IN THE SUPREME COURT OF OHIO

In re: L.E.S., E.S. & N.S.	:	Case No. 2024-0303
	:	
	:	

Appeal from the Court of Appeals, First Appellate District

App Nos. C-220430, C-220436

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Appellee Carmen Edmonds' Counterproposition of Law:

Where a same-sex couple got engaged, and—but for Ohio's unconstitutional same-sex marriage ban—would have been married at the time their children were born, both partners benefit from the protections of Ohio's artificial insemination statute, R.C. 3111.95(A).

This result is required by:

Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (requires recognition of same-sex marriage);

Pavan v. Smith, 137 S. Ct. 2075 (2017) (requires that courts read artificial insemination statutes to grant parental rights to same-sex and opposite-sex couples equally);

Harper v. Virginia Dept. of Tax'n, 113 S. Ct. 2510 (1993) (requires retroactive application of U.S. Supreme Court holdings);

Reed v. Campbell, 106 S. Ct. 2234 (1986) (requires courts to retroactively apply federal constitutional holdings that legitimize children);

Gomez v. Perez, 409 U.S. 535 (1973) (requires state courts to engage in difficult fact-finding when necessary to retroactively implement federal constitutional holdings that legitimize children);

Califano v. Westcott, 443 U.S. 76 (1979) (holds that when a statute violates Equal Protection, courts may extend it "to include those who are aggrieved by the exclusion" rather than striking it down);

In re Adoption of Y.E.F., 2020-Ohio-6785 (explaining that this Court will extend a statute rather than strike it down entirely when necessary to avoid disruptions)

Reynoldsville Casket Co. v. Hyde, 514 U.S. 749 (1995) (holds that this Court cannot interpret the Ohio Constitution to thwart retroactive implementation of a federal constitutional holding); *DiCenzo v. A Best Prods. Co.*, 2008-Ohio-5327, ¶ 16 n.2 (same).

1. Introduction.

Two decades ago, when Carmen Edmonds proposed to Priya Shahani with a diamond ring, any Ohioan who solemnized the couple's unlicensed union risked six months in jail. R.C. 3101.99(B). This State also banned recognition of all same-sex marriages—even those from other states. R.C. 3101.01. But to benefit from Ohio's artificial insemination statute, the two partners needed a marriage. R.C. 3111.95(A).

So when the pair donned matching "Mommy-to-Be" sashes and brought their children into the world, Ohio provided no path—not even adoption—for both women to be parents in the eyes of the law. *In re Bonfield*, 2002-Ohio-6660, ¶¶ 2, 29. This violated Equal Protection and Due Process. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015).

When a statute is "underinclusive"—meaning it falls short of reaching every person who, under Equal Protection, must be included—this Court has a choice. *In re Adoption of Y.E.F.*, 2020-Ohio-6785, ¶ 33. It may either strike down the law entirely, or it may extend the law's protections "to include those who are aggrieved by the exclusion." *Califano v. Westcott*, 443 U.S. 76, 89 (1979); *Y.E.F.*, 2020-Ohio-6785 at ¶ 33.

Neither party asks this Court to strike down all pre-*Obergefell* applications of this State's artificial insemination statute—doing so would disrupt Ohio families. *See id.* So this Court should extend the statute's protections "to include those who are aggrieved." *Califano*, 443 U.S. at 89. The parties disagree only about whether Ms. Edmonds and the children are "aggrieved" by Ohio's former same-sex marriage ban.

The First District's "would-have-married" test hits it on the nose. If the juvenile court finds on remand that but for Ohio's same-sex marriage ban, the parties would have been married when their children were born—making Ms. Edmonds a parent today under the artificial insemination statute—then she is aggrieved.

But if the juvenile court finds that the parties wouldn't have been married (even though Ms. Shahani said "yes" when Ms. Edmonds proposed, and even though they gave their children hyphenated last names), then Ms. Edmonds isn't aggrieved: Ohio's same-sex marriage ban wouldn't have deprived her of any rights.

By requiring Ms. Edmonds to prove that but for a violation of her federal constitutional rights, she would be a parent under the statute's text, the First District implemented the holdings of *Obergefell* while remaining as true as possible to the language the General Assembly enacted. This Court should affirm.

Ms. Shahani claims that Ms. Edmonds isn't aggrieved because they didn't apply for a marriage license or solemnize their union. The parties couldn't have gotten a marriage license. R.C. 3101.05(A) (allowing licenses only where there is "no legal impediment" to the marriage). Applying for one would have been futile.

To solemnize their union, the couple needed that marriage license. R.C. 3101.09 ("no marriage shall be solemnized without the issuance of a license"). On top of that, officiants may only "join together as husband and wife any persons *who are not prohibited by law* from being joined in marriage." R.C. 3101.08 (emphasis added).

Anyone who attempted to solemnize the parties' union risked a $500 fine and up to six months in jail. R.C. 3101.99(B) (imposing criminal liability for solemnizing unlicensed marriages). So Ms. Shahani's solemnization-based test would punish those who, like Ms. Edmonds, declined to find someone willing to risk jailtime for them.

Ms. Shahani also claims Ms. Edmonds isn't aggrieved because they could have married in Boston. But *Obergefell* gave same-sex couples two rights: First, to marry in their home state; and second, to have their home state recognize an out-of-state wedding. S. Ct. at 2607–08. Ms. Edmonds had neither right. Let's look at the impact on her.

When the couple traveled to Boston to get married, they learned on the trip that Ohio banned recognition of out-of-state marriages. So they packed up and headed home. But if Ohio had (as *Obergefell* requires) recognized a Massachusetts same-sex marriage, then they would have married on that trip—and Ms. Edmonds would be a parent today. That makes her aggrieved. *See Pueblo v. Haas*, 999 N.W.2d 433, 447 (Mich. 2023).

Now, let's turn to Ms. Shahani's other objections. Her chief argument is that Ohio's ban on common law marriages, R.C. 3105.12, prevents this Court from extending the protections of the artificial insemination statute to couples like this one. But this Court's power to extend unconstitutional statutes comes from the Ohio and federal Constitutions. *See Y.E.F.*, 2020-Ohio-6785 at ¶ 33; *see also Wengler v. Druggists Mut. Ins.*, 446 U.S. 142, 152–53 (1980). Constitutions trump statutes, so Ohio's statutory ban on common law marriages isn't an obstacle.

What is more, Ohio's ban on common-law marriages unconstitutionally discriminated against pre-*Obergefell* same-sex partners. It was just one more way that Ohio prohibited them from marrying: They couldn't solemnize their unions, but they couldn't have them recognized informally, either. That's a double whammy.

Next, Ms. Shahani claims that Ms. Edmonds should have brought a federal § 1983 action, rather than filing a state law parentage claim. No way: State courts vindicate federal rights all the time. In fact, they are "better positioned" than federal ones to adapt state statutes to new federal constitutional holdings. *Wengler*, 446 U.S. at 153.

Ms. Shahani also complains that the First District took away her "right" to be the only parent in the picture—a status she has used to try to limit Ms. Edmonds' role in the children's lives. Hold up. Ms. Edmonds has constitutional rights, too. And no one is ambushing Ms. Shahani by aiming for shared parenting here: Ms. Shahani ceded shared custody, and she put in a signed writing that the parties were "co-parenting."

When a new constitutional holding comes out, some people gain rights, and others have to share. When the U.S. Supreme Court held that nonmarital children are entitled to inherit under intestacy statutes, the "legitimate" family members lost property rights. *Trimble v. Gordon*, 430 U.S. 762, 764 (1977). When the Court held that an unwed father can sometimes block a mother's attempt to have their child adopted by another man, the Court took away some of the mother's exclusive rights. *Quilloin v. Walcott*, 98 S. Ct. 549, 551 (1978). Nothing stops this Court from holding that Ms. Shahani might need to share.

Next, Ms. Shahani has a new argument (not raised below) about the retroactive laws clause of the Ohio Constitution. This Court can't rely on the Ohio Constitution to defeat retroactive application of a federal constitutional holding. *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 753 (1995). So that argument is out.

Ms. Shahani also claims the "would-have-married" standard requires difficult fact-finding. But the need for state courts to engage in some fact-finding when evaluating parentage claims cannot "be made into an impenetrable barrier" to shield discrimination. *Gomez v. Perez*, 409 U.S. 535, 538 (1973).

In the past, state courts were up to the task of adjudicating parentage claims when the U.S. Supreme Court legitimized millions of nonmarital children—something that created evidentiary problems in an era before DNA testing. *See id.* And whether a party "would have chosen to be married, at a particular point in time," is a "question of fact" similar to those trial courts routinely decide. *In re Registered Domestic P'ship of Madrone*, 350 P.3d 495, 501 (Or. Ct. App. 2015). Even Ms. Shahani's lead case on the standard's supposed unworkability—*Sheardown v. Guastella*, 2018 Mich. Cir. LEXIS 241 (Mich. Ct. App. 2018)—was recently overruled in *Pueblo v. Haas*, 999 N.W.2d 433 (Mich. 2023).

Ms. Shahani should not be able to "use the law as a weapon because same-sex coparents" once lacked rights. *Mullen*, 2011-Ohio-3361 at ¶ 61 (Pfeiffer, J., dissenting). That's what is happening here: Ms. Shahani wants to exploit past inequalities to seize exclusive parental rights over the parties' children. *Obergefell* stops this.

2. Procedural History.

Because Ms. Edmonds and Ms. Shahani couldn't marry, their three children were born under the *Bonfield* framework—which requires that when same-sex partners use anonymous artificial insemination, the one who gives birth is the "parent," but the other is (at best) a nonparent "custodian." *In re Mullen*, 2011-Ohio-3361, ¶ 11. Such laws "humiliate the children of same-sex couples." *Obergefell*, 135 S. Ct. at 2590.

When the parties disputed parentage and custody below, the juvenile court applied the old *Bonfield* framework. It acknowledged a "clear disconnect" between *Bonfield*'s one-mother-one-custodian rule and *Obergefell*. (Tr. R. 108 at 2.) But it concluded it was powerless under *Bonfield* to award parentage. (Tr. R. 376 at 3.)

The juvenile court did find that Ms. Shahani had ceded shared custody of all three children to Ms. Edmonds. (Tr. R. 376 at 3.)[1] It also rejected Ms. Shahani's allegations of abuse and neglect. While the court admitted that Ms. Edmonds was "not always" nice after Ms. Shahani ran off with the children's nanny, it also found "there is absolutely no evidence Ms. Edmonds has ever acted in a way that put the children at risk of harm." (*Id.* at 10.) Ms. Shahani's accusations were just a rehash of "some initial issues after their romantic relationship ended," nothing more. (*Id.*)

[1] Ms. Shahani suggests that the juvenile court awarded "companionship time" rather than custody. Not so. *See In re L.E.S.*, 2024-Ohio-165 at ¶ 4 (explaining that "P.S. relinquished sole *custody* of the children in favor of shared custody with C.E.") (emphasis added). Ms. Shahani has not appealed that aspect of the First District's ruling.

The magistrate found Ms. Shahani not credible on key issues, explaining that she was not persuasive "in the least." (Tr. R. 217 at 12.) The court looked to her actions as "much more convincing than her testimony at trial." (*Id.*) Meanwhile, the court found that Ms. Edmonds has "acted as a loving parent," and that virtually every factor "strongly supports" Ms. Edmonds having legal rights with the children. (*Id.* at 16–17.)

Not only was this "obviously" in the children's best interests, but it would be "absolutely detrimental to them" if they were taken away from Ms. Edmonds. The court could not "conceive of the great sadness and emotional damage" to the children if that were to happen. (*Id.* at 17.)

Wanting sole custody, Ms. Shahani appealed. Ms. Edmonds filed a cross-appeal of her own, asking the First District to declare her a parent. In reversing the juvenile court's decision, the First District began by observing that federal constitutional holdings "must be given full retroactive effect." *In re L.E.S.*, 2024-Ohio-165 at ¶ 20 (quoting *Harper v. Virginia Dept. of Tax'n*, 113 S. Ct. 2510 (1993)).

It then explained that by denying Ms. Edmonds the protections of Ohio's artificial insemination statute, the juvenile court had deprived the children of one parent "because of a state wrong." *Id.* at ¶ 23. It then remanded for the juvenile court to determine whether, but for Ohio's same-sex marriage ban, Ms. Edmonds and the three children would have benefited from the protections the artificial insemination statute creates for spouses. Ms. Shahani, unwilling to accept shared parenting, appealed.

3. Statement of Facts.

3.1 Ms. Edmonds and Ms. Shahani get engaged and set out to marry.

The parties moved in together in 2003, when they enjoyed a "romantic, loving relationship." (Transcript of Proceedings, "T.p.," 332:18–22.) Ms. Edmonds proposed marriage with a diamond ring, and Ms. Shahani accepted both the proposal and the ring. (T.p. 333:21–334:1.)

They later returned the ring and bought silver and gold bracelets to "represent the engagement." (T.p. 334:1–13.) *See also Windsor v. United States*, 133 S. Ct. 2675 (2013) (explaining that same-sex couples sometimes used less traditional symbols, like diamond brooches, to avoid "unwelcome questions"). From then on, the parties called each other "partner." (T.p. 333:-17–23.) They intended to spend their lives together and were committed to each other exclusively. (T.p. 334:16–23.)

They traveled to Boston to get married. (T.p. 537:23–538:5.) But when they realized their marriage would not be recognized in Ohio, they went home, exchanged the bracelets with one another, and committed to each other privately instead. (T.p. 538:1–11); R.C. 3101.01(B)(2).[2]

[2] The trial court record supports only one conclusion about the Boston trip: Ohio's same-sex marriage ban was the couple's sole reason for heading home. (T.p. 538:1–11.) Ms. Shahani's opening brief includes a section on celebrities who got cold feet at the altar, but tellingly, Ms. Shahani never testified that *she* ever got them. Instead, she cites her sister's testimony, which was: "I think our oldest sister might have asked Priya at one point, and Priya was like, no, we're not getting married." (T.p. 670:7–11.) That little piece of hearsay is a slender reed for Ms. Shahani's bold claim.

Ms. Shahani's extended family welcomed Ms. Edmonds and treated her the same as other in-laws. (T.p. 375:6–11.) Their friends also believed they were "married" or at least "a family." (T.p. 123:15–17; 213:1–15). Ms. Edmonds always viewed the relationship "as a marriage," and they were "committed and married" to each other in their hearts. (T.p. 536:7–11, 596:5.)

3.2 The parties bring three children with hyphenated last names into the world.

The parties discussed having children from the start. (T.p. 765:2–9.) At first, Ms. Edmonds was "not ready" and wanted to wait for the "right time." (T.p. 765:12–17.) So they waited six years until Ms. Edmonds agreed to move forward. (T.p. 888:12–25.) After a "final discussion," (T.p. 766:5–9), they "started to try." (T.p. 889:1–2.)

For all their children, the couple used a sperm donor of Colombian descent to match Ms. Edmonds' ethnicity. (T.p. 769:24–770:7.) Ms. Edmonds attended all prenatal visits (T.p. 344:20–23, 772:7–8) and the insemination (T.p. 341:2–6). She helped foot the bill for the process (T.p. 341:10–11), and she contributed to the household when Ms. Shahani was pregnant (T.p. 342:5–18; T.d. 376 at 5.)

The parties gave the baby both of their last names, with Ms. Edmonds' name coming first: Edmonds-Shahani. (*Id.*)

Both women wore "Mommy-to-Be" sashes at the baby shower. (T.p. 37:22–25; 348:5–24.) (Edmonds Ex. 12). They jointly drafted a "birth plan," (T.p. 349:16–20), calling L.E.S. "our child" and "our baby." (T.p. 350:7–9, 351:22–24.)

Ms. Edmonds drove Ms. Shahani to the hospital. (T.p. 353:16–354:7.) Baby L.E.S. came into this world surrounded by just the couple, the birthing coach, and delivery doctor. (T.p. 354:4–7.)

The couple tried again when L.E.S. was 15 months old, and Ms. Shahani conceived triplets. (T.p. 786:14–16; 788:3–5.) One, Javier—named after Ms. Edmonds' brother—only survived the first four hours and passed away in Ms. Edmonds' arms. (T.p. 44:13–22, 189:20–190:2.) The other two, E.S. and N.E.S. (the "twins"), survived.

3.3 The parties sign documents recognizing Ms. Edmonds as an equal custodian and co-parent.

Ms. Shahani executed a Last Will & Testament, a living will, and a Health Care Power of Attorney drafted by her attorney. (Edmonds Trial Exhibits 2, 3, 4.) She signed the Living Will just one day before the birth of the twins—and she testified that her purpose was so that Ms. Edmonds would take care of all "the kids" (including the twins) if anything went wrong with her pregnancy. (T.p. 54:11–20.)

The Living Will stated that the couple had "an agreement to have and raise the children subject of this POA as equal co-custodians." (Edmonds Tr. Ex. 3). And by its own terms, the document is "evidence" that Ms. Shahani has "ceded exclusive custody in favor of shared custody with Carmen T. Edmonds." (Edmonds Tr. Ex. 3.)

Ms. Shahani also appointed Ms. Edmonds the guardian of the "children"—which she defined as the "children I am co-parenting with Carmen pursuant to a written or oral co-custody agreement." (Edmonds Tr. Ex. 2.)

3.4 The parties sign a separation agreement after Ms. Shahani's affair.

The parties' relationship deteriorated a year after the twins were born, when Ms. Shahani fell in love with the nanny. (T.p. 694:10–15.) In 2015, Ms. Shahani moved out, and Ms. Edmonds remained with the children in the family residence. (T.p. 902:4–7.) Ms. Shahani moved in with the nanny. (T.p. 376:16–18, 698:8–12.)

The parties then executed a separation agreement. (Edmonds Tr. Ex. 10.) They were represented by family law practitioners, and the agreement mimics a divorce decree: It divides the parties' property and grants Ms. Edmonds child support payments. (*Id.*); (T.p. 991:22–992:16). The parties also set a parenting time schedule.

3.5 Ms. Shahani holds Ms. Edmonds out to schools as a "parent" after the separation—then abruptly changes course.

For the first year or two after the breakup, Ms. Shahani continued to call Ms. Edmonds a "parent" when dealing with schools. *See* (Edmonds Tr. Ex. 7, 17.) That eventually stopped: Ms. Shahani applied to transfer the children to a new school without telling Ms. Edmonds, and she instructed the school not to communicate with Ms. Edmonds regarding the twins. (T.p. 906:22–907:13.)

In 2017, Ms. Shahani changed the twins' last names, stripping them of the last name "Edmonds." (T.p. 95:10–14.) Because Ms. Edmonds is—according to Ms. Shahani—not legally a "parent," she never notified Ms. Edmonds of the name change application. (T.p. 96:25–97:2.) Ms. Shahani soon moved to terminate shared custody.

4. Argument.

First, we'll explain how Ohio's artificial insemination statute is unconstitutionally underinclusive because it fails to protect same-sex couples. Then, we will look at how *Obergefell* retroactively legitimizes some parent-child relationships.

We'll then explain the "would-have-married" standard—and explain why it extends the protections of the artificial insemination statute just far enough to remedy constitutional problems (but no further). Finally, we'll tackle a myriad of objections to the standard from Ms. Shahani.

4.1 Ohio's artificial insemination statute, R.C. 3111.95(A), is unconstitutionally underinclusive because it fails to protect pre-*Obergefell* same-sex couples.

Under Ohio's artificial insemination statute, a consenting husband is the "natural father" of any child his wife conceives through artificial insemination. R.C. 3111.95(A). After *Obergefell*, Courts must read artificial insemination statutes like this one to include married same-sex couples, too. *Pavan v. Smith*, 137 S. Ct. 2075, 2078 (2017).

Other than through marriage—which only became available to same-sex couples in 2015—Ohio's artificial insemination statute provides no pathway for two people to become joint parents. *In re Bonfield*, 2002-Ohio-6660, ¶¶ 2, 29.

Ohio's deprivation of any legal pathway for Ms. Edmonds to obtain parentage—and her subsequent relegation to second-class "custodian" status—leaves her worse off than a similarly-situated straight person. *Obergefell*, 135 S. Ct. at 2600–01. It also violated her Due Process right to form a family. *Id.*

Federal holdings "must be given full retroactive effect." *Harper v. Virginia Dept. of Tax'n*, 113 S. Ct. 2510, 2517 (1993). When a federal holding legitimizes a parent-child relationship, that legitimization is retroactive unless a statute of limitations has run or an estate "has been finally distributed." *Reed v. Campbell*, 106 S. Ct. 2234, 2237 (1986).

For this reason, the overwhelming weight of authority holds that *Obergefell* applies retroactively to all cases still pending, on direct review, or not yet filed when the decision came out. *Ranolls v. Dewling*, 223 F. Supp. 3d 613, 622 (E.D. Tex. 2016) (collecting cases). Looking back, Ohio's artificial insemination statute unconstitutionally deprives Ms. Edmonds of her parental rights by making them hinge on her ability to have married Ms. Shahani at a time when Ohio banned all same-sex marriages.

So even when read in gender-neutral language, the artificial insemination statute—with its built-in assumption that the parties could have married—unconstitutionally excludes Ms. Edmonds. If she can show that she is aggrieved, its protections should be extended to include her. *Califano*, 443 U.S. at 89.

4.2 Under *In re Adoption of Y.E.F.*, this Court has the power to extend the protections of otherwise unconstitutional statutes.

Under our federalist system, the U.S. Supreme Court has the power to declare that state laws violate the federal Constitution. *McCulloch v. Maryland*, 17 U.S. 316, 401 (1819). But once it does so, whether to strike down the statute or extend its reach is an "issue of state law" for this Court. *Stanton v. Stanton*, 421 U.S. 7, 18 (1975).

State courts—not federal ones—are better positioned to "choose an appropriate method of remedying the constitutional violation." *Wengler v. Druggists Mut. Ins.*, 446 U.S. 142, 153 (1980). So this Court, not a federal court, is the right forum.

The judicial power vested in this Court by Article IV, § 1 of the Ohio Constitution includes extending unconstitutional statutes rather than striking them down entirely. *See In re Adoption of Y.E.F.*, 2020-Ohio-6785, ¶ 33. And under the federal constitution, when this Court extends the protections of an underinclusive statute, the extension should reach "those who are aggrieved" by being excluded. *Califano v. Westcott*, 443 U.S. 76, 89 (1979); *see also Y.E.F.*, 2020-Ohio-6785 at ¶ 33.

In *Y.E.F.*, this Court found that a statute violated Equal Protection because it gave public defenders to those facing termination of their parental rights in juvenile court, but not to those facing the same loss of rights in probate court. *Id.* Rather than strike the statute down, the Court extended it. *Id.* The Court defined the class of aggrieved persons—indigent parents facing a loss of rights in adoption proceedings—and then extended the statute's protections to that class, using its judicial power. *Id.*

The Court should do likewise here. Striking down all pre-*Obergefell* applications of Ohio's artificial insemination statute would disrupt the expectations of families across Ohio. Instead, this Court should look to see whether Ms. Edmonds is among those aggrieved by the federal constitutional violations resulting from uneven application of the statute to same-sex couples. We turn to that next.

4.3 The "would-have-married" standard is a widely-accepted, fair way to save otherwise unconstitutionally underinclusive laws.

This Court should extend the artificial insemination statute's protections to include "those who are aggrieved." *Califano*, 443 U.S. at 89. The "would-have-married" standard correctly frames the question of whether Ms. Edmonds is aggrieved: She will benefit from the statute's protections only if she can show that, but for Ohio's past violations of the federal constitution, she would have been married to Ms. Shahani at the time their three children were born—and would be a parent under R.C. 3111.95(A) today.

One key advantage of the "would-have-married" standard is that it remedies, rather than compounds, past constitutional wrongs. Ms. Edmonds was already deprived of the right to marry. Denying her parentage, too, just adds to her constitutional injuries.

The standard is also fair: It treats pre-*Obergefell* same-sex couples and opposite-sex couples the same. It asks the same question of each of them: Were they committed enough to marry? For opposite-sex couples, we know the answer—they either married, or they didn't. But for same-sex couples in Ohio, no legally valid option was open to them. So trial courts must engage in some fact-finding.

Because the standard is so precise, courts routinely apply it. For instance, in *Ayala v. Armstrong*, two women had wanted to marry, but couldn't due to Idaho's same sex-marriage ban. No. 1:16-cv-00501-BLW, 2018 U.S. Dist. LEXIS 128764, at *10 (D. Idaho July 30, 2018). They conceived in 2012 through artificial insemination, so under Idaho law, they needed to be married for them both to be parents. Idaho Code § 39-5405(3).

After the relationship ended, Adela Ayala—who hadn't given birth—sought legal recognition as a parent. *Id.* The court applied the "would-have-married" standard and granted her summary judgment: Ms. Ayala had been engaged to her former partner and had intended to marry before the child was born, so but for Idaho's same-sex marriage ban, she would have been a parent under Idaho's artificial insemination statute. *Id.*

Likewise, in the loss-of-consortium case *Sparks v. Meijer, Inc.*, the court reasoned that it would be unfair to punish a couple for not having married "when the sole reason" they didn't "was a now repudiated public policy against legal recognition of life-long same-sex relationships." No. 15CVC-1413, 2015 Ohio Misc. LEXIS 23179, at *7 (Ct. Com. Pl. Nov. 12, 2015). So the Court let the plaintiffs proceed based on their allegation that but for Ohio's same-sex marriage ban, they would have been married at the time of the accident. *Id.*; *see also In re Terrorist Attacks on September 11, 2001*, No. 03-MDL-1570 (GBD)(SN), 2016 U.S. Dist. LEXIS 144325, at *305–06 (S.D.N.Y. Oct. 14, 2016) (similar).

Along similar lines, in *Pueblo v. Haas*, the Supreme Court of Michigan extended who has standing as a "parent" under Michigan's domestic statute. 999 N.W.2d 433, 445 (Mich. 2023). In *Pueblo*, two women—Carrie Pueblo and Rachel Haas—were same-sex partners in the "early 2000s and early 2010s." *Id.* at 352. Like the parties here, they were unable to legally marry in their home state, so they committed to each other in private. *Id.* And like the parties here, they gave their offspring a hyphenated last name. *Id.*

After the parties separated in the 2010s, Haas—the birth mother—demanded that Pueblo stop seeing the child. *Id.* Pueblo sued for parenting time, but the trial court dismissed her claim: By statute, Michigan limits standing in such cases to "the natural or adoptive parent" of the child. *Id.* at 438. While Michigan has an "equitable-parent" doctrine, that doctrine only relates to "children born or conceived of a marriage." *Id.*

The Supreme Court of Michigan reinstated Pueblo's case. It first explained that *Obergefell* "rendered Michigan's constitutional and statutory prohibitions against same-sex marriage unenforceable." *Id.* at 441. It then noted that "this legal development came too late for those same-sex couples whose marriage-like relationships had already ended and who had not married in another jurisdiction." *Id.* at 444–45.

The Court reasoned that "[b]ut for the inability" of same-sex couples to legally marry, standing to pursue parenting time claims "would be available to them" under Michigan law. *Id.* at 446. So it allowed Pueblo's claim to proceed. *Id.*

Although the Supreme Court of Michigan ultimately adopted a slightly more inclusive framework for pre-*Obergefell* same-sex couples than a strict application of the "would-have-married" standard, this was only because of the state's equitable jurisprudence, which gave the justices additional leeway. *Id.* at 445. But the extension was grounded both in "equity and constitutional law." *Id.* Without the equitable part, the reasoning of *Pueblo* suggests that Michigan would have adopted the more restrictive would-have-married standard—the test *Obergefell* requires.

4.4 Ms. Shahani's solemnization test would leave the artificial insemination statute unconstitutionally underinclusive.

Ms. Shahani claims that Ms. Edmonds isn't aggrieved because they didn't apply for a marriage license or solemnize their union. The parties couldn't have gotten a marriage license. R.C. 3101.05(A) (allowing licenses only where there is "no legal impediment" to the marriage). Applying would have been futile.

To solemnize their union, the couple needed that marriage license. R.C. 3101.09 ("no marriage shall be solemnized without the issuance of a license"). On top of that, officiants may only "join together as husband and wife any persons *who are not prohibited by law* from being joined in marriage." R.C. 3101.08 (emphasis added).

Anyone who attempted to solemnize the parties' union risked a $500 fine and up to six months in jail. R.C. 3101.99(B) (imposing criminal liability for solemnizing unlicensed marriages). So Ms. Shahani's solemnization-based test would punish those who, like Ms. Edmonds, declined to find someone willing to risk jailtime for them.

While Ms. Shahani's solemnization test might favor those few same-sex couples who solicited others to engage in civil disobedience, it does nothing for normal, law-abiding couples like this one. By limiting the reach of Ohio's artificial insemination statute this way, Ms. Shahani's test would still leave the law underinclusive.

Ms. Shahani cites some cases that have found the need for solemnization for *Obergefell* to retroactively apply, but none of these analyze whether solemnization was a crime under state law—and they all deal with money or property, not children.

For instance, in *Anderson v. S.D. Ret. Sys.*, the court declined to extend retirement benefits to a woman's same-sex partner because the couple never attempted to solemnize their union. 924 N.W.2d 146, 151 (S.D. 2019). But Ms. Edmonds' case is different, because attempting solemnization in Ohio would have required participation in a crime.

As for property rights cases, in *Candelaria v. Kelly*, two men—Michael and Richard—got married in California in 2008. 535 P.3d 234, 236 (Nev. 2023). After the marriage, Michael stopped contributing to his 401(k) account. When the parties divorced years later, Michael claimed the account as his separate property. *Id.*

Richard asked the court to backdate the marriage so he could get a share of the money. *Id.* The trial court refused. The Supreme Court of Nevada affirmed, reasoning that if Michael had "wanted the property he acquired before 2008 to be community property," he could have just given it as a gift. *Id.*

Candelaria and other cases about property are easily distinguishable: Because people can always gift property (married or not), they have some route other than marriage to achieve their goals. But for Ms. Edmonds and Ms. Shahani, marriage was the only route to shared parenting.

That's one reason parentage cases are different—and why they allow parties to use the would-have-married standard or something like it. *See, e.g.*, *Ramey v. Sutton*, 362 P.3d 217, 218 (Okla. 2015); *P'ship of Madrone*, 350 P.3d at 501–02; *Matter of Brooke S.B. v. Elizabeth A.C.C.*, 61 N.E.3d 488, 498 (N.Y. 2016); *Pueblo*, 999 N.W.2d at 447.

4.5 Ohio's statutory common law marriage ban does not trump Ms. Edmonds' constitutional rights.

Ms. Shahani's chief argument is that Ohio's ban on common law marriages, R.C. 3105.12, prevents this Court from extending the protections of the artificial insemination statute to couples like this one. But this Court's power to extend unconstitutional statutes comes from the Ohio and federal Constitutions. *See Y.E.F.*, 2020-Ohio-6785 at ¶ 33; *Wengler v. Druggists Mut. Ins.*, 446 U.S. 142, 152–53 (1980). Constitutions trump statutes, so Ohio's statutory ban on common law marriages isn't an obstacle.

What is more, while Ms. Shahani claims that Ohio's ban on common-law marriages is gender-neutral, that isn't accurate. When Ohio banned common law marriage in 1991, it made solemnized marriages the only game in town. R.C. 3105.12. But of course, Ohio only allowed marriages to be solemnized between straight couples—a same-sex couple couldn't get a solemnized marriage.

Nobody here disputes here that Ms. Edmonds and Ms. Shahani would have been common-law married, if Ohio recognized that type of marriage. So by banning common law marriage—the only type of marriage that might have even been possible for gay couples—Ohio was throwing more fuel on the fire of its Equal Protection problem.

It was a double whammy: The couple couldn't get a solemnized marriage, but they couldn't get a common law one, either. So the common law marriage ban is just another part of the "received legal stricture[s]" of this State that denied same-sex couples equality. *Obergefell*, 135 S. Ct. at 2589. Those strictures have no application here. *Id.*

4.6 Ms. Shahani's out-of-state marriage test would also leave the artificial insemination statute unconstitutionally underinclusive.

Ms. Shahani also claims Ms. Edmonds isn't aggrieved because the couple could have married in Boston. But *Obergefell* gave same-sex couples two rights: First, to marry in their home state; and second, to have their home state recognize an out-of-state wedding. S. Ct. at 2607–08. Ms. Edmonds had neither of those two rights.

When the couple traveled to Boston to get married, they learned on the trip that Ohio banned recognition of out-of-state marriages. So they packed up and headed home. But if Ohio had (as *Obergefell* requires) recognized a Massachusetts same-sex marriage, then they would have married on that trip—and Ms. Edmonds would be a parent today. She is thus aggrieved.

As the Supreme Court of Michigan explained, adopting a test dependent on whether the parties married out of state "would be inconsistent with Michigan's contemporaneous unconstitutional prohibition on the recognition of such a marriage." *Pueblo*, 999 N.W.2d at 447. After all, because Michigan didn't recognize out-of-state marriages, "even a same-sex couple residing in Michigan that otherwise would marry might decline to do so." *Id.*

The constitutional problem same-sex couples faced is that they were "prohibited from marrying or having a marriage recognized here," in their home state. *Id.* Requiring Ms. Edmonds to have married in another State to preserve her rights fails to recognize that she was aggrieved by this State's same-sex marriage ban.

4.7 The Ohio Constitution's retroactive laws clause cannot stop retroactive application of a federal constitutional holding.

This Court may not apply the Ohio Constitution to thwart retroactive application of a federal constitutional holding. *DiCenzo v. A Best Prods. Co.*, 2008-Ohio-5327, ¶ 16 n.2 (explaining that the Ohio Constitution cannot defeat retroactive application of a "federal issue"). That's based on the Supremacy Clause. *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 753 (1995). *Id.*

When the General Assembly has unconstitutionally engaged in "differential treatment" of two classes, this Court should find a way to treat the two groups equally again—not use the Ohio Constitution to perpetuate past unequal treatment. *Id.*

But in any case, Ms. Shahani waived her reliance on the retroactive laws clause of the Ohio Constitution by not once mentioning that clause before the First District. *State ex rel. Lacroix v. Indus. Comm'n of Ohio*, 2015-Ohio-2313, ¶ 16.

4.8 Ms. Edmonds was not required to fill out the artificial insemination consent form to claim parentage.

Ms. Shahani claims that even if the parties had married, Ms. Edmonds wouldn't be a parent today because no one filled out the artificial insemination consent form typically used to claim parentage. That's not true: Even without the form, consent by a conduct is enough. *Jackson v. Jackson*, 137 Ohio App. 3d 782, 791 (2nd Dist. Ct. App. 2000) (explaining that in Ohio, unlike other in other states, a consenting spouse need not fill out the artificial insemination consent form to be a parent).

What's more, the burden of obtaining a consent form falls on the physician alone. R.C. 3111.93(A) ("the *physician* … shall" obtain the form) (emphasis added). The physician's failure to do so "shall not affect the legal status, rights, or obligations" of either the child or the spouse. R.C. 3111.96. Ms. Edmonds' conduct shows she consented to the artificial insemination, so she is a parent. *Jackson*, 137 Ohio App. 3d at 791.

There's also no real question the parties would have filled out the form if they'd had that option. They signed many documents just to approximate the legal protections afforded to other families—filling out a single consent form would have been far easier.

4.9 Ms. Edmonds wasn't required to bring a federal § 1983 action to pursue a claim for parentage in state court.

Ms. Shahani asserts that a federal statute, 42 U.S.C. § 1983, provides the exclusive remedy for violations of the Fourteenth Amendment. No way: This Court hears Equal Protection and Due Process claims all the time. *See*, *e.g.*, *Y.E.F.*, 2020-Ohio-6785, ¶ 33; *Brookbank v. Gray*, 74 Ohio St. 3d 279, 292 (1996) (holding the Fourteenth Amendment requires that fathers of nonmarital children be allowed to establish parentage under the Wrongful Death Act); *Anderson v. Jacobs*, 68 Ohio St. 2d 67, 73 (1981) (holding that Due Process requires the State to pay for an indigent family law defendant's paternity test).

In fact, State courts are better positioned than their federal counterparts to "choose an appropriate method of remedying the constitutional violation." *Wengler v. Druggists Mut. Ins.*, 446 U.S. 142, 153 (1980). So Ms. Edmonds was not required to bring a § 1983 claim in federal court to vindicate her rights here.

4.10 Requiring Ms. Shahani to share parental rights with Ms. Edmonds—whom she made an equal co-parent—doesn't offend the federal constitution.

Ms. Shahani claims the First District, by giving Ms. Edmonds a chance to establish parentage, unconstitutionally violated Ms. Shahani's "right" to be the children's exclusive parent. While Ms. Shahani has the right to be a parent, she doesn't have a constitutional right to be the child's *sole* parent. Ms. Edmonds has rights, too.

That Ms. Shahani may have to share parentage with Ms. Edmonds doesn't mean the First District violated the federal constitution. Courts must sometimes redistribute rights when the U.S. Supreme Court comes out with a new holding.

For instance, when the U.S. Supreme Court held that nonmarital children are entitled to inherit under intestacy statutes, the "legitimate" family members lost property rights. *Trimble v. Gordon*, 430 U.S. 762, 766 (1977). And when the Court held that an unwed father can sometimes block a mother's attempt to have their child adopted by another man, the Court took away some of the mother's (formerly exclusive) rights. *Quilloin v. Walcott*, 98 S. Ct. 549, 551 (1978).

Nothing stops this Court from extending the opportunity to establish parental rights to both parties here—something *Obergefell* requires. This is particularly true here, where Ms. Shahani ceded shared custody to Ms. Edmonds; signed a document acknowledging she was "co-parenting" children with Ms. Edmonds; and told schools that Ms. Edmonds was a parent. In short, Ms. Shahani isn't being ambushed here—she's just being held to what she once represented to Ms. Edmonds and to the world.

4.11 The would-have-married standard is based on the type of fact-finding trial courts engage in all the time, so it's workable.

The U.S. Supreme Court has held that even when there are "lurking problems" with respect to establishing parentage—problems that "are not to be lightly brushed aside"—the Constitution still requires that they not "be made into an impenetrable barrier that works to shield otherwise invidious discrimination." *Gomez v. Perez*, 409 U.S. 535, 538 (1973). In *Gomez*, a nonmarital daughter brought a suit seeking child support from her father—but Texas law prohibited courts from ordering support for illegitimate children. *Id.* The state courts of Texas denied the daughter relief, but the U.S. Supreme Court, citing Equal Protection, reversed. *Id.*

In so doing, the U.S. Supreme Court explained that its recent decisions mandating equality for nonmarital children would no doubt lead to the need for trial courts to engage in fact-finding. *Id.* But that's what trial courts are for. They cannot simply throw up their hands and say fact-finding is too hard—otherwise, "invidious discrimination" is shielded. *Id.*

But in any case, Ms. Shahani's concerns about the workability of the would-have-married standard are overblown. Whether a party "would have chosen to be married, at a particular point in time," is a "question of fact" similar to those trial Courts routinely decide. *P'ship of Madrone*, 350 P.3d at 501. And in *Ayala*, the factual issues were so clear-cut that the federal court granted summary judgment that two women would have been married but for Idaho's marriage ban. 2018 U.S. Dist. LEXIS 128764, at *10.

The would-have-married test directs the trial courts to do what they do best: Weigh the credibility of the evidence, looking at factors such as whether the parties considered themselves married for practical purposes; had children during the relationship; held a commitment ceremony or exchanged vows; exchanged rings; shared a last name; comingled assets or made financial decisions together; or attempted unsuccessfully to marry. *P'ship of Madrone*, 350 P.3d at 501.

What is more, there are no unwieldy multifactor tests; this Court does not have to extend rights to anyone who acts *in loco parentis*. Rather, under the would-have-married standard, the Court merely applies *Obergefell* to extend parental rights to a narrow subset of people: Those who can show they suffered a constitutional violation.

4.12 Courts have the tools they need to tackle the challenges of *Obergefell*.

Ms. Shahani claims the "would-have-married" standard could spawn new litigation—for instance, over child support. That isn't an issue here, where the parties signed a separation agreement spelling out support issues. But it is true that when the U.S. Supreme Court legitimizes new parent-child relationships, this can lead to litigation.

That being said, courts have already developed ground rules for dealing with these types of cases. States can still enforce time limits on claims, such as statutes of limitation. *See Reed v. Campbell*, 106 S. Ct. 2234, 2237 (1986). That should nip in the bud most attempts by those looking to sue for refunds or claim benefits based on things that happened nearly a decade ago.

As for estates, the ground rules for any future disputes are already largely set from the 1970s and 1980s, when the U.S. Supreme Court legitimized millions of new parent-child relationships. For instance, when a new child is legitimized, bona fide purchasers from estates are protected, but may have to give back property where they aren't adversely affected. *See Mitchell v. Hardwick*, 374 S.E.2d 681 (S.C. 1988). There's plenty of case law to draw from, so courts will have the tools they need to decide those disputes.

As for spousal evidentiary privileges, the judge can hold a hearing to determine whether the party asserting the privilege would have been married. Finally, juries can decide whether tort victims would have been married to their partners for purposes of loss of consortium. *See Sparks*, 2015 Ohio Misc. LEXIS 23179 at *7.

In short, the purported problems with retroactively applying *Obergefell* are overblown—especially considering the need for courts to give retroactive effect to federal constitutional holdings, even if doing so takes some work. *Gomez*, 409 U.S. at 538.

5. Conclusion.

As the dissent wrote in *In re Mullen*, one party should not be "able to use the law as a weapon because same-sex coparents lack legal rights." 2011-Ohio-3361, ¶ 61 (Pfeiffer, J., dissenting). Now that it is clear those coparents do have legal rights, this Court should not permit Ms. Shahani to continue to benefit from the past inequality of gays and lesbians. Ms. Edmonds respectfully requests that this Court affirm the First District so that she may prove her parentage before the juvenile court.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served to all counsel of record, via electronic mail, on September 15, 2024.

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