No. 16-111

IN THE

Supreme Court of the United States

MASTERPIECE CAKESHOP, LTD.,
AND JACK C. PHILLIPS,

Petitioners,

v.

COLORADO CIVIL RIGHTS COMMISSION,
CHARLIE CRAIG, AND DAVID MULLINS,

Respondents.

On Writ of Certiorari to the Colorado Court of Appeals

BRIEF *AMICUS CURIAE* OF RICHARD LAWRENCE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether applying Colorado's public accommodations law to compel Phillips to create expression that violates his sincerely held religious beliefs about marriage violates the Free Speech or Free Exercise Clauses of the First Amendment.

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INTEREST OF THE AMICUS CURIAE

Amicus Curiae, Richard A. Lawrence, is a licensed Alabama attorney.[1] He graduated from the University of Illinois Law School in 1975, clerked for the Honorable Reneau Almon on the Alabama Supreme Court in 1976-77, and has been practicing in Montgomery, Alabama since 1977. He has been married 47 years to the same woman, and believes that marriage is between a man and a woman. This brief is provided in support of the Petitioners and in suggestion of reversal of the case below.

SUMMARY OF ARGUMENT

This brief addresses the issue of the Free Exercise Clause and the proper test used in the application of the Clause. A church teaching is to "love the sinner; hate the sin." The lower Colorado appellate court says that distinction is not possible in the present context because homosexual status is indivisibly tied to homosexual conduct just as the yarmulke is tied to the Jew. That is not true. A religious baker can happily give or sell a cake to a homosexual person. But a religious baker cannot give or sell a wedding cake to be used in a homosexual or same-sex wedding. A wedding gives approval to and a blessing to the union of the two being joined as "man and wife." The believing baker cannot do that because he then is a part of the giving of approval to and blessing to a wrong and immoral act,

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[1] The Clerk of the Court has noted on the docket the blanket consents of the Petitioners and Respondents to the filing of *amicus curiae* briefs. Amicus curiae, Richard A. Lawrence, states that no party to this case has authored this brief or any part of this brief. He further states that neither he individually or in the capacity as counsel has received from any party in the case any monetary contribution to fund or that is intended to fund the preparation or submission of this brief.

in violation of his religious belief and conscience. The proper test is one of strict scrutiny.

The case of *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) was decided June 26, 2015. The time of the same-sex marriage in this case was before issuance of *Obergefell*. Yet, the case influences the decision in this case. Therefore, the questioning of the subject matter jurisdiction of the Court in *Obergefell* is proper in this matter. Undersigned Amicus submits that the Court lacked subject matter jurisdiction in *Obergefell*. Hence, the issue of the subject matter jurisdiction in *Obergefell* is addressed.

Jurisdiction in *Obergefell* was not questioned or addressed at any point in the trial or appellate process, and a final judgment has now been entered. A final judgment from the Court is not subject to collateral attack. However, this Court may reexamine the question of jurisdiction when raised in the proper case. If the Court lacked jurisdiction, then *Obergefell* should not stand as precedent in the instant matter. The issue of jurisdiction arises from the language in Article III, section 2 of the Constitution, "in law and equity," and the subsequent use of that language in the jurisdiction granting statutes, 28 U.S.C. §§1331, 1332, and 1343.

ARGUMENT

I. WHAT IS THE PROPER TEST?

The statute in question forbids discrimination by a business "because of … sexual orientation." *Craig v. Masterpiece Cake,* 370 P.3d 272, 288, fn. 11 (Col. App. 2015). The occupation to which it is applied is that of a baker. This particular baker would happily sell a cake to someone who is homosexual or lesbian. However, he will not sell a cake to the same homosexual or lesbian for use in that person's marriage to someone of

the identical sex. His reason for refusing the sale is his authentic religious belief, a belief held by millions of people in this country. Can the state force him to make that sale under penalty of fine, or jail, or being barred from his vocation and livelihood?

In *Lawrence v. Texas*, 539 U.S. 558, 571 (2003), the majority opinion stated the following:

> It must be acknowledged, of course, that the Court in *Bowers* was making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives.

In *Bowers. v Harwick*, 478 U.S. 186, 196 (1986), Chief Justice Burger stated in a separate concurring opinion (quoted in *Lawrence v. Texas*, at 539 U.S. at 571):

> Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards.

In *Lawrence v. Texas*, the Court declared that sodomy was lawful in the bedroom, as distinct from moral and right.

There is no dispute as to the authenticity or sincerity of the religious based faith and belief of the Petitioner, Mr. Phillips, as his views are clearly supportable by Biblical scripture, and he would be acting contrary to his faith and his belief by providing a wedding cake for a same-sex marriage. Support or recognition of same-sex marriage would be the giving of approval and blessing to the marriage, declaring that the wrong of homosexual conduct is now right. This he cannot do.

Employment Division v. Smith, 494 U.S. 872 (1990), addressed the test to be applied to such a case. "[Smith and Black] were fired from their jobs with a private drug rehabilitation organization because they ingested peyote for sacramental purposes at a ceremony of the Native American Church, of which both are members." *Id.* at 874. They were denied unemployment compensation due to the work related "misconduct." *Id.*

One can "hear" within the opinion the Justices' struggle in how to apply the Free Exercise Clause. Justice Scalia wrote the majority opinion which four justices joined. That opinion would give great deference to the legislature when the statute is a "valid and neutral law of general applicability," *id.* at 879, with recognized exceptions to this general rule. *Id.* at 881-882. Justice O'Connor wrote a concurring opinion, in which she disagreed with the test applied by the majority, but agreed with the result. She would apply the traditional test requiring the state to have a compelling reason narrowly applied for burdening a religious belief, notwithstanding that the statute may be a neutral law of general applicability. Justice O'Connor found health and safety reasons surrounding the use of the drug peyote sufficiently compelling justification for upholding the statute in this case. Justice

Blackmun dissented. He agreed with the test applied by Justice O'Connor, but disagreed with her conclusion. He found that the health and safety reasons surrounding the use of the drug peyote were not compelling. He was of the opinion that the allowance of an exemption for use of peyote in the ceremonial services would be a valid accommodation. *Id.* at 917-918.

There are at least two reasons why this case requires the use of the compelling interest test: (1) The statute in question is not a neutral law of general applicability; and (2) the general rule does not apply when the burden caused by the statute involves other constitutional rights in addition to the Free Exercise Clause, in this case the right of contract (in addition to freedom of speech which is not addressed in this brief).

The statute is neither neutral nor of general applicability. The lower court concluded that the sexual conduct of a homosexual cannot be separated from the individual homosexual and hence, cannot not be separated from the act of same-sex marriage. *Id.* 370 P.2d at 280-281. The Colorado court stated that in *Obergefell* this Court "equated laws precluding same-sex marriage to discrimination on the basis of sexual orientation." *Id.*at 281. Such a statement makes no sense in the context of this case. One can deal with and even appreciate aspects of the individual without affirming his sexual conduct. This interpretation (that the act and the individual are indivisible), however, requires the affirmation of conduct and by doing so makes the statute no longer neutral or of general applicability. Rather, the statute becomes directed at persons of faith who believe that such conduct is immoral, requiring them to affirm such conduct. While the Court in *Obergefell* may have even intended to teach the people that such conduct is socially good, 135

S. Ct. at 2606, the state does not have the right under the First Amendment to make people affirm such conduct. As such, the statute is not neutral or of general applicability.

In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialiah,* 508 U.S. 520 (1993) the Court struck the city ordinances in question. Justice Kennedy wrote the opinion for the Court. Part II-A-2 of the opinion did not garner a majority.[2] In that part, Justice Kennedy judged the ordinance in question based upon the perceived intent of the city legislature in its enactment. In determining whether a statute is neutral and of general applicability, the Court should look at the effect of the statute. Justice Scalia, author of *Smith,* in a concurring opinion in *Lukumi* stated:

> In my view, the defect of lack of neutrality applies primarily to those laws that by their terms impose disabilities on the basis of religion (*e.g.,* a law excluding members of a certain sect from public benefits, *cf. McDaniel v. Paty*, 435 U.S. 618 (1978)), *see Bowen v. Roy*, 476 U.S. 693, 703-704 (1986) (opinion of Burger, C.J.); whereas the defect of lack of general applicability applies primarily to those **laws which, though neutral in their terms, through their design, construction, or enforcement target the practices of a particular religion for discriminatory treatment**, *see Fowler v. Rhode Island*, 345 U.S. 67 (1953).

Id. at 557 (emphasis added). The construction given the statute in this case by the Colorado courts has the

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[2] Only Justice Stevens joined Justice Kennedy in Part II-A-2 of the opinion.

effect of directly "targeting" believers in the Christian faith.

Justice Souter, concurring in *Lukumi*, would reexamine the *Smith* rule. "I do not join Part II, where the dicta appear, for I have doubts about whether the *Smith* rule merits adherence." *Id.* at 559. "A law that is religion neutral on its face or in its purpose may lack neutrality in its effect by forbidding something that religion requires or requiring something that religion forbids." *Id.* at 561. See the concurring opinion of Justice Souter for a thorough analysis addressing why *Smith* should be reexamined. *Id.* at 559-577 including footnotes.

II. THE RIGHT OF CONTRACT

The Court has a mixed history on the importance of the right of contract. In *Allgeyer v. Louisiana,* 165 U.S. 578 (1897), the Court extensively discussed the liberty of contract under the Fourteenth Amendment, to wit:

> The "liberty" mentioned in that [Fourteenth] amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, to live and work where he will, to earn his livelihood by any lawful calling, to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.

Id. at 589. The Court struck the statute because it deprived the appellant of his liberty of contract, "which

the state legislature had no right to prevent . . . ." *Id.* at 591.

Lochner v. New York, 198 U.S. 45 (1905) followed. By 1937 with *West Coast Hotel Co. v. Parrish,* 300 U.S. 379 (1937), and in 1938 *United States v. Carolene Products Co*. 304 U.S. 144 (1938), the Court changed course. The Court began giving much greater deference to the acts of the legislature. However, the Court has never removed the right of contract as a constitutional right under the Due Process Clause of the Fourteenth Amendment. Such a statute is still required, constitutionally, to have a rational basis. *Carolene Products,* 304 U.S. at 152-154. The history of this area of law is reviewed in Rotunda and Nowak, *Treatise on Constitutional Law,* §§ 15.2 – 15.4. (5th Ed.).

Justice Scalia in *Smith*, 494 U.S. at 881-882, noted that when other constitutional rights are implicated with the Free Exercise Clause, then the Court would apply the traditional test of requiring a compelling reason, enforced by the least restrictive means, before a statute could burden a religious belief. He gave four examples. In *Cantwell v. Connecticut,* 310 U.S. 296 (1940) the Free Exercise Clause implicated the freedom to communicate; in *Murdock v. Pennsylvania,* 319 U.S. 105 (1943) and *Follett v. McCormick*, 321 U.S. 573 (1944), the Court invalidated a flat tax on solicitation as applied to the dissemination of religious ideas; and in *Wisconsin v. Yoder,* 406 U.S. 205 (1972), the Free Exercise Clause implicated the rights of parenthood through the Fourteenth Amendment.

The statute in *Cantwell* does not appear to be a neutral, generally applicable law, but rather is directed on its face toward religion. The Court reversed the convictions. The statutes in *Murdock* and *Follett* while appearing neutral and generally applicable on their

face were unconstitutional in application, and the Court imposed an exception for the religious activity, and reversed the convictions. The statute in *Yoder* requiring public education appears neutral and generally applicable on its face but was a burden on religion in application. The Court in *Yoder* recognized an exception for the religious activity, and affirmed the reversal of the convictions by the State Supreme Court. In each of those cases the Court engaged in a full strict scrutiny analysis.

The right of contract under the Due Process Clause is also supported by an express provision in Article I, Section 10: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ." While this provision has been interpreted to apply to an existing obligation and not a future obligation, it emphasizes the importance of the right of contract. See Rotunda and Nowak, *Treatise on Constitutional Law,* §§ 15.8.

One should not underestimate the importance of the constitutional right of contract in this matter. The appellant, Mr. Phillips, is in business. He has a basic right to sell to whomever he desires and not to sell to whomever he desires. That right is subject to rational regulation by the State that is limited by his additional right under the Free Exercise Clause that his freedom of belief not be burdened. The statute in question says do not discriminate based on sexual orientation. He will happily sell a cake to anyone including someone within the class defined by sexual orientation. However, a cake for use in a same-sex wedding is different. Serving a homosexual in normal commercial matters does not offend; contracting for a wedding does. A wedding has a religious sacredness associated with it. Biblically, marriage is between a man and a woman. A marriage between two men or

two women is an affirmation of a sexual relationship that is sinful and immoral. Providing the cake for the wedding is to affirm the sin.

This is not a matter of one having "conscientious opposition" and thus requesting relief "from any colliding duty fixed by a democratic government." *Smith,* 494 U.S. at 882. Instead, an individual is requesting relief from being forced to enter into a contract that affirms a matter that is contrary to ecclesiastical teaching and which is considered immoral and sinful.

The Free Exercise Clause is not limited to freedom to believe; it also includes the freedom to act (or not act). *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). In *Gonzales v. O Centro Spirita Beneficente Uniao Do Vegetal,* 546 U.S. 418 (2006), applying the Religious Freedom Restoration Act of 1993 ("RFRA"), the Court found that RFRA plainly contemplates court-recognized exceptions. *Id.* at 434. The compelling interest test mandated by Congress in RFRA "should be adjudicated in the same manner as constitutionally mandated applications of the test . . . ." *Id.* at 430. Court established exemptions do not violate the Establishment Clause. *Cutter v. Wilkerson,* 544 U.S. 709, 717-726 (2005). While RFRA is not applicable to the States, *Gonzales*, 546 U.S. at 524, n.1, its principles are the same as "constitutionally mandated applications."

The constitutional right of contract—a liberty given by the Fourteenth Amendment and emphasized further by Article II, Section 10 of the Constitution—together with the Free Exercise clause requires strict scrutiny: the government must prove the existence of a compelling interest effected by the least restrictive means to overcome the free exercise right to refuse to provide a wedding cake for a same-sex wedding.

The analysis in *Yoder* is applicable: "And, when the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a "reasonable relation to some purpose within the competency of the State" is required to sustain the validity of the State's requirement under the First Amendment." *Yoder,* 406 U.S. at 233. The *Yoder* Court therefore concluded: "For the reasons stated we hold, with the Supreme Court of Wisconsin, that the First and Fourteenth Amendments prevent the State from compelling respondents to cause their children to attend formal high school to age 16." *Id.* at 234.

III. *OBERGEFELL*: A JURISDICTIONAL QUESTION

Obergefell v. Hodges, 135 S. Ct. 2584 (2015) held that same sex persons have the same fundamental right to marry as do opposite sex persons. The same-sex marriage in this matter was not based upon *Obergefell*. The case of *Obergefell* should nevertheless be addressed for at least two reasons. First, the Colorado court cited *Obergefell* for the proposition that the person and the act are inseparable in the context of homosexual rights. 370 P.3d at 281 ("In these decisions, the Supreme Court recognized that, in some cases, conduct cannot be divorced from status."). Mr. Phillips's position correctly separates the person and the act. Secondly, *Obergefell* supports the argument that because same-sex marriage is a constitutional right a person in business should not be able to decline to support a constitutional right. Undersigned Amicus submits that the Court lacked subject matter jurisdiction in *Obergefell*. Hence, the issue of jurisdiction in *Obergefell* is addressed. The aspect of *Obergefell*

involving recognition of a marriage *valid* in another state is not addressed.

Obergefell was an appeal by the Plaintiffs below from the Sixth Circuit decision, *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), upholding the statutes and constitutional provisions in the States of Michigan, Ohio, Tennessee and Kentucky providing that marriage is between a man and a women. On appeal to the United States Supreme Court not one of the four States questioned the purported jurisdiction of the Supreme Court.[3]

In *United States v. Windsor*, 570 U.S. 12 (2013), the Court made the following statement, quoting from *Haddock v. Haddock*, 201 U.S. 562, 575 (1906): "[T]he states, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce . . . [and] the Constitution delegated no authority to the Government of the United States on the subject of marriage and divorce." (brackets in original). This was a statement of jurisdiction.

This statement taken from *Haddock* is consistent with such statements in other early cases. In *Barber v. Barber*, 62 U.S. 582, 584 (1859), the Court states: "We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony, either as an original proceeding in chancery or as an incident to divorce *a vinculo*, or to one from bed and board." In *Ex parte Burrus*, 136 U.S. 586, 593-594 (1890), the Court stated: "The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not to the laws of the United

[3] The amicus brief of Eagle Forum Education and Defense Fund questioned the jurisdiction of the Court.

States." In *Simms v. Simms,* 175 U.S. 162, 167 (1899) in interpreting the statement in *Barber*, the court stated: "It may therefore be assumed as indubitable that the circuit courts of the United States have no jurisdiction either of suits for divorce or of claims for alimony, whether made in a suit for divorce or by an original proceeding in equity, before a decree for such alimony in a state court." In *Sosna v. Iowa*, 419 U.S. 393, 404 (1975), the Court noted: "'The State . . . has absolute right to prescribe the conditions upon which the marriage relation between its own citizen shall be created, and the causes for which it may be dissolved . . . .'" (quoting *Pennoyer v. Neff*, 95 U.S. 714, 734-735 (1878)).[4]

The jurisdiction of the federal courts arises from Article III, Sections 1 and 2.

> Section 1. The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. ….
>
> Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more

[4] The 1977 case of *Shaffer v. Heitner*, 433 U.S. 186 (1977) affected the holding in *Pennoyer v. Neff*, but not the correctness of the statement quoted in *Sosna v. Iowa*.

> States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

There are two recognized exclusions, or in other words, exceptions, to federal court jurisdiction: "Among longstanding limitations on federal jurisdiction otherwise properly exercised are the so-called "domestic relations" and "probate" exceptions. Neither is compelled by the text of the Constitution or federal statute. Both are judicially created doctrines stemming in large measure from misty understandings of English legal history." *Marshall v. Marshall*, 547 U.S. 293, 299 (2006).

In *Ankenbrandt v. Richards*, 504 U.S. 689, 700-701 (1992), the Court addressed the issue of the domestic relations exception under the statutory grant of diversity jurisdiction, 28 U.S.C. §1332. Based upon the above quotation from *Barber v. Barber*, 62 U.S. 582, 584 (1859), there had historically developed a "domestic relations" exception to federal jurisdiction. *Ankenbrandt,* 504 U.S. at 693.

The statement from *Barber* reads: "We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony, either as an original proceeding in chancery or as an incident to divorce *a vinculo*, or to one from bed and board." 62 U.S. at 584. This statement had been followed for more than 130 years. The Court reasoned that the statement was therefore the legislative intent of 28 U.S.C. § 1332. "Because we are unwilling to cast aside an understood rule that has been

recognized for nearly a century and a half, we feel compelled to explain why we will continue to recognize this limitation on federal jurisdiction." *Ankenbrandt*, 504 U.S. at 694-695.

The *Ankenbrandt* Court based its conclusion on the interpretation of the statutory grant of diversity jurisdiction in 28 U.S.C. §1332. That statutory grant reads as follows: "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between-(1) citizens of different States . . . ." Prior to 1948, the phrase "civil actions" read as "all suits of a civil nature, at common law or in equity." *Ankenbrandt*, 504 U.S. at 698. (In 1996 Public Law 104-317 substituted $75,000 for $50,000.) The phrase "at common law or in equity" was traditionally understood as meaning that the ecclesiastical courts of England handled the core domestic relations and probate matters, not the common law or equity courts. The 1948 amendment to the statute regarding 28 U.S.C. §1332 was interpreted as not causing any change in meaning.

> When Congress amended the diversity statute in 1948 to replace the law/equity distinction with the phrase "all civil actions," we presume Congress did so with full cognizance of the Court's nearly century-long interpretation of the prior statutes, which had construed the statutory diversity jurisdiction to contain an exception for certain domestic relations matters. With respect to the 1948 amendment, the Court has previously stated that 'no changes of law or policy are to be presumed from changes of language in the revision unless an intent to make such changes

> is clearly expressed.' *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 227 (1957).

Ankenbrandt, 504 U.S. at 700-701.

The parties in *Barber* were a husband and wife who had been granted a divorce from bed and board (divorced *a mensa et thoro*) which is not a complete divorce (divorce *a vincula*); the parties are still married, just legally separated. The divorce from bed and board was granted in New York. Alimony was granted as part of the divorce from bed and board. The husband moved to Wisconsin allegedly to avoid the alimony. The Court addressed two issues. The first issue was whether the wife who is still married can, under the peculiarities of divorce law, establish a domicile in a State different from her husband. The second issue was whether "a court of equity is not a proper tribunal for a remedy in such a case." *Barber*, 62 U.S. at 584.

The Court in *Barber* began with the statement: "Our first remark is—and we wish it to be remembered—that this is not a suit asking the court for the allowance of alimony. That has been done by a court of competent jurisdiction. The [federal] court in Wisconsin was asked to interfere to prevent that decree from being defeated by fraud." *Id.* at 584. After working through the nuances of "divorced" parties, the Court concluded that the wife could have a different domicile, New York, than her husband, Wisconsin. *Id.* at 597-598. Having reached that conclusion, the Court further concluded that the allegations made by the wife fell outside the domestic relations exception. She was suing for alimony already decreed against a husband that had left the state, thus giving the federal court diversity jurisdiction to hear the case. *Id*. at 599-600.

Three justices dissented. They disputed whether under the facts a wife can have a different domicile and whether the alimony was an absolute debt. They would have held that a federal court, like courts of chancery, cannot take cognizance of cases of alimony. Of particular interest, though, is the dissent's understanding of limitations on the federal courts of equity:

> It has been repeatedly ruled by this court, that the jurisdiction and practice in the courts of the United States in equity are not to be governed by the practice in the State courts, but that they are to be apprehended and exercised according to the principles of equity, as distinguished and defined in that country from which we derive our knowledge of those principles. (citations omitted). Now, it is well known that the court of chancery in England does not take cognizance of the subject of alimony, but that this is one of the subjects within the cognizance of the ecclesiastical court, within whose peculiar jurisdiction marriage and divorce are comprised. Of these matters, the court of chancery in England claims no cognizance**.**

Id. at 604. The dissent further concluded:

> From the above views, it would seem to follow, inevitably, that as the jurisdiction of the chancery in England does not extend to or embrace the subjects of divorce and alimony, and as the jurisdiction of the courts of the United States in chancery is bounded by that of the chancery in England, all power or cognizance with respect to those subjects by the courts of the United States in chancery is equally excluded.

Id. at 605.

The majority and the dissent in *Barber* agreed that there existed a domestic relations exception to the law and equity jurisdiction of a federal court. They disagreed as to the extent of the exception. The dissent would have included within the exception (and hence, outside the jurisdiction of the court) an action for alimony, even where the alimony had already been established by the state court. The majority, while holding that there is a domestic relations exception, determined that a collection action for the already established alimony was not within the exception. Thus, where the alimony becomes an established debt as any other debt or the matter becomes a tort—committing fraud by leaving the state to avoid alimony—the federal district court would then have diversity jurisdiction, but not where the matter involves pure marriage or divorce. The interpretation given was from the recognized chancery practice in England. Looking to England for the extent of the chancery practice provided a uniform rule of law to be used in all federal courts. In *Boyle v. Zacharie and Turner*, 31 U.S. (6 Peters) 648, 658 (1832), a case cited by the dissent in *Barber*, the court stated:

> The chancery jurisdiction given by the constitution and laws of the United States is the same in all the states of the union, and the rule of decision is the same in all. In the exercise of that jurisdiction, the courts of the United States are not governed by the state practice; but the act of congress of 1792, ch. 36, has provided that the modes of proceeding in equity suits shall be according to the principles, rules and usages which belong to courts of equity, as contradistinguished

> from courts of law. And the settled doctrine of this court is, that the remedies in equity are to be administered, not according to the state practice, but according to the practice of courts of equity in the parent country, ...

The majority opinion in *Ankenbrandt*, after analyzing the domestic relations exception, concluded that the Court had jurisdiction because the case involved a tort removing it from the domestic relations exception. Ankenbrandt, a citizen of Missouri, had brought suit in Louisiana on behalf of her daughters against Richards (ex-husband and father) and Kesler (friend of ex-husband), citizens of Louisiana, seeking monetary damages alleging sexual and physical abuse. 504 U.S. at 691. Hence, there was diversity jurisdiction.

The majority opinion in *Ankenbrandt* stated:

> An examination of Article III, *Barber* itself, and our cases since *Barber* makes clear that the Constitution does not exclude domestic relations cases from the jurisdiction otherwise granted by statute to the federal courts.
>
> . . . .
>
> This section [Article III, § 2] delineates the absolute limits on the federal courts' jurisdiction. But in articulating three different terms to define jurisdiction—"Cases, in Law and Equity," "Cases," and "Controversies"—this provision contains no limitation on subjects of a domestic relations nature.

Id. 504 U.S. at 695. The Court then based its conclusion that there is a domestic relations exception to jurisdiction in diversity cases on the historical under-

standing of the statute, 28 U.S.C. § 1332. "We conclude, therefore, that the domestic relations exception, as articulated by this Court since *Barber,* divests the federal courts of power to issue divorce, alimony, and child custody decrees." *Id.* 504 U.S. at 703.

Justice Blackmun wrote a concurring opinion; he concurred in the judgment, but not in the reasoning. Justice Blackmun would have based the opinion on a theory of abstention rather than on a theory of jurisdiction. He argued, *inter alia*, that by the majority basing their opinion on interpretation of the statute granting diversity jurisdiction, 28 U.S.C. § 1332, and the clause referencing law and equity, that a similar interpretation would apply to the constitutional grant of federal question jurisdiction, to wit:

> Like the diversity statute, the federal question grant of jurisdiction in Article III of the Constitution limits the judicial power in federal question cases to "Cases, in Law and Equity." Art. III, § 2. Assuming this limitation applies with equal force in the constitutional context as the Court finds today that it does in the statutory context, the Court's decision today casts grave doubts upon Congress' ability to confer federal question jurisdiction (as under 28 U.S.C. § 1331) on the federal courts in any matters involving divorces, alimony, and child custody."

Id. at 715, fn. 8.

Blackstone Commentaries[5] is an early text on the law of England. Under the general topic of Husband

[5] *Blackstone Commentaries* were written by Sir William Blackstone, an Englishman, in the 1700's. The *Commentaries* are a treatise giving the English Common Law in a four volume set.

and Wife, on how marriages may be made, *Blackstone* states:

> Our law considers marriage in no other light than as a civil contract. The *holiness* of the matrimonial state is left entirely to the matrimonial law: The temporal courts not having jurisdiction to consider unlawful marriages as a sin, but merely as a civil inconvenience. The punishment therefore, or annulling, of incestuous or other unscriptural marriages, is the province of the spiritual courts; which act *Pro salute animae* . . . . And, taking it in this civil light, the law treats it as it does all other contracts: allowing it to be good and valid in all cases, where the parties at the time of making it were, in the first place, *willing* to contract; secondly, *able* to contract; and, lastly, actually *did* contract, in the proper forms and solemnities required by law.

1 William Blackstone Commentaries *434-435.

In addressing the disabilities or incapacities to contract, Blackstone further states:

> Now these disabilities are of two sorts: first, such as are canonical, and therefore sufficient by the ecclesiastical laws to avoid the marriage in the spiritual court; but these in our law only make the marriage voidable, and not *ipso facto* void, until sentence of nullity be

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They have been regularly referenced by the United State Supreme Court from before and including *Marbury v. Madison*, 5 U.S. 137, 163-169 (1803) through the majority and dissenting opinions in the case of *Obergefell*. Citations herein are from the St. George Tucker Edition (1803), as published by Rothman Reprints, Inc. and Augustus M. Kelley Publishers, 1969.

> obtained. Of this nature are pre-contract; consanguinity, or relation of blood; and affinity, or relation by marriage; and some particular corporal infirmities. . . . These canonical disabilities being entirely the province of the ecclesiastical courts, our books are perfectly silent concerning them.

1 William Blackstone Commentaries *434-435.

Blackstone, in addressing the dissolution of marriages stated: "And no marriage is *voidable* by the ecclesiastical law, after the death of either of the parties; nor during their lives, unless for the canonical impediments of pre-contract, if that indeed still exists; of consanguinity; and of affinity, or corporal imbecility, subsisting previous to the marriage." 1 *William Blackstone Commentaries* *440. Corporal imbecility is the physical inability to perform completely the act of sexual intercourse.[6] *Blackstone* distinguishes corporal imbecility arising after marriage from that existing before marriage.

> *A* total divorce, *a vinculo matrimonii*¸ must be for some of the canonical causes of impediment before-mentioned; and those, existing *before* the marriage*,* as is always the case in consanguinity; not supervenient, or arising *afterwards,* as may be the case in affinity or corporal imbecility. For in cases of total divorce, the marriage is declared null, as having been absolutely unlawful *ab initio*;

[6] *Black's Law Dictionary* 408 (4th ed. 1968) defines corporal imbecility: "Physical inability to perform completely the act of sexual intercourse; not necessarily congenital, and not invariably a permanent and incurable impotence."

> and the parties are therefore separated *pro salute animarum* . . . .

1 *William Blackstone Commentaries* *440. Matters that went to the capacity to marry, such as corporal imbecility existing prior to marriage, are dealt with in the ecclesiastical court.

In *Reynolds v. U.S.*, 98 U.S. 145, 165 (1879), the Court stated: "[U]pon the separation of the ecclesiastical courts from the civil the ecclesiastical were supposed to be the most appropriate for the trial of matrimonial causes and offences against the rights of marriage**,** just as they were for testamentary causes and the settlement of the estates of deceased persons."

The area of probate brings on similar considerations. Probate matters in England were in the jurisdiction of the Ecclesiastical Courts. III *Blackstone's Commentaries* *65-66. *In Case of Broderick's Will*, 88 U.S. 503 (1875) the Supreme Court considered whether the federal court had jurisdiction of a bill to set aside the probate of a will in the Probate Court of the City and County of San Francisco on the ground of forgery and fraud. There the court stated: "It seems, therefore, to be settled law in England that the court of chancery will not entertain jurisdiction of questions in relation to the probate or validity of a will which the ecclesiastical court is competent to adjudicate. It will only act in cases where the latter court can furnish no adequate remedy." *Id*. 88 U.S. at 512.

Marshall v. Marshall, 547 U.S. 293 (2006) addressed the 'probate exception'. Justice Ginsberg, writing for the Court, noted that *Ankenbrandt* had "reined in" (547 U.S. at 299) the 'domestic relations exception' but yet acknowledged that divorce, alimony, and child custody decrees "remain outside federal jurisdictional

bounds." 547 U.S at 308. *Marshall* also noted that the case of *Markham v. Allen*, 326 U.S. 490 (1946) had similarly attempted to "curtail" (*Marshall,* 547 U.S. at 299) the 'probate exception'. Yet, the probate exception remains to reserve "to state probate courts the probate or annulment of a will and the administration of a decedent's estate; it also precludes federal courts from endeavoring to dispose of property that is in the custody of a state probate court. But it does not bar federal courts from adjudicating matters outside those confines and otherwise within federal jurisdiction." *Marshall,* 547 U.S. at 311-312.

The Court's jurisdiction in *Marshall* was premised on an underlying bankruptcy case and 28 U.S.C. § 1334. The Court did not determine whether there existed a probate exception in bankruptcy matters because the claim fell outside the probate exception. "We therefore need not consider in this case whether there exists any uncodified probate exception to federal bankruptcy jurisdiction under § 1334." *Marshall*, 547 U.S. at 308-309.

Judge Posner, in *Jones v. Brennan*, 465 F.3d 304, 307 (7th Cir. 2006), addressed the question of whether the probate exception would apply to issues presented under federal question jurisdiction. The Seventh Circuit held that the probate exception did apply to federal question jurisdiction, to wit:

> When Congress in the Judiciary Act of September 24, 1789, § 11, 1 Stat. 73, conferred on the federal courts a diversity jurisdiction limited to 'all suits of a civil nature at common law or in equity,' which is narrower than Article III's definition of the federal judicial power, probate and domestic relations were, the courts interpreting the statute

> held, excluded because they were thought to be part of neither common law nor equity. (Citations omitted) "Congress used the same language when in the Judiciary Act of March 3, 1875, § 1, 18 Stat. 470, it conferred a general federal-question jurisdiction on the federal courts, by which time the probate and especially the domestic-relations exceptions had become established in the case law. (Citations omitted) The implication is that the exceptions were probably intended to apply to federal-question cases too.

Id. at 307. The court concluded that there was no reason to give a different meaning to the identical language in the diversity and federal question statutes. *Id.* at 307.

As previously noted *Obergefell* came to the Supreme Court by certiorari under 28 U.S.C. § 1254 from the Sixth Circuit Court of Appeals. The Sixth Circuit case, *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), was a consolidation of district court cases from the states of Michigan, Ohio, Tennessee, and Kentucky. Six district court cases were before the United State Supreme Court, two cases from Ohio, *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968 (S.D. Ohio 2013) and *Henry v. Himes*, 14 F. Supp. 3d 1036 (S.D. Ohio 2014); one case from Michigan, *DeBoer v. Snyder*, 973 F. Supp. 2d 757 (E.D. Mich. 2014); one from Tennessee, *Tanco v. Haslam*, 7 F. Supp. 3d 759 (M.D. Tenn. 2014); and two from Kentucky, *Love v. Beshear*, 989 F. Supp. 2d 536 (W.D. Ky. 2014) and *Bourke v. Beshear*, 996 F. Supp. 2d 542 (W.D. Ky. 2014). Two of the six cases (*Love* and *DeBoer*) addressed in-state marriages; the other four cases were recognition cases where marriages had been performed out-of-state. The district courts'

statutory grants of jurisdiction for in-state marriage cases based upon the Fourteenth Amendment would be found in 28 U.S.C. §1331 (Federal Question) or possibly 28 U.S.C. §1343 (Civil Rights). Each district court case noted the constitutional provisions upon which the case was based, but did not specify its statutory grant of jurisdiction. None of the district court cases gave consideration to the domestic relations exception to the court's jurisdiction.

The grant of federal question jurisdiction reads: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. §1331. Prior to 1948, the "civil actions" read as "all suits of a civil nature, at common law or in equity." June 25, 1948, ch. 646, 62 Stat. 930; Judiciary Act of March 3, 1875, § 1, 18 Stat. 470.[7] This is true as well as to 28 U.S.C. §1343 under civil rights jurisdiction. June 25, 1948, ch. 646, 62 Stat. 932; Mar. 3, 1911, c. 231, § 24, pars. 12, 13, 14, 36 Stat. 1092. Sixty-First Congress. Sess. III. Ch. 231, Chapter 2 Sec. 24, par. 14 reads: "The district courts shall have original jurisdiction as follows: . . . Fourteenth. Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage of any State, of any right, privilege, or immunity, secured by the Constitution of the United States . . . ." Thus, the same logic that Judge Posner applied in *Jones v. Brennan* to the probate exception would apply to the domestic relations exception. The federal court would lack jurisdiction where the domestic relations excep-

[7] Forty-Third Congress. Sess II Chap. 137, March 3, 1875.

tion applied notwithstanding that there might otherwise seem to be federal question jurisdiction or civil rights jurisdiction.[8]

In *Obergefell* the Supreme Court did not address the issue of jurisdiction, but assumed that the district courts had jurisdiction pursuant to the grants in 28 U.S.C. §§ 1331 or 1343, and that it thus had jurisdiction pursuant to its grant to take appeals in 28 U.S.C. § 1254(1). While subject matter jurisdiction may be questioned at any time during the case or its appeal, it is not subject to collateral attack. *Kontrick v. Ryan*, 540 U.S. 443, 459 fn. 9 (2004); *Travelers Indemnity Co. v. Bailey*, 557 U.S. 137, 152-155 (2009). Nevertheless, the issue can be addressed in subsequent cases and appeals. "When questions of jurisdiction have been passed on in prior decisions *sub silentio,* this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us." *Hagans v. Lavine*, 415 U.S. 528, 533, n. 5 (1974).

The decision of who can marry is a matter that is totally matrimonial. The question of whether two men or two women may marry falls squarely into that category. *Ankenbrandt* held, based on its interpretation of 28 U.S.C. § 1332, that there is a domestic relations exception from the jurisdiction of federal district courts in matters purely matrimonial. The question of whether the joining of two men or two women can constitute a marriage is purely matrimonial, just as voiding a marriage *ab initio* for corporal imbecility existing before the marriage was a matter

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[8] Other circuits have held that the domestic relation exception applies only to cases under federal diversity jurisdiction. *See e.g. Atwood v. Fort Peck Tribal Ct. Assiniboine*, 513 F.3d 943, 947 (9th Cir. 2008).

that went before the ecclesiastical court in the time of Blackstone.

In *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83 (1998), the Court held that in all but the rarest of exception, the matter of jurisdiction shall be determined by the Court before any other matter including even whether the complaint states a cause of action. In *Steel Co.* the Article III jurisdictional requirement of having a case and controversy was required to be determined before deciding whether the case stated a cause of action. In rebutting a practice used by the Ninth Circuit of "assuming" jurisdiction for the purpose of deciding the merits, the Court stated:

> We decline to endorse such an approach because it carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers. . . . "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause. *Ex parte McCardle,* 7 Wall. 506, 514 (1869).

Id. at 94. Moreover, if a lower court lacks jurisdiction, so does the appellate court.

> 'And if the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it. [When the lower federal court] lack[s] jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error

> of the lower court in entertaining the suit.' (Citations omitted) (brackets in original).

Id. at 95. Additionally, the Court points out how very fundamental and important it is within our federal system that the Court determines its proper jurisdiction, to wit:

> Much more than legal niceties are at stake here. The statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects. [Citations omitted.] For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires.

Id. at 101-102 (parentheses in original; brackets added).

In summary, based on the interpretation of the statutory grant of diversity jurisdiction in 28 U.S.C. § 1332, *Ankenbrandt v. Richards* held that there continues to exist a domestic relations exception to federal court jurisdiction. There is also a recognized exception to federal court jurisdiction in probate matters as noted in *Marshall v. Marshall.* In the Seventh Circuit case of *Jones v. Brennan* when the question arose in a probate matter as to whether the probate exception applies when federal question jurisdiction was claimed under 28 U.S.C. § 1331, the court concluded that the exception did apply because of the similarity in the history of the two statutes, as both originally had clauses referencing "at common law and in equity."

The civil rights jurisdictional statute, 28 U.S.C. § 1343, is also due to be given a similar interpretation because it too originally had a clause referencing "at law and in equity." Applying the case of *Ankenbrandt* and the logic of *Jones*, the district courts in the *Obergefell* case did not have jurisdiction under 28 U.S.C. §§ 1331 or 1343 to hear the in-state same sex marriage cases alleged to be violations of the Fourteenth Amendment, and hence, nor did the Supreme Court have jurisdiction in *Obergefell*. When the lower federal court lacks jurisdiction, then so does the appellate court lack jurisdiction, in this case the United States Supreme Court.

When the domestic relations exception applies, it applies notwithstanding that there might otherwise seem to be jurisdiction under diversity or federal question or civil rights. The decision of *Obergefell* changed the definition of marriage from being exclusively between a man and a woman, as it had "existed for millennia and across civilizations." *Obergefell*, 135 S. Ct. at 2594. Because the district courts lacked jurisdiction due to the domestic relations exception to jurisdiction the United States Supreme Court in *Obergefell* lacked subject matter jurisdiction over the issue of whether marriage may include two men or two women.

Yet, while the federal district courts, and hence the United State Supreme Court, would lack subject matter jurisdiction, a similar case might be brought to the United States Supreme Court through the state courts. State courts have concurrent jurisdiction over 42 U.S.C. § 1983 actions.[9] *Howlett v. Rose,* 496 U.S. 356, 358

[9] 42 U.S.C. § 1983 is not a statute granting jurisdiction to a federal court. The statute provides a basis for a cause of action. Jurisdiction would still have to be based upon 28 U.S.C. §§ 1331,

(1990) ("State courts as well as federal courts have jurisdiction over § 1983 cases."); *Treatise on Constitutional Law,* 5th Ed. Rotunda and Nowak, § 19.15(c). Appeal to the Supreme Court would be by writ of certiorari pursuant to 28 U.S.C. §1257.

An objection to the United States Supreme Court's jurisdiction of a state court case coming to them by writ of certiorari would have to arise from Article III, Section 2, of the Constitution. As previously noted, Justice Blackmun, in his concurrence in *Ankenbrandt*, suggested that the Court's interpretation of the "at common law and in equity" clause in 28 U.S.C. § 1332 would apply equally to the language in Article III, Section 2 ("in Law and Equity") of the Constitution. 504 U.S. at 715, fn. 8. Notwithstanding the dicta in *Ankenbrandt* "that the Constitution does not exclude domestic relations cases from the jurisdiction otherwise granted by statute to the federal courts," *id.* at 695, there has not yet been a direct ruling on whether the "in Law and Equity" clause in Section 2 of Article III would directly limit the Court's subject matter jurisdiction over marriage in a case brought to the court through the appeal of a state case.

Nevertheless, *Obergefell* came to the Court through the federal courts. *Obergefell* was decided by the Court without having proper subject matter jurisdiction.

CONCLUSION

Will this Court, at a same-sex marriage, force the florist to prepare the flowers[10], the baker to provide the

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1332, or 1343. *Treatise on Constitutional Law,* 5th Ed. Rotunda and Nowak, § 19.15(a).

[10] *See State v. Arlene's Flowers, Inc.,* 389 P.3d 543 (Wash. 2017).

cake, the caterer to bring the food, the photographer to take the pictures[11], and the band to play the music?

The applicable test in this case is one of strict scrutiny. There should be a judicial exemption or accommodation applied unless the state can provide compelling reasons narrowly tailored that would forbid an exemption. Mr. Phillips should not be required to provide a wedding cake to a same-sex marriage.

Obergefell should not stand as precedent. It was decided by the Court without proper jurisdiction of the matter.

Respectfully submitted,

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[11] *See Elane Photography, LLC v. Willock,* 309 P.3d 53 (N.M. 2013).