No. 14-124

In the Supreme Court of the United States

GARY R. HERBERT, GOVERNOR OF UTAH, ET AL., PETITIONERS

v.

DEREK KITCHEN, ET AL., RESPONDENTS

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

BRIEF OF *AMICUS CURIAE* DAVID BOYLE IN SUPPORT OF NEITHER PARTY

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AMICUS CURIAE STATEMENT OF INTEREST

The present *amicus curiae*, David Boyle (hereinafter, "Amicus"),[1] is respectfully filing this Brief in Support of Neither Party in Case 14-124 ("*Herbert*").[2] He was an amicus in the 10th Circuit iteration of *Herbert*, and also in other circuits' gay-marriage cases (while sometimes also serving as counsel for other amici in those cases). Noting the recent "mob" of judicial same-sex ("gay") marriage decisions excoriating the People's right to decide the issue, Amicus writes here to see if the Court can help "stop the madness"—a task which may take a while.

SUMMARY OF ARGUMENT

The court should consider granting certiorari in *Herbert*, *supra*, but not until after many relistings, maybe dozens. The States defending their gay-marriage bans, including Utah, have been notably unsuccessful so far. For the sake of fairness, the Court should wait until at least one appellate circuit, and maybe two or more, have upheld a gay-marriage ban, because such upholding will show that some winning arguments have finally been developed. It might even bore this Court to hear the same old, ineffective arguments over again.

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[1] No party or its counsel wrote or helped write this brief, or gave money to its writing or submission, *see* S. Ct. R. 37. Blanket permission to write briefs is filed with the Court. The parties were contacted 10 days before submission of this brief.
[2] *Gary R. Herbert, Governor of Utah, et al., v. Derek Kitchen, et al.*, 755 F.3d 1193, 2014 U.S. App. LEXIS 11935 (10th Cir. June 25, 2014, No. 13-4178), *pet. for cert. pending* (U.S. Aug. 5, 2014).

(Speaking of boredom, the Court might also want to let someone new, e.g., Utah, argue about gay marriage, instead of letting the same "super lawyers"—as some may occasionally call them—who made gay-marriage arguments before the Court in 2013 return to address those issues again.)

Pace the main dissent in *Lawrence v. Texas*, 539 U.S. 558 (2003), there are multifarious and highly-rational, non-moralistic reasons for bans on different kinds of marriage, whether incest or gay marriage. The States have not articulated these reasons well yet, including reasons related to sodomy and its virulence as a disease vector. The States need more time to develop their arguments.

While this brief supports neither party, Amicus does think Utah has strong points in its favor, as a contender with other States for certiorari in the gay-marriage issue. And having Utah wait a while will likely sharpen its eventual performance.

ARGUMENT

I. THE STATES' TROUBLED PERFORMANCES IN GAY-MARRIAGE CASES, ALTHOUGH THEY COULD AND SHOULD HAVE DONE MUCH BETTER

There has been a virtual mania among lower federal courts in recent months, those courts fairly scrambling to churn out relatively identical opinions that misinterpret or overstretch *United States v. Windsor* (133 S. Ct. 2675 (2013)), mandate legalized gay marriage, and make the American public sound like ignorant bigots who cannot be trusted to decide the issue themselves. The oral arguments do not

always show much respect for the States' attorneys, either; *see, e.g.*, Dale Carpenter, *The Posner treatment*, The Volokh Conspiracy, Wash. Post, Aug. 28, 2014,[3]

> At Tuesday's oral argument before the Seventh Circuit, Judge Richard Posner shredded two states' defenses of their laws excluding gay couples from marriage. . . .
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> . . . .
>
> [There were] many times over two hours that the state attorneys seemed curiously incurious or unprepared. . . .
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> . . . .
>
> Posner scoffed at the notion that the state should be able to ban gay marriage even if it had no idea what harmful consequences, if any, might be caused. Exasperated, he finally asked the Wisconsin attorney to "speculate" about what the "possibilities" might be. "The harmful possibilities are, 'We don't know,'" replied the lawyer, echoing Charles Cooper's famous response to Judge Walker on the harm of allowing same-sex marriage during the Prop 8 litigation. The exchange prompted Posner to quip, "You don't have any sort of empirical or even conjectural basis for your law. Funny."

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[3] http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/08/28/gay-marriage-bans-get-the-posner-treatment/ (last visited Sept. 4, 2014, as with all Internet links herein).

> . . . .
> . . . There is a long history of "savage" discrimination against gay people, [Posner] observed. The ban on gay marriage, Posner concluded, is "based on hate, isn't it?" Indeed, Posner has previously written that animus is the only explanation left when the state can offer no other real defense.
>
> . . . .
> Gay-marriage opponents have been backed into a vanishingly small empirical, logical, and legal corner[.]

Id. Actually, Carpenter is wrong about the "small . . . . corner", *id.*, since there are many reasons, discussed in part *infra*, to uphold a gay-marriage ban; but he is right that it presently *looks* like a small corner, judging by the States' repeated failures in court in gay-marriage cases.

Amicus is not sure why the States are failing so spectacularly. They are even getting worse over time, e.g., Amicus felt that Utah's brief and reply brief were not completely bad, and quite long; but at least one other, later reply brief (from a State that Amicus shan't mention, out of politeness) in a gay-marriage case, used fewer than 3000 words out of the allowed 7000, making it look as if that State were only going through the motions rather than seriously trying to win. This is sad stuff, surely.

It is especially sad since some courts are advancing questionable arguments and language that should be easy for the States to demolish. For

example, the idea of "savage discrimination", *The Posner treatment*, *supra*, is exaggerated rhetoric. If, say, *Loving v. Virginia* (388 U.S. 1 (1967)) really mandates gay marriage, then how come this Court's Justice Clarence Thomas, who is in an interracial marriage, is not known as a gay-marriage supporter? Would Posner venture to say Thomas is "savagely discriminating" against gays? Such a statement could offend African Americans, among others.

Similarly: the National Catholic Conference for Interracial Justice et al. submitted an amicus brief on behalf of interracial marriage in *Loving*, *see id.* at 1; so is the Catholic Church's belief "based on hate" (Posner, *supra*) now, when it opposes mandatory gay marriage? Is Posner publicly willing to call Catholics a "hate group"? Would he dare?

Finally: Posner would seemingly consider Justice Sandra Day O'Connor a "savage discriminator", *see* her concurrence in *Lawrence*, *supra* at 2: "Texas cannot assert any legitimate state interest here, such as . . . preserving the traditional institution of marriage. Unlike the moral disapproval of same-sex relations[,] other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group." *Id.* at 585.[4] It seems, then, that the States have to find their voice and be able to articulate precisely why O'Connor was right, and why she was not "savage" or a "discriminator": why, indeed, "reasons exist to promote the [traditional] institution of marriage", *id.*

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[4] O'Connor may in the interim have officiated at a gay wedding, but in the District of Columbia, so that her officiation does not imply that any *State* may not find good reason to disallow gay marriage. Precision is important here.

And Amicus believes they need time to find their voice, a.k.a., "time to get their stuff together", as the vernacular goes.

(Even Europeans may believe in some democratic, regionalist input re gay marriage; *see* this recent apposite item, Grégor Puppinck, *The ECHR does not impose an obligation on Contracting States to grant same-sex couples access to marriage*, Turtle Bay and Beyond, July 17, 2014,[5]

> The European Court of Human Rights, sitting as a Grand Chamber, in the case of *Hämäläinen v. Finland, Application no. 37359/09*, 16 July 2014 reaffirmed[, r]egarding article 8 [and article 12] of the European Convention on Human Rights:
>
> . . . The Court reiterates its case-law according to which Article 8 of the Convention cannot be interpreted as imposing an obligation on Contracting States to grant same-sex couples access to marriage[;] secures the fundamental right of a man and woman to marry and to found a family[, and] enshrines the traditional concept of marriage as being between a man and a woman[.] While it is true that some Contracting States have extended marriage to same-sex partners, Article 12 cannot be construed

[5] http://www.turtlebayandbeyond.org/2014/council-of-europe/the-echr-does-not-impose-an-obligation-on-contracting-states-to-grant-same-sex-couples-access-to-marriage/.

> as imposing an obligation on the Contracting States to grant access to marriage to same-sex couples[. I]t cannot be said that there exists any European consensus on allowing same-sex marriages.

Id. (citations and quotation marks omitted, and some spacing changed))

II. SOME SERIOUS FACTUAL OR LEGAL PROBLEMS IN THE MAIN *LAWRENCE* DISSENT RE GAY MARRIAGE, AND HOW THAT DISSENT HAS SKEWED THE DEBATE

But in defense of the States: the States have sometimes received misleading signals, even from some writers on this honorable Court. Amicus shall note, respectfully, that one Court dissent has worked, unintentionally, to greatly obscure the issues: i.e., the dissent by Justice Antonin Scalia in *Lawrence*, here in pertinent part,

> State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are . . . sustainable only in light of *Bowers*[*v. Hardwick*, 478 U.S. 186 (1986)]' validation of laws based on moral choices.
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> . . . .
>
> . . . If, as the Court asserts, the promotion of majoritarian sexual morality is not even a *legitimate* state

> interest, none of the above-mentioned laws can survive rational-basis review.
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> . . . .
>
> . . . But “preserving the traditional institution of marriage” is just a kinder way of describing the State’s moral disapproval of same-sex couples.
>
> . . . .
>
> . . . [W]hat justification could there possibly be for denying the benefits of marriage to homosexual couples exercising “[t]he liberty protected by the Constitution,” *ibid.*? Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry. . . .

539 U.S. at 590, 599, 601, 605 (Scalia, J., dissenting).

However, the above *Lawrence* quotes are not logically valid, on examination. For example, incest may cause genetically-damaged children; prostitution may create zones of violence and crime in a city; bestiality lacks an animal’s consent, and may distress some innocent horse, chicken, ostrich, platypus, or other helpless fauna. Therefore, to say that sans “promotion of majoritarian sexual morality[,] none of the above-mentioned laws can survive rational-basis review”, *id.* at 599, is completely false. Provable damage occurs, regardless of morals or religion, in incest etc., so the prohibitory laws are rationally valid.

It is also an incorrect assertion that Justice O’Connor was wrong, i.e., that her phrase “preserving the traditional institution of marriage”,

id. at 585, is "just a kinder way of describing the State's moral disapproval of same-sex couples", *id.* at 601. Section III of this brief will discuss non-moralistic reasons to let democratic voting decide about gay marriage, although one such reason will now be discussed: "Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry", *id.* at 605, is incorrect, since that assertion does not allow for the serious non-policeability of sterility. A person "sterile" one day could be rendered fertile by an operation the next. And how old is "elderly", anyway? (Not to mention the medical fact that elderly *males* are often fertile for a very long time.) So sterility is basically unpoliceable, unlike gender, which is an obvious, binary category and very easy to police.

Facts aside (e.g., the relative unpoliceability of sterility), the law, too, does not comport with the *Lawrence* dissent. For example: "The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both[.]" *Ballard v. United States*, 329 U.S. 187, 193 (1946) (Douglas, J.). That alone, *see id.*, precludes the correctness of the assertion, "[W]hat justification could there possibly be for denying the benefits of marriage to homosexual couples[?]", *Lawrence* at 605. (Especially considering that "The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Tigner v. Texas*, 310 U.S. 141, 147 (1940) (Frankfurter, J.). If a same-sex couple is "different from", *Ballard*, *supra*, at 193, a diverse-sex couple, then, according to *Tigner*…)

Innumerable pundits and court decisions have now cited the *Lawrence* dissent *supra* in order to conclude that only bigots and Bible-thumpers can possibly oppose mandatory gay marriage. On that note, perhaps any response by the Court to Utah's certiorari petition could include some comment by a certain Justice, showing that he understands that the *Lawrence* main dissent does not accurately reflect medical or other facts or law. This clarification would likely help avoid further confusion.

Scalia's dissent in *Windsor*, *supra* at 2, has also been used to support mandatory gay marriage, though the people doing so may have cherry-picked, and thus ignored some of, that dissent:

> I do not mean to suggest disagree[ing] that lower federal courts and state courts can distinguish today's case when the issue before them is state denial of marital status to same-sex couples[.] Lord, an opinion with such scatter-shot rationales as this one (federalism noises among them) can be distinguished in many ways. And deserves to be. State and lower federal courts should take the Court at its word and distinguish away.

133 S. Ct. 2709. Scalia is completely correct here, that *Windsor* "deserves to be", *id.* at 2709, distinguished, so that the People have a right to decide the issue of same-sex marriage.

III. NON-MORALISTIC AND NON-ECCLESIASTICAL REASONS AGAINST MANDATORY NATIONAL GAY MARRIAGE

And such distinguishment is quite possible. States' attorneys have given some good *broad and basic* reasons not to recognize gay marriage, e.g., issues of fertility and of providing children both a mother and a father. However, those attorneys have yet not really supported those reasons in detailed and successful ways—as witnessed by their repeated failures in court.

(There is a brand-new case decided yesterday in Louisiana by Judge Martin L. C. Feldman, *Robicheaux v. Caldwell* (No. 13-cv-5090, E.D. La. Sept. 3, 2014),[6] which upholds Louisiana voters' right to ban same-sex marriage, while making the pithy observation, "This Court has arduously studied the volley of nationally orchestrated court rulings against states whose voters chose in free and open elections [to ban] same-sex marriage. The federal court decisions thus far exemplify a pageant of empathy; decisions impelled by a response of innate pathos", *id.* at 26. However, that case is very much an exception to the rule, seeing the multifarious federal district courts striking down gay-marriage bans. And there is no appellate court, in the recent slew of cases, in which States' attorneys have been successful in protecting a gay-marriage ban.

In particular, Amicus has seen little ability by States' attorneys to answer questions like "How does

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[6] *Available at* http://sblog.s3.amazonaws.com/wp-content/uploads/2014/09/Louisiana-marriage-ruling-9-3-14.pdf (courtesy of SCOTUSblog).

gay marriage really harm anybody, and on what theories or evidence?" and its counterpart question, "What about the [putative] harm done to children of gay couples when gay marriage is banned?" in a manner that is much better than conclusory or diaphanous. States' attorneys still have much, much work to do.)

Amicus does not want to set out in full here the kinds of evidence and supporting arguments which could work, due to issues including space ("6000 words"), and also not wanting to "spoil the surprise" re any future merits briefs of his in this Court re gay marriage. However, he believes that successful arguments exist, even if State attorneys have so far either ignored them, or put them only into footnotes, a place where good ideas go to die.

One huge issue truly ignored by the States is sodomy, which is a proverbial "invisible 800-pound gorilla" in the gay-marriage cases. State attorneys seem to be shying away from any mention of the issue that sodomy is a massive disease vector, exponentially more dangerous than regular sex in terms of spreading AIDS, causing anal trauma, etc. If a health reason, the chance of genetic damage to children, is enough to prohibit incestuous marriage, then health reasons are acceptable to prevent other types of marriage—and the reality that sodomy is statistically an AIDS and physical-trauma vector is certainly a health issue.

Obviously, sodomy is not illegal or criminalized (*see Lawrence*), any more than a dangerous activity like rock-climbing is. However, to argue that a type of marriage based on a comparatively dangerous

practice like sodomy *demands mandatory recognition and subsidy by the State*, may be so silly as to defy description. After all, blood donation by gay men is still illegal. (And marriage, while not totally about sexual activity, is still substantially about sexual activity.)

The essentially-total failure of States' attorneys even to mention the sodomy/disease/injury issue may shows limited competence or candor (one is almost tempted to mention "evasiveness"); and their gross material omission, their making sodomy an invisible issue, shows just how much the attorneys' technique has to be stepped up to have a reasonable chance of success in future hearings.

State attorneys have, indeed, been making tepid arguments like,

"Allowing gay marriage may in the future somehow devalue marriage in general, and maybe in some way show a lack of support for traditional marriage."

While the argument just mentioned is not all bad, it is rather speculative, and quite milquetoasty, at least without serious further elaboration.

By contrast, the argument,

"Mandatory legal gay marriage forces the People to endorse and subsidize a sexual lifestyle that has killed hundreds of thousands of people—perhaps millions—, and to publicly norm that lifestyle for young, impressionable children."

, is a lot punchier, and is true as a matter of common sense and historical medical record. The tendency of States' attorneys to throw feathers instead of cannonballs in their gay-marriage briefs and arguments has not been encouraging.

A last word about sodomy is that heterosexual sex is a vector of life (pregnancy and birth), while sodomy can only ever be a vector of death, whether by AIDS or otherwise. People can play "Emperor's New Clothes" all they want, and whistle past the graveyard as they ignore the sodomy issue; but the facts are the facts, which is why amici like Amicus feel duty-bound to remind the Court of the facts. This is what a real friend of the Court tries to do.

Again, while the States' attorneys may have a vague idea of what arguments to make, none of their arguments are really ready for the Supreme Court, from what Amicus can see. (Many stellar and highly-experienced lawyers…lost their cases in the lower courts, sadly enough.) When they stop repeating the exact same unsuccessful arguments they made in lower courts, perhaps they can be considered ready.

(*See* the Duke of Wellington's comment about the unimaginative, failed tactics of the French at Waterloo: "They came on in the same old way, and we sent them back in the same old way."[7])

So, if the Court is truly interested in giving all sides a fair shake, instead of prematurely granting certiorari and creating a "turkey shoot" or "fish-in-a-barrel shoot" where the forces of democracy, the

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[7] *Available at*, e.g., Victor Davis Hanson, *The lessons of Wellington*, The New Criterion, Dec. 2002, http://www.newcriterion.com/articles.cfm/wellington-davishanson-1859.

States upholding their voters' rights, near-automatically lose the battle to mandatory-gay-marriage proponents: then the Court should consider taking a long while before granting certiorari to any party. The need for quick resolution of the issue is outweighed by the need for correct resolution of the issue, as long as that resolution takes. And it may take some time indeed for the States to get their act together.

IV. WHY UTAH MAY BE A BETTER CANDIDATE FOR CERTIORARI THAN SOME OTHER STATES

That being said, Utah may be better placed to receive certiorari than are some other States. For one, there is precedence in time: Utah was first. There are also various reasons Utah mentions in its brief.

One highly crucial point that Utah has in its favor is the well-known Utahn experience with polygamy. Utah may be able to make more heartfelt, thorough arguments than anyone else could, that there may be no more "fundamental right", or any kind of right, to gay marriage than there is to plural marriage, at least in a small-group polyamorous setting. (Say, 2 men and 2 women all married together in a gender-equal "intimate quadrilateral".) *See, e.g.*, Richard A. Epstein, *Judicial Offensive Against Defense Of Marriage Act*, The Libertarian, Forbes.com, July 12, 2010, 1:28 p.m.[8] (saying

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[8] http://www.forbes.com/2010/07/12/gay-marriage-massachusetts-supreme-court-opinions-columnists-richard-a-epstein.html.

marriage licenses must be extended to both polygamists and gays); Martha Nussbaum, *A Right to Marry? Same-sex Marriage and Constitutional Law*, Dissent, Summer 2009[9] (not only supporting gay marriage but also claiming "legal restriction . . . . would not tell against a regime of sex-equal polygamy"); Hilary White, *Group marriage is next, admits Dutch 'father' of gay 'marriage'*, LifeSiteNews, Mar. 12, 2013, 5:58 p.m.: "Boris Dittrich, the homosexual activist called the 'father' of . . . Dutch gay 'marriage', has admitted that group marriages of three or more people, is the next, inevitable logical step[.]"[10]

So, Utah's petition should be valued at least as highly as anybody's petition, or even higher than some, though Amicus is not playing favorites (and this brief is for neither party). Amicus sees no reason to favor another State over Utah.

* * *

Courts, especially this honorable Court, should be above mania. Sometimes slowdown is helpful to critical thought. The Senate has been called a cooling saucer for democracy, and this Court can be a cooling saucer as well, when logic has fled and ranting rhetoric reigns in the lower courts.[11]

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[9] http://www.dissentmagazine.org/article/a-right-to-marry-same-sex-marriage-and-constitutional-law.

[10] http://www.lifesitenews.com/news/group-marriage-is-next-admits-dutch-father-of-gay-marriage.

[11] On that note: the Court should avoid one remarkably bad idea—here consigned to a footnote—he has heard bruited, about the Court having a hearing assuming heightened scrutiny re gay marriage, and also another hearing assuming rational basis. Such a rigamarole begs the question and

The bad arguments of the past few months, on both sides, about mandatory legalized gay marriage resemble a huge mass of undigested food rushing down the gullet to some ugly fate. So, more thoughtful digestion of the arguments—by States' lawyers and by others—, and more percolation of the issues in lower courts, is needed, *ex abundanti cautela*. After all, the lack of percolation can lead to some pretty foul coffee. The Court deserves better than to rush itself into such a mess. And so does the Nation.

CONCLUSION

Amicus respectfully asks the Court to consider granting certiorari, in this case or another gay-marriage case or cases, in the far future, when the time is right; and humbly thanks the Court for its time and consideration.

September 4, 2014 Respectfully submitted,

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insinuates that there *should* be heightened scrutiny in the first place, which is essentially wrong.