Supreme Court of Ohio Clerk of Court - Filed October 28, 2024 - Case No. 2024-0303

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, HAMILTON COUNTY, OHIO APP. NO.S C-220430, C-220436

REPLY BRIEF OF APPELLANT PRIYA SHAHANI

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I. **Introduction**

This case is about whether Ohio's courts can reinvent history as a mechanism for seizing a fit parent's constitutionally protected rights. Unsatisfied with asking the Court to do just that, based on a "would have been married" standard, Appellee Carmen Edmonds submitted a brief in which she asks the Court to also rewrite at least two Ohio statutory schemes, at least two United States Supreme Court cases, and Sections 1 and 28, Article II of the Ohio Constitution. The central theme of Ms. Edmonds's brief is that the Court has the authority to do anything it takes—including legislate from the bench—to "remedy" a hypothetical injury. Because the First District Court of Appeals should not have overreached in the fashion Ms. Edmonds requested, this Court should reverse that decision and remand for consideration of the unresolved assignments of error.

Despite the First District's determinations to the contrary, Ohio's statutory schemes, read in sex-neutral terms, comply with the United States Supreme Court cases *Obergefell v. Hodges*, 576 U.S. 644 (2015) and *Pavan v. Smith*, 582 U.S. 563 (2017). Accordingly, there is no justification for subjecting Ohio to "legal and ethical chaos" by violating Sections 1 and 28, Article II of the Ohio constitution, judicially rewriting statutes, and applying those judicial rewrites retroactively.

Moreover, courts decide actual cases—courts do not reinvent facts to create hypothetical injuries and then remedy those alternate-reality injuries by violating an innocent party's constitutional rights. Ms. Edmonds asked the First District to proclaim that she is a "parent" based on a purported violation of her right to be issued a marriage license in Ohio and/or have an out-of-state marriage recognized by Ohio. But Ms. Edmonds was never denied a marriage license in Ohio, nor is there a marriage under the laws of any state for Ohio to recognize. All that remains is a thinly disguised plea for the Court to legislate from the bench and recognize common-law marriage.

Obergefell does not require, or even allow, a court to violate state law by recognizing a common-law marriage for same-sex couples only. And *Troxel v. Granville*, 530 U.S. 57 (2000) precludes a court from seizing Ms. Shahani's constitutionally protected parental rights and awarding them to a non-parent because *the State* (not Ms. Shahani) may have violated a person's constitutional rights in a hypothetical world where that person actually tried to exercise those rights.

For these many reasons, this Court should reverse the First District and remand this case for consideration of the unresolved assignments of error.

II. Ms. Edmonds's Incorrect Factual Background

Ms. Edmonds's arguments rely heavily on two factual assertions; but those factual assertions are contrary to the record evidence. First, Ms. Edmonds claims she and Ms. Shahani travelled to Boston to get married, but then changed their minds because she claims they learned the marriage would not be recognized in Ohio. (Appellee's Br. at Introduction, p. 3.)[1] Even if this version of events were true, and it is not, it would make no difference here because Ms. Shahani was already pregnant when they travelled. L.E.S. was born on February 16, 2012, *see* Appeal Op., Appx. at A-5, ¶ 5—six months after the Boston visit. Ohio's ART statute provides parental rights to a person who is a spouse who consents to *insemination*. *See* R.C. 3111.92. Even in Ms. Edmonds's version of events, she would not have been married to Ms. Shahani when the insemination occurred, and therefore would not have parental rights.

Ms. Edmonds also asserts as a "fact" that the parties signed documents as co-parents and equal custodians, and this, according to Ms. Edmonds, is evidence that Ms. Shahani wanted Ms.

[1] Ms. Shahani contends that they never travelled to Boston to get married, but did once visit Boston to attend a friend's wedding, held on August 12, 2011.

Edmonds to be a "parent." (Appellee's Br. at § 3.3, p. 10.) This factual assertion is a visible fiction. Ms. Shahani expressly *refused* to sign such a document for the twins. *See* Transcript of Proceedings Vol. 3, Common Pl. Doc. 384, p. 896. This conclusively demonstrates Ms. Shahani did not want Ms. Edmonds to be a co-parent of her children—and would not have signed a documenting consenting to such a transfer of rights under the ART statute. Moreover, even if Ms. Shahani had wanted to convey parental rights by contract, Ohio law prohibits such agreements. *See In re Bonfield*, 2002-Ohio-6660, and *In re Mullen*, 2011-Ohio-3361.

Though Ms. Shahani disputes many more of Ms. Edmonds's factual assertions, those two are worth highlighting because they undercut the foundation of Ms. Edmonds's argument. Even if the Court rewrote history and Ohio law, Ms. Edmonds would still not be a "parent" of Ms. Shahani's children.

III. Argument

Proposition of Law: Neither the State nor Federal Constitution Empower a State Court to Ignore State Statutes Barring Common-Law Marriage, Manufacture an Unlicensed Marriage into Existence, and Hinder a Parent's Fundamental Rights Based on that Manufactured Unlicensed Marriage.

As set forth in Ms. Shahani's opening brief, there are at least six reasons to reverse the First District's decision.

- A "would have been married" standard is a repackaged version of common-law marriage. Ohio does not recognize common-law marriage, and *Obergefell* does not require Ohio to do so.

- The foundation upon which a "would have been married" standard rests is a hypothetical injury that the individual may have been denied a marriage license if they had applied for one, or the state may not have recognized a marriage had there been an out-of-state marriage. Courts decide cases with real injuries, not hypothetical injuries.

- A "would have been married" standard is unworkable because it relies on courts speculating as to how events would have unfolded in some alternate reality.

- 42 U.S.C. § 1983 provides a remedy against state actors who violate a person's constitutional rights. Assuming Ms. Edmonds has suffered a cognizable injury, she has simply brought the wrong action against the wrong defendant.

- Sections 1 and 28, Article II of the Ohio constitution bar a court from rewriting a statute and applying it retroactively. Accordingly, Ohio's courts cannot delete the marriage or consent requirements from Ohio's ART statutory scheme and apply the judicially rewritten statute retroactively.

- Even if Ohio law permitted the Court to seize Ms. Shahani's parental rights based on judicial legislation, United States Supreme Court precedent set forth in *Troxel* precludes government interference in the activities of a fit parent.

A. *Obergefell* and Common-Law Marriage.

Obergefell dictates that states must license same-sex marriages. Applying *Obergefell*, state courts must read common-law marriage statues in sex-neutral terms. In relevant part, and read in sex-neutral terms, R.C. 3105.12(B)(1) provides:

> common law marriages are prohibited in this state, and the marriage of [two people] may occur in this state only if the marriage is solemnized by a person described in section 3101.08 of the Revised Code and only if the marriage otherwise is in compliance with Chapter 3101. of the Revised Code.

Once read in these sex-neutral terms, R.C. 3105.12(B)(1) is constitutional.

Applying *Obergefell*, courts in states that recognize common-law marriage have applied common-law marriage precedent to same-sex relationships. But in states that do not recognize common-law marriage, courts have held that a "would have been married" standard is merely a repackaged version of common-law marriage and have refused to create judicial exceptions to statutes barring common-law marriage. Fourteen courts have issued decisions within these boundaries, and there are no outliers except for the First District's decision in this case. *Compare Candelaria v. Kelly*, 535 P.3d 234 (Nev.2023); *Anderson v. S. Dakota Retirement Sys.*, 2019 S.D. 11; *Field v. Woolard*, 2017 NYLJ LEXIS 2442; *Sheardown v. Guastella*, 324 Mich.App. 251, 259-

60 (2018); *Matter of Leyton*, 22 N.Y.S.3d 422; *Philip Morris USA, LLC v. Rintoul*, 342 So.3d 656 (Fla.App.2022) *with Ford v. Freemen*, 2020 U.S. Dist. LEXIS 149176, at *2 (N.D.Tex. Aug. 17, 2020); *Swicegood v. Thompson*, 435 S.C. 63, 65 (2021); *Adami v. Nelson (In re J.K.N.A.)*, 398 Mont. 72 (2019); *Gill v. Van Nostrand*, 206 A.3d 869 (D.C.2019); *In re Estate of Carter*, 2017 PA Super 104; *In re Marriage of Lafleur v. Pyfer*, 2021 CO 3; *Ranolls v. Dewling*, 223 F. Supp. 3d 613 (E.D.Tex. 2016); *Hogsett v. Neale*, 2021 CO 1.

Accepting a sex-neutral reading of Ohio's statutory scheme, Ohio is in compliance with the Supreme Court's holding in *Obergefell* and is aligned with states across the nation. No case requires Ohio to recognize common-law marriage or a "would have been married" standard for same-sex couples—in fact, *Obergefell* forbids such unequal application of marriage standards.

Ms. Edmonds launches a multi-pronged attack on this reality, but none of her arguments have any merit. First, Ms. Edmonds argues that the "would have been married" standard is "widely accepted." (Appellee's Br. at § 4.3, p. 15.) But Ms. Edmonds fails to grapple with the fact that such acceptance is only in states that allow common-law marriage. States that do not recognize common-law marriage reject a "would have been married" standard.

Second, Ms. Edmonds protests that the "would have been married" standard is "precise." *Id.* It is difficult to reconcile that comment with the contrary language used by courts that describe that standard as "presuppose[ing] the actions of the parties years ago" in a way that would "introduce an element of unpredictable legal and ethical chaos." *Sheardown v. Guastella*, 2018 Mich. Cir. LEXIS 241, *20.

Third, Ms. Edmonds relies on three cases she claims demonstrate that courts apply a "would have been married" standard "routinely." (Appellee's Br. at § 4.11, p. 25.) Ms. Edmonds chiefly relies on *Ayala v. Armstrong*, 2018 U.S. Dist. LEXIS 128764 (D. Idaho July 30, 2018). In

Ayala, the biological mother *voluntarily* terminated her parental rights. *Id.* at *3. The Plaintiff, the biological mother's former partner, then cared for the child as a foster parent and was eventually awarded parental rights. Nothing in *Ayala* stands for the proposition that a court can reduce the parental rights of a fit parent seeking to exercise those rights. The *Ayala* court merely ensured the child remained with the only person claiming the child.

Ms. Edmonds also relies on a common pleas case from Franklin County that is distinguishable on the most crucial fact—the same-sex couple were married. In *Sparks v. Meijer, Inc.*, the court held that a loss of consortium claim could be raised by the spouse of a person who was seriously injured after falling in a parking lot. C.P. No. 15CVC-1413, 2015 Ohio Misc. LEXIS 23179 (Nov. 12, 2015). That same-sex couple at issue in *Sparks* married in Maryland, where the marriage was legal. *Id.* at *2. The court was not left to guess whether the couple "would have been married" had the law been different. The only issue for the court was the timing of the "marriage"—and given that the couple held a ceremony several years *before* the accident, there was nothing for the court to do other than accept the uncontested facts.

The final case Ms. Edmonds relies upon is *Pueblo v. Haas*, 511 Mich. 345, 350 (2023). In *Pueblo*, the Michigan Supreme Court held that whether a former couple would have been married is relevant for purposes of determining rights and parenting time under Michigan's "equitable-parent doctrine." *Id.* at 366. The equitable parent doctrine provides that a person who is not a biological parent or adoptive parent may obtain some custodial rights and parenting time. *Id.* at 367. Though the Michigan Supreme Court discussed *Obergefell* in reaching the conclusion that it should extend Michigan's "equitable-parent doctrine" beyond marital relationships, the court grounded its decision in a state law, not the United States Constitution. *Id.* at 351 ("we narrowly

extend the equitable-parent doctrine"). Thus, to the extent that *Pueblo* is relevant to this case at all, it provides that *Obergefell*, standing alone, does not redefine who is a "parent" under state law.

Fourth, Ms. Edmonds argues the Court can violate separation of powers principles and "extend" statutes. (Appellee's Br. at §§ 4.1, 4.2, p. 12-14.) The settled precedent refutes Ms. Edmonds's position. If a statute has exceptions, those exceptions must be drafted by the legislature, not the courts. *See Pelletier v. Campbell*, 2018-Ohio-2121, ¶ 20. Courts interpret statutes—"[t]o go beyond it is to usurp a power which our democracy has lodged in its elected legislature." *State ex rel. Clay v. Cuyahoga Cty. Med. Exam'rs Office*, 2017-Ohio-8714, ¶ 39 (quoting Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum.L.Rev. 527, 533, 535 (1947)). Courts "should not and, therefore, do not, judicially graft an exception to the express language of [a] statute." *State ex rel. Boggs v. Springfield Local School Dist. Bd. of Edn.*, 82 Ohio St.3d 222, 227 (1998).

Ms. Edmonds also suggests that *In re Adoption of Y.E.F.*, 2020-Ohio-6785 stands for the proposition that courts can extend unconstitutional statutes. (Appellee's Br. at § 4.2, p. 13-14.) *Y.E.F.* considered an unconstitutional statute that provided the right to counsel for indigent parents who could lose parental rights in a custody proceeding, but provided no right to counsel for indigent parents who could lose parental rights in adoption proceeding. *Id.* at ¶ 1. There was a group of similarly situated people who, based on an immaterial distinction, had different rights to counsel. *Id.* at ¶¶ 27-29. The Court concluded that the different rights in these circumstances was unconstitutional. But here, similarly situated people are treated the same: Different-sex couples and same-sex couples cannot be common-law married. Similarly, read in sex-neutral terms, Ohio's ART statute applies to all married couples the same, regardless of whether they are a same-sex

couple or different-sex couple. Thus, the statutes Ms. Edmonds asks the Court to "extend" are constitutional.

In a further effort to have the Court legislate from the bench, Ms. Edmonds suggests that Ohio's ban on common-law marriage is not gender neutral because it somehow changed the status quo. Edmonds argues that "[w]hen Ohio banned common law marriage in 1991, it made solemnized marriages the only game in town." (Appellee's Br. at §§ 4.5, p. 20.) It is not entirely clear, but it appears Ms. Edmonds is claiming that same-sex couples could be common-law married in Ohio before the legislature passed the 1991 statute barring common-law marriage. This Court has stated otherwise. "A common law marriage is the marital joinder of a man and a woman." *Nestor v. Nestor*, 472 N.E.2d 1091, 1094 (1984). When Ohio forbade common-law marriage, it did not change anything for same-sex couples. And *Obergefell* does not require that Ohio recognize common-law same-sex marriages but ban different-sex common-law marriages. In fact, *Obergefell* prohibits such unequal treatment in the recognition of marriages.

In a related argument, Ms. Edmonds argues that "any Ohioan who solemnized the couple's unlicensed union risked six months in jail." (Appellee's Br. at Introduction, p. 1.) That is a red herring. Ms. Edmonds cites no law prohibiting an out-of-state marriage, nor does she cite any law for the proposition that she could not have filed suit if Ohio refused to recognize an out-of-state marriage or refused to issue a marriage license. The issue is not whether Ms. Edmonds violated Ohio law, the issue is that Ms. Edmonds was not injured by Ohio law because she did not engage in a protected activity that Ohio unlawfully prohibited.

Finally, Ms. Edmonds argues "[n]obody here disputes here that Ms. Edmonds and Ms. Shahani would have been common-law married, if Ohio recognized that type of marriage." (Appellee's Br. at § 4.5, p. 20.) That is simply wrong. Common-law marriage requires an in

praesenti agreement of marriage. *Nestor*, 15 Ohio St.3d 143. Even Ms. Edmonds concedes that any purported agreement to marry was not in praesenti because, according to Ms. Edmonds, they did not want to marry unless Ohio recognized the marriage.[2] Accordingly, at most, there was a future promise to marry—that does not pass muster. "In futuro promises to marry, even those followed by cohabitation, do not constitute a valid common-law marriage." *Duncan v. Duncan*, 10 Ohio St. 181 (1859). As a matter of law, the requirements for a common-law marriage are missing.

In sum, the Court should reject Ms. Edmonds's request that it rewrite Ohio's constitutional statute banning common-law marriage and reverse the First District's decision that implicitly adopted Ms. Edmonds's position.

B. There are Proper Remedies Available for Litigants Who Timely Pursue Them.

The First District determined that application of a "would have been married" standard is the "only remedy" available to Ms. Edmonds in this situation. Appeal Op., Appx. At A-12, 13 ¶ 24. In her opening brief, Ms. Shahani explained why that statement was an error of law because, not only does Ms. Edmonds have the remedy of filing an action under 42 U.S.C. § 1983, but such an action is the "exclusive remedy" available to Ms. Edmonds. (Appellant's Br. at p. 15 citing *Smith v. Kentucky*, 36 F.4th 671, 675 (6th Cir.2022); *Ermold v. Davis*, 936 F.3d 429, 438 (6th Cir.2019)).

Ms. Edmonds's attempted riposte misidentifies the issue. Ms. Edmonds begins with the unusual argument that state courts are "better positioned" to hear federal constitutional claims than federal courts. (Appellee's Br. at § 4.9, p. 23.) Ms. Edmonds adds that Ohio's courts hear claims grounded in the United States Constitution and therefore can hear Ms. Edmonds's claims. (*Id.*)

[2] Ms. Shahani denies she ever has any intention to marry Ms. Edmonds or made any promise to do so, but even accepting Ms. Edmonds's factual assertions, her arguments fail for legal reasons.

Ms. Edmonds has confused the statute under which she must seek a remedy with Ohio court's jurisdiction to hear such claims. State courts and federal courts have concurrent jurisdiction to hear claims filed under 42 U.S.C. § 1983. *Schwarz v. Bd. of Trustees*, 31 Ohio St.3d 267, 272 (1987). Thus, no one can reasonably doubt that Ms. Edmonds could have pursued her claims in state court. The problem is not the court Ms. Edmonds filed in, but Ms. Edmonds's failure to pursue those claims under the proper statute and against the correct party.

In other words, Ms. Edmonds has offered no legally viable counterpoint to the precedent dictating that her claims are not cognizable in the form in which she brought them or as against Ms. Shahani. Simply put, if Ms. Edmonds wants to remedy the state's action of infringing on her right to marry, she needs to file the right action against the right defendant. Because Ms. Edmonds has not offered any viable argument on this point, this Court should reverse the First District's decision and remand with instructions to address the remaining claims brought on appeal.

C. The First District's Decision Violates the United States Supreme Court's Holding in *Troxel* that Parents are Free of Government Interference when Making Parental Decisions.

Relying on the controlling United States Supreme Court case, *Troxel v. Granville*, 530 U.S. 57 (2000), Ms. Shahani explained that the state cannot interfere with her established right to parental autonomy unless there was neglect or abuse of the children. (Appellant's Br. at pp. 16-18.) Ms. Shahani highlighted that there is not even an allegation that she neglected or abused the children, let alone proof of it. (*Id.* at p. 17.) Ms. Shahani further argued that the First District's decision "empowered the trial court to do exactly what the United States Supreme Court forbade"—seize her parental autonomy based on "alternative facts" and a "revisionist history." (*Id.*)

Again, Ms. Edmonds fails to grapple with the First District's misapplication of Constitutional law. Ms. Edmonds does not even mention *Troxel* in her brief. Instead, Ms. Edmonds relies on *Trimble v. Gordon*, a case discussing property rights. (Appellee's Br. at § 4.10, p. 24.) While *Obergefell* treats property rights and parental rights equally, *Troxel* does not—the First's District's decision to seize a biological parent's rights that are protected under *Troxel* is an error of constitutional magnitude.

Ms. Edmonds also relies on *Quilloin v. Walcott*, 98 S. Ct. 549 (1978), a case addressing whether a child's biological father has parental rights or whether the biological mother has an exclusive right to parental control because the child was born out of wedlock. (Appellee's Br. at § 4.10, p. 24.) But that case is also distinguishable on a fundamental level. Ms. Edmonds is not a biological parent, and no Ohio law (or federal law) allows her to be deemed a parent by imagining an alternative history.

Finally, Ms. Edmonds relies on what she refers to as a ceding of shared custody and an acknowledgment that she was a co-parent. (*Id.*) Those statements are both legally and factually flawed. As to the law, the cases *In re Bonfield*, 2002-Ohio-6660 and *In re Mullen*, 2011-Ohio-3361 provide that a parent cannot contract away parental rights. Thus, to the extent Ms. Edmonds relies on a purported co-parenting agreement—even if such an agreement existed for all of the children, it would be a legal nullity. As to the facts, Ms. Edmond asked Ms. Shahani to sign a shared custody agreement for the twins and Ms. Shahani declined to do so—no such document exists. *See* Transcript of Proceedings Vol. 3, Common Pl. Doc. 384, p. 896. What better evidence could there be that Ms. Shahani did not want to cede her parental rights than her express refusal to do so?

Because *Troxel* prohibits a state from interfering with Ms. Shahani's parental autonomy, and Ms. Edmonds's attempts to navigate that precedent fail, this Court should reverse the First District's decision.

D. Courts Cannot Rewrite Ohio's Statutory Scheme Regarding Artificial Reproductive Technology ("ART").

Ms. Edmonds argues that Ohio's ART statutory scheme is unconstitutionally underinclusive because she and Ms. Shahani would have been denied a marriage license had they applied for one, and because Ohio would not have recognized an out-of-state marriage. (Appellee's Br. at § 4.4 p. 18.) These arguments rest on the faulty premise that a party can sit on her rights and then ground a claim for relief on a hypothetical injury rather than a real, concrete injury.

Read in sex-neutral terms, Ohio's ART statutory scheme provides parental rights to *married* persons who *consented* under the statutory scheme. R.C. 3111.95(A). To overcome the lack of marriage and lack of consent, Ms. Edmonds invites the Court to legislate from the bench by rewriting Ohio's ART statutory scheme in a way that violates Ohio law and United States Supreme Court precedent.

As an initial matter, Ms. Edmonds complains that it would have been futile for her and Ms. Shahani to apply for a marriage license in Ohio or get married out of state and ask Ohio to recognize that marriage and that the lack of such a real injury is not an obstacle. But this purported futility did not stop Plaintiffs in *Obergefell* from marrying out of state and demanding Ohio recognize the marriage, nor did it stop Plaintiffs in *Obergefell* from challenging state marriage licensing laws. In other words, even accepting her version of events as true, Ms. Edmonds's lack of injury is because she sat on her rights, not because any attempt to exercise her rights would have been futile.

Further, everyone acknowledges that Ms. Edmonds was not married to Ms. Shahani. Though *Obergefell* requires the Court to read R.C. 3111.95(A) in sex-neutral terms, nothing in *Obergefell*, or any other case, allows the Court to delete the marriage requirement from the R.C. 3111.95(A). In fact, Ohio law precludes a court from rewriting the statute. *State ex rel. Clay v. Cuyahoga Cty. Med. Exam'rs Office*, 2017-Ohio-8714, ¶ 39 (quoting Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum.L.Rev. 527, 533, 535 (1947)).

Relying on a misreading of *Pavan*, Ms. Edmonds asks the court to eliminate the marriage requirement from the statute. (Appellee's Br. at § 4.1, p. 12.) In *Pavan*, the United States Supreme Court explained that *Obergefell* requires states to apply the constellation of benefits for *married persons* equally to same-sex and different-sex marriages. 582 U.S. at 564. *Pavan* does not empower state courts to rewrite statutes that provide the constellation of benefits of marriage sex-neutrally.

Ms. Edmonds next argues that the consent requirement in R.C. 3111.95(A) is optional in this situation. (Appellee's Br. at § 4.8, p. 22-23.) But Ms. Edmonds conflates her willingness to consent with Ms. Shahani's absolute right to refuse. R.C. 3111.92 requires that the biological mother consent—Ms. Shahani did not consent to giving parental rights to Ms. Edmonds and the Court ordering Ms. Shahani to share parental rights with Ms. Edmonds would be a plain violation of the United States Supreme Court's holding in *Troxel*.

To distract from the unambiguous and dispositive legal requirements, Ms. Edmonds offers the unsupported, and frankly remarkable, assertion that "[t]here's also no real question the parties would have filled out the form if they'd had that option." (Appellee's Br. at § 4.8, p. 23.) That is simply untrue. Ms. Edmonds asked Ms. Shahani to sign a co-custodian agreement and Ms. Shahani expressly declined to do so. *See* Transcript of Proceedings Vol. 3, Common Pl. Doc. 384, p. 896.

Again, there can hardly be stronger evidence that Ms. Shahani did not want to sign away her rights than her express refusal to do so.

Finally, Ms. Edmonds also tries to distinguish the multitude of cases that have held that *Obergefell* does not apply to unmarried same-sex couples. (Appellee's Br. at §§ 4.4, 4.5, pp. 21-22.) Ms. Edmonds grounds this effort in distinguishing property rights from parental rights. (*Id.* at p. 19.) But *Obergefell* provides no such distinction—the constellation of benefits of marriage are protected. To the extent there is a distinction between property rights and parental rights, that distinction ensures that Ms. Shahani's parental rights are entitled to paramount protections. *See Troxel*.

Read in sex-neutral terms, Ohio's ART statutory scheme is constitutional because it applies equally to all married couples. The fact that Ms. Edmonds and Ms. Shahani were not married—despite being lawfully permitted to marry in 35 states—ends the discussion. And to the extent Ms. Edmonds doubles down on her argument that she and Ms. Shahani "would have been married" in some alternate reality, courts deal in real facts—not hypotheticals. *See State v. Hacker*, 2023-Ohio-2535, ¶ 39 (citations omitted).

E. The Ohio Constitution Bars Retroactive Application of Judicially Rewritten Legislation.

The First District's decision to rewrite a statute violates separation of powers principles and the retroactivity clause of the Ohio constitution. In short, rewriting Ohio's common-law marriage statute and/or ART statute in a way that diminishes Ms. Shahani's established parental rights creates a multi-faceted violation of Section 1 and 28, Article II of the Ohio Constitution.

Unable to muster a cogent counterargument, Ms. Edmonds relies on two false premises. First, Ms. Edmonds argues that retroactive application of the judicially rewritten statutes is necessary to comply with the federal constitution. (Appellee's Br. at § 4.7, p. 22.) The flaw in this

argument is Ms. Edmonds does not challenge the constitutionality of the statutes she wants rewritten. Instead, Ms. Edmonds argues that Ohio's ban on same sex-marriage was unconstitutional, so the Court should rewrite two other statutes that are constitutional—Ohio's ban on common-law marriage and the ART statute that applies only to spouses, not unmarried couples.

Second, Ms. Edmonds complains that the retroactivity argument was not presented to the First District. (*Id.*) But the trial court rejected Ms. Edmonds's arguments and did not rewrite any statutes and apply them retroactively, so there was no retroactivity problem to discuss in the briefing below. It was only after the First District issued its decision, in which it empowered the trial court to recognize not-solemnized marriages and apply that judicial legislation in the ART context, that retroactivity of the judicial rewrites was on the agenda. Simply put, Ms. Shahani could hardly waive arguments about an error before that error occurred.

Once more, Ms. Edmonds fails to address the real issue: the First District's decision functions to rewrite two Ohio statutory scheme and apply those rewrites retroactively. That decision violates Sections 1 and 28, Article II of the Ohio constitution.

F. A "Would Have Been Married" Standard is Unworkable.

Ms. Edmonds's brief closes with two related arguments that courts are suitably positioned to resolve factual disputes and therefore can apply a "would have been married" standard. (Appellee's Br. at §§ 4.11, 4.12, pp. 25-27.) This is a strange argument to make since, on its own terms, the "would have been married" standard is not based on facts at all. Instead, it relies on fiction—a series of events that *may* have occurred in some alternate reality. Courts are not well positioned to reimagine history and assign rights based on fictional events. *See State v. Vazquez*, 2007 Ohio-2433, ¶ 42 (11th Dist.) (courts are not "in a position to rewrite history").

As for the parade of horribles that would follow if Ohio's courts attempt to tackle the chaos that fabricating marriages would lead to, Ms. Edmonds argues that judges will be empowered to

hold hearings and juries will render verdicts to determine who "would have been married" for purposes of spousal privilege or tort claims. Notably, Ms. Edmonds is silent as to: (1) child support backpay, (2) the adoptions that would need to be undone, (3) medical decision-making authority, (4) property division based on a "would have been divorced" standard, (5) amended tax returns, and (6) whether a person "would have had health insurance." Though Ms. Edmonds asks the Court to create marriages out of thin air, she could not conjure any suggestion for how to resolve the "legal and ethical chaos" that would follow. *Sheardown*, 2018 Mich. Cir. LEXIS 241, *20.

G. The Court Should Not Indulge the Request of Ms. Edmonds's Amici to Sacrifice the Plain and Unambiguous Language of Ohio's Statutes on the Altar of a Personal Policy Preference.

Two Amici briefs have been submitted in support of Ms. Edmonds. It bears briefly addressing the arguments raised by the Amici.

The Nathaniel R. Jones Center For Race, Gender, And Social Justice argues that states that do not recognize common-law marriage still apply a "would have been married" standard. The Jones Center chiefly relies on *McLaughlin v. Jones*, 243 Ariz. 29 (2017) for this proposition. The Jones Center remarkably avoids mentioning that in *McLaughlin*, "Kimberly and Suzan, a same-sex couple, *legally married in California*." *Id.* at ¶ 2. Thus, common-law marriage played no role in this case. The Jones Center also relies on *In re registered Domestic P'ship of Madrone*, 271 Ore.App. 116, 350 P.3d 495 (2015). *Madrone* merely stands for the proposition that, under Oregon state law, a person in a registered domestic partnership may have similar child-related rights to a married person. *Id.* at 130. But Ms. Shahani and Ms. Edmonds did not have a registered domestic partnership under Oregon law or the applicable Cincinnati Ordinance Title VII § 767-3 (which was in effect prior to the breakup of the relationship).

The remainder of the Jones Center's brief, and the entirety of the ACLU's brief, is an unabashed series of policy arguments advocating for judicial legislation. For example, instead of following Ohio's established precedent and relying on the plain language of the statutes to determine their meaning, they ask the Court to read the statutory schemes with a policy goal, essentially overriding the plain and unambiguous text and ultimately violating the United States Supreme Court holding in *Troxel*. This Court should not indulge the Amici's request to put their personal policy preferences ahead of United States Supreme Court precedent and the plain and unambiguous statutory text.

IV. Conclusion

For the reasons set forth above and those set forth in Ms. Shahani's opening brief, this Court should reverse the First District's decision and remand to that court for consideration of the unaddressed assignments of error.

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 October 28, 2024.

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