents as animus-driven, that reasoning would hardly support a sensitive accommodation of these important competing liberties." Daniel O. Conkle, *Evolv-*

ing Values, Animus, and Same-Sex Marriage, 89 Ind. L. J. 27, 41-42 (2014).

It is not irrational for defenders of traditional marriage to worry that as social attitudes about marriage change, they will be marginalized, ridiculed, and persecuted for maintaining the traditional belief. Wholesale attributions of animus only facilitate this process.

B. Deciding this case based on animus would have detrimental real-world effects.

It is clear that, whatever the intention, labeling a provision unconstitutional because it was motivated by animus has the effect of casting an aspersion on those who supported the measure, and in turn, marginalizes them, not merely as having mistakenly supported a policy at odds with a constitutional provision but as bigots and discriminators.

Professor Michael Perry, one of the *amici*, has maintained that the U.S. Constitution requires recognition of same-sex marriages. But he also notes that to suggest that support for a contrary marriage law is "based on the view that gays and lesbians are inferior human beings is tendentious in the extreme, and demeaning to all those who for a host of non-bigoted reasons uphold the traditional understanding of marriage as an essentially heterosexual institution." Michael J. Perry, *Right Decision, Wrong Reason*, Commonweal Magazine, August 5, 2013.[5]

---

[5] For a more complete argument, *see* Michael J. Perry, *Why Excluding Same-Sex Couples from Civil Marriage Violates the Constitutional Law of the United States,* 2014 Univ. Ill. L. Rev.

Professor Richard Garnett similarly notes "that [such a] characterization [of the] purpose and of the motives of" those who support legal definition of marriage as the union of a man and a woman "reflects a view that those states—and religious communities—that reject the redefinition of marriage are best regarded as backward and bigoted, unworthy of respect. Such a view is not likely to generate compromise or accommodation and so it poses a serious challenge to religious freedom." Richard W. Garnett, *Worth Worrying About?* Commonweal Magazine, August 5, 2013.

Professor Garnett's observation regarding compromise and accommodation points to a serious side effect of the marginalization of conscientious objectors to the changing views of marriage. That is, the imposition of the label of bigotry and animus to those who hold a different position will have a chilling effect on public debate over the definition of marriage and related issues. Many people will think that there is no need to hear out the "bigots" who express concerns. In turn, those who might have sincere questions about the wisdom of various policies related to same-sex marriages (*e.g.* the role of assisted reproductive technology, presumptions of parentage, religious liberty of those whose faith compels a different understanding of marriage) will face powerful pressure to subdue or silence their concerns.

A finding of animus in this case would be wrong. As Professor Daniel Conkle has explained: "The state-law context eliminates the federalism concern that was present in *Windsor* and that the Court directly

---

(forthcoming, Issue 5) (David C. Baum Memorial Lecture on Civil Liberties and Civil Rights).

linked to its animus rationale." Daniel O. Conkle, *Evolving Values, Animus, and Same-Sex Marriage,* 89 Ind. L. J. 27, 40 (2014).

Ironically, this chilling effect would undermine one of the values reflected in the majority decision in *Windsor v. United States*, 133 S. Ct. 2675 (2013). Although that decision concluded that Congress had acted from animus in amending the Dictionary Act to specify that marriage meant the union of a husband and wife, it also spoke at length about the importance of state-based decisions about the meaning of marriage. In the Utah case, the issue of federalism is presented in a way it was not in *Windsor*. The Court's discussions of federalism are instructive:

• "The recognition of civil marriages is central to state domestic relations law applicable to its residents and citizens. *See Williams v. North Carolina*, 317 U.S. 287, 298, 63 S.Ct. 207, 87 L.Ed. 279 (1942) ("Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders"). The definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the '[p]rotection of offspring, property interests, and the enforcement of marital responsibilities.'"

• "In acting first to recognize and then to allow same-sex marriages, New York was responding 'to the initiative of those who [sought] a voice in shaping the destiny of their own times.' These actions were without doubt a proper exercise of its sovereign authority within our federal system, all in the way that the Framers of the Constitution intended. The dynamics of state government in the federal system are to allow the formation of consensus respecting the

way the members of a discrete community treat each other in their daily contact and constant interaction with each other." *Id.* at 2692 (quoting *Bond v. United States*, 131 S. Ct. 2355, 2359 (2011)).

• "After a statewide deliberative process that enabled its citizens to discuss and weigh arguments for and against same-sex marriage, New York acted to enlarge the definition of marriage to correct what its citizens and elected representatives perceived to be an injustice that they had not earlier known or understood." *Id.* at 2689.

The principles so valued by the Court in these passages—forming consensus, discussion, and weighing of contrasting arguments—are crucial interests for a democracy. These same interests would be threatened by a dictate that some arguments and positions are outside the bounds of acceptable discourse. This is starker when the arguments in question are the respectable views of many citizens, arguments that, until quite recently, were widely understood and widely shared.

CONCLUSION

For the foregoing reasons, *amici* respectfully request this court grant certiorari and decide this case in a way not based on imputation of animus.

Respectfully submitted,

BRETT G. SCHARFFS*
Counsel of Record
530 JRCB
Brigham Young University
Provo, Utah 84602
(801) 422-9025
scharffsb@law.byu.edu
*Admission Pending

September 4, 2014