

A More Perfect Union

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“No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family.... Marriage embodies the love that endures even past death.”¹ Justice Anthony Kennedy wrote these words in *Obergefell v. Hodges*’ majority opinion, and Jim Obergefell repeated them in each of the nine wedding ceremonies he performed since the 2015 decision.² The man who officiated those weddings did not seek fame but rather simple recognition on his late husband’s death certificate. John Arthur, Obergefell’s partner for over twenty years, would have been labeled “single” in death if the Supreme Court upheld the Ohio Constitution’s rejection of same-sex marriages. Obergefell was not a militant activist in this fight, he was a solitary widower, a “pensive man who ... made love and loss seem transcendent, not gay or straight, but infinitely human;” he was an ideal litigant for establishing same-sex couples’ right to marry, winning the most significant battle in LGBT+ history.³ The *Obergefell* legal team effectively utilized sympathetic plaintiffs for victory at the Supreme Court, capitalizing on strategies that the gay rights movement had honed over almost a century of activism.

While the *Obergefell* plaintiffs reflected disparate backgrounds and geographic origins, their commonalities went far beyond sexual orientation. Thirty-three gay men and women, seven of their children, a funeral director, and an adoption agency sued their respective states over denial of their Fourteenth Amendment due process rights, violated when they were refused

¹ *Obergefell v. Hodges*, 576 U.S. ___ (2015).

² Tyler Foggat, “Jim Obergefell Reads from the Book of Justice Kennedy,” *The New Yorker*. July 23, 2018, <https://www.newyorker.com/magazine/2018/07/23/jim-obergefell-reads-from-the-book-of-justice-kennedy>.

³ Debbie Cenziper and Jim Obergefell, *Love Wins: The Lovers and Lawyers who fought the landmark case for marriage equality* (New York: Harper Collins, 2016), 209.

the right to marry in their state and/or have their marriages from other states recognized.⁴ A strategic sense of immediacy expedited the process, urging this case through the courts. Jim Obergefell initiated his case when his husband was dying of ALS, knowing that Ohio would not recognize their marriage on John Arthur's death certificate. Just two years prior, *U.S. v. Windsor* had established federal recognition of gay marriages, invalidating the Defense of Marriage Act because "DOMA undermines both the public and private significance of state-sanctioned same-sex marriages; for it tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition."⁵ *Obergefell* sought to apply the same logic to the thirteen states that banned same-sex marriage. Ohio had a "celebration law," meaning that, for most marriages, if it was performed legally in another state, Ohio recognized it. This applied to cases of cousin and underage marriages, for example; however, Ohio's Constitution specifically banned the performance or recognition of same-sex marriages, so the Ohio defendants' relationships were excluded from the celebration law.⁶ This provided standing to petition for a *writ of certiorari*, taking the case to the highest court in the country.

Though James Obergefell became the named plaintiff by happenstance, he provided the ideal face for the case. Michael Nesline, a member of the 1980's Gran Fury artist collective, noted that white men were uniquely equipped to lobby for change in the gay revolution: "We're middle class white guys and we're not used to being ignored and so what can we do to get what we want? And what we want is for other people to know what's going on."⁷ Obergefell was white, single, forty-nine years old and of medium build. The only gay plaintiff who was not part of a couple, he spoke alone, minimizing pictures of a same-sex couple holding hands or with

⁴ "In Your State." Lambda Legal, accessed October 28, 2018. <https://www.lambdalegal.org/states-regions/in-your-state>

⁵ *United States v. Windsor*, 570 U.S. ____ (2013)

⁶ Ohio Const. art. 15, pt 11.

⁷ Linda Hershman. *Victory: The Triumphant Gay Revolution* (New York: HarperCollins, 2010), 196.

their families at the heart of the case. Massachusetts was the first state to establish gay marriage, a precedent set by its courts and expanding to thirty-seven states through legislative and judicial action by the time *Obergefell* went to the Supreme Court in 2015; however, in that time thirteen states explicitly banned gay marriage, and the federal government passed the Defense of Marriage Act to attempt to limit marriage to heterosexual couples.⁸ Widower Jim Obergefell was uniquely situated to tug at the legal and emotional heartstrings of the American public and change the tide of homophobic public opinion.

While traditional views of marriage were evolving, the revolution was slow and best suited to a figurehead who did not discomfort audiences. During oral arguments Obergefell dressed in a conservative suit with a plaid shirt and tie, a far cry from the lavender bow-tie and equality pin that he wore the day the Court announced its decision.⁹ This change in apparel reflected Obergefell and his lawyers' cultivation of a sympathetic plaintiff as well as the historical significance of clothing in the gay rights movement. In the early twentieth century, gaudy suits, red neckties, and perfumed handkerchiefs were a safe way to signal sexual orientation to other men. Masquerade balls in New York City provided safe cover for homosexual relationships.¹⁰ These cultural practices fostered a community of bold sartorial choices that continue to be a hallmark of the modern gay culture. As the lawyers and plaintiffs sought to emphasize how similar they were to other Americans, however, those hallmarks took a backseat. Robert Duncan's 1944 Beat Poet manifesto argued that gay rights were human rights but that separatism did not accomplish the movement's goals. Majority culture balked at homosexual attitudes, criticising "the cultivation of a secret language, the camp, a tone and a

⁸ "Petitioners' Brief." Lambda Legal, accessed November 2, 2018. https://www.lambdalegal.org/in-court/legal-docs/henry_oh_20150227_petitioners-brief

⁹ Foggat, "Jim Obergefell Reads."

¹⁰ George Chauncey. *Gay New York: Gender, Urban Culture, and the Making of the Gay Male World, 1890-1940*, (New York: Basic Books, 1995), 286.

vocabulary that are loaded with contempt for the uninitiated... designating all who are not wise to homosexual ways, filled with an unwavering hostility and fear, gathering an incredible force of exclusion and blindness.”¹¹ Duncan would have approved of Obergefell’s discretion when appearing in front of the court.

Financial backing played a significant role in the LGBT+ movement, and the plaintiffs in *Obergefell*, accordingly, were upper class Americans. John Arthur came from a wealthy family, his mother buying a Victorian mansion for her son and his partner when they moved in together in Cincinnati, a city with an ordinance explicitly forbidding protections for homosexuals. The lavish purchase was reminiscent of gay New Yorkers who, finding increased criminalization of their lifestyle in the 1930’s, “used the power of their New York dollars during the Depression to buy property from the small, wary straight community that was there [on Fire Island].”¹² Obergefell and Arthur were “tastemakers,” travelling abroad, hosting lavish parties, and patronizing local artists. Arthur tailored velcro shirts and paid for in-home care when his health deteriorated; wealthy friends helped finance the \$14,000 medical flight to get married on a Maryland tarmac in Arthur’s final weeks.¹³ Likewise, when the Human Rights Campaign Fund formed as the first prominent Political Action Committee supporting gay rights, heirs to corporate windfalls like James Hormel and Dallas Coors financed its efforts. They transformed the gay rights movement “from the leather-clad SDS alums of the Gay Liberation Front to an elite club of the richest gay men in America.” The HRC successfully lobbied for federal funding to fight the AIDS crisis and discriminatory hiring practices decades before it financed efforts in

¹¹ Robert Duncan. “A Homosexual in Society,” in *A Selected Prose*, ed. Robert J. Bertholf (New York: New Directions Publishing, 1995), 41.

¹² Hershman, *Victory*, 12.

¹³ Cenziper, *Love Wins*, 109, 119.

Obergefell v. Hodges, demonstrating that maneuvering from within the political system was more effective than protesting from outside of it.¹⁴

The sixteen couples who also participated in the case came from diverse, but largely affluent, backgrounds. One couple met in veterinarian school, another were a pair of nurses. Joe Vitale was an insurance salesman. Pam Yorksmith and her wife Nicole ran a technology consulting company and worked in human resources, respectively. Verleria Tanco and Sophy Jesty were professors. Many of the couples had adopted children, seven of whom were named in the case. According to American Adoptions, the largest adoption agency in the United States, it costs between thirty and forty thousand dollars to adopt a child.¹⁵ These affluent white and hispanic plaintiffs represented complaints from sixth circuit states of Michigan, Ohio, Kentucky, and Tennessee. Other federal circuits had ruled in favor of same-sex marriage recognition, so when the sixth circuit ruled against the plaintiffs it provided a conflict into which the Supreme Court was more likely to wade. Ultimately, the sixth circuit court loss was a victory because it ushered same-sex marriage to the Supreme Court. The national effort also brought in more financial backing from support groups like the Human Rights Campaign and Lambda Legal, resulting in the mobilization of a 148 *amicus curiae*, including one signed by 379 employers asserting their companies “are better served by a uniform marriage rule that gives equal dignity to employee relationships. Allowing same-sex couples to marry improves employee morale and productivity, reduces uncertainty, and removes the wasteful administrative burdens imposed by

¹⁴ Hershman, *Victory*, 161.

¹⁵ “Comparing the Costs of Domestic, International, and Foster Care Adoptions,” *American Adoptions*, accessed November 2, 2018, https://www.americanadoptions.com/adopt/the_costs_of_adopting

the current disparity of state law treatment.”¹⁶ The plaintiffs’ financial success mirrored many businesses’ belief in the value of an inclusive workplace.

Obergefell saw friends in the gay community lose the fight against AIDS; their deterioration looked eerily similar to his husband’s progression through ALS. AIDS spread in staggering numbers throughout the 1980s as men embraced the same-sex rights that had been slowly afforded in the Civil Rights Era. Many gay men bristled at requests to curb their sexuality or wear prophylactics to prevent infection because it inhibited the freedoms they had finally won. Though the Reagan administration ignored the issue both publicly and financially, organizations like Lambda Legal and ACT UP successfully lobbied the FDA to approve four new drugs to combat the virus and its effects. As Radical Faeries co-founder Arthur Evans said, they had to “have institutional continuity and revolutionary energy... They combined the rationality of the enlightenment with the vigor of a popular uprising.”¹⁷ Over the past ten years alone, HIV infection rates have dropped by almost twenty percent among gay and bisexual men, though AIDS has taken the lives of 448,000 people since its emergence in 1983.¹⁸

John Arthur’s ALS shared characteristics with the way AIDS ravages the system, slowly deteriorating the body. Over six feet tall, he weighed one hundred pounds in his final weeks; a friend mistook his 100.2 weight for a blood-pressure reading.¹⁹ The neurodegenerative disease is characterized by increasing paralysis that ultimately spreads to vital organs and kills the patient. Lou Gehrig’s disease, as ALS was traditionally known, was masculinized by the fact that it was named for a renowned baseball player; unlike HIV/AIDS, it did not carry sexual stigma or moral

¹⁶ Meghan Rhea, “14-556 et al. 379 Employers and Organizations Representing Employers,” amici curiae in *Obergefell v. Hodges*, 576 U.S. __ (2015), 18.

¹⁷ Hershman, *Victory*, 116.

¹⁸ “Statistics Center: HIV/AIDS,” *Centers for Disease Control and Prevention*, last modified May 25, 2018. <https://www.cdc.gov/hiv/statistics/index.html>

¹⁹ Cenziper, *Love Wins*, 153.

judgement. Though it is a clinical analysis in the case of a heartbreaking situation, the fact that ALS rather than AIDS widowed Obergefell made him a more sympathetic plaintiff. As Obergefell noted, “I think John's and my story resonated with people. Everyone loves someone and everyone loses someone they love ... I think the fact that we had a compelling story made it real for people across the country and ... that had a big part in changing hearts and minds, not just in courtrooms, but also of our fellow Americans.”²⁰

Historians both laud Justice Kennedy as “the first gay Supreme Court Justice,” and criticize his opinion for emphasizing rather than legal arguments.²¹ As Ruthann Robson notes, “It would be difficult to argue that Justice Kennedy’s opinion for the Court in *Obergefell v. Hodges* is doctrinally rigorous.”²² She posits that, had Ginsburg written for the majority, she would have remedied this shortcoming by more substantially elucidating a Fourteenth Amendment due process and equal protection argument in an opinion that “would have been more doctrinally rigorous; it would have been less sentimental; and it would have jurisprudential integrity.”²³ Neglecting those standards put the case at risk of being overturned by a more conservative court. Kennedy’s reliance on a substantive due process argument “composed of vacuous pseudo-sophisticated -aphorisms [regarding the Fourteenth Amendment]... is contrary to all evidence of historical understandings at the time the amendment was adopted,” argues University of St. Thomas Law School professor Michael Stokes Paulsen.²⁴ This historiography further supports the power of a sympathetic plaintiff, since it appears to have been intuition that

²⁰ Emma Albirici, “Interview: Jim Obergefell, Same-Sex Marriage Campaigner,” ABC Lateline Australia, Nov 1, 2016, <https://www.abc.net.au/lateline/interview:-jim-obergefell,-same-sex-marriage/7986588>

²¹ Foggot, “Obergefell Reads.”

²² Ruthann Robson, “Justice Ginsburg’s *Obergefell v. Hodges*,” *University of Missouri-Kansas City Law Review*, (November 9, 2015): 4. <https://ssrn.com/abstract=2693361>

²³ *Ibid*, 3.

²⁴ Michael Stokes Paulson, “The Wreckage of *Obergefell*,” *First Things: A Journal of Religious and Public Life*, no. 256 (October): 33–40. <https://search-ebSCOhost-com.ezproxy.mnsu.edu/login.aspx?direct=true&db=aph&AN=109545294&site=ehost-live>.

won over the swing vote rather than a democratic or constitutional argument. The *Obergefell* lawyers played on emotion in their brief, referring to Obergefell and Arthur as a couple who “fell deeply in love” before “tragedy struck,” and, “Because Ohio would not permit them to marry, family and friends opened their hearts and wallets so the couple could travel to Maryland on a medically-equipped plane and marry there... It was a joyous moment, but cruelly short-lived.”²⁵ Kennedy’s majority opinion mirrors this sentimental approach.

Precedent and standing are integral components of success at the Supreme Court, but lawyers can more easily capitalize on them if they are seated with a sympathetic plaintiff. The Supreme Court’s decision to deny states the right to treat gay men and women second-class citizens was the culmination of almost a century of activism. Jim Obergefell did not see it that way, but rather that “John’s and my fight... is about love, dignity, rights and respect. Nothing more, nothing less.”²⁶ Their fight legitimized not only their own twenty-one year relationship, but the Preamble’s commitment “to form a more perfect Union.”²⁷

Bibliography

Albirici, Emma, “Interview: Jim Obergefell, Same-Sex Marriage Campaigner.” *ABC Lateline Australia*. Nov 1, 2016. <https://www.abc.net.au/lateline/interview:-jim-obergefell,-same-sex-marriage/7986588>

²⁵ Alphonse A. Gerhardstein, “Reply brief of petitioners Jim Obergefell, et al, and Britni Henry, et al,” *Obergefell v. Hodges*, 576 U.S. __ (2015), 21 https://www.supremecourt.gov/ObergefellHodges/PartyBriefs/14-556_Brief_Of_Obergefell.pdf.

²⁶ Steven Petrow, “Jim Obergefell on What’s Next for Him and the LGBT Community,” *The Washington Post*, June 29, 2015, https://www.washingtonpost.com/lifestyle/style/civilities-jim-obergefell-on-whats-next-for-him-and-the-lgbt-community/2015/06/29/f8af51b0-1ea0-11e5-bf41-c23f5d3face1_story.html

²⁷ U.S. Constitution, pmbl.

Cenziper, Debbie and Jim Obergefell. *Love Wins: The Lovers and Lawyers Who Fought the Landmark Case for Marriage Equality*. New York: Harper Collins, 2016.

Chauncey, George. *Gay New York: Gender, Urban Culture, and the Making of the Gay Male World, 1890-1940*. New York: Basic Books, 1995.

“Comparing the Costs of Domestic, International, and Foster Care Adoptions.” *American Adoptions*. Accessed November 2, 2018.

https://www.americanadoptions.com/adopt/the_costs_of_adopting

Duncan, Robert. “A Homosexual in Society,” in *A Selected Prose*, edited by Robert J. Bertholf, 38-50. New York: New Directions Publishing, 1995.

<https://books.google.com/books?id=J3XouvQbfkYC&lpg>

Foggat, Tyler. “Jim Obergefell Reads from the Book of Justice Kennedy.” *The New Yorker*. July 23, 2018. <https://www.newyorker.com/magazine/2018/07/23/jim-obergefell-reads-from-the-book-of-justice-kennedy>.

Gerhardstein, Alphonse A. “Reply brief of petitioners Jim Obergefell, et al, and Britni Henry, et al,” *Obergefell v. Hodges*, 576 U.S. ___ (2015).

https://www.supremecourt.gov/ObergefellHodges/PartyBriefs/14-556_Brief_Of_Obergefell.pdf.
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Lambda Legal. Accessed November 2, 2018. <https://www.lambdalegal.org/>

Obergefell v. Hodges, 576 U.S. ___ (2015).

Petrow, Steven. “Jim Obergefell on What’s Next for Him and the LGBT Community.” *The Washington Post*. June 29, 2015. https://www.washingtonpost.com/lifestyle/style/civilities-jim-obergefell-on-whats-next-for-him-and-the-lgbt-community/2015/06/29/f8af51b0-1ea0-11e5-bf41-c23f5d3face1_story.html

Robson, Ruthann. “Justice Ginsburg’s *Obergefell v. Hodges*.” *University of Missouri-Kansas City Law Review* (November 9, 2015): 1-29. <https://ssrn.com/abstract=2693361>

Stokes Paulsen, Michael. 2015. “The Wreckage of Obergefell.” *First Things: A Monthly Journal of Religion & Public Life*, no. 256 (October): 33–40. <https://search-ebSCOhost-com.ezproxy.mnsu.edu/login.aspx?direct=true&db=aph&AN=109545294&site=ehost-live>.

“Statistics Center: HIV/AIDS.” *Centers for Disease Control and Prevention*. Last modified May 25, 2018. <https://www.cdc.gov/hiv/statistics/index.html>

United States v. Windsor, 570 U.S. ___ (2013)