Nos. 14-2386, 14-2387, 14-2388, 14-2526

In The United States Court of Appeals For The Seventh Circuit

MARILYN RAE BASKIN, et al.,
Plaintiffs-Appellees,
v.
GREG ZOELLER, et al.,
Defendants-Appellants.

On Appeal From The United States District Court, For The Southern District of Indiana
Case Nos. 1:14-cv-00355-RLY-TAB, 1:14-cv-00404-RLY-TAB, 1:14-cv-00406-RLY-MJD (The Honorable Richard L. Young Presiding)

and

VIRGINIA WOLF, et al.,
Plaintiffs-Appellees,
v.
SCOTT WALKER, et al.,
Defendants-Appellants.

On Appeal From The United States District Court, For The Western District of Wisconsin
Case No. 3:14-cv-00064-BBC (The Honorable Barbara B. Crabb Presiding)

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

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Appellate Court No: 14-2386; 14-2387; 14-2388; 14-2526

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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 issues related to due process and marital choice to the Fourth Circuit in *Bostic v. Schaefer*, 2014 WL 3702493 (4th Cir. 2014); the Sixth Circuit in *Bourke v. Beshear*, No. 14-5291 (6th Cir.) (pending appeal), *Deboer v. Snyder*, No. 14-1341 (6th Cir.) (pending appeal), *Henry v. Himes*, No. 14-3464 (6th Cir.) (pending appeal), and Tanco v. Haslam, No. 14-5297 (6th Cir.) (pending appeal), and the Ninth Circuit in *Sevcik v. Sandoval*, No. 12-17668 (9th Cir.) (pending appeal) and *Latta v.Otter*, No. 14-35420 and 14-35421 (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 has two primary interests here. The first is in addressing the relation between state laws governing marriage within in the Seventh 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 Indiana and Wisconsin. Together, apart from the measures at issue here, these laws impose few restrictions 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 same-sex couples who seek to exercise their fundamental right to marry and to have that marriage recognized.

The Clinic's second interest is in highlighting the interdependence of the equal protection and due process guarantees. Together, as well as individually, these guarantees render impermissible Indiana's and Wisconsin's singular burden on same-sex couples who seek to exercise their fundamental right to marry.[1]

SUMMARY OF ARGUMENT

Marriage laws in Indiana and Wisconsin 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'

[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.

extensive domestic relations frameworks generally take pains to avoid restrictions on individuals' ability to marry the person of their choice. The states likewise impose few restrictions on the choices of married couples, other than forbidding abusive conduct. No state, either in the Seventh Circuit or elsewhere, 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. Thus, the bars on individuals from choosing a same-sex marital partner 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]

The marriage bans infringe, too, the guarantees of the Due Process and Equal Protection Clauses, which, together, reinforce that states must provide their constituents with fair and equal access to fundamental rights. Lesbian and gay couples are no exception to this rule. This is because fundamental rights are defined by the content of the protected conduct, not by *who* exercises those rights. Consequently, efforts to characterize the right at issue as inherently belonging only

[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.

to heterosexuals are unavailing. They miss the central point of the extensive equal protection and due process jurisprudence in this area: that states cannot singularly burden some of their constituents' access to these well-protected, elemental aspects of human autonomy and civic participation.

ARGUMENT

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

The law of Indiana and Wisconsin—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. City of East Cleveland*, 431 U.S. 494, 499 (1977); *Loving v. Virginia*, 388 U.S. 1, 10-12 (1967).

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 Indiana and Wisconsin 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* Ind. Code §§ 31-11-1-3 (bigamy); 31-

11-1-4 (age of consent); 31-11-1-2 (consanguinity); Wis. Stat. Ann. §§ 765.02 (age of consent); 765.03(1) (bigamy, consanguinity, capacity to consent). Indiana also forbids a clerk from issuing a marriage license if either applicant "is under the influence of an alcoholic beverage or a narcotic drug." Ind. Code § 31-11-4-11(2), and Wisconsin permits annulment for similar reasons. Wis. Stat. Ann. § 767.313(1).

In addition, parental consent is generally required for anyone under age 18. Ind. Code § 31-11-2-2, § 31-11-1-6 (setting out the procedure for issuing a marriage license to underage persons); Wis. Stat. Ann. § 765.02(2) (setting out parental or custodial consent requirements for minors). But with the required consent and judicial approval based on specified conditions being satisfied, Indiana also specifically permits 15-year-olds to marry, and Wisconsin does the same for 16-year-olds. *See* Ind. Code § 31-11-1-6; Wis. Stat. Ann. § 765.02(2).

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* Ind. Code § 31-11-1-1 (prohibiting same-sex couples from marrying and prohibiting the state from recognizing same-sex couples' marriages); Wis. Const. Art. XIII, § 13 (prohibiting same-sex couples from marrying); Wis. Stat. Ann. § 765.04(1) (prohibiting recognition of same-sex couples' marriages).

Indiana and Wisconsin, 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 apart from the bans at issue here. *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 other challenges to marriage-related restrictions, this Court and other courts in Indiana and Wisconsin have likewise recognized the fundamental importance of choice in marriage and have upheld restrictions only when they do not "prohibit[] individuals either from making a decision as to marital status, from selecting the marital mate of his or her choice, or from making a highly personal decision under the umbrella of marital privacy." *See Johnson v. United States*, 422 F. Supp. 958, 970 (N.D. Ind. 1976), *aff'd sub nom. Barter v. United States*, 550 F.2d 1239 (7th Cir. 1977) (adopting the district court's opinion that rejected a married couple's challenge to the tax penalty because it did not impede the spouses' personal marital choices); *Miller v. Morris*, 386 N.E.2d 1203 (Ind. 1979) (rejecting a law that required child support compliance as a prerequisite to marriage on the ground that it imposed "a 'serious intrusion' into [an individual's] freedom of choice over a fundamental right." (citations omitted)). *Miller* relied on *Zablocki*, 434 U.S. 374 (1978), which affirmed the district court decision rejecting a similar statute in Wisconsin. *Redhail v. Zablocki*, 418 F.Supp. 1061 (E.D. Wis. 1976),

aff'd, 434 U.S. 375 (1978).

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, including district courts in Indiana and Wisconsin, 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.*, *Baskin v. Bogan*, 1:14-CV-00355-RLY, 2014 WL 2884868, at *7 (S.D. Ind. June 25, 2014) (noting the parties' agreement that "the right to marry

necessarily entails the right to marry the person of one's choice"); *Wolf v. Walker*, 986 F. Supp. 2d 982, 1000 (W.D. Wis. 2014) ("With respect to marriage in particular, the Supreme Court has stated repeatedly that it is a matter of individual choice.") (citations omitted); *see also 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."), *aff'd*, 13-4178, 2014 WL 2868044 (10th Cir. June 25, 2014) ("And although we acknowledge that state recognition serves to 'enhance[ ]' the interests at stake, *Windsor*, 133 S. Ct. at 2692, surely a great deal of the dignity of same-sex relationships inheres in the loving bonds between those who seek to marry and the personal autonomy of making such choices.").

Of course, like every state, Indiana and Wisconsin have rules in place

regarding the solemnization of marriages. *See, e.g.*, Ind. Code § 31-11-6-1 (identifying individuals authorized to solemnize a marriage); Wis. Stat. Ann. § 765.16 (same). But premarital requirements, such as blood tests or medical examinations, no longer exist. Ind. Code § 31-11-5 (repealed in 2005); Wis. Stat. Ann. § 765.06 – 765.07 (repealed in 1981).

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, Indiana and Wisconsin 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 Indiana and Wisconsin 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.*, Ind. Code §§ 35-31.5-2-78 (defining "crime of domestic violence); 35-42-2-1.3 (criminalizing "domestic battery"); Wis. Stat. Ann. §§ 968.075(1)(a) (defining "domestic abuse"); 968.075(2) (criminalizing "domestic abuse").

Statutes governing divorce and child support similarly do not differentiate between male and female spouses. *See* Ind. Code §§ 31-15-2-3 (divorce); 31-16-2-2 – 31-16-2-3 (child support); Wis. Stat. Ann. §§ 767.315 (divorce); 767.511 (child

support).

Indeed, Indiana and Wisconsin 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* Ind. Code. §§ 31-11-3-1 – 31-11-3-10 (allowing prenuptial agreements); *Rider v. Rider*, 669 N.E.2d 160, 164 (Ind. 1996) ("[I]n 1995 Indiana joined the growing list of states which have adopted the [Uniform Premarital Agreement Act.]"); *Gaskell v. Gaskell*, 900 N.E.2d 13, 17 (Ind. Ct. App. 2009) (recognizing that postnuptial agreements should be accorded the same validity as prenuptial agreements); *Flansburg v. Flansburg*, 581 N.E.2d 430, 433 (Ind. Ct. App. 1991) (same); Wis. Stat. Ann. § 766.58 (permitting prenuptial agreements); *Button v. Button*, 388 N.W.2d 546, 548 (Wis. 1986) (recognizing that postnuptial agreements are permissible in many circumstances); *In re Beat's Estate*, 130 N.W.2d 739, 742 (Wis. 1964) (holding that postnuptial agreements are permitted).

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.*, Ind. Code §§ 31-11-9-2 (providing, but not requiring, that a marriage may be voided because of age or mental incompetence); 31-11-10-1 (same); Ind. Code §§ 31-11-9-3; 31-11-10-2

(same for fraud); Wis. Stat. Ann. § 767.313(1)(a) (discussing limited grounds for annulment, including lack of capacity to consent because of age, mental incapacity, or the influence of drugs, force or duress, and fraud); *see also Kuehne v. Kuehne*, 201 N.W. 506, 507 (Wis. 1924) ("[T]he jurisdiction of a court to annul a marriage is statutory, and . . . such a judgment may be entered only for the reasons authorized by statute.") (internal citations omitted).

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.*, 14 Ind. Prac., Family Law § 1:27, Effect of a voidable marriage ("[A] voidable marriage remains valid until it is annulled by a judicial decree."); *Lyannes v. Lyannes*, 177 N.W. 683, 686 (Wis. 1920) ("The voidable marriage . . . may subsequently ripen into an absolute marriage and is considered valid and subsisting until annulled by judgment of a court of competent jurisdiction.").

Neither are the dubious motives or conduct of one or both spouses grounds for annulment or non-recognition of a marriage. *See, e.g., Wells v. Talham*, 194 N.W. 36, 40 (Wis. 1923) (holding that a broken promise to have a second marriage ceremony performed in a Catholic church did not constitute grounds to annul the marriage); *Varney v. Varney*, 8 N.W. 739, 741 (Wis. 1881) (affirming that

misrepresentations about previous chastity did not constitute fraud for purposes of voiding a marriage).

In short, as a rule, state law does not restrict individuals' choices about whom to marry, however wise or foolish, happy or unhappy. As the Virginia Supreme Court once observed, "[c]ourts 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 Indiana and Wisconsin 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 couples and individuals) have children in a range of ways and draws no legal distinction between children conceived by or adopted by their parents. In fact, Wisconsin defines "parent" to include not only biological parents but also husbands who have consented to "artificial insemination" and adoptive parents as well. *See* Wis. Stat. Ann. § 48.02(13); *see also L. M. S. v. S. L. S.*, 312 N.W.2d 853, 855 (Wis. Ct. App. 1981) (holding that a sterile husband who consented to his wife's impregnation by a "surrogate father" has the legal duties and responsibilities of fatherhood, including support). The Indiana Court of Appeals has

also affirmed parentage via artificial insemination. *See Engelking v. Engelking*, 982 N.E.2d 326, 328 (Ind. Ct. App. 2013) (quoting *Levin v. Levin*, 645 N.E.2d 601, 604 (Ind. 1994)) ("[W]here the husband and wife knowingly and voluntarily consent to artificial insemination, the resulting child is a child of the marriage.").

Indiana and Wisconsin also have long affirmed that adopted children have the same legal rights and status as children conceived by their parents. *See* Ind. Code § 31-9-2-13(a) (defining "Child" to include "children born or adopted during the marriage of the parties."); Wis. Stat. Ann. §§ 48.92(1) ("After the order of adoption is entered the relation of parent and child and all the rights, duties and other legal consequences of the natural relation of child and parent thereafter exists between the adopted person and the adoptive parents . . . . "); 851.13 (defining "issue" to include adopted children, grandchildren, great-grandchildren, and lineal descendants of more remote degrees). The states' law specifies that this full recognition of married couples becoming parents by adoption includes matters of inheritance and intestate succession as well. *See* Ind. Code §§ 29-1-2-8 ("For all purposes of intestate succession, . . . an adopted child shall be treated as a natural child."); 29-1-6-1(d) ("In construing a will . . . any person adopted prior to the person's twenty-first birthday before the death of the testator shall be considered the child of the adopting parent or parents."); *see also In re Estate of Quackenbush*, 926 N.E.2d 127, 130 (Ind. Tax Ct. 2010) ("The overall design of Indiana's probate code with respect to the

distribution of property is to treat an adopted child as the natural child of the adoptive parents only."); Wis. Stat. Ann. § 854.20(1) ("[A] legally adopted person is treated as a birth child of the person's adoptive parents and the adoptive parents are treated as the birth parents of the adopted person for purposes of transfers at death to, through, and from the adopted person and for purposes of any statute or other rule conferring rights upon children, issue, or relatives in connection with the law of intestate succession or governing instruments."); *In re Adler's Trusts* 140 N.W.2d 219, 226 (Wis. 1966) (rejecting challenge to an adoptive child's inheritance and holding that a child's relationship to the adoptive parents is identical to the child's former relationship with the biological parents).

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 will have that opportunity, the Court did not limit the marriage right, or its recognition of marriage's important attributes, to just 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 group's 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 courts 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 4,882 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

August 5, 2014

CERTIFICATE OF SERVICE

I hereby certify that, on August 5, 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

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August 5, 2014