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**CHILDREN’S RIGHTS IN THE MIDST OF
MARRIAGE EQUALITY: AMICUS BRIEF IN
OBERGEFELL V. HODGES BY SCHOLARS OF THE
CONSTITUTIONAL RIGHTS OF CHILDREN**

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Many scholars have called for the acknowledgement and treatment of children’s rights as constitutionally protected and enforceable,¹ and Supreme Court precedent establishes that the

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1. Tanya Washington, *What About the Children?: Child-Centered Challenges to Same-Sex Marriage Bans*, 12 WHITTIER J. CHILD & FAM. ADVOC. 1, 1 (2012); See Catherine E. Smith, *Equal Protection for Children of Gay & Lesbian Parents: Challenging the Three Pillars of Exclusion—Legitimacy, Dual-Gender Parenting, & Biology*, 28 LAW & INEQ. 307, 318-20 (2010); See Tanya Washington, *In Windsor’s Wake: Section 2 of DOMA’s Defense of Marriage at the Expense of Children*, 48 IND. L. REV. 1, 4-5 (2014), available at <http://mckinneylaw.iu.edu/ilr/pdf/vol48p1.pdf> [hereinafter *Windsor’s Wake*]; See Tanya Washington, Catherine Smith & Susannah Pollvogt, *Amicus Brief in United States v. Windsor by Scholars for the Recognition of Children’s Constitutional Rights*, 17 J. GENDER RACE & JUST. 467, 467-68 (2014); See Tanya Washington, *Once Born, Twice Orphaned: Children’s Constitutional Case Against Same-Sex Adoption Bans*, 15 UTAH L. REV. 1003, 1008, 1023-24 (2013), available at <http://epubs.utah.edu/index.php/ulr/article/view/1163/843>; See Tanya Washington, *Throwing Black Babies Out with the Bathwater: A Child-Centered Challenge to Same-Sex Adoption Bans*, 6 HASTINGS RACE & POVERTY L. J. 1, 6, 14, 24 (2009); See Barbara Bennett Woodhouse, “*Out of Children’s Needs, Children’s Rights*”: *The Child’s Voice in Defining the Family*, 8 BYU J. PUB. L. 321, 323 (1994), available at <http://digitalcommons.law.byu.edu/cgi/viewcontent.cgi?article=1159&context=jpl>; See Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents’ Rights*, 14 CARDOZO L. REV. 1747, 1814-20 (1993); See generally Catherine

government may not punish children for matters beyond children's control.² Same-sex marriage bans and non-recognition laws, which are collectively referred to as marriage bans, impose prohibited punishment on children for being born into, or parented by, same-sex families.³ States argue that marriage is the optimal familial environment for children, yet marriage bans categorically exclude an entire class of children – children in same-sex families – from the legal, economic, and social benefits of marriage.⁴ In response to this reality, rather than States' rhetorical characterization of marriage bans as child welfare measures,⁵ this amicus brief filed with the Supreme Court in *Obergefell v. Hodges*, and relied on by the Court in its majority opinion,⁶ highlights the adverse impact of marriage bans on children's best interests.⁷

The brief recounts a powerful body of equal protection jurisprudence that prohibits punishing children for the purpose of expressing moral disapproval of parental conduct or to incentivize

E. Smith, *Equal Protection for Children of Same-Sex Parents*, 90 WASH. U. L. REV. 1589 (2013), available at http://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=6027&context=law_lawreview [hereinafter *Same-Sex Parents*].

2. Plyler v. Doe, 457 U.S. 202, 220 (1982); Levy v. Louisiana, 391 U.S. 68, 72 (1968); See Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175–76 (1972); See *Same-Sex Parents*, *supra* note 1, at 1591–92.

3. See *Windsor's Wake*, *supra* note 1, at 8.

4. *Id.* at 62.

5. See Reply Brief on the Merits for Respondent the Bipartisan Legal Advisory Group of the U.S. House of Representatives at 13, U.S. v. Windsor, 133 S. Ct. 2675 (2013) (No. 12-307), 2013 WL 1143561 (noting the intrinsic connection between marriage and children and arguing that same-sex marriages do not produce unintended and unplanned offspring, and also asserting that the government has an interest in protecting and supporting the societal goals of children being raised by biological parents employing differing parental roles).

6. *Obergefell v. Hodges*, 2015 U.S. LEXIS 4250, at *30 (2015).

7. See generally *DeBoer v. Snyder*, 772 F.3d 388, 407–08 (6th Cir. 2014), *cert. granted*, 135 S. Ct. 1040 (2015), and *cert. granted sub nom. Obergefell v. Hodges*, 135 S. Ct. 1039 (2015), and *cert. granted sub nom. Bourke v. Beshear*, 135 S. Ct. 1041, and *cert. granted sub nom., and rev'd sub nom. Obergefell*, 2015 U.S. LEXIS 4250 (stating, “[i]n addition to depriving [“gay couples the opportunity to publicly solemnize, to say nothing of subsidize, their relationships under state law”], [the traditional definition of marriage] deprives them of benefits that range from the profound (the right to visit someone in a hospital as a spouse or parent) to the mundane (the right to file joint tax returns). These harms affect not only gay couples but also their children”).

adult behavior.⁸ It explains that marriage bans punish children of same-sex couples by: 1) foreclosing their central legal route to family formation; 2) categorically voiding their existing legal parent-child relationships incident to out-of-state marriages; 3) denying them economic rights and benefits; and 4) inflicting psychological and stigmatic harm.⁹

Prior to the Supreme Court's decision in *U.S. v. Windsor*,¹⁰ the vast majority of the arguments for, and against, same-sex marriage were framed by the constitutional rights of adults.¹¹ However, at oral argument in *Hollingsworth v. Perry*,¹² Justice Kennedy described how California's marriage ban impacted children in same-sex families as "an immediate legal injury or . . . what could be a legal injury," acknowledging the existence of "40,000 children in California . . . that live with same-sex parents, [who] want their parents to have full recognition and full status."¹³ Though Justice Kennedy's acknowledgment of a potential legal injury to children affected by marriage bans has no precedential value, his characterization of the impact of same-sex marriage bans as an immediate legal injury casts children's rights as protected and enforceable. In the same vein, the Court's opinion in *Windsor*, decided during the same term, noted the harmful impact of prohibitions of same-sex marriage on children.¹⁴ In

8. See generally, e.g., *Plyler*, 457 U.S. at 220 (the Court explained, "[e]ven if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice").

9. Brief for Scholars of the Constitutional Rights of Children as Amici Curiae Supporting Petitioners at 5, *Obergefell*, 135 S. Ct. 1039 (No. 14-556), 2015 WL 1088972.

10. See generally *Windsor*, 133 S. Ct. 2675.

11. See, e.g., *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065, 1070 (D. Haw. 2012), vacated by 585 Fed.App'x. 413 (mem.) (9th Cir. 2014); See also Lewis A. Silverman, *Suffer the Little Children: Justifying Same-Sex Marriage from the Perspective of a Child of the Union*, 102 W. VA. L. REV. 411, 412 (1999), available at <http://digitalcommons.tourolaw.edu/cgi/viewcontent.cgi?article=1303&context=scholarlyworks> ("The preponderance of the dialogue about same-sex marriage concentrates on the adult partners and their derivative benefits from the relationship; precious little focus is given to the rights of a child who may be a product of a same-sex relationship.").

12. See generally *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

13. Transcript of Oral Argument at 21, *Hollingsworth*, 133 S. Ct. 2652 (No. 12-144), available at <http://www.afer.org/wp-content/uploads/2013/03/2013-03-26-Transcript-of-Oral-Argument.pdf>.

14. *Windsor*, 133 S. Ct. at 2695.

doing so, the Court ushered the rights of children in same-sex families out of the shadow of parental rights and provided them with more secure constitutional footing. Justice Kennedy explained the harmful effects of the Defense of Marriage Act on children in same-sex families and announced,

[DOMA] humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives. . . . DOMA also brings financial harm to children of same-sex couples. . . . DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others.¹⁵

In *Windsor's* wake, an avalanche of state and federal court decisions echoed this observation, and many courts invalidated state marriage bans on the grounds that they frustrated, rather than served, children's interests and therefore bore no rational relationship to states' legitimate interest in protecting children.¹⁶

15. *Id.* at 2694, 2695, 2696.

16. *See* *Bostic v. Rainey*, 970 F. Supp. 2d 456, 478-80 (E.D. Va. 2014) ("Of course the welfare of our children is a legitimate state interest. However, limiting marriage to opposite sex couples fails to further this interest [N]eedlessly stigmatizing and humiliating children who are being raised by the loving couples targeted by Virginia's Marriage Laws betrays that interest. . . . The 'for the children rationale' rests upon an unconstitutional, hurtful and unfounded presumption that same-sex couples cannot be good parents. . . . The state's compelling interests in protecting and supporting our children are not furthered by a prohibition against same-sex marriage."); *Wright v. State*, No. 60CV-13-2662, 2014 WL 1908815, at *6 (Ark. Cir. May 9, 2014) ("Even if it were rational for the state to speculate that children raised by opposite-sex couples are better off than children raised by same-sex couples, there is no rational relationship between the Arkansas same-sex marriage bans and this goal because Arkansas's marriage bans do not prevent same-sex couples from having children. The only effect the bans have on children is harming those children of same-sex couples who are denied the protection and stability of parents who are legally married."); *Bourke v. Beshear*, 996 F. Supp. 2d 542, 553 (W.D. Ky. 2014), *rev'd sub nom. by DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014) ("The Court fails to see how having a family could conceivably harm children. . . . [a]nd no one has offered evidence that same-sex couples would be any less capable of raising children. . . ."); *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1212 (D. Utah 2013) ("[T]he State fails to demonstrate any rational link between its prohibition of same-sex marriage and its goal of having more children raised in the family structure the State wishes to promote. . . . [T]he State's prohibition of same-sex marriage detracts from the State's goal of promoting optimal environments for children. The State does not contest the Plaintiffs' assertion that

During the hearing in *Obergefell*, several Justices asked questions about a point this amicus brief makes clear: states should not be permitted to justify marriage bans as good for children and then exclude children in same-sex families from, what states argue, is the optimal family unit.¹⁷ The arguments advanced in the brief are underwritten by an interesting and compelling mix of cases, including: bedrock civil rights cases, like *Brown v. Board of Education and Plyler v. Doe*,¹⁸ under-theorized cases, like the non-marital status cases of

roughly 3,000 children are currently being raised by same-sex couples in Utah (citation omitted). These children are also worthy of the State's protection, yet Amendment 3 harms them for the same reasons that the Supreme Court found that DOMA harmed the children of same-sex couples."); *De Leon v. Perry*, 975 F. Supp. 2d 632, 653 (W.D. Tex. 2014) ("There is no doubt that the welfare of children is a legitimate state interest; however, limiting marriage to opposite-sex couples fails to further this interest. Instead, Section 32 causes needless stigmatization and humiliation for children being raised by the loving same-sex couples being targeted. . . . Defendants have not provided any evidentiary support for their assertion that denying marriage to same-sex couples positively affects childrearing. Accordingly, this Court agrees with other district courts that have recently reviewed this issue and concludes that there is no rational connection between Defendants' assertion and the legitimate interest of successful childrearing.").

17. Transcript of Oral Argument at 40, 53, 68, *Obergefell v. Hodges*, 135 S. Ct. 1039 (2015) (No. 14-556), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/14-556q1_7148.pdf ("And what I would suggest is that in a world in which gay and lesbian couples live openly as our neighbors, they raise their children side by side with the rest of us, they contribute fully as members of the community, that it is simply untenable—untenable to suggest that they can be denied the right of equal participation in an institution of marriage, or that they can be required to wait until the majority decides that it is ready to treat gay and lesbian people as equals. Gay and lesbian people are equal. . . . So when people come in and ask for a marriage license, they just ask a simple question: Do you want children? And if the answer is no, the State says, no marriage license for you. Would that be constitutional? . . . If you think about the potential—who are the potential adoptive parents, many of them are same-sex parents who can't have their own children, and truly want to experience exactly the kind of bond that you're talking about. So how does it make those children better off by preventing that from happening?").

18. See generally *Plyler v. Doe*, 457 U.S. 202 (1982) (holding a Texas statute that withheld funds from local school districts for educating undocumented students, and instead allowed school districts to refuse enrollment for those students violated the Equal Protection Clause); See generally *Brown v. Bd. of Educ.*, 347 U.S. 483, 493-94 (1954) (acknowledging separate, but equal, laws "deprives the children of the minority group of equal educational opportunities," and stating further that "[t]o separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in

Levy v. Louisiana and *Weber v. Aetna Casualty & Surety*,¹⁹ and cases wherein the Supreme Court makes a rare excursion into the realm of family law, like *Palmore v. Sidoti* and *Caban v. Mohammad*.²⁰ The brief applies powerful themes in race, immigration, constitutional protections for children, and gender equality cases to emerging issues about equality for children in same-sex families.

In the Court's second landmark decision on marriage equality, the Obergefell majority cited this amicus brief in support of its determination that "[m]arriage . . . affords the permanency and stability important to children's best interests[,]” which was the Court's third bases for protecting the fundamental right to marry. Justice Kennedy, writing for the majority, recounts the harms that discriminatory marriage laws create for children in same-sex families, noting:

Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life. The marriage laws at issue here thus harm and humiliate the children of same-sex couples.²¹

As part of the constitutional calculus, this amicus brief informed the Court's consideration of marriage bans and the adverse impact on children in same-sex families, and it also provided a strong bases, independent of couples' constitutional rights, for the Supreme Court to rule that discriminatory same-sex marriage laws are unconstitutional.²²

a way unlikely ever to be undone”).

19. *See generally* *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972) (holding that a child's legitimacy, or illegitimacy, has no bearing on his right to recover damages for the wrongful death of his parent); *See generally* *Levy v. Louisiana*, 391 U.S. 68 (1968) (concluding, “it is invidious to discriminate against [illegitimate children] when no action, conduct, or demeanor of theirs was possibly relevant to the harm done to [their] mother”) (citations omitted).

20. *See generally* *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (stating that the state has “a duty of the highest order to protect the interests of minor children, particularly those of tender years”); *See generally* *Caban v. Mohammed*, 441 U.S. 380 (1979) (finding that “the distinction in § 111 between unmarried mothers and unmarried fathers, as illustrated by this case, does not bear a substantial relation to the State's interest in providing adoptive homes for its illegitimate children”).

21. *Obergefell v. Hodges*, 2015 U.S. LEXIS 4250, at *31 (2015) (citation omitted).

22. *Id.* at 30-31 (“It follows that the Court also must hold—and it now does hold—that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.”).