No. 14-14061-AA, 14-14066-AA

IN THE

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JAMES DOMER BRENNER, et al.,

Plaintiffs and Appellees,

v.

SEC'Y, FLA. DEP'T OF HEALTH, et al.,

Defendants and Appellants.

SLOAN GRIMSLEY, et al.,

Plaintiffs and Appellees,

v.

SEC'Y, FLA. DEP'T OF HEALTH and SEC'Y, FLA. DEP'T OF MGMT. SERVS.,

Defendants and Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA

BRIEF OF HISTORIANS OF MARRIAGE PETER W. BARDAGLIO, NORMA BASCH, STEPHANIE COONTZ, NANCY F. COTT, TOBY L. DITZ, LAURA F. EDWARDS, SARAH BARRINGER GORDON, MICHAEL GROSSBERG, HENDRIK HARTOG, ELLEN HERMAN, MARTHA HODES, LINDA K. KERBER, ALICE KESSLER-HARRIS, ELAINE TYLER MAY, SERENA MAYERI, STEVEN MINTZ, ELIZABETH PLECK, CAROLE SHAMMAS, MARY L. SHANLEY, AMY DRU STANLEY, AND BARBARA WELKE AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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INTEREST OF AMICI CURIAE

Amici are historians of American marriage, family, and law whose research documents how the institution of marriage has functioned and changed over time. This brief, based on decades of study and research by amici, aims to provide accurate historical perspective as the Court considers state purposes for marriage.[1] The appended List of Scholars identifies the individual amici.

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[1] Assertions in this brief are supported by amici's full scholarship, whether or not expressly cited, including: Peter W. Bardaglio, *Reconstructing the Household: Families, Sex, and the Law in the Nineteenth-Century South* (1995); Norma Basch, *Framing American Divorce* (1999) and *In the Eyes of the Law: Women, Marriage, and Property in 19th Century New York* (1982); Stephanie Coontz, *The Social Origins of Private Life: A History of American Families, 1600-1900* (1988) and *Marriage, A History* (2006); Nancy F. Cott, *Public Vows: A History of Marriage and the Nation* (2000); Toby L. Ditz, *Property and Kinship: Inheritance in Early Connecticut* (1986); Laura F. Edwards, *Gendered Strife and Confusion: The Political Culture of Reconstruction* (1997); Sarah Barringer Gordon, The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth-Century America (2002); Michael Grossberg, *Governing the Hearth: Law and the Family in Nineteenth-Century America* (1985); Hendrik Hartog, *Man & Wife in America, A History* (2000) and *Someday All This Will Be Yours: A History of Inheritance and Old Age* (2012); Ellen Herman, *Kinship by Design: A History of Adoption in the Modern United States* (2008); Martha Hodes, *White Women, Black Men: Illicit Sex in the 19th Century South* (1997); Linda K. Kerber, *No Constitutional Right to be Ladies: Women and the Obligations of Citizenship* (1998); Alice Kessler-Harris, *In Pursuit of Equity: Women, Men, and the Quest for Economic Citizenship in 20th-Century America* (2001); Elaine Tyler May, *Homeward Bound: American Families in the Cold War Era* (1988) and *Barren in the Promised Land* (1995); Steven Mintz, *Domestic Revolutions: A Social History of American Family Life* (1988); Elizabeth H. Pleck, *Celebrating the Family: Ethnicity, Consumer Culture, and Family Rituals* (2000) and *Not Just Roommates: Cohabitation after the Sexual Revolution* (2012); Carole Shammas, *A History of Household Government in America* (2002); Mary L. Shanley, *Making Babies, Making Families* (2001); Amy Dru Stanley, *From Bondage to Contract: Wage*

Amici support Plaintiffs-Appellees' position that states' interests in supporting marriage extend beyond opposite-sex couples to include same-sex couples. In view of the history of marriage in the United States, amici cannot credit Defendant-Appellant's central argument that marriage is a static institution in which "tradition" must trump change. The historical record shows that both judicial and legislative directives in the United States have altered marriage significantly over time, even in requirements previously regarded as essential to the institution. Amici also dispute the claims of amici curiae in support of Defendant-Appellants that the central purpose of marriage is to encourage responsible procreation among opposite-sex couples and to encourage child-rearing by biological parents. Joint Initial Brief of Appellants ("AOB") at 12, 13.

History shows that states have had multiple purposes for marriage. Neither procreation nor child welfare can be isolated as the principal or core function of marriage in American history, either in the eyes of the state or society. The notion that states license marriage for the procreation or well-being of children rather than (or more than) for the public benefits produced by adult couples forming stable households presents a false dichotomy. Florida's purpose in licensing and regulating marriage includes establishing public order and fostering economic

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Labor, Marriage and the Market in the Age of Slave Emancipation (1998); Barbara Young Welke, *Law and the Borders of Belonging in the Long Nineteenth Century United States* (2010).

benefit. Those purposes are served by marriages of same-sex couples, just as they are by marriages of opposite-sex couples.[2]

STATEMENT OF ISSUES

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.

SUMMARY OF ARGUMENT

In the United States, marriage has changed significantly over time to address changing social and ethical needs. Marriage in all the United States has always been under the control of civil rather than religious authorities. Religious authorities were permitted to solemnize marriages only by acting as deputies of the civil authorities. While free to decide what qualifications they would consider valid by religious precept, religious authorities were never empowered to determine the qualifications for entering or leaving a marriage that would be valid at law.

Marriage is a capacious institution. It has political, social, economic, legal and personal components. It conveys meanings and consequences that operate in

[2] The *amici* listed in the appendix appear in their individual capacities; institutional affiliations are listed for identification purposes only. No counsel for any party authored this brief in whole or in part, and no person or entity other than amici made a monetary contribution to its preparation or submission. Consent has been granted by all parties to the filing of this brief amicus curiae.

several arenas. Only a highly reductive interpretation would posit that the defining characteristic of marriage is procreation or care of biological children, since states' interests in marriage are more complex.

Marriage has served numerous purposes in American history. Recognizing these multiple purposes, Florida and other states have seen marriage as advancing the public good, whether or not minor children are present. Marriage has been instrumental in facilitating governance; in creating stable households, leading to public order and economic benefit; in assigning providers to care for dependents (including minors, the elderly and the disabled); in legitimating children; in facilitating property ownership and inheritance; and composing the body politic.

Marriage has long been entwined with public governance. The relation between marriage and government is visible today in both federal policy and state laws, which channel many benefits and rights of citizens through marital status. Every state gives special recognition to marriage, in areas ranging from tax to probate rules. Federal law identifies more than 1,000 kinds of marital benefits, responsibilities and rights, as the General Accounting Office reported in 2004. U.S. Gen. Accounting Office, GAO-04-353R: *Defense of Marriage Act: Update to Prior Report* (2004); *see also United States v. Windsor*, 133 S. Ct. 2675, 2683 (2013).

The individual's ability to consent to marriage is a mark of the free person in possession of basic civil rights. This is compellingly illustrated by the history of slavery in the United States. Lacking the ability to consent freely, slaves could not contract valid marriages. After emancipation, former slaves welcomed lawful marriage, which symbolized their new civil rights.

Over the centuries, legislative and judicial authorities in the states have altered marriage rules, creating features of marriage not envisioned at the founding of the United States. Three areas of fundamental change illustrate this pattern:

a) Marriage under Anglo-American common law treated men and women unequally and asymmetrically. The doctrine of coverture (marital unity) gave the husband and wife reciprocal responsibilities, while treating them as a single unit and merging the wife's legal and economic identity into that of her husband. This inequality was eliminated over time. Today, states still impose mutual responsibilities on spouses but treat them equally and in gender-neutral fashion. The U.S. Supreme Court has confirmed that gender-neutral treatment for marital partners is constitutionally required.

b) Racially-based restrictions on marriage choice, prohibiting and/or criminalizing marriages between whites and persons of color, began in the colonial Chesapeake and spread to most states, including Florida. The U.S. Supreme Court

eventually declared these restrictions unconstitutional and ended their nearly 300-year history. *Loving v. Virginia*, 388 U.S. 1 (1967).

c) Divorce grounds were few in early America. Divorce was an adversarial procedure requiring one spouse to sue on the basis of the other's marital fault. Over time, states greatly expanded grounds for divorce, eventually including "no-fault" provisions, thus altering the terms of the marital compact.

Today marriage is both a fundamental right and a privileged status. The institution has endured because it has been flexible, open to adjustment by courts and legislatures in accord with changing standards. Marriage has changed while retaining its basis in voluntary mutual consent, economic partnership and love. Necessary changes have moved marriage toward equality between the partners, gender-neutrality in marital roles, and spousal rather than state prescription of marital role-definition.

Exclusion of same sex couples from the right to marry stands at odds with the direction of historical change in marriage in the United States. Over time, courts and legislatures have moved to eliminate discriminatory restrictions on the freedom to marry chosen partners.

Contemporary public policy assumes that marriage is a public good. Excluding some citizens from the power to marry, or marking some as unfit on the

basis of their marriage choices, does not accord with public policy regarding the benefit of marriage or the rights of citizens.

ARGUMENT

I. MARRIAGE IS A CIVIL INSTITUTION.

From the founding of the United States, state laws have regulated the making and breaking of marriage. Marriage laws were among the first passed by states after declaring independence from Great Britain. The civil principle accommodated the new nation's diverse religions, and emphasized that marriage had much to do with property transmission. 1 George Elliott Howard, *A History of Matrimonial Institutions Chiefly in England and the United States* (1904), at 121-226 (colonial precedents), 388-497 (early state marriage laws).

Religion, sentiment and custom may color individuals' understanding of marriage, but law creates a valid marriage in Florida and every American state. Throughout American history, whether or not a marriage was recognized by a religion has not dictated its lawfulness. State laws have typically deputized religious authorities (and additional communal leaders) to conduct marriage ceremonies, which may take a religious form. Clerical authorities may decide which marriages their faith will recognize, but do not determine which marriages are lawful. Within constitutional limitations, states set the terms of marriage and divorce, including who can and cannot marry, who can officiate, what marital

obligations and rights are, and terms for ending marriage. *United States v. Windsor*, 133 S. Ct. 2675, 2692 (2013). State legislatures and courts through American history have repeatedly adjusted marriage rules, not hesitating to exercise their jurisdiction in this domain.

Being based on consent between two free individuals, marriage is understood to be a contract. Marriage is a unique contract, however, because of the state's essential role in defining marital eligibility, obligations and rights. *Maynard v. Hill*, 125 U.S. 190, 210-13 (1888). For example, spouses cannot decide to abandon their obligation of mutual economic support. Homer H. Clark, Jr., *The Law of Domestic Relations* 425-27 (2d ed. 1988, 2d prtg. 2002). To create or to terminate a valid marriage, the state must be a party to the couple's action.

II. MARRIAGE HAS SERVED VARIED PURPOSES IN UNITED STATES HISTORY AND TODAY.

Societies in different historical times and places have defined marriage variously: a legitimate marriage may be patrilineal or matrilineal, lifelong or temporary, monogamous or polygamous, for example. The form of marriage recognized in the United States is particular, not universal.

In U.S. history, marriage has served numerous complementary public purposes. The attempt to rank procreation or child-rearing as the core of marriage defies the complexity of the historical record. Among the purposes of marriage seen by the state are: to facilitate the state's regulation of the population; to create

stable households; to foster social order; to increase economic welfare and minimize public support of the indigent or vulnerable; to legitimate children; to assign providers to care for dependents; to facilitate the ownership and transmission of property; and to compose the body politic. Cott, *supra* note 1, at 2, 11-12, 52-53, 190-194, 221-224. In licensing marriages, states affirm that a couple's marital vows produce economic benefit, residential stability, and social good, whether or not biological children are present.

A. Marriage Developed in Relation to Governance.

Historically, marriage in Western political culture has been closely intertwined with sovereigns' aim to govern their people. When monarchs in Britain and Europe fought to wrest control over marriage from ecclesiastical authorities (circa 1500-1800), they did so because control of marriage was a form of power over the population. These sovereigns, aiming to see their people organized into governable subgroups, used male household heads as, in effect, their delegates, each ruling his own household. Mary Ann Glendon, *The Transformation of Family Law: State, Law, and Family in the United States and Western Europe* 23-34 (1989); Sarah Hanley, *Engendering the State: Family Formation and State Building in Early Modern France*, in 16 *French Historical Studies* 4, 6-15 (1989); Mary L. Shanley, *Marriage Contract and Social Contract*

in 17th-Century English Political Thought, in *The Family in Political Thought* 81 (J.B. Elshtain ed., 1982).

When the American colonies formed a republic, understandings of political governance and marital governance remained linked. Sovereignty in the new United States was justified as being based on voluntary consent of the governed, rather than on subjection to a ruler. Revolutionary spokesmen often invoked a parallel between a married couple's voluntary consent to one another and new American citizens' voluntary consent to permanent national allegiance. Jan Lewis, *The Republican Wife: Virtue and Seduction in the Early Republic*, 44 The William and Mary Quarterly 3d ser. 689, 695-99, 706-710 (1987).

Marital regulation, governance, and citizenship rights were deeply intertwined in early American history. Early state laws regulating marriage, and court decisions specifying the obligations and rights of spouses, formed important dimensions of states' authority. Anglo-American legal doctrine made a married man the head of his household, legally obliged to control and support his wife and other dependents, whether they were biological children, dependent relatives, or others, including orphans, apprentices, servants and slaves. In return, he became their public representative. Until the early twentieth century, married men's citizenship and voting rights were seen as tied to their headship of and

responsibilities for their families; wives' inferior citizenship and inability to vote were understood to be suited to their marital subordination.

Today, constitutional imperatives have eliminated sex and race inequalities from laws of marriage. The rule of the male head of household exercising dominion over his wife and other dependents is now quite archaic. A legacy of the sustained relation between marriage and citizenship persists, in that states grant marriage rights to certain couples and not others, and award married couples benefits and rights not available to other pairs or to single persons.

B. Marriage Creates Public Order and Economic Benefit.

In early American history, legal marriages served public order by establishing governable and economically viable households. Marriage organized households and figured largely in property ownership and inheritance, matters of civil society important to public authorities. Households managed food, clothing and shelter for all members, not only for biological offspring of the married couple.

Today, state governments retain strong economic interests in marriage. States offer financial advantages to married couples on the premise that their households promise social stability and economic benefit to the public, and thus minimize public expense for indigents. The marriage bond obliges the mutually consenting couple to support one another, which is not the case for unmarried couples – while parents' obligation to support their children is enforced alike on

unmarried and married parents. Laura W. Morgan, *Child Support Guidelines: Interpretation and Application* § 1.07 (2d ed. 2013); *Chart 3: Child Support Guidelines*, 45 Fam. L.Q. 498, 498-99 (Winter 2012).

Throughout American history, marriages in which step-parents took responsibility for non-biological children were common because of early deaths of biological parents, and widows' and widowers' remarriages. Families often took in orphans. Hartog, *Someday*, *supra* note 5, at 169-205. States' willingness to include unrelated adopted children in the marital family then and now suggests little interest in promoting a favored status for biologically-based parenting among the public purposes of marriage. Adoption law developments suggest that states have intended to recognize intentional and deliberate parenting as much as "accidental" procreation. Herman, *supra* note 1, at 203-04 and 292-93. The historical trend in states' laws has been to equalize the rights of legally adopted children with those of biological children.

States' intentions, historically, have focused on securing responsible adults' support for their minor dependents, whether these are adopted, or step-children, or biological progeny, and whether the children were born inside an intact marriage or not; states can thus limit the public's responsibility for children. Support for any child born or adopted into a family was in the past an obligation of the household

head. Today, it is a responsibility shared by the couple who marry – whether their marriage remains intact or they divorce.

The economic dimension of the marriage-based family took on new scope when federal government benefits expanded during the twentieth century. State and federal governments now channel many economic benefits through marital relationships. *Cf. Turner v. Safley*, 482 U.S. 78, 96 (1987) (voiding restriction on prison inmate marriages in part because "marital status often is a precondition to the receipt of government benefits"). Federal benefits such as immigration preferences and veterans' survivors' benefits are extended to legally married spouses, but not to unmarried partners. Same-sex spouses who have married lawfully enjoy these benefits, while those in states lacking marriage rights are disadvantaged. *Windsor*, 133 S. Ct. at 2694-95.

C. Marital Eligibility Has Never Turned Upon Child-Bearing or Child-Rearing Ability.

In licensing marriage, state governments have bundled legal obligations together with social rewards to encourage couples to choose committed relationships over transient ones, whether or not children will result. Sexual intimacy in marriage has been expected, but couples' ability or willingness to produce progeny has never been necessary for valid marriage in Florida or elsewhere in the U.S. For example, post-menopausal women are not barred from marrying, nor is divorce mandated after a certain age. Likewise, men or women

known to be sterile have not been prevented from marrying. 3 Howard, *supra*, at 3-160; Grossberg, *supra* note 1, at 108-110.

Inability to procreate has not been a ground for divorce or annulment. The Anglo-American common law and many early state statutes made impotence or other debility preventing sexual intimacy a reason for annulment or divorce, indicating that the inability to have sexual relations could invalidate a marriage; but sterility or infertility did not. Annulment for sexual incapacity depended upon a complaint by one of the marital partners, moreover, and if neither spouse objected, a non-sexual marriage remained valid in the eyes of the state. Chester G. Vernier, *American Family Laws: A Comparative Study of the Family Law of the Forty-Eight American States* I (grounds for annulment), II (grounds for divorce) (1931, 1932, 1935).

Childbearing or child welfare cannot be isolated as the principal or core function of marriage in American history, either in the eyes of the state or society. Adults' own intentions for themselves have been central to marriage in the history of the United States; romantic and sexual attachment, companionship and love, as well as economic partnership, were no less intrinsic to marriage than the possibility of children. Lewis, *supra*, at 689, 695-99, 706-710. Not only today, but in the long past, couples married even when it was clear that no children would result.

Widows and widowers remarried for love and companionship and because marriage enabled the division of labor expected to undergird a stable household.

Marital sexual intimacy became increasingly separable from reproductive consequences in the 20th century. By the 1920s, contraception became readily available in influential sectors of American society. John D'Emilio and Estelle B. Freedman, *Intimate Matters: A History of Sexuality in America* 239-74 (1988); Andrea Tone, *Devices and Desires: A History of Contraceptives in America* (2001). Intentionally non-procreative marriages became prevalent enough that social scientists coined the term "companionate marriage" to refer to them (though the term is used more generally now). Dr. M.M. Knight, for example, declared in the *Journal of Social Hygiene* in 1924 that this new term acknowledged that "[w]e cannot reestablish the old family, founded on involuntary parenthood, any more than we can set the years back or turn bullfrogs into tadpoles." M.M. Knight, *The Companionate and the Family*, Journal of Social Hygiene, 258, 267 (May 1924).

Contraception has made sexual satisfaction more central to individuals' expectations in marriage, whether or not they aim to have children; it has transformed the relation of marriage to parentage. Christina Simmons, *Making Marriage Modern* 113-34 (2009); Rebecca L. Davis, *More Perfect Unions: The American Search for Marital Bliss* 21-53 (2010). In the late 1930s, the American Medical Association embraced contraception as a medical service and by that time

or soon thereafter most states legalized physicians' dispensing of birth control to married couples. The Supreme Court struck down Connecticut's ban on married couples' use of birth control in 1965. *Griswold v. Connecticut*, 381 U.S. 479 (1965). More recently, reproductive technologies have multiplied methods to bring wanted children into being, with or without biological links to the parents who intend to rear them. Shanley, *Making Babies*, *supra* note 1, at 76-147.

III. DISCRIMINATORY APPLICATIONS OF MARRIAGE RULES HAVE OCCURRED IN THE PAST AND HAVE SINCE BEEN REJECTED.

In a number of striking instances, states created discriminatory marriage laws, establishing hierarchies of value and declaring some persons more worthy than others to obtain equal marriage rights. These laws created and enforced inequalities that were declared obvious, "natural" and right at the time, although today the laws seem patently unfair and discriminatory. Grossberg, *supra* note 1, at 70-74, 86-113, 144-45; Vernier, *supra*, at 183-209. States have differed as to the required age for consent to marriage, the degree of consanguinity allowed, the ceremonies prescribed, the definition and enforcement of marital roles, the required health minima and "race" criteria, and the possibility and grounds for marital dissolution – and this list of variations is not exhaustive.

In slaveholding states, slaves were unable to marry because they lacked basic civil rights and thus were unable to give the free consent required for lawful

marriage. Furthermore, a slave's obligatory service to the master made it impossible to fulfill the legal obligations of marriage. Margaret Burnham, *An Impossible Marriage: Slave Law and Family Law*, 5 Law & Ineq. 187 (1987-1988). Where slaveholders permitted, slave couples wed informally, creating families of great value to themselves and to the slave community. These unions, however, received no respect from slaveholders, who broke up families with impunity when they sold or moved slaves. Enslaved couples' unions received no defense from state governments; the absence of public authority undergirding their vows was the very essence of their invalidity.

After emancipation, African Americans welcomed the ability to marry as a civil right long denied to them. They saw marriage as an expression of their newly gained rights. It signified the ability to consent freely to marry a chosen partner. Laura F. Edwards, *The Marriage Covenant is the Foundation of All Our Rights*, 14 Law and History Review 81 (1996).

An even more widespread form of race-based definition in marriage law occurred in the nullification and/or criminalization of marriages of whites to persons of color. As many as 41 states and territories of the U.S. banned and/or criminalized marriage across the color line for some period. These prohibitions began in the colonial Chesapeake region and spread to several other colonies. After the American Revolution, states north and south adopted similar

prohibitions. Many states added or strengthened such laws after slavery was eliminated. These bans spread to Western states, where Chinese and "Mongolians" also were prohibited from marrying whites once immigration from Asia increased. Peggy Pascoe, *What Comes Naturally: Miscegenation Law and the Making of Race in America* (2009) 343, n.43. *See*, *e.g.*, *Perez v. Sharp*, 198 P.2d 17, 18 (Cal. 1948) (striking down law that prohibited "marriages of white persons with negroes, Mongolians, members of the Malay race, or mulattoes" which had been in effect since 1872).

In Florida, the first such ban was enacted in 1832, making it unlawful for a white male to intermarry with any negro, mulatto, or quarteroon, or other colored female" and the same for a white female to intermarry with "any negro, mulatto, or quarteroon, or other colored male." *Pascoe*, *supra*, 21; 1832 Fla. Laws ch. 3. The 1832 law declared such marriages null and void and any issue of such marriages to be bastards, and also subjected any county judge who licensed or performed such a marriage to a $1,000 fine.[3] *Id*. After the Civil War, Florida increased the penalties, making such a marriage a felony punishable by up to ten years in prison. 1881 Fla. Laws ch. 3282; *see also* 1865-66 Fla. Laws ch. 1468. Florida amended its state constitution to declare that: "All marriages between a

[3] The law was later amended to prohibit marriages between a white and "negro" person, with a negro person defined as any person with "one-eighth or more of negro blood. . . ." Fla. Gen. Stats § 2580 (1906).

white person and a negro, or between a white person and a person of negro descent to the fourth generation, inclusive, are hereby forever prohibited." Fla. Const. of 1885, art. XVI, § 24.

Marriage bans of this type served to deny public approval to familial relationships between whites and persons of color. Legislators and judges often justified these laws by insisting that such marriages were against nature, or against the Divine plan (as some opponents argue today against same-sex marriage). They contended that permitting cross-racial couples to marry would fatally degrade the institution of marriage. Pascoe, *supra*. By preventing such relationships from gaining the status of marriage, legislators and courts sought to delegitimize them altogether. In parallel fashion, denying marriage to same-sex couples' unions demotes and discredits their relationships. (On the abolition of racial restrictions on marriage, see Section VI(B), below.)

IV. MARRIAGE HAS CHANGED IN RESPONSE TO SOCIETAL CHANGES.

Like other successful civil institutions, marriage has evolved to reflect changes in ethics and in society at large. Legislators and judges in the U.S. have revised marriage requirements when necessary. Marriage has endured because it has not been static. Adjustments in key features of marital eligibility, roles, duties, and obligations have kept marriage vigorous and appealing. These changes have not, however, been readily welcomed by everyone. Some opponents at first

fiercely resisted features of marriage that we now can take for granted, such as both spouses' ability to act as individuals, to marry across the color line, or to divorce for reasons of their own.

Three areas of change are illustrative: (a) spouses' respective roles and rights; (b) racial restrictions; and (c) divorce.

A. Spouses' Respective Roles and Rights.

Marriage under the Anglo-American common law, as translated into American statutes, prescribed profound asymmetry in the respective roles and rights of husband and wife. Marriage law rested on the legal fiction that the married couple composed a single unit, which the husband represented legally, economically and politically. "The most important consequence of marriage is, that the husband and the wife become, in law, only one person." *The Works of James Wilson*, Vol. II, 602-03 (Robert J. McCloskey, ed., 1976).

This doctrine of marital unity or coverture was seen as essential to marriage. It required a husband to support his wife and family, and a wife to obey her husband. A married woman could not own or dispose of property, earn money, have a debt, make a valid contract, or sue or be sued under her own name, because her husband had to represent her in these acts. Neither spouse could testify for or against the other in court – nor commit a tort against the other – because the two

were considered one person. Kerber, *supra* note 1, at 11-15; Hartog, *Someday*, *supra* note 1, at 105-09.

Coverture reflected the degree to which marriage was understood to be an economic arrangement. Marriage-based households were fundamental economic units in early America. Unlike today, when occupations are open to either sex, the two sexes were expected to fill different though equally indispensable roles in the production of food, clothing and shelter. Marriage sustained these differences via coverture, which assigned opposite economic roles, understood as complementary, to the two spouses.

In Florida, a carryover from Spanish civil law moderated the implementation of coverture slightly, for the treaty that ceded Florida to the United States provided that white wives who married before 1818 could own their own separate property. Laurel A. Clark, *The Rights of a Florida Wife: Slavery, U.S. Expansion, and Married Women's Property Law*, 22 J. of Women's Hist. 39, 44-45 (2010). Although Florida adopted common law when it became a state in 1845, it nonetheless continued to allow separate property for white wives, insulated from their husbands' creditors. *Id.* That decision appears to have been intended in part to encourage white wives and their families to expand white settlement into Indian-occupied areas of the state. *Id.* at 56-57. Thus, although coverture was understood

as absolutely essential to marriage, competing social needs in Florida compromised one feature of it.

By the mid-1800s in the northeast, a dynamic market economy began to replace the static rural economy in which the coverture doctrine had originated. Wives began to claim rights to their own property and wages. Judges and legislators saw advantages in distinguishing spouses' assets individually: a wife's property could keep a family solvent if a husband's creditors sought his assets. Employed married women could support their children if their husbands were profligate. Richard H. Chused, *Married Women's Property Law: 1800-1850*, 71 Geo. L.J. 1359 (1982-1983). Most states enabled wives to keep and control their own property and earnings by 1900; by the 1930s, wives in many states could act as economic individuals, although other disabilities persisted. 3 Vernier, *supra*, at 24-30; Hartog, *Man & Wife*, *supra* note 1, at 110-135, 287-308. Thus, marriage was not unchangeable. In all the states, courts and legislatures gradually altered the terms of marriage fundamentally to take account of changing needs.

New federal government benefit programs in the 1930s nonetheless adopted the expectation that the husband was the economic provider and the wife his dependent. The 1935 Social Security Act gave special advantages to married couples and strongly differentiated between husbands' and wives' entitlements. Kessler-Harris, *supra* note 1, at 132-41. When plaintiffs challenged such spousal

gender differentiation in the 1970s, the Supreme Court found discrimination between husband and wife in Social Security and veterans' entitlements unconstitutionally discriminatory. *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Frontiero v. Richardson*, 411 U.S. 677 (1973). Since then, federal benefits channeled through marriage have been gender-neutral.

The unraveling of coverture in the United States was a protracted process, because it involved revising the gender asymmetry in marriage. Of all the legal features of marital unity, the husband's right of access to his wife's body lasted longest. Not until the 1980s did most states eliminate a man's exemption from prosecution for rape of his wife. E.g., Va. Code Ann. § 18.2-61(B) (Cum. Supp. 1986); Mich. Comp. Laws Ann. § 750.520l (West 1988); 1990 Ky. Laws H.B. 38 (Ch. 448). That shift signified a new norm for a wife's self-possession, and further reframed the roles of both spouses. Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, Cal. Law Review, 1375-1505 (Oct. 2000).

In Florida, spousal rape was recognized as a crime only through judicial fiat. In *State v. Smith*, 401 So.2d 1126 (Fla.Ct.App. 1981), a state court refused to hold a husband immune from prosecution for raping his wife under a common law exception to rape laws for spousal rape. The court did not squarely state, however, that no such exception existed; it held that, assuming a wife implied her consent to

sex by marrying, the wife in *Smith* had withdrawn any consent by filing for divorce. *Id*. at 1129. A subsequent decision, *State v. Rider*, 449 So.2d 903 (Fla.Ct.App. 1984), held that spousal rape could occur within any marriage, regardless of whether or not the couple was separated.

Over time, Florida and its sister states have moved to gender parity in marriage. Courts chipped away at the inequalities inhering in the status regime originating in coverture. Marriage criteria moved toward spousal parity, gender-neutrality in marital roles, and increased freedom in marital choice. The duty of support, which once belonged to the husband only, is now reciprocal. Likewise, after divorce either spouse may now seek alimony and both parties are required to support their children.

By updating the terms of marriage to reflect current understandings of gender equality and individual rights, and vastly changing traditional stipulations, courts have promoted the continuing vitality of marriage. For couples today, marriage has been transformed from an institution rooted in gender inequality and prescribed gender-based roles to one in which consenting parties choose their marital behavior. The gender of the spouses does not dictate their legal obligations or benefits. They are still economically and in other ways bound to one another by law, but the law no longer assigns them asymmetrical roles. No state requires

applicants for a marriage license to disclose how they will divide the responsibilities of marriage between them as a condition of issuing a license.

Twentieth-century courts have made clear that marriage is not an infinitely elastic contract, but rather a status relationship between two people with gender-neutral rights and responsibilities corresponding to contemporary realities. That evolution in marriage, along with the Supreme Court's legal recognition of the liberty of same-sex couples to be sexually intimate, *Lawrence v. Texas*, 539 U.S. 558 (2003), clears the way for equal marriage rights for same-sex couples who have freely chosen to enter long-term, committed, intimate relationships.

B. Racial Restrictions.

The U.S. Supreme Court first named the right to marry a fundamental right in *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). *See also Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942). Yet racially-based marriage restrictions remained in force in numerous states. Slowly but unmistakably, however, social and legal opinion began to see these laws as inconsistent with principles of equal rights and with the fundamental freedom to choose a marital partner. The California Supreme Court led the way, by striking down the state's prohibitory law put in place almost a century earlier. *Perez*, 198 P.2d at 18.

In 1967, the U.S. Supreme Court affirmed that freedom of choice of partner is basic to the civil right to marry, by striking down Virginia's racially-based

marriage restrictions of three centuries' duration, and declaring that marriage is a "fundamental freedom." *Loving*, 388 U.S. at 12. The ban on marriage across the color line, so long embedded in many states' laws and concepts of marriage – and often defended as natural and in accord with God's plan (*see, e.g.*, *id.* at 3) – was entirely eliminated.

At that time, the state of Virginia defended its "Racial Integrity" law with arguments similar to those raised by Appellants in this appeal, declaring that control of marriage was the exclusive province of the states and rooted in historical tradition, while also citing evidence that the Fourteenth Amendment was not intended to prevent such state regulation of marriage. *See* Brief on Behalf of Appellee, *Loving v. Virginia* (No. 395), 1967 WL 93641, at *4-7, 31-38.

Appellants misread the historical record in refusing to accept a parallel between denying marriage to whites who would choose "Negro" partners, and denying marriage to individuals who choose partners of their own sex. Appellants argue that there is no parallel between anti-miscegenation laws and bans on same-sex couples marrying, because *Loving* "said nothing about how States *define* marriage." AOB at 13 (original emphasis). The notion that *Loving* did not "redefine" marriage is sophistic at best. Racially-based marriage bans were wholly an American tradition, invented in colonial Maryland and Virginia at a time when marriage in the mother country of Great Britain was regulated by the church.

These bans were a longstanding characteristically American tradition. To supporters of these rules, when the Supreme Court in 1967 overturned them after three centuries of implementation, the claim that a white and black should have the freedom to marry one another seemed as much to "redefine" the right of marriage as the freedom of two persons of the same sex to marry may seem now. Both changes are more correctly removals of state restrictions on the established right of freedom to choose one's marriage partner.

C. Divorce.

Legal and judicial views of divorce likewise have evolved to reflect society's emphasis on consent and choice in marriage, including spouses' own determination of their satisfaction and marital roles. Soon after the American Revolution, most states and territories allowed divorce, albeit for extremely limited causes: adultery, desertion, or conviction of certain crimes. Grounds such as cruelty were later added. Basch, *Framing American Divorce*, *supra* note 1; Glenda Riley, *Divorce: An American Tradition* 108-29 (1991).

Early divorce laws presupposed differing, asymmetrical marital roles for husband and wife. For instance, desertion by either spouse was a ground for divorce, but failure to provide was a breach that only the husband could commit. A wife seeking divorce had to show, in order to succeed, that she had been a model of obedience to her husband.

Divorce was an adversarial process. The petitioning spouse had to show that the accused spouse had defaulted on marital requirements set by the state, *e.g.*, the husband had not provided for his wife. A guilty party's fault was a fault against the state as well as the spouse. Many states prohibited remarriage for the guilty party in a divorce.

Over time, state legislation expanded divorce grounds. This evolution was hotly contested, however. Many critics were vociferously opposed, sure that greater freedom in divorce would undermine marriage entirely. Basch, *Framing American Divorce*, *supra* note 1, at 72-93. The "fault" form prevailed even while divorce grounds multiplied, leading, by the twentieth century, to cursory fact-finding and fraud by colluding spouses who agreed that their marriage had broken down. In response, California in 1969 adopted no-fault divorce. Florida followed in 1971. *Baker v. Baker*, 271 So.2d 796, 797 (Fla.Ct.App. 1973) (stating that Florida's no-fault divorce law became effective July 1971). By 1980, almost all the states followed in allowing an incompatible couple to end their marriage without an adversarial procedure.

This speedy convergence showed acceptance of the idea that marriage partners should define their own standards of marital satisfaction. It likewise reflected contemporary views that continuing consent to marriage is essential.

Herbert Jacob, *Silent Revolution: The Transformation of Divorce Law in the United States* (1988).

Divorce law today presumes gender neutrality in couples' roles and decision-making. In the past, the two spouses' obligations regarding children after divorce were gender-assigned and asymmetrical: the husband was responsible for the economic support of any dependent children, while courts (starting in the late nineteenth century) gave the mother a strong preference for custody. Currently, in contrast, both parents are held responsible for economic support of dependent children and for child-rearing.

Gender neutrality is the judicial starting point for all post-divorce arrangements, including alimony. The Supreme Court has said that marriage partners have a constitutional right to be treated equally – regardless of gender – within marriage or at its ending. *Orr v. Orr*, 440 U.S. 268 (1979). With respect to government entitlements, welfare reforms placed responsibility for children's support on both parents by 1988. Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343 (1988).

V. MARRIAGE TODAY.

Marriage has evolved into a civil institution through which the state formally recognizes and ennobles individuals' choices to enter into long-term, committed,

intimate relationships. Marital relationships are founded on the free choice of the parties and their continuing mutual consent.

Marriage rules have changed over time, and the institution of marriage has proved to be resilient rather than static. Features of marriage that once seemed essential and indispensable – including coverture, racial restrictions, and state-delimited grounds for divorce – have been eliminated. Some alterations in marriage have resulted from statutory responses to economic and social change, while other important changes have emerged from judicial recognition that state strictures must not infringe the fundamental right to marry. Supreme Court decisions have affirmed that the basic civil right to marry cannot be constrained by ability to comply with child support orders, *Zablocki v. Redhail*, 434 U.S. 374, 387 & n.12 (1978) (firmly restricting statutory classifications that would "attempt to interfere with the individual's freedom to make a decision as important as marriage"), or by imprisonment, *Turner*, 482 U.S. 78.

Marriage has been strengthened, not diminished, by these changes. Today the contemporary pattern of internal equality within marriage commands majority support, although not every American embraces the long-term movement in that direction. Spokespersons today who give priority to preserving the institution's perpetuation of gender difference by preventing same-sex couples from marrying implicitly rely on conceptions of male and female roles that can be traced to a time

of profound *de jure* and *de facto* sexual inequality. But contemporary policy, respect for the equality of all individuals, economic realities and concomitant developments in marriage law, have left that thinking behind. Marriage persists as a public institution closely tied to the public good while it is simultaneously a private relationship honoring and protecting the couple who consent to it.

Florida, like other states, has eliminated gender-based rules and distinctions relating to marriage in order to reflect contemporary views of gender equality and to provide fundamental fairness to both spouses. Florida's marriage laws treat men and women without regard to gender and gender-role stereotypes – except in the statutory requirement that men may marry only women and women may marry only men. This gender-based requirement is out of step with the gender-neutral approach of contemporary marriage law.

The right to marry, and free choice in marriage partner, are profound exercises of the individual liberty central to the American polity and way of life. The past century has seen legal and constitutional emphasis on liberty in choice of marital partner and definition of marital roles. Legal allowance for couples of the same sex to marry is consistent with this ongoing trend, and continues a succession of adjustments to marriage rules to sustain the vitality and contemporaneity of the institution.

CONCLUSION

On the foregoing reasoning, amici respectfully request that the judgment below be affirmed.

Respectfully submitted,

Dated: December 23, 2014

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). The brief contains 6,990 words (as calculated by the word processing system used to prepare this brief), excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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Dated: December 23, 2014

s/ *Daniel McNeel Lane, Jr.*
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CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the CM/ECF system.

Participants in the case are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, to the following non-CM/ECF participants:

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s/ *Daniel McNeel Lane, Jr.*
Daniel McNeel Lane, Jr.