No. 14-5297

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

A VALERIA TANCO, et al.,
Plaintiffs-Appellees,

v.

WILLIAM EDWARD "BILL" HASLAM, as Governor of the State of Tennessee, in his official capacity, et al.,
Defendants-Appellants.

On Appeal from the United States District Court for the Middle District of Tennessee, No. 3:13-cv-01159
(Hon. Aleta Arthur Trauger)

BRIEF OF AMICUS CURIAE COLUMBIA LAW SCHOOL SEXUALITY AND GENDER LAW CLINIC IN SUPPORT OF PLAINTIFFS-APPELLEES

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INTEREST OF AMICUS CURIAE

The Columbia Law School Sexuality and Gender Law Clinic (the Clinic or Amicus), founded in 2006, is the first such clinical law program at an American law school. The Clinic has extensive expertise in the constitutional doctrine related to marriage and family recognition. In fact, the Clinic previously submitted an amicus brief on closely-related due process issues to the Fourth Circuit in *Bostic v. Schaefer*, Case No. 14-11647 (pending appeal) and the Ninth Circuit in *Sevcik v. Sandoval*, No. 12-17668 (9th Cir.) (pending appeal). The Clinic has also submitted amicus briefs in numerous other cases seeking to end the exclusion of same-sex couples from marriage and the exclusion of same-sex couples' marriages from legal recognition including *United States v. Windsor*, 133 S. Ct. 2675 (2013), and *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), at the U.S. Supreme Court, and before state supreme courts in California in *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), Connecticut in *Kerrigan v. Commissioner of Public Health*, 957 A.2d 407 (Conn. 2008), and Iowa in *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

The Clinic's interest here is in addressing the relation between state laws governing marriage within in the Sixth Circuit and the U.S. Constitution's due process guarantee. As this amicus brief shows, the protection of individual decisionmaking in matters as personally important as marriage is reflected throughout the marriage laws of Kentucky, Michigan, Ohio, and Tennessee.

Together, these laws impose few restrictions, apart from the ones at issue here, on adults' choice of marital partners and on the recognition of valid marriages. By contrast, the law in each of these states imposes a singular, categorical and constitutionally impermissible burden on lesbians and gay men who seek to exercise their fundamental right to marry their chosen partner and to have that marriage recognized.[1]

SUMMARY OF THE ARGUMENT

Marriage laws in Kentucky, Michigan, Ohio and Tennessee are largely consistent with the Due Process Clause of the U.S. Constitution, which the Supreme Court has recognized repeatedly as protecting "freedom of choice" in marriage. That is, these states' extensive domestic relations frameworks generally take pains to avoid restrictions on individuals' ability to marry the person of their choice. States likewise impose few restrictions on the choices of married couples, other than forbidding abusive conduct. No state, either in the Sixth Circuit or elsewhere,

[1] No counsel for a party authored this brief in whole or in part, and no one other than amicus, its members, or its counsel made any monetary contribution toward the brief's preparation or submission. All parties to this appeal have consented to this brief's filing.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus*, its members, or its counsel made a monetary contribution to its preparation or submission.

imposes rules requiring or even suggesting distinct roles for male and female spouses within a marriage.

Matters stand otherwise with respect to individuals who would choose a spouse of the same sex. Freedom of choice is absent here. The bars on individuals from choosing a same-sex marital partner thus exist in sharp contrast to the states' otherwise pervasive respect for marital freedom of choice. In doing so, they infringe the Constitution's long-settled protection against state interference in deeply personal decisions related to family life.[2]

ARGUMENT

I. Apart From Excluding Same-Sex Couples, the Marriage Laws of Kentucky, Michigan, Ohio and Tennessee Generally Reflect the Due Process Guarantee's Protection of Choice in Marriage.

The law of Kentucky, Michigan, Ohio and Tennessee—both statutory and jurisprudential—imposes few burdens on the "freedom of choice" in marriage that the U.S. Supreme Court has deemed to be fundamental under the Due Process Clause, aside from forbidding and refusing to recognize the choice of a spouse of the same sex. *See generally Moore v. East Cleveland*, 431 U.S. 494, 499 (1977); *Loving v. Virginia*, 388 U.S. 1, 10–12 (1967).

[2] Amicus endorses, but does not duplicate here, the arguments of Plaintiffs-Appellees that their state's restrictions on marriage for same-sex couples also violate the Constitution's equal protection guarantee.

A. These States Impose Few Limits on a Person's Choice of Spouse, Other Than the Choice of a Same-Sex Spouse at Issue Here.

Apart from the restrictions challenged in this case, the domestic relations law of the Kentucky, Michigan, Ohio and Tennessee codes prohibits marriage only when one or both partners is currently married or lacks the capacity to consent, or when the partners are related to a specified degree by blood or marriage. *See* Ky. Rev. Stat. Ann. §§ 402.020(1)(b) (bigamy); 402.020(1)(f) (age of consent); 402.010 (consanguinity); Mich. Comp. Laws Ann. §§ 551.3 – 551.4 (consanguinity); 551.5 (bigamy); 551.2 (capacity to consent); 551.51, 551.103 (age of consent); Ohio Rev. Code Ann. § 3101.01 (bigamy, age of consent, consanguinity); *Seabold v. Seabold*, 84 N.E.2d 521, 523 (Ohio Ct. App. 1948) (capacity to consent); Tenn. Code Ann. §§ 36-3-101 (consanguinity); 36-3-102 (bigamy); 36-3-104 – 36-3-107 (age of consent); 36-3-109 (capacity to consent); *see also Bryant v. Townsend*, 221 S.W.2d 949, 951 (Tenn. 1949) ("We have no statute that prohibits or annuls the marriage of an insane person." (additional citations and internal punctuation omitted)). Parental consent is generally required for anyone age 16 or 17. Ky. Rev. Stat. Ann. § 402.020(1)(f); Mich. Comp. Laws Ann. § 551.103; Tenn. Code Ann. §§ 36-3-104 – 36-3-107. *Cf.* Ohio Rev. Code Ann. § 3101.01(A) (providing minimum marriage age of 18 for men and 16 for women, and setting out consent requirements).

States within this Circuit also generally forbid marriage by parties under 16

years old. *See* Ky. Rev. Stat. Ann. § 402.020(1)(f)(1); Mich. Comp. Laws Ann. § 551.103; Ohio Rev. Code Ann. § 3101.01; Tenn. Code Ann. § 36-3-105. All make an exception to this limitation, however, and authorize judges, parents, or other responsible adults to waive even the minimum marriage age requirements. Ky. Rev. Stat. Ann. § 402.020(1)(f)(3); Mich. Comp. Laws Ann. § 551.201; Ohio Rev. Code Ann. § 3101.04; Tenn. Code Ann. § 36-3-107.

In other words, an unmarried person who is at least 18 years old and has the capacity to consent can marry any other consenting adult who is not a relative, and have that marriage recognized—so long as the chosen partner is also not of the same sex. *See* Ky. Rev. Stat. Ann. § 402.020(1)(d) (prohibiting same-sex couples from marrying); Mich. Comp. Laws Ann. § 551.1 (same); Ohio Rev. Code Ann. § 3101.01 (same); Tenn. Code Ann. § 36-3-113 (same); Ky. Rev. Stat. Ann. §§ 402.005; 402.040(2); 402.005 (prohibiting recognition of same-sex couples' marriages); Mich. Const. Art. 1, § 25 (same); Ohio Const. article XV, § 11 (same); Ohio Rev. Code § 3101.01(C) (same); Tenn. Const. Art. XI, § 18 (same); Tenn. Code Ann. § 36-3-113 (same).

The four states within this Circuit, like all other states, thus impose few restrictions on the "freedom of personal choice in matters of marriage" guaranteed by the U.S. Constitution's due process guarantee. *See Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974); *see also Zablocki v. Redhail*, 434 U.S. 374,

387 (1978) (stressing that "freedom of choice" is a "fundamental" aspect of marriage).

In challenges to marriage-related restrictions such as anti-nepotism policies, this Court and state courts have likewise recognized the fundamental nature of the freedom to marry and distinguished laws and polices that "[place] a non-oppressive burden on the decision to marry, or on those who are already married" from those that place a "'direct and substantial' burden" on the right of an individual to marry the person of their choice. *See Montgomery v. Carr*, 101 F.3d 1117, 1124, 1125 (6th Cir. 1996); *see also* *Pena v. Northeast Ohio Emergency Affiliates, Inc.*, 670 N.E.2d 268, 276, 277 (Ohio Ct. App. 1995), *appeal not allowed*, 664 N.E.2d 1291 (Ohio 1996) (recognizing the "'freedom to marry . . . as one of the vital personal rights essential to the orderly pursuit of happiness by free men'" while upholding a provision of the wrongful death law allowing introduction of evidence of a surviving spouse's remarriage because the provision did not "directly prohibit or discourage marriage") (quoting *Loving*, 388 U.S. at 12); *Miller v. C.A. Muer Corp.*, 362 N.W.2d 650, 655 (Mich. 1984) (affirming the importance of the freedom to marry while rejecting a challenge to anti-nepotism policies because the policies did not "prohibit marriage or deny co-workers the right to marry").

The Supreme Court has also reinforced repeatedly that states should not limit an individual's choice of spouse outside of baseline concerns related to

consanguinity, minimum age, bigamy, and consent. "[T]he regulation of constitutionally protected decisions, such as . . . whom [a person] shall marry, must be predicated on legitimate state concerns other than disagreement with the choice the individual has made." *Hodgson v. Minnesota*, 497 U.S. 417, 435 (1990); *see also Roberts v. U.S. Jaycees*, 468 U.S. 609, 620 (1984) ("[T]he Constitution undoubtedly imposes constraints on the State's power to control the selection of one's spouse . . . ."); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684-85 (1977) ("[I]t is clear that among the decisions that an individual may make without unjustified government interference are personal decisions 'relating to marriage . . . .'") (citations omitted)); *Loving*, 388 U.S. at 12 ("Under our Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State.").

Numerous courts have recognized that this constitutional protection against state interference with the choice of marital partner encompasses an individual's choice of a same-sex partner. *See, e.g.*, *Henry v. Himes*, 1:14-CV-129, 2014 WL 1418395, at *7 (S.D. Ohio Apr. 14, 2014) ("[W]hile states have a legitimate interest in regulating and promoting marriage, the fundamental right to marry belongs to the individual."); *De Leon v. Perry*, SA-13-CA-00982-OLG, 2014 WL 715741, at *18 (W.D. Tex. Feb. 26, 2014) ("While Texas has the 'unquestioned authority' to regulate and define marriage, the State must nevertheless do so in a

way that does not infringe on an individual's constitutional rights.") (quoting *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013)); *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1199–1200 (D. Utah 2013) ("The right to marry is intertwined with the rights to privacy and intimate association, and an individual's choices related to marriage are protected because they are integral to a person's dignity and autonomy."), *appeal docketed*, No. 13-4178 (10th Cir. Dec. 20, 2013).

Of course, like every state, Kentucky, Michigan, Ohio and Tennessee have rules in place regarding the solemnization of marriages. *See, e.g.*, Ky. Rev. Stat. Ann. § 402.050(1) (indicating who can solemnize a marriage); Mich. Comp. Laws Ann. §§ 551.7 (same); 551.9 (providing that "no particular form shall be required" to solemnize a marriage); Ohio Rev. Code Ann. § 3101.08 (identifying individuals authorized to solemnize a marriage); Tenn. Code Ann. §§ 36-3-301 (same); 36-3-302 (providing that "no formula need be observed" in solemnization of marriage).

Notably, though, these rules do not restrict individuals in their choice of spouse beyond the few eligibility requirements discussed *supra*. *See also, e.g.*, Ohio Op. Atty. Gen. 69-051, May 27, 1969 (prohibiting probate courts from requiring IQ or other test to prove mental capacity or from refusing to issue a marriage license based on a party's inability to support a family).

Indeed, even premarital blood test or medical examination requirements were repealed long ago. Ky. Rev. Stat. Ann. § 402.120 – 402.170 (repealed in 1982);

Mich. Comp. Laws Ann. §§ 551.151 – 551.154 (repealed in 1978); Ohio Rev. Code Ann. § 3101.05 (repealed in 1981); Hon. V. Michael Brigner, Baldwin's Oh. Prac. Dom. Rel. L. § 2:8 (4th ed. 2013) (confirming repeal); Tenn. Code Ann. §§ 36-3-201, 36-3-210 (repealed in 1985).

Against this backdrop, the rules at issue here, which disallow individuals from marrying the person of their choice and refuse recognition to individuals who chose to marry a same-sex partner, *see supra*, cut strikingly against the due process limitation on government interference with this intimate and personal choice.

B. Also Consistent with Due Process, the States in this Circuit Impose Few Requirements on Spousal Conduct Within Marriage, and No Rules That Differentiate Roles for Male and Female Marital Partners.

There is little in the law of Kentucky, Michigan, Ohio or Tennessee law specifying how spouses should behave within marriage; the few rules that do exist focus on violence and abuse, and all of those are gender-neutral. *See, e.g.*, Ky. Rev. Stat. Ann. §403.720(1) (defining "domestic violence and abuse"); Mich. Comp. Laws Ann. § 400.1501(d)(i-iv) (defining "domestic violence"); Ohio Rev. Code Ann. § 3113.31 (same); Tenn. Code Ann. §§ 36-3-601(4) (defining "domestic abuse"); 39-13-111 (criminalizing "domestic assault").

Statutes governing divorce and child support similarly do not differentiate between male and female spouses. *See, e.g.*, Ky. Rev. Stat. Ann. §§ 403.170 (divorce); 403.211 (child support); Mich. Comp. Laws Ann. §§ 552.6(1) (divorce);

552.16(1) (child support); Ohio Rev. Code Ann. §§ 3105.01 (divorce); 3119.02 (child support); Tenn. Code Ann. §§ 36-4-101 (divorce); 36-5-101(a)(1) (child support).

Indeed, states within (and outside) the Sixth Circuit generally permit spouses to craft agreements that define the terms of their marriage so long as the agreements "have been entered into . . . freely, knowledgeably and in good faith and without exertion of duress or undue influence upon either spouse." *See* Tenn. Code Ann. § 36-3-501 (allowing prenuptial agreements); *see also Bratton v. Bratton*, 136 S.W.3d 595, 600 (Tenn. 2004) (permitting postnuptial agreements); Mich. Comp. Laws Ann. § 557.28 (prenuptial); *Hodge v. Parks*, 844 N.W.2d 189, 195 (Mich. Ct. App. 2014) (post-nuptial); Ohio Rev. Code Ann. §§ 2106.22 (prenuptial); 3103.05 (postnuptial); *Hardesty v. Hardesty Ex'r*, 34 S.W.2d 442 (Ky. 1931) (prenuptial); *Campbell v. Campbell*, 377 S.W. 93 (Ky. 1964) (post-nuptial). *But see* Ohio Rev. Code Ann. § 3103.06 (restricting marital partners from contracting to alter their legal relations).

Each state also strictly limits the circumstances in which marriages can be annulled, reinforcing that parties exercise nearly complete autonomy when choosing marital partners, for better or worse. *See, e.g.*, Ky. Rev. Stat. Ann. § 402.030 (permitting annulment where spouse is underage only if sought by the underage spouse or another acting on the underage spouse's behalf); Mich. Comp. Laws Ann. § 552.2 (same); Ohio Rev. Code Ann. § 3105.31 (same); Tenn. Code

Ann. § 36-3-105 (same); *see also* Ohio Rev. Code Ann. § 3105.31 (discussing additional limited grounds for annulment, including bigamy, mental incapacity, and fraud); 15 Ky. Prac. Domestic Relations L. §§ 10:1 – 10:7 (same); Mich. Civ. Jur. Marriage §§ 31 – 37 (same); W. Walton Garrett, 19 Tenn. Prac. Tenn. Divorce, Alimony & Child Custody § 1:7 (2013 ed.) (same).

As a result, nearly all marriages – including those that contravene state law, other than bigamous or closely consanguineous marriages – are treated as presumptively valid. *See, e.g.*, *Robinson v. Com.*, 212 S.W.3d 100, 104-06 (Ky. 2006) (holding that marriage between 37-year old and 14-year old was valid ("voidable, not void") and rejecting statutory rape charge on that ground); *In re Miller's Estate*, 214 N.W. 428 (Mich. 1927) (refusing to void a marriage between first cousins that would not have been allowed under Michigan law); *Soley v. Soley*, 655 N.E.2d 1381 (Ohio Ct. App. 1995) (same).

The absence of consummation is typically also not grounds for annulment, making clear that states do not require sexual intimacy for a valid marriage. A Michigan court, for example, recently observed that non-consummation "alone is not grounds for annulment unless it is part of [a] fraud that induced the wronged party to consent to marriage and the parties did not cohabitate after that fraud." *Summers v. Summers*, Docket No. 273226, 2007 WL 4125339, at *1 (Mich. Ct. App. Nov. 20, 2007); *see also Lang v. Reetz-Lang*, 488 N.E.2d 929, 932 (Ohio Ct. App. 1985) ("A

marriage which fails for nonconsummation is not void *ab initio* but, rather, is voidable" by the party who sought consummation.).

Neither are dubious motives of one or both spouses grounds for annulment or non-recognition of a marriage. *See, e.g.*, *In re Estate of Smallman*, 398 S.W.3d 134, 154 (Tenn. 2013) (holding that evidence suggesting that a woman who married her husband two weeks before he died was a "bad person" and a "'gold digger'" could not be a proper basis for invalidating a marriage and that evidence about the husband's ill health did not establish his lack of consent); *Hawkins v. Hawkins*, 258 S.W. 962, 963 (Ky. 1924) (characterizing one spouse as having "no other motive in view in marrying [her husband] than to secure every ease, luxury, and comfort obtainable for herself and family and to give to her husband as little affection and pleasure and association as possible); *Koebel v. Koebel*, 176 N.W. 552, 553 (Mich. 1920) (describing a spouse's motive for marriage as "purely a commercial one in which 'Dan Cupid' had no part"). Tennessee also will not annul marriages "entered into in jest." *Coulter v. Hendricks*, 918 S.W.2d 424, 425 (Tenn. Ct. App. 1995) *appeal denied* (citations omitted).

In short, as a rule, state law does not restrict individuals' choices about whom to marry, however wise or foolish, happy or unhappy. *Cf. Baker v. Baker*, 194 S.W.2d 825, 828 (Ky. 1946) ("Married persons must submit to the ordinary consequences of . . . unwise mating"); *Kelly v. Kelly*, 209 S.W. 335, 338 (Ky. 1919)

("When men and women enter into the marriage relation, they take each other with all their weaknesses, faults, and foibles . . ."); *Joy v. Joy*, 12 Ohio Dec. 574 (Ohio Ct. Com. Pl. 1900) ("In regard to incontinence, as well as to other personal traits and attributes of character, it is the duty of a party to make due inquiry beforehand, and not to ask the law to relieve him from a position into which his own indiscretion or want of diligence has led him."). As the Virginia Supreme Court once observed, "Courts do not exist to guarantee happy and successful marriages, or to annul and cancel the effect of mere errors of judgment in the making of contracts of marriage." *Jacobs v. Jacobs*, 35 S.E.2d 119, 126 (Va. 1945).

C. Eligibility for Marriage in the Sixth Circuit's States Does Not Hinge on Spouses Being Able to Procreate Biologically.

Within the extensive body of state law just discussed, there is no procreation requirement associated with marriage—and there is no law supporting the position that eligibility to marry turns on a couples' capacity to have children biologically.

To the contrary, each state's domestic relations law expressly recognizes that married couples (as well as unmarried individuals and couples) have children in a range of ways and draws no legal distinction between children conceived by or adopted by their parents. Indeed, the Tennessee statute dedicates an entire part to establishing rules for "Parentage of Children Born of Donated Embryo Transfer," including that children have the same legal status regardless of whether their parents received medical assistance in conception. *See* Tenn. Code Ann. §§ 36-2-401 – 36-

2-403. Ohio also recognizes that couples have children via "non-spousal artificial insemination" and embryo donation and has legislated to protect those parent-child relationships. *See* Ohio Rev. Code Ann. §§ 3111.88 – 3111.97. Likewise, Michigan sets out a statutory framework for inheritance by children conceived following a married couples' "utilization of assisted reproductive technology." *See* Mich. Comp. Laws Ann. § 700.2114(a). And the Kentucky Supreme Court has affirmed the state's allowance of parentage via surrogacy. *See Surrogate Parenting Assoc., Inc. v. Com. ex rel. Armstrong*, 704 S.W.2d 209 (Ky. 1986).

All states also have long affirmed that adopted children have the same legal status as children conceived by their parents. *See, e.g.*, Ky. Rev. Stat. § 199.520 (providing for equal treatment of adopted and biological children); Mich. Comp. Laws Ann. § 710.60 ("After entry of the order of adoption, there is no distinction between the rights and duties of natural progeny and adopted persons . . . ."); Ohio Rev. Code Ann. § 3107.15 (same, with limited exceptions for adoptions of individuals age 18 or older); *Meriwether v. Fourth & First Bank & Trust Co.*, 285 S.W. 34, 34 (Tenn. 1926) (rejecting challenge to an adoptive child's inheritance and holding that an adopted child has the same legal status as a "legitimate natural" child).

This delinking of marriage and biological procreation is consistent with the Supreme Court's commentary on the due process protections governing marriage.

As the Court explained in *Turner v. Safley*, 482 U.S. 78, 95-96 (1987), when permitting a prison inmate to marry, marriage remains a fundamental right for those who may never have the opportunity to "consummate" a marriage, much less have children within the marriage. While observing that "most inmates eventually will be released" and have that opportunity, the Court did not limit the marriage right, or its recognition of marriage's important attributes, to those inmates. *Id.* at 96. Instead, it stressed that numerous other "important attributes of marriage remain . . . [even] after taking into account the limitations imposed by prison life." *Id.* Among these, the Court included "expressions of emotional support and public commitment . . . [as] an important and significant aspect of the marital relationship," along with "spiritual significance" and "the receipt of government benefits . . . , property rights . . . , and other, less tangible benefits." *Id.* at 95-96.

II. The Marriage Restrictions at Issue Infringe Same-Sex Couples' Constitutionally Protected Liberty Interests in Family Integrity and Association.

As the Court has explained many times, the Constitution's due process and equal protection guarantees protect the freedom to marry as one among several "aspects of what might broadly be termed 'private family life' that are constitutionally protected against state interference." *Moore*, 431 U.S. at 536. Others identified by the Court include "personal decisions relating to . . . procreation, contraception, family relationships, child rearing, and education."

Lawrence v. Texas, 539 U.S. 558, 574 (2003) (citing *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

These kinds of decisions, like the decision to marry, are elemental to an individual's ability to "'define the attributes of personhood.'" *Id.* For this reason, the Court has found in numerous cases that "the Constitution demands . . . the autonomy of the person in making these choices." *Id.*; *see also, e.g., Santosky v. Kramer*, 455 U.S. 745, 753 (1982) ("[F]reedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment.").

The Court has consistently held, too, that autonomy to choose how to structure one's family life must be accessible to all rather than available only for those favored by the state. Two older decisions regarding the rights of parents to control their children's education, *Meyer v. Nebraska*, 262 U.S. 390, 396-97 (1923), and *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925), lay the groundwork for this proposition. They make clear that the Court's due process jurisprudence is centrally concerned with guaranteeing equal access to fundamental associational rights, a commitment the Court has carried forward to the present.

In *Meyer*, the Court overturned a law that made it illegal to teach any language other than English to a student who had not yet completed eighth grade. Recognizing that the law's impact fell singularly on "'those of foreign lineage,'"

Meyer, 262 U.S. at 398 (quoting the decision below, *Meyer v. State*, 107 Neb. 657, 662 (1922)), the Court stressed that "[t]he protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue." *Id.* at 401.

Pointedly, the Court determined that the fundamental associational right to "establish a home and bring up children" had to be available on an equal basis to the country's newest inhabitants as well as to its longtime residents. *Id.* at 399. Equal access to this associational right, the Court held, outweighed the state's proffered interest in establishing English as the primary language, *id*. at 401, even though that interest was surely central to American life at that time.

In *Pierce*, the Court likewise overturned, on due process grounds, a law that required all children to attend public schools because the law "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control." 268 U.S. at 534-35. In this case, the targets were religious minorities—specifically, Roman Catholics—who maintained that the law "conflict[ed] with the right of parents to choose schools where their children will receive appropriate mental and religious training." *Id.* at 532. The states' refusal to allow those parents equal access to the right to decide how their children would be educated offended the "fundamental theory of liberty." *Id.* at 535.

Addressing a different type of restriction on familial choices, the Court similarly struck down a state-imposed fee to appeal terminations of parental rights because that fee unequally burdened indigent persons' associational right to be parents. *See M.L.B. v. S.L.J.*, 519 U.S. 102, 127 (1996). In so holding, the Court recognized that "'[d]ue process and equal protection principles converge'" when state action restricts individual choices related to family formation. *Id.* at 120. The invalidated fee requirement "fenc[ed] out would-be appellants based solely on their inability to pay core costs." *Id.* As the Court explained, if there is a fundamental liberty interest involved—such as the integrity of the parent-child relationship—the state must provide "'equal justice'" to all. *Id.* at 124.

Same-sex couples and their deeply personal decisions about how to build a family life together are no exception to this rule. In *Lawrence*, 539 U.S. 558, the Court relied on due process to strike down a law that restricted gay people's associational freedom to make personal choices about sexual intimacy. By holding that "the substantive guarantee of liberty" may not be infringed for individuals who choose same-sex partners any more than it can be infringed for heterosexual couples, the Court affirmed that the due process guarantee protects individuals' ability to exercise their fundamental rights on an equal basis with others. *Id.* at 575. As the Court explained, "[p]ersons in a homosexual relationship may seek autonomy . . . just as heterosexual persons do" for "'the most intimate and personal

choices a person may make in a lifetime.'" *Id.* at 574 (quoting *Casey*, 505 U.S. at 851).

III. Redefining the Fundamental Right to Marry in a Manner that Excludes Same-Sex Couples Cannot Satisfy the Due Process and Equal Protection Guarantees.

Arguments that the instant cases implicate a "new" right to marry a person of the same sex, rather than the fundamental right to marry a person of one's choice, ignore the extent to which fundamental rights are defined by what conduct they protect, not by *who* can exercise them. If fundamental rights could be redefined so easily and superficially, the Constitution's insistence on equal and fair access to those rights would be eviscerated—states could restrict a groups' exercise of a fundamental right and then characterize the right as one available only to those not similarly burdened.

Refashioning the right at issue in any of the Court's familial-choice due process cases just discussed makes clear how unworkable this proposition is. *Meyer*, for example, was not based on a fundamental right of Germans to raise their children in their own tradition but rather on a general liberty interest of all parents in choosing how their children will be raised. *Pierce* did not describe a fundamental right to parent in a Catholic fashion, but rather a general liberty interest of all parents to choose how their children are educated.

Likewise, *Turner* was not a case about "prisoner marriage" any more than

Loving was about a fundamental right to "interracial marriage." Instead, these cases were about the fundamental right to marry. *Cf. Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) ("Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, . . . a harmony in living, . . . a bilateral loyalty.").

Indeed, the Court's opinion in *Lawrence* directly corrected a similar rights-framing error in its earlier *Bowers v. Hardwick*, 478 U.S. 186 (1986), ruling. In *Bowers*, the Court characterized the plaintiff's claim as seeking protection for "a fundamental right to engage in homosexual sodomy." *Id.* at 191. But in *Lawrence*, the Court flatly rejected that description as a mischaracterization of the right at issue. It held, instead, that defendants Lawrence and Garner sought protection of their fundamental right to "the autonomy of the person" to make "'the most intimate and personal choices . . . [that are] central to personal dignity and autonomy . . . [and] to the liberty protected by the Fourteenth Amendment.'" *Lawrence*, 539 U.S. at 574 (quoting *Casey*, 505 U.S. at 851). That liberty right could not properly be understood as defined by the sex or sexual orientation of the parties who sought to exercise it.

Likewise, the speculation that heterosexual couples might stop valuing marriage if gay and lesbian couples can marry rests on the similarly impermissible

reasoning that a fundamental right can be denied to some based on the preferences of others. Indeed, that reasoning is uncomfortably akin to justifications offered for racially restrictive covenants nearly a century ago. "It is said that such acquisitions [of property] by colored persons depreciate property owned in the neighborhood by white persons." *Buchanan v. Warley*, 245 U.S. 60, 82 (1917).

Rejecting this theory for denying rights, the Supreme Court offered an observation about the absurdity of this speculation in relation to the constitutional claim there, which applies here as well: "But property [marriage] may be acquired by undesirable white [heterosexual] neighbors or put to disagreeable though lawful uses with like results." *Id*. In short, conditioning one group's access to a fundamental right based on the preferences or actions of another is wholly contrary to the longstanding doctrine, just discussed, that recognizes the central importance of these rights.

CONCLUSION

For the foregoing reasons, *Amicus* respectfully requests that this Court affirm the district court and permanently enjoin the laws at issue as unconstitutional.

Respectfully submitted,

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CERTFICIATE OF COMPLIANCE

Pursuant to the Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned counsel certifies that this brief:

(i) complies with the type-volume limitation of Rule 32(a)(7)(B) because it contains 3,602 words, including footnotes and excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2010 and is set in Times New Roman font in a size equivalent to 14 points or larger.

/s/ Suzanne B. Goldberg

Suzanne B. Goldberg

June 16, 2014

CERTIFICATE OF SERVICE

I hereby certify that, on June 16, 2014, the foregoing brief was filed with the Clerk of Court using the Court's CM/ECF system. I further certify that counsel for all parties in this case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Suzanne B. Goldberg

Suzanne B. Goldberg

June 16, 2014