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.

[Additional Case Captions Listed on Inside Front Cover]

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIAE* SCHOLARS OF ORIGINALISM IN SUPPORT OF RESPONDENTS

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BRITTANI HENRY, ET AL.,
Petitioners,

v.

RICHARD HODGES, DIRECTOR,
OHIO DEPARTMENT OF HEALTH, ET AL.,
Respondents.

VALERIA TANCO, ET AL.,
Petitioners,

v.

WILLIAM EDWARD "BILL" HASLAM, ET AL.,
Respondents.

APRIL DEBOER, ET AL.,
Petitioners,

v.

RICHARD SNYDER, ET AL.,
Respondents.

TIMOTHY LOVE, ET AL. AND GREGORY BOURKE, ET AL.,
Petitioners,

v.

STEVE BESHEAR,
Respondents.

QUESTIONS PRESENTED

1. Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex?

2. Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state?

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INTEREST OF *AMICI CURIAE*[1]

Amici Curiae are legal scholars who over a period of decades have taught and written extensively on constitutional law including the Fourteenth Amendment and originalist and other methods of constitutional interpretation. They are:

Lawrence A. Alexander, Warren Distinguished Professor of Law, University of San Diego and Co-Executive Director of that university's Institute for Law and Philosophy.

Bruce P. Frohnen, Professor of Law, Ohio Northern University.

William Kelley, Associate Professor of Law, University of Notre Dame.

Nelson Lund, University Professor, George Mason University School of Law.

Robert Pushaw, James Wilson Endowed Professor of Law, Pepperdine School of Law.

Maimon Schwarzchild, Professor of Law, University of San Diego.

Steven D. Smith, Warren Distinguished Professor of Law, University of San Diego and Co-Executive

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[1] Parties to these cases have consented to the filing of this brief and letters indicating their consent are on file with the Clerk. *Amici* states that no counsel representing a party in this Court authored this brief in whole or in part, and no person other than *amici* and their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

Director of that university's Institute for Law and Philosophy.

Lee J. Strang, Professor of Law, The University of Toledo College of Law.

Affiliations are listed for identification purposes only.

SUMMARY OF ARGUMENT

In Part I of the Cato Brief, *amici* argue that, contrary to what nearly everyone had until recently supposed, the *original meaning* of the Fourteenth Amendment requires invalidation of traditional marriage laws such as those at issue in this case. Despite claiming the label of "originalism," the Cato position is not based on new historical evidence or fresh facts illuminating the contemporaneous understanding of the Fourteenth Amendment. *Amici* do not purport to show that anyone involved with the enactment of the Amendment–drafters, ratifiers, readers, or the general public–intended, believed, desired, or imagined that the provision would do anything to alter traditional state understandings of marriage. On the contrary, *amici* acknowledge, as they must, that "*no one alive at the time of the Fourteenth Amendment's ratification expected that its adoption would 'require a state to license a marriage between two people of the same sex'*." (Cato Brief at 4, emphasis added).

So, if no one at the time of the Amendment's adoption believed it had or could have any implications adverse to the traditional conception of marriage, how then could its *original meaning*

require invalidation of laws embodying that conception? The novelty in the Cato argument consists not of new historical evidence but rather of a more theoretical claim about how original meaning should be conceptualized. More specifically, *amici* propose a theoretical distinction between "original understanding" and "original meaning" (Cato Brief at 3), such that a provision can have "meanings"–even "original meanings"–that no one associated with the adoption of the provision believed or imagined it would have.

This argument is unpersuasive for two main reasons. First, the proposed distinction between "original understanding" and "original meaning" is untenable and unsupported by either "intentionalist" or "public meaning" conceptions of original meaning. The theoretical approach advocated by *amici* is thus not a plausible account of original meaning.

Second, even if the Fourteenth Amendment were interpreted as *amici* propose—basically, as a general prohibition of "class legislation"–this interpretation would not support the conclusion favored by *amici*. This is so because laws adopting a traditional conception of marriage are not "class legislation" in the historical sense, or indeed in any legally cogent sense. In this respect, such laws are crucially different from Colorado's Amendment 2, as interpreted and invalidated by this Court in *Romer v. Evans*, 517 U.S. 620 (1996), and from laws prohibiting interracial marriage, such as the statute struck down in *Loving v. Virginia*, 388 U.S. 1 (1967). Those laws *can* plausibly be understood as "class legislation"; as the examples and analysis of *amici* themselves

demonstrate, however, a law adopting a traditional conception of marriage *cannot* be so understood.

More generally, the interpretive approach advocated and practiced by *amici*, which proceeds by ratcheting up the meaning of a constitutional provision to a level of abstraction never contemplated or intended by the enactors, is incompatible with the constitutional enterprise of rational self-government by "We the People." Thomas Jefferson observed that "[o]ur peculiar security is in the possession of a written Constitution. Let us not make it a blank paper by construction." THOMAS JEFFERSON ON POLITICS AND GOVERNMENT, 10:419 (Eyler Robert Coates, Sr., editor). The sort of interpretation advocated and practiced by *amici* would do just that.

ARGUMENT

I. An Untenable Distinction between "Original Understanding" and "Original Meaning" Serves not to Recover the Historical Meaning of the Fourteenth Amendment, but Rather to Obscure and Suppress that Meaning.

If "no one alive at the time" of the Fourteenth Amendment's adoption believed that the provision had any implications adverse to the traditional conception of marriage, as *amici* concede (Cato Brief at 4), how then could its *original meaning* require invalidation of laws reflecting that conception? Attempting to defend this proposition, *amici* propose a distinction between the "original understanding" of a constitutional provision and its "original meaning."

(Cato Brief at 3) On this logic, the amendment could have a "meaning"– even an "*original* meaning"– that invalidates laws reflecting the traditional conception of marriage, even though no one in the generation that enacted it *understood* it to have any such meaning.

But this distinction between what a provision "means" and what its enactors and the public subject to it "understood" it to mean is untenable. Indeed, and ironically, *amici's* proposed distinction renders the notion of "original meaning" meaningless. A constitutional provision, after all, is not some mystical or sibylline utterance. It is a legal measure, deliberated on by the legislators and citizens who decide whether to adopt it, and designed to have legal effects understandable to those legislators and citizens. If the provision's "original meaning" is severed from the "understanding" of the provision held by the people who draft, debate, and enact it, then it becomes wholly unclear what (and where) that disembodied "meaning" even is.

To be sure, subtle distinctions are sometimes drawn between the "subjective" intentions of a provision's enactors and the more "objective" or "public" meanings that the linguistic and interpretive conventions of the time might have supported. Different theorists and jurists favor one or the other of these approaches, but this (mostly academic) debate is of no consequence here. That is because both kinds of approaches locate "original meaning" in the "original understanding"; they differ only about *whose understanding* supplies the pertinent legal meaning of the Constitution. One approach—original

intent—looks to the understandings of the people who wrote and enacted the text; the other—original public meaning—looks to the understandings of the general public, or of contemporary competent speakers, who read or could have read the text.[2] Neither approach divorces original meaning from original understanding.

Acknowledging that "*no one* alive at the time" the Fourteenth Amendment was adopted could have imagined the position they favor, *amici* can get no support *either* from the understanding of the enactors and ratifiers *or* from the public understanding that informed the "original public meaning." Consequently, *amici* attempt to separate "original meaning" from "original understanding" altogether. Thus separated, the notion of "meaning" loses its meaning—as if "original meaning" were some sort of ghostly grab bag conjured from the air of the twenty-first century. "Meaning," then, is discernible only by those few cognoscenti initiated into an arcane wisdom hidden from those invested with the actual authority to formulate the provision in the first place. Such an interpretive approach does not deliver "original meaning," but rather serves only to obfuscate and ultimately reject that meaning.

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[2] *See* Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning* SOCIAL SCIENCE RESEARCH NETWORK, 16, 28-32 (Feb. 3, 2015) at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2559701.

II. Traditional Marriage Laws Are Not "Class Legislation" Within the Historical Meaning of the Term.

Amici make much of the uncontroversial truth that enactors cannot anticipate all of the applications or consequences that a provision may have in the future. This is a correct and utterly familiar point; it is also, in this context, a red herring. Thus, to borrow an example from the Cato *amici*, legislators might prohibit the "theft of goods," and this prohibition will apply to microwave ovens—even though microwave ovens had not been invented when the statute was originally enacted. (Cato Brief at 4) Similarly, a constitutional provision forbidding unreasonable "searches" will apply to electronic searches that would not have been technologically possible when the provision was adopted. And, most mundanely, a constitutional provision referring to "persons" will apply to Maria Vasquez and Solomon Grundy, who were not even born until decades after the provision was enacted. These conclusions simply reflect the reality that new facts can fit within the legal categories ("goods," "searches," "persons") adopted by–and *understood by*—a measure's enactors.

But this correct observation is of no help to *amici*, because traditional marriage laws do not fit within the category that *amici* themselves purport to find in the Fourteenth Amendment. Thus, *amici* repeatedly argue that the Fourteenth Amendment constituted a prohibition of "class legislation." This is a contestable interpretation, and a less than helpful one, because the term "class legislation" is amorphous and potentially all-engulfing. After all, virtually *every* law

describes some class of people (e.g., veterans, citizens over the age of 18, people who have been convicted of homicide) for the purpose of conferring some benefit (educational assistance, the right to vote) or imposing some burden or sanction (a prison term) that will not be extended to people outside that class. Moreover, *every* law will have consequences favorable to the interests of some classes of people and unfavorable to the interests of other classes of people. In either of these all-encompassing senses, traditional marriage laws (or, for that matter, *any* marriage laws, traditional or not) would indeed be "class legislation"—because *all* laws would be "class legislation."[3]

If the concept of "class legislation" is understood more precisely and in its historical sense, however, then traditional marriage laws, such as those involved in the present cases, emphatically are *not* "class legislation." Although *amici* fluctuate among diverse conceptions, their most helpful and historically plausible definition comes from a nineteenth-century author who explained that "class legislation" referred to *"laws restraining the activity*

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[3] *Amici's* other recurring suggestion—that the Fourteenth Amendment embodies a commitment to equality under law– is even less helpful. Thus, their Brief is replete with sweeping, eloquent statements from American history—and there are many, of course—saying that all citizens are equal and that the law is supposed to "'operate *equally* upon all'." (Cato Brief at 15) The constitutional commitment to equality is clear enough, and uncontested. But *amici* then go on to argue that a law violates this commitment if it is beneficial to some classes and burdensome to other classes, as *all* laws are. An interpretive method that allows every statute to be declared unconstitutional is patently absurd.

of a class of persons, more or less strictly defined, to a particular course of life, and allowing only a limited enjoyment of property and relative rights." (Cato Brief at 12, emphasis added) In a similar vein, *amici* quote another nineteenth-century source that described "class legislation" in terms of "special codes for one class of citizens." (Cato Brief at 15).

The "Black Codes" adopted in some Southern states following the Civil War were an obvious example of "class legislation" in this sense, and they were the example with which the Fourteenth Amendment was most immediately concerned. The statutes deliberately subjected blacks to special criminal prohibitions (on "insulting gestures," for example, or preaching the Gospel without a license) and deliberately imposed on the class a whole variety of legal disabilities such as those limiting property ownership, employment, and the rights to hunt, fish, or graze livestock.[4]

As *amici* correctly observe, the concept of "class legislation" was not limited to the Black Codes, or even to race.[5] The Cato Brief references some other clarifying eighteenth- and nineteenth-century

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[4] *See* ERIC FONER, A SHORT HISTORY OF RECONSTRUCTION 93-95 (1990).

[5] Just as the Black Codes were class legislation so, too, were laws that required public schools (and other public facilities) to be segregated by race. The holding in *Brown v. Board of Education*, 347 U.S. 483 (1954), is perfectly plausible as a matter of original meaning, *see* Michael W. McConnell, *Originalism and the Desegregation Decisions* 81 VA. L. REV. 947 (1995), even if some contemporaneous legislatures misinterpreted or ignored that meaning.

examples. Thus, a law that explicitly describes some class of people by religion (Cato Brief at 7), or race or ethnicity ("Jews, Indians, Ethiopians"; Cato Brief at 10), or ancestry or parentage ("half-breeds"; Cato Brief at 8), and then deliberately subjects that class of people to legal disabilities, such as disqualification from holding office, voting, or owning property, could plausibly be described as "class legislation." Although sexual orientation would not have appeared on nineteenth-century lists of typical classes, a law defining a class of persons based on sexual orientation and deliberately subjecting that class to legal disabilities could fit within the historical conception of "class legislation."

Such laws are "rare" in modern American law, as this Court pointed out in *Romer v. Evans*, 517 U.S. 620, 633 (1996). As interpreted and invalidated by this Court in *Romer*, however, Colorado's Amendment 2 was just such a law. Under that law, the Court explained:

> [h]omosexuals, by state decree, are put in a solitary class with respect to transactions and relations in both the private and governmental spheres. The amendment withdraws from homosexuals, but no others, specific legal protections from the injuries caused by discrimination, and it forbids reinstatement of those laws and policies. *Id*. at 627.

But to understand how the Black Codes or Colorado's Amendment 2 law *can* be viewed as "class legislation"

is to understand how the marriage laws at issue here *cannot* be so viewed. These laws do *not* define, strictly or otherwise, any "class of persons" who are restrained to "a particular course of life . . . allowing only a limited enjoyment of property and relative rights," or indeed who are subjected to the restriction of *any* legal rights. Nor do such laws constitute any sort of "special code[] for one class of citizens." Instead, the laws merely adopt a millennia-old definition of what constitutes "marriage"; they prohibit no one from entering into that status.

If the laws challenged here defined some class of persons (such as gay and lesbian persons) and denied such persons the legal right to marry, these laws might be considered class legislation. But traditional marriage laws do no such thing; under these laws, persons of any sexual orientation are wholly free to marry if they so choose.

In those states where marriage is defined (as it has been, for millennia) as a union of a man and a woman, then marriage may be unattractive to individuals who are sexually drawn to others of their same sex. In that sense, although gay and lesbian people have the same legal right to marry that anyone else has (a right that many have undoubtedly exercised), the law will in practice have a distinctive impact on the class of gay and lesbian persons. But, although this sort of disparate impact can sometimes be legally relevant (under Title VII, for example), it is not unequal "class legislation" in the nineteenth-century sense of the term, or indeed in any legally viable sense.

And this is fortunate, for two reasons. First, because *all* laws have disparate impacts on different classes of people—often on constitutionally protected classes of people. Thus, this Court has rejected the claim that laws having a disparate impact on the basis of race thereby violate the Equal Protection Clause. As the Court explained, constitutional disapproval of laws having a disparate impact on the basis of race "would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white." *Washington v. Davis*, 426 U.S. 229, 248 (1976).

Second, on *amici*'s reasoning, any definition of marriage—the one suggested by *amici*, or any other limited definition—will have a disparate impact on some categories of people, which will make any definition unconstitutional class legislation, in *amici*'s eyes. For example, so long as marriage is limited to two individuals, then it will be unattractive to, and have a disparate impact on, individuals who wish to marry more than one individual at the same time.

In making their argument, *amici* attempt to invoke this Court's decision in *Loving v. Virginia*, but in fact their "class legislation" interpretation of the Fourteenth Amendment shows how the present cases are *not* like *Loving*. So-called anti-miscegenation laws, such as the one struck down in *Loving*, did not define *what constitutes marriage*; indeed, at the time of the Fourteenth Amendment and earlier, it had long been understood that interracial marriages *were*

marriages, and that absent some special state-imposed restriction, persons of different races had a legal right to marry.[6] In derogation of this right, anti-miscegenation laws accepted the traditional and legal conception of what marriage is, but then explicitly and deliberately imposed restrictions limiting the ability of defined classes of people–whites and non-whites—to *enter into what everyone agreed to be marriage*. These laws thus fit the description of "laws restraining the activity of a class of persons, more or less strictly defined" and subjecting that class to a legal disability.

Once again, however, traditional marriage laws such as those at issue here do nothing similar.

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[6] In a recent, carefully-researched article, David Upham explains:

> State racial endogamy laws emphatically "abridged" a right—they *contracted* a *prior* right of individuals. Seemingly all authorities concurred that in the absence of such positive law, the race of the parties was no impediment to a lawful marriage. Because marriage arose from natural right as recognized at common law, the "legalization" of interracial marriages required merely the absence of the statutory prohibition; so, for instance, Iowa's legislature permitted such marriage simply by omitting the restriction from the state's 1851 code. Even in antebellum South Carolina, some prominent authorities concluded that the lack of an express and specific statutory prohibition implied the validity of interracial marriages.

David Upham, *Interracial Marriage and the Original Understanding of the Privileges or Immunities Clause* 42 HASTINGS CONST. L.Q. 213, 220-21 (2015) (citations omitted).

Rather, these laws merely define what marriage is, in a manner consistent with a millennia-old understanding, and they do not limit anyone's ability or right to enter into the status of marriage, so defined.

III. *Amici's* Proposal to Interpret the Fourteenth Amendment at a Lofty Level of Abstraction Never Contemplated by Its Enactors Is Incompatible with the Constitutional Enterprise of Rational Self-Government by "We the People."

The Cato Brief's "originalist" section exemplifies a kind of rhetorical argument that is by now perfectly familiar to lawyers and scholars, and that is sometimes described as the "level of abstraction" move. The strategy is simple and transparent: an advocate asserts that a constitutional provision stands for some "principle," and then proceeds to articulate the "principle" at a high enough level of abstraction so that the advocate can purport to derive his or her favored conclusion from that "principle." Thus, *amici* are able to assert that traditional marriage laws are impermissible "class legislation" only by elevating that concept to a level of abstraction not intended, contemplated, or foreseeable by its drafters or ratifiers, or by the general public at the time. In doing so, however, *amici* implicitly discard the actual historical meaning– the meaning intended and understood by actual human beings at the time. Moreover, they advocate and practice an interpretive method that is incompatible with constitutionalism as an enterprise in rational self-government.

Decades ago, sophisticated critics of originalist constitutionalism—Ronald Dworkin, for example—were advocating that judges should enforce the general "concepts" reflected in the Constitution, not the specific "conceptions" contemplated by the enactors. *See, e.g.*, RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 134-37 (1978). The difference is that the older critics understood and acknowledged that they were *opposing* historical meaning as an authoritative criterion. *See*, *e.g.*, RONALD DWORKIN, LAW'S EMPIRE 359-69 (1986). By contrast, some more recent theorists make prodigious use of the "abstraction" strategy, while continuing to claim the label of "originalism"; the Cato Brief is very much in this vein. In doing so, these academic theorists are sometimes forthright about their purpose of dissolving originalist constitutionalism into non-originalist or "living constitutionalism," its erstwhile rival.[7]

Academicians are of course free to deconstruct whatever they like (in their theorizing at least), and to adopt whatever labels they choose to describe themselves. In fact, there are definite advantages, at least within the academy, in turning "originalism"

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[7] The most prominent example is probably Yale professor Jack Balkin. *See* JACK BALKIN, LIVING ORIGINALISM (2011). Balkin achieved prominence some years ago as a leading "deconstructionist," and his recent turn to originalism has sometimes been viewed as an effort to "deconstruct" originalism, as indeed the title of his book suggests. Professor Calabresi, a signatory of the Cato Brief, is among Professor Balkin's adherents. *See*, *e.g.*, Steven G. Calabresi & Livia Fine, *Two Cheers for Professor Balkin's Originalism* 103 NW. U.L. REV. 663 (2009). *But see* John O. McGinnis & Michael B. Rappaport, *The Abstract Meaning Fallacy*, 2012 U. ILL. L. REV. 737 (2012).

into a "big tent" that can include almost anyone. The strategy can make for large and lively academic conferences, it can dispel some of the hostility that originalism has sometimes provoked, and it can permit a scholar or advocate to claim whatever rhetorical or analytical benefits originalism yields, while continuing to argue for pretty much any outcome she or he may prefer in particular controversies. Still, if "original meaning" is defined so loosely that virtually everyone and every decision can be classed as "originalist," the term ceases to have any real meaning at all.

Most importantly, a theoretical conception of "original meaning" that is highly abstract and separated from the "understanding" of constitutional enactors and ratifiers defeats the goal of permitting "We the People," acting through our elected representatives in Congress and the state legislatures, to deliberate intelligently and understandingly about proposed constitutional measures, and then to decide whether or not to entrench those measures in our fundamental law. "You may understand this proposed measure to have meaning *X* with consequences *Y* and *Z*," citizens and legislators are in effect told. "But please be aware that if you adopt the measure, your *understandings* will not determine the '*meanings*' that will be enforced against you and your descendants; those 'meanings' may turn out to be altogether different from anything you intended, desired, or could even have imagined."

On these assumptions, the constitutional enterprise would be not be so much rational and responsible public decision-making as throwing darts

in the dark. And citizens and legislators might rationally conclude that, on these assumptions at least, they would be well advised not to delude themselves by thinking that adopting a constitutional provision will have much of anything to do with how it is used to govern them.

CONCLUSION

For the foregoing reasons, and for those advanced by Respondents, *amici* urge this Court to affirm the decision of the court below.

Respectfully submitted,

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