Case Nos. 13-4178, 14-5003, 14-5006

In the United States Court of Appeals for the Tenth Circuit

DEREK KITCHEN, ET AL.,
Plaintiffs-Appellees,

versus

GARY R. HERBET, ET AL.,
Defendants-Appellants.

Appeal from the U.S. District Court for the District of Utah
(No. 2:13-cv-00217), Hon. Robert J. Shelby

MARY BISHOP, ET AL.,
Plaintiffs-Appellees,

versus

SALLY HOWE SMITH, ET AL.,
Defendants-Appellants.

Appeal from the U.S. District Court for the Northern District of Oklahoma
(No. 4:04-cv-00848), Hon. Terence C. Kern

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CORPORATE DISCLOSURE STATEMENT

Pursuant to FED R. APP. P. 26.1, *Amicus* Lambda Legal is a not-for-profit corporation incorporated in New York, does not have a parent corporation, and no corporation owns 10% or more of *amicus*'*s* stock.

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INTEREST OF AMICUS CURIAE

Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal" or "*Amicus*") is a non-profit national organization committed to achieving full recognition of the civil rights of lesbian, gay, bisexual, and transgender people and those living with HIV through impact litigation, education, and public policy work. Lambda Legal has participated as counsel or *amicus* in numerous challenges to state laws banning same-sex couples from marriage, including *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), and *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009) (counsel in cases establishing the right of same-sex couples to marry in California and Iowa, respectively). Lambda Legal also was party counsel in *Romer v. Evans*, 517 U.S. 620 (1996), and *Lawrence v. Texas*, 539 U.S. 558 (2003), two of the Supreme Court's leading cases redressing sexual orientation discrimination. Lambda Legal accordingly has both an

interest in protecting lesbian and gay couples and their children in every state of the nation and extensive expertise in the issues before this Court.[1]

SUMMARY OF THE ARGUMENT

Amicus agrees with Plaintiffs-Appellees that the district courts in these cases correctly struck down as unconstitutional state laws and constitutional provisions in Utah[2] and Oklahoma[3] that excluded lesbian and gay couples from marriage (collectively the "marriage bans" or "bans"). *Amicus* specifically agrees that both states' marriage bans

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[1] All parties have consented to the filing of this brief. 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.

[2] UTAH CONST. art. I, § 29; UTAH CODE ANN. §§ 30-1-2(5), 30-1-4.1.

[3] OKLA. CONST. art. II, § 35; OKLA. STAT. tit. 43 § 3.1; tit. 51 § 255.

target same-sex couples for discrimination based on their sex and sexual orientation in violation of the Constitution's equality guarantee, that laws targeting persons based on sexual orientation warrant at least heightened judicial scrutiny, and that, in any event, the bans merit the strictest judicial scrutiny under the Equal Protection Clause because they discriminate with respect to the exercise of one or more fundamental liberty interests. *Amicus* further agrees that the bans were motivated by animus and lack even a rational relationship to a legitimate justification, let alone an important or compelling one.

Amicus here provides briefing to complement Appellees' arguments that the bans also violate the Due Process Clause of the Constitution by denying lesbian and gay individuals the fundamental right to marry the person she or he loves, and infringe upon same-sex couples' protected liberty interests in family integrity and

association. In particular, *Amicus* submits this brief to elucidate why ongoing exclusion of a class of people historically barred from exercise of a fundamental right freely exercised by others violates the Due Process Clause.

Defendant-Appellant Herbert et al. ("Utah Appellants") and Defendant-Appellant/Cross-Appellee Sally Howe Smith ("Oklahoma Appellant") (together, "Appellants") argue that Utah and Oklahoma laws have always excluded lesbian and gay couples from marriage. *See* Appellants' Principal Brief in *Kitchen v. Herbert*, Case No. 13-4178 (10th Cir. filed Dec. 10, 2013) ("Utah Appellants' Br.") at 4-18, 37-42; Appellants' Principal Brief in *Bishop v. Smith*, Case No. 14-5003 (10th Cir. filed Jan. 17, 2014) ("Oklahoma Appellants' Br.") at 5-6, 37-41. Appellants argue that this history of exclusion forecloses any claim that the marriage bans violate the fundamental right to marry.

To the contrary, in numerous cases recognizing and upholding the fundamental right to marry, the Supreme Court has made clear that *freedom of choice of whom to marry* is a critical component of that right. These cases demonstrate the Constitution's respect for our autonomy to make the personal decisions at stake here – decisions about with whom a person will build a life and a family. Appellants fail to appreciate the contours of this liberty when they try to re-frame the fundamental right asserted as a "new" right solely to marry someone of the same sex. When a person who has been excluded from exercising a claimed fundamental right steps forward seeking to exercise that right, courts properly frame the right based on the attributes of the right itself, without reference to the identity of the person who seeks to exercise it. In other words, fundamental rights are defined by the nature of the liberty sought, not by *who* seeks to exercise the liberty. Here, the right at issue is the right to

marry, among the most deeply rooted and cherished liberties identified by our courts.

The history of marriage in Utah, Oklahoma, and elsewhere around the country belies Appellants' argument that marriage is static, defined by its historic limitation to different-sex couples, and incapable of becoming more inclusive without damage to the institution. Marriage laws have undergone substantial changes in past generations to end subordination of married women and race-based entry requirements, for example. History tells us that these changes to eliminate remnants of past discrimination have served our society well by keeping marriage relevant despite altered social needs and conceptions of equity. Today, seventeen states and the District of Columbia permit same-sex couples to marry. Marriage remains a vital and cherished institution in these states, even as barriers to fuller participation in that institution have fallen. Indeed,

the Supreme Court in *Windsor* recently acknowledged that in these states, marriage confers on same-sex couples "a dignity and status of immense import," *United States v. Windsor*, 133 S. Ct. 2675, 2681 (2013), and that by denying recognition to these validly married couples, the federal government had "demean[ed]" married couples and "humiliated" their children in violation of the equality and liberty guarantees of the Constitution. The liberty interests at stake for same-sex couples who wish to marry and build a family together are the same universal liberty interests protected by courts for generations, reflecting a societal understanding that respect for the choices we make about whom to marry is central to our dignity as human beings. As the district court below concluded,

> [T]here is no legitimate reason that the rights of gay and lesbian individuals are any different from those of other people. All citizens, regardless of their sexual identity, have a fundamental right to liberty, and this right protects an individual's ability to

> marry and the intimate choices a person makes about marriage and family. The court therefore finds that the Plaintiffs have a fundamental right to marry that protects their choice of a same-sex partner.

Kitchen v. Herbert, 2013 U.S. Dist. LEXIS 179331, *52 (D. Utah 2013).

Accordingly, *Amicus* urges the Court to find that the marriage bans violate lesbian and gay persons' fundamental right to marry.

ARGUMENT

I. The Liberty Protected By The Fundamental Right To Marry Includes Freedom Of Choice In The Selection Of One's Spouse Free of Governmental Interference.

The right to marry long has been recognized as fundamental, protected under the due process guarantee, because deciding whether and whom to marry is exactly the kind of personal matter about which government should have little say. *Webster v. Reproductive Health Service*, 492 U.S. 490, 564-65 (1989) ("*freedom of personal choice* in

matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment" (emphasis added) (citing *Loving v. Virginia,* 388 U.S. 1, 12 (1967))); *Zablocki v. Redhail*, 434 U.S. 374, 387 (1978) (finding burden on right to marry unconstitutional because it infringed "*freedom of choice* in an area in which we have held such freedom to be fundamental" (emphasis added)); *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977). Indeed, "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Loving*, 388 U.S. at 12 (citation omitted). *See generally Johnson v. Pomeroy*, 294 F. Appx 397, 401 (10th Cir. 2008) (unpublished) (discussing individuals' liberty interests in right to marry and of familial association).[4]

[4] Many other cases describe the right to marry as fundamental. *Turner v. Safley*, 482 U.S. 78, 95 (1987); *continued —*

Because the right to make personal decisions central to marriage would have little meaning if government dictated one's marriage partner, courts have placed special emphasis on protecting one's free choice of spouse. "[T]he regulation of constitutionally protected decisions, such as where a person shall reside or *whom he or she 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) (emphasis added); *see also 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."); *Roberts v. United States Jaycees*, 468 U.S. 609, 620 (1984) ("[T]he Constitution undoubtedly

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— *continuation*
Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965). *See generally Washington v. Glucksberg*, 521 U.S. 702, 727 n.19 (1997) (citing cases).

imposes constraints on the State's power to control the selection of one's spouse . . . ."). Indeed, "[t]he essence of the right to marry is freedom to join in marriage with the person of one's choice." *Perez v. Sharp,* 198 P.2d 17 (Cal. 1948).

II. In Keeping With The Right To Autonomy In Deciding Whether And Whom To Marry, Utah And Oklahoma Impose Very Few Restrictions On Adults In Different-Sex Relationships Who Wish To Marry, And Do Not Require An Intention Or Ability To Procreate.

Consistent with the autonomy protected by the due process guarantee, Utah and Oklahoma impose few restrictions on an individual's decision whether and whom to marry – provided that the individual selects a spouse of a different sex. A person may marry a different-sex spouse of another religion, with a criminal record, or a history of abuse. Whether we choose to marry a scoundrel or a saint, or not to marry at all, the Constitution guarantees our liberty, for better or for worse, to choose for ourselves. *See generally Lawrence v. Texas*, 539 U.S. 558, 562 (2003) ("[T]here are . . .

spheres of our lives and existence . . . where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.").

Accordingly, Utah and Oklahoma permit a person to marry anyone he or she chooses, as long as the spouses meet age requirements, are unmarried, meet affinity and consanguinity limits, evidence their consent on a joint license application, *and are of different sexes*.[5] Utah and Oklahoma also permit spouses to determine for themselves the *purposes* marriage serves and the form it takes. Married couples may have children, but they need not and often do not. Spouses need not pass a fertility test, intend to

[5] *See* UTAH STAT. ANN. §§ 30-1-1, 30-1-2, 30-1-8; OKLA. STAT. ANN. tit. 43 §§ 3, 2; 4 Okla. Prac., Okla. Family Law § 1:2 ("requisites of a valid marriage").

procreate, be of childrearing age, have any parenting skills, or account for any history of childrearing or support.

The right to marry in Utah and Oklahoma – and in every state in the nation – is not and has never been conditioned on procreation. *See* Brief of *Amici Curiae* Family Law Professors in Support of Plaintiff-Appellees at IB; *see also, e.g.,* UTAH CODE ANN. §§ 30-1-1, 30-1-2 (listing void marriages, and not mentioning fertility except expressly to provide that cousins 55 years of age or older may marry providing a court finds that at least one is *unable to reproduce*).[6] Indeed, that the right to marry is not

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[6] As the following sampling of cases from around the country illustrates, a spouse's infertility has never been grounds for annulment. *See, e.g.*, *Turner v. Avery*, 113 A. 710 (N.J. Ch. 1921) (that wife could not bear children was not grounds for annulment, because she still was able to engage in sexual relations); *Korn v. Korn*, 242 N.Y.S. 589, 591 (N.Y. App. Div. 1930) ("The law appears to be well settled that sterility is not a ground for annulment."); *cf. Goodridge v. Dep't of Public Health*, 798 N.E.2d 941, 961 (Mass. 2004) ("Fertility is not a condition of marriage, nor is it grounds for

continued —

conditioned on procreation was recognized expressly in *Turner v. Safley*, 482 U.S. 78, 95-96 (1987) (marriage is fundamental right for prisoners even though some may never have opportunity to "consummate" marriage; "important attributes" of marriage include "expression . . . of emotional support and public commitment," and, for some, "exercise of religious faith as well as personal dedication" and "precondition to the receipt of government benefits . . . [including] less tangible benefits," such as "legitimization of

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— *continuation*
divorce"). Although a spouse's inability to have sexual relations may be grounds for divorce, impotency does not render the marriage void. *See, e.g.*, UTAH CODE ANN. § 30-3-1(3)(a) (impotency a ground for divorce, but no mention of infertility); UTAH CODE ANN. § 29-3-1208 (1898) (same); UTAH CODE ANN. §§ 30-1-1, 30-1-2 (void marriages; no mention infertility or impotency); OKLA. STAT. ANN. tit. 43 § 101 (same); 43 § 2 (same); 4 Okla. Prac., Okla. Family Law § 25:2 (listing grounds for annulment and for void marriages; no mention impotency or infertility). In other words, different-sex Utah and Oklahoma couples who are incapable of procreating have always had the right to choose to get married, and state law recognized such marriages as valid.

children born out of wedlock"); *cf. Lawrence*, 539 U.S. at 578 ("[D]ecisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment."). As *Windsor* acknowledged, an individual's choice of whom to marry often fulfils dreams and vindicates a person's dignity and desire for self-definition in ways that have nothing to do with a desire to have children; marriage permits couples "to define themselves by their commitment to each other," and "to affirm their commitment to one another before their children, their family, their friends, and their community." *Windsor*, 133 S. Ct. at 2689.

In short, in deference to personal autonomy, and consistent with the laws in other states, Utah and Oklahoma minimally regulate entry into marriage and the ways any two persons build married life together after exchanging

vows. In these states as in all others, the absence of children, now or in the future, does not vitiate the basic liberty and fundamental right to marry guaranteed to all adults.

III. The Right At Stake Here Is The Right To Marry, Shared by All Adults, Not A "New" Right To Marry A Person Of The Same Sex.

In an effort to avoid binding precedent mandating respect for the fundamental right to marry, Appellants attempt to reframe the right as a "new" right of "same-sex marriage." Appellants contend that same-sex couples' claims therefore must fail under *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997), because the "right to marry a person of the same sex is [not] 'objectively, deeply rooted in this Nation's history and tradition" (Oklahoma Appellants' Br. at 39-40). But Plaintiffs-Appellees do not seek recognition of a "new" right. Instead, they seek to exercise a *pre-existing*, settled fundamental right: marriage.

The scope of a fundamental right is defined by the *attributes of the right itself,* and not the identity of the people who seek to exercise it or who have been excluded from doing so in the past. When analyzing fundamental rights and liberty interests, the Supreme Court has consistently adhered to the principle that a fundamental right, once recognized, properly belongs to *everyone* – regardless of whether a particular claimant can point to a historical tradition supporting the claimant's ability to exercise that right. For example, in *Youngberg v. Romeo*, 457 U.S. 307, 315-16 (1982), the Supreme Court held that an individual involuntarily committed to a custodial facility because of a disability retained liberty interests, including a right to freedom from bodily restraint. The Court thus departed from the longstanding tradition in which people with serious disabilities were viewed as not sharing such substantive due process rights and were routinely subjected to bodily

restraints. *See also Eisenstadt v. Baird,* 405 U.S. 438 (1972), (liberty interest in controlling one's fertility, previously recognized for married persons in *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) , recognized equally for unmarried persons).

Specifically in the context of the fundamental right to marry, the Supreme Court has rejected attempts to reframe the right narrowly so as to include only those previously acknowledged to enjoy that liberty. Thus, the fundamental right to marry could no more be a right to "same-sex marriage" than the right enforced in *Loving* was to "interracial marriage," 388 U.S. 1; or in *Zablocki* to "deadbeat parent marriage," 434 U.S. 374; or in *Turner* to "prisoner marriage," 482 U.S. 78. Same-sex couples in Utah and Oklahoma seek the same fundamental right to marry invoked in *Loving*. The states' marriage bans should be evaluated for what they are: a burden on the exercise of that

fundamental right. *See Kitchen*, 2013 WL 6697874, at *16 ("The Plaintiffs are seeking access to an existing right, not the declaration of a new right.").

The argument that same-sex couples seek a "new" right rather than the same right exercised by others makes the identical mistake of *Bowers v. Hardwick,* 478 U.S. 186 (1986), corrected in *Lawrence,* 539 U.S. 558. In a challenge by a gay man to Georgia's sodomy statute, the *Bowers* Court recast the right at stake from a right, shared by all adults, to consensual intimacy with the person of one's choice, to a claimed "fundamental right" of "homosexuals to engage in sodomy." *Id.* at 566-67 (quoting *Bowers*, 478 U.S. at 190). Significantly, *Lawrence* overruled *Bowers*, holding that that case's constricted framing "fail[ed] to appreciate the extent of the liberty at stake." *Lawrence*, 539 U.S. at 567.

The liberty interests in marital autonomy shared by lesbian and gay persons are as profound as for other

individuals. As *Windsor* acknowledges, and as already recognized in seventeen other states and the District of Columbia, nothing about marriage is inherently limited solely to different-sex couples. In states where same-sex couples may marry, marriage permits these families to "live with pride in themselves and their union and in a status of equality with all other married persons." *Windsor*, 133 S. Ct. at 2689.

IV. Appellants Misapprehend The Role Of History When Considering The Scope Of Fundamental Rights.

Appellants spend considerable ink on the description of marriage in Utah, Oklahoma, and around the country as limited historically to different-sex couples, arguing that our nation's past exclusion of a group from exercise of a fundamental right—or limitation on who may marry whom—is itself justification to continue the limitation. This misuses the role of history and tradition in due process

jurisprudence for two reasons. First, although courts consider history and tradition to identify the interests that due process protects, *Glucksberg,* 521 U.S. 710-18, once a right has been deemed fundamental, courts must not allow historical limitations on the classes of persons permitted to exercise the right to blinder their analysis of whether continued denial of the right violates the Due Process Clause. Second, Appellants' argument that marriage is static, defined by its historic limitation to different-sex couples, and incapable of becoming more inclusive without damage to the institution, ignores that marriage laws, through court decisions and legislation, have undergone profound changes over time and are virtually unrecognizable from the way they operated a century ago, let alone two centuries and more. *See generally* Nancy F. Cott, A History of Marriage and the Nation (Harvard Univ. Press 2000). And yet, the essence endures. Couples continue to come together,

to join their lives, and form new families, and marriage continues to support and stabilize them.

Thus, contrary to Appellants' assertions (Utah Appellants' Br. at 10-11; Oklahoma Appellants' Br. at 5-6), the fact that same-sex couples historically were not allowed to marry is hardly the end of the analysis. *See Lawrence*, 539 U.S. at 572 ("[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry." (quotation marks omitted)). History merely guides the *what* of due process rights, not the *who* of which individuals may exercise them. This distinction is central to due process jurisprudence, and explains why Appellants are incorrect to argue that the right to marry is reserved solely for those who wish to marry someone of a different sex. By their very nature, fundamental rights cannot be made to turn on "the person who is asserting" them. Once a right is recognized as *fundamental*, it "cannot be denied to particular

groups on the ground that these groups have historically been denied those rights." *In re Marriage Cases*, 183 P.3d at 430 (quotation marks omitted).

Appellants' argument runs counter to numerous Supreme Court cases rejecting invidious historical restrictions on who had been permitted to exercise a fundamental right. For instance, when the Court held that anti-miscegenation laws violated the fundamental right to marry in *Loving*, it did so despite a long tradition of using race to determine who could marry whom, excluding interracial couples from marriage. *See Planned Parenthood v. Casey*, 505 U.S. 833, 847-48 (1992) ("[I]nterracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause in *Loving* . . . ."). Likewise, in *Turner*, 482 U.S. 78, the Supreme Court held

that a state needed sufficient justification to restrict an incarcerated prisoner's ability to marry, even though the right to marry as traditionally understood in this country did not extend to prisoners. *See* Virginia L. Hardwick, *Punishing the Innocent: Unconstitutional Restrictions on Prison Marriage and Visitation*, 60 N.Y.U. L. Rev. 275, 277-79 (1985). Further, the right to marry traditionally did not include a right to remarriage after a divorce. But in the modern era, the Supreme Court has held that states may not burden an individual's right to marry simply because that person has been married before. *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971) (states may not require indigent individuals to pay court fees in order to obtain a divorce, since doing so unduly burdened their fundamental right to marry again); *see also Zablocki*, 434 U.S. at 388-90 (state may not condition ability to marry on fulfillment of existing child support obligations).

Nor have other fundamental rights been protected only when exercised by people who historically held them. *Eisenstadt*, for example, struck down a ban on distributing contraceptives to unmarried persons, building on its prior holding in *Griswold*, 381 U.S. at 486, that states could not prohibit the use of contraceptives by married persons. The *Eisenstadt* Court did not suggest that there was a history of protecting the sexual privacy of unmarried people. Rather, the Court held that, "[i]f the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Eisenstadt*, 405 U.S. at 453. *Casey* struck down a spousal notification law that was "consonant with the common-law status of married women" – and thus with historical tradition – but "repugnant to our present understanding of marriage and of the nature of the

rights secured by the Constitution." *Casey,* 505 U.S. at 898. And in *Lawrence*, the Court followed *Eisenstadt* and other due process cases in holding that lesbian and gay Americans could not be excluded from the existing fundamental right to sexual intimacy, even though they had often been prohibited from enjoyment of that right in the past. *Lawrence*, 539 U.S. at 566-67. These cases all reject the argument, advanced by Appellants here, that the "historic understanding" of marriage as reserved for different-sex couples prevents further analysis of Plaintiffs-Appellees' due process claims (Utah Appellants' Br. at 8). Instead, by striking down these infringements of fundamental rights or liberty interests despite these plaintiffs' lack of a historical claim, the Supreme Court demonstrates that the focus should be on the right asserted, rather than the person asserting it.

Appellants also err in claiming that marriage is a static institution, defined by its historic exclusion of lesbian

and gay couples, and that striking down the ban "would obscure [marriage's] animating purpose and thereby undermine its social utility." Oklahoma Appellants' Br. at 1. This argument – that marriage will be devalued if historic limitations are lifted – is not new. In the past, individuals who have struggled to make cherished institutions more inclusive and equitable often have confronted similar fears, now discredited, that a more inclusive version of the institution would diminish its worth.[7]

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[7] Utah's suggestion that the families of same-sex couples are comparable to students whose classwork does not deserve a grade of "A" (Utah Appellant's Br. at 2) echoes fears expressed generations ago about the impact on the legal profession of admitting women to the bar. For example, in 1876, a Minnesota court explained why women were thought unfit to practice law: "[T]he opposition of courts to the admission of females to practice arises . . . from a comprehension of the magnitude of the responsibilities connected with the successful practice of law, and a desire to *grade up* the profession." *In re Application of Martha Angle Dorsett to Be Admitted to Practice as Attorney and Counselor at Law* (Minn. C.P. Hennepin Cty., 1876), in The Syllabi, Oct. 21, 1876, pp. 5, 6 (emphasis added). A like fear

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For example, both Utah's and Oklahoma's marriage laws have transformed dramatically with respect to discriminatory racial restrictions that once were widely accepted elements of marriage. In 1888, when Utah was still a territory, its anti-miscegenation law banned whites from marrying a "negro" or "Mongolian." Patrick Q. Mason, *The Prohibition of Interracial Marriage in Utah 1888-1963*, 76 Utah Hist. Q. 108, 109 (2008).[8] Similarly, Oklahoma prohibited "the marriage of any person not of African descent

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accounted for Columbia Law School's resistance to women's admission: "If women were admitted to the Columbia Law School, [the faculty] said, then the choicer, more manly and red-blooded graduates of our great universities would go to the Harvard Law School!' The Nation, Feb. 18, 1925, p. 173." *U.S. v. Virginia,* 518 U.S. 515, 542-44 (1996) (footnotes omitted). Similarly, fears were expressed that the admission of women to the Virginia Military Institute "would downgrade [the school's] stature, destroy the adversative system and, with it, even the school." *Id.* at 542-42.

[8] Utah retained its anti-miscegenation law upon its admission to the union as a state. UTAH CODE ANN. § 29-1-1184 (1898).

to any person of African descent," which courts upheld numerous times against constitutional challenge. OKLA. COMP. STAT. § 7499 (1921); *see also* OKLA. COMP. STAT. 7500 (1921); *Blake v. Sessions*, 94 Okla. 59, 220 P. 876 (Okla. 1923) (interracial marriages "void"); *Eggers v. Olson*, 231 P. 483 (Okla. 1924) (marrying someone of a different race a felony); *Baker v. Carter*, 68 P.2d 85 (Okla. 1937); *Jones v. Lorenzen*, 441 P.2d 986 (Okla. 1966).

With regard to these interracial marriage bans, Utah and Oklahoma were hardly outliers; in many states throughout the union, such racial restrictions were widely accepted elements of marriage. In case after case, state courts upheld such racial restrictions in reliance on "tradition" rooted in conceptions of "nature."[9] Long into the

[9] For example, the Indiana Supreme court relied on the "undeniable fact" that the "distribution of men by race and color is as visible in the providential arrangement of the earth as that of heat and cold," and that segregation derived

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twentieth century, the sheer weight of cases accepting the constitutionality of bans on interracial marriage was deemed justification in and of itself to perpetuate these discriminatory laws. *See, e.g.*, *Jones*, 441 P.2d at 989 (upholding Oklahoma anti-miscegenation law since the "great weight of authority holds such statutes constitutional").[10]

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not from "prejudice, nor caste, nor injustice of any kind, but simply to suffer men to follow the law of races established by the Creator himself, and not to compel them to intermix contrary to their instincts." *State v. Gibson*, 36 Ind. 389, 404-05 (1871); *see also Scott v. State*, 39 Ga. 321, 326 (1869) ("[M]oral or social equality between the different races . . . . does not in fact exist, and never can.").

[10] *See also Jackson v. City & Cnty. of Denver*, 124 P.2d 240, 241 (1942) ("It has generally been held that such acts are impregnable to the [constitutional] attack here made."); *Naim v. Naim*, 87 S.E.2d 749, 753 (1955) (anti-miscegenation statutes "have been upheld in an unbroken line of decisions in every State [except one] in which it has been charged that they violate" constitutional guarantees), *judgment vacated*, 350 U.S. 891 (1955), *adhered to on remand*, 90 S.E.2d 849 (1956).

Not until 1948 did a state high court critically examine these traditions, and strike down an anti-miscegenation law as violating rights of due process and equal protection. *Perez*, 198 P.2d 17. In *Perez*, the California Supreme Court acknowledged that these laws were based on the historically "assumed" view that such marriages were "unnatural." *Id.* at 22. But rather than accept this view as sheltering such laws from meaningful constitutional review, the court fulfilled its responsibility to ensure that legislation infringing the fundamental right to marry "must be based upon more than prejudice." *Id.* at 19. In doing so, the court rejected the dissent's assertion that the legislature's authority to regulate marriage conferred unchecked power to define who may marry. *Id.* at 33, 37, 42 (Shenk, J., dissenting). The court understood as well that the long duration of a wrong cannot justify its perpetuation. *Id.* at 26 (majority opinion). It was not that the Constitution had changed; rather, its

mandates had become more clearly recognized. *Id.* at 19-21, 32 (Carter, J., concurring) ("[T]he statutes now before us never were constitutional."); *see also Lawrence*, 539 U.S. at 579 ("[T]imes can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."); *Windsor*, 133 S. Ct. at 2689 (when permitting same-sex couples to marry, New York corrected "what its citizens and elected representatives perceived to be an injustice that they had not earlier known or understood").

Following *Perez*, many states repealed their anti-miscegenation laws. *Mason*, *supra*, at 128. Utah repealed its law in 1963. *Id.* Finally, the Supreme Court struck down all remaining anti-miscegenation laws, including Oklahoma's, grounding its decision on both the equal protection and due

process guarantees of the Fourteenth Amendment. *Loving*, 388 U.S. at 6 fn. 5, 12. Emphasizing that the choice of *whom* to marry is at the heart of this fundamental right and liberty interest, the Court in *Loving* held that "[u]nder 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." *Id.*

Utah's and Oklahoma's marriage laws also have rejected differential treatment based on gender that was a signal element of marriage under the common law. Under the doctrine of coverture, a married woman lost her separate legal existence as a person, and her legal being was subsumed into her husband. *See, e.g.*, *Stoker v. Stoker*, 616 P.2d 590, 590 (Utah 1980) (citing 1 William Blackstone, Commentaries 290 (1879)); *see, also, Thompson v. Thompson*, 218 U.S. 611, 614-15 (1910) ("generally speaking, the wife was incapable of making contracts, of acquiring

property or disposing of the same without her husband's consent."). For centuries, this arrangement was legally imposed and was believed to reflect "natural," God-given roles of men and of women in marriage. *See, e.g., Bradwell v. Illinois*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring).[11] Through marriage laws, states and the federal government reinforced the view that a man should be the legal head of the household, responsible for its support and links to external society, with physical, sexual, economic, and legal

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[11] In his now infamous concurring opinion, Justice Bradley emphasized these perceived "natural and proper" differences – embodying sex-role expectations for *each* sex, not just one – as a basis for denying women the right to practice law:

> Man is, or should be woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.

Id.

dominion over his wife, while a married woman should be responsible for the day-to-day management of the home and the care and nurture of children. *Id.*; *see also, e.g., Califano v. Westcott*, 443 U.S. 76 (1979); *People v. Liberta*, 474 N.E.2d 567 (N.Y. 1984) (striking down marital rape exemption, and describing origin of doctrine under coverture, which gave possession of wife's body to her husband); *Brandt v. Keller*, 413 Ill. 503, 505 (1952) (married woman "regarded as a chattel with neither property nor other rights against anyone, for her husband owned all her property and asserted all her legal and equitable rights").

However, Utah, Oklahoma, and all other states have rejected these past requirements for sex-differentiated roles within marriage. *See, e.g., Fiedeer v. Fiedeer*, 140 P. 1022, 1024 (Okla. 1914) (describing Oklahoma statutory scheme enacted in 1910 to permit married women to "retain the same legal existence and legal personality after marriage as

before marriage"); *Account Specialists and Credit Collections, Inc. v. Jackman*, 970 P.2d 202 (Okla. Civ. App. Div. 3 1998) (striking down statute codifying "doctrine of necessaries" because, as vestige of coverture, it unconstitutionally discriminated based on sex); UTAH CONST. art. XXII, § 2 (1895) (provision, in Utah's first constitution, derogating common law and allowing married women to hold property); UTAH CODE ANN. § 29-2-1198 (1898) (codifying same language); UTAH CODE ANN. §§ 29-2-1198—1207 (1898) (Married Woman's Property Act, passed in 1898, lifting disabilities imposed on married woman by coverture); *see also Hackford v. Utah Power & Light Co.*, 740 P.2d 1281, 1291 (1987). Today, the states and federal law treat both spouses equally and in gender-neutral fashion with respect to marriage, and the Supreme Court has confirmed that such gender-neutral treatment for marital partners is

constitutionally required. *See Califano v. Goldfarb*, 430 U.S. 199 (1977); *Weinberger v. Wiesenfeld,* 420 U.S. 636 (1975).

Utah's and Oklahoma's divorce law has also evolved, highlighting both states' movement toward a view of marriage as a voluntary union of equal partners. For much of its history, Utah and Oklahoma allowed divorce only for cause. *Cordner v. Cordner*, 61 P.2d 601, 604 (Utah 1936); *Vincent v. Vincent,* 257 P.2d 512 (Okla. 1953). Not until 1987, did Utah's legislature pass a law making divorce available on the no-fault basis of "irreconcilable differences of the marriage." UTAH CODE ANN. § 30-3-1; 1987 Utah Laws 645; *Haumont v. Haumont*, 793 P.2d 421, 427 (Utah Ct. App. 1990) (divorce on grounds of irreconcilable differences, unlike other statutorily enumerated grounds, is a no-fault provision). Oklahoma moved earlier, amending its divorce statutes in 1953 to permit divorce for the no-fault ground of "incompatibility." OKLA. STAT. tit. 43 § 101; 4 Okla. Prac.,

Okla. Family Law § 3:1. Thus, the history of Utah's and Oklahoma's marriage laws – as is true in every other state in the country – shows a rejection of discriminatory entry requirements and a steady progression towards a view of marriage in which adults are free to marry the partner of their choice, spouses have equal legal standing within their relationship and in their dealings with others, and, if necessary, spouses may divorce when they agree they no longer wish to remain married.

Marriage today is a vastly changed institution from what it historically was. And yet, it remains both a cherished value and the sole universally-understood and respected way in our society to communicate that two people have chosen each other, to join their lives and create a new family bound by love, mutual commitments and responsibility, and shared hopes for the future. Thus, as much as marriage has changed, the profound liberty

interests in marriage have *not* changed, and are shared by all individuals.[12] As a Virginia federal district court recently concluded, "The reality that marriage rights in states across the country have begun to be extended to more individuals

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[12] Appellants argue, just as proponents of interracial marriage bans did in generations past, that permitting same-sex couples to marry would send this nation on a slippery slope to authorized polygamy. Utah Appellant's Br. at 54, 76; Oklahoma Appellant's Br. at 81; *compare Perez,* 198 P.2d at 41 (Shenk, J., dissenting) (comparing interracial marriage bans to bans on incest, bigamy, and polygamy). Those arguments are baseless. Prohibitions on polygamy do not bar exercise of the fundamental right to marry the person of one's choice, but instead preclude marrying multiple people. State and federal marriage laws establish a comprehensive network of reciprocal rights and responsibilities based on the premise that marriage is a bilateral association. *Zablocki*, 434 U.S. at 384. Eliminating a gendered entry requirement requires no alteration to existing rights and responsibilities, but permitting more than two spouses would require a profound restructuring of marital rights and responsibilities, including concerning consent, presumptions of parentage, of who may speak for an incapacitated spouse, and of public and private benefit systems. *See*, *e.g.*, *Potter v. Murray City*, 760 F.2d 1065, 1070 n.8 (10th Cir. 1985) (explaining that many of Utah's marriage laws are premised upon the existence of two spouses in a bilateral relationship).

fails to transform such a fundamental right into some 'new' creation." *Bostic v. Rainey*, No. 2:13cv395, 2014 WL 561978, (E.D. Va. Feb. 13, 2014) at *12. It is now acknowledged that "[g]ay and lesbian individuals share the same capacity as heterosexual individuals to form, preserve and celebrate loving, intimate and lasting relationships. Such relationships are created through the exercise of sacred, personal choices—choices, like the choices made by every other citizen, that must be free from unwarranted government interference." *Id.* at *13; *see, also, Kitchen*, 2013 U.S. Dist. LEXIS 179331 at *16.

V. The Marriage Bans Infringe Upon Same-Sex Couples' Liberty Interests In Family Integrity And Association.

By denying same-sex couples access to marriage, the Utah and Oklahoma marriage bans infringe not only lesbian and gay persons' fundamental right to marry, but also a host of other related fundamental liberty interests. The marriage

bans burden same-sex couples' protected interest in autonomy over "personal decisions relating to . . . family relationships." *Lawrence*, 539 U.S. at 573; *see also 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."). Additionally, the bans impair same-sex couples' ability to identify themselves and to participate fully in society as married couples, thus burdening their fundamental liberty interests in intimate association and self-definition. *See Griswold*, 381 U.S. at 482-83 (discussing evolving concept of protected liberty interest in intimate association); *Windsor*, 133 S. Ct. at 2689 (marriage permits same-sex couples "to define themselves by their commitment to each other" and "so live with pride in themselves and their union and in a status of equality with all other married persons").

Furthermore, the marriage bans also interfere with constitutionally protected interests in family integrity and association by precluding those same-sex couples who have children from securing legal recognition of their parent-child relationships through the established legal mechanisms available to married parents. *See, e.g.*, UTAH CODE ANN. § 78B-6-117(2) (1953) (allowing adoption by two adults only if legally married). By foreclosing the possibility that a couple rearing children together can be recognized as joint and equal parents through a spousal presumption of parenthood, stepparent adoption, or other marital parentage protections, the marriage bans impair same-sex couples' ability to make decisions concerning their child's school enrollment, travel, health care, and other important matters, thus infringing their fundamental liberty interest in parental autonomy, including "direct[ing] the upbringing and education" of their child. *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus*

& Mary, 268 U.S. 510, 534-35 (1925). Such infringements on the bonds between children and the parents raising them strike at core substantive guarantees of the Due Process Clause. *See, e.g.*, *Moore*, 431 U.S. at 503.

VI. The Marriage Bans Are Subject To Strict Scrutiny.

Because the marriage bans discriminatorily burden lesbian and gay persons' fundamental liberty interests, including the fundamental right to marry, the bans are subject to strict scrutiny. State infringement of fundamental rights is constitutionally permissible only when "necessary to promote a compelling state interest." *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 627 (1969). *Amicus* agrees with Plaintiffs-Appellees that not even a legitimate state interest, much less a compelling or significant one, exists to justify the marriage bans.

CONCLUSION

More than half a century ago, the California Supreme

Court admonished that "[h]uman beings are bereft of worth and dignity by a doctrine that would make them as interchangeable as trains." *Perez*, 198 P.2d at 25. The freedom to marry is *not* freedom to select from Group A, B, or C, per the government's instructions. Rather, it is the freedom to marry the uniquely precious, "irreplaceable" person of one's *own* choice. For the reasons stated above, *Amicus* urges the Court to find that the marriage bans abridge the fundamental right of lesbian and gay persons to marry, in addition to discriminating against them based on sex and sexual orientation. Based on any and all of these grounds, the judgments should be affirmed.

Respectfully submitted,

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I hereby certify that, on March 4, 2014, I electronically transmitted the above and foregoing document to the Clerk of the Court using the ECF System for filing.

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