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

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JAMES 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 LAMBDA LEGAL DEFENSE AND EDUCATION FUND IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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Brenner v. Sec'y, Fla. Dep't of Health
Grimsley v. Sec'y, Fla. Dep't of Health

SUPPLEMENTAL STATEMENT OF INTERESTED PERSONS

Pursuant to Eleventh Circuit Rule 26.1-1, Amicus Curiae provides this Supplemental Statement to disclose those with an interest in this amicus brief and certifies that the certificate contained in the first brief filed and in the subsequent briefs that have been filed are complete.

The Amicus Curiae is:

Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is a 501(c)(3) not-for-profit corporation incorporated under the laws of the State of New York with its principal place of business in New York City, New York.

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STATEMENT OF INTEREST AND AUTHORITY

Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal" or "*Amicus*") is a non-profit national organization committed to achieving full recognition of the civil rights of lesbian, gay, bisexual, and transgender people and those living with HIV through impact litigation, education, and public policy work. Lambda Legal has participated as counsel or *amicus* in numerous challenges to state laws banning same-sex couples from marriage, including *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014) (holding Indiana marriage ban unconstitutional) and *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014) (counsel for intervening appellee class of Virginia same-sex couples) (holding Virginia marriage ban unconstitutional). Lambda Legal also was party counsel in *Romer v. Evans*, 517 U.S. 620, 116 S. Ct. 1620 (1996), and *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472 (2003), and *amicus* in *United States v. Windsor*, 133 S. Ct. 2675 (2013), the leading Supreme Court cases redressing sexual orientation discrimination. Lambda Legal accordingly has both an interest in protecting lesbian and gay couples and their children in every state of the nation and extensive expertise in the issues before this Court.

This brief is submitted with consent of the parties.

No party's counsel has authored this brief in whole or in part; no person (including any party or any party's counsel) other than the *amicus curiae*, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief.

STATEMENT OF THE ISSUES

The primary issues presented by this case is whether the district court correctly held that Florida's prohibition against marriage for same-sex couples violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Whether the district court's order preliminarily enjoining enforcement of Florida's prohibition against allowing same-sex couples to marry or recognizing the marriages of same-sex couples validly entered into in other states was an abuse of discretion is also an issue in this case.

SUMMARY OF ARGUMENT

Amicus agrees with Plaintiffs-Appellees ("Plaintiffs") that the district court in this case correctly granted a preliminary injunction that enjoins enforcement of state laws and constitutional provisions in

Florida[1] that exclude lesbian and gay couples from marriage (the "marriage ban" or "ban"). *Amicus* specifically agrees that the marriage ban was motivated "entirely, or almost entirely, by moral disapproval," which is not a constitutionally sufficient justification for a law. Order Granting Pls.' Mot. Prelim. Inj. at 22-23.

Amicus here provides briefing to complement Appellees' arguments that the district court correctly ruled that the ban denies lesbian and gay individuals the fundamental right to marry the person she or he loves, as well as the right to have a lawful out-of-state marriage respected, in violation of the Equal Protection and Due Process Clauses of the United States Constitution. In particular, *Amicus* submits this brief to elucidate why, as the district court held, the ongoing exclusion of a class of people historically barred from exercising a fundamental right freely exercised by others violates the Due Process Clause.

Appellants argue that because Florida laws never have permitted lesbian and gay couples to marry, this history of exclusion forecloses any claim that the marriage ban violates the guarantees associated

[1] Fla. Const. Art. I, § 27, Fla. Stat. Ann. § 741.212, among others.

with a fundamental right. *See* Appellants' Br., Case Nos. 14-14061 and 14-14066 (11th Cir. filed Nov. 14, 2014) at 27, 29. However, in numerous cases recognizing and upholding the fundamental right to marry, the Supreme Court has made clear that *freedom of choice of whom to marry* is a critical component of that right. The Supreme Court also has established that the fundamental right to marry includes the right of a couple to marry in another state and receive governmental respect for their marriage upon returning home. These cases demonstrate the Constitution's respect for our autonomy to make the personal decisions at stake here—decisions about with whom a person will build a life and a family.

Appellants fail to appreciate the contours of this liberty when they attempt to re-frame the fundamental right asserted as a "new" right to marry someone of the same sex. *See* Appellants' Br., at 22. When a person who has been excluded from exercising a claimed fundamental right steps forward seeking to exercise that right, courts properly frame the right based on the attributes of the right itself, without reference to the identity of the person who seeks to exercise it. In other words, fundamental rights are defined by the nature of the liberty sought, not

by *who* seeks to exercise the liberty. Here, the right at issue is the right to marry, among the most deeply-rooted and cherished liberties identified by our courts.

The history of marriage in Florida and elsewhere around the country belies Appellants' argument that marriage is static, and defined by its historic limitation to different-sex couples. Marriage laws have undergone substantial changes in past generations to end subordination of married women and race-based entry requirements, for example. History tells us that these changes have served our society well by keeping marriage relevant despite evolving social needs and conceptions of equality.

Today, thirty-five states and the District of Columbia permit same-sex couples to marry. Marriage remains a vital and cherished institution in these states, even as barriers to fuller participation in that institution have fallen. Indeed, the Supreme Court in *Windsor* recently acknowledged that marriage confers on same-sex couples "a dignity and status of immense import," *Windsor*, 133 S. Ct. at 2681, and that by denying recognition to these validly married couples, the federal government had "demean[ed]" married couples and "humiliated" their

children in violation of the equality and liberty guarantees in the Constitution.

The liberty interests at stake for same-sex couples who wish to marry and build a family together are the same universal liberty interests protected by courts for generations, reflecting a societal understanding that respect for the choices we make about whom to marry is central to our dignity as human beings. As the district court below concluded, "[t]he right to marry is as fundamental for the plaintiffs in the cases at bar as for any other person wishing to enter a marriage or have it recognized." Order Granting Pls.' Mot. Prelim. Inj. 21 (citations and internal quotation marks omitted). Accordingly, *Amicus* urges the Court to hold that the marriage ban violates lesbian and gay persons' fundamental right to marry.

ARGUMENT

I. The Essence of the Fundamental Right to Marry Is Freedom of Choice in the Selection of One's Spouse Free from Governmental Interference.

The right to marry long has been recognized as fundamental and protected under the due process guarantee because deciding whether and whom to marry is exactly the kind of personal matter about which

government should have little say. *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 564-65, 109 S. Ct. 3040, 3081 (1989) ("freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment") (emphasis added) (citing *Loving v. Virginia*, 388 U.S. 1, 12, 87 S. Ct. 1817 (1967)); *Zablocki v. Redhail*, 434 U.S. 374, 387, 98 S. Ct. 673 (1978) (finding burden on right to marry unconstitutional because it infringed "freedom of choice in an area in which we have held such freedom to be fundamental" (emphasis added)); *Moore v. City of E. Cleveland*, 431 U.S. 494, 499, 97 S. Ct. 1932, 1935 (1977). Indeed, "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Loving*, 388 U.S. at 12, 87 S. Ct. at 1824 (citation omitted); *see also McDonald v. City of Chicago*, 561 U.S. 742, 864, 130 S. Ct. 3020, 3091-92 (2010) (Thomas, J., concurring) ("[S]ubstantive due process is fundamentally a matter of personal liberty. . . .") (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847, 112 S. Ct. 2791, 2805 (1992)).[2]

[2] Many other cases describe the right to marry as fundamental.

continued —

Because the right to make personal decisions central to marriage would have little meaning if government dictated one's marriage partner, courts have placed special emphasis on protecting one's choice of spouse. "[T]he regulation of constitutionally protected decisions, such as where a person shall reside or *whom he or she shall marry*, must be predicated on legitimate state concerns other than disagreement with the choice the individual has made." *Hodgson v. Minnesota*, 497 U.S. 417, 435, 110 S. Ct. 2926, 2937 (1990) (emphasis added); *see also Loving*, 388 U.S. at 12 ("Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State."); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 620, 104 S. Ct. 3244, 3251 (1984) ("[T]he Constitution undoubtedly imposes constraints on the State's power to control the selection of one's spouse . . . ."). Indeed, "[t]he essence of the right to marry is freedom to join in marriage with the person of one's choice." *Perez v. Sharp*, 198 P.2d 17 (Cal. 1948).

— continuation
Turner v. Safley, 482 U.S. 78, 95 (1987); *Griswold v. Connecticut*, 381 U.S. 479, 485-86, 85 S. Ct. 1678 (1965). *See generally Washington v. Glucksberg*, 521 U.S. 702, 727 n.19, 117 S. Ct. 2258 (1997) (citing cases).

II. In Keeping with the Autonomy Protected by the Due Process Guarantee, Florida Imposes Very Few Restrictions on Adults in Different-Sex Relationships Who Wish to Marry and Does Not Require an Intention or Ability to Procreate.

Florida imposes few restrictions on an individual's decision whether and whom to marry. *See* Fla. Stat. Ann. § 741.04(1) ("No county court judge or clerk of the circuit court in this state shall issue a license for the marriage unless [1] there shall be first presented . . . an affidavit . . . providing the social security numbers . . . [2] both such parties shall be over the age of 18 years, except as provided . . . and [3] unless one party is male and the other party is female."); *see also id.* § 741.21. A person may marry a different-sex spouse of another religion, with a criminal record, or with a history of abuse. Whether we choose to marry a scoundrel or a saint, or not to marry at all, the Constitution guarantees our liberty, for better or for worse, to choose for ourselves. *See generally Lawrence v. Texas*, 539 U.S. 558, 562, 123 S. Ct. 2472, 2475 (2003) ("[T]here are . . . spheres of our lives and existence . . . where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.")

Florida also permits spouses to determine for themselves the *purposes* marriage serves and the form it takes. Married couples may have children, but they need not and often do not. Spouses need not pass a fertility test, intend to procreate, be of childrearing age, or have any parenting skills. The right to marry in Florida—and in every state in the nation—is not and has never been conditioned on procreation.[3]

Indeed, that the right to marry is not conditioned on procreation was recognized expressly in *Turner v. Safley*, 482 U.S. 78, 95-96, 107 S. Ct. 2254 (1987) (marriage is a fundamental right for prisoners even though some may never have the opportunity to "consummate" marriage; "important attributes" of marriage include "expression . . . of emotional support and public commitment," and, for some, "exercise of

[3] Although a spouse's inability to have sexual relations may be grounds for an annulment or divorce, infertility has never been a basis for annulment or divorce either in Florida or elsewhere. *See, e.g.*, Fla. Stat. Ann. § 61.052 (specifying grounds for divorce, which do not include infertility); *Gibbs v. Gibbs*, 23 So. 2d 382 (Fla. 1945); *see also*, *e.g.*, *Griego v. Oliver*, 316 P.3d 865, 877-78 (N.M. 2013) (infertility never a ground for divorce); *Turney v. Avery*, 113 A. 710 (N.J. Ch. 1921) (that wife could not bear children was not grounds for annulment, because she still was able to engage in sexual relations); *Korn v. Korn*, 242 N.Y.S. 589, 591 (App. Div. 1930) ("The law appears to be well settled that sterility is not a ground for annulment"); *cf. Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 961 (Mass. 2003) ("Fertility is not a condition of marriage, nor is it grounds for divorce").

religious faith as well as personal dedication" and "precondition to the receipt of government benefits . . . [including] less tangible benefits," such as "legitimization of children born out of wedlock"); *cf. Lawrence*, 539 U.S. at 578, 123 S. Ct. at 2483 ("[D]ecisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment."). As *Windsor* acknowledged, an individual's choice of whom to marry often fulfills dreams and vindicates a person's dignity and desire for self-definition in ways that have nothing to do with a desire to have children; marriage permits couples "to define themselves by their commitment to each other," and "to affirm their commitment to one another before their children, their family, their friends, and their community." *Windsor*, 133 S. Ct. at 2689.

In short, with deference to personal autonomy, and consistent with the laws in other states, Florida minimally regulates entry into marriage and the ways any two persons build married life together after exchanging vows—providing that the parties are of different sexes. In this state as in all others, the absence of children, now or in the

future, does not vitiate the basic liberty and fundamental right to marry guaranteed to all adults.[4]

III. The Fundamental Right to Marry Includes the Right of Couples Married Out-of-State to Remain Married in Florida.

Just as the right to marry a spouse of one's own choosing has a deeply-rooted constitutional foundation, there is nothing novel about the principle that a couple has a fundamental right to have their marriage accorded legal recognition by the state in which the couple lives. That is precisely what the landmark case *Loving v. Virginia* was all about. In *Loving*, Mildred and Richard Loving, an interracial couple, left their home state of Virginia to marry in Washington, D.C., a jurisdiction that permitted persons of different races to marry, before returning home. 388 U.S. at 2, 87 S. Ct. at 1818. The Supreme Court struck down not only Virginia's law prohibiting interracial marriages within the state, but also its statutes that denied recognition to and criminally punished such marriages entered into outside the state. *Id.* at 4, 87 S. Ct. at 1819-20. Significantly, the Court held that Virginia's

[4] Same-sex couples (like different-sex couples) have children and will continue to do so through assisted procreation, adoption, and prior relationships. All the marriage ban does is deny the children of same-sex couples the benefits and dignity of having their parents be married.

statutory scheme—including the penalties on out-of-state marriages and its voiding of marriages obtained elsewhere—"deprive[d] the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment." *Id.* at 12, 87 S. Ct. at 1824; *see also Zablocki*, 434 U.S. at 397 n.1, 98 S. Ct. at 687 n.1 (Powell, J., concurring) ("[T]here is a sphere of privacy or autonomy surrounding an existing marital relationship into which the State may not lightly intrude . . . .") (emphasis added).

When government effectively terminates the marriage of a same-sex couple married in another jurisdiction, it intrudes into the realm of private marital, family, and intimate relations protected by the liberty and equality guarantees of the Constitution. *See Windsor*, 133 S. Ct. at 2694 (explaining that when government targets same-sex couples for denial of marital respect, "[t]he differentiation demeans the couple, whose moral and sexual choices the Constitution protects, and whose relationship the State [under whose laws the couple has married] has sought to dignify") (internal citation omitted). Indeed, the constitutionally-guaranteed right to marry would be meaningless if government were free to refuse recognition of a couple's marriage once

entered and effectively annul the marriage as if it had never occurred. The status of being married "is a far-reaching legal acknowledgment of the intimate relationship between two people," *id.* at 2692, a commitment of enormous import that spouses carry wherever they go throughout their married lives. Florida may not strip same-sex spouses of "one of the vital personal rights essential to the orderly pursuit of happiness," *Loving*, 388 U.S. at 12, 87 S. Ct. at 1824, when they set foot in the State. Like Mildred and Richard Loving, Florida same-sex spouses have a constitutional due process right not to be deprived of their already-existing legal marriage once they return home.

IV. The Right at Stake Here Is the Right to Marry, Shared by All Adults, Not a "New" Right to Marry a Person of the Same Sex.

In an effort to avoid binding precedent mandating respect for the fundamental right to marry, Appellants attempt to reframe the right at issue here as a "new" right of "same-sex marriage," which they argue is too recent a claim to be fundamental. Appellants' Br. at 22-27. But Appellees do not seek recognition of a "new" right. Instead, they seek to exercise a *pre-existing*, settled fundamental right: marriage.

The scope of a fundamental right is defined by the *attributes of the right itself,* and not the identity of the people who seek to exercise it

or who have been excluded from doing so in the past. When analyzing fundamental rights and liberty interests, the Supreme Court has consistently adhered to the principle that a fundamental right, once recognized, properly belongs to *everyone*—regardless of whether a particular claimant can point to a historical tradition supporting the claimant's ability to exercise that right. For example, in *Youngberg v. Romeo*, 457 U.S. 307, 315-16, 102 S. Ct. 2452, 2457-58 (1982), the Supreme Court held that an individual involuntarily committed to a custodial facility because of a disability retained liberty interests, including a right to freedom from bodily restraint. The Court thus departed from the longstanding tradition in which people with serious disabilities were viewed as not sharing such substantive due process rights and were routinely subjected to bodily restraints. *See also Eisenstadt v. Baird*, 405 U.S. 438, 92 S. Ct. 1029 (1972) (liberty interest in controlling one's fertility, previously recognized only for married persons in *Griswold v. Connecticut*, 381 U.S. 479, 486, 85 S. Ct. 1678, 1682 (1965), recognized equally for unmarried persons).

Specifically in the context of the fundamental right to marry, the Supreme Court has rejected attempts to reframe the right narrowly so

as to include only those previously acknowledged to enjoy that liberty. Thus, the fundamental right to marry could no more be a right to "same-sex marriage" than the right enforced in *Loving* was to "interracial marriage," 388 U.S. 1, 87 S. Ct. 1817; or in *Zablocki* to "deadbeat parent marriage," 434 U.S. 374, 98 S. Ct. 673; or in *Turner* to "prisoner marriage," 482 U.S. 78, 107 S. Ct. 2254.

The argument that same-sex couples seek a "new" right rather than the same right exercised by others makes the identical mistake of *Bowers v. Hardwick*, 478 U.S. 186, 106 S. Ct. 2841 (1986), corrected by *Lawrence*, 539 U.S. 558, 123 S. Ct. 2472. In a challenge by a gay man to Georgia's sodomy statute, the *Bowers* Court recast the right at stake from the right to consensual intimacy with the person of one's choice—one shared by all adults—into a claimed "fundamental right" of "homosexuals to engage in sodomy." *Id.* at 566-67, 123 S. Ct. at 2478 (quoting *Bowers*, 478 U.S. at 190, 106 S. Ct. at 2843). Significantly, *Lawrence* overruled *Bowers*, holding that that case's constricted framing "fail[ed] to appreciate the extent of the liberty at stake." *Lawrence*, 539 U.S. at 567, 123 S. Ct. at 2478.

The liberty interests in marital autonomy shared by lesbian and gay persons are as profound as for other individuals. As *Windsor* acknowledges, and as is already recognized in thirty-five other states and the District of Columbia, nothing about marriage is inherently limited solely to different-sex couples. In states where same-sex couples may marry, marriage permits these families to "live with pride in themselves and their union and in a status of equality with all other married persons." *Windsor*, 133 S. Ct. at 2689.

V. Appellants Misapprehend the Role of History When Considering the Scope of Fundamental Rights.

Appellants rely on the tradition of exclusion to justify continued exclusion, arguing that Florida's laws do not violate the fundamental right to marry because the plaintiffs in the *Loving, Zablocki*, and *Turner* cases were different-sex couples and that the historical limitation of marriage to different-sex couples is itself justification to continue the limitation. Appellants' Br. at 25. This misuses the role of history and tradition in due process jurisprudence for two reasons. First, although courts consider history and tradition to identify the interests that due process protects, once a right has been deemed fundamental, courts must not allow historical limitations on the classes

of persons permitted to exercise the right to blind their analysis of whether continued denial of the right violates the Due Process Clause. *Washington v. Glucksberg*, 521 U.S. 702, 710-18, 117 S. Ct. 2258 (1997) Second, Appellants' argument that marriage is static, defined by its historic limitation to different-sex couples, ignores that marriage laws have undergone profound changes over time and are virtually unrecognizable from the way they operated a century ago, let alone two centuries and more. *See generally* NANCY F. COTT, A HISTORY OF MARRIAGE AND THE NATION (Harvard Univ. Press 2000). And yet, the essence of marriage endures. Couples continue to come together—to join their lives and to form new families—and marriage continues to support and stabilize them.

Thus, contrary to Appellants' assertions, the fact that same-sex couples historically were not allowed to marry is hardly the end of the analysis. *See Lawrence*, 539 U.S. at 572, 123 S. Ct. at 2480 ("[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.") (internal quotation marks omitted). History merely guides the *what* of due process rights, not the *who* of which individuals may exercise them. This distinction is central

to due process jurisprudence and explains why Appellants' argument that the right to marry is reserved solely for those who wish to marry someone of a different sex is incorrect. By their very nature, fundamental rights cannot be made to turn on the person who is asserting them. Once a right is recognized as *fundamental*, it "cannot be denied to particular groups on the ground that these groups have historically been denied those rights." *In re Marriage Cases*, 183 P.3d 384, 430 (Cal. 2008) (internal quotation marks omitted).

Appellants' argument runs counter to numerous Supreme Court cases rejecting invidious historical restrictions on who had been permitted to exercise a fundamental right, whether those restrictions are couched as 'historical definitions' or otherwise. For instance, when the Court held that anti-miscegenation laws violated the fundamental right to marry in *Loving*, it did so despite a long tradition of using race to determine who could marry whom, excluding interracial couples from marriage. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847-48, 112 S. Ct. 2791, 2805 (1992) ("[I]nterracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state

interference by the substantive component of the Due Process Clause in Loving . . . .") Likewise, in *Turner*, 482 U.S. 78, 107 S. Ct. 2254, the Supreme Court held that a state needed sufficient justification to restrict an incarcerated prisoner's ability to marry, even though the right to marry as traditionally understood in this country did not extend to prisoners. *See* Virginia L. Hardwick, *Punishing the Innocent: Unconstitutional Restrictions on Prison Marriage and Visitation*, 60 N.Y.U. L. Rev. 275, 277-79 (1985). Further, the right to marry traditionally did not include, and was not defined as including, a right to remarriage after a divorce. But in the modern era, the Supreme Court has held that states may not burden an individual's right to marry simply because that person has been married before. *Boddie v. Connecticut*, 401 U.S. 371, 376, 91 S. Ct. 780, 785 (1971) (states may not require indigent individuals to pay court fees in order to obtain a divorce since doing so unduly burdened their fundamental right to marry again).

Nor have other fundamental rights been protected only when exercised by people who historically held them. *Eisenstadt*, for example, struck down a ban on distributing contraceptives to unmarried persons,

without suggesting that there was a history of protecting the sexual privacy of unmarried people. 405 U.S. at 453, 95 S. Ct. at 1038. *Casey* struck down a spousal notification law that was "consonant with the common-law status of married women"—and thus with historical tradition—but "repugnant to our present understanding of marriage and of the nature of the rights secured by the Constitution." *Casey,* 505 U.S. at 898, 112 S. Ct. at 2831. And in *Lawrence*, the Court followed *Eisenstadt* and other due process cases in holding that lesbian and gay Americans could not be excluded from the existing fundamental right to sexual intimacy, even though they had often been prohibited from enjoyment of that right in the past. 539 U.S. at 566-67, 123 S. Ct. at 2477-78.

These cases all reject the argument, advanced by Appellants here, that the historical exclusion of a class of people from exercise of a fundamental right precludes their claim to that right now. Instead, by striking down these infringements of fundamental rights or liberty interests despite these plaintiffs' lack of a historical claim, the Supreme Court demonstrates that the focus should be on the right asserted, rather than the person asserting it.

Appellants also ignore that marriage as an institution is not static, but already has changed dramatically over the last century, and that these transformations have ensured its continued relevance. For example, discriminatory racial restrictions once were widely accepted elements of marriage. *See*, *e.g.*, *Free v. State*, 194 So. 639 (Fla. 1940) (appeal from criminal conviction for marrying a person of a different race); *McLaughlin v. State*, 153 So. 2d 1, 2 (Fla. 1963) (affirming interracial couple's conviction and sentence of 30 days in jail and a $150 fine for cohabiting with a member of a different race, and relying upon the statute upheld in *Pace v. Alabama*, 106 U.S. 583, 1 S. Ct. 637 (1883), which banned interracial marriage), *rev'd sub nom. McLaughlin v. Florida*, 379 U.S. 184 (1964).

Florida was hardly an outlier in banning interracial marriage. Most states' laws contained such bans at some point in their history and in case after case, courts upheld such racial restrictions in reliance on "tradition" rooted in conceptions of "nature."[5] Long into the twentieth

[5] For example, the Indiana Supreme Court relied on the "undeniable fact" that the "distribution of men by race and color is as visible in the providential arrangement of the earth as that of heat and cold," and that segregation derived not from "prejudice, nor caste, nor injustice of

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century, the sheer weight of cases accepting the constitutionality of bans on interracial marriage was deemed justification in and of itself to perpetuate these discriminatory laws. *See*, *e.g.*, *Jones v. Lorenzen*, 441 P.2d 986, 989 (Okla. 1965) (upholding Oklahoma anti-miscegenation law since the "great weight of authority holds such statutes constitutional").[6]

Not until 1948 did a state high court critically examine these traditions, and strike down an anti-miscegenation law as violating rights of due process and equal protection. *Perez*, 198 P.2d 17. In *Perez*, the California Supreme Court acknowledged that these laws were based on the historically "assumed" view that such marriages were

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— *continuation*
any kind, but simply to suffer men to follow the law of races established by the Creator himself, and not to compel them to intermix contrary to their instincts." *State v. Gibson*, 36 Ind. 389, 404-05 (1871); *see also Scott v. State*, 39 Ga. 321, 326 (1869) ("[M]oral or social equality between the different races . . . . does not in fact exist, and never can.").

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

"unnatural." *Id.* at 22. But rather than accept this view as sheltering such laws from meaningful constitutional review, the court fulfilled its responsibility to ensure that legislation infringing the fundamental right to marry "must be based upon more than prejudice." *Id.* at 19. In doing so, the court rejected the dissent's assertion that the legislature's authority to regulate marriage conferred unchecked power to define who may marry. *Id.* at 33, 37, 42 (Shenk, J., dissenting). The court understood as well that the long duration of a wrong cannot justify its perpetuation. *Id.* at 26 (majority opinion). It was not that the Constitution had changed; rather, its mandates had become more clearly recognized. *Id.* at 19-21, 32 (Carter, J., concurring) ("[T]he statutes now before us never were constitutional."); *see also Lawrence*, 539 U.S. at 579, 123 S. Ct. at 2484 ("[T]imes can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."); *Windsor*, 133 S. Ct. at 2689 (when permitting same-sex couples to marry, New York corrected "what its

citizens and elected representatives perceived to be an injustice that they had not earlier known or understood").

Following *Perez*, many states repealed their anti-miscegenation laws. Finally, the Supreme Court struck down all remaining anti-miscegenation laws, including Florida's, grounding its decision on both the equal protection and due process guarantees of the Fourteenth Amendment. *Loving*, 388 U.S. at 6 n.5, 12, 87 S. Ct. at 1821 n.5, 1823-24. Emphasizing that the choice of *whom* to marry is at the heart of this fundamental right and liberty interest, the Court in *Loving* held that "[u]nder our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State." *Id.*

Florida's marriage law has also rejected differential treatment based on gender that was a signal element of marriage under the common law. Under the doctrine of coverture, a married woman lost her separate legal existence as a person, and her legal being was subsumed into her husband. *See*, *e.g.*, *Connor v. Sw. Fla. Reg'l Med. Ctr.*, 668 So. 2d 175 (Fla. 1995) ("At common law, a married woman's legal identity merged with that of her husband, a condition known as coverture. She

was unable to own property, enter into contracts, or receive credit."). For centuries, this arrangement was legally imposed and was believed to reflect "natural," God-given roles of men and of women in marriage. *See*, *e.g.*, *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring).[7] Through marriage laws, states and the federal government reinforced the view that a man should be the legal head of the household, responsible for its support and links to external society, with physical, sexual, economic, and legal dominion over his wife, while a married woman should be responsible for the day-to-day management of the home and the care and nurture of children. *Id.*; *see also Califano v. Westcott*, 443 U.S. 76, 99 S. Ct. 2655 (1979); *People v. Liberta*, 474 N.E.2d 567 (N.Y. 1984) (striking down marital rape exemption, and

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

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

Bradwell v. Illinois, 83 U.S. 130, 141 (1872)

describing origin of doctrine under coverture, which gave possession of wife's body to her husband); *Brandt v. Keller*, 109 N.E.2d 729, 730 (Ill. 1952) (married woman "regarded as a chattel with neither property nor other rights against anyone, for her husband owned all her property and asserted all her legal and equitable rights").

However, Florida and all other states have rejected these obsolete requirements for sex-differentiated roles within marriage. *See*, *e.g.*, *Merchs. Hostess Serv. of Fla. v. Cain*, 9 So. 2d 373 (Fla. 1942) . Today, the states and federal law treat both spouses equally and in gender-neutral fashion with respect to marriage, and the Supreme Court has confirmed that such gender-neutral treatment for marital partners is constitutionally required. *See Califano v. Goldfarb*, 430 U.S. 199, 97 S. Ct. 1021 (1977); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 95 S. Ct. 1225 (1975).

Florida's divorce law has also evolved, highlighting the state's movement toward a view of marriage as a voluntary union of equal partners. For much of its history, Florida allowed divorce only for cause, but now spouses may exit marriage when their relationship is irretrievably broken. *Coltea v. Coltea*, 856 So. 2d 1047, 1050 (Fla. 4th

DCA 2003) ("Marriages in Florida are no longer terminated by divorce. Today we deal with dissolution of marriage rather than divorce. Divorce was a fault based system for ending marriages. To prevail in a divorce, the wife had to show misconduct, or fault, by the husband."). Thus, the history of Florida's marriage law—as is true in every other state in the country—shows a rejection of discriminatory entry requirements and a steady progression towards a view of marriage in which adults are free to marry the partner of their choice, spouses have equal legal standing within their relationship and in their dealings with others, and spouses may divorce when they no longer wish to remain married.

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

not changed, and are shared by all individuals.[8] *See Kitchen v. Herbert*, 755 F.3d 1193, 1209-10 (10th Cir. 2014); *Bostic*, 760 F.3d at 376-77.

VI. The Marriage Ban Is Subject to Strict Scrutiny.

Because the marriage ban discriminatorily burdens lesbian and gay persons' fundamental liberty interests, including the fundamental right to marry, the ban is subject to strict scrutiny. State infringement of fundamental rights is constitutionally permissible only when "necessary to promote a compelling state interest." *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 627, 89 S. Ct. 1886, 1890 (1969).

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[8] Appellants imply, just as proponents of interracial marriage bans did in generations past, that permitting same-sex couples to marry would send this nation on a slippery slope to state-authorized polygamy. Appellants' Br. at 26; *compare Perez*, 198 P.2d at 41 (Shenk, J., dissenting) (comparing interracial marriage bans to bans on incest, bigamy, and polygamy). However, in a challenge to a ban on polygamy, the State would have different governmental interests to assert from the interests Appellants raise here because permitting more than two spouses would require a profound restructuring of marital rights and responsibilities, including concerning consent, presumptions of parentage, of who may speak for an incapacitated spouse, and of public and private benefit systems. *See*, *e.g.*, *Potter v. Murray City*, 760 F.2d 1065, 1070 n.8 (10th Cir. 1985) (explaining that many of Utah's marriage laws are premised upon the existence of two spouses in a bilateral relationship). By contrast, permitting same-sex couples to marry requires no change to current marriage laws other than elimination of the gendered entry barrier. Consequently, the outcome of this case does not predetermine the outcome to a challenge to a ban on polygamy.

Appellants do not even claim that there is a compelling, or even important, governmental interest to justify the infringement on their citizens' constitutional rights, relying on the highly deferential scrutiny afforded to state laws that do not implicate the infringement of constitutional rights of its citizens. *Amicus* agrees with Appellees that not even a legitimate state interest, much less a compelling or significant one, exists to justify the marriage ban.

CONCLUSION

The judgment below should be ***affirmed***.

Dated: December 23, 2014.

Respectfully submitted,

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I hereby certify that on December 23, 2014, I electronically transmitted the above and foregoing document to the Clerk of the Court using the CM/ECF System for filing.

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