Case Nos. 14-14061-AA, 14-14066-AA

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JAMES DOMER BRENNER, et al.,

Plaintiffs-Appellees,

v.

JOHN ARMSTRONG, et al.,

Defendants-Appellants.

SLOAN GRIMSLEY, et al.,

Plaintiffs-Appellees,

v.

JOHN ARMSTRONG, et al.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA

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

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Amicus Curiae Columbia Law School Sexuality and Gender Law Clinic is an educational and advocacy program within Columbia Law School that provides students with an opportunity to engage in advocacy regarding sexuality and gender law issues, including by the filing of amicus briefs. The Clinic's Director is Suzanne B. Goldberg. The Clinic is part of Morningside Heights Legal Services, Inc., which houses the clinical legal education program at Columbia Law School.

Amicus Curiae Columbia Law School Sexuality and Gender Law Clinic certifies that the following persons and entities have an interest in the outcome of this case and/or appeal:

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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*, No. 14-1167 (4th Cir.), the Sixth Circuit in *Bourke v. Beshear*, No. 14-5291 (6th Cir.), *Deboer v. Snyder*, No. 14-1341 (6th Cir.), *Henry v. Himes*, No. 14-3464 (6th Cir.), and *Tanco v. Haslam*, No. 14-5297 (6th Cir.), the Seventh Circuit in *Baskin v. Zoeller*, No. 14-2386 (7th Cir.), and the Ninth Circuit in *Sevcik v. Sandoval*, No. 12-17668 (9th Cir.) and *Latta v.Otter*, No. 14-35420 and 14-35421 (9th Cir.).

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. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008), and Iowa in *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

The Clinic's interest here is in addressing the relation between Florida's laws governing marriage and the U.S. Constitution's due process guarantee. As this amicus brief shows, the protection of individual decision-making in matters as personally important as marriage is reflected throughout the marriage laws of Florida. On the whole, these laws impose few restrictions on adults' choice of marital partners and on the recognition of valid marriages. Yet, by contrast, Florida imposes a singular, categorical, and constitutionally impermissible burden on lesbians and gay men who seek to exercise their fundamental right to marry their chosen partner and to have that marriage recognized.[1]

This brief is submitted with consent of all parties.

SUMMARY OF THE ARGUMENT

Marriage laws in Florida 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, the state's extensive domestic relations framework generally takes pains to avoid restrictions on individuals' ability to marry the person of their choice. Florida likewise imposes few restrictions on the choices of married couples, other than forbidding abusive conduct, and it imposes no

[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.

[2] Amicus endorses, but does not duplicate here, the arguments of Plaintiffs-

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

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

ARGUMENT

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

The law of Florida—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).

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

A. Florida Imposes 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, Florida's domestic relations law 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* Fla. Stat. § 741.04 (2014) (age of consent); § 741.21 (consanguinity); *Reese v. Reese*, 192 So. 2d 1, 2 (Fla. 1966) (asserting the "well established principle that a bigamous marriage under our law is void").

Parental/guardian consent is generally required for anyone age 16 or 17, Fla. Stat. § 741.0405 (2014), and the state generally forbids marriage by parties under 16 years old, *see* Fla. Stat. § 741.0405 (4) (2014), but even that restriction is waivable under certain conditions. Fla. Stat. § 741.0405 (2) – (4) (2014) (setting out exception to minimum age restriction related to pregnancy and parties' status as parents).

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* Florida. Const. art. 1 § 27 (providing that "[i]nasmuch as marriage is the legal union of only one man and one woman as husband and wife, no other legal union that is treated as marriage or the substantial equivalent thereof shall be valid or recognized"); Fla. Stat. § 741.04(1) (2014) (limiting marriage licenses to male-female couples); § 741.05 (making violation of § 741.04(1) a misdemeanor offense);

§ 741.212 (banning recognition of same-sex couples' marriages entered into in other jurisdictions).

Florida, like all other states, thus imposes few restrictions on the "freedom of personal choice in matters of marriage" guaranteed by the U.S. Constitution's Due Process Clause. *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).

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 the court below, have recognized that fundamental right to marry encompasses the right to marry someone of the same sex, and that this constitutional protection against state interference with the choice of marital partner encompasses an individual's choice of a same-sex partner. In *Brenner v. Scott*, 999 F. Supp. 2d 1278, 1288 (N.D. Fla. 2014), the district court observed that "the [fundamental] right to marry—to choose one's own spouse—is just as important to an individual regardless of whom the individual chooses to marry." In *Bostic v. Schaefer*, 760 F.3d 352, 376 (4th Cir. 2014), the Fourth Circuit, in rejecting the state's exclusion of same-sex couples from marriage, likewise wrote that the fundamental right to marry "is not circumscribed based on the characteristics of the individuals seeking to exercise that right." The court added: "If courts limited the right to marry to certain couplings, they would effectively create a list of legally preferred spouses, rendering the choice of whom to marry a hollow choice instead." *Id.* at 377. A Florida state court similarly stated, in finding constitutional protection for same-sex couples right to marry in the state, "[t]he Supreme Court has never analyzed whether a fundamental right to marry exists by defining the right to include only those who are not being excluded from access to that right." *Pareto v. Ruvin*, Case No. 14-1661-CA-01, at 14 (July

25, 2014). *See also Bishop v. Smith*, 760 F.3d 1070, 1080 (10th Cir. 2014) ("State bans on the licensing of same-sex marriage significantly burden the fundamental right to marry. . . ."); *De Leon v. Perry*, 975 F. Supp. 2d 632, 657 (W.D. Tex. 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*, 755 F.3d 1193, 1214 (10th Cir. 2014) ("[S]urely 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, Florida has rules in place regarding the solemnization of marriages. *See, e.g.*, Fla. Stat. § 741.07 (2014) (listing people able to solemnize a marriage); § 741.08 (stating that marriage is not to be solemnized without the issuance of a marriage license). Notably, though, these rules do not restrict individuals in their choice of spouse beyond the few eligibility requirements discussed *supra.* Indeed, even premarital blood test and medical examination requirements were repealed long ago. *See Miami-Dade* Marriage License Bureau – Frequently Asked Questions, *https://www2.miami-dadeclerk.com/MobilePortal/MLBFAQs.aspx#Are any medial exams required in*

order to apply for a Marriage License? (last visited Dec. 19, 2014) (explaining, at point 5, that these requirements were repealed in 1986).

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, Florida Imposes Few Requirements on Spousal Conduct Within Marriage, and No Rules That Differentiate Roles for Male and Female Marital Partners.

There is little in Florida law specifying how spouses should behave within marriage; the few rules that do exist focus on violence and abuse, and all of those are gender-neutral. *See, e.g.*, Fla. Stat. § 741.28 (2014) (defining "[d]omestic violence" as encompassing specified injurious acts "resulting in physical injury or death of one family or household member by another family or household member"). Statutes governing dissolution of marriage and child support similarly do not differentiate between male and female spouses. *See, e.g.*, Fla. Stat. § 61.052 (2014) (dissolution of marriage); § 61.08 (2014) (alimony).

Indeed, Florida generally permits spouses to craft premarital agreements that define the terms of their marriage, so long as the agreements are "not in violation of either the public policy of [the state of Florida] or a law imposing a criminal penalty" and do not adversely affect "[t]he right of a child to support." Fla. Stat. §

61.079(4)(a)(8), (4)(b) (2014). Couples may also form an enforceable contract providing for the "rights and obligations of each of the parties in any of the property of either or both of them whenever and wherever acquired or located." Fla. Stat. § 61.079(4)(a)(1) (2014).

Florida 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.*, *Mahan v. Mahan*, 88 So. 2d 545 (Fla. 1956) (granting annulment where spouse lacked capacity to consent because of intoxication at the time of the marriage ceremony); *Savage v. Olson*, 9 So. 2d 363 (Fla. 1942) (granting annulment where one spouse lacked mental capacity to consent); *Kuehmsted v. Turnwall*, 138 So. 775 (Fla. 1932) (same); Steven Scott Stephens, 23 Fla. Prac., Florida Family Law §§ 3:6 – 3:7 (2014) (identifying grounds for annulment to include false representations about statutory eligibility to marry, and lack of capacity to consent due to age, fraud, bigamy, incest, and permanent incapacity).

Even the dubious motives of one or both spouses are not grounds for annulment or non-recognition of a marriage. *See, e.g.*, *Savini v. Savini*, 58 So. 2d 193 (Fla. 1952) (treating a marriage as valid and holding that a wife was entitled to divorce, but not annulment, where the husband deliberately concealed prior to marriage the fact that he had been convicted of rape and was on parole); *Adler v.*

Adler, 805 So. 2d 952 (Fla. 2d DCA 2001) (disallowing annulment of the marriage notwithstanding that the wife had lied about her previous marriages and that the husband would not have entered into the marriage had he been aware of her actual marital history). As the Florida Supreme Court observed in *Chaachou v. Chaachou*, 73 So.2d 830, 838 (Fla. 1954), "[i]t matters not whether the arrangement or the contract or the marriage was for 'mere convenience' or 'business reasons' if the marriage was once established, it remains established until dissolved by death or divorce."

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, "Courts do not exist to guarantee happy and successful marriages, or to annul and cancel the effect of mere errors of judgment in the making of contracts of marriage." *Jacobs v. Jacobs*, 35 S.E.2d 119, 126 (Va. 1945).

C. Eligibility for Marriage in Florida 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.

The court below addressed the marital procreation rationale definitively:

> Florida has never conditioned marriage on the desire or capacity to procreate. Thus individuals who are medically unable to procreate can marry in Florida. If married elsewhere, their marriages are recognized in Florida. The same is

> true for individuals who are beyond child-bearing age. And individuals who have the capacity to procreate when married but who voluntarily or involuntarily become medically unable to procreate, or pass the age when they can do so, are allowed to remain married. In short, the notion that procreation is an essential element of a Florida marriage blinks reality.

Brenner v. Scott, 999 F. Supp. 2d at 1289.

Instead, Florida's domestic relations law expressly recognizes that married couples may have children through assisted insemination, adoption, or other means and that children born to and adopted by their parents have the same legal status. *See*, *e.g.*, Fla. Stat. § 63.042 (2014) (providing that married couples, as well as unmarried individuals, can adopt children); § 742.11 (setting out legal relationship of children born within wedlock and "conceived by the means of artificial or in vitro insemination" or "by means of donated eggs or preembryos").

Florida also has long affirmed that adopted children have the same legal status as children conceived by their parents. *See* Fla. Stat. § 63.032(2) (2014) (declaring adoptive children to have "all the rights and privileges and [to be] subject to all the obligations of a child born to such adoptive parents in lawful wedlock"); *see also G.S. v. T.B.*, 985 So.2d 978, 985 (Fla. 2008) (affirming that "[a]doptive children and adopting parents are legally the same as natural children and natural parents"). It bears noting, too, that Florida does not distinguish between gay and nongay adults for purposes of adoption. *Cf. Florida Dep't of Children & Families v. Adoption of*

X.X.G., 45 So.3d 79 (Fla. 3d DCA 2010) (invalidating the state statutory ban on gay people adopting children).

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

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

As the Supreme 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 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. These decisions 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 (citation omitted). 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 (quoting *Griffin v. Illinois*, 351 U.S. 12, 24 (1956)).

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. The Due Process and Equal Protection Guarantees Require Equal Access to Fundamental Rights, Including Autonomy in Decisions about Childrearing, Intimacy, and Whom to Marry.

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. . . ."); *Bostic*, 760 F.3d at 377 ("We . . . have no reason to suspect that the Supreme Court would accord the choice to marry someone of the same sex any less respect than the choice to marry an opposite-sex individual who is of a different race, owes child support, or is imprisoned.").

Indeed, the Court's opinion in *Lawrence* directly corrected a similar rights-framing error in its earlier *Bowers v. Hardwick*, 478 U.S. 186 (1986), ruling. In *Bowers*, the Court characterized the plaintiff's claim as seeking protection for "a

fundamental right to engage in homosexual sodomy." *Id.* at 191. But in *Lawrence*, the Court flatly rejected that description as a mischaracterization of the right at issue. It held, instead, that defendants Lawrence and Garner sought protection of their fundamental right to "the autonomy of the person" to make "'the most intimate and personal choices . . . [that are] central to personal dignity and autonomy . . . [and] to the liberty protected by the Fourteenth Amendment.'" *Lawrence*, 539 U.S. at 574 (quoting *Casey*, 505 U.S. at 851). That liberty right could not properly be understood as defined by the sex or sexual orientation of the parties who sought to exercise it.

Likewise, the speculation that heterosexual couples might stop valuing marriage if gay and lesbian couples can marry rests on the similarly impermissible reasoning that a fundamental right can be denied to some based on the preferences of others. Indeed, that reasoning is uncomfortably akin to justifications offered for racially restrictive covenants nearly a century ago. "It is said that such acquisitions [of property] by colored persons depreciate property owned in the neighborhood by white persons." *Buchanan v. Warley*, 245 U.S. 60, 82 (1917).

Rejecting this theory for denying rights, the Supreme Court offered an observation about the absurdity of this speculation in relation to the constitutional claim there, which applies here as well: "But property [marriage] may be acquired by undesirable white [heterosexual] neighbors or put to disagreeable though lawful

uses with like results." *Id*. In short, conditioning one group's access to a fundamental right based on the preferences or actions of another is wholly contrary to the longstanding doctrine, just discussed, that recognizes the central importance of these rights.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE 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 4388 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

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December 19, 2014

CERTIFICATE OF SERVICE

I hereby certify that, on December 19, 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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December 19, 2014