Nos. 14-556, 14-562, 14-571 & 14-574

# In The
# Supreme Court of the United States

JAMES OBERGEFELL, et al.,

*Petitioners,*

v.

RICHARD HODGES, DIRECTOR,
OHIO DEPARTMENT OF HEALTH, et al.

[Additional Captions On Inside Cover]

**On Writs Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## BRIEF OF *AMICI CURIAE* LIBERTY SCHOLARS AND THE SAINT THOMAS MORE SOCIETY OF DALLAS *SUPPORTING AFFIRMANCE*

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*Petitioners,*

v.

BILL HASLAM, GOVERNOR OF TENNESSEE, et al.

APRIL DeBOER, et al.,

*Petitioners,*

v.

RICK SNYDER, GOVERNOR OF MICHIGAN, et al.

GREGORY BOURKE, et al.,

*Petitioners,*

v.

STEVE BESHEAR, GOVERNOR OF KENTUCKY, et al.

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## INTRODUCTION AND INTERESTS OF *AMICI CURIAE*[1]

*Amici curiae* "Liberty Scholars" are professors whose teaching and research interests include the American constitutional tradition of liberty. *Amici* are concerned that the holding urged by Petitioners will do substantial harm to the integrity and coherence of that tradition, as developed by this Court's jurisprudence.

Liberty Scholars include the following: (1) Teresa Stanton Collett, Professor, the University of St. Thomas School of Law; (2) Lynne Marie Kohm, Professor and John Brown McCarty Professor of Family Law, Regent University School of Law; and (3) D. Brian Scarnecchia, Associate Professor, Ave Maria School of Law.

*Amicus curiae* the Saint Thomas More Society of Dallas is an organization of Roman Catholic attorneys. *Amicus* likewise cherishes our tradition of liberty, and is concerned that the Petitioners' request will undermine the law's traditional protections for the relation between parent and offspring.

In particular, *Amici* file this brief to explain and defend the principles of *Meyer v. Nebraska* and its progeny, up through and including *Lawrence v. Texas*. *Amici* submit that a decision compelling same-sex

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[1] This brief is filed with the consent of all parties. *Amici* and undersigned counsel have authored this brief in whole, and no other person or entity has funded its preparation or submission.

marriage would do violence to the liberty jurisprudence of the *Meyer-Lawrence* tradition.

*Amici* urge the Court to reaffirm our Constitution's tradition of liberty, and thus affirm the decision below.

## SUMMARY OF ARGUMENT

Two decades after the adoption of the Fourteenth Amendment, this Court stated unanimously that "no legislation" was more "necessary" to the foundation of a free society and "social and political improvement" than laws reflecting "the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony." *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885). A century later, this Court unanimously affirmed the male-female nature of marriage, by summarily rejecting the claim that the Amendment required the states to recognize same-sex unions as "marriages." *Baker v. Nelson*, 409 U.S. 810 (1972); *see also Labine v. Vincent*, 401 U.S. 532, 552-53 (1971) (Brennan, J., dissenting) (stating, in a Fourteenth Amendment case, that it is "important not to obscure the fact that the formality of marriage primarily signifies a relationship between husband and wife"); *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979) (indicating that "marriage" means "the domestic relations of husband and wife") (quoting *In re Burrus*, 136 U.S. 586, 593-94 (1890)).

Yet now Petitioners and supporting *amici* ask this Court to disavow these and countless other precedents. They argue that times have changed, and that this Court should too. In urging an undeniable revolution against precedent, they rely heavily on a few recent precedents, including *Lawrence v. Texas*, 539 U.S. 558, 581 (2003).

In *Lawrence*, however, this Court expressly denied that its holding involved "public conduct" or "whether the government must give formal recognition to any relationship." *Id.* at 578. *Lawrence*, then, said nothing favoring the contention that the Fourteenth Amendment compels the states publicly to issue marriage licenses to persons of the same sex, and thereby grant a "formal recognition" to certain relationships.

Petitioners, however, insist that *Lawrence* effectively *did* involve such "public conduct" and such "formal recognition." They effectively agree with Justice Scalia's dissent, in which he alleged that the "principle and logic" of *Lawrence* could well lead to the "judicial imposition of [same-sex] marriage."[2] *Lawrence*, 539 U.S. at 604. As to the majority's disclaimer, he was skeptical: "Do not believe it." *Id.*

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[2] *Amici* note that the question before the Court is only tangentially related to sexual orientation, for the Petitioners are asking this Court to endorse same-sex marriage, without discrimination as to the sexual orientation or private activity of the parties to such a contract.

*Amici* submit respectfully that Justice Scalia was clearly mistaken, and that the Court's disclaimer in *Lawrence* was not only credible but entirely persuasive. The alleged extension of *Lawrence* that Justice Scalia feared, and the petitioners here desire, would be no extension at all. Rather, it would do violence to the "principle and logic" of *Lawrence*.

In particular, *Lawrence* represented an organic development of a century-old line of precedents stretching back to *Meyer v. Nebraska*, 262 U.S. 390 (1923), and beyond. The *Meyer-Lawrence* family of cases involved (1) the abridgement of personal liberty, (2) by criminal laws, (3) the enforcement of which this Court found to have violated rights long recognized at common law. But the holding sought by Petitioners would invalidate laws having none of these features, and would thus be *foreign* and *opposed* to, the *Meyer-Lawrence* line of decisions. Rather than a development of common-law principles, the proposed holding would represent a direct repudiation of them. Indeed, by claiming the presumption of paternity for persons incapable of being a child's father, Petitioners are seemingly asking this Court to *contradict* the central right vindicated in *Meyer*: the presumptive right and duty of natural parents to the care and education of their offspring.

## ARGUMENT

### I. *Lawrence* represented an organic development of precedent in the *Meyer-Griswold-Casey* line of decisions.

In *Lawrence v. Texas*, 539 U.S. 558 (2003), this Court reversed as unconstitutional a conviction under Texas's anti-sodomy statute. To reach that conclusion, the Court relied on a long line of precedents. Indeed, the Court began the opinion with a citation to *Meyer v. Nebraska,* 262 U.S. 390 (1923), and *Pierce v. Society of Sisters,* 268 U.S. 510 (1925), followed by an elaborate discussion of *Meyer*'s more recent progeny, beginning with *Griswold v. Connecticut*, 381 U.S. 479 (1965) and extending to *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992). *Lawrence*, 539 U.S. at 564-66, 574.

*Lawrence* thus was based on precedent. To be sure, the Court expressly overturned one precedent, *Bowers v. Hardwick*, 478 U.S. 186 (1986). But the Court did not launch a revolution. Rather, the Court held that *Bowers* was an *aberrational* decision, at odds with both prior and subsequent precedent in the *Meyer-Griswold-Casey* line: "*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent." *Lawrence*, 539 U.S. at 578.[3]

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[3] Perhaps this Court's most notorious due-process decision is also its most aberrational, anti-precedential decision. *Buck v. Bell*, 274 U.S. 200 (1927). As courts before 1922 seemed to

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### A. In particular, the *Meyer-Casey* precedents all involved (1) the abridgement of personal liberty, (2) by criminal statutes, (3) the enforcement of which was found to have violated our common-law tradition.

The forerunners to *Lawrence* all involved *three* main features. *First*, in each case, the Court invalidated the abridgement of a personal liberty – that is, the power of individuals to act or refrain in a certain way. In *Meyer v. Nebraska*, 262 U.S. 390 (1923), a majority of this Court affirmed the right of parents to delegate their "natural duty" and educational right to a private teacher by "engag[ing] him so to instruct their children." *Id*. at 400. In *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), a unanimous court reaffirmed *Meyer* and recognized that liberty included the parental right to withhold their children from public schools and send them instead to sectarian schools. *Id.* at 534-35. Four decades later, a unanimous Court again expressly reaffirmed *Meyer* and

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acknowledge, state destruction of bodily integrity, without criminal law or procedure, was alien to due process. *Smith v. Bd. of Examiners of Feeble-Minded*, 88 A. 963, 966 (N.J. 1913); *Davis v. Berry*, 216 F. 413, 416-19 (S.D. Iowa 1914); *Williams v. Smith*, 131 N.E. 2, 2 (Ind. 1921). A year after joining Justice Holmes's opinion in *Buck*, Justice Brandeis celebrated the decision precisely because Virginia had met "modern conditions" by adopting coercive procedures that "a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive." *Olmstead v. United States*, 277 U.S. 438, 472 (1928) (Brandeis, J., dissenting) (quotations and citations omitted).

held that constitutional liberty encompassed the right of a man and woman, regardless of race, to contract a marriage and subsequently perform that agreement by cohabitation and otherwise. *Loving v. Virginia*, 388 U.S. 1, 7, 12 (1967). In *Griswold v. Connecticut*, 381 U.S. 479 (1965), and subsequent cases, through *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833 (1992), this Court repeatedly cited *Meyer* and repeatedly upheld (though over repeated dissent) the right to the use of contraception and abortion, and more generally, the liberty to decide "whether to bear or beget a child." *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *see also Griswold*, 381 U.S. at 482, 486; *Roe v. Wade*, 410 U.S. 113, 152-53, 154 (1973); *Carey v. Population Services Int'l*, 431 U.S. 678, 685 (1977); *Casey*, 505 U.S. at 848.

*Second*, all the cases involved the actual or prospective enforcement of criminal statutes. *See, e.g.*, *Meyer*, 262 U.S. at 397 (recounting the plaintiff-in-error's conviction under Nebraska's law against foreign-language instruction); *Griswold*, 381 U.S. at 480 (detailing appellants' conviction under Connecticut's anti-contraception law); *Casey*, 505 U.S. at 844-45 (noting petitioners' suit to enjoin enforcement of Pennsylvania's Abortion Control Act).[4]

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[4] In *Loving*, the Court's reliance on the Equal Protection Clause, as well as the Due Process Clause, 388 U.S. at 11-12, implicated the unconstitutionality of any law *invalidating* as well as *prohibiting* interracial marriage.

*Third*, in each of those cases, actual or prospective statutory enforcement was found to violate liberties deeply rooted in our common-law tradition. In *Meyer*, the Court set forth the general rule: that the "liberty" secured by the Fourteenth Amendment incorporated "generally those *privileges long recognized at common law* as essential to the orderly pursuit of happiness by free men." 262 U.S. at 399 (emphasis added). *Meyer* applied this principle by endorsing the traditional rights of parents to educate their offspring.

Contrary to Justice Scalia's suggestion in *Troxel v. Granville*, 530 U.S. 57, 91-92 (2000) (Scalia, J., dissenting), *Meyer* was not part of any substantive due process revolution. There was abundant early precedent supporting the contention that "due process of law" incorporates a strong presumption favoring natural parents' custodial and educational authority, much as due process incorporates a stronger presumption of innocence in criminal cases.[5]

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[5] *People ex rel. O'Connell v. Turner*, 55 Ill. 280, 284-88 (1870) (holding that to coercively transfer a child from his father's custody to a reform school would violate due process absent a finding of the child's criminal liability or the father's "gross misconduct or almost total unfitness"); *Milwaukee Indus. Sch. v. Supervisor of Milwaukee County*, 40 Wis. 328, 338-39 (1876) (holding that a Wisconsin statute depriving a parent of custody did not violate due process, because the deprivation required proof of a "total failure of the parent to provide for the child" and the parent, after a temporary failure, could recover custody upon showing he was "able and willing to resume the

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Accordingly, *Meyer*'s progeny continued to look back to our common-law tradition. To cite the most prominent cases, *Griswold* celebrated the "right of privacy older than the Bill of Rights – older than our political parties, older than our school system." 381 U.S. at 486.

In *Roe*, the Court similarly found that both at common law and under antebellum statutes, "a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today." 410 U.S. at 140. The Court proceeded to invalidate the statute that abridged that traditional right. *Id*. at 164. Even if *Roe*'s historical claim and decision were erroneous, the case followed the pattern of its predecessors: the abridgement of an alleged traditional liberty by modern criminal statutes.[6]

*Loving* also vindicated our common-law tradition. The Court alluded to *Meyer* in declaring that "the freedom to marry has long been recognized as one of

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nurture and education of the child"); *Nugent v. Powell*, 33 P. 23, 48 (Wyo. 1893) (holding that adoption proceedings that permanently transferred a child were satisfied because they required proof of both the mother's consensual relinquishment and the non-consenting father's "abandonment"); *Kennedy v. Meara*, 56 S.E. 243, 247-48 (Ga. 1906) (affirming that the parent has not only a duty to educate the child, but also a property interest in the child's services, the deprivation of which required a showing, after notice and hearing, that the parent had "by his conduct, forfeit[ed] his right to the custody of his minor child").

[6] *Amici* disagree with the historical claim and resulting decision in *Roe*, and with the reaffirmation of *Roe* in *Casey*.

the vital personal rights essential to the orderly pursuit of happiness by free men." The Court's conspicuous reluctance to mention the "common law" was unnecessary, for the right to marry, regardless of race, was indeed a right long recognized at common law – a liberty abridged by some states' racial-apartheid statutes. *See, e.g.*, JAMES SCHOULER, A TREATISE ON THE LAW OF THE DOMESTIC RELATIONS 29 (2d ed. 1874) (noting that "race, color, and social rank do not appear to constitute an impediment to marriage at the common law, nor is any such impediment now recognized in England. But by local statutes in *some* of the United States, inter-marriage has long been discouraged between persons of [different] races.") (emphasis added).[7]

Parenthetically, *Amici* note that this Court's oft-cited statement in *Casey* as to the "tradition" favoring racial-endogamy rules was mistaken. 505 U.S. at 847-48. Such statutes not only abridged the common law, but were inconsistent with the original understanding

[7] Authorities endorsing such laws had candidly noted they were in derogation of common law. *Robertson v. State*, 42 Ala. 509, 512 (1868) (Byrd, J., concurring) (citing Alabama's racial-endogamy statute as evidence that the legislature had restricted the full common-law liberty to marry); *Baity v. Cranfill*, 91 N.C. 293, 295 (1884) (contrasting the common law's nullification of certain immoral marriages with North Carolina's statutory nullification of interracial marriages). *See generally*, David R. Upham, *Interracial Marriage and the Original Understanding of the Privileges or Immunities Clause*, 42 HASTINGS CONST. L.Q. 213, 218-22 (2015).

of the Fourteenth Amendment.[8] Further, contrary to the Court's claim that "interracial marriage was illegal in most States in the 19th century," *Casey*, 505 ere non-existent or unenforced in a clear majority of the states, and a super-majority of the ratifying states, in large measure because Republican officials deemed such laws inconsistent with the Amendment, the Civil Rights Act of 1866, or both.[9]

### B. *Lawrence* was consistent with this long line of precedents.

In each of these three respects, *Lawrence* followed its predecessors. First, the case involved personal liberty. The Court cited (or alluded) to all the *Meyer-Griswold-Loving-Roe-Casey* cases in vindicating a personal freedom: adults' freedom from criminal liability in their "private sexual conduct." 539 U.S. at 564-66, 573-74, 578.

Second, *Lawrence* likewise involved the abridgement of liberty by a criminal prosecution. 539 U.S. at 563 (discussing petitioners' conviction under Texas's anti-sodomy law).

Third, *Lawrence* found that such criminal enforcement violated principles long-recognized at common law. Like its predecessors, *Lawrence* renewed

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[8] Upham, *Interracial Marriage*, at 252-72.

[9] Upham, *Interracial Marriage*, at 258-72.

our common-law liberty tradition against legal innovation. The Court emphasized that recent anti-sodomy statutes had introduced a novel discrimination targeting same-sex relations. 539 U.S. at 569. Further, the Court explained that laws against certain sexual acts, however traditional, were traditionally unenforced against private conduct by consenting adults. *Id*. The absence of enforcement was glaringly conspicuous given the undoubted prevalence of such conduct, whether marital or otherwise. As the Court suggested, due process effectively precluded such enforcement, for where the conduct was private and consensual, prosecution would have required a violation of traditional procedural rights, including testimonial privileges and/or the freedom from unreasonable intrusions into the home. *Id*. at 569-70. Further, we might add, where prosecutions did not involve such unlawful procedures, their extreme rarity might have implicated other traditional principles of due process. *See, e.g.*, *Furman v. Georgia*, 408 U.S. 238, 309-10 (1976) (Potter, J., concurring).

*Lawrence*, therefore, stands for the same principles as its forerunners, stretching back to *Meyer*, and beyond: the Fourteenth Amendment prohibits the states from making or enforcing criminal law so as to abridge personal liberties long recognized at common law.

To be sure, the common law and related statutes incorporated a *declaratory* prohibition on nonmarital sex – prohibitions endorsed with no dissent by this Court in *McLaughlin v. Florida*, 379 U.S. 184, 193 (1964) (characterizing "premarital and extramarital" sex as "illicit"); *accord*, *Griswold*, 381 U.S. at 498

(Goldberg, J., concurring).[10] And consistent with Justice White's uncontroverted opinion for the *McLaughlin* Court, the *Lawrence* Court disavowed any effort to find a "right to engage" in any private nonmartial act. 539 U.S. at 567.

The *Lawrence* Court overturned, instead, Justice White's opinion for a sharply-divided *Bowers* Court, which had endorsed the criminal enforcement of such law against consenting adults. This *enforcement* violated privacy and other procedural liberties long recognized at common law and our broader tradition. Constitutional liberty encompassed adults' freedom from criminal liability in their consensual, "private sexual conduct." 539 U.S. at 578.

## II. Traditional marriage laws are thoroughly consistent with the *Meyer-Lawrence* precedents, for such laws (1) abridge no personal liberty, (2) impose no criminal liability, and (3) are an integral part of our common-law tradition.

### A. Gender-diverse marriage laws neither directly nor indirectly impair any personal liberty.

The laws at issue in this case plainly discriminate on multiple bases: not only (1) gender diversity

[10] *See also*, *Pollard v. Lyon*, 91 U.S. 225, 227-28 (1876) (characterizing fornication and adultery as "[b]eyond all doubt, offences [that] involve moral turpitude").

(*not* sex or sexual orientation), but also (2) number (two and only two persons), and (3) natural personhood (artificial persons are not able to contract valid marriage, *Citizens United v. FEC*, 558 U.S. 310 (2010), notwithstanding). Yet these discriminations in no way abridge anyone's personal liberty. The laws do not define permissible *private* conduct but permissible *governmental* conduct: the state executive and judicial authorities must reserve the status, benefits, and presumptions of "marriage" to just one among the countless diversity of free associations that persons may enter under our Constitution.

At one time, theoretically, the lack of governmental "marriage" might have indirectly abridged personal liberty by exposing an unmarried couple to criminal liability for their private conduct. But *Lawrence* held that, as to consenting adults, all enforcement of such criminal law was unconstitutional.

Accordingly, none of the Petitioners here claim that traditional-marriage laws subject them to any direct or indirect impairment of their personal liberty (*e.g.*, to engage in private conduct). Petitioners cite substantial hardship as to the loss of certain marital benefits, but no abridgement of liberty. *See, e.g.*, Brief for Petitioners Obergefell et al., at 6-12.[11]

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[11] The only arguable liberties involved here are the automatic right to parental authority over one's partner's offspring, and the right to adopt others' offpsring. These "liberties," however, are far from personal, for they involve at least three

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Indeed, in our time, the lack of any governmental "marriage" license poses little to no obstacle to our fellow citizens' personal freedom. In recent decades, more Americans have chosen alternatives, whether remaining single, participating in casual relations, entering nonmarital cohabiting relationships, etc.[12] Such trends plainly confirm what is apparent from the Petitioners' silence: individuals, regardless of

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other parties: the non-consenting child, a natural parent, and, in case of adoption, the government. In sharp contrast, in *Meyer* and *Pierce*, the transfers at issue did not involve the government, and as to the child, represented mere temporary and revocable delegations to private-school teachers. Our common law recognized no right to irrevocable transfer of what was an inalienable trust. "A child is not in any sense like a horse or any other chattel, subject matter for absolute and irrevocable gift or contract. The father cannot by merely giving away his child release himself from the obligation to support it nor be deprived of the right to its custody." *Chapsky v. Wood*, 26 Kan. 650, 652 (1881). Irrevocable transfers, like statutory adoptions, presupposed not the parent's consensual delegation but the parent's death, other inability, or *forfeiture* (by abandonment, abuse, etc.), in which fact the state acquiesced, assumed the parental role, and then transferred that office to other adults, designated as "parents by adoption."

Further, adoption rights can be distinguished from marriage, as a state may both retain traditional marriage and allow unmarried persons to adopt. *See, e.g.*, *Arkansas Dep't of Human Servs. v. Cole*, 380 S.W.3d 429, 443 (Ark. 2011) (holding that a state law preventing an unmarried cohabiting couple from adopting children violated the fundamental right to privacy implicit in the Arkansas Constitution).

[12] Wendy Wang & Kim Parker, *Record Share of Americans Have Never Married*, PEW RESEARCH TRENDS (Sept. 24, 2014), http://www.pewsocialtrends.org/2014/09/24/record-share-of-americans-have-never-married/.

marital status, are free from not only criminal liability, but other restrictions on their power to choose whatever relationships suit them.

### B. Gender-diverse marriage laws impose no criminal liability.

Unlike the *Meyer-Lawrence* line of precedents, this case does not involve criminal law or liability. Among Petitioners' list of concerns, there is no mention of any deprivation of bodily liberty by imprisonment or deprivation of property by punitive fine. Instead, Petitioners seek from this Court a variety of important *civil* benefits and burdens, including, *inter alia*, marriage's legal presumptions (as to offspring, property, etc.), adoption rights, as well as the status of governmental "marriage." *See, e.g.*, Brief for Petitioners Obergefell et al., at 6-12.

### C. Gender-diverse marriage laws, with offspring as one of the main purposes, are endorsed by the common law and our entire legal tradition.

Unlike the *Meyer-Lawrence* cases, the present controversy involves law that is plainly consistent with the common law, and indeed, our entire legal tradition. Before 1970, there does not seem to be any evidence that anyone anywhere seriously denied that "marriage" was a male-female arrangement. Accordingly,

before 1973, no state deemed it necessary to adopt a statutory definition of marriage as "male-female."[13] Such laws were as unnecessary then as laws preventing inter-corporate marriages are today. Marriage, at that time, had always been as much male-female, as marriage requires natural persons today.[14]

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[13] Patricia A. Cain, *Contextualizing* Varnum v. Brien*: A "Moment" in History*, 13 J. GENDER RACE & JUST. 27, 30 (2009) (noting that in 1973, "Maryland became the first state to clarify" its marriage statute in this way).

[14] While *gender diversity* was *definitional*, *racial homogeneity* was *regulatory*. Consequently, statutory silence therefore has had exactly the *opposite* effect. All authorities agreed that such silence implied the validity of interracial marriages, but the utter invalidity of same-sex marriages. *Compare, e.g.*, *Goodridge v. Dep't of Pub. Health,* 798 N.E.2d 941, 952 (Mass. 2003) (unanimously holding that "marriage" under Massachusetts *statutory* law is male-female because "[t]he everyday meaning of 'marriage' is 'the legal union of a man and woman as husband and wife' ") (citations and quotations omitted), and *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971) (unanimously affirming the same), *with Bonds v. Foster*, 36 Tex. 68, 69 (1872) (holding an interracial marriage valid because the prohibitory statute had been abrogated by the Fourteenth Amendment), and *Pearson v. Pearson*, 51 Cal. 120, 125 (1875) (holding valid such a marriage because when contracted, the prohibitory statute had not yet been adopted). As to interracial marriage, even statutory *illegality* did not imply *invalidity*. *See, e.g.*, 2 SAINT GEORGE TUCKER, BLACKSTONE'S COMMENTARIES, App. G, at 58 (1803) (noting that in Virginia, interracial marriage remained valid, though statutorily illicit); *State v. Bailey*, 10 Ohio Dec. Reprint 455, 455 (Toledo Police Ct. 1884) (stating that Ohio's statutory prohibition had "nothing to do with the validity of the marriage: we know of no law which invalidates it").

And before 1993, no American judge challenged the constitutionality of gender diversity as a prerequisite for marriage.[15] Accordingly, before the 1990s, no state deemed it necessary to adopt a *constitutional* definition of marriage,[16] for the traditional definition had seemed safe from judicial invalidation as unconstitutional.

Furthermore, with seeming unanimity, authorities concurred that one of the chief purposes of this male-female arrangement was the reproduction and education of *offspring*. *See, e.g.*, *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971) (citing *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) to claim that marriage is "a union of man and woman, uniquely involving the procreation and rearing of children within a family"); *Scheinberg v. Smith*, 659 F.2d 476, 483 (5th Cir. 1981) (noting that "one of the primary purposes of marriage [is] the bringing forth and nurturing of children"); *Zerk v. Zerk*, 44 N.W.2d 568, 570 (Wis. 1950) (holding that "[p]rocreation of children is one of the important ends of matrimony").[17]

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[15] *Baehr v. Lewin*, 852 P.2d 44, 60-64 (Haw. 1993) (opinion of Levinson, J.) (discussing the uniformly contrary precedents from the 1970s and citing no judicial precedent in direct support).

[16] *See, e.g.*, ALASKA CONST. art. I, § 25 (1998).

[17] *See also,* among many other authorities, *In re Marriage of Ramirez*, 81 Cal. Rptr. 3d 180, 185 (Ct. App. 2008) (identifying "the sexual, procreative or child-rearing aspects of marriage" as "vital" to the relationship); *T v. M*, 242 A.2d 670, 674 (N.J.

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Most notably, marriage's procreative purpose was affirmed often in the very cases holding that sterility was no impediment to marital validity. *See, e.g.*, *Burroughs v. Burroughs*, 4 F.2d 936, 937 (D.C. Cir. 1925) (affirming "the general rule that mere barrenness is not a ground for the annulment of a marriage, though the prime object of marriage is thus defeated").[18]

To be sure, marriage serves other purposes, much like any human enterprise, like a for-profit corporation, or a dinner party, or a Constitution. *See, e.g.*, U.S. CONST. pmbl. (enumerating six purposes). But marriage's procreative-educational purpose seems the only way to make intelligible the main definitional discriminations of marriage: not only (1) sex diversity, but also (2) number, and (3) natural-personhood.

Conversely, the definition has never been tightly coextensive with its purpose. But such a discrepancy between primary purpose and broader definition is ubiquitous in the law. Consider, for instance, our Constitution's Second Amendment and the Patent and Copyright Clause. Both involve rights with

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Super. Ct. Ch. Div. 1968) (noting that "[t]he begetting of children is truly an important end of marriage").

[18] *See also*, *Wendel v. Wendel*, 30 A.D. 447, 452 (N.Y. App. Div. 1898) ("[W]hile the policy of the law undoubtedly contemplates the possibility, and the probability, of issue, it cannot be held as a matter of law that the physical incapacity to conceive is a bar to entering the marriage state.").

definitions made intelligible by narrower express purposes.[19]

Both marriage's traditional male-female definition and its traditional procreative-educational purpose were noted by this Court in *United States v. Windsor*, 133 S. Ct. 2675 (June 26, 2013). The Court affirmed that "many citizens" once deemed same-sex

[19] In his dissent in *Lawrence*, Justice Scalia argued that marriage's alleged procreative purposes could not justify the male-female definition "since the sterile and the elderly are allowed to marry." 539 U.S. at 606. But this objection seems answered by his opinion for the Court in *District of Columbia v. Heller*, 554 U.S. 570 (2010), where he indicated that a legal definition logically serves a legal purpose even though the definition is over-inclusive relative to the purpose. The right to bear arms is logically reserved to only a portion of humanity, "members of the political community," *id.* at 580, because the chief (but not sole) purpose of the right is to promote that community's best security – a well-regulated militia staffed by a subset of those members. *Id*. at 599. Similarly, the Copyright and Patent Clause serves the express purpose of *progress* in the arts and science, though its definition is over-inclusive, granting rights in some mere *novelties* that are not necessarily *improvements*. *But see Great Atlantic & Pacific Tea Co. v. Supermarket Corp.*, 340 U.S. 147, 154-55 (1950) *(*Douglas, J., concurring) (advocating restricting patents to instances where the invention satisfies the constitutional purpose of scientific progress). In all these instances, definitional overbreadth may very well serve the purposes, whether militias, progress in arts and sciences, or offspring; more precise distinctions would involve costly and obtrusive governmental interference and micromanagement. As to marriage, blanket age discrimination might inexpensively serve this purpose, but such a rule would be grossly over-inclusive as to men, and, as applied only to women, nakedly discriminatory as to gender.

marriage unthinkable because "marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term," *id.* at 2689. In enumerating marriage's role, the Court listed first the "[p]rotection of offspring" and next "property interests, and the enforcement of marital responsibilities," *id*. at 2691 (citations omitted).

Indeed, the *Windsor* Court's qualifiers of "most" and "many" seem inapposite: for both marriage's traditional definition and purpose seem unanimously supported by legal authority before 1993. Counsel for *Amici* is aware of *no* authority to the contrary.[20]

[20] In their *amicus* brief, various historians of marriage, and the American Historical Association, present no evidence indicating that anyone, anywhere denied (1) that marriage, by *definition*, involved discrimination on the basis of (a) sex diversity, (b) number, and (c) natural personhood, or (2) that marriage's chief purposes included offspring. Instead the historians limit their arguments to rebutting the strawman that marriage is *solely* for reproduction and to asserting the obvious fact that the *regulations* of marriage have varied, and that its various other purposes (political, economic, etc.) have been emphasized and deemphasized over time. *See generally*, Brief of Historians of Marriage and the American Historical Association as *Amici Curiae* in Support of Petitioners. Indeed, to say that "marriage" changes over time and place requires first that "marriage" has a stable meaning. It is this very meaning that makes "marriage" an intelligible thing to be compared across time and culture.

## III. Traditional marriage laws involve the sort of governmental promotion endorsed in the *Meyer-Lawrence* precedents.

Traditional marriage laws surely promote one particular way of life: two-person, gender-diverse domesticity. This Court has expressly upheld such governmental promotion as consistent with the *Meyer-Lawrence* line of cases.

Since *Meyer*, this Court has consistently denied that each "liberty" must entail a corresponding "equality," so as to prohibit governmental promotion of one permitted choice over another. So, for example, although *Pierce* secured the right of parents to send their children to private schools, "it has never been held" that this liberty entitles private schools to "some share of public funds allocated for education" *Norwood v. Harrison*, 413 U.S. 455, 462 (1973). Similarly, while *Roe* recognized the right to abortion, the states need not subsidize abortion equally with childbirth. *Maher v. Roe*, 432 U.S. 464, 475-77 (1977); *accord Center for Reproductive Law and Policy v. Bush,* 304 F.3d 183, 198 (2d Cir. 2002) (opinion of Sotomayor, J.) ("The Supreme Court has made clear that the government is free to favor the anti-abortion position over the pro-choice position, and can do so with public funds.").

Similarly, the states may lawfully prefer gender-diverse monogamy in their marriage laws, but must not prohibit alternative personal relationships. In sum, the *Meyer-Lawrence* holdings permit the states

to promote one choice, *e.g.*, nonsectarian education, live childbirth, and traditional marriage, but forbid the states to criminalize the alternatives.[21]

Indeed, the states retain a similar freedom as to enumerated rights. No court, it seems, has endorsed or even entertained the conclusion that the right to bear arms compels the states to fund some gun-buy programs equally with gun-buy-back programs. Every "free exercise" right does not entail a corresponding "non-establishment" right, forbidding the government from speaking and spending so as to "endorse" one particular use of that freedom. *Cf. Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 841 (1995) (affirming that the Establishment Clause forbids "government speech endorsing religion") (citation omitted).

Further, the "marriage equality" holding sought here would be grossly under-inclusive relative to the generous liberty recognized in *Lawrence*. Neither the facts of the case nor the Court opinion suggested that liberty must involve an enduring formal relationship between only two natural persons. The vindicated liberty encompassed a much broader diversity of conduct, whether same-sex or otherwise.

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[21] *Loving* was no exception. Rather than deriving an equality from a liberty, the Court found in the Fourteenth Amendment's equality mandate the first, and independent ground for the ruling: the Amendment's "broader, organic purpose" of a multiracial republic prohibited marital-apartheid laws and similar forms of racial discrimination. 388 U.S. at 9.

## IV. Conversely, same-sex marriage might conflict with the *Meyer-Lawrence* precedents, for the conferral of the presumption of paternity on a birthmother's same-sex partner might abridge the constitutional rights of natural parents, as vindicated in *Meyer* and its progeny.

Petitioners have expressly asked this Court to hold that the states must extend all the aspects of "marriage" to same-sex couples, including the presumption of paternity.[22] *Amici* submit that such a holding may conflict with the natural-parental presumption that this Court has long held to be essential to due process of law. This issue is a difficult one, and cannot be adequately briefed here, but *Amici* submit a brief sketch of the apparent conflict.

### A. The Constitution creates a strong presumption of the child's entrustment to her natural mother and father.

*Meyer*'s progeny included not the only criminal cases sketched above, but a substantial number of civil cases concerning child custody. *See,* of most

[22] Petitioners thus seek a "marriage" more comprehensive than that granted in most European jurisdictions, where legislatures have carefully withheld this presumption. Perry Dane, *Natural Law, Equality, and Same-Sex Marriage*, 62 BUFFALO L. REV. 291, 357 n.174 (2014) (noting that unlike American jurisdictions, "many of the foreign countries that now recognize same-sex marriage have been more hesitant to extend the presumption of parentage along with it").

recent prominence, *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (opinion of O'Connor, J.) (citing *Meyer* to celebrate parental rights to offspring as "perhaps the oldest of the fundamental liberty interests recognized by this Court"); *id*. at 77 (Souter, J., concurring); *id*. at 80 (Thomas, J., concurring) (citing *Pierce*). Most recently, Justice Sotomayor emphasized this principle just a day before the decision in *Windsor*. Joined by Justices Ginsburg and Kagan, she reminded her colleagues that our Constitution and broader legal tradition mandate a strong *preference* for the relationship between a child and her *natural parents*.[23] *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2582 (June 25, 2013) (Sotomayor, J., dissenting). She highlighted, *inter alia*, the Court's decisions in *Troxel* and *Parham v. J. R.*, 442 U.S. 584 (1979), in which, she explained, the Court had rightly held that the Due Process Clause incorporated "the presumption that a *natural parent* will act in the best interests of

[23] The word "natural parent" is something of a redundancy. *Parent* is derived from the Latin verb *parere* (to bring forth, produce, or beget), so a *parent* is one who produces or brings forth something – in this case, offspring. 11 OXFORD ENGLISH DICTIONARY 222 (2d ed. 1989). In recent times, guardians who adopt children are deemed, as a matter of law, to be parents. This usage is so widespread and the custom so well established, that we frequently speak of adoptive parents as "parents" simply.

his child." *Adoptive Couple*, 133 S. Ct. at 2582 & 2583 n.14 (emphasis added).[24]

This constitutional presumption, she wrote, reflects the recognition that the child and her natural parents have a *priceless* interest in their relationship. On the one hand, the "'natural parent's desire for and right to the companionship, care, custody, and management of his or her children . . . is an interest *far more precious* than any property right.'" On the other hand, the child has a reciprocally precious right; indeed, to foreclose "a newborn child's opportunity to 'ever know his natural parents' [is] a 'los[s] [that] *cannot be measured*.'" *Id*. at 2574-75, 2582 (quoting *Santosky v. Kramer*, 455 U.S. 745, 758-59, 760-71 n.11 (1982)) (emphasis added); *accord May v. Anderson*, 345 U.S. 528, 533 (1953). *See also, Hodgson v. Minnesota*, 497 U.S. 417, 485 (1990) (Kennedy, J., dissenting) (endorsing the "fundamental liberty interest of natural parents in the care, custody, and management of their child" (citations and quotations omitted)); *but see Troxel*, 530 U.S. at 98 (Kennedy, J., dissenting) (noting as a "principal concern" that this natural-parental presumption would wrongly prioritize "the conventional nuclear family [as] the visitation standard for every domestic relations case").

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[24] Because federal law on marriage does not concern child custody, the Court had no need to consider presumptive parental rights in *Windsor*.

This presumption is rebuttable. The termination of a parent's rights to his or her "natural child" requires "clear and convincing evidence" of parental neglect. *Santosky*, 455 U.S. at 748; *see also*, *Hodgson*, 497 U.S. at 483 (Kennedy, J., dissenting) ("Absent a showing of abuse or neglect, [the natural parent] has the paramount right to the custody and control of his minor children, and to superintend their education and nurture."). What is most significant, however, is that *Meyer* and its progeny endorse the presumption favoring the natural parent.

### B. Traditional marriage carries a complementary presumption of paternity.

Marriage, both at common law and under our statutes, involves the presumption of paternity – that any child born to a woman is likewise the offspring of her husband. Under traditional (gender-diverse) marriage, this presumption *complements* the constitutional presumption in at least three ways.

First, as a factual matter, the presumption is true in the vast majority of cases: the husband is the father.[25]

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[25] *Michael H. v. Gerald D.*, 491 U.S. 110, 113 (1989) (plurality op.) ("The facts of this case are, we must hope, extraordinary.").

Second, the presumption itself, coupled with law and opinion's persistent disapproval of adultery,[26] serves, via a self-fulfilling prophesy,[27] to make the presumption true in even more cases.

Third, the legal presumption of paternity effectively incorporates a sufficient rebuttal to the constitutional presumption: the father's adultery itself is strong evidence of his intent to abandon the resulting offspring.[28]

For these reasons, *Amici* submit, this Court reached the right conclusion in upholding the constitutionality of the paternal presumption, even as the justices were divided as to how and whether the

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[26] *See, e.g.*, UTAH CODE § 76-7-103 (prohibiting adultery); TEX. FAM. CODE § 6.003 (allowing a spouse to divorce on the sole basis of the other spouse's adultery). Despite remarkable increases, in the last decade, in the number of Americans approving of same-sex conduct, non-marital sex, non-marital procreation, and polygamy, a stable 90% of Americans continue to disapprove of adultery. Gallup Politics, *In U.S., Record-High Say Gay, Lesbian Relations Morally OK*, May 20, 2013, http://www.gallup.com/poll/162689/record-high-say-gay-lesbian-relations-morally.aspx.

[27] As Justice O'Connor once noted, the law's expectations as to the weakness of fathers' bonds with their offspring can become a noxious "self-fulfilling prophesy." *Nguyen v. INS*, 533 U.S. 53, 89 (2001) (O'Connor, J., dissenting). Conversely, the law's presumption of paternity functions in a similar fashion, but here this self-fulfilling expectation has the beneficial effect of strengthening the father's bond with home and child.

[28] This intent cannot be imputed to the mother who carries the resulting child to term.

constitutional parental presumption requires that the marital paternal presumption be rebuttable, *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

### C. Same-sex marriage may create a conflict between these two presumptions.

Under same-sex marriage, however, the presumption of paternity would not complement the constitutional parental presumption, but conflict with it. First and foremost, in excusive, same-sex relationships, the presumption of paternity (now dubbed "parentage") would be *always* false. Every child born in such a marriage would be falsely, but legally, presumed to be the child of her mother's partner, and to have no father at all. The veil here would be an untruth.

In *Troxel*, the Supreme Court held that the states cannot create presumptions "opposite" to the presumption of natural-parental trusteeship. 530 U.S. at 63 (O'Connor, J., plurality opinion). In that case, the Court struck down Washington's decision to grant partial custody to a child's grandparents without respecting the mother's constitutional right to presumptive custody. The Court indicated that no matter how strong and deep the relationship between grandparent and grandchild,[29] the states may not reassign

[29] The familial relationship between the two women (mother and grandmother), no matter how deep and important, is likewise insufficient to create presumptive custodial rights in

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the custody of children from parents to grandparents or any other adults without first rebutting the strong presumption in favor of the child's natural father and mother.

The new presumption of parentage, requested by Petitioners, would seem to be an "opposite" presumption. What the states could not do in favor of the grandfather or grandmother – the mother's parents – states cannot do in favor of the mother's same-sex partner. The Constitution does not permit the redefinition of "marriage" so as to redefine "parent" and thus manufacture a presumption in direct conflict with the Constitution's presumption favoring the natural parent.

But in this case, Petitioners effectively ask this Court to order the states to do precisely what the Constitution forbids: to issue marriage licenses that will impair or destroy the child's presumptive, constitutional right to her mother and father. The careful procedural safeguards of adoption – designed to provide evidence of deliberate intentional relinquishment[30] – will be swept away in favor of an

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the grandmother. The most common form of same-sex parenting in the United States involves a mother and grandmother.

[30] The Utah Supreme Court eloquently explained how adoption procedures serve to protect the parental presumption: "Courts have not hesitated to build a strong fortress around the parent-child relation, and have stocked it with ammunition in the form of established rules that add to its impregnability. To sever the relationship successfully, one must have abandoned the child, and such abandonment [of] all correlative rights and

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automatic presumption of "parentage" in a non-parent – simply by the issuance of the marriage license.

Instead, the child born into a same-sex marriage would have no presumptive right to her father. To be sure, in case of the merely anonymous sperm donor, the father may properly be said to have forfeited his duty and right by abandonment. But not all fathers to children in same-sex households will be mercenary or anonymous. Able, willing, loving fathers will be shut out by force of the marriage licenses that the states will now be compelled to issue.

This child's presumptive relation to her mother would also be impaired. In any custody dispute between the mother and her partner, the law will treat both equally, and impute to the mother, simply by requesting the marriage license, an irrevocable consent to share custody of future children with her partner. Indeed, frequently if not usually, the courts

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duties incident to the relation – must be with a specific intent so to do – an intent to sever ship. Such intent must be proved by him who asserts it, by proof that not only preponderates, but which must be clear and satisfactory, – something akin to that degree of proof necessary to establish an offense beyond a reasonable doubt, or, as one authority puts it 'by clear and indubitable evidence.' . . . Ofttimes it is pointed out that abandonment, within the meaning of adoption statutes, must be conduct evincing 'a settled purpose to forego all parental duties and relinquish all parental claims to the child.'" *In re Adoption of Walton*, 259 P.2d 881, 883 (Utah 1953) (citations omitted).

will decide that her co-parent should have primary custody.[31]

Such forfeiture, by a quasi-Rumpelstiltskin contract covering future offspring, is utterly alien to due process of law. Unlike the mother who relinquishes her child to adoptive parents, the alleged consent here would not necessarily be specific, deliberate, or, in many cases, even conscious (the future mother will not be thinking of future offspring and custody disputes).

*Lawrence v. Texas* cannot justify such a conclusion. The *Meyer-Lawrence* line of cases began with the constitutional rights of the parent-offspring relationship. Petitioners' request seemingly undermines that foundation.

It seems, then, that the real danger is the precise opposite of what Justice Scalia feared. *Lawrence*'s principle and logic do not support the judicial imposition of same-sex marriage. Rather, the judicial imposition of same-sex marriage might endanger the very precedents that constitute *Lawrence*'s principle and logic.

[31] In such disputes, the equality in law will frequently be an inequality in fact. The woman who has undertaken to bear and often nurse a child typically must temporarily sacrifice her activity in the labor market; to the extent she may be thus poorer than her former partner, she will typically lack equal legal representation.

## CONCLUSION

In safeguarding and renewing the American Constitution's tradition of liberty, this Court has both reaffirmed and developed judicial precedent. The Court has thus followed a policy best described by a famous Irish Englishman:

> A spirit of innovation is generally the result of a selfish temper and confined views. People will not look forward to posterity, who never look backward to their ancestors. Besides, the people of England well know, that the idea of inheritance furnishes a sure principle of conservation, and a sure principle of transmission without at all excluding a principle of improvement. It leaves acquisition free; but it secures what it acquires.[32]

*Amici* ask this Court to preserve our tradition of liberty, as developed in *Meyer* and subsequent precedents – to look forward to our posterity by looking backwards to our ancestors. This tradition – this policy – has allowed for both preservation and improvement, for sustainable progress.

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[32] EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 47-48 (1793).

We ask the Court to disavow judicial innovation, affirm its own precedents, and affirm the decision below.

Respectfully submitted,

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