14-35420 & 14-35421

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUSAN LATTA, ET AL
PLAINTIFFS-APPELLEES

v.

C.L. "BUTCH" OTTER, ET AL
DEFENDANTS-APPELLANTS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

BRIEF OF DAVID A. ROBINSON AS *AMICUS CURIAE*
IN SUPPORT OF DEFENDANTS-APPELLANTS
IN SUPPORT OF REVERSAL OF DISTRICT COURT DECISION

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My Identity, Counsel, Expenditures, Interest in This Case, and Consent to File This Brief

This brief is filed with the consent of all parties.

I am an individual, not a corporation or organization. I am a 61 year-old man, lifelong U.S. citizen, now residing in Connecticut. I am a lawyer. I practiced law for 31 years in Massachusetts and now practice in Connecticut.

I wrote this brief because I am in a relatively unique position to opine about court-ordered legalization of same-sex marriage. In 2003 I wrote a book that I believe possibly, inadvertently, played a role in the court-ordered legalization of same-sex marriage in Massachusetts, the first state to legalize it. My connection with Massachusetts and Connecticut, which in 2008 likewise experienced court-ordered legalization of same-sex marriage, enables me to offer insights that other parties in this case might not offer.

I am my own counsel. I wrote this brief myself. I have likewise written and filed amicus briefs in three other same-sex marriage cases pending in the U.S. Court of Appeals: *Bostic v. Schaefer*, No. 14-1167 (4th Cir. argued May 13, 2014), Doc. 76; *Bourke v. Beshear*, No. 14-5291 (6th Cir.), Doc. 24; and *DeBoer v. Snyder*, No. 14-1341 (6th Cir.), Doc. 48. I have paid any costs, if any, associated with all these briefs. I have received no payment for any of them.

I have read Defendants-Appellants' principal briefs, Docs. 21-1 & 21-2, filed June 19, 2014, and Ninth Circuit Advisory Committee Note to Rule 29-1.

My brief does not repeat anything their briefs say. I am not associated with any party or amicus in this case or the other cases, so it would be difficult for me to join my brief with theirs. Moreover, it takes me nearly 7,000 words to fully present my argument, so space prohibits my joining it with another amicus brief.

I was born in Massachusetts in 1953, lived there until 2002, then moved to Connecticut. In 1977 I earned a J.D. from Washington University in St. Louis and was admitted to the Massachusetts bar. I practiced law in Springfield, Mass., from 1977 to 2008. I am now an active member of the Connecticut bar and retired member of the Massachusetts bar. I practice labor and employment law. I also teach part-time. I teach human resource management, including the laws pertaining to sexual orientation discrimination, at the University of New Haven. I have taught there since 2005.

In early 2003, while practicing law in Massachusetts, I wrote a book entitled *A Legal and Ethical Handbook for Ending Discrimination in the Workplace*. It was published by Paulist Press, a Christian book publisher, on or about July 1, 2003. In addition to legal tips and practical tips, the book included some Bible quotes I thought might motivate employers to provide equal opportunity to all. It received some publicity in Massachusetts in October 2003. *See, e.g.*, Kenneth L. Ross, "Book targets workplace discrimination," *Sunday Republican* (the Springfield, Mass., daily newspaper is called *The Republican* because that was its original

name in 1824; it is not a reference to the political party; the name predates the party), Oct. 19, 2003. I think it is possible that something I said in the book was misconstrued as an argument in favor of same-sex marriage. I said on page 71:

> Some of you might feel that laws protecting homosexuals from discrimination conflict with the Bible. The Bible forbids homosexuality (Lev 18:22; 20:13; 1 Cor. 6:9), but there is no conflict. These laws do not require you to *approve of* homosexuality. They require you *not to discriminate against* employees for being homosexual. In other words, these laws permit you to disapprove, in your heart and mind, of homosexuality, but do not permit you to play God. The law is the same as stated in the *Catechism of the Catholic Church*, which requires acceptance of homosexuals but does not require approval of homosexuality. "They must be accepted with respect, compassion, and sensitivity. Every sign of unjust discrimination in their regard should be avoided" (*Catechism*, paragraph 2358).

(emphasis in original). I was trying to make a magnanimous statement of goodwill and equality for gays in the workplace. I was trying to persuade Bible-reading employers not to discriminate against gays. I was talking about employment, not marriage.

But one month later, on November 18, 2003, the Massachusetts Supreme Judicial Court (SJC), in a 4-3 decision, stunned the world,[1] me included. For the

[1] *See, e.g.*, Kathleen Burge, "Gays have right to marry, SJC says in historic ruling," *Boston Globe* Nov. 19, 2003 ("This is such an incredible event," said a lawyer who wrote the amicus brief for the Boston Bar Association supporting gay marriage. "I think for the gay community, it is somewhat akin to the Berlin Wall coming down."); Michael Paulson, "Strong, divided opinions mark clergy response," *Boston Globe*, Nov. 19, 2003 (Boston archbishop O'Malley says "It is alarming

first time in U.S.—and possibly world—history, a high court held that same-sex couples have a constitutional right to a marriage certificate. *Goodridge v. Department of Pub. Health*, 798 N.E.2d 941 (Mass. 2003). The Hawaii Supreme Court in 1993 laid the groundwork for such a holding, *Baehr v. Lewin*, 852 P.2d 44, but *Goodridge* was the first to hold it. For reasons I will explain, I disagreed, and continue to disagree, with *Goodridge*. More importantly, I wondered if someone on the SJC read my book and construed, or misconstrued, my statement of goodwill and equality for gays in the workplace as an argument in favor of same-sex marriage.

Whether anyone on the Massachusetts SJC read or was influenced by my book, I do not know for certain. I think a number of judges and lawyers read it, but I do not know exactly who. Rather than speculate about it, I want to simply explain why my book's urging employers not to discriminate against gays was not, and is not, an argument in favor of same-sex marriage. I also want to explain how a little-noticed aspect of *Goodridge* should caution courts not to declare same-sex marriage a constitutional right. Same-sex marriage supporters were obviously ecstatic about *Goodridge* but there was one aspect of *Goodridge* they, or some of them, knew could hinder their quest to legalize same-sex marriage in other states.

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that the Supreme Judicial Court in this ruling has cast aside what has been . . . the very definition of marriage held by peoples for thousands of years"; Massachusetts Catholic Conference calls *Goodridge* "radical").

Goodridge, read together with Mass. Gen. Laws ch. 207, §§ 1 and 2, means that in Massachusetts a man can marry his brother. I devote nearly all of this brief to discussing that aspect. Then I cite some cases I think shed light on what the Framers of the Constitution and its Amendments might say about same-sex marriage. I close by explaining why the statement (*see* page 3 *supra*) in my 2003 book ("Some of you might feel . . . .") is not an argument for same-sex marriage.

ARGUMENT

HOLDING THAT SAME-SEX COUPLES HAVE A CONSTITUTIONAL RIGHT TO MARRY IS TANTAMOUNT TO HOLDING THAT A MAN HAS A CONSTITUTIONAL RIGHT TO MARRY HIS BROTHER, ELDERLY (TOO OLD TO GET PREGNANT) SISTER, OR ELDERLY MOTHER. THEY ARE "SIMILARLY SITUATED."

Do Idaho's marriage laws give every Idaho citizen an equal right to marry? Yes. Every unmarried Idaho adult has the right to marry an unmarried adult of the opposite sex who is not a blood relative. Idaho Code §§ 32-202, 205, 207.

The district court held that that is not an equal right. A man who prefers to have sex with a man than with a woman, held the district court, does not have an equal right to marry in Idaho. Only if he is allowed to marry a man does he have an equal right to marry, the court held. Doc. 98, pp. 26-27. The court gave him that right. The court held that two male friends who want to marry are equal to a man and woman who want to marry.

But the truth of the matter is that two male friends who want to marry are more equal to two brothers who want to marry than to a man and woman who want to marry. Two brothers are a same-sex couple. If a same-sex couple has a constitutional right to marry, do two brothers have the right to marry?

At first glance, the answer might seem to be no. Since a man is not allowed to marry his sister, he should not be allowed to marry his brother, either, the answer might seem. The problem is, that statement, "Since a man is not allowed to marry his sister, he should not be allowed to marry his brother, either," makes no sense. It compares apples with oranges. The reason a man is not allowed to marry his sister is that if they conceive a child, there is an increased likelihood of birth defects. Two men cannot conceive a child. If two men have a constitutional right to marry, it follows that two adult brothers have the right to marry. It would violate "equal protection" to give two adult brothers fewer rights (no right to marry) than two male friends. Just being brothers does not give them the rights married people have.

Goodridge, the 2003 Massachusetts case, recognizes this. *Goodridge* tries, or seems to try, to prevent this slippery slope. *Goodridge* states, "Nothing in our opinion today should be construed as relaxing or abrogating the consanguinity or polygamy prohibitions of our marriage laws. . . . Rather, the statutory provisions concerning consanguinity or polygamous marriages shall be construed in a gender

neutral manner." 798 N.E.2d at 969 n.34. But as I just explained, that statement in *Goodridge*, lofty though it may sound, makes no sense. The consanguinity prohibitions of our marriage laws make sense (are rational) only if they are gender-specific, not gender-neutral. The very purpose of those consanguinity laws is to discourage a couple of blood relatives from conceiving a child. Two brothers cannot conceive a child.

Indeed, *Goodridge* states that as a result of *Goodridge*, a man can marry his brother in Massachusetts. "Sections 1 and 2 of G. L. c. 207 prohibit marriages between a man and certain female relatives and a woman and certain male relatives, but are silent as to the consanguinity of male-male or female-female marriage applicants." *Id.* at 953. Prior to *Goodridge*, a man could not marry his brother in Massachusetts. After *Goodridge*, he can.

> We are already sliding down the slippery slope. As a result of court-ordered same-sex marriage, in at least two states (Iowa and Massachusetts) and as many as seven states a man can now marry his brother. This court should stop the slide.

When same-sex marriage supporters realized that, thanks to *Goodridge*, a man in Massachusetts can marry his brother, they were concerned. They knew that the same-sex marriage movement would not gain traction in other states if it meant a man could marry his brother. So, in 11 of the next 12 states (New York is the

exception) to enact statutes allowing same-sex marriage, they made sure two brothers cannot marry. They, or their legislative allies, wrote those statutes to exclude (discriminate against) two brothers.[2]

But, for reasons I just explained, if same-sex couples have a constitutional right to marry, statutes prohibiting two brothers to marry are unconstitutional. Two brothers will make the same argument all same-sex couples make when arguing they have a constitutional right to marry: They 1) love each other, 2) want the benefits of marriage (just being brothers does not entitle them to those benefits), 3) aren't harming anyone (they cannot conceive a child together), and 4) aren't diminishing anyone else's marriage. The brothers might also argue, if it's true, that they don't have a sexual relationship. I expect that these courts (courts that hold that "equal protection" means same-sex couples have the right to marry) will agree that the brothers have the right to marry.

Same-sex marriage supporters might argue that the man and his brother are already "related" and therefore should not be allowed to marry. However, for

[2] Conn. Gen. Stat. § 46b-21; Del. Laws tit. 13, § 101(a); Haw. Rev. Stat. § 572-1(1); Ill. Comp. Stat. 750, ch. 40, par. 212(a)(2); Maine Rev. Stat. § 701(2)(a); Md. Code Ann., Fam. Law § 2-202(b)(1); Minn. Stat. 2013, § 517.03(2); N.H. Rev. Stat. § 457:2; R.I. Gen. Laws § 15-1-2; Vt. Stat. tit. 15 § 1a; and Wash. Rev. Code § 26.04.020(2). Connecticut, like Massachusetts, began allowing same-sex marriage because of a 4-3 state supreme court ruling. *Kerrigan v. Commisioner of Pub. Health*, 957 A.2d 407 (Conn. 2008). Connecticut eventually codified *Kerrigan*. New York began allowing same-sex marriage by legislation, not court order. The legislation allows a man to marry his brother. N.Y. Dom. Rel. Law § 5.

reasons I just explained, that is unfair ("unequal") to the two brothers. It treats them less favorably than two male friends are treated. Just being brothers does not give them the tax benefits, insurance benefits, and social security benefits of marriage. Only marriage (or civil union with all the benefits of marriage) would give them those benefits.

If same-sex marriage supporters argue that marriage is about gaining a "new" relative, why only one? A man can have ten brothers. Why should he be allowed only one more relative? Why not ten more?

If same-sex marriage supporters argue that marriage is about having a sex partner, what if a man's sex partner is his brother? If, as same-sex marriage supporters argue, it is OK for two men to have sex, why would it not be OK for two adult brothers to have sex? The two couples (the two male friends, and the two brothers) are similarly situated. In fact, they are identically situated.

Six states—California, Iowa, New Jersey, New Mexico, Oregon, and Pennsylvania—are allowing same-sex marriage but only as a result of court order. Can a man marry his brother in those states? As far as I can tell (I did quick, not exhaustive, research on these states; it is possible I am mistaken about something), a man can marry his brother in Iowa. *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009) (holding Iowa Code § 595.2, which provides, "Only a marriage between a

male and a female is valid," unconstitutional). The "void marriages" section of the Iowa Code, § 595.19, does not prevent them from marrying.

In Pennsylvania, the marriage consanguinity laws don't prevent two brothers from marrying, 23 Pa. Stat. §§ 1304(e) &1703, but a criminal statute, 18 Pa. Stat. § 4302(a), does. Two brothers would argue that the criminal statute is unconstitutional as applied to them. If two male friends have a constitutional right to have sex and marry, two brothers do. *United States. v. Windsor*, 133 S. Ct. 2675, 2692 (2013) ("Private, consensual sexual intimacy between two adult persons of the same sex may not be punished by the State"), citing *Lawrence v. Texas*, 539 U.S. 558, 567 (2003).

California, New Jersey, New Mexico, and Oregon have statutes prohibiting siblings to marry—Cal. Fam. Code § 2200, N.J. Stat. Ann § 37:1-1, N.M. Stat. § 40-1-7, and Or. Rev. Stat. § 106.020. But are those statutes constitutional? If, as courts have recently held in those states, a man has a constitutional right to marry a man, I think it is highly likely those courts would hold that two brothers have the right to marry.

New York enacted legislation in 2011 allowing same-sex marriage. As a result, two brothers can marry in New York. N.Y. Dom. Rel. Law § 5.

The fact that legalization of same-sex marriage has legalized a man's marrying his brother in Iowa, Massachusetts, New York, and also possibly in

California, New Jersey, New Mexico, Oregon, and Pennsylvania is troubling to same-sex marriage supporters. They don't want society to associate or equate homosexuality with incest. They want society to equate homosexuality with heterosexuality. They want society and the government to have the same respect for homosexual sex as for heterosexual sex. Since heterosexual sex between blood relatives is not respectable, they are saying homosexual sex between blood relatives is not respectable. Their effort to dissociate homosexuality from incest may help them politically but is hypocritical, absurd, and therefore constitutionally incorrect. It is hypocritical because they do exactly what they complain is done to them. They discriminate against two loving, consenting, same-sex adults who aren't harming anybody and want the benefits of marriage: a man and his brother. It is absurd because in those 11 states, two brothers have fewer rights (no right to marry) than two male friends.

The fact that legalization of same-sex marriage can lead to legalization of nonprocreative incestuous marriages (marriage between blood relatives who cannot conceive a child together) is no mere "fly in the ointment." It is a mirror that tells the truth about same-sex marriage: There is no difference, biological or otherwise, between two adult brothers' having sex and two adult male friends' having sex. There is no difference between two adult brother's marrying and two adult male friends' marrying. One couple has as much value to society as the other.

One couple makes as much sense as the other. Courts that hold that same-sex couples have a constitutional (Due Process and/or Equal Protection) right to marry will sooner or later hold that two adult brothers have a constitutional right to marry.

After, or perhaps even before, these courts hold that two brothers have a constitutional right to marry, a man will try to marry his elderly (post-menopause) mother. Same-sex marriage supporters will vehemently oppose it. "That is incest! Incest is illegal! We are opposed to incest!" they'll say. But same-sex marriage supporters also say, "Marriage is about love, not sex or procreation." Vice President Joseph Biden, speaking in support of same-sex marriage on March 22, 2014, said, "The single most basic of all human rights is the right to decide who you love."[3] The Idaho Court of Appeals recently construed *Lawrence v. Texas*, 539 U.S. 558, 578 (2003), to mean that the Due Process Clause precludes criminalizing private, consensual sex between adults. *State v. Hamlin*, 324 P.3d 1006, 1013 (Idaho App. 2014). *Hamlin* means, or seems to mean, that consensual sex between a man and his post-menopause mother is legal, not illegal, in Idaho, and that the Idaho statute that criminalizes incest, Idaho Code § 18-6602, is unconstitutional as applied to a man and his post-menopause mother. The district court in the present case (*Latta v. Otter*) held that it is because of "who they are

[3] Ian Lovett, "Biden notes progress in gay rights, but says there is 'much left to do,'" *N.Y. Times*, Mar. 23, 2014.

and whom they love" that same-sex couples in Idaho are denied the right to marry. Doc. 98, page 56. If marriage is about "love," it should come as no surprise that a man will try to marry a woman he loves: his mother.

His mother will produce a medical certificate that she has reached menopause and cannot get pregnant, or she might argue, if it's true, that she and her son don't have sex. Or she might argue, if it's true, that she and her son have a sexual relationship but not intercourse (his penis does not enter her vagina). *Lawrence* holds that consenting adults have a constitutional right to "engage[] in sexual practices common to a homosexual lifestyle," 539 U.S. at 578, which I assume means oral sex, anal sex, and mutual masturbation. If homosexuals have the right to engage in those practices, I assume that heterosexuals (man and post-menopause mother) do. She and her son will argue they should be treated like the two brothers and the two male friends, because they 1) love each other, 2) want the benefits of marriage (just being mother and son does not give them those benefits), 3) aren't harming anyone (they cannot conceive a child together), and 4) aren't diminishing anyone else's marriage. They will argue that if the relationship between two men is "equal to" the relationship between a man and woman, then surely the relationship between a man and his mother is "equal to" the relationship between a man and woman. A man and his mother *are* a man and woman. And since the mother is too old to get pregnant, the relationship between them is "equal

to" the relationship between two men. They'll argue that "equal protection" gives them the right to marry. They are "similarly situated."

If same-sex marriage supporters persist in arguing that it is illegal for the man to marry his mother in Idaho, the man and his mother will point out that it was, until recently, illegal for a man to marry a man in Idaho. If the latter is constitutionally legal, so is the former, the man and his mother will argue. The man and his mother will argue that their incest (she cannot get pregnant) is no more harmful than homosexual sex, and therefore is legal. They will argue they deserve a marriage certificate as much as two male friends do. It seems quite possible the court (a court that holds that same-sex couples have a constitutional right to marry) will agree with the man and his mother. If it sounds ridiculous to issue a marriage certificate to a man and his mother, many people before 2003 (before *Goodridge*) said it is ridiculous to issue a marriage certificate to two men.

If the man and his mother have or intend to have sexual intercourse, same-sex marriage supporters might point out that there is a very ugly word used to describe a man who has sexual intercourse with his mother and therefore such intercourse is wrong. The man and his mother will remind them that there is an equally ugly word used to describe a man who has oral sex with a man.

That is the slippery slope that results when a rights movement achieves success not by enacting, repealing, or amending laws but by declaring laws

unconstitutional. If their movement prevails in this case, the downhill slide a few years from now, looking back at the years 2003 (*Lawrence v. Texas* was decided in 2003) to 2015, 2016, or other year in the near future, will be as follows: Laws against homosexual sex? Unconstitutional. Laws defining marriage as the union of a man and woman? Unconstitutional. Laws allowing two adult male friends, but not two adult brothers, to marry? Unconstitutional. Laws allowing two men to have sex but not allowing a man and his post-menopause mother to have sex? Unconstitutional. Laws allowing two men to marry but not allowing a man and his post-menopause mother to marry? Unconstitutional. It is as simple as that. What creates a "slippery slope" is not the enactment of laws but rather the destruction of laws.

From ancient times until about a dozen years ago, everywhere in the world, the marriage laws included three requirements. The couple had to be: 1) at least a minimum age (15, 16, or whatever), 2) a male and female; and 3) not blood relatives of each other. The marriage laws were thus a three-legged stool. The destruction of any of those legs, as the same-sex marriage movement seeks to do (destroy the male-female requirement), means collapse, or substantial collapse, of the stool.

What is particularly alarming is this. The *law* seems to be changing, but the *facts* are not. The facts about sex and marriage have not changed in the past five

thousand years or more. A man still has a penis, a woman still has a vagina. The penis is designed to fit into the vagina. That is not the penis's only function, but I don't think anyone disputes that the penis is designed to fit into the vagina. It still takes a man and woman to conceive a child. Probably 99.99% (or more) of all the people who have ever lived were conceived as a result of a man's inserting his penis into a woman's vagina. The other .01% were conceived from the product of that general area of the male body and female body but not by sexual intercourse. As a result of modern reproductive science, that .01% might increase to .02% or .03% but will remain very, very low. Approximately 87% of male-female married couples conceive a child.[4] Those are the facts. Those have been the facts for five thousand years or more. Those will continue to be the facts.

So why does the U.S. Constitution, the pertinent parts of which have not changed since 1868 (Fourteenth Amendment), suddenly require the government to issue marriage certificates to same-sex couples? The answer is, it does not.

One of the very few of the 13 or so U.S. District Court cases in the past year that have struck down laws defining marriage as the union of a man and woman to

[4] James B. Stewart, "A C.E.O.'s Support System, aka Husband," *N.Y. Times*, Nov. 4, 2011, www.nytimes.com/2011/11/05/business/a-ceos-support-system-a-k-a-husband.html?pagewanted=all&_r=0iting (last visited June 19, 2014). The *Times* derived the 87% figure from a Pew Research report that says, "Among 40-44-year-old women currently married or married at some point in the past, 13% had no children of their own in 2008." www.pewsocialtrends.org/2010/06/25/childlessness-up-among-all-women-down-among-women-with-advanced-degrees/ (last visited June 19, 2014).

discuss whether court-ordered legalization of same-sex marriage will lead to legalization of incestuous marriage is *Wolf v. Walker*, 2014 WL 2558444, at *41 (W.D. Wis. June 6, 2014). *Wolf* states, first, that there is no reason to engage in "hypothetical discussions about what might come next." *Id.* Second, *Wolf* states, "There are obvious differences between the justification for the ban on same-sex marriage and other types of marriage restrictions. For example, polygamy and incest raise concerns about abuse, exploitation, and threats to the social safety net." *Id.* I have no idea what *Wolf* means by "abuse, exploitation, and threats to the social safety net." *Wolf* does not say. What is the difference between two adult male friends' marrying and two adult brothers' marrying? There is no difference. Is *Wolf* concerned that two brothers will marry for the purpose of increasing their social security benefits? Two male friends can marry to increase their social security benefits, file a joint tax return, and receive the other government benefits married couples receive, *Wolf* holds. That is a major reason why same-sex couples want the right to marry: to receive government benefits. Why can't two brothers?

Wolf opines that even if its holding means a man can marry his brother, sister, or mother, there is no need to worry. *Id. Wolf* opines that men will not want to marry their brother, sister, or mother. Citing page 40 of a 2006 book, *Gay Marriage: For Better or For Worse?*, by William N. Eskridge Jr. & Darren R. Spedale, *Wolf* states "there is no evidence from Europe that lifting the restriction

on same-sex marriage has had an effect on other marriage restrictions related to age, consanguinity or number of partners." However, nothing on page 40 of that book says that. I did not read the whole book but I carefully read the first 50 pages of it and the index. The only thing I found on the topic of incest or consanguinity was on pages 24 and 36. On page 24, the authors point out that same-sex marriage opponents believe that same-sex marriage will open up a "Pandora's box" or "slippery slope" (the authors' words) that could, according to same-sex marriage opponents, affect "consanguinity." On page 36, which I assume is the page *Wolf* means (not page 40), the authors say that

> the slippery slope objection is beginning to look like a lavender herring. Denmark has been registering same-sex partners for more than fifteen years now—without any slippage toward child marriage, polygamy, or incestuous marriages. There is not even a public campaign we know of to expand marriage in these other ways. Pandora opened her box, and nothing else came out!

The authors cite no statistics (none I could find in their book; to repeat, I didn't read the whole book) to support their assertion. Moreover, even if their assertion about incestuous marriage in Denmark is correct, Denmark is a very small country (pop. 5.6 million). *Wolf* generalizes it to "Europe" (pop. 742 million). *Id.*

Then *Wolf*, citing no authority, or perhaps referring to the same 2006 book, states that in Vermont (pop. 626,630, which is 49th in U.S.) and Massachusetts

(pop. 6.7 million, 14th in U.S.), the first states to give legal recognition to same-sex couples, "there has been no movement toward polygamy or incest."

The Idaho legislature is far better equipped to gather the facts on whether blood relatives are marrying in Massachusetts, Vermont, and Europe in 2014 than the court in *Wolf* was and Eskridge and Spedale (the book's authors) were in 2006. By 2006, there had been only a few same-sex marriages. Thousands of same-sex marriages have taken place since 2006. How many have been between blood relatives? I do not know. Even if the number is small, I stand by my argument: To hold that two men have a constitutional right to marry is to hold that a man has a constitutional right to marry his brother, elderly sister, or elderly mother. How many have *exercised*, or will exercise, that right, I do not know. I will say only this: The day a marriage certificate is issued to a man and his mother in the U.S. will be a very sad day for the institution of marriage. Marriage will become a joke—a bad joke. Couples who shouldn't be allowed to marry will marry, and couples who should be allowed to marry will see no reason to. Marriage will mean nothing.

Interestingly, Eskridge and Spedale wrote something very persuasive but I don't mean their 2006 book. On May 29, 2009, they wrote an article, "Sit Down, Ted Olson and David Boies: Let the states experiment with gay marriage—it's not

time yet for a federal lawsuit," that appears on Slate.com.[5] Referring to their 2006 book, Eskridge and Spedale said in May 2009:

> In our book, however, we ask whether this is an idea whose time has come at the national level. The nation remains evenly and intensely divided on the issue of marriage equality. And so we continue to think that the answer is no. This is not the moment for federal judges to step in and close off discussion. Why not continue with the state-by-state process of debate, experimentation, and slow but increasing movement toward marriage equality?

They were, and still are, correct about that. As recently as three years ago (June 20, 2011), only five states (Connecticut, Iowa, Massachusetts, New Hampshire, and Vermont)—none ranked higher than 14th in population among the 50 states—and the District of Columbia allowed same-sex marriage. The Ninth Circuit should do what Eskridge and Spedale recommended: Don't step in and close off discussion. Continue with the state-by-state process of debate and experimentation. Nineteen states now allow same-sex marriage but 14 of them only began doing so within the past three years. Except for New York, which began allowing same-sex marriage in 2011, the most populous of those 14 states—California, Illinois, New Jersey, and Pennsylvania—only began allowing same-sex marriage within the past one year (after *U.S. v. Windsor* was decided; *Windsor* was decided on June 26, 2013).

[5] www.slate.com/articles/news_and_politics/jurisprudence/2009/05/sit_down_ted_olson_and_david_boies.html (last visited June 16, 2014).

Wolf opines that there is little or no need to worry that a man will try to marry his brother, sister, or post-menopause mother. Same-sex marriage supporters say not to worry about it. My response is this. If same-sex marriage supporters are not worried that a man will try to marry his brother, why did they go to such effort when drafting the same-sex marriage statutes in 11 of the 13 states with statutes allowing same-sex marriage to discriminate against two brothers? These new statutes deliberately discriminate against two adult brothers who want to marry. Why don't same-sex marriage supporters or their legislative allies write the law to read, "An unmarried adult can marry an unmarried adult"? If they are worried that a man will marry and impregnate his daughter, why don't they write the law to read, "An unmarried adult can marry an unmarried adult, except that a man cannot marry a female blood relative unless she provides proof she is post-menopause or otherwise infertile"?

Why don't they? Here is why, or at least here I think is why. If I am mistaken about this, they can correct me. Their goal is not "marriage equality for all." If their goal were "marriage equality for all," they would word the law as I just described. Their goal, rather, is for government and society to equate homosexual sex with heterosexual sex. Since it is not respectable for a man to have sex with his sister, they are saying it is not respectable for a man to have sex with his brother. That is what they mean by "marriage equality." Their position is

hypocritical. They do exactly what they complain is done to them: They devalue the sex lives of many loving, consenting adult couples (couples who are blood relatives but cannot conceive a child) who pose no more of a health hazard or other hazard than two male friends do.

Put another way, their goal is to force the government to disregard a person's "sex," or what they call the sex "assigned at birth." *Time* magazine's June 9, 2014, cover story is "The Transgender Tipping Point: America's next civil rights frontier." The article (page 38), referring, I assume, to *Hollingsworth v. Perry*, 133 S. Ct. 2652, and *United States v. Windsor*, 133 S. Ct. 2675, 2691, which were both decided on June 26, 2013, says:

> Almost one year after the Supreme Court ruled that Americans were free to marry the person they loved, no matter their sex, another civil rights movement is poised to challenge long-held cultural norms and beliefs. Transgender people—those who identify with a gender other than the sex they were "assigned at birth," to use the preferred phrase among trans activists—are emerging from the margins to fight for an equal place in society.[6]

I don't think transgender rights is the "next" or "another" civil rights frontier. It is the same frontier. The same-sex marriage movement and the transgender rights movement have the same goal: force the government to disregard a person's "sex assigned at birth." Will they prevail? That is up to the federal appellate courts.

[6] Katy Steinmetz, "America's Transition," *Time*, June 9, 2014, p. 38.

Legislatively-enacted, as opposed to court-ordered, same-sex marriage is less likely to lead to incestuous marriage.

If, on the other hand, same-sex marriage becomes legal in a state because that state's citizens or legislators vote to make it legal, then it might not lead to incestuous marriage. Voters or legislators can, if they choose, write the law so as to prohibit blood relatives to marry. That is what 11 of the 13 states with statutes allowing same-sex marriage have done. *See* page 8 n.2 *supra*. Does that restriction have a "rational basis?" Not in *my* mind, but I am not a legislator. The legislation will certainly be entitled to some deference, because each state has "virtually exclusive" authority to define marriage as the state sees fit, so long as federal constitutional rights are not violated. *United States v. Windsor*, 133 S. Ct. 2675, 2691 (2013). The district court's decision is contrary to *Windsor*.

The Framers knew what homosexuality is. There is no possibility they regarded same-sex marriage as a constitutional right.

We often ask when analyzing constitutional issues what the Framers of the Constitution and its Amendments had in mind. *E.g.*, *Harris v. United States*, 536 U.S. 545, 563 (2002). This is difficult when the facts relate to cellphones, computers, automobiles, and other gadgetry that did not exist when the Constitution and pertinent Amendments were written. *United States v. Jones*, 132 S. Ct. 945, 958 (2012) (Alito, J., concurring).

But homosexuality is as old as time. Had someone asked John Adams, Thomas Jefferson, or, eighty years later, the Framers of the Fourteenth Amendment (Equal Protection Clause, 1868), about cellphones, they would have asked, "What are cellphones?" But had someone asked them if the Constitution and Amendments require the government to issue a marriage certificate to a same-sex couple, they would have understood the question perfectly. They knew that some men have sex with men. I'm not sure they knew the word "homosexuality" but they knew the words "sodomy," "crime against nature," or whatever they called it then. In 1858 in *Ausman v. Veal*, the Indiana Supreme Court stated, "Sodomy is a connection between two human beings of the same sex—the male—named from the prevalence of the sin in Sodom." 10 Ind. 355, 1858 WL 4030. The court stated that bestiality is a "connection between a human being and brute of the opposite sex." Then the court discussed both "sodomy" and "bestiality."

> Both may be embraced by the term, "crime against nature," as felony embraces murder, larceny, etc.; though we think that term is most generally used in reference to sodomy. Lev. ch. 18, v. 22, ch. 20, v. 13; Deut. ch. 23, v. 17; Rom. ch. 1, v. 27; 1 Cor. ch. 6, v. 9; 1 Tim. ch. 1, v. 10.

Note the authorities the court cited. Citing God and the Bible when writing appellate court opinions in 2014 would cause an uproar but was common in "sodomy" cases in the 1800s. Prosecutors likewise invoked such language. In Maryland in 1810 an indictment alleged the defendant:

> in and upon . . . a youth of the age of 19 years . . . did beat, wound, and illtreat, with an intent that most horrid and detestable crime, (among christians not to be named,) called Sodomy . . . and against the order of nature, then and there feloniously, wickedly and devilishly . . . to the great displeasure of Almighty God, contrary to the act of assembly . . . .

Davis v. State, 3 H. & J. 154, 1810 WL 178 (parenthetical material in original). Aside from the propriety or impropriety of American public officials' citing biblical sources, it leaves no doubt how they would have ruled on the question, Must the government issue a marriage certificate to a same-sex couple? They would have ruled no.

Passage of the Fourteenth Amendment (Equal Protection Clause) in 1868 did little, if anything, to increase public approval of homosexuality. In 1917, an Oklahoma court had to decide whether oral sex is "sodomy." *Ex parte De Ford*, 168 P. 58 (Okla. Crim.). The court held that oral sex is "sodomy" and discussed the equality or inequality of heterosexual sex and homosexual sex.

> In the order of nature the nourishment of the human body is accomplished by the operation of the alimentary canal, beginning with the mouth and ending with the rectum. In this process food enters the first opening, the mouth, and residuum and waste are discharged through the nether opening of the rectum. The natural functions of the organs for the reproduction of the species are entirely different from those of the nutritive system. It is self–evident that the use of either opening of the alimentary canal for the purpose of sexual copulation is against the natural design of the human body. In other words, it is an offense against nature. There can be no difference in reason whether such an unnatural coition takes place in the mouth or in the

> fundament—at one end of the alimentary canal or the other. The moral filthiness and iniquity against which the statute [statute prohibiting "sodomy"] is aimed is the same in both cases.

Would the Oklahoma court have held that the government must issue a marriage certificate to a same-sex couple? I don't think so. Has biology changed since 1917? No. Do people in Idaho today regard oral sex and anal sex as "moral filthiness and iniquity?" Idaho's people can answer that question better than a federal court can.

I said in my 2003 book that employers should accept gay people, not "play God," and not discriminate "unjustly." I stand by what I said. I was speaking to employers, not the government, except to the extent the government is an employer. The employment laws serve a very different purpose than the marriage laws. The employment laws protect the right to earn a living. The marriage laws are the government's way of rewarding people for entering into the type of intimate relationship society desires. Laws that define marriage as the union of a man and woman who are not blood relatives of each other are "just," not "unjust." I adopt and incorporate by reference what the defendants-appellants said in this regard in their briefs (Docs. 21-1 & 21-2, filed 6/19/14).

Conclusion

The district court decision should be reversed.

Date: June 20, 2014

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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,794 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii). This brief complies with the requirements of Rules 32(a)(5) & (6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman.

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I hereby certify that on June 20, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date). I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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