Nos. 17-1618, 17-1623

In The Supreme Court of the United States

GERALD LYNN BOSTOCK,

Petitioner,

v.

CLAYTON COUNTY, GEORGIA,

Respondent.

ALTITUDE EXPRESS, INC., & RAY MAYNARD,

Petitioners,

v.

MELISSA ZARDA & WILLIAM MOORE, JR., CO-INDEPENDENT EXECUTORS OF THE ESTATE OF DONALD ZARDA,

Respondents.

On Writs Of Certiorari To The United States Courts Of Appeals For The Eleventh And Second Circuits

BRIEF OF *AMICUS CURIAE* MARRIAGE LAW FOUNDATION IN SUPPORT OF EMPLOYERS

WILLIAM C. DUNCAN
1868 North 800 East
Lehi, UT 84043
(801) 367-4570
billduncan56@gmail.com
Counsel for Marriage Law Foundation

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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INTEREST OF *AMICUS CURIAE*[1]

The Marriage Law Foundation is a nonprofit, nonpartisan organization which, since its creation in 2004, has provided to courts, legislatures, executive branch departments, other government entities, educational institutions, and the general public information, analysis, arguments, and data bearing on the important and pressing family law issues of the day. *Amicus* was extensively involved in the cases in State and federal courts on the constitutionality of the legal definition of marriage, including filing *amicus* briefs, participating in academic conferences and publishing articles in legal journals on the arguments made in these cases.

SUMMARY OF THE ARGUMENT

In this case, employees urge this Court to interpret Title VII's prohibition of discrimination on the basis of sex to include, as a subset, alleged discrimination on the basis of sexual orientation. Though the specific statutory interpretation claim is novel, there is an analogous line of cases developed at length spanning several decades raising a similar claim in the constitutional context. In those cases, plaintiffs challenged state and federal marriage laws, arguing that these

[1] All parties have given consent to the filing of this brief. No counsel for a party wrote this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae* or its counsel made a monetary contribution intended to fund its preparation or submission.

discriminated on the basis of sex and sexual orientation (importantly, treating these categories as distinct).

Whether as a matter of constitutional analysis or interpretation of a specific constitutional text (as where a state had ratified an Equal Rights Amendment), state and federal appellate courts uniformly treated sex and sexual orientation discrimination claims as separate, not as the latter being a subset of the former.

Exemplary is this passage from the California Supreme Court:

> "past judicial decisions, in California and elsewhere, virtually uniformly hold that a statute or policy that treats men and women equally but that accords differential treatment either to a couple based upon whether it consists of persons of the same sex rather than opposite sexes, or to an individual based upon whether he or she generally is sexually attracted to persons of the same gender rather than the opposite gender, is more accurately characterized as involving differential treatment on the basis of *sexual orientation* rather than an instance of *sex discrimination*, and properly should be analyzed on the *former* ground. These cases recognize that, in realistic terms, a statute or policy that treats same-sex couples differently from opposite-sex couples, or that treats individuals who are sexually attracted to persons of the same gender differently from individuals who are sexually

> attracted to persons of the opposite gender, does not treat an individual man or an individual woman differently *because of* his or her *gender* but rather accords differential treatment *because of* the individual's *sexual orientation*." *In re Marriage Cases*, 183 P.3d 384, 437 (Cal. 2008) (emphasis in original).

This approach has been followed by this Court in its sexual orientation discrimination cases including *Obergefell v. Hodges*, 576 U.S. ___ (2015), where challengers of state marriage laws argued the laws employed a facial sex classification and constituted sex stereotyping. This Court, however, clearly treated as distinct the categories that are asserted by the employees in this case to be overlapping. That approach is sound and should be followed here.

ARGUMENT

In the context of the same-sex marriage litigation, this Court, and lower state and federal courts, have had occasion to hold that discrimination against gays and lesbians is a form of sex discrimination but have consistently treated these classifications as distinct.

These cases involve a claim that Title VII creates protections for legal categories including sexual orientation that Congress has considered, but failed, to amend the statute to include. Specifically, the attorneys for employees argue that discrimination against gays and lesbians is a form of sex discrimination. This

argument has come before the Court (and many other state and federal courts) before, only in the guise of a constitutional claim rather than the statutory interpretation claim advanced here.

Neither this Court nor the majority of other courts to decide these earlier cases treated the marriage laws eventually condemned as anti-gay as a form of sex discrimination. In fact, the same-sex marriage decisions overwhelmingly ignored or rejected the sex discrimination claim and, where they addressed both the sex and sexual orientation discrimination claims, treated the claims as distinct regardless of their eventual conclusion on the question of the constitutionality of marriage laws.

In this case, the rationales offered for interpreting Title VII to include the category of sexual orientation are familiar to those who participated in the debate over the constitutionality of earlier marriage laws. Here, plaintiffs assert sexual orientation is a subset of sex because the employers allegedly took into account the sex of the persons the employee was attracted to (Opening Brief of Respondents, *Altitude Express*, at 19-23; Brief for Petitioner, *Bostock*, at 18-23) or because the employers were relying on sex stereotypes (Opening Brief of Respondents, *Altitude Express*, at 23-27; Brief for Petitioner, *Bostock*, at 23-29).

Similar claims were made in the litigation over the legal definition of marriage. Since there was little precedent for extending heightened scrutiny to classifications based on sexual orientation, a finding that

marriage laws classified on the basis of sex would immediately have justified heightened scrutiny. Over several decades of litigation, though the sex discrimination claim was pressed relentlessly, only one appellate court plurality and very few individual judges accepted the claim that marriage definitions discriminated on the basis of sex, even as some concluded they discriminated on the basis of sexual orientation. The courts treated sexual orientation and sex discrimination claims as distinct. Interestingly, the sex discrimination claims made by plaintiffs also were typically made separately from the claims that these laws discriminated on the basis of sexual orientation. In some of the state cases, the state constitutions included Equal Rights Amendments that, like Title VII, explicitly prohibited discrimination on the basis of sex. In those States, courts were engaged in the kind of textual interpretation this Court must perform here.

A. State and federal appellate decisions on same-sex marriage consistently treated sex and sexual orientation classifications as distinct.

One of the earliest same-sex marriage decisions directly addressed the argument that marriage laws that prevented gay and lesbian couples from marrying violated Washington's Equal Rights Amendment. The Washington Court of Appeals noted that plaintiffs in that case made an argument like the one urged in this case—that the mere mention of the sex of the parties to a marriage created a presumption of sex discrimination. *Singer v. Hara*, 522 P.2d 1187, 1190 (Wash. Ct.

App. 1974). The court rejected the claim, holding the state ERA "merely insures that existing rights and responsibilities, or such rights and responsibilities as may be created in the future, which previously might have been wholly or partially denied to one sex or to the other, will be equally available to members of either sex." *Id*. at 1194.

The one time the sex discrimination claim prevailed was in a 1993 plurality opinion of the Hawaii Supreme Court. The plurality there accepted a claim similar to the one made by the employees here that the mere invocation of sex constitutes sex discrimination. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993). Notably, though, the plurality specifically *rejected* the claim that the marriage law at issue constituted sexual orientation discrimination. The plurality said, "Rudimentary principles of statutory construction render manifest the fact that, by its plain language, HRS § 572-1 [Hawaii's marriage statute] restricts the marital relation to a male and a female." *Id*. at 60. The court specified however, that the sexual orientation of the parties was irrelevant and that their sex and their sexual orientation were distinct categories: " 'Homosexual' and 'same-sex' marriages are not synonymous; by the same token, a 'heterosexual' same-sex marriage is, in theory, not oxymoronic." *Id*. at 51 n. 11. Thus, even though the plurality believed the challenged marriage law discriminated on the basis of sex, its reasoning squarely rejected the claim that sexual orientation is a subset of sex.

In holding that Vermont's constitution mandated extension of marriage benefits to same-sex couples, the majority forthrightly rejected the sex stereotyping urged by the employees in this case. The majority recognized that there were "long-repealed marriage statutes [that] subordinated women to men within the marital relation" but continued that "[i]t is quite another" matter "to demonstrate that the authors of the marriage laws excluded same-sex couples because of incorrect and discriminatory assumptions about gender roles or anxiety about gender-role confusion. That evidence is not before us." Thus, the majority concluded sex discrimination did not offer "a useful analytic framework for determining plaintiffs' rights under the Common Benefits Clause." *Baker v. Vermont*, 744 A.2d 864, 880 n. 13 (Vt. 1999).

In a separate opinion, one justice disagreed about the sex discrimination claim but still clearly distinguished sex-based and sexual orientation-based classifications: "I recognize, of course, that although the classification here is sex-based on its face, its most direct impact is on lesbians and gay men, the class of individuals most likely to seek same-sex marriage." *Id*. at 906 (Johnson, J., concurring and dissenting).

In the first U.S. court decision to hold as a matter of state constitutional law that the government must issue marriage licenses to same-sex couples, the majority analogized *Loving v. Virginia*, 388 U.S. 1 (1967), saying the marriage statute there and Massachusetts' law "deprives individuals of access to an institution of fundamental legal, personal, and social significance—

the institution of marriage—because of a single trait: skin color in *Perez* and *Loving*, sexual orientation here." *Goodridge v. Department of Public Health*, 798 N.E.2d 941, 958 (Mass. 2003). It did not consider the sex discrimination argument advanced in a concurrence (which did not address the question of sexual orientation). *Id*. at 970 (Greaney, J., concurring).

In 2006, New York's highest court rejected the sex discrimination claim as applied to marriage laws: "By limiting marriage to opposite-sex couples, [the State] is not engaging in sex discrimination. The limitation does not put men and women in different classes and give one class a benefit not given to the other." *Hernandez v. Robles*, 855 N.E.2d 1, 6 (2006). The court pointedly distinguished the sexual orientation claim: "However, the legislation does confer advantages on the basis of sexual preference. Those who prefer relationships with people of the opposite sex and those who prefer relationships with people of the same sex are not treated alike." *Id*. at 11.

In a Washington Supreme Court decision later the same year, the plurality opinion rejected the sex discrimination claim because "[m]en and women are treated identically under" the state's marriage law and the history of the state's Equal Rights Amendment specifically disavowed any effect on marriage laws. *Andersen v. King County*, 138 P.3d 963, 988-989 (Wash. 2006) (plurality). The opinion went on to note that "plaintiffs have not established that as of today sexual orientation is a suspect classification" (*id*. at 990), which would clearly not have been the case if sexual

orientation was a subset of sex in a state with an Equal Rights Amendment. This reasoning is particularly relevant here because the court in Andersen was being asked to interpret a constitutional provision barring discrimination on the basis of sex as this Court is being asked to interpret a statutory bar on discrimination on the basis of sex.

Similarly, Maryland's high court also found that "the prohibition on same-sex marriage did not draw a sex-based classification" *Conaway v. Deane*, 932 A.2d 571, 599 (Md. 2007). It held that "the primary purpose of the ERA was to eliminate discrimination as between men and women as a class" and "to subject to closer scrutiny any governmental action which singled out for disparate treatment men or women as discrete classes." *Id*. at 589, 596.

The California Supreme Court's opinion holding that state's marriage law was unconstitutional on state constitutional grounds treated sex and sexual orientation as distinct. It noted the trial court had concluded the marriage law constituted sex discrimination but concluded "that the challenged statutes cannot properly be viewed as discriminating on the basis of sex or gender for purposes of the California equal protection clause." *In re Marriage Cases*, 183 P.3d 384, 436 (Cal. 2008). The court described relevant precedent as squarely rejecting the argument made in this case:

> "past judicial decisions, in California and elsewhere, virtually uniformly hold that a statute or policy that treats men and women equally

> but that accords differential treatment either to a couple based upon whether it consists of persons of the same sex rather than opposite sexes, or to an individual based upon whether he or she generally is sexually attracted to persons of the same gender rather than the opposite gender, is more accurately characterized as involving differential treatment on the basis of *sexual orientation* rather than an instance of *sex discrimination*, and properly should be analyzed on the *former* ground. These cases recognize that, in realistic terms, a statute or policy that treats same-sex couples differently from opposite-sex couples, or that treats individuals who are sexually attracted to persons of the same gender differently from individuals who are sexually attracted to persons of the opposite gender, does not treat an individual man or an individual woman differently *because of* his or her *gender* but rather accords differential treatment *because of* the individual's *sexual orientation*." *Id*. at 437 (emphasis in original)

In describing one particular California case making this distinction, the court said that "'as a semantic argument' the plaintiffs' contention might have some appeal, we nonetheless squarely rejected the claim, explaining that the statute proscribing 'discrimination on the basis of "sex," did not contemplate discrimination against homosexuals.'" *Id*. at 438 (citations omitted). The court explained that it relied "on the circumstance that the identical statutory prohibition against sex discrimination in employment set forth in

title VII of the 1964 federal Civil Rights Act uniformly had been interpreted as not encompassing discrimination on the basis of sexual orientation or homosexuality," and "on the circumstance that the agency charged with administering the California statute consistently had interpreted the prohibition of sex discrimination as inapplicable to claims of discrimination based upon sexual orientation." *Id*.

In the federal appellate decisions leading up to *Obergefell*, the sex discrimination claim was raised. The most substantive treatment was in the Ninth Circuit where a panel held that "Idaho and Nevada's [marriage] laws discriminate on the basis of sexual orientation" and thus must be analyzed with heightened scrutiny. *Latta v. Otter*, 771 F.3d 456, 468 (9th Cir. 2014). A concurring opinion urged that the state's proffered interests in the marriage law were "without merit as justifications for sexual orientation discrimination" and "are likewise wholly insufficient under intermediate scrutiny to support the sex-based classifications at the core of these laws." *Id*. at 491 (Berzon, J., concurring).

The consistent theme apparent in this and the other discussions is that sex and sexual orientation discrimination are treated as distinct analyses, not as the latter being a subset of the former.

B. This Court has also treated the categories of sex and sexual orientation as distinct.

This Court's first major sexual orientation discrimination case followed a similar pattern to the cases discussed above. In *Romer v. Evans*, 517 U.S. 620 (1996), this Court identified the affected class "as homosexual persons or gays and lesbians." *Id*. at 624. This classification is referenced repeatedly throughout the opinion but sex discrimination is never discussed. The decision's discussion of the lack of a rational basis for the challenged Colorado law would have been beside the point if the Court were to have employed heightened scrutiny as would have been appropriate if a sex classification were at issue.

In *Lawrence v. Texas*, 539 U.S. 558 (2003), this Court overturned its earlier decision on sodomy because its continued validity "demeans the lives of homosexual persons." *Id*. at 575. Justice O'Connor wrote separately to discuss equal protection issues raised by the Texas statute. Specifically, that "[t]hose harmed by this law are people who have a same-sex sexual orientation" and that the "Texas statute makes homosexuals unequal in the eyes of the law." *Id*. at 581 (O'Connor, J., concurring). Her concurrence uniformly describes the law as singling out gay and lesbian persons and never as discriminating on the basis of sex.

This Court's decision in *Windsor* employs the same analysis. Respondents there admitted that the challenged law treated plaintiffs "differently, based *solely on their sexual orientation*" and urged

heightened scrutiny. Brief of Respondent, *U.S. v. Windsor*, 570 U.S. 744 (2013) at 17 (emphasis added). This Court said clearly: "The class to which DOMA directs its restrictions and restraints are those persons who are joined in same-sex marriages made lawful by the State" and did not assert that DOMA was a sex classification. *U.S. v. Windsor*, 570 U.S. 744, 775 (2013).

In *Obergefell*, the majority discussed sex discrimination precedent, but not as dispositive of the sexual orientation claims. Rather, the Court referenced this line of precedent in its discussion of the interplay between principles of liberty and equality to demonstrate "new insights and societal understandings" that "can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged." *Obergefell v. Hodges*, 576 U.S. ___ (2015) (slip op.) at 20. The Court cited examples of "invidious sex-based classifications in marriage" and "laws imposing sex-based inequality on marriage." *Id*. at 21. The Court then turned to a separate instance of the interplay between due process and equal protection, its decision in *Lawrence v. Texas*, 539 U.S. 558 (2003). The Court did not treat the decision in *Lawrence* as stemming from its sex discrimination precedent but rather characterized it as an effort "to define and protect the rights of gays and lesbians." *Obergefell* at 22. The analysis clearly treated as distinct the categories that are asserted by the employees in this case to be overlapping.

This was not because the Court was not aware of the argument that the marriage laws it concluded

imposed a "disability on gays and lesbians" (*id.*) actually constituted sex discrimination. The briefing in that case had urged the sex discrimination argument in terms very similar to the way the argument is framed here. Petitioners argued the challenged marriage laws employed a facial sex classification and constituted sex stereotyping. Brief for Petitioners, *Obergefell v. Hodges* No. 14-556, at 48-49; Reply Brief for Petitioners, *Bourke v. Beshear* No. 14-574, at 11-12; Reply Brief for Petitioners, *Tanco v. Haslam* No. 14-562, at 16-17. The Court did not address this argument though it would have clearly tied the claim for same-sex marriage to established precedent on sex discrimination. Importantly, even the briefing treated the claims of sex discrimination and sexual orientation as distinct, as the Court's decision did.

Like lower court marriage decisions, this Court's treatment of laws affecting gay and lesbian persons have uniformly analyzed the laws as sexual orientation classifications rather than as distinctions on the basis of sex.

CONCLUSION

For the foregoing reasons, this Court should find in favor of the employers in these cases.

Respectfully submitted,

WILLIAM C. DUNCAN
1868 North 800 East
Lehi, UT 84043
(801) 367-4570
billduncan56@gmail.com
Counsel for Marriage Law Foundation