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RESUMEN

In the United States, much like in Colombia, the courts have gradually recognized a series of constitutional rights to which its lesbian and gay citizens are entitled. In its most recent decision, the U.S. Supreme Court ruled that same-sex couples have the same Constitutional right to full civil marriage that different-sex couples have, despite legislation to the contrary. Obergefell v. Hodges, 135 S.Ct. 2584 (2015). (A Spanish translation of the opinion can be found at http://www.revistajuridicaupr.org/wp-content/uploads/2015/07/Obergefell-v.-Hodges-espa%C3%B1ol.pdf and was previously submitted to this Court.) To deny this right, the Court found, would demean gay and lesbian persons and violate their right to "dignity in the eyes of the law."

Prior to the Obergefell decision, several states in the United States had attempted to resolve the inequality faced by lesbian and gay couples by creating a new legal status, usually called civil union or domestic partnership. The new legal status offered all or almost all the financial benefits of marriage, but courts found that this separate status was inherently unequal, because of both legal and dignitary shortcomings. From this history, two principles became clear that are relevant to this Court in ruling on today's marriage question in Colombia:

- A second-class version of marriage (whatever it is called) cannot substitute for the full dignitary and material set of rights that comprise civil marriage, and
- A court charged with interpreting its national Constitution has the authority and duty to read those provisions in a way that best promotes the underlying principles and spirit of the Constitutional text.

Therefore, Amicus respectfully argues that the first three questions proposed by the Court must be answered yes.[1] As to the fourth question,

[1] These questions read as follows: (1) Are couples of the same sex entitled to enter into a publicly recognized civil marriage? (2) Do you deem it an infringement of fundamental rights for the same-sex couples if a judicial authority or public notary rejects the application to officially realize and register a civil marriage? (3) Is the Constitutional

Amicus will describe how proposals similar to the "contractual relationship" mentioned in the fifth paragraph of verdict C-577 have proven to be insufficient for the protection of essential rights because their precise scope was unclear, they were unfair to children as well as to adults, and they were unworkable when couples traveled, relocated or separated. Such experiments created more problems than they solved for couples who wished full access to marriage. Amicus respectfully urges this Court not to create yet another second-class status, but to take up its responsibility to decide the concrete legal question of whether access to the established right of civil marriage must be extended to same-sex couples. For both principled and pragmatic reasons, the answer can only be yes.

1. **Introduction**

I am honored by the invitation to present argument to this Court. In this brief, I hope to assist the Court in answering the four questions proposed in the letter of invitation by drawing on the law of the United States. I will describe the process by which the right of same-sex couples to marry has been realized under the U.S. Constitution and suggest comparisons, where appropriate, to the law of Colombia.

At the outset, one must note that there is a key structural difference between the Constitution of Colombia and that of the United States. The U.S. Constitution does not itself identify any rights as "fundamental." In addition, there is no right to "dignity" as such stated in the text of the Constitution. As a result, the U. S. Supreme Court has had to use a process of logic and inference to determine that certain rights should be treated as fundamental. Griswold v. Connecticut, 381 U.S. 479 (1965); Skinner v. Oklahoma ex. rel. Williamson, 316 U.S. 535 (1942). Similarly the Court has had to reason by logical deduction to conclude that the individual's right to "dignity in the eyes of the law" lies at the heart of individual freedom. Obergefell v. Hodges, 135 S.Ct. 2584, 2608 (2015).

By contrast, the Constitution of Colombia explicitly identifies certain protected rights as fundamental, specifically including the right to dignity. Dignity is declared to be a Fundamental Principle of the 1991 Constitution in Article 1. The pre-eminent position of the dignity right is unambiguous. Now that this Court has been called on to resolve the cases of same-sex couples who seek to marry or who have already married, the Honorable Magistrates of this Court have the advantage of constitutional text to guide them that is more

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Court competent to make a decision about whether or not same-sex couples can enter into a publicly acknowledged civil marriage contract, or does this authority lie with the Congress of the Republic?

explicit and more powerful than the text that was available to the U.S. Supreme Court.

The stronger text of the Constitution of Colombia is the first of many reasons why, in the aftermath of the National Congress's failure to resolve the issue, this Court has only one remaining option to effectuate the Fundamental Principle of Dignity for same-sex couples: that is to rule that lesbian and gay persons have, as part of their dignity right, a right of access to the same status of civil marriage that heterosexual couples have.

2. **The Right of Same-Sex Couples to Publicly Recognized Civil Marriage**

The growing realization that government may not demean lesbians and gay men by treating them as second-class citizens has developed in the United States through a series of Supreme Court decisions that began in 1996.

In Romer v. Evans, 517 U.S. 620 (1996), the Supreme Court ruled that the state constitution of Colorado,[2] as amended by the voters, could not include a provision that singled out gay people for a separate and more difficult process of enacting anti-discrimination laws. The Court ruled that the democratic process of voting did not insulate provisions that were enacted to inscribe inequality into the law. For that reason, the state constitutional amendment was invalidated because it violated the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

In 2003, the Supreme Court struck down a Texas law that criminalized certain sexual acts (such as oral sex) when engaged in between persons of the same sex, but which were not criminal when engaged in by different-sex partners. Lawrence v. Texas, 539 U.S. 558 (2003). The Court rejected the claim that a state could criminalize acts that cause no harm simply because a majority believed them to be immoral. "The fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient" justification for such a law. Id at 577, quoting Bowers v. Hardwick, 478 U.S. at 216 (Stevens, J., dissenting) Rather, the Court said, the two gay men who were arrested "are entitled to respect for their private lives." 539 U.S. at 578.

These two cases established *three important principles relevant to the question of same-sex marriage*:

- First, the principle of legal equality for lesbians and gay men – The Supreme Court made clear that *neither widespread prejudice toward lesbians*

[2] In the United States, each of the 50 states has its own constitution.

and gay men nor sincerely held beliefs about morality can be a legitimate basis for discriminatory treatment by the government.

- Second, the recognition that the same behaviors should have the same consequences - The Court reasoned that when different-sex and same-sex couples *engage in the same behavior*, the law cannot accept one and penalize the other.
- Third, the principle of the living Constitution - The Court declared that changing social understandings (including those about homosexuality) can change the public meaning of the language of the Constitution, and that the Court has an obligation to interpret constitutional text in light of contemporary understandings:

> [T]hose who drew and ratified the [Constitution] knew [that] times can blind us to certain truths, and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

539 U.S. at 578. Accord, In re Marriage Cases, 183 P.2d 384, 427 (Calif. 2008) ("Tradition alone, however, generally has not been viewed as a sufficient justification for perpetuating, without examination, the restriction or denial of a fundamental constitutional right.")

After these two decisions, claims by same-sex couples for a right to marry grew in intensity and frequency. With greater knowledge about the lives of lesbian and gay persons, the understanding grew that gay couples seek the right to marry for the same reasons that different-sex couples do. The courts began to realize that the institution of marriage serves the same purposes for same-sex couples that it does for heterosexual couples. Just as the same sexual acts must be treated the same under law whether engaged in by different-sex or same-sex couples (Lawrence), so too the fact that the fundamental components of marriage are the same for both groups means that they must be treated the same.

The first same-sex marriage case came to the U.S. Supreme Court two years ago, when a challenge was brought to the so-called "Defense of Marriage Act" (DoMA). DoMA was a law adopted by the federal Congress prohibiting the national government from recognizing same-sex couples for the purpose of federal benefits or taxes, even though they had been lawfully married under a state law. DoMA created a system under which different-sex couples were recognized as married for both federal and state law purposes, but same-sex couples could obtain only state-level recognition.

In United States v. Windsor, 133 S.Ct. 2675 (2013), the Court struck down DoMA as unconstitutional. The Court found that DoMA's distinction between gay and heterosexual marriages revealed that its true "purpose and effect [was] to disparage and injure" gay men and lesbians, id. at 2696, by sending a message of inequality in status. As Justice Ginsburg noted during oral argument, the law cannot tolerate "two kinds of marriage – the full marriage and then this sort of skim milk marriage." (leche entera y leche descremada)[3] The Supreme Court found that "marriage," once granted by the state, had to be the *same* under law for gay and different-sex couples.

This year, the Supreme Court ruled that same-sex couples in all 50 states must be allowed to marry. Obergefell v. Hodges, 135 S.Ct. 2584 (2015). In Obergefell, the Court ruled that access to full civil marriage is *required* for same-sex and different-sex couples:

> The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest. With that knowledge must come the recognition that laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter.

Obergefell v. Hodges, 135 S.Ct. at 2602.

Thus, under the U.S. Constitution, it is now binding precedent that the institution of marriage must be *the same for heterosexual and same-sex couples* (Windsor) and that same-sex couples must have *equal access to marriage* in every state, in all parts of the nation (Obergefell).

3. **Obtaining registration as a civil marriage is a fundamental right for both different-sex and same-sex couples.**

In light of the failure by the National Congress to address the question framed for it by this Court in Verdict 5-277, this Court must now decide whether, in the context of intimate relationships, each individual's right to equality and dignity can be properly protected in any way other than by granting access to civil marriage. This Court in its prior decisions has already recognized the equal dignity of gays and lesbians. Therefore the key question is whether judicial officials and notaries violate a fundamental right when they refuse to realize and register a civil marriage. If the answer is yes when the couple being denied a civil marriage is heterosexual, then the answer can only be yes when the couple denied this right is gay or lesbian. To ask the question is to answer it.

[3] Oral argument in United States v. Windsor, 2013 WL 2337935 at 71.

The primary argument in opposition centers on historical understandings of marriage as limited to a man and a woman and focused on procreation. This argument has been made in the United States as well as in Colombia. This traditional understanding was correct at the time that the Fifth and Fourteenth Amendments were adopted in the United States, in 1789 and 1868. It continued to be the assumption when the Supreme Court first recognized the right to marry as fundamental. Skinner v. Oklahoma, supra; Griswold v. Connecticut, supra. Similarly, it is clear from Article 42 of the 1991 Constitution of Colombia that then, too, the assumption was that marriage was a relationship between persons of different sexes.[4] In 1991, there was no nation that allowed same-sex couples to marry, nor was gay marriage allowed in any part of the United States.

Today, of course, that has changed dramatically. In those nations with the strongest consitutitonal democracies, such as Colombia and the United States, both courts and legislatures have recognized that the institution of marriage "has not stood in isolation from developments in law and society." Obergefell v. Hodges, 133 S.Ct. at 2595. Just as the historical meaning of the roles of husband and wife have changed, forcing the law of family relations to change, so too has the understanding of the definition and purpose of marriage changed.

> These new insights have strengthened, not weakened, the institution of marriage. Indeed, changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations…

Id at 2596.

What was once thought of as outside the definition of marriage has come to be seen instead as merely one variation of the institution of marriage. Like different-sex marriage, gay marriage is created by a public lifelong commitment of two persons to remain with and support each other and their family members in sickness and health, good times and bad. Like heterosexual couples, "same-sex couples [seek] to affirm their commitment to one another before their children, their family, their friends, and their community." United States v. Windsor, 133 S.Ct. at 2689.[5] The individuals in both kinds of couples are equally capable (or

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[4] My understanding of the language of Article 42 is that it describes matrimony as based on the free decision of a man and woman to contract, but it does not specifically prohibit marriage between persons of the same sex. Similarly, the first marriage cases in the United States, which established marriage as a fundamental right, described marriage as it was then known, but did not address the issue of same-sex marriage.

[5] Accord, Kerrigan v. Commissioner of Public Health, 957 A.2d 407, 424 (Conn. 2008) (Gay couples "share the same interest in a committed and loving relationship as heterosexual persons who wish to marry, and they share the same interest in having a family and raising their children in a loving and supportive environment.")

not) of love, commitment and mutual support. Under the rule of law, the same acts must be given the same meaning.

Further, as this Court knows from its ruling in the adoption case, 2014 Sentencia U-617/14, same-sex couples also raise children, as do heterosexual couples. These children may have been born to one of the partners or they may be adopted. There are many thousands of adopted children in both Colombia and the United States. It cannot be valid under either Constitution for those children who are adopted by one set of families to gain the benefits of having parents who can be officially married, while children who happen to be adopted by the other category of parents are denied those benefits.

It may help to consider this issue from a different perspective. There is no dispute that persons of good will can disagree about what is the best form of marriage, just as they can disagree about questions of politics or religion. In a free society, we respect the autonomy of each individual to determine how to live his or her life, so long as no others are harmed. Neither the Constitution of Colombia nor the Constitution of the United States makes an exception for marriage.[6] Thus, this Court cannot rule in a way that allows only heterosexual persons to make autonomous choices about their most important relationships, but forces lesbian and gay persons to live under separate and unequal rules determined by legislatures.

4. **The Constitutional Court has the power and the duty to determine the rights of same-sex couples to a civil marriage contract**.

In a constitutional democracy, the role of the highest court is to ensure that the Constitution can and does evolve. Just as the U.S. Supreme Court could not allow telephone calls to remain unprotected from government intrusion because there was no such thing as a telephone when the Fourth Amendment was adopted, neither could it allow a right with the importance of marriage to be denied to a group of citizens because there was no such thing as gay marriage until recently. Whether the relevant date is 1789 or 1868 or 1991, the protection of individual rights cannot be left as frozen in time.

[6] Similarly, the "California Constitution cannot properly be interpreted to withhold from gay individuals the same basic civil right of personal autonomy and liberty (including the right to establish, with the person of one's choice, an officially recognized and sanctioned family) that the California Constitution affords to heterosexual individuals." In re Marriage Cases, 183 P.2d 384, 429 (Calif. 2008).

The U.S. Supreme Court addressed this question at some length in Obergefell v. Hodges:

> The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution…History and tradition guide and discipline this inquiry but do not set its outer boundaries…The nature of injustice is that we may not always see it in our own times…When new insight reveals discord between the Constitution's central protections and received legal stricture, a claim to liberty must be addressed…
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> …If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied. This Court has rejected that approach, both with respect to the right to marry and the rights of gays and lesbians.

Obergefell v. Hodges, 133 S.Ct. at 2598, 2602.

There are some who have argued that for a controversial right such as same-sex marriage, courts should wait for further debate to occur and even for there to be a level of majority support for such rights. Yet waiting is not a neutral or even-handed resolution: it is a decision to continue the denial of the recognition of equal dignity for all persons. That is why the U.S. Supreme Court held in 1943 that "fundamental rights may not be submitted to a vote; they depend on the outcome of no elections." West Virginia Board of Education v. Barnette, 319 U.S. 624, 638 (1943).

In Obergefell, the Court applied this principle specifically to same-sex marriage:

> It is of no moment whether advocates of same-sex marriage now enjoy or lack momentum in the democratic process. The issue before the Court here is the legal question whether the Constitution protects the right of same-sex couples to marry.

133 S.Ct. at 2606.

Lastly, the question today may be less difficult than it initially seems to be. The right to equal dignity is *all* that this Court must decide. Just as it is not the function of courts to be bound by what a majority of the population may think is moral or immoral, it is not the function of courts to tell others what is moral or immoral. As the Supreme Court of California stated:

> [O]ur task in this proceeding is not to decide whether we believe, *as a matter of policy*, that the officially recnognized relationship of a same-sex couple *should* be designated a marriage…but only whether [different names for the legal status] *violates the California Constitution*.

In re Marriage Cases, 183 P.2d 384, 398-99 (Calif. 2008) (emphasis in the original).

This Court, too, is being asked to decide only a concrete question of law: whether the Constitutional right to equal dignity requires that same-sex couples must be governed by the same marriage law as heterosexual couples. It cannot default on that duty without weakening the Constitution. As the Chief Justice of the New Jersey State Supreme Court wrote,

> Perhaps the political branches will right the wrong presented in this case…That possibility does not relieve this Court of its responsibility to decide constitutional questions…The question of access to civil marriage by same-sex couples 'is not a matter of social policy but of constitutional interpretation.'

Lewis v. Harris, 908 A.2d 196, 230-31 (N.J. 2006) (Poritz, C.J., concurring and dissenting).

5. **The "contractual relationship" mentioned in C-577 lacks clarity as to its scope and consequences, and cannot substitute for civil marriage.**

Under the Civil Code in Colombia and various state laws in the United States, governments have given unique benefits and responsibilities to the status of marriage. In the effort to create an end run around equality, several U.S. state legislatures sought to use various forms of quasi-marital status laws to provide material benefits to same-sex couples while reserving for heterosexual couples the word "marriage." These attempts all failed, for the same set of reasons.

First, in this situation, separate is inherently unequal. As the U.S. Supreme Court found with regard to racial segregation in schools,[7] a law that separates people artificially into two groups and forces them into separate segments of the same legal or social institution, inevitably sends a message that the two groups are not truly equal. In the context of marriage,

> [B[ecause of the long history of discrimination that gay persons have faced, there is a high likelihood that the creation of a second, separate legal entity for same sex couples will be viewed as reflecting an official state policy that that entity is inferior to marriage, and that the committed relatioships of same sex couples are of a lesser stature than comoparable relationships of opposite sex couples.

Kerrigan v. Commissioner of Public Health, 957 A.2d 407, 475 (Conn. 2008). Accord, In re Marriage Cases, 183 P.2d 384, 401-02 (Calif. 2008). See also, Opinions of the Justices to the Sentae, 440 Mass. 1201, 1207 (Mass. 2004) ("[t]he

[7] Brown v. Board of Education, 347 U.S. 483 (1954). See also, Loving v. Virginia, 388 U.S. 1 (1967).

dissimiltude between the terms 'civil marriage' and 'civil union' is not innocuous; it is a considered choice of language that reflects a demonstrable assigning of same-sex…couples to second-class status"). In order words, the separate status itself creates a cognizable harm.

Second, even the material characteristics of such alternative relationship status categories are almost inevitably not equal to the complete package of benefits and duties that comprise civil marriage. Certainty as to the process for termination, for example, is essential to the legal definition of marriage, but it is absent in a contract. How would a local court that has refused to marry a same-sex couple cope with a petition for divorce? This question arose in the United States before the Supreme Court eliminated the barriers for same-sex couples to marry. A state appeals court in Texas denied the divorce petition from a gay couple who had married legally in Massachusetts and then later relocated to Texas because of work opportunities. See In re the Marriage of J.B. and H.B., 326 S.W.3d 654 (Tex. Ct. App. 2010).

Another characteristic of marriage with tangible consequences is its portability as an official legal order. When a married couple travels to another country, that country recognizes the marriage for purposes that range from immigration law to simply the right of a spouse to hospital visitation in the case of an accident. There is no comparable transnational recognition for contracts, especially those signifying a status that does not exist in the second nation. In a federal republic such as the United States, the recognition for a "solemn contract," if it occurs at all, may vary from state to state.

Third, although there is no harm to heterosexual couples from allowing gay couples to marry, there is harm to those same-sex couples who have already been permitted to marry if this Court reneges on the implied promise of equal treatment. Already married gay couples face a loss because they cannot be provided with the same reassurance, taken for granted by heterosexual married couples, that their legal union will not be taken away from them by nullification.

Lastly, one may ask – even if contracts are not sufficient – are there any other forms of relationship law that could be truly equal as between gay and heterosexual couples. Perhaps, if we force ourselves to imagine true equality as a thought experiment, we could think of two possibilities, but both are unsatisfactory.

First, the Court could equalize relationship law by removing the word "marriage" from the civil status for all couples. As the Supreme Court of California noted, the state could "assign a name other than marriage as the official designation of the formal family relationship for *all* couples." In re

Marriage Cases, 183 P.2d 384, 400 (Calif. 2008) (emphasis in the original). As that court recognized, however, extending the use of the word "marriage" would be more consistent with the legislative intent to protect families than would be withholding it in the name of equality. Id at 453.

Second, if the Court were to accept the claim that procreation is the only true purpose of marriage, then it would logically follow that only couples raising children could be granted full civil marriage. Couples who could not reproduce or did not wish to and who did not seek to adopt would be excluded from marriage, whether they were gay or heterosexual. This option, too, however, might be genuinely equal but it would create other problems, such as issues of privacy.

In short, the various attempts to create a new legal status have not solved the problem of inequality under the law and have only created new problems.

Conclusion

In the end, we can turn to logic. Premise 1 is uncontested: that lesbian, gay and heterosexual persons have equal standing under law. Premise 2 is equally valid: that the institution of marriage operates in the same way, imposes the same benefits and burdens, and serves the same functions for both same-sex and different-sex couples. The necessary conclusion can only be that both types of couples must have the same full access to civil marriage.

Respectfully submitted,

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