No. 14-50196

In the
United States Court of Appeals
for the Fifth Circuit

CLEOPATRA DE LEON, NICOLE DIMETMAN, VICTOR HOLMES, and MARK PHARISS,

Platiniffs-Appellees,

v.

RICK PERRY, in His Official Capacity as Governor of the State of Texas; GREG ABBOTT, in His Official Capacity as Texas Attorney General; and DAVID LAKEY, in His Official Capacity as Commissioner of the Texas Department of State Health Services,

Defendants-Appellants

On Appeal from the United States District Court for the Western District of Texas,
San Antonio
No. 5:13-CV-00982

BRIEF OF AMICUS CURIAE PROFESSOR DAVID R. UPHAM IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT AND SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

Amicus Curiae is an individual and a natural person, and not a corporate or other organizational entity. Amicus is not aware of any other persons who have an interest in this brief.

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

David R. Upham, Ph.D., J.D. ("Amicus") is an Associate Professor of Politics at the University of Dallas,[2] where he teaches graduate and undergraduate courses in constitutional law and American political thought. He has researched extensively in the history of the Fourteenth Amendment. Besides his doctoral dissertation and published articles, he has recently completed a study on interracial marriage and the original understanding of that Amendment.[3]

In addition, Amicus is a citizen and licensed attorney of the State of Texas. In 2005, he voted to ratify Texas's constitutional marriage amendment. He was persuaded then, and is more persuaded now, that the amendment was thoroughly consistent with our national Constitution.

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[1] No party's counsel authored the brief in whole or in part, and no one other than the amicus curiae contributed money that was intended to fund preparing or submitting the brief. This brief is filed with the consent of all parties, pursuant to the joint stipulation filed on June 25, 2104. *See* Fed. R. App. P. 29(a).

[2] In filing this brief, Amicus is acting solely on his own behalf and not as a representative of the University of Dallas.

[3] David R. Upham, *Interracial Marriage and the Original Understanding of the Fourteenth Amendment* (Draft, Jan. 2, 2014), *available at* http://ssrn.com/abstract=2240046 ("Upham, *Interracial Marriage*"). A short version of this study was published as a blog post. David Upham, *Same-Sex Unions, Assumed Historical Facts, and Interracial Marriage*, Liberty Law Blog, Apr. 15, 2013, *available at* http://www.libertylawsite.org/2013/04/15/same-sex-unions-assumed-historical-facts-and-interracial-marriage/#more-9856.

Through this brief, Amicus hopes to bring to this Court's attention certain facts of our nation's constitutional history—facts that are highly relevant to the disposition of this case, but which were not addressed in the proceedings below.

SUMMARY OF ARGUMENT

What is "marriage" under our Constitution?

The State of Texas defines marriage as a union of one man and one woman. TEX. CONST. art. I, § 32. But the District Court, citing *Loving v. Virginia*, 388 U.S. 1 (1967), concluded that under the Fourteenth Amendment prohibits this traditional definition. Instead, the court ordered Texas to adopt a new formulation: "the right to make a public commitment to form an exclusive relationship and create family with a partner with whom the person shares an intimate and sustaining emotional bond." ROA.2029 (citation and quotation omitted).

Relative to "our Nation's history, legal traditions, and practices,"[4] this conception of marriage is plainly a *redefinition*. It not only discards the essential element of gender diversity, but injects the new requirement of "emotional bond."[5]

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[4] *Washington v. Glucksberg*, 521 U.S. 702, 710 (1997).

[5] *See, e.g.*, *Salzberg v. Salzberg*, 153 A. 605, 607 (N.J. E. & A. 1931) ("A marriage cannot be annulled for the reason only that no love existed between the parties to the marriage at the time thereof."); Jane Austen, Pride and Prejudice 84 (Dover Thrift ed. 1995) ("Miss Lucas…accepted him solely from the pure and disinterested desire of an establishment."); *cf.* C.S. Lewis, The Four Loves 92 (1960) ("The times and places in which marriage depends on Eros are in a small minority. Most of our ancestors were married off in early youth to partners chosen by their parents on grounds that had nothing to do with Eros.").

Contrary to the District Court's opinion, such contra-traditional redefinition finds no support in *Loving*. *Loving* involved neither a redefinition of marriage, nor any other rejection of our legal tradition. Rather, *Loving* represented a restoration of that tradition, and in particular, the original understanding of the Fourteenth Amendment.

Moreover, this redefinition not only is unwarranted by *Loving*, but violates the holding of *Troxel v. Granville*, 530 U.S. 57 (2000) (and other cases), that the Due Process Clause incorporates the presumption favoring the child's relation with her natural parents. In effect, this judicial redefinition would extend the statutory presumption of parentage to a mother's same-sex partner, thus mandating a presumption *contrary* to the constitutional presumption that the child is entrusted to the care, custody, and education of her natural mother and father.

By imposing "marriage equality," the District Court's decision would thus subvert two equalities secured by our Constitution. First, by misreading *Loving* as endorsing the redefinition of rights, the court undermined the equal right of each state to popular self government—a right secured by the Tenth Amendment and the Republican Guaranty Clause. Second, by overlooking *Troxel* and related cases, the court threatens the equal right of each child to the presumptive custody, care, and education of her natural parents—a right secured by the Fourteenth Amendment.

ARGUMENT

I. The District Court's decision reflects a fundamental redefinition of "marriage."

As the Defendant-Appellants' argued in the principal brief, "same-sex marriage" is, from the standpoint of our tradition an oxymoron, a "contradiction in terms." Appellants' Main Brief at 11. The etymology of the word "marriage,"[6] and the consistent legal tradition of our country, all indicate that gender diversity was essential to marriage. A century ago, the Supreme Court affirmed that "no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth…than that which seeks to establish it on the basis of 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 US 15, 45 (1885).

The necessity of gender diversity arises from marriage's function as a partnership ordered to offspring. The Texas Supreme Court has long held that marriage is intended not only "for [t]he mutual comfort and happiness of the

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[6] Marriage is a gendered term. It is derived from the Latin noun *marita* (wife). *Marita* is a feminine past-participle related to the root for male/masculine/etc; the form indicated a lost (indelicate) verb by which a *marita* was a woman who had been "manned" or provided with a husband. 9 Oxford English Dictionary 400 (2d ed. 1989); *accord* Walter W. Skeat, An Etymological Dictionary of the English Language 365 (1910). *See also*, "Marry," Online Etymology Dictionary, http://www.etymonline.com/index.php?term=marry&allowed_in_frame=0 (providing a different, but still "gendered" etymology) (last visited Feb. 8, 2014).

parties, [but] also for the benefit of their common offspring." *Sheffield v. Sheffield*, 3 Tex. 79, 86 (1848). And this Court, just three decades ago, declared that "one of the primary purposes of marriage [is] the bringing forth and nurturing of children." *Scheinberg v. Smith*, 659 F. 2d 476, 483 (5th Circuit 1981 (Unit B)). Accordingly, "[t]he state's interest in maintaining the integrity of this component of marriage is compelling." *Id*. at 487 (emphasis added).

II. *Loving v. Virginia* provides no precedent for the District Court's contra-historical redefinition.

In holding that our Constitution compels Texas to abandon the traditional definition of marriage, the District Court relied heavily on the purportedly "analogous" case of *Loving v. Virginia*, 388 U.S. 1 (1967). ROA.2029. The court used *Loving* for two related purposes.

First, the District Court invoked *Loving*, as discussed in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992) to support a contra-historical (and contra-textual) reading of the Fourteenth Amendment. Three times, the District Court cited the following passage from *Casey*:

> Marriage is mentioned nowhere in the Bill of Rights and interracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause in *Loving v. Virginia*.

Casey, 505 U.S. at 847–48 (*quoted and cited* in ROA.2028–.2029). This passage from *Casey* likewise figures prominently in the Tenth Circuit's recent decision

invalidating Utah's definition of marriage. *Kitchen v. Herbert*, No. 13-4178, slip op. at 23, 25–26 (10th Cir. June 25, 2014).

Second, the court cited *Loving* to refute Texas's claim that the purported right to "same-sex marriage" represented a *definitional* issue, that is "that Plaintiffs are seeking recognition of a 'new right to same-sex marriage' as opposed to the existing 'right to marry.'" *Id.*

> This Court finds this argument fails, as the Supreme Court did not adopt this line of reasoning in the analogous case of *Loving v. Virginia*. Instead of declaring a new right to interracial marriage, the [Supreme] Court held that individuals could not be restricted from exercising their "existing" right to marry on account [of the race] of their chosen partner.

Id.

A. *Loving* was consistent with the original understanding of the Fourteenth Amendment's text, and thus does not support the disregard of "our Nation's history, legal traditions, and practices."

In both these respects, the District Court's decision reflects fundamental and material historical error. *First,* the *Loving* precedent was not a *rejection*, but a *recovery* of "our Nation's history, legal traditions, and practices"[7]; indeed, *Loving* was consistent with a strict, originalist and textualist construction of our Constitution. The Fourteenth Amendment, by its express terms, secured the status and "privileges" of American citizenship to all persons born or naturalized in the United States, and subject to the jurisdiction thereof. U.S. CONST. amend. XIV, §

[7] *Washington v. Glucksberg*, 521 U.S. 702, 710 (1997).

1. Before the Amendment, most authorities, including the Supreme Court, had agreed that if free blacks enjoyed the privileges of such citizenship, racial-endogamy laws[8] would be invalid. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 408–409 (1857).[9] Indeed, during the debates over the adoption of the Amendment, most participants asserted, acknowledged, or conspicuously failed to deny, that the Amendment would invalidate racial-endogamy laws.[10]

Consistent with this original understanding, in the decade after the Amendment's ratification many judges struck down these laws as inconsistent with the Amendment and/or the Civil Rights Act of 1866. These judges included nearly every Republican trial or appellate judges in the country (and in *each* of the three states within this Court's circuit).[11] Most notably, the Texas Supreme Court

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[8] Amicus prefers the use of the term "racial endogamy" to "anti-miscegenation," in part because the word "miscegenation" was a pejorative neologism, invented by critics in 1863, which term suggested that Americans of different races could properly be classified as members of different *genera*, whose intermarriage represented a "mixing" of these *genera*. Amicus deems such a notion hostile to the principles of the Reconstruction Amendments—which recognized only *one* people, under *one* Constitution. Upham, *Interracial Marriage*, *supra* at 5–6.

[9] This opinion spanned the political spectrum from Roger Taney to Stephen Douglas to Orestes Brownson to William Lloyd Garrison. Upham, *Interracial Marriage*, *supra* at 26–38.

[10] *Id*. at 38–55; *see, e.g.*, Debates at the Arkansas Constitutional Convention 377, 502–04 (1868) (remarks of Miles Langley & James Hodges), *available at* https://archive.org/details/cu31924032658480.

[11] *See Bonds v. Foster*, 36 Tex. 68, 69–70 (1872); *Burns v. State*, 48 Ala. 195, 197–98 (1872); *Hart v. Hoss & Elder*, 26 La. Ann. 90 (1874). Republican trial judges in Mississippi, Louisiana, and Texas, as well as in North Carolina, Indiana, and Ohio, made the same holding. Upham, *Interracial Marriage*, *supra* at 62–68.

unanimously held that the state's law "had been abrogated by the 14th Amendment." *Bonds v. Foster*, 36 Tex. 68, 69 (1872).

To be sure, many judges upheld these laws, but as the Supreme Court noted in *Loving*, these jurists were generally "antagonistic to both the letter and the spirit of the [Reconstruction] Amendments and wished them to have the most limited effect." *Loving*, 388 U.S. at 9 (citations and quotations omitted). Indeed, the research of Amicus has confirmed that during Reconstruction, these judges were virtually all former southern disloyalists, or, in Indiana, members of an avowedly racist, anti-reconstruction state party.[12]

But the Supreme Court asserted in *Casey* that "interracial marriage was illegal in most states in the 19th century," 505 U.S. at 848. Amicus submits that this statement is *materially false*. The Court provided no citation or evidence to support the *dictum*, and subsequent scholarship has refuted it. In truth, within five years of the Fourteenth Amendment's ratification, racial-endogamy laws were either non-existent, repealed, unenforced, or judicially nullified, in our nation's capital, a clear majority of states (including Texas, Louisiana, and Mississippi), and a super majority of ratifying states—largely because Republican officials

[12] *Id*. at 68–71.

concluded that these laws violated the spirit and letter of the Amendment.[13] It was only after Reconstruction, with the new birth of racial apartheid in the South and in some western jurisdictions, that interracial marriage became once again invalid or illegal in a clear majority of states and territories, including the three states in this Court's circuit.[14]

Despite the *Casey* dictum, the District Court's claims as to the historical prevalence of racial-endogamy laws represent "assumed historical facts which are not really true."[15] These factual errors were critical to the District Court's decision to jettison the once-universal, traditional definition of "marriage." Amicus asks

[13] *Id*. at 53–68 (finding that within five years of ratification, interracial marriage was effectively lawful in 23 of the 33 states that had ratified the Amendment, and in virtually all the predominantly Republican states); Peter Wallenstein, Tell the Court I Love My Wife: Race, Marriage, and Law--An American History 103 (2004) (finding that interracial marriage was lawful in seven of the eleven former Confederate states); *Mixed Marriages*, Nashville Union and American, Oct. 2, 1873, at 3, *available at* http://chroniclingamerica.loc.gov/lccn/sn85033699/1873-10-02/ed-1/seq-2/ (last visited Jan. 29, 2014) (reporting that one judge's multistate survey had found that interracial marriages was effectively lawful in 21 of 37 states and the District of Columbia).

[14] Upham, *Interracial Marriage*, *supra* at 79.

[15] Abraham Lincoln, *Speech at Springfield, Illinois*, June 26, 1857, *in* 2 Collected Works 398, 403 (Roy P. Basler ed. 1946).

this Court, as a matter of anticipatory compliance,[16] to correct the mistake and reconsider the conclusion based on it.[17]

B. *Loving* involved no redefinition of marriage.

Moreover, *Loving* is not relevant to the issue of *redefinition* because the definition of "marriage" was never at issue in the debates over racial-endogamy laws. Both supporters and opponents agreed that racial homogeneity was no part of the definition of "marriage." All agreed that racial homogeneity involved a *regulatory* not a *definitional* discrimination. All authorities concurred that at common law, racial diversity was no impediment to marriage, so in the absence of local statutory restriction, interracial marriages were valid and otherwise lawful.[18]

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[16] *See generally* John Gruhl, *Anticipatory Compliance with Supreme Court Rulings*, 14 POLITY 294, 294 (1981) (explaining lower courts' anticipatory compliance with expected Supreme Court decisions).

[17] *Cf.* Abraham Lincoln, *Address at Cooper Institute, New York City*, Feb. 27, 1860, *in* 3 Collected Works, 522, 546. ("When this obvious [factual] mistake of the Judges shall be brought to their notice, is it not reasonable to expect that they will withdraw the mistaken statement, and reconsider the conclusion based upon it?").

[18] 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" and that although "by local statutes in some of the United States, intermarriage has been discouraged between persons of the negro, Indian, and white races, [w]ith the recent extinction of slavery, many of these laws have passed into oblivion"); *see generally*, Upham, *Interracial Marriage*, *supra* at 12–17.

Consequently, "legalization" required only statutory silence.[19] *See, e.g.*, *Bonds v. Foster*, 36 Tex. 68, 69 (1872); *see also, e.g.*, *Pearson v. Pearson*, 51 Cal. 120, 125 (1875) (holding that because there was no "law or regulation…in the Territory of Utah interdicting intermarriage between white and black persons" such a marriage had been validly contracted there in 1854).

In sharp contrast, unlike racial homogeneity, *gender diversity* has always been deemed *definitional* and not *regulatory*. Statutory silence therefore has had exactly the *opposite* effect. Silence has implied not the validity, but the utter invalidity (indeed impossibility) of same-sex marriages. *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971); *see also Goodridge v. Dep't of Pub. Health,* 798 N.E.2d 941, 952 (Mass. 2003) (holding that "marriage" under state *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).[20]

So deep and broad was this universal definition that before1973, no American jurisdiction saw any need to statutorily clarify what had always been

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[19] *Id*. Even statutory *illegality* did not always entail *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").

[20] In the case, the court divided 4-3 on the *constitutional* issue but was unanimous in concluding that the statutory mere use of the word "marriage" implied the statutory invalidity of same-sex "marriage." *See Goodridge*, 798 N.E.2d at 969 (holding the "marriage" statute unconstitutional); *id*. at 974 (Spina, J., dissenting).

clear: marriage requires gender diversity.[21] For much the same reason, there is—*not yet*—any perceived need for laws invalidating putative "marriages" (1) between corporations or other artificial persons, notwithstanding *Citizens United v. Federal Election Comm'n*, 558 U.S. 310 (2010) or marriages (2) involving less than, or more than, two natural persons.

III. The District Court's extension of the presumption of paternity to same-sex couples would violate the constitutional presumption, affirmed in *Troxel v. Granville*, that the child should be entrusted to the care, custody, and education of her natural mother and father.

One day before the Court's decision in *United States v. Windsor*, 133 S.Ct. 2675 (June 26, 2013), Justice Sotomayor, joined by Justices Ginsburg and Kagan, reminded her colleagues that our laws, and indeed the Constitution itself, mandate a strong *preference* for the relationship between a child and her *natural parents*.[22] *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2582 (June 25, 2013) (Sotomayor, J., dissenting). She highlighted, *inter alia*, the Supre Court's decisions in *Troxel v. Granville*, 530 U.S. 57 (2000) and *Parham v. J. R.*, 442 U.S. 584 (1979), in which,

[21] 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).

[22] The word "natural parent" is something of a redundancy. *Parent* is derived from the Latin verb *parēre* (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.

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 his child." *Adoptive Couple*, 133 S. Ct. at 2582 & 2583 n.14 (emphasis added).[23]

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).

A. ***Troxel v. Granville*** and related cases establish that "Due Process of Law" requires the States to presume that children are entrusted to their natural parents.

As Justice Sotomayor suggested, the presumption favoring this precious relationship is indeed deeply rooted in our constitutional tradition. In *Meyer v. Nebraska*, 262 U.S. 390 (1923), the Supreme Court vindicated the parents' "natural duty," and (thus) natural right, to direct the education of their offspring. *Id*. at 400. Since then, seemingly every member of the Court has endorsed this presumption in

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

one case or another. Just ten years ago, most of the Justices reaffirmed this presumption. *Troxel*, 530 U.S. at 68–69 (opinion of O'Connor, J, joined by Rehnquist, C. J., and Ginsburg and Breyer, JJ); *id.*at 77 (Souter, J., concurring); *id.* at 86–87 (Stevens, J, dissenting).

Only Justices Kennedy and Scalia demurred, *id.* at 91–93 (Scalia, J., dissenting), *id.* at 98 (Kennedy, J., dissenting). But a decade earlier, both had affirmed the "fundamental liberty interest of *natural* parents in the care, custody, and management of their child," *Hodgson v. Minnesota*, 497 U.S. 417, 485 (1990) (Kennedy, J., dissenting) (citations and quotations omitted) (emphasis added).

In *Troxel*, Justice Scalia doubted whether the Constitution's text and original understanding supported this liberty interest. *Troxel*, 530 U.S. at 91–93 (Scalia, J., dissenting). In sharp contrast, Justice Kennedy cited as his "principal concern" the obvious implication of this natural-parental presumption: "that the <u>conventional nuclear family</u> [would] establish the visitation standard for every domestic relations case." *Id*. at 98 (emphasis added)

Amicus submits that Justice Scalia was probably mistaken in doubting the originalist and textual foundation of *Meyer* and its progeny. The Fourteenth Amendment's Due Process Clause, as originally understood, incorporated those "settled usages and modes of proceeding existing in the common and statute law of England" that had been preserved in the American colonies and states. *Murray's*

Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 277 (1856). These settled "usages and modes" encompassed certain presumptions, including not only the presumption of innocence in criminal cases,[24] but also the presumption of the natural parent's trusteeship in child-custody cases. Accordingly, decades before *Meyer*, several courts had affirmed that to disregard this presumption, in reassigning custody to non-parents, was to deprive the child (or parent), of liberty (or property), without due process of law.[25] In 1990, Justice Kennedy himself articulated this old procedural rule: "Absent a showing of abuse or neglect, [the natural parent] has the paramount right to the custody and control of his minor

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[24] *Greene v. Briggs*, 10 F. Cas. 1135, 1140 (C.C.D. R.I. 1852) (No. 5,764); *Wynehamer v. the People*, 13 N.Y. 378, 446 (1856) (Selden, J., concurring).

[25] *People ex rel. O'Connell v. Turner*, 55 Ill. 280, 284–88 (1870) (holding that to deprive a child of his father's care and assign the child to a reform school, without a prior finding of criminal liability on the child's part, or a prior finding of "gross misconduct or almost total unfitness" on the father's part, would deprive the child of liberty without due process of law); *Nugent v. Powell*, 33 P. 23, 48 (Wyo. 1893) (holding that consistent with due process, a child's adoption would be effective by the consent of the mother if, as to the non-consenting father, "the fact of abandonment" is first proven); *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 "property" requires a showing, after notice and hearing, that the parent had "by his conduct, forfeit[ed] his right to the custody of his minor child"); *cf. 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 triggered upon a showing of "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 nurture and education of the child").

children, and to superintend their education and nurture." *Hodgson*, 497 U.S. at 483 (Kennedy, J., dissenting).[26]

But Justice Kennedy, a decade later in *Troxel*, was probably correct in inferring that this strong presumption in favor of the natural parents does indeed establish a constitutional preference for the "conventional nuclear family." After all, to hold "precious" the bond between child and natural parent necessarily implicates a preference for that domestic arrangement where the child lives with both parents at the same time and in the same place. To the extent of the presumption, then, the states' interest in promoting the nuclear family is not only compelling, but *constitutionally* compelling.[27]

[26] Besides the authorities listed by Justice Kennedy, *Hodgson*, 497 U.S. at 483–84, see also, *e.g.*, 2 James Kent, Commentaries on American Law 205 (1832) (The natural father and mother are "generally entitled to the custody of the infant children, inasmuch as they are their natural protectors, for maintenance and education. But the courts of justice may, in their sound discretion, and when the morals, or safety, or interests of the children *strongly* require it, withdraw the infants from the custody of the father or mother, and place the care and custody of them elsewhere" (emphasis added)). *Accord*, 2 Joseph Story, Commentaries on Equity Jurisprudence as Administered in England and America 574–75 § 1341 (1839); W.C. Rodgers, A Treatise on the Law of Domestic Relations 536 (1899).

[27] To say that this relationship is *precious* and even *preferred* is not to insult the countless adults, whether adoptive parents, grandparents, or other caregivers, who cherish their personal relation with a child, and who have often acted *in loco parentis* or otherwise played a *vital* role in the child's education.

B. This constitutional presumption can be overcome by clear and convincing evidence of forfeiture.

According to our history and tradition, this presumption was not irrebuttable or conclusive. Instead, as indicated by the authorities cited above, the presumption could be overcome, but only by a "strong" showing of forfeiture by abuse or neglect. In recent decades, the Supreme Court has used a somewhat different formula: the complete 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.

C. Forfeiture, by parental consent, requires that the consent be deliberate, informed, and specific.

This forfeiture requires something more than naked consent. Our laws have never treated the parent's authority over the child as something transferable at will. Parents do not own their children in fee simple absolute. Parents may not buy and sell their offspring as chattel. They have no *right*, properly speaking, to abandon their children. Rather, parental rights arise only from parental duties,[28] for parental authority is in the nature of a sacred trust.[29] Thus, a parent's decision to abandon that trust has typically been characterized as *forfeiture*, not lawful transfer. Even

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[28] Kent, Commentaries, *supra* at 203 ("The rights of parents result from their duties.").

[29] Lewis Hochheimer, The Law Relating to the Custody of Infants: Including Forms and Precedents 42, § 40 (1899) (concluding that "the prevailing view in the American courts has always been [that] guardianship is in the nature of a trust").

today, while our modern statutory law authorizes adoption, the attitude toward the natural parent's departure remains acquiescence rather than celebration. *See, e.g.*, TEX. FAM. CODE § 161.005. And frequently parental choice is ignored, as the states regularly compel child-support payments from reluctant parents. *See, e.g.*, TEX. FAM. CODE § 154.001.

For the same reason, the law has generally not enforced any contract involving an irrevocable parental reassignment. By "a mere gift of his child or a contract with reference to its custody[,] the father may not divest himself of the right to the custody of his child to such an extent that he may not reclaim it."[30]

To be sure, legal adoption can involve such irrevocable consent. Still, courts have disfavored adoption statutes as in derogation of the common-law rights and duties of natural parents.[31] Further, adoption procedures typically respect the law's presumption in favor of the child's right to her natural parents; to be effective, the parents' consent must be so deliberate, informed, and specific as to evince an intent to abandon definitively parental authority, and only respecting a specific child. The Utah Supreme Court eloquently explained the rule a half-century ago:

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[30] *Nugent*, 33 P. at 38.
[31] *See, e.g.*, *Estate of Jones v. Howell* , 687 So. 2d 1171, 1175 (Miss. 1996); *Royal Neighbors v. Fletcher*, 230 S.W. 476, 479 (Tex. Civ. App. 1921); *Roy v. Speer*, 192 So. 2d 554, 556–57 (La. 1966) ("Ties between parent and child, being the closest and strongest within the human family, courts sever them with extreme reluctance…[Adoption] statutes, being in derogation of the natural right of the parents to the child, and the right of the child to its parents, have consistently been strictly construed in the jurisprudence in favor of the parents.").

> 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 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). Accordingly, the states have generally required that the irrevocable relinquishment of parental authority must satisfy exacting procedures to ensure such informed, specific, and definitive relinquishment.

Consistent with these due-process principles, Texas requires that a parent's alleged consent to terminate the parent-child must be proved by "clear and convincing evidence" that the parent complied with certain exacting and extensive formalities. TEX. FAM. CODE § 161.103 (enumerating the requirements for a valid affidavit of relinquishment of parental rights). Therefore, for instance, no such consent is valid unless the child is at least two days old and has been given a name. *Id*. § 161.103.

D. Texas's statutory presumption of paternity *complements* the constitutional presumption of natural-parental trusteeship.

One long-established benefit (and burden) of marriage is the presumption of paternity. At common law, any child born to a married woman was strongly presumed to be the offspring of her husband.[32] This presumption is now codified by statute in Texas and many states. TEX. FAM. CODE § 160.204.

Under traditional marriage, this presumption *complements* the constitutional presumption favoring natural parents, 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.[33] Second, the presumption itself, coupled with law and opinion's stubborn disapproval of adultery,[34] serves, via a self-fulfilling prophesy,[35] to make the presumption true in even more cases. Third, the legal presumption of paternity

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[32] Schouler, Law of Domestic Relations, *supra* at 303–308
[33] *Michael H. v. Gerald D.*, 491 U.S. 110, 113 (1989) (plurality op.) ("The facts of this case are, we must hope, extraordinary.").
[34] *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 homosexual conduct, non-marital sex, non-marital procreation, and polygamy, a stable 90% of Americans continue, obstinately, 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.
[35] 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 that bond.

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.[36]

E. The District Court has ordered Texas to extend the presumption of paternity to same-sex couples, and thus set aside the procedural safeguards of adoption law that favor natural-parental trusteeship.

In holding that the Constitution compels Texas to redefine marriage, the District Court announced that same-sex couples must henceforth enjoy all the "numerous rights, privileges, and responsibilities" of marriage. ROA.2041. Such rights include the presumption of parentage, whereby a mother's partner could become a legal "parent" without "the long administrative and expensive process of adoption." ROA.2007.

The District Court, in company with several other American courts, indicated that nothing short of full equality of all couples, in all respects, will be acceptable. Many foreign legislatures, in contrast, have granted the status "marriage," but carefully withheld one or more marital rights or duties, especially

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

the presumption of paternity.[37] As Professor Perry Dane has pointed out, 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."[38]

F. As extended to same-sex couples, the presumption of paternity would not *complement*, but *conflict with*, the Constitution's presumption of natural-parental trusteeship.

Under same-sex "marriage," the presumption of paternity would not complement, but conflict with, the constitutional presumption favoring natural parents. First and foremost, in same-sex relationships, the presumption of paternity (now dubbed "parentage") would be *always* false. Every child born in

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[37] *See, e.g.*, Marriage (Same Sex Couples) Act, 2013, c. 30, sched. 4, pts. 2–3 (Eng.) (stipulating that "where a child is born to a woman during her marriage to another woman, that [common-law] presumption is of no relevance to the question of who the child's parents are" and that unlike opposite-sex marriages, same-sex marriages will not be voidable due to a party's inability or unwillingness to consummate the marriage (referencing Matrimonial Causes Act, 1973, c. 18, § 12 (Eng.))).

[38] Perry Dane, *Natural Law, Equality, and Same-Sex Marriage*, 62 Buffalo L. Rev. 291, 357 n.174 (2014) (citing Macarena Sáez, *General Report, Same-Sex Marriage, Same-Sex Cohabitation, and Same-Sex Families Around the World: Why "Same" Is So Different*, 19 AM. U. J. GENDER SOC. POL'Y & L. 1, 4-7 (2011)). Courts in other states have reached a similar conclusion regarding comprehensive "marriage equality." William C. Duncan, *Redefining Marriage, Redefining Parenthood* 10–12 (Mar. 15, 2013), *available at* http://www.law2.byu.edu/page/categories/marriage_family/2013_march/drafts/duncan_parenthood.pdf (noting state courts' assigning automatic parental status to the same-sex partner of the child's mother).

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 become a lie.

Second, the redefinition would not discourage, but encourage, extra-marital reproduction, for the comprehensive and uncompromising "marriage equality" demanded in this case would be inimical to any laws and opinions that have a disparate impact on same-sex couples—and acceptance of extramarital reproduction is essential to the same-sex couple's purported right to joint "parenthood."[39] Third, precisely to the extent of this revolution in values, the biological fathers could not, by their praiseworthy service to "marriage equality," be deemed to have intended, *ipso facto*, to abandon their own offspring, unlike the adulterous man under traditional marriage.[40]

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[39] *See, e.g.*, Anemona Hartocollis, *And Surrogacy Makes 3: In New York, a Push for Compensated Surrogacy*, N.Y. Times, Feb. 19, 2014, http://www.nytimes.com/2014/02/20/fashion/In-New-York-Some-Couples-Push-for-Legalization-of-Compensated-Surrogacy.html?_r=0 (noting the legislative efforts to foster such equality by legalizing enforceable surrogacy contracts).

[40] *See,* among countless contemporary examples of the new ethics, Shawn Hitchens, *Experience: I Was a Sperm Donor For My Friends*, The Guardian, Aug. 17, 2013, http://www.theguardian.com/lifeandstyle/2013/aug/17/experience-sperm-donor ("The baby is now 10 months old, and although I see her regularly, I'm certainly not 'Dad.' I'm Shawn. But we will always be open about my connection to her…. It's important for her to know that she was born in a special way, and that her arrival helped to change ideas of what a family can be.").

G. The District Court's redefinition would thus violate the equal constitutional right of every child to her father and mother.

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,[41] the states may not reassign 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.

What the State of Washington could not do in favor of the grandfather or grandmother—the mother's parents—Texas cannot do in favor of the mother's same-sex partner. The Constitution does not permit Texas to redefine "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, the District Court has ordered the state of Texas to do precisely what the Constitution forbids: to issue marriage licenses that will impair

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

or destroy the child's presumptive right to her mother and father. The careful procedural safeguards of adoption will be swept away in favor of an automatic presumption of "parentage" in a non-parent.

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 and mercenary sperm donor, the father may properly be said to have forfeited this duty and right by abandonment.[42] 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 Texas will be compelled to issue.[43]

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,

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[42] *Compare*, TEX. FAM. CODE § 160.702 (excluding such a biological father—a "donor"—from the legal definition of "parent") *with* TEX. FAM. CODE § 160.7031 (stating that a donor-father will be the "father" of the unmarried mother's child where the father *intends* to be the father).

[43] Granting a marriage license to two otherwise "unmarried" women will thus defeat the willing father's right under TEX. FAM. CODE § 160.7031.

frequently if not usually, the courts will decide that her partner should have primary custody.[44]

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 be neither specific, nor deliberate, nor, in many cases, even conscious.[45]

In sum, the District Court's disregard of the traditional definition of marriage reflects a disregard for the constitutional rights not only of the states, but also of children. Here, as in similar matters, the neglect of our ancestors will prove the neglect of our posterity.[46]

CONCLUSION

The dispute over same-sex marriage is truly about *equality*: irreconcilable notions of equality. "Marriage equality" is incompatible with (1) the equal rights of the states under the Tenth Amendment, and (2) the fundamental, equal right of

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[44] 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.

[45] That is to say, upon applying for the marriage license, the woman frequently will not be thinking about the effects on her relationship with future offspring.

[46] "People will not look forward to posterity who never look backward to their ancestors." Edmund Burke, Reflections on the Revolution in France 33 (Oxford Classics ed. 2004).

every child to her mother and father, without regard to her mother's sexual orientation or choice of partner.

The equality of the states and their citizens, and the equal rights of children and their parents, whether LGBT or otherwise, are safeguarded by our Constitution. But "marriage equality" is "foreign to our Constitution, and unacknowledged by our laws."[47]

In light of the historical principles set forth in this brief, Amicus respectfully asks the Judges of this Court to safeguard our Constitution inflexibly and uniformly[48]—and especially the equal constitutional rights, both of the states and their citizens, and of the child and her parents—and therefore to uphold, *unanimously*, the validity of the traditional definition of marriage.

Dated: August 4, 2014

Respectfully submitted,

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[47] Declaration of Independence (U.S. 1776).
[48] Federalist No. 78, at 464, 469 (Signet Classic ed. 1999) (noting that our Constitution gives federal judges life tenure partly to ensure their "inflexible and uniform adherence to the rights of the Constitution, and of individuals").

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Certificate of Compliance with Type-Volume Limitation,
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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,962 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Date: August 4, 2014

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Attorney *pro se*

CERTIFICATE OF SERVICE

I hereby certify that on August 4, 2014, I electronically filed the foregoing using the court's CM/ECF system, which will send notification of such filing to counsel for all parties to the case. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Date: August 4, 2014.

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