No. 25-125

In the Supreme Court of the United States

KIM DAVIS, PETITIONER
v.
DAVID ERMOLD, ET AL., RESPONDENTS

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

BRIEF OF *AMICUS CURIAE* DAVID BOYLE IN SUPPORT OF NEITHER PARTY

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AMICUS CURIAE STATEMENT OF INTEREST

The present *amicus curiae*, David Boyle (hereinafter, "Amicus"),[1] is respectfully filing this Brief in Support of Neither Party. In *Obergefell v. Hodges*, 576 U.S. 644 (2015), he was counsel for six people who testified, in their three amicus briefs, that they suffered greatly from having same-sex parents or households. The Court didn't really consider that point of view at all, *see Obergefell*, *supra*, which omission may have helped lead to the blanket mandate for same-sex marriage. So, he returns to remind the Court of those who suffered, or may suffer, from the lack of a mother or a father, due to having same-sex parents.

However, this brief is neutral, given, e.g., Petitioner's brief's unnecessary request to destroy substantive due process, which should be denied. Thus, the instant brief lays out facts and arguments/ counter-arguments, to provide a "menu" from which the Court can draw, neutrally, sans animus or bias, when writing its Opinion.

SUMMARY OF ARGUMENT

Kim Davis, while imperfect, may not have been treated entirely fairly.

Obergefell may need revisiting, for reasons including same-sex couples' children lacking a

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[1] No party or its counsel wrote or helped write this brief, or gave money intended to fund its writing or submission; and Amicus informed the parties, at least 10 days before the due date, of his intention to write the brief, *see* S. Ct. R. 37.

mother or a father.

Recent recognition of common-sense, biological limits on the "LGBT Revolution" may affect *Obergefell* and the treatment of same-sex couples' children.

Children's need for mother and father, as attested in, e.g., various *Obergefell* amicus briefs, may be a compelling interest allowing State regulation of same-sex marriage, adding to the rational-basis (or stronger) justification that same-sex marriage restrictions would, e.g., steer bisexuals/sexually-fluid persons into fertile marriages, increasing the population.

One solution to same-sex couples' children lacking a mother or a father could be to let the children choose to be adopted by a diverse-sex couple. This would be less extreme than a State's taking away every same-sex couple's children, and also avoid the opposite extreme of simply ignoring children's motherless/fatherless status.

Re other *Obergefell* issues, the Court may want to remove, keep, or add, that every State: itself offer same-sex marriage; and/or recognize out-of-state same-sex marriages; and/or offer gays/lesbians at least a civil union or "reciprocal benefits contract".

Native American nations or tribes, who have a long history of same-sex unions (while often valuing fertile, opposite-sex unions more), show a wide variety of acceptance, partial acceptance, or rejection of same-sex marriage, *see infra* Part VII, which may

argue for similarly letting each State decide acceptance, or not, of same-sex marriage.

The Court should neutrally respect and balance LGBT people's, and non-LGBT people's, rights, not forgetting same-sex couples' children's rights.

Finally, the world has moved on from 2015, and a fair, humane post-*Obergefell* or amended-*Obergefell* world is imaginable, and desirable, if the Court helps create it thoughtfully.

ARGUMENT

I. KIM DAVIS MAY HAVE BROKEN THE LAW, BUT MAY, *ARGUENDO*, ALSO HAVE BEEN PUNISHED EXCESSIVELY

Kim Davis is a polarizing figure, and Amicus is not an expert on her case. However, as a rule, clerks should do the jobs they are paid to do, and Amicus understands the frustration through which David Ermold and David Moore went when she refused them a marriage license.

Then again, speaking frankly: people may be prejudiced against Davis because of her appearance and self-presentation, but if she deserves a day in court, then she does.

Too, even if she broke the law by not serving Ermold and Moore, she may have been punished excessively, whether excessive fines, being jailed too long, or being jailed at all. It seems she did what she did out of conscience, not for personal advantage.

Some may wonder if Davis might be absolved of

fines/punishment due to First Amendment issues, but *Obergefell* might be left intact.

Then again, if *Obergefell* is overturned in full, that might help exonerate her, since she might not have been obliged to follow an illegal command in the first place.

Countering that, though: if *Obergefell* is overturned for reasons which came up after her clerk's-office actions, e.g., if the Respect for Marriage Act, Pub. L. 117–228, 136 Stat. 2305 (2022) ("RFMA"), has made *Obergefell* obsolete, because Congress allows people to transport their same-sex-married status into any State, so that the Court doesn't need to mandate same-sex marriage any longer; then Davis might not be exonerated, since, in that scenario, she may still have acted illegally back in 2015.

Finally, a lower court says Davis actually disavowed a desire to overturn *Obergefell*, 25-125 App'x at 29 n.3. However, despite that, the instant Court could take various options, e.g., *sua sponte* willingness to reconsider *Obergefell*.

But whatever the Court decides about Davis, the larger issue of *Obergefell* looms; so now to that.

II. *OBERGEFELL* NEEDS REVISITING, SINCE, E.G., IT LACKS CONSIDERATION FOR SAME-SEX COUPLES' CHILDREN DEPRIVED OF A MOTHER OR FATHER

Obergefell was wrongly decided, at least in part, and definitely in its method, which failed to recognize the suffering of children denied diverse-sex parents (a mother and father). However, the Court

may not want to overturn *Obergefell* in full: options include, leaving it intact; overturning it partially; amending it (e.g., making only civil unions mandatory, not full marriage); or adding to it (e.g., requiring that same-sex couples' children be given a legal right to a mother and father).

Obergefell is admittedly a beautifully written Opinion, even if wrong. Retired Justice Anthony Kennedy opined, for example, "As some of the petitioners … demonstrate, marriage embodies a love that may endure even past death. … They ask for equal dignity in the eyes of the law. The Constitution grants them that right." *Id.* at 681. (The Opinion might've been better if it granted same-sex couples' children the right to mother and father, as well.)

And Kennedy speaks movingly of same-sex couples' children: "Without the recognition, stability, and predictability marriage offers, [the] children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents[.]" *Id.* at 668. There may be some truth to this, although the Chief Justice accurately rejoins that this "lesserness" would also apply to children of polyamorous parents, *id.* at 704. Amicus wishes all children well, and any reconsideration of *Obergefell* should consider the well-being of same-sex couples' children, including those who want a mother/father.

However, Amicus observes frankly that the children are never the couple's biological children, since it is biologically, physically impossible for two people of the same sex to have children. (Unless one used to be another gender… but that causes other

issues.) So, the children are always, to an extent… *someone else's children*, to be bluntly accurate.

On the note of biological truth, our next section:

III. THE "BIOLOGICAL REFUTATION" RE LGBT RIGHTS: SOCIETY RECOGNIZES THE NON-FUNGIBILITY OF BIOLOGICAL SEX

In broad terms, there has been a "LGBT Revolution" in recent decades, whereby persons of homosexual or related inclinations gained rights and status. Some of this may be good, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003), precluding people from being arrested for sodomy—and gays might be arrested more often than "straights" would, leading to "equal protection" and other problems.

(Amicus doesn't endorse sodomy, or same-sex marriage, in any form; but actually arresting people for sodomy would resemble Nazi Germany or Iran.)

However, this revolution may be reaching its outer limits, as revolutions tend to do. And part of that retrenchment or "refutation" is a common-sense realization that biology, including difference between female and male, matters, and is not fully changeable. "The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both", *Ballard v. United States*, 329 U.S. 187, 193 (1946) (Douglas, J.). (Query: has *Obergefell* overturned *Ballard*? If not, then…)

Cf. also Diana Nerozzi, Chris Nesi & Patrick Reilly, *Minneapolis school shooter Robin Westman confessed he was 'tired of being trans': 'I wish I never brain-washed myself'*, N.Y. Post, updated Aug. 28,

2025, 7:01 p.m., https://nypost.com/2025/08/28/us-news/minneapolis-school-shooter-robin-westman-confessed-he-was-tired-of-being-trans/ (all links in this brief last visited September 5, 2025), quoting Catholic-school shooter Westman, "I regret being trans.[..] I wish I was a girl I just know I cannot achieve that body with the technology we have today." *Id.* While trans people should not be demonized, Westman was honest enough to admit that biology is very hard to supervene, *see id.*

More recent than *Ballard*, *supra*, is the United Kingdom's Supreme Court case *For Women Scotland Ltd v The Scottish Ministers*, [2025] UKSC 16, Apr. 16, 2025 (Hodge, Rose, Simler, JJ.) ("*For Women Scotland*"), *available at* https://supremecourt.uk/uploads/uksc_2024_0042_judgment_aea6c48cee.pdf. The case's Press Summary, *available at* https://supremecourt.uk/uploads/uksc_2024_0042_press_summary_8a42145662.pdf, says, under "Judgment", that the Court "holds that the terms 'man', 'woman' and 'sex' in the E[quality Act] 2010 refer to biological sex." *Id.*, PDF at 2.

In other words, transgender ("trans") people in Britain may not now use bathrooms they might prefer. However, the Press Summary, *supra*, notes, under "Protection from Discrimination", that the Opinion "does not remove protection from trans people, [who] are protected from discrimination on the ground of gender reassignment." *Id.*, PDF at 4. (*Cf. Bostock v. Clayton County*, 590 U.S. 644 (2020) (protecting workers from orientation/gender-identity discrimination))

Thus, *For Women Scotland* offers a nuanced

perspective, whereby trans people's substantial rights are recognized, but balanced with others' rights, e.g., cisgender people's right to bathroom privacy. On a similar note, the biological reality of men's and women's differences may impact *Obergefell* and the treatment of same-sex couples' children.

IV. SAME-SEX COUPLES' CHILDREN SHOULD HAVE A LEGAL RIGHT TO A MOTHER AND FATHER; THIS RIGHT IS A HIGHLY-COMPELLING BASIS FOR REGULATING SAME-SEX-MARRIAGE

As evinced by testimony in the three amicae/i briefs in *Obergefell* from, respectively, Heather Barwick and Katy Faust, Robert Oscar Lopez and Brittany Klein, and Dawn Stefanowicz and Denise Shick (Amicus was counsel of record, though isn't currently representing them) (*available at* https://tinyurl.com/mr3pntfy, https://tinyurl.com/zxn2pe4f, https://tinyurl.com/2jue6z7n), all of them children of same-sex parents or households, children do suffer in same-sex marriages, horribly, by having no mother or no father—with any attendant humiliation, stigma, injury, and gender confusion. (Stefanowicz's gay father's male partners lived in her home, mother was ill, passive, and subservient to father; Shick's father acted/dressed as a woman, "Becky": Stefanowicz/Shick Br., *supra*, at 7-8, 10-11, 14, 21, 24-37.) Because of the State's actions in encouraging, through government honor and subsidy, same-sex couples to marry, knowing that even if not most of them, still, many of them will have or adopt children, the State is responsible for what happens.

This State action hurts children, including the expressive harm of saying they don't need both mother and father; and this gives ample reason for the Court to revisit *Obergefell*. *Cf.* Brittany Klein's description of her oppressive upbringing by two women: "In this setting children have to squelch wishing for a mother or father. They are mocked and shamed if they ever express such a sentiment. They might be considered as traitors and sentenced to isolation, rejection and silence." Lopez/Klein Br., *supra*, at 28.

One might even say that if children have an equal right not to be deprived of a mother/father, then State licensing of same-sex marriages may violate the Fourteenth Amendment equal-protection or due-process rights of same-sex couples' children.

(Nothing here is to belittle any genuine love, care, and expenditure by same-sex parents toward children. However, that may not be enough in some cases.)

So, if either same-sex marriage, or same-sex-marriage bans, may hurt children in some way, then who decides on the legality of same-sex marriage? If there's damage (or benefit) either way, it seems States might be trusted to do a "cost-benefit judgment" and make the decision.

One gap in Kim Davis' petition, *see id.*, is that she alleges no actual damage from same-sex marriage besides religious-liberty or Constitution-fiddling damage. But Amicus has now shown, *see* the amicus briefs *supra* at 8, damage to children of same-sex parents. This supports Davis' request for certiorari.

Of course, not everyone believes that proven

harm from an action, is needed for a State to make laws to regulate that action. Indeed, in *Obergefell*, the Chief Justice, apparently no John Stuart Mill fan, eschews the "harm principle", *id.* at 705-06. It certainly doesn't hurt to allege harm, though, if you want to make a point, or meet intermediate- or strict-scrutiny hurdles.

On that note: Roberts puts forth as a rational basis for same-sex marriage bans, a State's "legitimate state interest" in "preserving the traditional institution of marriage", *id.* at 707 (citation omitted). Amicus respectfully offers a more scientific, or detailed, version of that: *see* Michael Boucai, *Sexual Liberty and Same-Sex Marriage: An Argument from Bisexuality*, 49 San Diego L. Rev. 415 (2012), *available at* https://williamsinstitute.law.ucla.edu/wp-content/uploads/Marriage-Argument-Bisexuality-Aug-2012.pdf: "This Article proposes that same-sex marriage bans channel individuals, particularly bisexuals, into heterosexual relations and relationships[.]" *Id.* at 416.

Given Boucai's sensible observation, then, such bans will steer more people into traditional, diverse-sex marriage, and grow the population, since opposite-sex marriages can actually create children. This is obviously enough for "rational basis" support of same-sex-marriage bans; though, if many sexually-fluid people are steered into fertile marriages, it may be enough to meet even intermediate or strict scrutiny.

And added to that, the harm from denial of children's need for a mother and father, may persuade the Court to revise *Obergefell*.

Whether *Obergefell* is overturned or not, though,

it is important to give same-sex couples' children at least some right to have diverse-sex parents. One hypothetical proposal follows:

V. ALLOWING CHILDREN OF SAME-SEX COUPLES TO CHOOSE ADOPTION BY A DIVERSE-SEX COUPLE, IS ONE POSSIBLE SOLUTION, AND LESS EXTREME THAN OTHERS

If same-sex couples' children—who, again, can never, ever be the biological children of both parents, barring some "trans" surprise—don't want to be denied a mother and father, perhaps the State can allow them to petition to be adopted by a diverse-sex couple. This would allow them the benefits of having both a father and mother for the rest of their childhood, and beyond.

Most people don't get to choose their parents, but in this unusual, "double whammy" situation, where their same-sex parents can't both be their biological parents, and the children testify they would suffer from being denied opposite-sex parents, the option to escape their deprivation and find the joy of having a mommy and daddy, might be workable, and beneficial.

(Indeed, much of our culture, e.g., the traditional American spiritual *Sometimes I Feel Like a Motherless Child*, is now incoherent, if it doesn't actually matter to be motherless, and there's really nothing to cry about.)

Objections might be manifold: people might claim that the child leaving for new parents would create instability, "cheat" the same-sex couple out of any

money and time they put into raising the child, be "homophobic", etc. But if it's in the best interests of the child to go join diverse-sex parents, then it is. *See, e.g.*, *Parham v. J.R.*, 442 U.S. 584 (1979), recognizing "the child's best interests", *id.* at 602-03 (Burger, C.J.) (citation omitted).

And if a child despises being denied a mother /father, how "stable" is his/her family anyway? Too, aren't the child's best interests more important than the mere money/time parents spend? Finally, is a child, or society, truly "homophobic" for not wanting the child to suffer deprivation of what children throughout history have had, a mother and father? *See* Klein, *supra* at 9, on same-sex couples' abuse of children who declare a desire for mother and father.

Adoption by a diverse-sex couple—and there may be many who'd be happy to give the child the joy of having a mom and dad—would be a "one-way ratchet": children of diverse-sex parents couldn't leave their parents to be adopted by same-sex parents. But the "asymmetry" is justified, because diverse-sex parents can't be considered a *deprivation*; one might have to be mentally ill to claim that it's somehow a *loss* to have mother and father. *See Grutter v. Bollinger*, 539 U.S. 306 (2003)—never overturned—(compelling interest of diversity, which can include gender diversity); *Ballard*, *supra* at 6 (diverse-sex groups offer what single-sex groups cannot). Indeed, same-sex parents offer their children literally a (sex)-*segregated environment*. Is this good?

(Too, there are fewer same-sex parents than

opposite-sex ones, making it harder for children to be adopted from opposite-sex parents to same-sex parents.)

And a right to be adopted by diverse-sex parents is a moderate solution, considering the alternatives. —One would be to allow States not only to ban same-sex marriage, but to take away the children of currently-married same-sex parents, and put them up for adoption by diverse-sex couples, or into a foster home. This may sound even less appetizing than offering children the chance to leave same-sex parents voluntarily. (To be clear, Amicus isn't endorsing the "States take same-sex parents' kids away" option.)

The other extreme is to whistle past the graveyard and pretend there's no problem, pretend that same-sex couples' or households' children all love being deprived of what may be called a birthright, having a mother and father. Six of those children already testified in *Obergefell* about the horrible deprivation they felt; it's more than reasonable to assume that there are many similar ones out there, who, through fear, intimidation by their same-sex parents, lack of hope or knowledge of any alternative (e.g., the possibility of being adopted by a diverse-sex couple), may be prevented from coming forward about the problem.

They may not even be aware of their deprivation, *see, e.g.*, Barwick/Faust Br., *supra* at 8, at 7-8, 11 (detailing how *amicae* did not realize their loss until later in life). So, it is very definitely a problem, one that can cause pain and loss for a lifetime.

Imagine, say, a girl entering puberty. Is she obliged to be happy that two men, at most one of whom is her biological father, are looking after her as she begins menstruation and other bodily changes, with no mother to talk to? …If it's bad/threatening for a trans girl/woman to use a cisgender girl's bathroom/shower for a short while, then is it good, for a period of *years*, for two men to be in an intimate situation with a developing girl? And the same for a boy with two mothers. (There may be success stories; but there can be failure stories, too.)

Cf. Stefanowicz/Shick Br., *supra* at 8, at 7-8, 10-11 (Stefanowicz suffered threatening atmosphere from father's male sex partners living in her home).

But would gays/lesbians who aren't married, still be allowed to adopt? Possibly, since the situation isn't exactly the same.

What if, say, a homosexual who adopts, then decides he/she is a bisexual and marries someone of the opposite sex? Or, what if two same-sex people live together, but are not married? It might be good if the adopted child could choose adoption by a diverse-sex couple; but perhaps this issue could be resolved after *Obergefell*-related issues are resolved.

If one of the same-sex couple is a biological parent, that could complicate the children's being adopted by someone else; but the other, absent biological parent could be given a right to adopt the children, or have a "right of first refusal" re being an adopting parent.

And, "Those who live in glass houses shouldn't

throw stones": if someone enters a highly-untraditional arrangement (in the Anglo-American legal tradition) like same-sex marriage, he shouldn't be surprised if children might, "untraditionally", want to be leave and be adopted by another family with mother and father.

Finally, if a parent cared about the child, she might not mind that the child wanted to leave to where greater happiness would be, with a mother and father. *See* the "Judgment of Solomon", 1 *Kings* 3:16–28 (woman gives up child to non-biological mother, to save the child's life); though in the present scenario, many same-sex couples wouldn't be biological parents at all.

In any case, it is maybe *Obergefell*'s worst defect that the class of same-sex couples' children who want diverse-sex parents, was not even considered. This powerless class of children should be ignored no longer. The Court should allow the States (or Congress?) to try rational solutions.

Thus, the Court, to protect children—a crucial thing, as the "horror story" of Jeffrey Epstein and victims reminds us—, may want to limit, clarify, or supplement *Obergefell* to say something like, "*Obergefell* must not be construed to prevent States from taking reasonable measures to allow children of same-sex parents voluntarily to seek adoption by opposite-sex parents." Such language would seem to preclude the State's just taking away all children of same-sex parents.

Cf. "[Some] States [support] the traditional understanding of marriage … to provide the best atmosphere for raising children. … [T]hose States

that do not want to recognize same-sex marriage … worry that by officially abandoning the older understanding, they may contribute to marriage's further decay", *id.* at 739-40 (Alito, J., dissenting).

…If the Court wants to be less definite, and avoid any perceived "hurry", it could, say, even avoid the word "adoption", and pronounce that States are free, as Brandeis-ian "laboratories", to experiment with debate and measures to let same-sex couples' children have a mother and father if they so desire. Of course, vagueness in the Court's language could lead to, e.g., States' harassing same-sex parents who don't give up their children to a diverse-sex couple.

Does *Obergefell* need to be overturned, then, if adoptability by diverse-sex parents solves the problem of children who want that? (Especially since not all same-sex couples have children.)

There is still the issue of all the years *before* a child is old enough that a State might let her express her preference for a traditional family: the child would be deprived of mother/father in those early years, too, including benefits of breast-feeding, etc. (Two men cannot breast-feed a child…)

"Maximalists" might argue that no same-sex parents should have a child at any point, lest a child be damaged by not having diverse-sex parents.

Some counterarguments are that one cannot force families to breast-feed children anyway (some do not), and that great trauma could be done to children taken away from same-sex parents (or any parents) against their will, trauma which could exceed any good done by transfer to diverse-sex parents.

However, even without the "maximalist"

maneuver of taking away all kids of same-sex parents, a State's ban on same-sex marriage would serve to show, per Alito, *supra*, that the State cares about marriages which give both mother and father to a child. The State may still have to accept out-of-state marriage licenses, but the State would still stick up for traditional marriage with its own policies. This might, e.g., encourage some sexually-fluid people to enter fertile, diverse-sex marriages, so their children would have a mother and father.

Note carefully, though, that merely overturning *Obergefell*—making *future* same-sex marriages less numerous—will do nothing to help children who *already* have same-sex parents. States may need to experiment/legislate, with the Court's permission, to let those children who *currently* want a mother and father, to get them.

Finally, if there are better solutions to the problem, Amicus welcomes them. But at least the problem, motherlessness/fatherlessness, should be duly recognized—and acted upon, soon.

VI. SHOULD THE COURT END MANDATING THAT EACH STATE OFFER SAME-SEX MARRIAGE AND/OR RECOGNIZE SUCH MARRIAGES DONE IN OTHER STATES?

As for same-sex marriage itself in *Obergefell*: one "Solomonic" way to update *Obergefell* might be to retain the mandate that (1) every State recognize out-of-state same-sex marriages, but (2) overturn the requirement that each State itself offer same-sex marriage. This would "split the baby" and could

seem fair to many people.

One rationale for (1), *supra*, is that the Defense of Marriage Act ("DOMA"), Pub. L. 104–199, 110 Stat. 2419 (1996) (restricting same-sex-marriage recognition) (repealed by RFMA) was unconstitutional in the first place, due to the Full Faith and Credit Act of the Constitution: therefore, *Obergefell* was right (under that rationale) to insist each State recognize same-sex marriages from other States.

As for (2), a rationale is that there is little or no need to infringe on State sovereignty and local democracy by demanding that each State offer same-sex marriage, especially since they'd have to recognize such marriages from out of state, anyway. That strident demand borders on "forced speech", making each State say something (approval of same-sex marriage) in which the people of that State might not believe.

A counterargument for (1), is that with RFMA, *Obergefell* is somewhat obsolete, unneeded, anyway, since RFMA forces States to recognize out-of-state marriages. Additionally, if the Court thinks same-sex marriage is best left to democratic decision, letting future Congresses decide on keeping RFMA or not, this would also encourage overturning *Obergefell* in full.

A counter-counter-argument is that the Full Faith and Credit Act shouldn't be subject to majoritarian reversal (except for Constitutional amendment), so that recognition of out-of-state same-sex marriages must be still Constitutionally safeguarded by *Obergefell*.

In any case, forcing each State to offer same-sex marriage itself, may seem a bit overweening: a.k.a. "hubris", *id.* at 718 (Scalia, J., dissenting). With modern jet travel, and many States offering same-sex marriage, a quick out-of-state trip—maybe doubling as a honeymoon trip—, to enter marriage in the traveled-to State, would be enough to guarantee same-sex marriage for all; and such a trip would be far easier than for a child to have to endure a lifetime without a mother or father.

Otherwise put, it doesn't seem like a great oppression to rule that some people may have to travel out of state to register a same-sex marriage, compared to the real oppression of lacking a mother/father eternally.

Other relevant ways to modify *Obergefell* come to mind. For example, should the Court ever have forced same-sex marriage on States, when the alternative of civil unions or domestic partnerships exists? Such arrangements, while lacking the name "marriage" (which some would argue belongs only to fertile relationships offering mother and father to children), could offer similar protections and rights as marriage would.

One nation's example, *see* Wikipedia, *LGBTQ rights in Croatia*, https://en.wikipedia.org/wiki/LGBTQ_rights_in_Croatia (as of July 18, 2025, 07:39 GMT): Croatia legalized same-sex intimate relations back in 1977, *see id.*, well before *Lawrence*, *supra* at 6; but Croatia still bans same-sex marriage, though they do allow a "life partnership", a civil union. This is a relatively moderate solution, which the Court might have followed instead of mandating national

same-sex marriage.

If the Court scraps some or all of *Obergefell*, it could still mandate that each State offer at least a civil union or domestic partnership. Or, if any same-sex partnership at all is deemed offensive to force on States, then, at least, say, a "reciprocal benefits contract" or such, ensuring that same-sex couples have mutual hospital visitation rights, ability to pass on pensions to each other, etc. There might or might not be the right to adopt, though, per the discussion *supra* about denying a mother or father to children.

As said before, Amicus is laying out a detailed "menu" of sorts, so the Court has various options for going forward on *Obergefell*.

Speaking of civil unions, Amicus shall now correct one notable error in *Obergefell*, the notion that same-sex marriage or unions are a new thing.

VII. NATIVE AMERICANS AND OTHERS HAD SAME-SEX-MARRIAGE OR SIMILAR PRACTICES—AND HOW THIS MIGHT HELP DAVIS' CASE

"For … millennia, across … civilizations, 'marriage' referred to only one relationship: the union of a man and a woman." 576 U.S. at 688 (Roberts, C.J., dissenting) (citation omitted). But, respectfully said, this is not accurate. *See, e.g.*, Wikipedia, *History of same-sex unions*, https://en.wikipedia.org/wiki/History_of_same-sex_unions (as of Aug. 28, 2025, 11:31 GMT), listing not only same-sex unions in ancient Greece, Mesopotamia, and China, but also:

"The first Roman emperor to have married a man

was Nero, who is reported to have married two other men[.] First, with one of his freedmen, Pythagoras, to whom Nero took the role of the bride." *Id.* This colorful episode—with a transgender touch!—may make readers scratch their heads, but it proves that same-sex marriage has existed for millennia, like it or not.

And on our own continent, *see, e.g.*, Jeffrey S. Jacobi, *Two Spirits, Two Eras, Same Sex: For a Traditionalist Perspective on Native American Tribal Same-Sex Marriage Policy*, 39 U. Mich. J. L. Reform 823 (2006) ("*Two Spirits*"), *available at* https://repository.law.umich.edu/context/mjlr/article/1347/viewcontent/uc.pdf. The article covers same-sex ("two-spirit", i.e., one partner acting like he contains both female and male spirits) marriage in various forms among Native Americans: e.g., "Whereas the Navajo allowed two-spirit same-sex marriages … substantially similar to heterosexual marriages except in their duration, the Lakota [Sioux] provided two-spirit same-sex with fewer marriage privileges than heterosexual counterparts." *Id.* at 843.

Too, while "social recognition … varied from tribe to tribe, generally, tribes afforded two-spirit unions less esteem than heterosexual marriages[, and] biomen were reluctant to enter lifelong monogamous marriages with male-bodied two-spirits because marriage partners typically wanted children to provide them support in old age." *Id.* at 837 (citation omitted). Does this desire for children, curbing same-sex marriages, make Native Americans "homophobic" (!), or does it just reflect biological reality, *see* Section III, *supra*, on the "Biological

Refutation"?

Indeed, there is a huge variety of practice on same-sex marriage in Native American nations, *see* Wikipedia, *Same-sex marriage in tribal nations in the United States*, https://en.wikipedia.org/wiki/Same-sex_marriage_in_tribal_nations_in_the_United_States (as of Sept. 3, 2025, 16:59 GMT), listing, *inter alia*, nations explicitly allowing same-sex marriage (e.g., Cherokee Nation), those accepting same-sex marriage licenses from elsewhere (e.g., Standing Rock Sioux Tribe), and those totally banning same-sex marriages (e.g., Navajo Nation), *id.*

This makes a case that, similarly, each State has a right to substantial choice in how to treat same-sex marriage, which supports revisiting *Obergefell*.

VIII. RESPECTING BOTH LGBT AND NON-LGBT RIGHTS IS CRUCIAL, AND ACHIEVABLE

Just as Native Americans balanced the rights of "two-spirits" with those of more numerous "one-spirit" tribe members, Americans in general, whether on the "Right" or "Left", should, try to treat people, and social issues, without animus.

Amicus himself wrote the Court in *United States, et al., v. Shilling, Commander, et al.*, 605 U.S. ___ (2025), brief *available at* https://tinyurl.com/2a98zp6z, upholding the rights/duties of trans people in the military, *see id.* at 1-5. He also wrote the Court in *Trump v. CASA, Inc.*, 606 U.S. ___ (2025), brief *available at* https://tinyurl.com/4vcxujrf, supporting birthright citizenship, *see id.* at 1-5. But he cares not only about children's citizenship, he also

cares about the "birthright" of having a mother and father. And supporting some trans rights, doesn't mean Amicus must overlook *Obergefell*'s flaws. Balance is important.

There are fanatics or thoughtless people on both sides, sadly. For example, the recently-deceased Christian psychologist James Dobson (RIP), no friend of LGBT rights, suggested that to prevent homosexuality, "[a] boy's father ... to mirror and affirm his son's maleness ... can even take his son with him into the shower, where the boy cannot help but notice that Dad has a penis, just like his, only bigger." Julian Sanchez, *James Dobson's Patented Cure for the Gay*, Reason, Aug. 11, 2005, 10:36 a.m., https://reason.com/2005/08/11/james-dobsons-patented-cure-fo/. This unfortunate suggestion, with near-redolence of pedophilia/incest/narcissism/exhibitionism(?), does not make Dobson look good.

On the other side, *see* the lyrics of lesbian singer Chappell Roan (born Kayleigh Rose Amstutz) in her hit song *Pink Pony Club* (2020 Atlantic Records); the tune may be catchy, *cf. id.*, but the words are about the singer's leaving Tennessee to dance in LGBT haven West Hollywood, "[w]here boys and girls can all be queens every single day/I'm having wicked dreams …/Won't make my mama proud, it's gonna cause a scene/She sees her baby girl, I know she's gonna scream [etc.]", *id.* How can a decent person celebrate abandoning their mother, making her scream, to go thousands of miles away to dance in a club, with "queens" or otherwise? (If people can tolerate that, they should have no problem with a child leaving same-sex, not-both-biological parents to actually *get* a mama and papa.)

So, Dobson and Roan are two sides of the same coin, showing unwisdom, though on different cultural sides.

The Court has shown consideration to LGBT rights in *Lawrence* and *Bostock*; if it balanced this with a wise reappraisal of *Obergefell*, avoiding any Dobson/Roan-type excesses, and realizing that, e.g., some same-sex couples' having to travel out of state to solemnize their marriage may be little burden (and a "judicial bypass" or such might let the truly poor use the Internet to have out-of-state officials perform the wedding?), compared to a child's suffering permanent motherlessness/fatherlessness, equal justice under law might be done.

Speaking of "equal", we now see photographs of the parties, showing them in their humanity, humanity which all should recognize.

First, the controversial Kim Davis (*cf.* Kim Carnes, *Bette Davis Eyes* (EMI America 1981), "she'll unease you [etc.]", *id.*), from Newsy, *What happens If Kim Davis keeps denying marriage Licenses?*, USA Today, Sept. 2, 2015, 8:05 p.m., https://www.usatoday.com/videos/news/politics/2015/09/02/71560806/, *id.*,

And Davids Ermold and Moore who, too, should be considered in their humanity (the parties have almost the same name!—Davis, David, David—: a pity that people have to fight), from their article *Op-ed: We're Still Fighting to Marry in Kentucky*, The Advocate, Aug. 18, 2015, 5:00 a.m., https://www.advocate.com/commentary/2015/08/18/op-ed-were-still-fighting-marry-kentucky, *id.*,

Finally, here is a blank portrait:

That is an empty space representing kids of same-sex couples who want a mother and father. We can't see them, but we can, and should, imagine them.

* * *

"The nature of injustice is that we may not always see it in our own times." *Obergefell*, 576 U.S. at 664. Kennedy was right, though maybe not in ways he foresaw in his own time; it took years for some to realize it might be bad to have people with opposite-sex genitalia in your bathroom/shower, or be on your sports team, *see For Women Scotland*, *supra* at 7-8; *see also United States v. Skrmetti*, 605 U.S. ____ (2025) (letting States protect children from therapy interfering with their biological sex); *Free Speech Coalition, Inc. v. Paxton*, 606 U.S. ___ (2025) (States may protect youth from damaging sexual material); *Ames v. Ohio Department of Youth Services*, 605 U.S. ___ (2025) (heterosexual woman treated unfairly due to her orientation). It's not 2015 anymore.

And now, the injustice that some children are separated, against their will, from having a mother or father, by same-sex marriage, should finally be seen, in *our* own times, and addressed, and solved, along with any other problems in *Obergefell*, or problems with how Kim Davis was treated. (The Question Presented on *Obergefell* should not mention abolishing substantive due process; rather, a mention of same-sex couples' children's rights to mother and father might be added.) The Court may not see this petition/case as a perfect vehicle; then again, no more perfect vehicle may come, and children may suffer until *Obergefell* is revisited.

Mass media and interest groups will likely have the Court's head if the Court touches *Obergefell*—especially if that exonerates Davis—, falsely calling the Court "bigoted", "Christian/Catholic fanatic", "Right-Wing Conspiracy", etc.; but the Court has its duties.

On that note, and finally: will the Court declare about same-sex couples' children who want both mother and father, "They ask for equal dignity in the eyes of the law. The Constitution grants them that right [or, grants States the power to give them that right]", 576 U.S. at 681, or words to that effect, so that "love wins"? Perhaps it should. After all, the Constitution is here to "secure the Blessings of Liberty" not just for adults, "ourselves", but also for children, "our Posterity" (Preamble, U.S. Const.).

CONCLUSION

Amicus respectfully asks the Court to make fitting and beneficial decisions re Kim Davis, *Obergefell*, and same-sex-couples' children's right to

a mother and father; and humbly thanks the Court for its time and consideration.

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