Nos. 14-556, 14-562, 14-571 & 14-574

IN THE

Supreme Court of the United States

JAMES OBERGEFELL, ET AL., AND BRITTANI HENRY, ET AL., PETITIONERS,

v.

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

VALERIA TANCO, ET AL., PETITIONERS,

v.

WILLIAM EDWARD "BILL" HASLAM, GOVERNOR OF TENNESSEE, ET AL., RESPONDENTS.

APRIL DEBOER, ET AL., PETITIONERS,

v.

RICK SNYDER, GOVERNOR OF MICHIGAN, ET AL., RESPONDENTS.

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

v.

STEVE BESHEAR, GOVERNOR OF KENTUCKY, ET AL., RESPONDENTS.

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

BRIEF FOR 54 INTERNATIONAL AND COMPARATIVE LAW EXPERTS FROM 27 COUNTRIES AND THE MARRIAGE AND FAMILY LAW RESEARCH PROJECT AS *AMICI CURIAE* IN SUPPORT OF THE RESPONDENT

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INTEREST OF AMICI CURIAE

This brief *amicus curiae* on behalf of the 54 individuals listed in the appendix and the Marriage and Family Law Research Project is respectfully submitted pursuant to Supreme Court Rule 37.1.[*] The individuals listed are prominent academic experts in international and comparative law and have joined to share their broad international experience concerning same-sex marriage and constitutional law. The Marriage and Family Law Research Project is an academic research center at the J. Reuben Clark Law School of Brigham Young University.

SUMMARY OF THE ARGUMENT

While international legal opinion is not determinative of whether a particular U.S. practice is constitutional, this Court has "acknowledge[d that] the overwhelming weight of international opinion," can "provide respected and significant confirmation" of the Court's conclusions.[1] In *Lawrence v. Texas*, for

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[*] Pursuant to Supreme Court Rule 37(3)(a), all parties have consented to the filing of this brief. Pursuant to Rule 37(6), *amici* affirm that no counsel for a party authored the brief in whole or in part and no person other than the *amici* or their counsel made a monetary contribution to this brief. Affiliations of signatories are given for information only and do not constitute the endorsement of the contents of this brief by any institution listed.

[1] *Roper v. Simmons*, 543 U.S. 551, 578 (2005). *See also Washington v. Glucksberg*, 521 U.S. 702, 710 & n.8 (1997) (Rehnquist, C.J., joined by O'Connor, Scalia, Kennedy, and Thomas, J.J.) (remarking that "[i]n almost every State—indeed, in almost every western democracy—it is a crime to assist a suicide" and citing a Canadian judicial decision "discussing assisted-suicide provisions in Austria, Spain, Italy, the United Kingdom, the Netherlands, Denmark, Switzerland, and France");

example, this Court cited foreign and international law in support of its conclusion that the claim of a consenting adult to enter a homosexual relationship without fear of criminal penalty was not "insubstantial in our Western civilization."[2]

An examination of comparative law on the subject of same-sex marriage, however, provides no similar support for extending the rights in *Lawrence* to a right to same-sex marriage. Koh *et al. amici* (hereinafter "Koh *amici*") argue that this Court should be influenced by a supposed "emerging global consensus," touting their appendix's chronological list of legal events dealing with same-sex unions or marriage.[3] Koh *amici*'s appendix, however, masks the simple fact that Brazil is the ***only*** country to nationally create same-sex marriage judicially,[4] out of the 13 international organizations or nations to address the

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Poe v. Ullman, 367 U.S. 497, 555 n.16 (1961) (Harlan, J., dissenting) (citing contraception laws from Belgium, France, Ireland, Italy, Spain, and Canada); *Rochin v. California*, 342 U.S. 165, 170 n.3 (1952) (Frankfurter, J.) (citing English law on the permissibility of non-unanimous jury verdicts); *Palko v. Connecticut*, 302 U.S. 319, 326 n.3 (1937) (Cardozo, J.) (citing French and Roman law as legal systems that permit compulsory self-incrimination).

[2] *Lawrence v. Texas*, 539 U.S. 558, 573 (2003). None of the sources of foreign and international law cited in *Lawrence*, however, support the argument that a right to intimate autonomy entails the right to marry. *See* The Wolfenden Report: Report of the Committee on Homosexual Offenses and Prostitution (1963); Sexual Offences Act 1967 (U.K.); *Dudgeon v. United Kingdom*, No. 7525/76 (ECtHR, 22 Oct.1981).

[3] Amicus brief for foreign and comparative law experts Harold Hongju Koh, et al., *Obergefell v. Hodges*, Nos.14-556, 14-562, 14-571, 14-574 at 41.

[4] ADI 4277/DF and ADPF 132/RJ (4 May 2011) (Supreme Federal Court).

question. It is also true that South Africa has held traditional marriage laws discriminatory, but significantly, has refused to judicially expand marriage, leaving the legislature a number of options, including distinguishing same-sex unions from traditional marriage.[5]

There is simply no "emerging global consensus" for same-sex marriage. In fact, any form of same-sex marriage has only been adopted by 17 of the 193 member states of the United Nations.[6] Most of the remaining countries are not the "anti-models" that Koh *amici* suggest, but are constitutional democracies that share our values of individual liberty. In fact, the 12 national and international tribunals in 11 countries that have explicitly upheld male-female marriage as consistent with human rights[7] include some of the jurisdictions with the earliest and strongest LGBT protections in the world, such as France, Germany, Spain, Finland, the European Court of Human Rights, and the U.N. Human Rights Committee.[8]

These courts recognize that there are significant moral, religious, and social reasons for opposing same-sex marriage unrelated to impermissible animus. Even the South African Constitutional Court, which is

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[5] *Minister of Home Affairs v. Fourie*, 2006 (3) BCLR 355 (CC), ¶147.

[6] *See infra* note 14. Koh *amici* count 20, but only by including England, Scotland, and Wales separately, which have limited sovereignty and are not U.N. member states, and Finland, which has legislation that has not passed its second reading and would not take effect until 2017. We include the UK as a nation with same-sex marriage, since the majority of its jurisdictions have adopted same-sex marriage. *See infra* note 14.

[7] *See infra* Section I.B.

[8] *See infra* Section I.B.

deeply solicitous of minority rights, including the rights of sexual minorities, has stated that "[i]t would be wrong and unhelpful to dismiss opposition to homosexuality on religious grounds as simply an expression of bigotry to be equated with racism."[9]

This concern for the varied and deeply felt societal views on same-sex marriage has led virtually all foreign jurisdictions to defer to legislatures on this issue. None of these courts has sought to have the final word on same-sex unions, instead expressly inviting and approving legislative responsibility for crafting marriage laws. Legislatures play an important role in this sensitive area because of both the need for democratic legitimacy and the important moral and social views that are raised. The European Court of Human Rights, for instance, observed that

> marriage has deep-rooted social and cultural connotations which may differ largely from one society to another. The Court reiterates that it must not rush to substitute its own judgment in place of the national authorities, who are best placed to assess and respond to the needs of society.[10]

Courts have recognized the importance of not freezing the social discussion on same-sex marriage and have noted that same-sex couples themselves will benefit from legislative resolution of these issues because of the compromise and resulting stability that the democratic process entails. The South African Constitutional Court, for example, reasoned that "[g]iven the great public significance of the matter, the

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[9] *Fourie*, ¶91.

[10] *Schalk and Kopf v. Austria,* No. 30141/04 (ECtHR, 24 June 2010), ¶62.

deep sensitivities involved and the importance of establishing a firmly-anchored foundation for the achievement of equality in this area, it is appropriate that the legislature be given an opportunity to map out what it considered to be the best way forward."[11] That court rejected even a temporary judicially-crafted remedy, which "would be far less likely to achieve the enjoyment of equality as promised by the Constitution than would lasting legislative action . . . . [T]he greater the degree of public acceptance for same-sex unions, the more will the achievement of equality be promoted."[12] A judicial rush to judgment seems particularly inopportune in a country in which general social attitudes appear to be shifting anyway.[13]

I. FOREIGN JURISDICTIONS OVERWHELMINGLY REJECT SAME-SEX MARRIAGE

A. The Vast Majority of Nations, Even Those Protecting LGBT Rights, Only Retain Traditional Marriage

At the outset, it is important to recognize that the vast majority of nations, even those protecting LGBT rights, define marriage as solely the union of male-female couples. Only seventeen non-U.S. jurisdictions currently recognize same-sex unions as

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[11] *Fourie*, ¶147.

[12] *Id*. ¶¶136, 139.

[13] *See* Robyn Fretwell Wilson, *Marriage of Necessity: Same-Sex Marriage and Religious Liberty Protections,* 64 CASE W. L.REV. 1161 (2014); *cf.* Cass Sunstein, *Civil Rights Legislation in the 1990s: Three Civil Rights Fallacies*, 79 CALIF. L. REV. 751, 766 (1991) ("*Roe* may have taken national policy too abruptly to a point toward which it was groping more slowly, and in the process may have prevented state legislatures from working out long-lasting solutions based upon broad public consensus.").

marriages.[14] ***All*** of the rest, 176 sovereign nations, retain the understanding of marriage as the union of a man and a woman. That is, taking the 193 member

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[14] Same-sex unions are permitted to have the designation of marriage in seventeen foreign states. Argentina (Ley no. 26.618, 22 July 2010 (CXVIII) B.O. 31.949); Belgium (Civil Code Article 143); Brazil (Resolution 175 of Brazil's National Judicial Council of 14 May 2013), implementing decisions of the Supreme Federal Court (ADI 4277/DF and ADPF 132/RJ, 4 May 2011) and the Supreme Tribunal of Justice of 25 Oct. 2011 (R.E. 1.183.378 – RS (2010/0036663-8); Canada (Bill C-38 (2005)); Denmark (Lov nr. 532 af 12 June 2012 Gældende); France Loi 2013-404 du 17 mai 2013 ouvrant le mariage aux couples de personnes de même sexe) (18 May 2013); Iceland (Lög Nr. 65/3010, Doc. 836 - 485th matter (28 March 2010)); Luxembourg (Memorial A nº 125 de 2014); Netherlands (Law of 21 Dec. 2000 in *Staatsblad* 2001 no. 9); New Zealand (Marriage (Definition of Marriage) Amendment Act 2013 (13/20)); Norway (Besler. O. nr. 91 (2007-2008)); Portugal (Lei No. 9/2010); South Africa (Civil Union Act 17 of 2006); Spain (Ley 13 of 1 July 2005); Sweden (Svensk författningssamling 2011:891); United Kingdom (England, Scotland, and Wales), (Marriage (Same Sex Couples) Act 2013 (c.30) (Royal Assent on 17 July 2013) and Marriage and Civil Partnership Act, 12 March 2014 (A.S.P.5)); and Uruguay (Se Dictan normas relativas al matrimonio igualitario Ley No. 19.075) (3 May 2013)) have all legalized same-sex marriage.

Koh *amici* count 20 countries currently permitting same-sex marriage, but only by separately including England, Wales, and Scotland, which lack full sovereignty and are not member states of the U.N. Although not all jurisdictions of the U.K. have adopted same-sex marriage, we have included it in our count since the majority of its jurisdictions legalized same-sex marriage. Koh *amici* also count Finland. Finland and Slovenia are in the process of adopting legislation to legalize same-sex marriage; if these laws take effect in 2016 and 2017 respectively, the count will rise to 19 countries. Law on Marriage and Family Relations, as amended 4 Mar. 2015 (Slovenia); KAA 3/2013 Kansalaisaloite eduskunnalle avioliittolain, rekisteröidystä parisuhteesta annetun lain ja transseksuaalin sukupuolen vahvistamisesta annetun lain muuttamisesta (Fin.).

states of the United Nations as the reference point, ten times more countries disallow same-sex marriage than allow it. Additionally, more nations have constitutional provisions defining marriage as the union of a husband and wife than have recognized any form of same-sex union.[15] Many other countries adopt legal protections of same-sex unions that stop short of changing the definition of marriage.[16]

The Koh *amici* suggest that world opinion on same-sex marriage is split between an inexorable march towards same-sex marriages in constitutional democracies and "anti-models" that give no rights to homosexuals. This is a vast misrepresentation of the state of laws globally.

While we recognize that some countries are extremely intolerant of the LGBT community, rejection of same-sex marriage is not the result of mere bigotry and intolerance: 95 of the 176 states allowing only traditional marriage have decriminalized homosexual conduct.[17] Eighty-eight have affirmatively extended constitutional and/or legislative protections to LGBT individuals, including

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[15] *See* Lynn D. Wardle, *The Legal Status of Same-Sex Marriage and Unions in the World and in the USA* (7 Mar. 2015) (listing 47 such countries), http://www.law2.byu.edu/site/marriage-family/home; *see also* Lynn D. Wardle, *Who Decides? The Federal Architecture of DOMA and Comparative Marriage Recognition* 4 CAL. WEST. INT'L. L. J. 143, 186-187 note 251 (2010) (listing 35 such countries).

[16] *See infra* note 31.

[17] *See* LUCAS PAOLI ITABORAHY & JINGSHU ZHU, STATE-SPONSORED HOMOPHOBIA: A WORLD SURVEY OF LAWS PROHIBITING SAME SEX ACTIVITY BETWEEN CONSENTING ADULTS, http://old.ilga.org/Statehomophobia/ILGA_SSHR_2014_Eng.pdf [hereinafter "WORLD SURVEY"], 16.

prohibiting discrimination in employment based on sexual orientation, considering hate crimes based on sexual orientation as an aggravating circumstance, prohibiting incitement to hatred based on sexual orientation, and constitutionally prohibiting discrimination based on sexual orientation.[18] Even Germany,[19] Switzerland,[20] Bolivia,[21] and Ecuador,[22] which constitutionally bar discrimination based on sexual orientation, still limit marriage to opposite-gender couples.

The narrative that liberal democracies' experience is a "progression towards marriage equality"[23] is simply inaccurate. Like the varied approaches to same-sex marriage in U.S. states, national approaches elsewhere are deep and often divisive as various nations struggle with how to implement norms of liberty and equality with respect for existing families, worldviews, and traditions; in any case, there is no clear movement towards any particular norm. As recently as last year, the European Court of Human Rights ("European Court"), itself a bastion of civil rights and LGBT protections, recognized that "it

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[18] *Id.* at 22-26.

[19] Equal Treatment Act (14 Aug. 2006)(Germany).

[20] SWITZERLAND CONST. art. 8.

[21] BOLIVA CONST. tit. II, ch. I, art. 14 ("The state prohibits and punishes all forms of discrimination based on . . . sexual orientation").

[22] ECUADOR CONST., tit. II, ch. 1, art. 11, ¶ 2 ("No one shall be discriminated against for reasons of . . . sexual orientation").

[23] Koh *amici* at 14.

cannot be said that there exists any European consensus on allowing same-sex marriage."[24]

The diversity to which the European Court of Human Rights alludes is only reinforced by recent events across Europe. In the past two years, the Italian Court of Cassation, the European Court's Grand Chamber, and the Austrian Constitutional Court have all rejected claims for rights to same-sex marriage. In the past two years, four EU member states have legislatively adopted same-sex marriage,[25] three have legislatively adopted civil unions,[26] and three have amended their constitutions in popular referenda to reject same-sex marriage.[27] Overall, only 11 countries of the 47 in the Council of Europe permit same-sex marriage,[28] and the same number of European nations have chosen instead to legally protect same-sex unions while keeping the widespread understanding of marriage as the union of a husband

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[24] *Hämäläinen v. Finland,* No. 37359/09 (ECtHR, 16 July 2014), ¶74.

[25] France, UK (England and Wales), Luxembourg, and Finland. *See supra* note 14.

[26] Zakona o životnom partnerstvu osoba istog spola, Official Gazette of the Republic of Croatia No. 92/2014 (Cro.); Kooseluseadus, 9 Oct. 2014 (Est.) (effective 1 Jan. 2016); Act IX of 2014, Civil Unions Act, 2014, 14 April 2014 (Malta).

[27] CROATIA CONST., ch. III, pt. 3, art. 62; *Macedonian lawmakers approve same-sex marriage ban, WASHINGTON BLADE,* 21 Jan. 2015 http://www.washingtonblade.com/2015/01/21/macedonian-lawmakers-approve-sex-marriage-ban/ (Macedonia and Slovakia).

[28] *See supra* note 14 (Belgium, Denmark, France, Iceland, Luxembourg, Netherlands, Norway, Portugal, Spain, Sweden, and the UK).

and wife.[29] This is hardly an emerging European consensus, much less an "emerging global consensus."[30]

Legal bars to marriage for same-sex relationships, however, need not prevent countries from providing significant protections to same-sex couples. Many jurisdictions that reject same-sex marriage provide same-sex unions with many or all of the legal incidents associated with marriage.[31] Several states recognizing same-sex unions (but not marriages), as well as two

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[29] *See infra* note 31 (Andorra, Austria, Croatia, Czech Republic, Finland, Germany, Hungary, Ireland, Liechtenstein, Slovenia, and Switzerland).

[30] Koh *amici* at 41.

[31] Andorra (Qualificada de les unions estables de parella 17 BOPA No. 25 (Law 4/2005)); Australia (Family Law Act 1975 sec. 60EA), Australia (Family Law Act 1975 sec. 60EA, as amended by the Same-Sex Relationships (Equal Treatment in Commonwealth Laws-General Law Reform) Act 2008); Austria (Eingetragene Partnerschaft-Gesetz (EPG) Act of 30 Dec. 2009); Croatia (Zakon o životnom partnerstvu osoba istog spola Official Gazette of the Republic of Croatia No. 92/2014); Czech Republic (Act no. 115/2006 Coll. on Registered Partnership); Ecuador (CONST. (2008) art. 68); Finland (Lag 950 of 28 Sept. 2001 Amended by Lag 59 of 4 Feb. 2005); Germany ((Gesetz zur Beendigung der Diskriminierung Gleichgeschlechtlicher Gemeinschaften: Lebenspartnerschaften, 2001 BGBl. No. 9 S. 266 (2001), as amended by Gesetz zur Überarbeitung des Lebenspartnerschaftsrechts, 2004 BGBl. No. 29 S. 3996 (2004)); Hungary (2009, evi IV., § 685 Polgári törvénykönyv; Ireland (Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 (Act No. 24/2010)); Liechtenstein (Lebenspartnerschaftsgesetz (2011)); Luxembourg (Loi du 9 juillet 2004 relative aux effets légaux de certains partenariats); Slovenia (Zakon o registraciji istospolne partnerske skupnosti (2009)); Switzerland (Loi fédérale sur le partenariat enregistré entre personnes du même sexe [LSP] 18 June 2004, Nbr. 210, art. 95).

that have no formal recognition of same-sex unions at all, for example, permit joint adoption by same-sex couples or second-parent adoption by same-sex couples.[32]

B. All National Courts and International Tribunals Have Refused to Impose Same-Sex Marriage Judicially, with the Sole Exception of Brazil

The Koh *amici* try to argue that because several legislatures drew on constitutional principles of equality, liberty, and dignity in adopting new legislation, this Court should feel authorized to impose the same result without legislative mandate. No doubt these are among the highest values that should be protected in democracy, but it does not follow that judicial implementation of those values, particularly when it runs counter to democratic processes, is always the best safeguard.

Comparative practice reflects these concerns: while legislative protections for same-sex marriages have been increasing,[33] claims for a right to same-sex marriage have overwhelmingly failed in international and national tribunals of last resort. Only one country, Brazil, has mandated that same-sex couples across its nation have access to traditional marriage.[34] The

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[32] WORLD SURVEY, 29 (Uruguay and Israel permit joint adoption and Austria, Germany, Finland, Israel, and Slovenia permit second-parent adoption). Ecuador and Israel have no protections for same-sex unions, and Austria, Germany, Finland, and Slovenia permit same-sex unions but not same-sex marriage). *See supra* note 31.

[33] *See supra* note 14.

[34] Supreme Tribunal of Justice of 25 Oct 2011 (R.E. 1.183.378 – RS (2010/0036663-8).

South African Constitutional Court, the only other nationally binding court to hold marriage laws discriminatory, stopped short of judicially mandating a "one size fits all" approach to marriage.[35]

Koh *amici* attempt to inflate the number of nations supporting same-sex marriage by citing Mexican and Canadian courts without national effect,[36] by making the clearly erroneous claim that Colombia "gave the legislature two years to implement a solution that results in the issuance of marriage licenses to same-sex couples,"[37] and by incorrectly implying that the Canadian Supreme Court held insistence on male-female marriage unconstitutional.[38] In fact, these courts lend no real support to the Koh *amici:* The Canadian Supreme Court has explicitly avoided the question whether male-female marriage violates the Charter of Rights and Freedoms.[39] The Mexican Supreme Court's *amparo* panel decision has no *ergo omnes* effects in Mexico.[40] And the Colombian Constitutional Court, while requesting that the legislature "make a law for the legal acknowledgement [***not*** marriage] of homosexual couples," within two years, as it explained in its official statement, has

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[35] *Fourie*.

[36] *See* Koh *amici* at 15-16.

[37] Koh *amici* at 17.

[38] Koh *amici* at 16 (describing South Africa as "joini[ng] Canada in holding unconstitutional the exclusion of same-sex couples from the institution of civil marriage").

[39] *Re Same-Sex Marriage,* [2004] 3 S.C.R. 698, 2004 SCC 79.

[40] MEXICO CONST. art. 107.

actually "maintain[ed] the concept of marriage as . . . between a man and a woman."[41]

The Koh *amici* modestly note that "to be sure, not every foreign state that has addressed these questions has ruled for marriage equality," citing one court.[42] They are not nearly modest enough. Two foreign organizations and 12 tribunals in 11 nations have upheld male-female marriage against claims of discrimination: the European Court of Human Rights,[43] the U.N.'s Human Rights Committee,[44] and national courts in Germany,[45] Austria,[46] France,[47]

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[41] English press release, Decision C-577/11 (Const. Ct.), http://english.corteconstitucional.gov.co/sentences/C-577-2011.pdf; *see also* http://www.corteconstitucional.gov.co/comunicados/No.%2030%20comunicado%2026%20de%20julio%20de%202011.php, especially §2 (Spanish version).

[42] Koh *amici* at 15.

[43] *Hämäläinen*; *Schalk; see also Gas and Dubois v. France*, No. 25951/07 (ECtHR, 15 Mar. 2012), ¶66 (rejecting a claim for extending rights of marriage to a same-sex couple in the adoption context).

[44] *Joslin v. New Zealand*, CCPR/C/75/D/902/1999 (17 July 2002).

[45] Entscheidungen des Bundesverfassungsgerichts [BverfGE] 28 Feb. 1980, 53, 245; Civil Partnership Case, 105 BVerfGE 313 (2002).

[46] Verfassungsgerichtshof (VfGH), B777/03 (12 Dec. 2003); Verfassungsgerichtshof (VfGH), B 166 / 2013-17 (12 March 2014).

[47] *Mrs. Corinne C. et al.*, Decision No. 2010-92 QPC, Constitutional Council, 28 Jan. 2011 (France).

Spain,[48] Finland,[49] Italy (both the Constitutional Court and Court of Cassation),[50] Ireland,[51] Chile,[52] and Colombia.[53] Even though these bodies and countries have strong and deep support for LGBT rights[54] (and a few have legislatures that have gone on to legalize same-sex marriage),[55] the courts have rejected claims that same-sex marriage should be judicially established as a fundamental or constitutional right. Inexplicably, the Koh *amici* cite only two of these decisions.[56]

Particularly notable is the repeated refusal by the European Court of Human Rights to mandate same-

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[48] ATC 222/1994, 11 July 1994; reaffirmed by STC, 6 Nov. 2012 (Spain).

[49] Supreme Administrative Court (3 Feb. 2009) (Finland), as cited in *Hämäläinen,* , ¶18.

[50] *Judgment No. 138 of 2010*, Corte costituzionale (Italy).

[51] *Zappone v. Revenue Commissioners*, [2006] IEHC 404 (Ireland High Court 2006).

[52] Sentencia del Tribunal Constitucional Chileno, Rol 1881-10-INA, del 3 de noviembre de 2011.

[53] C-029/09 (2009) (Colombia Const. Ct.); C-577 (2011) (Const. Ct.).

[54] *See infra* notes 58-60 (European Court), 68 (UNHRC), 71 (Spain), 73-76 (France), 80-82 (Germany), 83-86 (Italy, Austria, Finland, Colobmia, and Chile).

[55] Loi 2013-404 du 17 mai 2013 ouvrant le mariage aux couples de personnes de même sexe) (18 May 2013) (France); (Ley No. 13 of 1 July 2005) (Spain).

[56] Koh *amici* (citing only the Colombian Constitutional Court and the Italian Court of Cassation). Koh *amici* do refer to the European Court of Rights, but omit any reference to *Hämäläinen,* the 2014 Grand Chamber decision directly on point.

sex marriage,[57] since it has been supportive of sexual orientation and transgender claims in many other settings,[58] has held that "differences based on sexual orientation require particularly serious reasons by way of justification,"[59] and has suggested in dicta that same-sex unions could fall under European Convention protections for family life.[60] Most recently, however, in July 2014, the European Court's Grand Chamber has declined to recognize a fundamental right to same-sex marriage. [61] It recognized that "[i]n the absence of a European consensus and taking into account that the case at stake undoubtedly raises sensitive moral or ethical issues, the Court considers

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[57] *Hämäläinen*; *Schalk*; *see also Gas and Dubois*, ¶66 (rejecting a claim for extending rights of marriage to a same-sex couple in the adoption context).

[58] *See*, *e.g.*, *Dudgeon v. the United Kingdom* (barring prohibition of homosexual activity by consenting adults); *Lustig-Prean and Beckett v. the United Kingdom,* Nos. 31417/96 and 32377/96 (ECtHR, 27 Sept. 1999) (extensive investigation into lives of homosexual military officials violated privacy rights); *Salgueiro da Silva Mouta v. Portugal*, No. 33290/96 (ECtHR, 21 Dec. 1999) (holding that sexual orientation discrimination falls under Article 14's general ban on discrimination); *A.D.T. v. the United Kingdom*, No. 35765/97 (ECtHR, 31 July 2000) (states may not ban private taping of homosexual acts); *E.B. v. France*, No. 43546/02 (ECtHR, 22 Jan. 2008) (sexual orientation discrimination in application of adoption law violates Article 14's nondiscrimination ban); *Christine Goodwin v. the United Kingdom,* No. 28957/95 (ECtHR, 7 Nov. 2002) (preventing post-operative transsexual from marriage in her assigned gender violates right to marry).

[59] *Schalk*, ¶97.

[60] *Id.* ¶¶94-99

[61] *Hämäläinen*, ¶74

that the margin of appreciation to be afforded to the respondent State must still be a wide one."[62]

Hämäläinen v. Finland addressed a challenge to a Finnish law that which required that an individual undergoing a gender change transform her marriage into a civil partnership. The Court characterized Article 12 of the European Convention, which contains an explicit right to marry phrased in general terms, as "enshrin[ing] the traditional concept of marriage as being between a man and a woman."[63] It further held: "While it is true that some Contracting States have extended marriage to same-sex partners, Article 12 [right to marriage] cannot be construed as imposing an obligation on the Contracting States to grant access to marriage to same-sex couples."[64]

In *Schalk and Kopf v. Austria*, the European Court similarly rejected a claim that differences between same-sex marriage and a registered partnership were discriminatory,[65] explaining that deference to member states was appropriate because of the lack of consensus among the states. The level of deference granted to member nations "will vary according to the circumstances, the subject matter and its background; in this respect, one of the relevant factors may be the existence or the non-existence of common ground between the laws of the Contracting States."[66]

The European Court in *Schalk* also asserted that the provisions of the European Convention should be

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[62] *Id.* at ¶75.

[63] *Id. at* ¶96.

[64] *Id*. at ¶96.

[65] *Schalk.*

[66] *Id.* at ¶98.

taken together—if a right to family life does not include same-sex marriage, then an anti-discrimination provision "of more general purpose and scope, cannot be interpreted as imposing such an obligation either."[67]

The United Nations Human Rights Committee, the official treaty body charged with overseeing implementation of the International Covenant on Civil and Political Rights ("ICCPR"), has similarly upheld protections for LGBT individuals while holding that marriage legitimately can be limited to male-female couples. The Committee held that Australia's anti-sodomy laws violated the equality and non-discrimination provisions found in Article 26 of the ICCPR, which, they held, protected against discrimination based on sexual orientation.[68] Nevertheless, the Committee declined to prescribe a right to same-sex marriage.[69] It held that the ICCPR's provision on marriage "recognize[d] as marriage only the union between a man and a woman wishing to marry each other" and that a "mere refusal to provide for marriage between homosexual couples" did not breach the Covenant.[70]

In Spain, one of the first countries to statutorily recognize same-sex marriages,[71] the Constitutional

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[67] *Id*. at ¶101.

[68] *Toonen v. Australia,* CCPR/C/WG/44/D/488/1992 (31 Mar. 1994). The Human Rights Committee has also held that a ban on homosexual propaganda violates rights of freedom of expression and non-discrimination. *Fedotova v. Russian Federation*, CCPR/C/106/D/1932/2010 (19 Nov. 2012).

[69] *Joslin v. New Zealand*.

[70] *Id.*

[71] *See supra* note 14.

Court explicitly declared in 2012 that "the Spanish legislator . . . had various available choices to grant legal recognition to the situation of same-sex couples," but was not required to do so.[72] The Spanish Constitutional Court previously held that "there is no constitutional right to the establishment of a union between persons of the same sex, in contrast with marriage between man and woman, which is a constitutional right . . . Public authorities may grant a privileged treatment to the union between man and woman in comparison with a homosexual union. This does not exclude that the legislator can establish a balanced system in which same-sex partners benefit from full rights and advantages of marriage."[73]

France, which has extensive protections of LGBT rights, has also rejected a constitutional right to same-sex marriage. France has permitted homosexual relations since the French Revolution,[74] has had laws prohibiting discrimination on the basis of sexual orientation since 1985[75] and gender identity since 2012,[76] and adopted Civil Solidarity Pacts

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[72] STC 198/2012, 6 Nov. 2012.

[73] ATC 222/1994, 11 July 1994.

[74] *See* William N. Eskridge, Jr., *Comparative Law and the Same-Sex Marriage Debate: A Step-by-Step Approach Toward State Recognition,* 31 MCGEORGE L. REV. 641, 665 (2000) (Appendix I) ("The French Revolution's criminal code of 1791 dropped the crime against sodomy, and it was never reinstated.").

[75] Loi 85-772 du 25 juillet 1985 portant diverses dispositions d'ordre social, [J.O.].

[76] Loi 2012-954 du 6 août 2012 relative au harcèlement sexuel [J.O.].

(a form of registered domestic partnership) in 1999.[77] Nevertheless, the French Constitutional Council rejected a constitutional equality-based claim for same-sex marriage in 2011.[78] The public discussion in France continued, however, and led to legislative adoption of same-sex marriage in 2013.[79]

Germany also has numerous protections of LGBT rights: it permits registered life partnerships since 2001,[80] bans discrimination on the basis of sexual orientation,[81] and permits parents to avoid choosing a gender for their child at birth,[82] among other LGBT protections. But the German Constitutional Court has explicitly ruled that marriage is reserved for male-female unions, although legislators may adopt civil unions if they so choose.[83]

Italy, Austria, Finland, Ireland, Colombia, and Chile have likewise understood that protections for the equal rights of LGBT individuals do not mandate access to traditional forms of marriage. All of these countries have decriminalized homosexual acts[84] and

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[77] Loi 99-944 du 15 novembre 1999 relative au pacte civil de solidarité [J.O.], 16960.

[78] *Mrs. Corinne C. et al.*, Decision No. 2010-92 QPC, Constitutional Council, 28 Jan. 2011.

[79] Loi 2013-404 du 17 mai 2013 ouvrant le mariage aux couples de personnes de même sexe.

[80] *See supra* note 31.

[81] Equal Treatment Act (14 Aug. 2006).

[82] [BGB], 7 May 2013, Reichsgesetzblatt [RGBl] 1122, as amended, § 3.6 .

[83] Civil Partnership Case, 105 BVerfGE 313 (2002).

[84] STRAFRECHTSÄNDERUNGSGESETZ 1971, (2 AUG. 1971) BUNDESGESETZBLATT [BGB1] 273/1971 (Austria); Ley No. 19617, 12 julio 1999, DIARIO OFICIAL [D.O.] (Chile); Decriminalization of

have banned discrimination based on sexual orientation.[85] Some outlaw hate speech based on sexual orientation,[86] and Finland bans discrimination on the basis of gender identity.[87] Nevertheless, courts of last resort in each of these countries have rejected constitutional claims for a right to same-sex marriage.[88]

In short, courts with national effect in 11 LGBT-friendly countries, plus the European Court of Human Rights and U.N. Human Rights Committee, have all rejected a constitutional or fundamental right to same-sex marriage. In contrast, only Brazil has judicially mandated same-sex marriage. The "overwhelming

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homosexuality: Ley No. 35461, 20 feb.1980, DIARIO OFICIAL [D.O.] (Colom.); 16/1971 laki rikoslain 20. ja 25. luvun muuttamisesta (Fin.); Criminal Law (Sexual Offenses) Act 1993 (S.I. No. 20/1993) (Ir.); 1890 Penal Code (Italy).

[85] GLEICHBEHANDLUNGSGESETZ BUNDESGESETZBLATT [BGB 1] 66/2004 (Austria); Ley No. 20609, 24 julio 2012, DIARIO OFICIAL [D.O.] (Chile); Ley No. 1482, 30 nov. 2011, DIARIO OFICIAL [D.O.] (Colom.); Decree 216/2003 (Italy); Employment Equality Act 1998 (Ireland); Equal Status Act 2000 (S.I. No. 8/2000) (Ireland); Non-Discrimination Act 2009 (Act No. 84/2009) (Finland)

[86] Ley No. 1482, 30 noviembre de 2011, DIARIO OFICIAL [D.O.] Articlo 134b (Colom.); Prohibition of Incitement to Hatred Act 1989 (S.I. No. 19/1989) (Ir.); Penal Code Chapter 11, § 10 (Finland), as amended June 2011.

[87] 1325/2014 YHDENVERTAISUUSLAKI.

[88] Verfassungsgerichtshof (VfGH), B777/03 (12 Dec. 2003) (Austria); Verfassungsgerichtshof (VfGH), B 166 / 2013-17 (12 Mar. 2014) (Austria); *Zappone v. Revenue Commissioners*, [2006] IEHC 404 (Ireland High Court 2006); Sentencia del Tribunal Constitucional Chileno, Rol 1881-10-INA, del 3 de noviembre de 2011 (Chile); *Judgment No. 138 of 2010*, Corte costituzionale (Italy); Supreme Administrative Court (3 Feb. 2009) (Finland), as cited in *Hämäläinen*, ¶18.

weight of international opinion" provides "respected and significant confirmation"[89] to a conclusion that courts need not overturn male-female marriage in order to adequately protect sexual minorities.

II. FOREIGN TRIBUNALS HAVE REJECTED BROAD CLAIMS OF IMPROPER ANIMUS AND HAVE REFUSED TO ENTRENCH THE DEBATE ON SAME-SEX MARRIAGE

A. National Courts, with the Exception of Brazil, Have Identified Legitimate Reasons for Opposing Same-Sex Marriage

With the sole exception of Brazil, no foreign or international tribunal, even those supporting rights for same-sex unions, has relied on claims of invidious discrimination based on improper animus to hold male-female marriage discriminatory. And Brazil has only suggested that legislators and the public "may nourish some aversion" against sexual minorities if they were to legislate against same-sex marriage.[90] All other national courts to address the issue make abundantly clear that retaining male-female marriage may be motivated and justified by important social considerations unrelated to invidious discrimination.

Even South Africa, which has held that the state may not deny equal rights and benefits to same-sex couples, has rejected improper animus towards lesbians and gays as a basis for its ruling, stating, "It would be wrong and unhelpful to dismiss opposition to

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[89] *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

[90] ADI 4277/DF and ADPF 132/RJ (4 May 2011) (Supreme Federal Court) ¶10.

homosexuality on religious grounds as simply an expression of bigotry to be equated with racism."[91] Quoting a previous case, the court explained that

> [t]he issues in this case touch on deep convictions and evoke strong emotions. It must not be thought that the view which holds that sexual expression should be limited to marriage between men and women with procreation as its dominant or sole purpose, is held by crude bigots only. On the contrary, it is also sincerely held, for considered and nuanced religious and other reasons . . . ."[92]

The European Court of Human Rights likewise noted that a same-sex marriage case raised "sensitive moral or ethical issues."[93]

These legitimate and deep-rooted social, cultural, and religious reasons,[94] including the importance of protecting the institution of marriage because of its significance for procreation and nurturing children,[95] have formed the basis for LGBT-friendly courts' determinations that legislatures have sufficient and legitimate reasons for limiting marriage to male and

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[91] *Fourie*, ¶91.

[92] *Id.*, quoting *National Coalition for Gay and Lesbian Equality v. Minister of Justice* (CCT11/98) [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517 (9 October 1998).

[93] *Hämäläinen*, ¶75.

[94] *See Schalk*, ¶62 ("marriage has deep-rooted social and cultural connotations which may differ largely from one society to another").

[95] Many countries, for example, group together constitutional protections of marriage and children. *See*, *e.g.*, LATVIA CONST. art. 110; LITHUANIA CONST. art. 38; PARAGUAY CONST. art. 52; POLAND CONST art. 18; SURINAME CONST. art. 35; UKRAINE CONST. art. 51.

female couples. While courts are aware that there are different perceptions of the reach of these arguments, they have dealt with such differences of viewpoint by acknowledging the legitimacy of differing views and exhibiting respect for the democratic process in pluralistic societies.

Ireland's High Court, for example, rejected a claim for same-sex marriage, even though it found the extensive evidence on potential negative effects of same-sex marriage for child well-being ambivalent. "Until such time as the state of knowledge as to the welfare of children is more advanced," stated the court, "the State is entitled to adopt a cautious approach to changing the capacity to marry . . . ."[96]

Other courts have similarly accepted legislative approaches as legitimate. The Chilean Constitutional Tribunal, for example, determined that recognition of only male-female marriages does not violate its constitution's ban on arbitrary discrimination.[97]

> By reserving the celebration of marriage only to persons of different sex, it cannot be said that it constitutes an arbitrary or capricious difference, for it is ostensible that its foundation is based in the natural differences between man and woman, which the law has legitimately esteemed to be relevant in establishing differences, as it occurs, for instance, in our labor and social security legislation [which in some cases favors women over men]. In a similar fashion, it is clearly reasonable, and not arbitrary or capricious, that

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[96] *Zappone v. Revenue Commissioners*, [2006] IEHC 404 (Ireland High Court 2006), 130.

[97] Sentencia del Tribunal Constitucional Chileno, Rol 1881-10-INA, del 3 de noviembre de 2011; CHILE CONST. (1980). art. 19.3.

> those who celebrate the contract of marriage as defined by article 102 of the Civil Code be, precisely, a man and a woman . . . .[98]

The German Constitutional Court has held that constitutional provisions "guarantee the essential structure of marriage."[99] These provide that "[m]arriage and family shall enjoy the special protection of the state" and that "the care and upbringing of children is the natural right of parents."[100] The German Constitutional Court has upheld the right of the legislature to create same-sex civil partnerships, but has also ruled that "part of the content of marriage, as it has stood the test of time . . . is that it is the union of one man with one woman to form a permanent partnership . . . ."[101] The constitutional protection of marriage means that

> marriage alone, like the family, enjoy[s] constitutional protection as an institution. No other way of life . . . merits this protection. Marriage cannot be abolished nor can its essential structural principles be altered without an amendment to the constitution.[102]

Marriage is not only a "sphere of freedom" but also a "social institution" and the "structural principles that characterize marriage give it the form and exclusivity

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[98] Sentencia del Tribunal Constitucional Chileno, Rol 1881-10-INA, del 3 de noviembre de 2011, 19 ¶9 (Venegas, Navarro, and Aróstica, JJ).

[99] Civil Partnership Case, 105 BVerfGE 313 (2002).

[100] Grundgesetz für die Bundesrepublik Deutschland [GG], 23 May 1949, BGBl. VI.

[101] *Id*.

[102] *Id*. at 609.

in which it enjoys constitutional protection as an institution."[103]

Constitutional courts in France, Italy, Ireland, Austria, and Colombia have specifically identified realities of procreation and children as legitimate and sufficient state interests in enacting legislation limiting marriage to heterosexual unions.

In 2011, the Constitutional Council of France focused on biological differences between men and women: "the difference in situation between couples of the same sex and couples composed of a man and a woman can warrant a difference in treatment in regards to the rule of family law."[104] This difference in situation was in "direct relation to the purpose of the [French marriage] law," thus justifying the legislature's decision to limit marriage to male-female couples.[105]

In 2010 the Italian Constitutional Court, strictly followed in 2015 by Italy's Court of Cassation, upheld the constitutionality of that nation's marriage laws, relying on an understanding of the potential procreative nature of marriage.[106] The Constitutional Court focused on the relationship between marriage, the family, and the protection of children, holding that "the legislation itself does not result in unreasonable

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[103] *Id.* at 609-10.

[104] *Mrs. Corinne C. et al.*, , ¶10 as quoted in William C. Duncan, *Why French Law Rejects a Right to Gay Marriage: An Analysis of Authorities*, 2 INT'L. J. JURISPRUDENCE FAM. 215, 223 (2011).

[105] *Id.*

[106] Court of Cassation, I Civil Section, Judgment (30 Oct. 2014 – 9 Feb 2015), 2400. *Judgment No. 138 of 2010*, Corte costituzionale.

discrimination, since homosexual unions cannot be regarded as homogenous with marriage."[107]

The Colombian Constitutional Court likewise accepted the legitimacy of the government's decision to limit marriage to male-female unions, although they also have granted same-sex couples the same rights as other co-habiting couples[108] and recognized that homosexual couples should have the right to form some kind of legal union.[109]

In 2003, the Austrian Constitutional Court rejected a claim that lack of access to same-sex marriage violated anti-discrimination provisions, holding that it was not required to extend "the concept of marriage as being geared to the fundamental possibility of parenthood" to relationships of a different kind.[110] It reiterated this holding again in 2014, rejecting a claim that differences between male-female marriage and same-sex registered partnerships were unlawfully discriminatory.[111]

B. Brazil Is the Only Court to Try to Freeze the Debate on Same-Sex Marriage

Because of the sensitivity of the religious, moral, and social issues involved with same-sex marriage, every national court of last resort to address the issue, with the exception of Brazil's, has deferred to

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[107] *Judgment No. 138* at 27.

[108] C-029/09 (2009) (Colombian Const. Ct.)

[109] C-577 (2011) (Colombian Const. Ct.)

[110] Verfassungsgerichtshof (VfGH), B777/03, (12 Dec. 2003) (Austria).

[111] Verfassungsgerichtshof (VfGH), B 166 / 2013-17 (12 March 2014) (Austria), ¶3.1.

legislative prerogatives in structuring their nation's legal responses in this important domain. Other foreign courts, even those holding that same-sex couples have significant rights, have explicitly deferred to legislatures to resolve the complex issues surrounding same-sex unions.

1. Judicial deference to marriage legislation respects the need for democratic legitimacy and deliberation.

This deference afforded the legislative branch by national courts of last resort reflects axiomatic concerns of democratic legitimacy and respect for constitutional separation of powers that have long been foundational in the United States. This Court has indicated that the doctrine of judicial restraint "requires us to exercise the utmost care whenever we are asked to break new ground."[112] It has emphasized that democratic, respectful, rational deliberation on sensitive issues "is impeded, not advanced, by court decrees based on the proposition that the public cannot have the requisite repose to discuss certain issues."[113] These concerns have special cogency in the domain of family law and marriage, which has long been left to legislation in American states as in virtually every other legal system of the world.[114]

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[112] *Collins v. City of Harker Heights, Texas,* 503 U.S. 115, 125 (1992).

[113] *Schuette v. Bamn*, 572 U.S. __ (2014).

[114] *See*, *e.g.*, Case C-430/97 *Jutta Johannes v Hartmut Johannes* [1999] E.C.R. I-3475 (European Union has no competence in family law issues); Detlev Vagts & Louis F. Del Duca, *Book Review*, 83 AM.J.INT'L L. 444, 444 (1989), (*Problemi di Riforma del Diritto Internazionale Privato Italiano* (1986); Reg

The South African Constitutional Court, for example, strongly emphasized the importance of democratic legitimacy and the need for legislative involvement in defining marriage. Despite finding a violation of equality rights in the denial of a marriage license to a same-sex couple, the court explicitly left the remedy to the legislature to fashion, rejecting the proposed remedy of simply expanding the text of traditional marriage to include same-sex couples.[115] The court noted that this did not "necessarily exhaust the legislative paths which could be followed to correct the defect."[116] The court even rejected granting a temporary judicial remedy, stating that "[i]nterim arrangements that would be replaced by subsequent legislative determinations by Parliament would give to any union established in terms of such a provisional scheme a twilight and impermanent character out of keeping with the stability normally associated with marriage. The dignity of the applicants and others in like situation would not be enhanced by the furnishing of what would come to be regarded as a stop-gap mechanism."[117]

Graycar, *Family Law Reform in Australia, or Frozen Chooks Revisited Again,* 13 THEORETICAL INQUIRIES L. 241, 241 (2012); Fritz Snyder, *The Fundamental Human Rights Compared in Two Progressive Consitutions: Japan and Montana,* 14 INT'L LEGAL PERSP. 30, 39 (2004); Lynn D. Wardle, *The Proposed Federal Marriage Amendment and the Risks to Federalism in Family Law*, 2 UNIV. ST. THOMAS L.J. 137-198 (2004); Lynn D. Wardle, *Tyranny, Federalism and the Federal Marriage Amendment*, 17 YALE J. L. & FEMINISM 221-266 (2005).

[115] *Fourie*, ¶147.

[116] *Id.*

[117] *Id.*, ¶154.

Other courts have concurred in the importance of democratic involvement in this area. The Australian High Court held in 2013 that only the Commonwealth legislature could legalize same-sex marriage.[118] The Commonwealth's legislation limiting marriage to a man and a woman "covered the field" (or created a legislative code) within Commonwealth power under Section 51(xxi) of the Australian Constitution, which "necessarily contain[s] the implicit negative proposition that the kind of marriage provided for by the Act is the *only* kind of marriage that may be formed or recognised in Australia."[119] The High Court left the decision about same-sex marriage to elected democratic officials,[120] determining that "whether same sex marriage should be provided for by law . . . is a matter for the federal Parliament."[121]

The French Constitutional Council held that it is not the prerogative of the court "to substitute its appreciation to that of the legislator in considering, in this manner, the difference in situation" between same and opposite-sex couples.[122] The Spanish Constitutional Court declared in 2012 that "the

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[118] *The Commonwealth v Australian Capital Territory* [2013] HCA 55 (overruling regional same-sex marriage provision).

[119] *Id.* at [57].

[120] Under Australian parliamentary supremacy, once the High Court determines that Commonwealth legislation was within its powers, the High Court cedes the sphere to the legislature. *See* GEORGE WILLIAMS, *et al.*, AUSTRALIAN CONSTITUTIONAL LAW AND THEORY, COMMENTARY AND MATERIALS (6th ed. 2014), [2.53].

[121] *Australian Capital Territory* at [1].

[122] *Mrs. Corinne C. et al.*, ¶10, as quoted in Duncan, *supra* note 104 at 223.

concrete constitutional configuration [of marriage] is deferred to the legislator."[123]

The Italian Constitutional Court similarly concluded that "it is for Parliament to determine—exercising its full discretion—the form of guarantee and recognition for [same-sex cohabiting relationships]."[124] In rejecting a challenge to the country's civil partnership law, Germany's Federal Constitutional Court also stated that for the legislature "it is not forbidden in general to establish new opportunities for couples of opposite sex or for other relationships . . . . But there is no constitutional command to create such opportunities."[125] The Colombian Constitutional Court similarly explained that addressing the circumstances

> in the case of homosexual couples that have decided to establish a family and their concrete development is of no business to the Constitutional Court, but of the Congress of the Republic, among other reasons because, in addition to being the democratic forum par excellence, . . . the family is the basic institution and fundamental core of society and its social transcendence imposes its protection through measures that the representative organ is called to adopt . . . .[126]

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[123] STC 198/2012, 6 Nov. 2012.

[124] *Judgment No. 138 of 2010*, at 25.

[125] Entscheidungen des Bundesverfassungsgerichts [BVerfGE], 17 July 2002, 1 BvF 1/01, ¶111.

[126] C-577 (2011).

2. Judicial deference permits nuanced compromises on socially and morally complex issues.

Deference also reflects the difficulty in the context of a particular case to address and balance the full range of issues ultimately involved. Resolution of same-sex marriage questions inevitably raises profound questions of morality and religion, the expression of which invokes constitutional protections. The Koh *amici* brush aside religious freedom concerns raised by recognition of same-sex marriage with conclusory statements to the effect that "[e]qual marriage rights need not intrude on anyone's religious freedom."[127] They rely on legislative provisions and two statements of courts that same-sex marriage laws do not require clergy to solemnize same-sex marriages to which they are religiously opposed.[128]

But it is now widely recognized that recognition of same-sex marriage raises a host of practical and often divisive issues, ranging across virtually every legal field and including public accommodation laws, anti-discrimination laws, housing laws, and employment regulation, to name only a few of the most obvious areas. Leading experts have noted the importance of protecting religious freedom and finding nuanced compromises that will afford maximal respect to the dignity and freedom of all concerned.[129] In dealing with

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[127] Koh *amici* at 39.

[128] *Id.* at 39-41.

[129] *See*, *e.g.*, Douglas Laycock, *Afterword*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS (Douglas Laycock, Anthony R. Picarello, Jr., & Robin Fretwell Wilson (eds.), 2008); Marc Stern, *Same-Sex Marriage and the Churches*, in Laycock, Picarello and Wilson, *supra;* Douglas

the complex range of issues involved, the legislative branch is more in touch with the concerns of the entire populace, is in a better (and more legitimate) position to gather and assess the full range of relevant policy considerations and find viable compromises.

While courts can delineate basic principles for protecting the religious freedom of individuals and institutions, legislatures can often craft exemptions and protections that optimize respect for all the interests concerned. This explains why the European Court of Human Rights, despite deep commitment to sexual orientation rights, has recognized the importance of affording member states of the Council of Europe a wide margin of appreciation in this area because of the "absence of a European consensus and taking into account that the case at stake [challenging same-sex marriage] undoubtedly raises sensitive moral or ethical issues."[130]

Concerns of the complexity and sensitivity of marriage and family issues have been strongly emphasized by courts throughout the world. The Finnish Supreme Administrative Court, for example, explained that '[t]he question of transforming the institution of marriage into a gender-neutral one brought significant ethical and religious values into play and required the enactment of an Act of Parliament."[131] The Chilean Constitutional Court likewise emphasized that "it is the exclusive province of the Legislature, and not this Tribunal's, to give

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Laycock and Thomas C. Berg, *Protecting Same-Sex Marriage and Religious Liberty,* 99 Va. L.Rev. IN BRIEF 1 (2013).

[130] *Hämäläinen*.

[131] *Hämäläinen*, ¶18, describing the holding of the Finnish Supreme Administrative Court decision from 3 Feb 2009.

shape and content to new legal institutions which may be needed to satisfy the necessities of society's march in history, having due regard to the mutations that are experiments in its constant movement."[132]

The South African Constitutional Court also noted that "[g]iven the great public significance of the matter, the deep sensitivities involved and the importance of establishing a firmly-anchored foundation for the achievement of equality in this area, it is appropriate that the legislature be given an opportunity to map out what it considered to be the best way forward."[133]

3. Judicial deference prevents perpetuation of conflicts.

Finally, resolving these often highly contested issues on the basis of abstract constitutional or human rights norms risks perpetuating conflicts and preventing normal political processes of compromise and adjustment that can often find better solutions for all. As this Court has noted, "[b]y extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action."[134]

Taking a highly contested issue outside the arena of public debate and legislative action, however, usually only serves to perpetuate conflict and polarization.[135]

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[132] Sentencia del Tribunal Constitucional Chileno, Rol 1881-10-INA, del 3 de noviembre de 2011, 19 ¶14 (Venegas, Navarro, and Aróstica, JJ).

[133] *Fourie*, ¶147.

[134] *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

[135] *See*, *e.g.*, Margaret G. Farrell, *Revisiting* Roe v. Wade: *Substance and Process in the Abortion Debate,* 68 IND. L.

Scholars from a range of perspectives recognize the importance of leaving room for the give and take of democratic processes in this area, recognizing that optimal solutions for all may emerge from such processes. As Martha Minnow has noted, "[a]ccommodation and negotiation can identify practical solutions where abstract principles sometimes cannot—and, in the meantime, build mutual trust."[136] Charles Taylor has noted, "The

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J. 269, 276 (1993) (the way the issue was presented and decided by the Court in *Roe* and *Casey* "provoked extremist reactions"); Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 381, 381–82 (1985) ("Roe ventured too far in the change it ordered. . . . [T]he opinion stimulated the mobilization of a right-to-life movement and attendant reactions in Congress and state legislatures."); Adam Liptak, *Shadow of Roe v. Wade Looms Over Ruling on Gay Marriage,* N.Y. TIMES, 23 Mar. 2013, http://www.nytimes.com/2013/03/24/us/roes-shadow-as-supreme-court-hears-same-sex-marriage-cases.html?pagewanted=all&_r=1 (Justice Ginsburg notes: "It's not that the judgment [in *Roe*] was wrong, but [the Court] moved too far too fast,' . . . ."); Cass Sunstein, *Civil Rights Legislation in the 1990s: Three Civil Rights Fallacies*, 79 CALIF. L. REV. 751, 766 (1991) ("Roe may have taken national policy too abruptly to a point toward which it was groping more slowly, and in the process may have prevented state legislatures from working out longlasting solutions based upon broad public consensus."); Robyn Fretwell Wilson, *Marriage of Necessity: Same-Sex Marriage and Religious Liberty Protections,* 64 CASE W. L.REV. 1161 (2014) (describing effect of judicial support of same-sex marriage rights in hardening of stances of opposing sides); Robyn Fretwell Wilson, *When Governments Insulate Dissenters from Social Change: What Hobby Lobby and Abortion Conscience Clauses Teach About Specific Exemptions,* 48 U.C. DAVIS L.REV. 703 (2014) (arguing that legislative tailored exemptions for dissenters can facilitate social change in areas like same-sex marriage).

[136] Martha Minnow, *Should Religious Groups Be Exempt from Civil Rights Laws,* 48 B.C. L. REV. 781, 849 (2007).

penchant to settle things judicially, further polarized by rival-interest campaigns, effectively cuts down the possibilities of compromise."[137]

It is not surprising, then, that courts have consistently shown great deference to legislative decision-making in the domain of marriage and family law. The European Court of Human Rights held that "marriage has deep-rooted social and cultural connotations which may differ largely from one society to another. The Court reiterates that it must not rush to substitute its own judgment in place of the national authorities, who are best placed to assess and respond to the needs of society."[138]

The South African Constitutional Court similarly emphasized that "respecting the separation of powers and giving Parliament an opportunity to deal appropriately with the matter"[139] will lead to greater public acceptance than a judicial remedy, which "would be far less likely to achieve the enjoyment of equality as promised by the Constitution than would lasting legislative action . . . ."[140] "[T]he greater the degree of public acceptance for same-sex unions, the more will the achievement of equality be promoted."[141] Legislation is particularly important in this area because "[t]his is an area where symbolism and intangible factors play a particularly important role. What might appear to be options of a purely technical

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[137] CHARLES TAYLOR, THE MALAISE OF MODERNITY (1991) 116.

[138] *See Schalk,* ¶62.

[139] *Fourie*, ¶139

[140] *Id*. ¶136.

[141] *Id*. ¶139.

character could have quite different resonances for life in public and in private."[142]

As we have shown, courts worldwide have refused to freeze the discussion about same-sex marriage but instead permit or invite legislative action in this arena. They have explained such legislative deference by citing the democratic legitimacy of legislation, the need for nuanced compromises in a socially and morally complex area, and the need to ensure firmly grounded, lasting solutions on this topic, all of which can only come through legislative processes. Our experience in countries around the world is that respect for legislative processes in resolving questions of same-sex marriage, rather than short-circuiting them through judicial intervention, pays dividends for all in the long run.

The Sixth Circuit's decision below should be affirmed.

Respectfully submitted,

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[142] *Id.* ¶139.

APPENDIX

APPENDIX

Institutional affiliations of the individual signatories are given for purposes of identification only and do not constitute endorsement by any institution listed with respect to the contents of this brief.

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