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COLORADO SUPREME COURT 2 East 14th Avenue Denver, CO 80203 On Certiorari Before Judgment to the Colorado Court of Appeals, Case No. 2018CA2252 Jefferson County District Court (Judge Margie L. Enquist), Case No. 2018DR30057	
In re the Marriage of: **Petitioner:** DEAN LAFLEUR, v. **Respondent:** TIMOTHY PYFER.	▲ Court Use Only ▲
Attorneys for Amici Curiae the Colorado LGBT Bar Association; the Colorado Women's Bar Association; Lambda Legal Defense and Education Fund, Inc.; and the National Center for Lesbian Rights: Shelly L. Skeen (pro hac vice pending) Lambda Legal Defense and Education Fund, Inc. 3500 Oak Lawn Avenue, Suite 500 Dallas, TX 75219 Tel.: (214) 219-8585 Fax: (214) 219-4455 Email: sskeen@lambdalegal.org	Case No. 2019SC1004

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BRIEF OF AMICI CURIAE COLORADO LGBT BAR ASSOCIATION; COLORADO WOMEN'S BAR ASSOCIATION; LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.; AND NATIONAL CENTER FOR LESBIAN RIGHTS IN SUPPORT OF RESPONDENT

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with all requirements of C.A.R. 29 and C.A.R. 32, including all formatting requirements set forth in these rules. I certify the following:

The brief complies with the applicable word limits set forth in C.A.R. 29(d).

The brief contains 4409 words.

The brief complies with the content and form requirements set forth in C.A.R. 29(c).

I acknowledge that this brief may be struck if it fails to comply with any of the requirements of C.A.R. 29 and C.A.R. 32.

/s/ Mark D. Gibson
Mark D. Gibson

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IDENTITY AND INTEREST OF AMICI CURIAE

The Colorado LGBT Bar Association is a voluntary professional association of lesbian, gay, bisexual, and transgender attorneys, judges, paralegals, and law students, and allies, who provide an LGBT presence within Colorado's legal community. The LGBT Bar Association promotes recognizing civil and human rights, encourages sensitivity to legal issues facing the LGBT community, and ensures the fair and just treatment of members of the LGBT community.

The Colorado Women's Bar Association ("CWBA") is an organization of more than 1200 Colorado attorneys, judges, legal professionals, and law students dedicated to promoting women in the legal profession and the interests of women generally. The CWBA has an interest in this case because its members are committed to protecting women's rights, including the marital and property rights of women in same-sex relationships.

Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is the nation's oldest and largest legal organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, and transgender ("LGBT") people and people living with HIV through impact litigation, education, and public-policy work. Lambda Legal participated as party counsel in *Obergefell v. Hodges*, 135

S. Ct. 2584 (2015), and as counsel for amici curiae in *United States v. Windsor*, 133 S. Ct. 2675 (2013), and *Pavan v. Smith*, 137 S. Ct. 2075 (2017), which together provide the most explicit, recent articulations of the interconnected and mutually reinforcing nature of the constitutional guarantees of liberty and equality that protect the rights of lesbian, bisexual, and gay people against discrimination and denial of the fundamental right to marry. Lambda Legal has been counsel in marriage-equality cases since *Baehr v. Miike*, 910 P.2d 112 (Haw. 1996), and was involved as party counsel or amicus in nearly every major case addressing the rights of same-sex couples since then.

The National Center for Lesbian Rights ("NCLR") is a national nonprofit legal organization dedicated to protecting and advancing the civil rights of LGBT people and their families through litigation, public-policy advocacy, and public education. NCLR has participated as party counsel or amicus in cases across the country addressing the right of same-sex couples to marry and be recognized as married. *See, e.g., Pavan*, 137 S. Ct. 2075; *Obergefell*, 135 S. Ct. 2584; *Windsor*, 570 U.S. 744.

ARGUMENT

In granting review in this case, this Court highlighted the central issue: whether Colorado must recognize that same-sex couples could enter common-law marriages before the decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), which held that all state laws purporting to ban same-sex couples from marrying are unconstitutional. Under settled law, decisions of the U.S. Supreme Court striking civil laws as unconstitutional must be applied retrospectively to all prior events. Therefore, Colorado must recognize that same-sex couples could enter common-law marriages at any point in the past.

Colorado's marriage bans were held unconstitutional by the U.S. Supreme Court, as well as both federal and state courts. *See id.* (striking down all bans on marriage for same-sex couples in the U.S. as unconstitutional and mandating equal treatment of same-sex and different-sex couples under all state marriage laws); *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014); *Bishop v. Smith*, 760 F.3d 107 (10th Cir. 2014); *Burns v. Hickenlooper*, No. 14–cv–01817–RM–KLM, 2014 WL 3634834 (D. Colo. July 23, 2014); *Brinkman v. Long*, Nos. 13-CV-32572, 14-CV-30731, 2014 WL 3408024 (Colo. Dist. Ct. July 9, 2014).

Under well-established precedent, when the Supreme Court declares a law facially unconstitutional, its decision applies retroactively to all prior actions. *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 101 (1993). Accordingly, whether a same-sex couple established a common-law marriage must be examined as though Colorado's marriage bans never existed.[1] Failing to recognize those marriages would unconstitutionally replicate Colorado's prior discrimination and re-inflict the constitutional harms the Supreme Court denounced in *Obergefell.* Thus, this Court should answer the question presented by holding that a common-law marriage established by a

[1] Common-law marriage must be equally open to same-sex couples on the same terms as provided to different-sex couples. As set forth in the Brief of Amici Curiae submitted by these same amici in *In re Marriage of Hogsett*, No. 2019SC000044, courts should apply that test in a way that aligns with the realities of same-sex relationships and the history of discrimination they have faced. States have an affirmative obligation to alleviate prior harms caused by laws that have been struck as unconstitutional, so this Court should ensure that this test is applied in a way to avoid continuing the harm caused by same-sex couples' prior unconstitutional exclusion from marriage. *See Harper*, 509 U.S. at 101 (due process and equal protection require states to "provide meaningful backward-looking relief to rectify any unconstitutional deprivation").

same-sex couple prior to the end of Colorado's exclusion of same-sex couples from marriage is entitled to equal recognition.[2]

1. Colorado laws barring same-sex couples from marriage, including common-law marriage, have been held unconstitutional.

In *Obergefell*, the U.S. Supreme Court declared unconstitutional all state laws that barred marriages between persons of the same sex:

> [T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. . . . [t]he State laws challenged by the petitioners in these cases are held invalid **to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.**

35 S. Ct. at 2604–05 (emphasis added). The Supreme Court later reaffirmed, in *Pavan v. Smith*, 2075 (2017), that under *Obergefell*, "a State may not 'exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.'" 137 S. Ct. at 2078. In *Pavan*, the Court summarily reversed an Arkansas Supreme Court decision that had permitted Arkansas to treat same-sex spouses differently from different-sex spouses by omitting them from the birth certificates of

[2] Amici take no position on Issues II-IV of Petitioner's Opening-Answer Brief, or any of the Issues in Respondent's Opening Brief, filed in the Court of Appeals on October 18, 2019, and July 3, 2019, respectively.

children born during their marriage if the spouse was not the person who gave birth to the child. *Id.* at 2077, 2079.

Before *Obergefell*, the Tenth Circuit's decisions in *Kitchen* and *Bishop* struck down marriage bans like Colorado's[3] in Utah and Oklahoma. *See Kitchen*, 755 F.3d at 1230*; Bishop*, 760 F.3d at 1074, 1078, 1080. The Tenth Circuit stated:

> [W]e hold that under the Due Process and Equal Protection Clauses of the United States Constitution, those who wish to marry a person of the same sex are entitled to exercise the same fundamental right as is recognized for persons who wish to marry a person of the opposite sex, and that [Utah's marriage bans] do not withstand constitutional scrutiny.

Kitchen, 755 F.3d at 1229–30. And in *Bishop*, the court reaffirmed that "State bans on the licensing of same-sex marriage significantly burden the fundamental right to marry[.]" 760 F.3d at 1080. Shortly after these decisions, a federal district court and state trial court in Colorado recognized that the reasoning in *Kitchen* and *Bishop* also applied to Colorado's laws barring same-sex couples from marrying and enjoined

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[3] Colorado's prior laws barring same-sex couples from marriage were located in art. II, § 31 of the Colorado Constitution ("Only a union of one man and one woman shall be valid or recognized as a marriage in this state"), C.R.S. §§ 14-2-104(1)(b) (a marriage is valid in this state only if it is between one man and one woman), and 14-2-104(2) (a marriage between two persons of the same sex shall not be recognized regardless of where contracted) (collectively "marriage bans").

the application of these laws. *Brinkman*, 2014 WL 3408024; *Burns*, 2014 WL 3634834.[4]

As each of these courts held, the federal constitution prohibits states from excluding same-sex couples from any of the rights, benefits, or protections of marriage.[5] Those protections—including the protections afforded by common-law marriage—must be available to same-sex and different-sex couples on equal terms. These decisions not only require Colorado to allow same-sex couples access to its common-law-marriage laws prospectively, but also necessarily require recognition of common-law marriages between same-sex couples that predate them. *Obergefell* expressly directed states to make marriage available to all couples—both those in-

[4] On October 6, 2014, the U.S. Supreme Court denied certiorari in *Kitchen* and *Bishop*. *See Herbert v. Kitchen*, 135 S. Ct. 265 (2014); *Smith v. Bishop*, 135 S. Ct. 271 (2014). The following day, the Tenth Circuit lifted the stays of the *Burns* and *Brinkman* injunctions prohibiting enforcement of Colorado's laws banning marriage between same-sex spouses, and Colorado began issuing marriage licenses to same-sex couples. *See Kitchen v. Herbert*, No. 13–4178, 2014 WL 4960471, at *1 (10th Cir. Oct. 6, 2014); *see also* Jesse Paul & Jordan Steffen, *Colorado Supreme Court, Suthers Clear Way for Same Sex Licenses*, Denver Post (Apr. 26, 2016), https://tinyurl.com/ydcvz8zs.

[5] While the U.S. Supreme Court's *Obergefell* holding is binding precedent on this Court under the Supremacy Clause, U.S. Const. art. VI, cl. 2, decisions of lower federal courts are not similarly binding, though Colorado courts may "look to the federal decisions for guidance, and … follow the analysis that we find persuasive." *Cmty. Hosp. v. Fail*, 969 P.2d 667, 672 (Colo. 1998).

volving different-sex and same-sex couples—on the same terms. Permitting same-sex couples to establish a common-law marriage, but only if that marriage post-dated the end of Colorado's marriage bans, would breathe new life into the very laws the courts struck down.

2. A U.S. Supreme Court determination that a law is facially unconstitutional applies retroactively to all prior events.

Recognizing the common-law marriages of same-sex couples entered before *Obergefell* is required by the well-established rule that U.S. Supreme Court decisions striking down a civil law as facially unconstitutional apply retroactively to all pending cases and retrospectively to all prior events. *Harper*, 509 U.S. at 97. In *Harper*, the Supreme Court set forth a clear rule regarding the retroactivity and retrospectivity[6] of its holdings:

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and **must be given full retroactive effect** in all cases still open on direct review and **as to all**

[6] The term "retroactivity" refers to the application of new cases or laws to pending cases, and the term "retrospectivity" refers to application of new cases or laws to all prior events. *See Harper*, 509 U.S. at 94–96. However, *Harper* and many other cases also use the term "retroactivity" to refer more broadly to both retroactivity and retrospectivity, which amici have done here.

> **events, regardless of whether such events predate or postdate our announcement of the rule**.

Id. at 97 (emphasis added) (citing *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 544 (1991) (White, J., concurring)); *accord Danforth v. Minnesota*, 552 U.S. 264, 271 (2008); *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 752 (1995). Retroactivity of judicial decisions is inherent in the judicial power, following from the courts' role to "say what the law is … not what the law shall be." *Harper*, 509 U.S. at 107 (Scalia, J., concurring). "Fully retroactive decisionmaking," Justice Scalia explained, "was considered a principal distinction between the judicial and the legislative power." *Id.*

Indeed, courts treat a facially unconstitutional law as though it had never existed:

> [A]n unconstitutional statute, whether federal or state, though having the form and name of law, is in reality no law but is wholly void and ineffective for any purpose. Since unconstitutionality dates from the time of its enactment and not merely from the date of the decision so branding it, an unconstitutional law, in legal contemplation, is as inoperative as if it had never been passed and never existed; that is, it is void ab initio.

19 Am Jur. 2d, *Constitutional Law* § 195 (footnotes omitted). "[W]hat a court does with regard to an unconstitutional law is simply to ignore it. It decides the case disregarding the unconstitutional law, because a law repugnant to the Constitution is

void, and is as no law." *Reynoldsville Casket Co.*, 514 U.S. at 760 (Scalia, J., concurring) (internal citation and quotation marks omitted) (emphasis added). Thus, an unconstitutional measure is as inoperative as if it had never been passed and never existed; that is, it is null from the beginning. *See City & County of Denver v. McNichols*, 268 P.2d 1026, 1030 (Colo. 1954).[7]

Under *Harper*, there is no question that common-law marriages entered prior to *Obergefell* by same-sex couples are entitled to retroactive recognition on the same terms applied to different-sex couples. Indeed, the U.S. Supreme Court itself had held that the couples who sought relief in *Pavan*, all of whom had married prior to *Obergefell*, were entitled to be treated equally under their state's vital records laws under a retroactive application of *Obergefell*. *Pavan*, 137 S. Ct. at 2077–78. Other federal courts have also recognized marriages entered before *Obergefell* as valid. For example, the Eleventh Circuit held that a district court had not abused its discre-

[7] The origin of the doctrine that a statute held unconstitutional is considered void in its entirety and inoperative as if it had no existence dates back to *Marbury v. Madison*, in which Chief Justice Marshall wrote that "a law repugnant to the constitution is void." 5 U.S. 137, 180 (1803). In *Norton v. Shelby County*, the U.S. Supreme Court stated that "[a]n unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." 118 U.S. 425, 442 (1886).

tion in disbursing the spousal share of wrongful-death proceeds to an Alabama man whose husband died prior to *Obergefell* when Alabama still banned same-sex couples from marrying. *See Hard v. Attorney General*, 648 F. App'x 853 (11th Cir. 2016); *see also, e.g.*, *Birchfield v. Armstrong*, No. 4:15-CV-00615, 2017 WL 1319844, at *3 (N.D. Fla. Mar. 23, 2017) (ordering Florida to amend death certificates issued prior to *Obergefell* to recognize decedents' marriages to same-sex spouses, noting "plaintiffs are entitled to appropriate injunctive relief correcting the state's prior, unremedied violation of the plaintiffs' constitutional rights"); Order, *Williams v. Colvin*, No. 1:14-cv-08874 (N.D. Ill. Oct. 26, 2015), ECF No. 36 (directing Commissioner of Social Security "to apply the SSA's rules and regulations and process the [spousal benefits] claim consistent with, and in light of, the Supreme Court's decision in *Obergefell*, and the Commissioner's own internal instructions, which both recognize the nature of plaintiff's marriage as valid as of the date it was celebrated"). State and federal agencies have done so as well. *See, e.g.*, Advisory to the Court, *DeLeon v. Abbott*, No. 5:13-CV-982-OLG (W.D Tex. Aug. 24, 2015), ECF No. 115 (noting Texas agency policies and procedures that recognize ceremonial and common-law marriages of same-sex couples entered pre-*Obergefell*); Social Security Admin. (S.S.A.), Program Op. Manual Systems GN 00210.001 *et seq.* (June 12, 2017),

available at https://secure.ssa.gov/apps10/poms.nsf/lnx/0200210001 (affirming recognition of same-sex couples' marriages for social-security-benefits eligibility regardless of whether entered prior to *Obergefell*).[8]

These retroactivity principles apply to both ceremonial marriages and common-law marriages. Several federal courts have applied *Obergefell* retroactively to state common-law-marriage laws to a surviving spouse's wrongful-death claim. *See, e.g.*, *Ford v. Freeman*, No. 3:18-cv-3095-B, 2020 WL 521084 (N.D. Tex. Jan. 16, 2020) (holding that same-sex couple had established a common-law marriage based on their 24-year relationship, notwithstanding the death of one of the men in 2016);

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[8] This is consistent with retroactive application of prior landmark marriage decisions rectifying past discrimination. For example, in *United States v. Windsor*, 133 S. Ct. 2675 (2013), the Supreme Court struck down as unconstitutional a federal law denying recognition to marriages of same-sex couples. Federal courts have uniformly applied *Windsor* retroactively to provide federal benefits to same-sex couples whose eligibility turned upon events prior to *Windsor*. *See, e.g., Schuett v. FedEx Corp.*, 119 F. Supp. 3d 1155 (N.D. Cal. 2016); *Cozen O'Connor P.C. v. Tobits*, No. 11-0045, 2013 WL 3878688, at *4 (E.D. Pa. July 29, 2013). Federal courts and agencies proceeded similarly after the Supreme Court's decision in *Loving v. Virginia*, 388 U.S. 1 (1967), which struck down bans on marriage for interracial couples. *See, e.g.*, *Prudential Ins. Co. of Am. v. Lewis*, 306 F. Supp. 1177 (N.D. Ala. 1969) (holding an interracial common-law marriage could be valid when the spouse died prior to the decision in *Loving*); Soc. Security Ruling 67-56, Section 216(h)(1)(A), Marital Relationship, Applicability of State Anti-miscegenation Statute, available at https://tinyurl.com/y9gq39mb.

Ranolls v. Dewling, 223 F. Supp.3d 613, 622 (E.D. Tex. 2016). The *Ranolls* court's analysis is instructive here where the same principles of retroactivity apply:

> The [US Supreme Court] reinforced its preference for retroactivity in *Harper*, holding: "**this Court's application of a rule of federal law to the parties before the Court requires every court to give retroactive effect to that decision**." 509 U.S. at 89 (emphasis added). In reaching this conclusion, the Court stated that both "the common law and our own decisions" have "recognized a general rule of retrospective effect for the constitutional decisions of this Court" and noted that "[n]othing in the Constitution alters the fundamental rule of 'retrospective operation' that has governed '[j]udicial decisions ... for near a thousand years.'" *Id.* at 94.

Id. at 621–22 (citations omitted).

In a companion case to this one, the Colorado Court of Appeals applied *Obergefell* retroactively, noting that such application "means that same-sex couples must be accorded the same right as opposite-sex couples to prove a common law marriage even when the alleged conduct establishing the marriage pre-dates *Obergefell*." *In re Marriage of Hogsett*, No. 17CA1484, 2018 WL 6564880, at *4 (Colo. App. Dec. 13, 2018) (citing Lee-ford Tritt, *Moving Forward by Looking Back: The Retroactive Application of* Obergefell, 2016 Wis. L. Rev. 873, 921 ("arguing that *Obergefell* should be applied retroactively to conduct occurring prior to the date of the decision because 'substantive law should not shift according to claims of reli-

ance on an old rule that deprived people of a fundamental right' ")).[9] Other Colorado courts have reached the same conclusion. *See, e.g.*, *Hernoud v. Price*, No. 2017DR30023 (Boulder Cty. Dist. Ct. 2017); *In re Golobay*, No. 2015PR030377 (Jefferson Cty. Dist. Ct. May 21, 2015).

Numerous other states that respect common-law marriages also have applied *Obergefell* retroactively to respect the marriages of same-sex couples entered into before *Obergefell*'s issuance. *See*, *e.g.*, *In re J.K.N.A.*, 454 P.3d 642 (Mont. 2019) (court applied *Obergefell* retroactively to find that a common-law marriage existed between the parties beginning in 2000); *Gill v. Van Nostrand*, 206 A.3d 869, 875 (D.C. Ct. App. 2019) (holding *Obergefell* requires retroactive recognition of same-sex couples' ability to enter into a common-law marriage); *In re Estate of Carter*, 159 A.3d 970, 976, 982 (Pa. Super. Ct. 2017) (recognizing common-law marriage between two men beginning in 1997).

Despite state and federal courts' uniform retroactive application of *Obergefell*, Petitioner attempts to avoid its clear applicability, citing *Marinez v. Indus. Comm'n of Colo.*, 746 P.2d 552, 556–57 (Colo. 1987), and *Findley v. Findley*, 629 S.E.2d 222,

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[9] In *Hogsett*, the parties stipulated that *Obergefell* applied retroactively. 2018 WL 6564880, at *1. *Hogsett* is set for oral argument before this Court on June 24, 2020, the same day as this case.

225–28 (Ga. 2006). *See* Opening-Answer Br. at 34; Reply Br. at 12. These cases are wholly inapposite.

First, Petitioner fundamentally misconstrues the nature of the rule that is being applied retroactively. The issue here is the retroactive application of the Supreme Court's holding in *Obergefell* that excluding same-sex couples from marriage violates their fundamental right to marry and deprives them of equal protection. This is not a matter of a state court deciding whether to apply a new state ruling retroactively, as in *Marinez*, 746 P.2d at 556. *Obergefell* is a binding federal constitutional ruling, to which, under the very language Petitioner quoted from *Findley*, state courts must give retroactive effect. *See Findley*, 629 S.E.2d at 226 (citing *Harper*, 509 U.S. at 97).

Moreover, *Marinez*'s analysis has been superseded by subsequent U.S. Supreme Court case law. Relying on *Marinez*, Petitioner attempts to apply the test set forth by the Supreme Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), allowing use of a balancing test to determine whether to apply case law retroactively. But in *Harper*—decided after *Marinez*—the Supreme Court rejected the *Huson* analysis, holding it inapplicable to determining the reach of federal decisions applying the U.S. Constitution or other federal law. *See* 509 U.S. at 96–98 ("[T]he legal im-

perative 'to apply a rule of federal law retroactively after the case announcing the rule has already done so' must 'prevai[l] over any claim based on a [*Huson*] analysis.'" (quoting *James B. Beam Distilling*, 501 U.S. at 540 (Souter, J.)).

Because *Obergefell* struck down marriage laws restricting same-sex couples from marrying or having their marriages recognized as a violation of the federal constitution, *Huson* analysis does not apply here, even though this dispute is being heard in a state court. Indeed, the U.S. Supreme Court in *Harper* reversed the Virginia Supreme Court's application of *Huson* to determine whether to retroactively apply an earlier U.S. Supreme Court opinion, explaining that state courts have no discretion in the retroactive application of U.S. Supreme Court decisions striking civil laws as unconstitutional. 509 U.S. at 97–98.

Furthermore, Petitioner's application of *Huson* misses the mark, and underscores precisely why it has no applicability to a case involving federal constitutional principles. First, Petitioner's assertion that *Obergefell* and *Kitchen* "recognized marriage as a fundamental right for the first time," Opening-Answer Br. at 34, is patently false. As the Supreme Court stated in *Obergefell*, "[T]he Court has long held the right to marry is protected by the Constitution." 135 S. Ct. at 2598 (citing *Loving v. Virginia*, 388 U.S. 1 (1967); *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Turner v.*

Safley, 482 U.S. 78 (1987)); *see also Obergefell*, 135 S. Ct. at 2601 (quoting *Maynard v. Hill*, 125 U.S. 190 (1888) ("marriage is 'the foundation of the family and of society, without which there would be neither civilization nor progress.' ").

Second, Petitioner ignores that the purpose and effect of the Supreme Court's ruling striking down state laws that excluded same-sex couples from marriage are the very purposes of the constitutional provisions at issue: the promises of liberty and equality embodied in the Fourteenth Amendment. *See id* at 2602 (the right of same-sex couples to marry "is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws").

Finally, there is no inequality caused by retroactive application of *Obergefell*. In fact, the opposite is true. Refusing to apply its principles retroactively to recognize a common-law marriage established at a time when Colorado unconstitutionally denied such recognition would be to repeat the very exclusion *Obergefell* struck down in the first place.

3. Failing to recognize the common-law marriages of same-sex couples that pre-date the end of Colorado's marriage bans would reinforce past discrimination and impose the precise constitutional harms the Supreme Court condemned in *Obergefell*.

Colorado should also recognize common-law marriages between same-sex spouses entered into before *Obergefell* because states have an affirmative obligation to address prior harms caused by their unconstitutional laws. *Harper*, 509 U.S. at 101. Applying *Obergefell* retroactively is particularly appropriate in the context of common-law marriage, the central characteristic of which is the backward-looking establishment of the spousal relationship. It is also critically important here, where states for decades wrongly denied same-sex couples the right to marry formally. History shows that many couples nonetheless lived as married couples in spite of state-sponsored discrimination. Unlike their different-sex counterparts, for whom formal marriage was accessible, same-sex couples faced unique obstacles that only recently have been erased. For same-sex couples, common-law marriage can serve a remedial role in correcting past injustice.

Although the evidence adduced in common-law-marriage cases involving same-sex couples may reflect the presence of past Colorado marriage laws in various ways, this Court must ensure that any inquiry into that evidence does not in-

clude a facially unconstitutional refusal to recognize their relationships at all. *See Reed v. Campbell*, 476 U.S. 852, 856 (1986) (holding the interest in avoiding unjustified discrimination guaranteed by the Fourteenth Amendment required the state court to fully apply its decision declaring the state statue unconstitutional to events predating its decision). Refusing to recognize common-law marriages that pre-date *Obergefell* would re-impose the unconstitutional restrictions afresh, simply because the parties entered their marriage at a time when Colorado law unconstitutionally banned them from marriage. Because the Colorado marriage bans are void and must be treated as if they had never existed, they must not be resurrected to obstruct a trier of fact from evaluating evidence of a couple's marriage before the bans were struck down.

Holding otherwise would deprive same-sex couples of equal protection and impermissibly burden fundamental liberty interests protecting intimate relationships, including the fundamental right to marry. *See Obergefell*, 135 S. Ct. 2584; *Lawrence v. Texas*, 539 U.S. 558 (2003). The Supreme Court's decisions affirming the equal dignity of same-sex relationships make clear that government may not deny equal access to marriage, including legal benefits and protections associated with marriage, to same-sex couples. *See Obergefell*, 135 S. Ct. at 2601; *Windsor*, 570 U.S.

at 772–74. Members of same-sex couples must be given an equal opportunity to demonstrate the validity of their relationships, including through recognition of a common-law marriage. It is solely because the parties were a same-sex couple that Petitioner contends this Court should hold that their relationship cannot be recognized as a common-law marriage. If the parties were a different-sex couple, there would be no question about whether they could have entered a common-law marriage. Accordingly, the recognition of common-law marriages established by same-sex couples prior to *Obergefell* is required by controlling U.S. Supreme Court precedent, and by the equal-protection and due-process guarantees of the United States Constitution. Failing to recognize those marriages would impose the same unconstitutional harm and stigma condemned in *Obergefell.*

CONCLUSION

For the reasons stated here, the Court's question regarding whether common-law marriages established by same-sex couples prior to Colorado's marriage bans being struck down must be recognized should be answered in the affirmative.

Respectfully submitted,

/s/ Shelly L. Skeen
Shelly L. Skeen (pro hac vice pending)

/s/ Mark D. Gibson
Mark D. Gibson (#45349)

Attorneys for Amici Curiae the Colorado LGBT Bar Association; the Colorado Women's Bar Association; Lambda Legal Defense and Education Fund, Inc.; and the National Center for Lesbian Rights

CERTIFICATE OF SERVICE

I certify that on June 12, 2020, I used the E-System to serve this document on all counsel of record.

/s/ Mark D. Gibson
Mark D. Gibson