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No. 12-144

IN THE

Supreme Court of the United States

DENNIS HOLLINGSWORTH, *et al.*,

Petitioners,

v.

KRISTIN M. PERRY, *et al.*,

Respondents.

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

BRIEF OF *AMICI* JONATHAN WALLACE, MERI WALLACE AND DUNCAN PFLASTER IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI*[1]

Amicus Jonathan Wallace has written extensively on the judicial application of analogical reasoning to new technologies and social arrangements (with Mark Mangan, *Sex, Laws and Cyberspace* (2007)) and is the editor and publisher of *The Ethical Spectacle,* www.spectacle.org, a monthly Web-based newsletter which has examined the intersection between ethics, law and politics in the United States since January 1995. In an *Ethical Spectacle* article, Wallace called for the availability of civil marriage to same sex couples in 1996. Wallace has been married to amicus Meri Wallace since 1988. Ms. Wallace is a psychotherapist who has worked with a wide variety of clients on marriage and parenting-related issues. As a long-married opposite sex couple, the Wallaces are offended by the assertion that their marriage needs to be "defended" against same sex couples. The Wallaces believe, to the contrary, that they, and society in general, benefit from the availability of marriage to same sex couples, because justice is then extended to people who have been denied it, social stability increases and a secure environment is created for more children, adopted and biological.

Amicus Duncan Pflaster is a New York-based playwright whose work, produced Off Off Broadway, has frequently dealt with themes of gender and gay identity.

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici*, or their counsel, made a monetary contribution intended to fund its preparation or submission. The parties have filed blanket waivers with the Court consenting to the submission of all *amicus* briefs.

Pflaster has written two well-reviewed plays about same sex marriage, "Admit Impediments" and "The Taint of Equality". Pflaster recently qualified as an officiant and performs New York marriages, including same sex ones. He wants the people whose marriages he performs to be treated equally to one another everywhere, and demands the same rights and protections should he choose to marry.

SUMMARY OF ARGUMENT

This Court frequently, in cases arising from novel technological or social issues, is called upon to use the power of analogical reasoning to look for similarity between new developments and those upon which it has already adjudicated. Amici argue that, looked at through the lens of analogy, there is no difference between opposite sex and same sex couples, or the marriages into which they enter, which would justify different treatment under the Constitution.

ARGUMENT

THERE IS NO CONSTITUTIONALLY COGNIZABLE DISTINCTION BETWEEN OPPOSITE SEX AND SAME SEX COUPLES OR THEIR MARRIAGES

Same sex and opposite sex couples are equivalent to each other in all respects except the sex of one member, a distinction of which the law cannot constitutionally take cognizance. In both cases, two people have conceived a long term emotional attachment to one another which they are ready to confirm through civil marriage. Same sex couples (as society at large is belatedly coming to understand) regard each other with the same love, fidelity, and dedication as opposite sex couples. The fact that a couple is of the same sex is completely irrelevant to

their human need for certainty regarding estates, health matters and the security of their children. Therefore, defining marriage exclusively as involving one male and one female makes as much sense, and is as constitutional, as defining a two person law partnership to require one male and female lawyer, or a two shareholder corporation as requiring one shareholder of either sex.

This Court's power of analogical reasoning demands the extension of the protections of marriage to same sex couples, just as it once demanded its extension to interracial couples. Reasoning by analogy first demands recognition of the similarities between apparently unlike things; then the differences, such as they are, can be put in perspective—and may, as the issue of sex does here, prove to be a distinction without a difference.

Benjamin Cardozo, in *The Nature of the Judicial Process* (1921), spoke of analogy as being one of the primary pathways by which judges reach a conclusion:

> The directive force of a principle may be exerted along the lines of logical progression; this I call the rule of analogy or the method of philosophy....

Professor Cass Sunstein notes that reasoning by analogy:

> promotes moral evolution over time; it fits uniquely well with a system based on principles of stare decisis; and it allows people who diverge on abstract principles to converge on particular outcomes.... A notable aspect of

> analogical thinking is that people engaged in this type of reasoning are peculiarly alert to the inconsistent or abhorrent.

"On Analogical Reasoning", 106 *Harv. L. Rev.* 741, 790-91 (1993).

This Court has on occasion failed to perceive the similarity o` f the matter before it to other matters already adjudicated. It did not see the similarity between the new telephone and the previously established telegraph, *City of Richmond v. S. Bell, Tel. & Tel. Co.*, 174 U.S. 761 (1899), or between sheet music and music embodied in player piano rolls, *White-Smith Music Publ'g Co. v. Apollo Composers*, 209 U.S. 1 (1908). Lower courts similarly took a while to figure out that software was copyrightable regardless of whether stored on disk or in read only memory, *Apple Computer, Inc. v. Franklin Computer Corp.*, 545 F. Supp. 812, 813 (E.D. Pa. 1982), *rev'd,* 714 F.2d 1240 (3rd. Cir. 1983), certiorari dismissed, 464 U.S. 1033 (1984) or that an electronic communication was a writing for Statute of Frauds purposes, *Parma Tile Mosaic & Marble Co. v. Estate of Short*, 87 N.Y.2d 524 (Court of Appeals of New York 1996).

Applying existing law to new developments is a constant process of attempting to determine similarities and then asking whether differences are significant enough to require different treatment, Ithiel de Sola Pool, *Technologies of Freedom* (1983); Jonathan Wallace and Michael Green, "Bridging the Analogy Gap: The Internet, the Printing Press, and Freedom of Speech", 20 *Seattle University Law Review* 711 (1997); Jonathan Wallace and Mark Mangan, *Sex, Laws and Cyberspace* (1997).

According to Professor Lawrence Tribe,

> the Constitution's norms, at their deepest level, must be invariant under merely technological transformations. Our constitutional law evolves through judicial interpretation, case by case, in a process of reasoning by analogy from precedent. At its best, that process is ideally suited to seeing beneath the surface and extracting deeper principles from prior decisions.

Laurence H. Tribe, *The Constitution* in *Cyberspace: Law and Liberty Beyond the Electronic Frontier*, Keynote Address at the First Conference on Computers, Freedom and Privacy (Mar. 26, 1991), http://epic.org/free_speech/tribe.html.

A new social arrangement, like a new technology, demands a careful comparison with more familiar forms. The analogy between new technologies and new social arrangements is exact; frequently the former drive the latter, as in the case of in vitro fertilization, implantation of embryos, and sex reassignment surgery, which brought novel developments such as surrogacy, donor rights, and the amendment of birth certificates.

In a same sex marriage, two people seek the legal endorsement of a long-standing commitment of care and fidelity to one another, and intend to seek and share the benefits and responsibilities attendant on that commitment. The sex of the two individuals seeking to establish this civil legal status is about as relevant in today's world as the difference between "written" communications carried

by telegraph and "oral" communications by telephone (both of which were in reality electrical impulses), or the difference between disk and read only memory. This Court has long since learned not to respect a "distinction without a difference", *Wis. Dep't of Indus., Labor & Human Rels. v. Gould, Inc.*, 475 U.S. 282 (1986) (Wisconsin law did not escape federal preemption on the theory it was an exercise of the spending rather than the regulatory power). The analogy between same sex and opposite sex marriage is much closer than that between sheet music and player piano rolls, or software stored on disks rather than chips. A failure to apply analogical reasoning here will result in what in what Professor Sunstein described as an "inconsistent or abhorrent" result, fostering discrimination against same sex couples based on an irrelevant and essentially trivial difference in gender.

The gender of a "spouse" should be a matter only of anecdotal, not legal interest. The Court has already ruled in many contexts that sex is not legally relevant and does not justify discriminatory treatment, *Reed v. Reed,* 404 U.S. 71 (1971) (administrators of estates); *Stanley v. Ill.*, 405 U.S. 645 (1972) (unwed father); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (spouse of military service-person); *Schlesinger v. Ballard*, 419 U.S. 498 (1975) (Navy lieutenants); *Stanton v. Stanton*, 421 U.S. 7 (1975) (Utah age of majority); *Craig v. Boren,* 429 U.S. 190 (1976) (age at which it is legal to buy beer in Oklahoma). The word "spouse" can no more be required to have an inherent gender, than "nurse", "policeman", "teacher" or "doctor" can. "[Any] statutory scheme which draws a sharp line between the sexes, *solely* for the purpose of achieving administrative convenience, necessarily commands 'dissimilar treatment for men and women

who are . . . similarly situated,' and therefore involves the 'very kind of arbitrary legislative choice forbidden by the [Constitution] ...". *Reed v. Reed,* supra, 404 U.S. at 77. Reasoning by analogy demands recognition that same sex and opposite sex couples are "similarly situated".

That the two parties to a marriage must be of different sexes was a principle that had already significantly eroded before the states began legislating same sex marriage. Many jurisdictions have long permitted post-operative transgendered individuals to obtain first amended birth certificates and then, based on these, marriage certificates allowing them to marry as a member of the destination gender, see for example, *Matter of Birney v New York City Dept. of Health & Mental Hygiene,* 34 Misc. 3d 1243A (Supreme Court, New York County 2012). Thus, in various jurisdictions, males can already marry males, and females marry females, so long as one of them had satisfied a court that surgery had been completed—surgery which does not of course make the individual genetically a member of the other sex, as females re-assigned to male still do not have a Y chromosome and males re-assigned to female still do.

Unlike these jurisdictions, the U.S. Customs and Immigration Service does not require proof of surgery:

> Benefits based upon marriage may be approved on the basis of a marriage between a transgender individual and an individual of the other gender if the Petitioner/Applicant establishes 1) the transgender individual has legally changed his or her gender and subsequently married an individual of the other gender, 2) the marriage is recognized as a heterosexual marriage under

> the law where the marriage took place, and 3) the law where the marriage took place does not bar a marriage between a transgender individual and an individual of the other gender.
>
> Sex reassignment surgery is not required in order for USCIS to approve a Form I-130 to establish a legal change of gender unless the law of the place of marriage clearly requires sex reassignment surgery in order to accomplish a change in legal gender. The fact of sex reassignment surgery, however, would generally be reflected in the medical certification. USCIS will not ask for records relating to any such surgery. (citation omitted)

USCIS Adjudicators' Field Manual, http://www.uscis.gov/portal/site/uscis/menuitem.f6da51a2342135be7e9d7a10e0dc91a0/?vgnextoid=fa7e539dc4bed010VgnVCM1000000ecd190aRCRD&vgnextchannel=fa7e539dc4bed010VgnVCM1000000ecd190aRCRD&CH=afm

In other words, the U.S.C.I.S. will grant "heterosexual" status to same sex married couples if the jurisdiction of origin does. Thus someone self-identifying as a member of the opposite sex, without surgery, can already receive the benefits of heterosexual marriage in this country, as far as the federal government is concerned.

This Court described the importance and extent of civil marriage more than 130 years ago:

> Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized

> nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal.

Reynolds v. United States, 98 U.S. 145 (1879). The crucial question here is whether the convenience, in fact the social necessity, of being able to create and ascertain secure "social relations and social obligations and duties" can constitutionally be denied, when the two members of a couple seeking the shelter of these conventions happen to be of the same sex.

In *Lawrence v. Texas,* 539 U.S. 558, 156 L. Ed. 2d 508, 123 S. Ct. 2472 (2003), the majority correctly and trenchantly stated that "times can blind us to certain truths and later generations can see that laws once thought … proper in fact serve only to oppress." In dissent, Justice Scalia noted that the majority opinion in *Lawrence* removed the public perception of homosexual immorality as the last rationale for denying marriage to same sex couples:

> Today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned. If moral disapprobation of homosexual conduct is "no legitimate state interest" for purposes of proscribing that conduct... and if, as the Court coos (casting aside all pretense of neutrality), "[w]hen sexuality finds overt expression in

> intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring,"....what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising "[t]he liberty protected by the Constitution,"...? Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry. This case "does not involve" the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court. (page references omitted)

Justice Scalia is correct, that *Lawrence* logically demands the recognition of same sex couples who seek the legal bundle of marriage rights and responsibilities to confirm their "personal bond that is more enduring". *Lawrence* also ably continues the through-line which began in *Loving v. Virginia*, 388 U.S. 1 (1967), in which this Court noted that "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." If the contract of marriage cannot constitutionally be denied to a couple because of the legally irrelevant accident that one is of a different race than the other, neither should it be denied because of the legally irrelevant accident that one is of the same sex as the other.

Arguments that marriage must be defined as a union of one male and one female, are based on three basic rationales, all of which are logically, legally and constitutionally illegitimate: i. An argument from prejudice, often implied more than stated, that same sex couples are immoral and inferior; ii. An argument that

government has a rational basis for restricting marriage to opposite sex unions in order to encourage "responsible procreation and child-rearing"; and iii. The weakest argument of all, that of novelty, that same sex marriage is not appropriate because it didn't exist earlier in history, that no-one ever thought of it before. The briefs filed by the respondents and other amici herein deal thoroughly with the point that Proposition 8, because based on discrimination, violates equal protection standards. This brief therefore concentrates on refuting the other two points, numbered ii. and iii. above.

The most apparently substantial argument posed by petitioner against recognition of same sex marriage, is point ii., that marriage is based on the encouragement of procreation and therefore demands that the couple be of opposite sex. However, the encouragement of procreation has *never* been a significant goal of the legal contract of marriage anywhere in the United States; if it had been, there would be differential legal, tax, and trusts and estates treatment and other incentives for biological children of both parents, or for marriages which have them. In most states, the major or sole criterion for a valid marriage has always been simply that the legalities of marriage were properly observed, and courts tend not to have a reason to look beyond that, Juliet Williams, *Loving or Leaving: On the Regulation of Marriage and Citizenship in the United States* (American Political Science Association 2007), http://www.allacademic.com/meta/p209897_index.html (citing cases in which marriages for convenience and even for the parties' mutual amusement were confirmed as valid). As Justice Scalia noted in his dissent in *Lawrence v. Texas,* 539 U.S. 558, 156 L. Ed. 2d 508, 123 S. Ct. 2472 (2003), "the sterile and the elderly are allowed to marry".

Long before same sex marriage was an issue, courts held in various contexts that even the sex act which might lead to procreation was not a requirement of a valid marriage. In *Jackson v. Winne,* 7 Wend. 47 (Supreme Court of Judicature of New York, 1831) the husband had departed right after the ceremony without consummating the marriage, which had never been annulled or dissolved. The court held that for purposes of a determination as to who inherited under a will, the marriage was valid because based on the consent of the parties to their union, regardless of the absence of sex. Quoting a treatise called *Institute on the Civil Law*, by a Mr. Wood, the Court held that "Espousals de praesenti or marriage is contracted by consent only, without carnal knowledge."

While state courts tend to avoid delving into whether married people are "married enough", the federal government routinely makes this determination in immigration cases in which an American citizen or permanent resident seeks a visa for a foreign spouse. In an influential 1968 ruling, the Bureau of Immigration Appeals reversed the immigration examiner's finding that the sexless marriage of a sixty year old man with his immigrant housekeeper was a sham:

> We believe that the Service has failed to take into account the circumstances of the marriage. The parties herein are mature people. The husband has been unable to work for the past five years due to illness. He has been unmarried since 1936 and in view of his illness and age needed a wife who also would be a housekeeper. The wife agreed to become his wife and housekeeper....We regard the fact that

> the parties sleep in separate rooms and have not had sexual intercourse insignificant in view of the evidence showing that there was intended a valid and lasting marital relationship which has continued for over two years. The reasons for the marriage appear to be far sounder than exist for most marriages. There is not a single iota of evidence that this was a sham marriage.

Matter of Peterson A-14706662 Interim Dec #1845 http://www.justice.gov/eoir/vll/intdec/vol12/1845.pdf (1968).

Petitioner's suggestion that what takes place in the bedroom is crucial to the definition of marriage offends the privacy principle established by *Griswold v. Connecticut,* 381 U.S. 479 (1965): "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship."

The thread running through all these cases is that marriage is a legal creation, based on contract law, in which two people seek to create a stable and ascertainable relationship, availing themselves of certain rights and undertaking certain responsibilities, regardless of sexual activity.

The final and weakest argument that petitioner and the other adversaries of same sex marriage advance, is that it is novel (point iii above). In fact, widely accepted scholarly research and writing has established that same sex unions are *not* novel, William N. Eskridge, Jr., "A History of Same

Sex Marriage" (1993), *Faculty Scholarship Series, Paper 1504,* http://digitalcommons.law.yale.edu/fss_papers/1504; John Boswell, *Same Sex Unions in Pre-Modern Europe* (New York: Random House, 1995). However, even if same sex marriage had never been imagined by anyone in the world until this year, the fact that something has never been done before has never been a valid argument against assimilating that thing, by analogy, to the set of rights and obligations which the law provides. The technology cases cited above illustrate the principle that courts constantly must assimilate new developments to old rules. This Court dealt with the argument from novelty in *Lawrence* when it said, referencing *Loving* :

> [T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack.

As amicus Wallace wrote 17 years ago in *The Ethical Spectacle,* www.spectacle.org/796/gay.html:

> In a cold, violent and lonely world, there is no reason why we cannot extend the possibilities of warmth with a broader, more flexible definition of a family.... Not only is no-one harmed, but a social interest in responsibility and stability is advanced.
>
> Gay people are simply asking for the right to live their lives like anyone else. I had the choice to marry or not, and chose to marry; and the

> sweetness of my marriage is not decreased if gay people also marry. To the contrary, as a human being I am rewarded if gay people also marry, because the stock of enduring love increases in the world.

The Court's power of analogy, and the demands of fairness and evolving social understandings, require the recognition that same and opposite sex marriages are indistinguishable for constitutional purposes.

CONCLUSION

For the reasons stated, the decision of the Court of Appeals below should be affirmed.

Respectfully submitted,

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