No. 14-

IN THE

Supreme Court of the United States

TIMOTHY LOVE, *et al.*
AND GREGORY BOURKE, *et al.*,

Petitioners,

v.

STEVE BESHEAR, in his official capacity as Governor of Kentucky,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does a State violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment by prohibiting gay men and lesbians from marrying an individual of the same sex?

2. Does a State violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment by refusing to recognize legal marriages between individuals of the same sex performed in other jurisdictions?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the United States Court of Appeals for the Sixth Circuit included Petitioners Timothy Love, Lawrence Ysunza, Maurice Blanchard, Dominique James, Gregory Bourke, Michael De Leon, Kim Franklin, Tamera Boyd, Randell Johnson, Paul Campion, Jimmy Meade, and Luke Barlowe. Respondent herein, and Defendant/Appellant below, is Steve Beshear, in his official capacity as Governor of the Commonwealth of Kentucky.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Timothy Love, et al., and Gregory Bourke, et al., respectfully petition for a writ of certiorari to review the opinion and judgment of the U.S. Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Sixth Circuit, dated November 6, 2014, styled *DeBoer v. Snyder*, is reproduced at Petitioners' Appendix ("App.") A, 1a-95a. The opinion and order of the U.S. District Court for the Western District of Kentucky, in *Bourke v. Beshear* , dated February 12, 2014, is reported at 996 F. Supp. 2d 542, and is reproduced at Petitioners' Appendix C, 124a-157a. The subsequent opinion and order of the same court in *Love v. Beshear*, dated July 1, 2014, is reported at 989 F. Supp. 2d 536, and is reproduced at Petitioners' Appendix B, 96a-123a.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Sixth Circuit sought to be reviewed was entered on November 6, 2014. This petition is timely under 28 U.S.C. § 2102(c) and Supreme Court Rules 13.1 & 13.3 because it is being filed within 90 days after the judgment of the Sixth Circuit. This Court has jurisdiction to review the judgment of the U.S. Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant portions of pertinent constitutional and statutory provisions are set forth in the Petitioners' Appendix D, 158a-161a.

STATEMENT OF THE CASE

I. Introduction

As long ago as 1888, this Court acknowledged that marriage is "the most important relation in life." *Maynard v. Hill*, 125 U.S. 190, 205 (1888). Since that time, the Court has repeatedly recognized that "[t]he freedom to marry . . . [is] one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Loving v. Virginia*, 388 U.S. 1, 12 (1967). It is this enduring conception of marriage as an essential expression of individual liberty and dignity that prompted this Court to hold that "[c]hoices about marriage" belong to the individual and are "sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996).

Last year, this Court reaffirmed the fundamental importance of marriage to individuals and families in *United States v. Windsor*, 133 S. Ct. 2675 (2013). *Windsor* held that a federal law denying recognition of same-sex marriages demeaned and degraded them in violation of the Constitution's Due Process and Equal Protection guarantees. *See id.* at 2693–94. Despite this Court's unequivocal insistence that the Fourteenth Amendment encompasses a fundamental right to marry "for all

individuals," *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978), the Commonwealth of Kentucky has established a scheme that singles out gay men and lesbians for exclusion from the right to marry the person they love. Kentucky's constitution and statutes prohibit (1) marriage between individuals of the same sex, (2) recognition of such marriages legally performed in other jurisdictions, and (3) any alternative classification that would provide the benefits of marriage to same-sex couples.

Together, these laws deny Petitioners and all other gay men and lesbians living in Kentucky the right to marry the person they love. Even those who have been validly married in other jurisdictions cannot enjoy the rights, responsibilities, and privileges of married life that their heterosexual counterparts enjoy. In addition to these concrete deprivations, Kentucky's Marriage Prohibition marks same-sex relationships and the families they create as less valuable and less worthy of respect than opposite-sex relationships, thus "impos[ing] a disadvantage, a separate status, and so a stigma" on gay and lesbian Kentuckians that is incompatible with the bedrock constitutional principles animating the Fourteenth Amendment. *Windsor*, 133 S. Ct. at 2693.

Since *Windsor*, federal courts have almost uniformly held that state laws denying gay men and lesbians the right to marry violate the Fourteenth Amendment. This includes the Courts of Appeals in the Fourth, Seventh, Ninth, and Tenth circuits. *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014); *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014); *Baskin v. Bogan,* 766 F.3d 648 (7th Cir. 2014); *Latta v. Otter,* 2014 U.S. App. LEXIS 19620 (9th Cir. 2014). On October 6, 2014, this Court denied petitions for writs

of certiorari arising from the decisions from the Fourth, Seventh, and Tenth Circuits. *See Bogan v. Baskin*, 190 L. Ed. 2d 142 (U.S. 2014); *Rainey v. Bostic*, 190 L. Ed. 2d 140 (U.S. 2014); *Herbert v. Kitchen*, 190 L. Ed. 2d 138 (U.S. 2014). As of the date of this Petition, only two federal district courts have upheld same-sex marriage bans: *Conde-Vidal v. Garcia-Padilla*, No. 3:14-cv-01253-PG, 2014 U.S. Dist. LEXIS 150487 (D.P.R. Oct. 21, 2014); and *Robicheaux v. Caldwell*, 2 F. Supp. 3d 910 (E.D. La. 2014).

Despite contrary decisions from four of its sister circuits, on November 6, 2014, the Sixth Circuit upheld the discriminatory marriage schemes of four states without any meaningful analysis justifying its rejection of that precedent, App. 1a-60a. Included in that opinion were Petitioners' challenges in Kentucky, *Love v. Beshear* (No. 14-5818) and *Bourke v. Beshear* (No. 14-5291). The former case concerns the right to marry; the latter concerns recognition of valid, out-of-state marriages.

This Court should grant certiorari because the decision below presents a marked departure from the reasoning of other circuits on a question of exceptional importance. Given the significance of this issue to Petitioners and to hundreds of thousands of families across the country, this Court's review is needed to settle the question first presented in *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013): whether it is constitutional to relegate gay men and lesbians to second-class status by denying them the right to marry the person they love. This case provides an excellent vehicle for resolution of the underlying constitutional question and the attendant gulf between circuits created by the Sixth Circuit's opinion.

II. Kentucky's Discriminatory Framework

Prior to 1998, Kentucky statutes neither defined marriage nor explicitly prohibited marriages between same-sex couples. The only law addressing the issue of same-sex marriage came from a 1973 Kentucky Supreme Court case, *Jones v. Hallahan*, 501 S.W.2d 588 (1973). There, the Court concluded that two women could not marry "because what they propose is not a marriage." *Id.* at 590. In 1993, the Hawaii Supreme Court held that the state must assert a compelling interest for its refusal to issue marriage licenses to same-sex couples in order to survive an equal protection challenge. *Baehr v. Lewine*, 74 Haw. 530, 536 (Haw. 1993). Responding to fears that such challenges may represent a growing trend, in 1998 Kentucky's General Assembly enacted a series of statutes explicitly limiting marriage to opposite-sex couples. Ky. Rev. Stat. Ann. § 402.005 defines marriage as an institution existing exclusively between one man and one woman. Ky. Rev. Stat. Ann. § 402.020(1)(d) prohibits marriage between members of the same sex. Ky. Rev. Stat. Ann. § 402.040(2) declares that marriage between members of the same sex is against Kentucky public policy. And Ky. Rev. Stat. Ann. § 402.045 voids same-sex marriages performed in other jurisdictions.

In the following years, respect for the rights of same-sex couples began to gain ground in the United States and abroad. In 2003, the Massachusetts Supreme Judicial Court struck down that state's prohibition of same-sex marriage. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003). A visceral, nationwide response by anti-same-sex marriage advocates ensued. On March 11, 2004, in response to the Massachusetts case, the

Kentucky Senate passed Senate Bill 245, which proposed the following amendment to the Kentucky Constitution:

> Only a marriage between one man and one woman shall be valid or recognized as a marriage in Kentucky. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized.

The amendment was sponsored by Sen. Vernie McGaha, who promoted the bill on the Senate floor:

> Marriage is a divine institution designed to form a permanent union between man and woman. According to the principles that have been laid down, marriage is not merely a civil contract; the scriptures make it the most sacred relationship of life . . . . I'm a firm believer in the Bible. And Genesis 1, it tells us that God created man in his own image, and the image of God created he him; male and female created he them. And I love the passage in Genesis 2 where Adam says 'this is now a bone of my bones and flesh of my flesh. She shall be called woman because she was taken out of man. Therefore shall a man leave his father and his mother and cleave to his wife and they shall be one flesh.' The first marriage, Mr. President. And in First Corinthians 7:2, if you notice the pronouns that are used in this scripture, it says, 'Let every man have his own wife, and let every woman have her own husband.'

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> We in the legislature, I think, have no other choice but to protect our communities from the desecration of these traditional values. We must stand strong and against arbitrary court decisions, endless lawsuits, the local officials who would disregard these laws, and we must protect our neighbors and our families and our children. . . . . Once this amendment passes, no activist judge, no legislature or county clerk whether in the Commonwealth or outside of it will be able to change this fundamental fact: The sacred institution of marriage joins together a man and a woman for the stability of society and for the greater glory of God.

App. 141a-143a. Sen. Gary Tapp, the bill's Co-Sponsor, then declared, ". . . [W]hen the citizens of Kentucky accept this amendment, no one, no judge, no mayor, no county clerk will be able to question their beliefs in the traditions of stable marriages and strong families." *Id*. The only other senator to speak in favor of the bill, Sen. Ed Worley, described marriage as a "cherished" institution. He bemoaned that "liberal judges" changed the law so that "children can't say the Lord's Prayer in school." Soon, he concluded, we will all be prohibited from saying "the Pledge to the 'Legiance [*sic*] in public places because it has the words 'in God we trust.'" In support of the amendment, he cited the Bible's "constant" reference to men and women being married. *Id*. The Senate passed the bill, and the amendment was placed on the ballot. On November 2, 2004, voters ratified the amendment, which is now codified as Ky. Const. § 233A.

III. PROCEEDINGS BELOW

A. *Bourke v. Beshear*

The *Bourke* Petitioners are four same-sex couples who are legally married in other jurisdictions and currently live in Kentucky. Gregory Bourke and Michael De Leon were married in Ontario, Canada in March, 2004. They live in Louisville, Kentucky, where they are raising two teenage children. Because Kentucky does not recognize their marriage, Michael De Leon is the children's only adoptive parent. Kim Franklin and Tamera Boyd were married in Stratford, Connecticut in July, 2010, and now reside in Cropper, Kentucky. Randell Johnson and Paul Campion were married in Riverside, California in July, 2008. They live in Louisville, Kentucky, and are currently raising four children. Randell Johnson is the sole adoptive parent of the couple's three sons; Paul Campion is the sole adoptive parent of their daughter. Jimmy Meade and Luke Barlowe have been together for forty-seven years. They were married in Davenport, Iowa in July, 2009, and currently reside in Bardstown, Kentucky. App. 130a-131a.

Following the landmark decision by this Court in *Windsor*, the *Bourke* Plaintiffs filed suit in the district court for the Western District of Kentucky, challenging Kentucky's refusal to recognize their valid out-of-state marriages. The original defendants to the case below included Kentucky Attorney General Jack Conway and Kentucky Governor Steve Beshear. The Complaint alleged that Kentucky's marriage scheme violated the Fourteenth Amendment, as well as the First Amendment, the Full Faith and Credit Clause, and the Supremacy Clause of the U.S. Constitution. Petitioners also challenged Section 2 of

the federal Defense of Marriage Act, 28 U.S.C. § 1738C. The parties and the court agreed that there was no factual dispute and the case should be decided as a matter of law.

In their Motion for Summary Judgment, Petitioners argued that they suffered a number of tangible harms under Kentucky's marital scheme including higher income and estate taxes, restricted benefits under the Family Medical Leave Act, an inability to obtain family insurance plans, impediments to the ability to make medical and legal decisions for their spouses, an increase in related legal costs, an inability to divorce, a denial of Social Security benefits, and the loss of inheritance rights under the state's intestacy statutes. Of greater importance, however, was the deprivation of the intangible benefits of marriage: societal respect and acknowledgment of their relationships with each other and their children. The Commonwealth argued that tradition and state sovereignty justified discrimination against these couples.

On February 12, 2014, the district court issued a memorandum opinion granting Petitioners' Motion for Summary Judgment. App. 124a-157a. In its well-reasoned opinion, the district court relied on *Windsor*, *Lawrence v. Texas,* 539 U.S. 558 (2003), *Romer v. Evans*, 517 U.S. 620 (1996), and *Loving v. Virginia*, 388 U.S. 1 (1967) to conclude that "Kentucky's denial of recognition for valid same-sex marriage violates the United States Constitution's guarantee of equal protection under the law, even under the most deferential standard of review." *Id.* at 125a. The trial court opined that Petitioners may well be a suspect class requiring heightened scrutiny, but declined to make that holding. The court further suggested that the nature of marriage as a fundamental right might also

require heightened scrutiny. Ultimately, the district court concluded that the application of heightened scrutiny ought to emanate from a higher court, particularly since its application would not affect the outcome of the case before it. The court issued a final Order on February 27, 2014.

On March 4, 2014, five days after the district court issued its final Order, Defendant Attorney General Jack Conway publicly announced that he would not appeal the district court's decision. Conway explained, "as Attorney General of Kentucky, I must draw the line when it comes to discrimination."[1] Governor Beshear appealed the ruling using outside counsel.

B. *Love v. Beshear*

Timothy Love and Lawrence Ysunza share a home in Louisville, Kentucky. They have lived together in a committed relationship for thirty-three years. Maurice Blanchard and Dominique James also live together in Louisville, Kentucky. Their relationship has endured for ten years. Both couples attempted, with the requisite identification and filing fees, to apply for marriage licenses at the Jefferson County Clerk's Office in Louisville, Kentucky. Both couples are otherwise qualified to receive a marriage license in the state of Kentucky; they are over the age of 18, not married to anyone else, not mentally disabled, and not "nearer in kin to each other...than second cousins." Ky. Rev. Stat. Ann. §§ 402.010-020 (2014).

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1. Dan Hirschhorn, *Kentucky Gov Will Defend Gay Marriage Ban After AG Refuses*, Time, March 4, 2014, http://time.com/12387/kentuck-gay-marriage-steve-beshear-jack-conway/. (accessed Nov. 14, 2014).

However, pursuant to the laws challenged here, the clerk refused to issue a marriage license to either couple.

On February 14, 2014, shortly after the *Bourke* opinion was issued but before entry of final judgment, the *Love* plaintiffs moved to intervene. The Intervening Complaint, like the *Bourke* Complaint, alleged violations of the Fourteenth Amendment, the First Amendment, and the Supremacy Clause of the U.S. Constitution. The district court granted intervention and approved an expedited briefing schedule for dispositive motions. Governor Beshear's response to the *Love* plaintiffs' motion for summary judgment alleged two new "legitimate state interests" justifying Kentucky's marriage laws: "natural procreation" and stable birth rates.

On July 1, 2014, the district court granted Intervening Plaintiffs' Motion for Summary Judgment, again finding that Kentucky's marriage laws violated the Equal Protection Clause of the Fourteenth Amendment. App. 96a-123a. The district court also stayed enforcement of its final order "until further notice of the Sixth Circuit." *Id.*

Governor Beshear appealed the district court's ruling, and the parties filed a Joint Motion to Consolidate *Love* with *Bourke* at the Court of Appeals for the Sixth Circuit. The cases were consolidated on July 16, 2014.

C. The Sixth Circuit Opinion

On August 6, 2014, the Sixth Circuit heard oral arguments in the *Love* and *Bourke* cases, along with similar challenges from Tennessee (*Tanco v. Haslam*, No. 14-5297), Ohio (*Obergefell v. Hodges*, No. 14-3057 and

Henry v. Hodges, No. 14-3464), and Michigan (*DeBoer v. Snyder*, No.14-1341). On November 6, 2014, the Sixth Circuit Court of Appeals rendered one opinion for all four cases. App. 1a-95a. Judge Jeffrey Sutton authored the majority opinion. Judge Martha Craig Daughtrey dissented.

Though Plaintiffs in this case specifically challenged Kentucky's discriminatory marriage laws under the Fourteenth Amendment and other provisions of the federal Constitution, the Sixth Circuit characterized the case as a question of "how best to handle" social change: legislatively or judicially? *Id.* at 4a. In answer, the majority noted that it was bound by existing Supreme Court precedent, finding only the one-line summary dismissal in *Baker v. Nelson* applicable. 409 U.S. 810 (1972). App. at 15a-17a.

According to the majority below, an inferior court can "ignore a Supreme Court decision" only when that decision is overruled by name or outcome. *Id*. at 17a. Neither *Windsor*, *Lawrence*, nor this Court's October 6, 2014 orders denying petitions for writ of certiorari originating from the Fourth, Seventh, and Tenth Circuits changed the binding effect of *Baker*. Those denials "tell us nothing about the democracy-versus-litigation path to same-sex marriage," the majority says, so it considers other ways to assess it: "originalism; rational basis review; animus; fundamental rights; suspect classifications; evolving meaning." *Id.* at 19a.

Originalism. The Sixth Circuit frames its first analysis as "original meaning," in which it applied a "long-accepted usage" approach to interpreting rights to marry

under the Fourteenth Amendment. *Id.* This approach, gleaned entirely from precedent arising under the First Amendment and Article II, relies upon tradition alone. "From the founding of the Republic to 2003, every State defined marriage as a relationship between a man and a woman, meaning that the Fourteenth Amendment permits, though it does not require, States to define marriage in that way." *Id.* at 22a. The majority does not discuss how this view can be reconciled with *Loving v. Virginia*'s rejection of the long tradition of anti-miscegenation laws.

Rational basis. Next, the majority below considers whether there is "any plausible reason" for Kentucky's exclusion of same-sex couples from marriage, finding two: "to regulate sex, most especially the intended and unintended effects of male-female intercourse" *Id.* at 23a; and a desire "to wait and see before changing a norm that our society (like all others) has accepted for centuries." *Id.* at 26a.

Animus. The majority distinguishes *Romer,* finding that the Kentucky marriage ban does not fit the pattern of a novel law "born of animosity toward gays" designed "to make gays unequal to everyone else." *Id.* at 32a. Because the initiative "codified a long-existing, widely held social norm already reflected in state law," it was not unusual. Rather, it was born of a reasonable fear "that the courts would seize control over an issue that people of good faith care deeply about," and thus could not be the result of unconstitutional animus. *Id.* at 32a. Also, the impossibility of individually assessing the motives of all 1.2 million people who voted for Kentucky's marriage amendment precluded any such finding. *Id.* at 34a.

Fundamental rights. The majority below points out that, "the right to marry in general, and the right to gay marriage in particular, nowhere appear in the Constitution." So, whether the marriage bans interfere with a fundamental right justifying strict scrutiny "turns on bedrock assumptions of liberty." *Id.* at 38a. Only by summarily distinguishing precedent such as *Loving*, *Zablocki*, and *Turner v. Safley*, 482 U.S. 78 (1987), on the grounds that this Court has always assumed a heterosexual definition of marriage, is the majority able to conclude that no fundamental right is implicated in this case. App. at 39a.

Suspect classification. The Sixth Circuit next rejects the Plaintiffs' argument that Kentucky's marriage laws discriminate against a "discrete and insular class without political power." *Id.* at 42a. First, the majority cites three circuit cases which explicitly rely on the overruled case of *Bowers v. Hardwick*, 478 U.S. 186 (1986), to evade application of the four-factor test from *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973). App. at 42a. Then, the court pays lip service to the test by acknowledging "the lamentable reality that gay individuals have experienced prejudice in this country," but distinguishes prejudice in state marriage laws because "the institution of marriage arose independently of this record of discrimination." *Id.* The majority below then changes the subject entirely to discuss federalism, which it says "permeates" state marriage laws and therefore negates any need for "extraordinary protection from the majoritarian political process." *Id.* at 46a.

Evolving meaning. The Sixth Circuit then distills the present case to a societal debate about "public norms"

and "societal values" in which much progress has been made nationwide in favor of same-sex couples. *Id.* at 48a. The court dismisses Plaintiffs' demand for the dignity and respect withheld by Kentucky's marriage scheme. Instead, the court reframes Plaintiffs' claim as one "to resolve today's debate and to change heads and hearts in the process." *Id.* at 52a. Federal litigation is the wrong method, the majority says, because "[i]t is dangerous and demeaning to the citizenry to assume that [judges], and only [judges], can fairly understand the arguments for and against gay marriage." *Id.* at 53a.

Full Faith and Credit. Turning to the issue of recognition, the subject of the *Bourke* case, the Sixth Circuit rules again in favor of Kentucky's scheme of marital discrimination because the Full Faith and Credit Clause does not require Kentucky to apply "another State's law in violation of its own public policy." *Id.* at 55a. And under the Fourteenth Amendment, "a State does not behave irrationally by insisting upon its own definition of marriage rather than deferring to the definition adopted by another State." *Id.*

As discussed in detail below, the Sixth Circuit's Opinion is a dramatic departure from the rulings of its sister circuits on the issue of marriage equality, and a dramatic step backwards for proponents of marriage equality nationwide. The requirements of both SUP. CT. R. 10(a) and (c) are easily satisfied. For these reasons, the Court should grant certiorari.

REASONS TO GRANT THE PETITION

I. The Sixth Circuit's Opinion Represents a Dramatic Split from the Fourth, Seventh, Ninth, and Tenth Circuits

Petitioners state the obvious: there exists a split among the circuits on the questions presented in this case. Indeed, it is rare that a split among the circuits is so stark and so infamous that the average layperson may be expected to know of its existence, but this is such an instance. Specifically, and as explained in Judge Daughtrey's well-reasoned dissent below, the Sixth Circuit's Opinion diverges sharply from decisions earlier this year in four other circuits: *Kitchen*, 755 F.3d 1193 (holding Utah statutes and voter-approved state constitutional amendment banning same-sex marriage unconstitutional under the Fourteenth Amendment); *Bostic*, 760 F.3d 352 (same, Virginia); *Baskin,* 766 F.3d 648 (same, Indiana statute and Wisconsin state constitutional amendment); and *Latta,* 2014 WL 4977682 (same, Idaho and Nevada statutes and state constitutional amendments). App. pp.76a-77a.

Convinced of its correctness, and despite driving a sizable wedge between the circuits, the Sixth Circuit neither analyzed nor distinguished the opinions of its sister courts, nor did it meaningfully analyze the opinions of the district courts it reversed. Although the Seventh Circuit's opinion two months prior contradicts nearly every single point made by the majority, the latter does not address Judge Richard Posner's reasoning. Where jurists of the caliber of Judges Posner and Sutton are so sharply divided on issues fundamentally important to so

many Americans, an explanation is commanded. The lack of such explanation from the Sixth Circuit leaves a gaping void for this Court to fill.

It should be noted that the lower courts (both district and circuit), Respondent, representatives of various states, legal scholars, and the media have long taken for granted that the issue of marriage equality will ultimately be resolved by this Court. During oral arguments in *Bostic,* Judge Paul V. Niemeyer joked that his court was a "way station" as the issue "moved up I-95 to Washington." During oral argument below, even Judge Sutton recognized the inevitability of this Court's review, stating "I'm really hopeful it will help us reach what I'm afraid counts as an interim decision, and I don't think anyone is under the illusion that this is the end of the road for anyone."

The differences between the circuits are not trivial. Nor are these differences merely abstract legal distinctions. The fundamental differences between the circuits have had, and will continue to have, a profound effect on the day-to-day lives of thousands of American families. Naturally, these effects will be most acutely felt by same-sex couples unfortunate enough to live within the Sixth Circuit. They will be accorded far different treatment as to benefits, parenting, and basic dignity than their counterparts in other circuits, many of whom, like Petitioners here, may be separated by no more than a few miles.

A. The Circuits Are Split on Almost Every Major Point

The circuits that have decided this issue differ from the Sixth Circuit on nearly every major point. The first circuit to decide the issue was the Tenth Circuit in *Kitchen v. Herbert.* That court found that the statutory and voter-approved constitutional amendments banning same-sex marriage in Utah violated both the Due Process and Equal Protection Clauses of the Fourteenth Amendment. In *Bostic v. Schaefer*, the Fourth Circuit reached a similar conclusion on similar grounds. Denying same-sex couples the choice of whether and whom to marry, the Fourth Circuit concluded, "prohibits them from participating fully in our society, which is precisely the type of segregation that the Fourteenth Amendment cannot countenance." 760 F.3d. at 384.

The Seventh Circuit in *Baskin* did not reach the issue under the Due Process Clause, unanimously concluding instead that Indiana and Wisconsin's marriage bans violate the Equal Protection Clause. Recognizing that "this is a case in which the challenged discrimination is . . . along suspect lines," the Seventh Circuit applied elevated scrutiny, requiring "a compelling showing that the benefits of the discrimination to society as a whole clearly outweigh the harms to its victims." 766 F.3d at 654-655. After closely examining each argument offered by the states, the Seventh Circuit found that none justified the denial of marriage to same-sex couples:

> [M]ore than unsupported conjecture that same-sex marriage will harm heterosexual marriage or children or any other valid and

> important interest of a state is necessary to justify discrimination on the basis of sexual orientation. As we have been at pains to explain, the grounds advanced by Indiana . . . for [its] discriminatory policies are not only conjectural; they are totally implausible.

Id. at 671.

The most recent circuit to disagree with the Sixth Circuit's majority, just weeks before its opinion was issued, was the Ninth Circuit in *Latta.* That court also applied a heightened form of scrutiny to determine that marriage bans in Idaho and Nevada violated the Equal Protection Clause of the Fourteenth Amendment. 2014 U.S. App. LEXIS 19620. It rejected the states' arguments that the bans were justified because they promoted child welfare through "procreative channeling" and "complementary" opposite-sex parenting. *Id.* at 30-31.

In short, although virtually every lower court disagrees with Judge Sutton's conclusions, they do so "in many ways, often more than one way in the same decision." App. at 19a. These disparities underscore the need for review by this Court.

B. The Circuits Are Split as to the Level of Scrutiny which Should Be Used to Analyze Marriage Restrictions

The circuit split on the issue of the applicable standard of review in itself warrants a grant of certiorari. Every circuit court to have ruled on same-sex marriage restrictions since this Court decided *Windsor* has

considered the level of scrutiny differently. According to the opinion below, rational basis is the correct standard to apply to Kentucky's discriminatory marriage restrictions based upon Sixth Circuit precedent as well as the majority's view that Plaintiffs are seeking recognition of a "new" right. App. at 27a. This view could not be more distinct from the level of scrutiny applied by the other circuits.

The Seventh Circuit analyzed whether sexual orientation constitutes a suspect classification by tracking the approach taken by this Court in applying heightened scrutiny. 766 F.3d at 671 (citing the analysis of *Windsor* in *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 483 (9th Cir. 2014)). Rather than presume the constitutionality of the ban, Judge Posner analyzed the "fit" between the classification and the governmental objective, weighing the degree of harm or intrusion imposed on the individuals burdened by the law. In doing so, the court took into account factors this Court has used to determine whether a particular classification is suspect, thus triggering heightened scrutiny. *See Rodriguez*, 411 U.S. 1, 28. As the Seventh Circuit explained, the difference between its approach and the more conventional heightened scrutiny approach "is semantic rather than substantive." *Baskin*, 766 F.3d at 656. Following *SmithKline*, the Ninth Circuit also applied heightened scrutiny. *Latta*, 2014 U.S. App. LEXIS 19620 at 19.

The Fourth and Tenth Circuits, however, forwent the *SmithKline/Rodriguez* analysis and applied strict scrutiny because the laws impinged a fundamental right. The Fourth Circuit considered each of the rationales offered by the state to justify Virginia's Marriage Prohibition—

federalism, history and tradition, safeguarding marriage, "responsible procreation," and "optimal childrearing"—and concluded that none were sufficient to satisfy strict scrutiny. *Bostic*, 760 F.3d at 384. The Tenth Circuit rejected the four justifications offered by Utah: the effects on child rearing, the creation of stable homes, interests in population, and religious freedom. *Kitchen*, 755 F.3d at 1219. The court assumed that Utah's interests in encouraging reproduction, "fostering a child-centric marriage culture" and "children being raised by their biological mothers and fathers" qualified as compelling, but found that these justifications "falter[ed] on the means prong of the strict scrutiny test," as the laws at issue were not narrowly tailored to achieve their purpose. *Id.* at 1219.

A substantial majority of federal court decisions have applied some form of heightened scrutiny to prohibitions on same-sex marriage.[2] Several district courts have applied rational basis review but nonetheless invalidated marriage bans under the Equal Protection Clause,

2. *See*, *e.g.*, *Condon v. Haley*, No. 2:14-4010-RMG (D.S.C. Nov. 12, 2014), *Marie v. Moser*, 2014 U.S. Dist. LEXIS 157093 (D. Kan. Nov. 4, 2014), *McGee v. Cole*, 2014 U.S. Dist. LEXIS 158680 (S.D. W. Va. Nov. 7, 2014); *Lawson v. Kelly*, 2014 U.S. Dist. LEXIS 157802 (W.D. Mo. Nov. 7, 2014); *Brenner v. Scott*, 999 F. Supp. 2d 1278 (N.D. Fla. Aug. 21, 2014); *Bostic*, 760 F.3d 352; *Bishop v. Smith*, 760 F.3d 1070 (10th Cir. July 18, 2014); *Kitchen*; *Baskin v. Bogan*, 12 F. Supp. 3d 1144 (S.D. Ind. June 25, 2014); *Wolf v. Walker*, 986 F. Supp. 2d 982 (W.D. Wis. June 6, 2014); *Whitewood v. Wolf*, 992 F. Supp. 2d 410 (M.D. Pa. May 20, 2014); *Latta v. Otter*, 2014 U.S. Dist. LEXIS 66417 (D. Idaho May 13, 2014); *Henry v. Himes*, 2014 U.S. Dist. LEXIS 51211 (S.D. Ohio Apr. 14, 2014); *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968 (S.D. Ohio December 23, 2013); *Kitchen v. Herbert*, 961 F. Supp. 2d 1181 (D. Utah December 20, 2013).

including the Kentucky court below.[3] No circuit court, until now, has held that rational basis review should apply, or that marriage restrictions would survive even that low level of scrutiny. As recognized by the *Latta* court, "These courts have applied varying types of scrutiny or have failed to identify clearly any applicable level, but irrespective of the standard have all reached the same result." *Latta v. Otter*, 2014 U.S. App. LEXIS 19828 at 16 (9th Cir. Idaho Oct. 15, 2014) (*per curiam* order dissolving stay of the district court's order enjoining enforcement of Idaho's marriage bans).

Nonetheless, the Sixth Circuit applied rational basis review, and determined that Kentucky's laws easily survive. The Court should grant certiorari in order to clarify the appropriate standard of review for marriage restrictions and other sexual orientation classifications.

C. The Circuits Are Split as to the Nature of Marriage as a Fundamental Right

In characterizing Plaintiffs' claim as one for recognition of "a new constitutional right," the court below departed sharply from the holdings of its sister circuits, creating yet another conflict warranting this Court's review. *See* App. at 36-37. Plaintiffs argued below that the right to marry is a *fundamental* right, and hardly a "new" one. Marriage is a liberty interest to which all

3. *See Love,* App. at 96a; *Geiger v. Kitzhaber,* 994 F. Supp. 2d 1128 (D. Or. 2014); *DeBoer v. Snyder*, 973 F. Supp. 2d 757 (E.D. Mich. 2014); *Tanco v. Haslam,* 7 F. Supp. 3d 759 (M.D. Tenn. 2014); *DeLeon v. Perry*, 975 F. Supp. 2d 632 (W.D. Tex. 2014); *Bourke,* App. at 124a; *Bishop v. Smith*, 962 F. Supp. 2d 1252 (N.D. Okla. 2014).

individuals are entitled. *Meyer v. Neb.*, 262 U.S. 390, 399 (1923). It is a right which is "central to personal dignity and autonomy." *Lawrence*, 539 U.S. at 574. It has been described as "the most important relation in life," and "of fundamental importance for all individuals." *Zablocki*, 434 U.S. at 384. Marriage is "one of the basic civil rights of [humankind]." *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942). In accord with the precedents of this Court, Plaintiffs argued below that one cannot reconcile the concept of marriage as a fundamental right for all individuals with the denial of that right to persons whose partners are of the same sex.

Other circuits to decide this issue are in accord with this interpretation, and in conflict with the court below. The Fourth Circuit in *Bostic* rejected the states' argument that the right at issue was a new right to *same-sex* marriage, rather than the fundamental right to marry. 760 F.3d at 376. Relying on this Court's marriage jurisprudence, the Fourth Circuit concluded that "the broad right to marry is not circumscribed based on the characteristics of the individuals seeking to exercise that right." *Id*. In *Kitchen*, the Tenth Circuit rejected Utah's argument that the fundamental right to marry is limited to opposite-sex couples, reasoning that "in describing the liberty interest at stake, it is impermissible to focus on the identity or class-membership of the individual exercising the right." 755 F.3d at 1215. Thus, both courts concluded that same-sex couples have a fundamental right to marry.

The scope of the fundamental right to marry is therefore a critical issue which, given the sharp division that now exists between the circuits, can only be resolved by this Court.

D. The Circuits Are Split as to the Meaning of *Windsor*

Similarly, the issue of whether *Windsor* is a case about individual rights, or about federalism, or something else, is a question that now divides the circuit courts. As the Sixth Circuit states, "Plaintiffs read [*Windsor*] as an endorsement of heightened review . . . [and] as proof that individual dignity, not federalism, animates *Windsor*'s holding." App. at 32a. Petitioners are not alone in this sentiment; it is one shared by nearly every federal court to have decided the issue. *See Latta*, 2014 U.S. App. LEXIS 19620 at 46; *Bostic*, 760 F.3d at 378-79; and *Kitchen*, 755 F.3d at 1207. These lower courts did not pull their conclusions out of thin air. In *Windsor*, this Court clearly articulated that the Fifth and Fourteenth Amendments were implicated by the government's infringement upon *individual rights.* 133 S. Ct. at 2695 (*See also Id.* at 2706 (Scalia, J. dissenting) and *Id.* at 2714 (Alito, J., dissenting)). However, Justice Roberts' dissent suggests that even *this* Court is divided as to the ultimate meaning of *Windsor.*[4]

On the issue of recognition, the Sixth Circuit majority holds that *Windsor* actually "reinforces" the rights of states to discriminate against gay and lesbian couples. App. at 39a. Even conceding that *Windsor* deals primarily with federalism, this interpretation is difficult to reconcile with the plain language of the majority opinion in *Windsor*:

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4. "I think the majority goes off course . . . but it is undeniable that its judgment is based on federalism." *Id.* at 2697 (Roberts, J., dissenting).

> What has been explained to this point should more than suffice to establish that the principal purpose and the necessary effect of this law are to demean those persons who are in a lawful same-sex marriage. This requires the Court to hold, as it now does, that DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution.

133 S. Ct. at 2695. Review is warranted to correct the Sixth Circuit's failure to follow *Windsor* on this point, in conflict with the other courts of appeals.

E. The Circuits are Split as to the Controlling Effect of *Baker v. Nelson*

The Sixth Circuit acknowledges that *Windsor* recognizes marriage –specifically same-sex marriage – as "a dignity and status of immense import." App. at 44a. Yet the court inexplicably holds that that outcome does not "clash" with *Baker v. Nelson's* pronouncement that the issue of same-sex marriage did not raise "a substantial federal question." This, too, is diametrically opposed to the way the other circuits have viewed *Baker* (and by extension, other summary decisions of its kind).

For example, the Fourth Circuit held that *Baker* did not control because it was a summary dismissal, this Court decided *Windsor* without mentioning *Baker*, and "[e]very federal court to consider this issue since" *Windsor* had determined that *Baker* was no longer controlling. *Bostic*, 760 F.3d at 373. Likewise, the Tenth Circuit held that "it is clear that doctrinal developments foreclose the

conclusion that the issue is, as *Baker* determined, wholly insubstantial." *Kitchen*, 755 F.3d 1208. The Seventh Circuit mentions *Baker* just once, and puts it down forcefully: "*Baker* was decided in 1972—42 years ago and the dark ages so far as litigation over discrimination against homosexuals is concerned." *Baskin,* 766 F.3d at 660. Similarly dismissive language was used by the Ninth Circuit: "Although these cases did not tell us the *answers* to the federal questions before us *Windsor* and *Lawrence* make clear that these are substantial federal *questions* we, as federal judges, must hear and decide." *Latta*, 2014 U.S. App. LEXIS 19620 at *25 n.6 (emphasis original).

Nonetheless, the Sixth Circuit's view is that these courts have overstepped their bounds, and instead ought to throw up their hands and direct litigants to the entirely unhelpful opinion in *Baker*. Indeed, Judge Sutton goes so far as to opine that non-reliance on *Baker* would lead to lower courts "anticipatorily overrul[ing] all manner of Supreme Court decisions[.]"*Id.* By that logic, the last word on marriage equality under the federal Constitution was delivered by the Minnesota Supreme Court in 1971.

The clear consensus prior to the Sixth Circuit's ruling was that substantial doctrinal developments since 1972, culminating in this Court's decision in *Windsor*, have made reliance on *Baker* untenable. The other courts of appeals recognized that, while "the question presented in *Windsor* is not identical to the question" of whether state-level discrimination against same-sex couples violates the Constitution, the critical point is that *Windsor* could not have been decided as it was if the constitutional status of same-sex couples did not raise a substantial federal question. *Kitchen*, 755 F.3d at 1206.

Doctrinal developments have made plain that the core issues raised by this petition – whether Petitioners possess a fundamental right to marriage, whether their relationships are entitled to equal protection of the laws, and the appropriate standard by which to judge those questions – are substantial. While Petitioners believe the Sixth Circuit's reliance on *Baker* is clear error, a grant of certiorari in this case would give the Court the opportunity to resolve an important sub-question, i.e., what constitutes doctrinal developments sufficient to permit lower courts to discount a summary decision.

II. THE QUESTIONS PRESENTED ARE EXCEPTIONALLY IMPORTANT

There is little doubt this case presents "an important question of federal law that has not been, but should be, settled by this Court." SUP. CT. R.10(c); *See, e.g., Olmstead v. Zimring*, 527 U.S. 581, 596 (1999) ("We granted certiorari in view of the importance of the question presented to the States and affected individuals."). At stake in this case is whether states may, within constitutional parameters, relegate same-sex couples' relationships to a "second-tier" status, and by doing so "demean the couple" and "humiliate . . . children now being raised by same-sex couples," *Windsor*, 133 S. Ct. at 2694. Or, conversely, whether the Fourteenth Amendment demands the equal dignity of same-sex couples and their children. No less at issue, as the dissent below recognized, is the welfare of American children being raised by same-sex parents. App. at 62a.

Aside from the salient questions of fundamental rights and dignity which, if left unanswered, would unjustly

disadvantage thousands of American couples in loving, committed, stable relationships, there are additional consequences of letting the Sixth Circuit's Opinion go unchecked.

A. If Left Unresolved, the Sixth Circuit's Opinion Will Create Inconsistent and Absurd Results Within and Between States, and Between States and Federal Governments

The specter of "chaos" has often been invoked by both sides of the marriage debate over the last twenty years.[5] In the ten years since *Goodridge*, there has indeed been tension between the federal government and the states, and among the states themselves, as to the status of same-sex marriage. This tension continued to grow as some states (and countries) began recognizing same-sex marriage and others reacted with bans. *Windsor* resolved this tension in part, but has created new issues requiring resolution, which culminated in the various and sundry opinions below.

According to the Sixth Circuit, this Court's October 6, 2014 denial of certiorari in the cases from the Fourth, Seventh, and Tenth circuits should be disregarded. App. 18a-19a. But even if one concedes that these denials should be held for naught as legal precedent, they are undeniably relevant in a practical sense. These denials led to numerous marriages in at least 12 different states.

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5. Associated Press, *Kentucky Governor Warns of "Legal Chaos" in Same-Sex Marriage Case*, CBS News (March 4, 2014), http://www.cbsnews.com/news/kentucky-governor-warns-of-legal-chaos-in-same-sex-marriage-case/ (accessed Nov. 14, 2014).

More than thirty states now allow same-sex marriage, and approximately 60% of the U.S. population lives in a state which allows consenting, loving same-sex couples to marry. While there are now states which must, under the federal Constitution, recognize the out-of-state marriages of same-sex couples, states in the Sixth Circuit, under Judge Sutton's interpretation of the same Constitution, need not do so. While Governor Beshear's fear of "legal chaos," is a dramatization, it is no exaggeration to say the legal landscape is in an unprecedented state of disorder.

B. The Sixth Circuit's Approach Would Allow Federal Courts to Abdicate their Role under Article III in Controversial Cases

The theme of the Sixth Circuit's opinion is clear: courts should wait for the democratic process to run its course. It identified the dichotomy as "the democracy-versus-litigation path to same-sex marriage[.]" App. 19a. The court reiterated its view by way of a series of rhetorical questions, e.g.: "Isn't the goal to create a culture in which a majority of citizens dignify and respect the rights of minority groups through majoritarian laws rather than through decisions issued by a majority of Supreme Court Justices?" *Id.* at 53a.

The court below cited no case law to support this utopian vision of judicial restraint. It seemed not to recognize the inherent danger in such reasoning, that federal courts will simply pass on issues that, in the subjective view of the judges, would be better addressed by popular vote. The dissent recognizes this danger, and lambasts the majority for it. Judge Daughtrey writes, "If we in the judiciary do not have the authority, and

indeed the responsibility, to right fundamental wrongs left excused by a majority of the electorate, our whole intricate, constitutional system of checks and balances, as well as the oaths to which we swore, prove to be nothing but shams." *Id.* at 95a.

The majority writes that when a "federal court denies the people suffrage over an issue long thought to be within their power, they deserve an explanation." *Id.* at 19a. The explanation, of course, is the United States Constitution. There is nothing particularly novel about the invalidation of discriminatory legislation by an Article III Court. Courts have been shaping the contours of fundamental rights under the Fourteenth Amendment for as long as the Amendment has existed. "The Equal Protection Clause [denies] to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute." *Reed v. Reed*, 404 U.S. 71, 75-76 (1971) (quotations omitted). Federal courts have repeatedly upheld the supremacy of the Fourteenth Amendment over state power in domestic relations. *See Loving*, 388 U.S. at 7; *Zablocki,* 434 U.S. at 383-385; *see also Sturgell v. Creasy*, 640 F.2d 843, 850-851 (6th Cir. 1981).

Yet, the Sixth Circuit gleans from *Dandridge v. Williams,* 397 U.S. 471 (1970), a principle of near-total judicial deference to state prerogatives, and from *Windsor* that "regulation of domestic relations is an area that has long been regarded as a virtually exclusive province of the States." 133 S. Ct. at 2691. But the States' sovereignty over domestic relations is not without constitutional limits, and the federal judiciary is not restrained from striking

down discriminatory laws which conflict with the Due Process and Equal Protection clauses of the Fourteenth Amendment. Though each state does retain "vast leeway in the management of its internal affairs," federal courts have the power, and duty, to strike down state laws which "[run] afoul of a federally protected right." *Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623, 1638 (2014). Indeed, as this Court has already stated in the context of same-sex marriage that, "state laws defining and regulating marriage, of course, must respect the constitutional rights of persons." *Windsor*, 133 S. Ct. at 2691 (citing *Loving*, 388 U.S. at 7).

It takes little imagination to perceive disturbing implications of the court's hands-off approach. For example, as hinted at by the dissent, a ballot measure reverting women to the status of chattel within the context of marriage – a status which most women "enjoyed" until very recently in history –would undeniably also be in keeping with "norm[s] that our society (like all others) [have] accepted for centuries." App. 26a. This reversion to a despicable "tradition" would not absolve the federal courts of overturning it simply because it was the subject of a popular vote.

Another example is demonstrated by *Plessy v. Ferguson*:

> The object of the [Fourteenth] [A]mendment was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished

> from political, equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power.

163 U.S. 537, 544 (1896). *Plessy* enshrined a "long-accepted usage" of the Fourteenth Amendment better known as "separate-but-equal," which lasted eighty-seven years after ratification. It permitted racial discrimination in housing, public accommodations, and schools. And it turned a blind eye to anti-miscegenation laws, which predated the Revolution and lasted more than a century beyond the Civil War. "Separate-but-equal," as this Court is well aware, was not overturned by popular vote.

Similarly, federal and state courts alike, relying on "traditional" conceptions of race relations and state sovereignty, repeatedly upheld the constitutionality of racist state marriage restrictions prior to *Loving*. [6] "Laws forbidding the intermarriage of the two races

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6. The Sixth Circuit's brief analysis of *Loving* – a case which is perhaps the most important precedent aside from *Windsor* – consists of one paragraph. (Appx. 38a-39a.) *Loving*, according to the lower court, bolsters the *states'* arguments because the denial of a marriage license to "a gay African-American male and a gay Caucasian male" would not have violated the Fourteenth Amendment at that time. In hindsight, it is difficult to argue that such result was injurious to American democracy.

. . . have been universally recognized as within the police power of the State." *Id.* at 545. Had this Court relied upon a "long-accepted usage" approach to Fourteenth Amendment interpretation, as the Sixth Circuit suggests it should, both *Brown v. Board of Education* and *Loving v. Virginia* would have been decided quite differently, because the issues would have been subject to a 'wait-and-see' approach. In hindsight, it is difficult to argue that the results in these cases were injurious to American democracy.

Aside from clear-cut legal issues, as a practical matter, waiting for the people to decide an issue of fundamental individual rights by popular vote is often an exquisitely bad idea. For example, in 2000, Alabama became the last state to remove a law banning marriage between a "Negro and a Caucasian."[7] The ballot initiative to purge the law succeeded, but 40 percent of Alabaman voters were against it.[8] It is inconceivable that in 1967, when *Loving v. Virginia* was decided, such an initiative would have passed. Indeed, to assume that it would have passed 10 or even 20 years later is an expression of purest optimism.

Elsewhere in its opinion, the Sixth Circuit explains that the democratic process will work for same-sex couples because they are not quite as bad off as other minority groups throughout American history. "It is not a setting in which the recalcitrance of Jim Crow demands judicial, rather than we-can't-wait-forever legislative, answers." App. 46a (citing *Brown v. Bd. Of Educ.*, 347 U.S. 483

7. Alabama State Constitution, Article IV, Section 102.

8. *See* Suzy Hansen, *Mixing it Up*, Salon (March 8, 2001), http://www.salon.com/2001/03/08/sollors/. (accessed Nov. 14, 2014).

(1954)). In the majority's view, Petitioners' families *can* wait. If they would simply be patient, and perhaps try a little harder, the democratic process will surely vindicate them. The majority's optimism does nothing to address the palpable harm suffered by thousands of couples in the Sixth Circuit who are *today* relegated to second-class status.

Furthermore, while the Sixth Circuit prefers to abdicate its role in the federal judiciary in favor of the "democratic process," the majority fails to recognize that this "process" is over. The provision was put on the ballot by the legislature and approved by a popular vote in 2004. There is no ongoing political process in Kentucky that would justify the "wait-and-see" approach the court below prefers. *Cf. United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938) (noting that "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation," might be "subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation."). In this case, the democratic process failed to protect the unpopular minority from the majority.

Petitioners and other individuals in that minority deserve a definitive answer from this Court. The Sixth Circuit does not identify any case in which any court has been constrained to wait and see what the electorate intended to do to address individual constitutional rights. That is likely because "wait-and-see" is not a legal doctrine, nor a legitimate excuse, upon which the rights of individuals may be deferred. This Court should accept certiorari if for no other reason than to resolve the issue

of the precise role of federal courts in determining issues of individual rights under the Fourteenth Amendment.

III. THIS CASE IS AN EXCELLENT VEHICLE TO RESOLVE THE QUESTIONS PRESENTED

While all of the cases reversed by the Sixth Circuit below present substantially identical questions for this Court to resolve, the *Love* and *Bourke* cases are particularly well-suited for review. There are in fact two separate cases: one involving recognition, the other involving the right to marry. If the Court is disinclined to resolve the question regarding the right to marry (the *Love* case), it can choose to resolve only the recognition issue by granting certiorari for the *Bourke* case alone. Petitioners are directly harmed by Kentucky's legal framework, and there is no dispute that Governor Beshear has the duty and authority to enforce and uphold Kentucky's laws. The question that this Court granted certiorari to review in *Hollingsworth v. Perry,* 133 S. Ct. 2652 (2013), is therefore presented in this case free of jurisdictional obstacles.

Moreover, the factual record below is uncomplicated. The Western District of Kentucky based its opinions almost exclusively on the well-established precedents of this Court. Petitioners and their attorneys are not polarizing political figures, nor are they intimately connected with any special interest groups. They are simply private individuals who care deeply about the issues discussed above. This case is therefore an excellent vehicle for issues which the Court almost inevitably must address.

CONCLUSION

For the foregoing reasons, petitioner requests that the Court grant the petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

Dated:

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED NOVEMBER 6, 2014

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 14-1341; 3057; 3464; 5291; 5297; 5818

14-1341

APRIL DEBOER, *et al.*,

Plaintiffs-Appellees,

v.

RICHARD SNYDER, GOVERNOR, STATE OF MICHIGAN, IN HIS OFFICIAL CAPACITY, *et al.*,

Defendants-Appellants.

14-3057

JAMES OBERGEFELL, *et al.*,

Plaintiffs-Appellees,

v.

RICHARD HODGES, DIRECTOR OF THE OHIO DEPARTMENT OF HEALTH, IN HIS OFFICIAL CAPACITY,

Defendant-Appellant.

14-3464

BRITTANI HENRY, *et al.*,

Plaintiffs-Appellees,

Appendix A

v.

RICHARD HODGES, DIRECTOR OF THE OHIO DEPARTMENT OF HEALTH, IN HIS OFFICIAL CAPACITY,

Defendant-Appellant.

14-5291

GREGORY BOURKE, *et al.*,

Plaintiffs-Appellees,

v.

STEVE BESHEAR, GOVERNOR, COMMONWEALTH OF KENTUCKY, IN HIS OFFICIAL CAPACITY,

Defendant-Appellant.

14-5297

VALERIA TANCO, *et al.*,

Plaintiffs-Appellees,

v.

WILLIAM EDWARD "BILL" HASLAM, GOVERNOR, STATE OF TENNESSEE, IN HIS OFFICIAL CAPACITY, *et al.*,

Defendants-Appellants.

14-5818

TIMOTHY LOVE, *et al.*,

Plaintiffs/Intervenors-Appellees,

v.

Appendix A

STEVE BESHEAR, GOVERNOR,
COMMONWEALTH OF KENTUCKY, IN HIS
OFFICIAL CAPACITY,

Defendant-Appellant.

14-1341

Appeal from the United States District Court for the
Eastern District of Michigan at Detroit;

No. 2:12-cv-10285—Bernard A. Friedman,
District Judge.

14-3057 & **14-3464**

Appeals from the United States District Court for the
Southern District of Ohio at Cincinnati;

Nos. 1:13-cv-00501 & 1:14-cv-00129—Timothy S. Black,
District Judge.

14-5291 & **14-5818**

Appeals from the United States District Court for the
Western District of Kentucky at Louisville;

No. 3:13-cv-00750—John G. Heyburn II, District Judge.

14-5297

Appeal from the United States District Court for the
Middle District of Tennessee at Nashville;

No. 3:13-cv-01159—Aleta Arthur Trauger,
District Judge.

Argued: August 6, 2014

Decided and Filed: November 6, 2014

Appendix A

Before: DAUGHTREY, SUTTON and COOK, Circuit Judges.

SUTTON, J., delivered the opinion of the court, in which COOK, J., joined. DAUGHTREY, J. (pp. 43–64), delivered a separate dissenting opinion.

OPINION

SUTTON, Circuit Judge. This is a case about change—and how best to handle it under the United States Constitution. From the vantage point of 2014, it would now seem, the question is not whether American law will allow gay couples to marry; it is when and how that will happen. That would not have seemed likely as recently as a dozen years ago. For better, for worse, or for more of the same, marriage has long been a social institution defined by relationships between men and women. So long defined, the tradition is measured in millennia, not centuries or decades. So widely shared, the tradition until recently had been adopted by all governments and major religions of the world.

But things change, sometimes quickly. Since 2003, nineteen States and the District of Columbia have expanded the definition of marriage to include gay couples, some through state legislation, some through initiatives of the people, some through state court decisions, and some through the actions of state governors and attorneys general who opted not to appeal adverse court decisions. Nor does this momentum show any signs of slowing. Twelve of the nineteen States that now recognize gay marriage did so in the last couple of years. On top of

that, four federal courts of appeals have compelled several other States to permit same-sex marriages under the Fourteenth Amendment.

What remains is a debate about whether to allow the democratic processes begun in the States to continue in the four States of the Sixth Circuit or to end them now by requiring all States in the Circuit to extend the definition of marriage to encompass gay couples. Process and structure matter greatly in American government. Indeed, they may be the most reliable, liberty- assuring guarantees of our system of government, requiring us to take seriously the route the United States Constitution contemplates for making such a fundamental change to such a fundamental social institution.

Of all the ways to resolve this question, one option is not available: a poll of the three judges on this panel, or for that matter all federal judges, about whether gay marriage is a good idea. Our judicial commissions did not come with such a sweeping grant of authority, one that would allow just three of us—just two of us in truth—to make such a vital policy call for the thirty-two million citizens who live within the four States of the Sixth Circuit: Kentucky, Michigan, Ohio, and Tennessee. What we have authority to decide instead is a legal question: Does the Fourteenth Amendment to the United States Constitution prohibit a State from defining marriage as a relationship between one man and one woman?

Through a mixture of common law decisions, statutes, and constitutional provisions, each State in the Sixth Circuit has long adhered to the traditional definition of

marriage. Sixteen gay and lesbian couples claim that this definition violates their rights under the Fourteenth Amendment. The circumstances that gave rise to the challenges vary. Some involve a birth, others a death. Some involve concerns about property, taxes, and insurance, others death certificates and rights to visit a partner or partner's child in the hospital. Some involve a couple's effort to obtain a marriage license within their State, others an effort to achieve recognition of a marriage solemnized in another State. All seek dignity and respect, the same dignity and respect given to marriages between opposite-sex couples. And all come down to the same question: Who decides? Is this a matter that the National Constitution commits to resolution by the federal courts or leaves to the less expedient, but usually reliable, work of the state democratic processes?

I.

Michigan. One case comes from Michigan, where state law has defined marriage as a relationship between a man and a woman since its territorial days. *See* An Act Regulating Marriages § 1 (1820), *in* 1 *Laws of the Territory of Michigan* 646, 646 (1871). The State reaffirmed this view in 1996 when it enacted a law that declared marriage "inherently a unique relationship between a man and a woman." Mich. Comp. Laws § 551.1. In 2004, after the Massachusetts Supreme Judicial Court invalidated the Commonwealth's prohibition on same-sex marriage, *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003), nearly fifty-nine percent of Michigan voters opted to constitutionalize the State's

definition of marriage. "To secure and preserve the benefits of marriage for our society and for future generations of children," the amendment says, "the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose." Mich. Const. art. I, § 25.

April DeBoer and Jayne Rowse, a lesbian couple living in Michigan, challenge the constitutionality of this definition. Marriage was not their first objective. DeBoer and Rowse each had adopted children as single parents, and both wanted to serve as adoptive parents for the other partner's children. Their initial complaint alleged that Michigan's adoption laws violated the Equal Protection Clause of the Fourteenth Amendment. The State moved to dismiss the lawsuit for lack of standing, and the district court tentatively agreed. Rather than dismissing the action, the court "invit[ed the] plaintiffs to seek leave to amend their complaint to . . . challenge" Michigan's laws denying them a marriage license. *DeBoer* R. 151 at 3. DeBoer and Rowse accepted the invitation and filed a new complaint alleging that Michigan's marriage laws violated the due process and equal protection guarantees of the Fourteenth Amendment.

Both sets of parties moved for summary judgment. The district court concluded that the dispute raised "a triable issue of fact" over whether the "rationales" for the Michigan laws furthered "a legitimate state interest," and it held a nine-day trial on the issue. *DeBoer* R. 89 at 4, 8. The plaintiffs' experts testified that same-sex couples raise children as well as opposite-sex couples, and that

denying marriage to same-sex couples creates instabilities for their children and families. The defendants' experts testified that the evidence regarding the comparative success of children raised in same-sex households is inconclusive. The district court sided with the plaintiffs. It rejected all of the State's bases for its marriage laws and concluded that the laws failed to satisfy rational basis review.

Kentucky. Two cases challenge two aspects of Kentucky's marriage laws. Early on, Kentucky defined marriage as "the union of a man and a woman." *Jones v. Hallahan*, 501 S.W.2d 588, 589 (Ky. 1973); *see* An Act for Regulating the Solemnization of Marriages § 1, 1798 Ky. Acts 49, 49–50. In 1998, the Kentucky legislature codified the common law definition. The statute says that "'marriage' refers only to the civil status, condition, or relation of one (1) man and one (1) woman united in law for life, for the discharge to each other and the community of the duties legally incumbent upon those whose association is founded on the distinction of sex." Ky. Rev. Stat. § 402.005. In 2004, the Kentucky legislature proposed a constitutional amendment providing that "[o]nly a marriage between one man and one woman shall be valid or recognized as a marriage in Kentucky." Ky. Const. § 233A. Seventy-four percent of the voters approved the amendment.

Two groups of plaintiffs challenge these Kentucky laws. One group, the fortuitously named *Love* plaintiffs, challenges the Commonwealth's marriage-licensing law. Two couples filed that lawsuit: Timothy Love and

Lawrence Ysunza, along with Maurice Blanchard and Dominique James. Both couples claim that the Fourteenth Amendment prohibits Kentucky from denying them marriage licenses.

The other group, the *Bourke* plaintiffs, challenges the ban on recognizing out-of-state same-sex marriages. Four same-sex couples filed the lawsuit: Gregory Bourke and Michael DeLeon; Jimmy Meade and Luther Barlowe; Randell Johnson and Paul Campion; and Kimberly Franklin and Tamera Boyd. All four couples were married outside Kentucky, and they contend that the State's recognition ban violates their due process and equal protection rights. Citing the hardships imposed on them by the recognition ban—loss of tax breaks, exclusion from intestacy laws, loss of dignity—they seek to enjoin its enforcement.

The district court ruled for the plaintiffs in both cases. In *Love*, the court held that the Commonwealth could not justify its definition of marriage on rational basis grounds. It also thought that classifications based on sexual orientation should be subjected to intermediate scrutiny, which the Commonwealth also failed to satisfy. In *Bourke*, the court invalidated the recognition ban on rational basis grounds.

Ohio. Two cases challenge Ohio's refusal to recognize out-of-state same-sex marriages. Ohio also has long adhered to the traditional definition of marriage. *See* An Act Regulating Marriages § 1, 1803 Ohio Laws 31, 31; *Carmichael v. State*, 12 Ohio St. 553, 560 (1861). It reaffirmed this definition in 2004, when the legislature

passed a Defense of Marriage Act, which says that marriage "may only be entered into by one man and one woman." Ohio Rev. Code § 3101.01(A). "Any marriage entered into by persons of the same sex in any other jurisdiction," it adds, "shall be considered and treated in all respects as having no legal force or effect." *Id.* § 3101.01(C)(2). Later that same year, sixty-two percent of Ohio voters approved an amendment to the Ohio Constitution along the same lines. As amended, the Ohio Constitution says that Ohio recognizes only "a union between one man and one woman" as a valid marriage. Ohio Const. art. XV, § 11.

Two groups of plaintiffs challenge these Ohio laws. The first group, the *Obergefell* plaintiffs, focuses on one application of the law. They argue that Ohio's refusal to recognize their out-of-state marriages on Ohio-issued death certificates violates due process and equal protection. Two same-sex couples in long-term, committed relationships filed the lawsuit: James Obergefell and John Arthur; and David Michener and William Herbert Ives. All four of them are from Ohio and were married in other States. When Arthur and Ives died, the State would not list Obergefell and Michener as spouses on their death certificates. Obergefell and Michener sought an injunction to require the State to list them as spouses on the certificates. Robert Grunn, a funeral director, joined the lawsuit, asking the court to protect his right to recognize same-sex marriages on other death certificates.

The second group, the *Henry* plaintiffs, raises a broader challenge. They argue that Ohio's refusal to

recognize out-of-state marriages between same-sex couples violates the Fourteenth Amendment no matter what marital benefit is affected. The *Henry* case involves four same-sex couples, all married in other States, who want Ohio to recognize their marriages on their children's birth certificates. Three of the couples (Brittani Henry and Brittni Rogers; Nicole and Pam Yorksmith; Kelly Noe and Kelly McCracken) gave birth to children in Ohio and wish to have both of their names listed on each child's birth certificate rather than just the child's biological mother. The fourth couple (Joseph Vitale and Robert Talmas) lives in New York and adopted a child born in Ohio. They seek to amend their son's Ohio birth certificate so that it lists both of them as parents.

The district court granted the plaintiffs relief in both cases. In *Obergefell*, the court concluded that the Fourteenth Amendment protects a fundamental right to keep existing marital relationships intact, and that the State failed to justify its law under heightened scrutiny. The court likewise concluded that classifications based on sexual orientation deserve heightened scrutiny under equal protection, and that Ohio failed to justify its refusal to recognize the couples' existing marriages. Even under rational basis review, the court added, the State came up short. In *Henry*, the district court reached many of the same conclusions and expanded its recognition remedy to encompass all married same-sex couples and all legal incidents of marriage under Ohio law.

Tennessee. The Tennessee case is of a piece with the two Ohio cases and one of the Kentucky cases, as it too challenges the State's same-sex-marriage recognition

ban. Tennessee has always defined marriage in traditional terms. *See* An Act Concerning Marriages § 3 (1741), *in Public Acts of the General Assembly of North-Carolina and Tennessee* 46, 46 (1815). In 1996, the Tennessee legislature reaffirmed "that the historical institution and legal contract solemnizing the relationship of one (1) man and one (1) woman shall be the only legally recognized marital contract in this state in order to provide the unique and exclusive rights and privileges to marriage." Tenn. Code Ann. § 36-3-113(a). In 2006, the State amended its constitution to incorporate the existing definition of marriage. *See* Tenn. Const. art. XI, § 18. Eighty percent of the voters supported the amendment.

Three same-sex couples, all in committed relationships, challenge the recognition ban: Valeria Tanco and Sophy Jesty; Ijpe DeKoe and Thomas Kostura; and Johno Espejo and Matthew Mansell. All three couples were legally married in other States. The district court preliminarily enjoined the law. Relying on district court decisions within the circuit and elsewhere, the court concluded that the couples likely would show that Tennessee's ban failed to satisfy rational basis review. The remaining preliminary injunction factors, the court held, also weighed in the plaintiffs' favor.

All four States appealed the decisions against them.

II.

Does the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment require States

to expand the definition of marriage to include same-sex couples? The Michigan appeal (*DeBoer*) presents this threshold question, and so does one of the Kentucky appeals (*Love*). Caselaw offers many ways to think about the issue.

A.

Perspective of an intermediate court. Start with a recognition of our place in the hierarchy of the federal courts. As an "inferior" court (the Constitution's preferred term, not ours), a federal court of appeals begins by asking what the Supreme Court's precedents require on the topic at hand. Just such a precedent confronts us.

In the early 1970s, a Methodist minister married Richard Baker and James McConnell in Minnesota. Afterwards, they sought a marriage license from the State. When the clerk of the state court denied the request, the couple filed a lawsuit claiming that the denial of their request violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971). The Minnesota Supreme Court rejected both claims. As for the due process claim, the state court reasoned: "The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis. . . . This historic institution manifestly is more deeply founded than the asserted contemporary concept of marriage and societal interests for which petitioners

contend. The due process clause . . . is not a charter for restructuring it by judicial legislation." *Id.* As for the equal protection claim, the court reasoned: "[T]he state's classification of persons authorized to marry" does not create an "irrational or invidious discrimination. . . . [T]hat the state does not impose upon heterosexual married couples a condition that they have a proved capacity or declared willingness to procreate . . . [creates only a] theoretically imperfect [classification] . . . [and] 'abstract symmetry' is not demanded by the Fourteenth Amendment." *Id.* at 187. The Supreme Court's decision four years earlier in *Loving v. Virginia*, 388 U.S. 1 (1967), which invalidated Virginia's ban on interracial marriages, did not change this conclusion. "[I]n commonsense and in a constitutional sense," the state court explained, "there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex." *Baker*, 191 N.W.2d at 187.

Baker and McConnell appealed to the United States Supreme Court. The Court rejected their challenge, issuing a one-line order stating that the appeal did not raise "a substantial federal question." *Baker v. Nelson*, 409 U.S. 810, 810 (1972). This type of summary decision, it is true, does not bind the Supreme Court in later cases. But it does confine lower federal courts in later cases. It matters not whether we think the decision was right in its time, remains right today, or will be followed by the Court in the future. Only the Supreme Court may overrule its own precedents, and we remain bound even by its summary decisions "until such time as the Court informs [us] that [we] are not." *Hicks v. Miranda*, 422 U.S.

332, 345 (1975) (internal quotation marks omitted). The Court has yet to inform us that we are not, and we have no license to engage in a guessing game about whether the Court will change its mind or, more aggressively, to assume authority to overrule *Baker* ourselves.

But that was then; this is now. And now, claimants insist, must account for *United States v. Windsor*, 133 S. Ct. 2675 (2013), which invalidated the Defense of Marriage Act of 1996, a law that refused for purposes of federal statutory benefits to respect gay marriages authorized by state law. Yet *Windsor* does not answer today's question. The decision never mentions *Baker*, much less overrules it. And the outcomes of the cases do not clash. *Windsor* invalidated a federal law that refused to respect state laws permitting gay marriage, while *Baker* upheld the right of the people of a State to define marriage as they see it. To respect one decision does not slight the other. Nor does *Windsor*'s reasoning clash with *Baker*. *Windsor* hinges on the Defense of Marriage Act's unprecedented intrusion into the States' authority over domestic relations. *Id.* at 2691–92. Before the Act's passage in 1996, the federal government had traditionally relied on state definitions of marriage instead of purporting to define marriage itself. *Id.* at 2691. That premise does not work—it runs the other way—in a case involving a challenge in federal court to state laws defining marriage. The point of *Windsor* was to prevent the Federal Government from "divest[ing]" gay couples of "a dignity and status of immense import" that New York's extension of the definition of marriage gave them, an extension that "without doubt" any State could provide.

Id. at 2692, 2695. *Windsor* made explicit that it does not answer today's question, telling us that the "opinion and its holding are confined to . . . lawful marriages" already protected by some of the States. *Id.* at 2696. Bringing the matter to a close, the Court held minutes after releasing *Windsor* that procedural obstacles in *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), prevented it from considering the validity of state marriage laws. Saying that the Court declined in *Hollingsworth* to overrule *Baker* openly but decided in *Windsor* to overrule it by stealth makes an unflattering and unfair estimate of the Justices' candor.

Even if *Windsor* did not overrule *Baker* by name, the claimants point out, lower courts still may rely on "doctrinal developments" in the aftermath of a summary disposition as a ground for not following the decision. *Hicks*, 422 U.S. at 344. And *Windsor*, they say, together with *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Romer v. Evans*, 517 U.S. 620 (1996), permit us to cast *Baker* aside. But this reading of "doctrinal developments" would be a groundbreaking development of its own. From the perspective of a lower court, summary dispositions remain "controlling precedent, unless and until re-examined by [the Supreme] Court." *Tully v. Griffin, Inc.*, 429 U.S. 68, 74 (1976); *see Hicks*, 422 U.S. at 343–45. And the Court has told us to treat the two types of decisions, whether summary dispositions or full-merits decisions, the same, "prevent[ing] lower courts" in both settings "from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). Lest doubt remain,

the Court has also told us not to ignore its decisions even when they are in tension with a new line of cases. "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989); *see Agostini v. Felton*, 521 U.S. 203, 237 (1997).

Just two scenarios, then, permit us to ignore a Supreme Court decision, whatever its form: when the Court has overruled the decision by name (if, say, *Windsor* had directly overruled *Baker*) or when the Court has overruled the decision by outcome (if, say, *Hollingsworth* had invalidated the California law without mentioning *Baker*). Any other approach returns us to a world in which the lower courts may anticipatorily overrule all manner of Supreme Court decisions based on counting-to-five predictions, perceived trajectories in the caselaw, or, worst of all, new appointments to the Court. In the end, neither of the two preconditions for ignoring Supreme Court precedent applies here. *Windsor* as shown does not mention *Baker*, and it clarifies that its "opinion and holding" do not govern the States' authority to define marriage. *Hollingsworth* was dismissed. And neither *Lawrence* nor *Romer* mentions *Baker*, and neither is inconsistent with its outcome. The one invalidates a State's criminal antisodomy law and explains that the case "does not involve . . . formal recognition" of same-sex relationships. *Lawrence*, 539 U.S. at 578. The other invalidates a "[s]weeping" and "unprecedented" state

law that prohibited local communities from passing laws that protect citizens from discrimination based on sexual orientation. *Romer*, 517 U.S. at 627, 633, 635–36.

That brings us to another one-line order. On October 6, 2014, the Supreme Court "denied" the "petitions for writs of certiorari" in 1,575 cases, seven of which arose from challenges to decisions of the Fourth, Seventh, and Tenth Circuits that recognized a constitutional right to same-sex marriage. But this kind of action (or inaction) "imports no expression of opinion upon the merits of the case, as the bar has been told many times." *United States v. Carver*, 260 U.S. 482, 490 (1923). "The 'variety of considerations [that] underlie denials of the writ' counsels against according denials of certiorari any precedential value." *Teague v. Lane*, 489 U.S. 288, 296 (1989) (internal citation omitted). Just as the Court's three decisions to stay those same court of appeals decisions over the past year, all without a registered dissent, did not end the debate on this issue, so too the Court's decision to deny certiorari in all of these appeals, all without a registered dissent, does not end the debate either. A decision not to decide is a decision not to decide.

But don't *these* denials of certiorari signal that, from the Court's perspective, the right to same-sex marriage is inevitable? Maybe; maybe not. Even if we grant the premise and assume that same-sex marriage will be recognized one day in all fifty States, that does not tell us how— whether through the courts or through democracy. And, if through the courts, that does not tell us why— whether through one theory of constitutional invalidity or

another. Four courts of appeals thus far have recognized a constitutional right to same-sex marriage. They agree on one thing: the result. But they reach that outcome in many ways, often more than one way in the same decision. *See Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014) (fundamental rights); *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014) (rational basis, animus); *Latta v. Otter*, No. 14-35420, 2014 WL 4977682 (9th Cir. Oct. 7, 2014) (animus, fundamental rights, suspect classification); *Bishop v. Smith*, 760 F.3d 1070 (10th Cir. 2014) (fundamental rights); *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014) (same). The Court's certiorari denials tell us nothing about the democracy-versus-litigation path to same-sex marriage, and they tell us nothing about the validity of any of these theories. If a federal court denies the people suffrage over an issue long thought to be within their power, they deserve an explanation. We, for our part, cannot find one, as several other judges have concluded as well. *See Bostic*, 760 F.3d at 385–98 (Niemeyer, J., dissenting); *Kitchen*, 755 F.3d at 1230–40 (Kelly, J., concurring in part and dissenting in part); *Conde-Vidal v. Garcia-Padilla*, No. 14-1253-PG, 2014 WL 5361987 (D.P.R. Oct. 21, 2014); *Robicheaux v. Caldwell*, 2 F. Supp. 3d 910 (E.D. La. 2014).

There are many ways, as these lower court decisions confirm, to look at this question: originalism; rational basis review; animus; fundamental rights; suspect classifications; evolving meaning. The parties in one way or another have invoked them all. Not one of the plaintiffs' theories, however, makes the case for constitutionalizing the definition of marriage and for removing the issue

from the place it has been since the founding: in the hands of state voters.

B.

Original meaning. All Justices, past and present, start their assessment of a case about the meaning of a constitutional provision by looking at how the provision was understood by the people who ratified it. If we think of the Constitution as a covenant between the governed and the governors, between the people and their political leaders, it is easy to appreciate the force of this basic norm of constitutional interpretation—that the originally understood meaning of the charter generally will be the lasting meaning of the charter. When two individuals sign a contract to sell a house, no one thinks that, years down the road, one party to the contract may change the terms of the deal. That is why the parties put the agreement in writing and signed it publicly—to prevent changed perceptions and needs from changing the guarantees in the agreement. So it normally goes with the Constitution: The written charter cements the limitations on government into an unbending bulwark, not a vane alterable whenever alterations occur—unless and until the people, like contracting parties, choose to change the contract through the agreed-upon mechanisms for doing so. *See* U.S. Const. art. V. If American lawyers in all manner of settings still invoke the original meaning of Magna Carta, a Charter for England in 1215, surely it is not too much to ask that they (and we) take seriously the original meaning of the United States Constitution, a Charter for this country in 1789. Any other approach, too

lightly followed, converts federal judges from interpreters of the document into newly commissioned authors of it.

Many precedents gauging individual rights and national power, leading to all manner of outcomes, confirm the import of original meaning in legal debates. *See, e.g.*, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173–80 (1803); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401–25 (1819); *Legal Tender Cases*, 79 U.S. 457, 536–38 (1870); *Myers v. United States*, 272 U.S. 52, 110–39 (1926); *INS v. Chadha*, 462 U.S. 919, 944–59 (1983); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218–25 (1995); *Washington v. Glucksburg*, 521 U.S. 702, 710–19 (1997); *Crawford v. Washington*, 541 U.S. 36, 42–50 (2004); *Boumediene v. Bush*, 553 U.S. 723, 739–46 (2008); *Giles v. California*, 554 U.S. 353, 358–61 (2008); *District of Columbia v. Heller*, 554 U.S. 570, 576–600 (2008).

In trying to figure out the original meaning of a provision, it is fair to say, the line between interpretation and evolution blurs from time to time. That is an occupational hazard for judges when it comes to old or generally worded provisions. Yet that knotty problem does not confront us. Yes, the Fourteenth Amendment is old; the people ratified it in 1868. And yes, it is generally worded; it says: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Nobody in this case, however, argues that the people who adopted the Fourteenth Amendment understood it to require the States to change the definition of marriage.

Tradition reinforces the point. Only months ago, the Supreme Court confirmed the significance of long-accepted usage in constitutional interpretation. In one case, the Court held that the customary practice of opening legislative meetings with prayer alone proves the constitutional permissibility of legislative prayer, quite apart from how that practice might fare under the most up-to-date Establishment Clause test. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1818–20 (2014). In another case, the Court interpreted the Recess Appointments Clause based in part on long-accepted usage. *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2559–60 (2014). Applied here, this approach permits today's marriage laws to stand until the democratic processes say they should stand no more. From the founding of the Republic to 2003, every State defined marriage as a relationship between a man and a woman, meaning that the Fourteenth Amendment permits, though it does not require, States to define marriage in that way.

C.

Rational basis review. Doctrine leads to the same place as history. A first requirement of any law, whether under the Due Process or Equal Protection Clause, is that it rationally advance a legitimate government policy. *Vance v. Bradley*, 440 U.S. 93, 97 (1979). Two words ("judicial restraint," *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314 (1993)) and one principle (trust in the people that "even improvident decisions will eventually be rectified by the democratic process," *Vance*, 440 U.S. at 97) tell us all we need to know about the light touch judges

should use in reviewing laws under this standard. So long as judges can conceive of some "plausible" reason for the law—*any* plausible reason, even one that did not motivate the legislators who enacted it—the law must stand, no matter how unfair, unjust, or unwise the judges may consider it as citizens. *Heller v. Doe*, 509 U.S. 312, 330 (1993); *Nordlinger v. Hahn*, 505 U.S. 1, 11, 17–18 (1992).

A dose of humility makes us hesitant to condemn as unconstitutionally irrational a view of marriage shared not long ago by every society in the world, shared by most, if not all, of our ancestors, and shared still today by a significant number of the States. Hesitant, yes; but still a rational basis, some rational basis, must exist for the definition. What is it? Two at a minimum suffice to meet this low bar. One starts from the premise that governments got into the business of defining marriage, and remain in the business of defining marriage, not to regulate love but to regulate sex, most especially the intended and unintended effects of male-female intercourse. Imagine a society without marriage. It does not take long to envision problems that might result from an absence of rules about how to handle the natural effects of male-female intercourse: children. May men and women follow their procreative urges wherever they take them? Who is responsible for the children that result? How many mates may an individual have? How does one decide which set of mates is responsible for which set of children? That we rarely think about these questions nowadays shows only how far we have come and how relatively stable our society is, not that States have no explanation for creating such rules in the first place.

Once one accepts a need to establish such ground rules, and most especially a need to create stable family units for the planned and unplanned creation of children, one can well appreciate why the citizenry would think that a reasonable first concern of any society is the need to regulate male-female relationships and the unique procreative possibilities of them. One way to pursue this objective is to encourage couples to enter lasting relationships through subsidies and other benefits and to discourage them from ending such relationships through these and other means. People may not need the government's encouragement to have sex. And they may not need the government's encouragement to propagate the species. But they may well need the government's encouragement to create and maintain stable relationships within which children may flourish. It is not society's laws or for that matter any one religion's laws, but nature's laws (that men and women complement each other biologically), that created the policy imperative. And governments typically are not second-guessed under the Constitution for prioritizing how they tackle such issues. *Dandridge v. Williams*, 397 U.S. 471, 486–87 (1970).

No doubt, that is not the only way people view marriage today. Over time, marriage has come to serve another value—to solemnize relationships characterized by love, affection, and commitment. Gay couples, no less than straight couples, are capable of sharing such relationships. And gay couples, no less than straight couples, are capable of raising children and providing stable families for them. The quality of such relationships, and the capacity to raise children within them, turns not on sexual orientation

but on individual choices and individual commitment. All of this supports the policy argument made by many that marriage laws should be extended to gay couples, just as nineteen States have done through their own sovereign powers. Yet it does not show that the States, circa 2014, suddenly must look at this policy issue in just one way on pain of violating the Constitution.

The signature feature of rational basis review is that governments will not be placed in the dock for doing too much or for doing too little in addressing a policy question. *Id.* In a modern sense, crystallized at some point in the last ten years, many people now critique state marriage laws for doing too little—for being underinclusive by failing to extend the definition of marriage to gay couples. Fair enough. But rational basis review does not permit courts to invalidate laws every time a new and allegedly better way of addressing a policy emerges, even a better way supported by evidence and, in the Michigan case, by judicial factfinding. If legislative choices may rest on "rational speculation unsupported by evidence or empirical data," *Beach Commc'ns*, 508 U.S. at 315, it is hard to see the point of premising a ruling of unconstitutionality on factual findings made by one unelected federal judge that favor a different policy. Rational basis review does not empower federal courts to "subject" legislative line- drawing to "courtroom" factfinding designed to show that legislatures have done too much or too little. *Id.*

What we are left with is this: By creating a status (marriage) and by subsidizing it (e.g., with tax-filing

privileges and deductions), the States created an incentive for two people who procreate together to stay together for purposes of rearing offspring. That does not convict the States of irrationality, only of awareness of the biological reality that couples of the same sex do not have children in the same way as couples of opposite sexes and that couples of the same sex do not run the risk of unintended offspring. That explanation, still relevant today, suffices to allow the States to retain authority over an issue they have regulated from the beginning.

To take another rational explanation for the decision of many States not to expand the definition of marriage, a State might wish to wait and see before changing a norm that our society (like all others) has accepted for centuries. That is not preserving tradition for its own sake. No one here claims that the States' original definition of marriage was unconstitutional when enacted. The plaintiffs' claim is that the States have acted irrationally in standing by the traditional definition in the face of changing social mores. Yet one of the key insights of federalism is that it permits laboratories of experimentation—accent on the plural—allowing one State to innovate one way, another State another, and a third State to assess the trial and error over time. As a matter of state law, the possibility of gay marriage became real in 2003 with the Massachusetts Supreme Judicial Court's decision in *Goodridge*. Eleven years later, the clock has not run on assessing the benefits and burdens of expanding the definition of marriage. Eleven years indeed is not even the right timeline. The fair question is whether in 2004, *one* year after *Goodridge*, Michigan

voters could stand by the traditional definition of marriage. How can we say that the voters acted irrationally for sticking with the seen benefits of thousands of years of adherence to the traditional definition of marriage in the face of one year of experience with a new definition of marriage? A State still assessing how this has worked, whether in 2004 or 2014, is not showing irrationality, just a sense of stability and an interest in seeing how the new definition has worked elsewhere. Even today, the only thing anyone knows *for sure* about the long-term impact of redefining marriage is that they do not know. A Burkean sense of caution does not violate the Fourteenth Amendment, least of all when measured by a timeline less than a dozen years long and when assessed by a system of government designed to foster step-by-step, not sudden winner-take-all, innovations to policy problems.

In accepting these justifications for the four States' marriage laws, we do not deny the foolish, sometimes offensive, inconsistencies that have haunted marital legislation from time to time. States will hand some people a marriage license no matter how often they have divorced or remarried, apparently on the theory that practice makes perfect. States will not even prevent an individual from remarrying the same person three or four times, where practice no longer seems to be the issue. With love and commitment nowhere to be seen, States will grant a marriage license to two friends who wish to share in the tax and other material benefits of marriage, at least until the State's no-fault divorce laws allow them to exit the partnership freely. And States allow couples to continue procreating no matter how little stability, safety,

and love they provide the children they already have. Nor has unjustified sanctimony stayed off the stage when it comes to marital legislation—with monogamists who "do not monog" criticizing alleged polygamists who "do not polyg." *See* Paul B. Beers, *Pennsylvania Politics Today and Yesterday* 51 (1980).

How, the claimants ask, could *anyone* possibly be unworthy of this civil institution? Aren't gay and straight couples both capable of honoring this civil institution in some cases and of messing it up in others? All of this, however, proves much too much. History is replete with examples of love, sex, and marriage tainted by hypocrisy. Without it, half of the world's literature, and three-quarters of its woe, would disappear. Throughout, we have never leveraged these inconsistencies about deeply personal, sometimes existential, views of marriage into a ground for constitutionalizing the field. Instead, we have allowed state democratic forces to fix the problems as they emerge and as evolving community mores show they should be fixed. Even if we think about today's issue and today's alleged inconsistencies solely from the perspective of the claimants in this case, it is difficult to call that formula, already coming to terms with a new view of marriage, a failure.

Any other approach would create line-drawing problems of its own. Consider how plaintiffs' love-and-commitment definition of marriage would fare under their own rational basis test. Their definition does too much because it fails to account for the reality that no State in the country requires couples, whether gay or straight, to

be in love. Their definition does too little because it fails to account for plural marriages, where there is no reason to think that three or four adults, whether gay, bisexual, or straight, lack the capacity to share love, affection, and commitment, or for that matter lack the capacity to be capable (and more plentiful) parents to boot. If it is constitutionally irrational to stand by the man-woman definition of marriage, it must be constitutionally irrational to stand by the monogamous definition of marriage. Plaintiffs have no answer to the point. What they might say they cannot: They might say that tradition or community mores provide a rational basis for States to stand by the monogamy definition of marriage, but they cannot say that because that is exactly what they claim is illegitimate about the States' male-female definition of marriage. The predicament does not end there. No State is free of marriage policies that go too far in some directions and not far enough in others, making all of them vulnerable—if the claimants' theory of rational basis review prevails.

Several cases illustrate just how seriously the federal courts must take the line-drawing deference owed the democratic process under rational basis review. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976), holds that a State may require law enforcement officers to retire without exception at age fifty, in order to assure the physical fitness of its police force. If a rough correlation between age and strength suffices to uphold exception-free retirement ages (even though some fifty-year-olds swim/bike/run triathlons), why doesn't a correlation between male-female intercourse

and procreation suffice to uphold traditional marriage laws (even though some straight couples don't have kids and many gay couples do)? *Armour v. City of Indianapolis*, 132 S. Ct. 2073 (2012), says that if a city cancels a tax, the bureaucratic hassle of issuing refunds entitles it to keep money already collected from citizens who paid early. If administrative convenience amounts to an adequate public purpose, why not a rough sense of social stability? More deferential still, *Kotch v. Board of River Port Pilot Commissioners*, 330 U.S. 552 (1947), concludes that a State's interest in maintaining close ties among those who steer ships in its ports justifies denying pilotage licenses to anyone who isn't a friend or relative of an incumbent pilot. Can we honestly say that traditional marriage laws involve more irrationality than *nepotism*?

The debate over marriage of course has another side, and we cannot deny the costs to the plaintiffs of allowing the States to work through this profound policy debate. The traditional definition of marriage denies gay couples the opportunity to publicly solemnize, to say nothing of subsidize, their relationships under state law. In addition to depriving them of this status, it deprives them of benefits that range from the profound (the right to visit someone in a hospital as a spouse or parent) to the mundane (the right to file joint tax returns). These harms affect not only gay couples but also their children. Do the benefits of standing by the traditional definition of marriage make up for these costs? The question demands an answer—but from elected legislators, not life-tenured judges. Our task under the Supreme Court's precedents is to decide whether the law has some

conceivable basis, not to gauge how that rationale stacks up against the arguments on the other side. Respect for democratic control over this traditional area of state expertise ensures that "a statewide deliberative process that enable[s] its citizens to discuss and weigh arguments for and against same-sex marriage" can have free and reasonable rein. *Windsor*, 133 S. Ct. at 2689.

D.

Animus. Given the broad deference owed the States under the democracy-reinforcing norms of rational basis review, the cases in which the Supreme Court has struck down a state law on that basis are few. When the Court has taken this step, it usually has been due to the novelty of the law and the targeting of a single group for disfavored treatment under it. In one case, a city enacted a new zoning code with the none-too-subtle purpose of closing down a home for the intellectually disabled in a neighborhood that apparently wanted nothing to do with them. The reality that the code applied only to homes for the intellectually disabled—and not to other dwellings such as fraternity houses—led the Court to invalidate the regulation on the ground that the city had based it upon "an irrational prejudice against the mentally retarded." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985). In another case, a statewide initiative denied gays, and gays alone, access to the protection of the State's existing antidiscrimination laws. The novelty of the law, coupled with the distance between the reach of the law and any legitimate interest it might serve, showed that the law was "born of animosity toward" gays and

suggested a design to make gays "unequal to everyone else." *Romer*, 517 U.S. at 634–35.

None of the statewide initiatives at issue here fits this pattern. The four initiatives, enacted between 2004 and 2006, codified a long-existing, widely held social norm already reflected in state law. "[M]arriage between a man and a woman," as the Court reminded us just last year, "had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization." *Windsor*, 133 S. Ct. at 2689.

Neither was the decision to place the definition of marriage in a State's constitution unusual, nor did it otherwise convey the kind of malice or unthinking prejudice the Constitution prohibits. Nineteen States did the same thing during that period. Human Rights Campaign Found., *Equality from State to State 2006*, at 13–14 (2006), *available at* http://s3.amazonaws.com/hrc-assets//files/assets/resources/StateToState2007. pdf. And if there was one concern animating the initiatives, it was the fear that the courts would seize control over an issue that people of good faith care deeply about. If that is animus, the term has no useful meaning.

Who in retrospect can blame the voters for having this fear? By then, several state courts had altered their States' traditional definitions of marriage under the States' constitutions. Since then, more have done the same. Just as state judges have the authority to construe a state constitution as they see fit, so do the people have the

right to overrule such decisions or preempt them as they see fit. Nor is there anything static about this process. In some States, the people have since re-amended their constitutions to broaden the category of those eligible to marry. In other States, the people seemed primed to do the same but for now have opted to take a wait- and-see approach of their own as federal litigation proceeds. *See, e.g.*, Wesley Lowery, *Same- Sex Marriage Is Gaining Momentum, but Some Advocates Don't Want It on the Ballot in Ohio*, Wash. Post (June 14, 2014), http://www.washingtonpost.com/politics/same-sex-marriage-is-gaining-momentum-but-ohio-advocates-dont-want-it-on-the-ballot/2014/06/14/a090452a- e77e-11e3-afc6-a1dd9407abcf_story.html (explaining that Ohio same-sex marriage advocates opted not to place the question on the 2014 state ballot despite collecting nearly twice the number of required signatures). What the Court recently said about another statewide initiative that people care passionately about applies with equal vigor here: "Deliberative debate on sensitive issues such as racial preferences all too often may shade into rancor. But that does not justify removing certain court-determined issues from the voters' reach. Democracy does not presume that some subjects are either too divisive or too profound for public debate." *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1638 (2014). "It is demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds." *Id.* at 1637.

What of the possibility that other motivations affected the amendment process in the four States? If assessing the

motives of multimember legislatures is difficult, assessing the motives of *all* voters in a statewide initiative strains judicial competence. The number of people who supported each initiative—Michigan (2.7 million), Kentucky (1.2 million), Ohio (3.3 million), and Tennessee (1.4 million)—was large and surely diverse. In addition to the proper role of the courts in a democracy, many other factors presumably influenced the voters who supported *and* opposed these amendments: that some politicians favored the amendment and others opposed it; that some faith groups favored the amendment and others opposed it; that some thought the amendment would strengthen families and others thought it would weaken them or were not sure; that some thought the amendment would be good for children and others thought it would not be or were not sure; and that some thought the amendment would preserve a long-established definition of marriage and others thought it was time to accommodate gay couples. Even a rough sense of morality likely affected voters, with some thinking it immoral to exclude gay couples and others thinking the opposite. For most people, whether for or against the amendment, the truth of why they did what they did is assuredly complicated, making it impossible to pin down any one consideration, as opposed to a rough aggregation of factors, as motivating them. How in this setting can we indict the 2.7 million Michigan voters who supported the amendment in 2004, less than *one year* after the *first* state supreme court recognized a constitutional right to gay marriage, for favoring the amendment for prejudicial reasons and for prejudicial reasons alone? Any such conclusion cannot be squared with the benefit of the doubt customarily

given voters and legislatures under rational basis review. Even the gay-rights community, remember, was not of one mind about taking on the benefits and burdens of marriage until the early 1990s. *See* George Chauncey, *Why Marriage? The History Shaping Today's Debate over Gay Equality* 58, 88 (2004); Michael J. Klarman, *From the Closet to the Altar: Courts, Backlash, and the Struggle for Same-Sex Marriage* 48–52 (2013). A decade later, a State's voters should not be taken to task for failing to be of one mind about the issue themselves.

Some equanimity is in order in assessing the motives of voters who invoked a constitutionally respected vehicle for change and for resistance to change: direct democracy. *See Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 151 (1912). Just as gay individuals are no longer abstractions, neither should we treat States as abstractions. Behind these initiatives were real people who teach our children, create our jobs, and defend our shores. Some of these people supported the initiative in 2004; some did not. It is no less unfair to paint the proponents of the measures as a monolithic group of hate-mongers than it is to paint the opponents as a monolithic group trying to undo American families. "Tolerance," like respect and dignity, is best traveled on a "two-way street." *Ward v. Polite*, 667 F.3d 727, 735 (6th Cir. 2012). If there is a dominant theme to the Court's cases in this area, it is to end otherness, not to create new others.

All of this explains why the Court's decisions in *City of Cleburne* and *Romer* do not turn on reading the minds of city voters in one case or of statewide initiative supporters

in the other. They turn on asking whether anything but prejudice to the affected class could explain the law. *See City of Cleburne*, 473 U.S. at 450; *Romer*, 517 U.S. at 635. No such explanations existed in those cases. Plenty exist here, as shown above and as recognized by many others. *See Lawrence*, 539 U.S. at 585 (O'Connor, J., concurring in the judgment) ("Unlike the moral disapproval of same-sex relations[,] . . . other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group."); *Bishop*, 760 F.3d at 1104–09 (Holmes, J., concurring) (same); *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 868 (8th Cir. 2006) (enactment not "'inexplicable by anything but animus' towards same-sex couples"); *Conaway v. Deane*, 932 A.2d 571, 635 (Md. 2007) (no reason to "infer antipathy"); *Hernandez v. Robles*, 855 N.E.2d 1, 8 (N.Y. 2006) (those who favor the traditional definition are not "irrational, ignorant or bigoted"); *Andersen v. King Cnty.*, 138 P.3d 963, 981 (Wash. 2006) (en banc) ("the only reason" for the law was not "anti-gay sentiment").

One other point. Even if we agreed with the claimants that the nature of these state constitutional amendments, and the debates surrounding them, required their invalidation on animus grounds, that would not give them what they request in their complaints: the right to same-sex marriage. All that the invalidation of the amendments would do is return state law to where it had always been, a status quo that in all four States included state statutory and common law definitions of marriage applicable to one man and one woman—definitions that no one claims were motivated by ill will. The elimination

of the state constitutional provisions, it is true, would allow individuals to challenge the four States' other marital laws on state constitutional grounds. No one filed such a challenge here, however.

E.

Fundamental right to marry. Under the Due Process Clause, courts apply more muscular review—"strict," "rigorous," usually unforgiving, scrutiny—to laws that impair "fundamental" rights. In considering the claimants' arguments that they have a fundamental right to marry each other, we must keep in mind that something can be fundamentally important without being a fundamental right under the Constitution. Otherwise, state regulations of many deeply important subjects—from education to healthcare to living conditions to decisions about when to die— would be subject to unforgiving review. They are not. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) (public education); *Maher v. Roe*, 432 U.S. 464, 469 (1977) (healthcare); *Lindsey v. Normet*, 405 U.S. 56, 73–74 (1972) (housing); *Glucksberg*, 521 U.S. at 728 (right to die). Instead, the question is whether our nation has treated the right as fundamental and therefore worthy of protection under substantive due process. More precisely, the test is whether the right is "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed." *Glucksberg*, 521 U.S. at 721 (internal citations omitted). That requirement often is met by placing the right in the Constitution, most obviously in (most of) the

guarantees in the Bill of Rights. *See id.* at 720. But the right to marry in general, and the right to gay marriage in particular, nowhere appear in the Constitution. That route for recognizing a fundamental right to same-sex marriage does not exist.

That leaves the other option—that, even though a proposed right to same-sex marriage does not appear in the Constitution, it turns on bedrock assumptions about liberty. This too does not work. The first state high court to redefine marriage to include gay couples did not do so until 2003 in *Goodridge*.

Matters do not change because *Loving v. Virginia*, 388 U.S. 1 (1967), held that "marriage" amounts to a fundamental right. When the Court decided *Loving*, "marriage between a man and a woman no doubt [was] thought of . . . as essential to the very definition of that term." *Windsor*, 133 S. Ct. at 2689. In referring to "marriage" rather than "opposite-sex marriage," *Loving* confirmed only that "opposite-sex marriage" would have been considered redundant, not that marriage included same-sex couples. *Loving* did not change the definition. That is why the Court said marriage is "fundamental to our very existence and survival," 388 U.S. at 12, a reference to the procreative definition of marriage. Had a gay African-American male and a gay Caucasian male been denied a marriage license in Virginia in 1968, would the Supreme Court have held that Virginia had violated the Fourteenth Amendment? No one to our knowledge thinks so, and no Justice to our knowledge has ever said so. The denial of the license would have turned not on the

races of the applicants but on a request to change the definition of marriage. Had *Loving* meant something more when it pronounced marriage a fundamental right, how could the Court hold in *Baker* five years later that gay marriage does not even raise a substantial federal question? *Loving* addressed, and rightly corrected, an unconstitutional eligibility requirement for marriage; it did not create a new definition of marriage.

A similar problem confronts the claimants' reliance on other decisions treating marriage as a fundamental right, whether in the context of a statute denying marriage licenses to fathers who could not pay child support, *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978), or a regulation restricting prisoners' ability to obtain marriage licenses, *Turner v. Safley*, 482 U.S. 78, 94–95 (1987). It strains credulity to believe that a year after each decision a gay indigent father could have required the State to grant him a marriage license for his partnership or that a gay prisoner could have required the State to permit him to marry a gay partner. When *Loving* and its progeny used the word marriage, they did not redefine the term but accepted its traditional meaning.

No doubt, many people, many States, even some dictionaries, now define marriage in a way that is untethered to biology. But that does not transform the fundamental-rights decision of *Loving* under the old definition into a constitutional right under the new definition. The question is whether the old reasoning applies to the new setting, not whether we can shoehorn new meanings into old words. Else, evolving-norm

lexicographers would have a greater say over the meaning of the Constitution than judges.

The upshot of fundamental-rights status, keep in mind, is strict-scrutiny status, subjecting all state eligibility rules for marriage to rigorous, usually unforgiving, review. That makes little sense with respect to the trials and errors societies historically have undertaken (and presumably will continue to undertake) in determining who may enter and leave a marriage. Start with the *duration* of a marriage. For some, marriage is a commitment for life and beyond. For others, it is a commitment for life. For still others, it is neither. In 1969, California enacted the first pure no-fault divorce statute. *See* Family Law Act of 1969, 1969 Cal. Stat. 3312. A dramatic expansion of similar laws followed. *See* Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 BYU L. Rev. 79, 90. The Court has never subjected these policy fits and starts about who may *leave* a marriage to strict scrutiny.

Consider also the *number* of people eligible to marry. As late as the eighteenth century, "[t]he predominance of monogamy was by no means a foregone conclusion," and "[m]ost of the peoples and cultures around the globe" had adopted a different system. Nancy F. Cott, *Public Vows: A History of Marriage and the Nation* 9 (2000). Over time, American officials wove monogamy into marriage's fabric. Beginning in the nineteenth century, the federal government "encouraged or forced" Native Americans to adopt the policy, and in 1878 the Supreme Court upheld a federal antibigamy law. *Id.* at 26; *see Reynolds v. United*

States, 98 U.S. 145 (1878). The Court has never taken this topic under its wing. And if it did, how would the constitutional, as opposed to policy, arguments in favor of same-sex marriage not apply to plural marriages?

Consider finally the *nature* of the individuals eligible to marry. The age of consent has not remained constant, for example. Under Roman law, men could marry at fourteen, women at twelve. The American colonies imported that rule from England and kept it until the mid-1800s, when the people began advocating for a higher minimum age. Today, all but two States set the number at eighteen. *See* Vivian E. Hamilton, *The Age of Marital Capacity: Reconsidering Civil Recognition of Adolescent Marriage*, 92 B.U. L. Rev. 1817, 1824–32 (2012). The same goes for the social acceptability of marriage between cousins, a union deemed "desirable in many parts of the world"; indeed, around "10 percent of marriages worldwide are between people who are second cousins or closer." Sarah Kershaw, *Living Together: Shaking Off the Shame*, N.Y. Times (Nov. 25, 2009), http://www.nytimes.com/2009/11/26/ garden/26cousins.html. Even in the United States, cousin marriage was not prohibited until the mid-nineteenth century, when Kansas—followed by seven other States—enacted the first ban. *See* Diane B. Paul & Hamish G. Spencer, *"It's Ok, We're Not Cousins by Blood": The Cousin Marriage Controversy in Historical Perspective*, 6 PLoS Biology 2627, 2627 (2008). The States, however, remain split: half of them still permit the practice. *Ghassemi v. Ghassemi*, 998 So. 2d 731, 749 (La. Ct. App. 2008). Strict scrutiny? Neither *Loving* nor any other Supreme Court decision says so.

F.

Discrete and insular class without political power. A separate line of cases, this one under the Equal Protection Clause, calls for heightened review of laws that target groups whom legislators have singled out for unequal treatment in the past. This argument faces an initial impediment. Our precedents say that rational basis review applies to sexual-orientation classifications. *See Davis v. Prison Health Servs.*, 679 F.3d 433, 438 (6th Cir. 2012); *Scarbrough v. Morgan Cnty. Bd. of Educ.*, 470 F.3d 250, 260–61 (6th Cir. 2006); *Stemler v. City of Florence*, 126 F.3d 856, 873–74 (6th Cir. 1997).

There is another impediment. The Supreme Court has never held that legislative classifications based on sexual orientation receive heightened review and indeed has not recognized a new suspect class in more than four decades. There are ample reasons for staying the course. Courts consider four rough factors in deciding whether to treat a legislative classification as suspect and presumptively unconstitutional: whether the group has been historically victimized by governmental discrimination; whether it has a defining characteristic that legitimately bears on the classification; whether it exhibits unchanging characteristics that define it as a discrete group; and whether it is politically powerless. *See Rodriguez*, 411 U.S. at 28.

We cannot deny the lamentable reality that gay individuals have experienced prejudice in this country, sometimes at the hands of public officials, sometimes

at the hands of fellow citizens. Stonewall, Anita Bryant's uninvited answer to the question "Who are we to judge?", unequal enforcement of antisodomy laws between gay and straight partners, Matthew Shepard, and the language of insult directed at gays and others make it hard for anyone to deny the point. But we also cannot deny that the institution of marriage arose independently of this record of discrimination. The traditional definition of marriage goes back thousands of years and spans almost every society in history. By contrast, "American laws targeting same-sex couples did not develop until the last third of the 20th century." *Lawrence*, 539 U.S. at 570. This order of events prevents us from inferring from history that prejudice against gays led to the traditional definition of marriage in the same way that we can infer from history that prejudice against African Americans led to laws against miscegenation. The usual leap from history of discrimination to intensification of judicial review does not work.

Windsor says nothing to the contrary. In arguing otherwise, plaintiffs mistake *Windsor*'s avoidance of one federalism question for avoidance of federalism altogether. Here is the key passage:

> Despite these considerations, it is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance. The State's power in defining the marital relation is of central relevance in this case quite apart from principles of federalism. Here the State's

> decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import. When the State used its historic and essential authority to define the marital relation in this way, its role and its power in making the decision enhanced the recognition, dignity, and protection of the class in their own community. DOMA, because of its reach and extent, departs from this history and tradition of reliance on state law to define marriage. "'[D]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.'"

Windsor, 133 S. Ct. at 2692 (quoting *Romer*, 517 U.S. at 633). Plaintiffs read these words (and others that follow) as an endorsement of heightened review in today's case, pointing to the first two sentences as proof that individual dignity, not federalism, animates *Windsor*'s holding.

Yet federalism permeates both parts of this passage and both parts of the opinion. *Windsor* begins by expressing doubts about whether Congress has the delegated power to enact a statute like DOMA at all. But instead of resolving the case on the far-reaching enumerated-power ground, it resolves the case on the narrower *Romer* ground—that anomalous exercises of power targeting a single group raise suspicion that bigotry rather than legitimate policy is afoot. Why was DOMA anomalous? Only federalism can supply the answer. The national statute trespassed upon New York's time-

respected authority to define the marital relation, including by "enhanc[ing] the recognition, dignity, and protection" of gay and lesbian couples. *Id.* Today's case involves no such "divest[ing]"/ "depriv[ing]"/"undermin[ing]" of a marriage status granted through a State's authority over domestic relations within its borders and thus provides no basis for inferring that the purpose of the state law was to "impose a disadvantage"/"a separate status"/"a stigma" on gay couples. *Id.* at 2692–95. When the Framers "split the atom of sovereignty," *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (Kennedy, J., concurring), they did so to *enhance* liberty, not to allow the National Government to *divest* liberty protections granted by the States in the exercise of their historic and in this instance nearly exclusive power. What we have here is something entirely different. It is the States doing exactly what every State has been doing for hundreds of years: defining marriage as they see it. The only thing that has changed is the *willingness* of many States over the last eleven years to expand the definition of marriage to encompass gay couples.

Any other reading of *Windsor* would require us to subtract key passages from the opinion and add an inverted holding. The Court noted that New York "without doubt" had the power under its traditional authority over marriage to extend the definition of marriage to include gay couples and that Congress had no power to enact "unusual" legislation that interfered with the States' long-held authority to define marriage. *Windsor*, 133 S. Ct. at 2692–93. A decision premised on heightened scrutiny under the Fourteenth Amendment

that redefined marriage nationally to include same-sex couples not only would divest the States of their traditional authority over this issue, but it also would authorize Congress to do something no one would have thought possible a few years ago—to use its Section 5 enforcement powers to add new definitions and extensions of marriage rights in the years ahead. That would leave the States with little authority to resolve ever-changing debates about how to define marriage (and the benefits and burdens that come with it) outside the beck and call of Congress and the Court. How odd that one branch of the National Government (Congress) would be reprimanded for entering the fray in 2013 and two branches of the same Government (the Court and Congress) would take control of the issue a short time later.

Nor, as the most modest powers of observation attest, is this a setting in which "political powerlessness" requires "extraordinary protection from the majoritarian political process." *Rodriguez*, 411 U.S. at 28. This is not a setting in which dysfunction mars the political process. *See Reynolds v. Sims*, 377 U.S. 533 (1964); *Baker v. Carr*, 369 U.S. 186 (1962). It is not a setting in which the recalcitrance of Jim Crow demands judicial, rather than we-can't-wait-forever legislative, answers. *See Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). It is not a setting in which time shows that even a potentially powerful group cannot make headway on issues of equality. *See Frontiero v. Richardson*, 411 U.S. 677 (1973). It is not a setting where a national crisis—the Depression—seemingly demanded constitutional innovation. *See W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). And it is not a setting,

most pertinently, in which the local, state, and federal governments historically disenfranchised the suspect class, as they did with African Americans and women. *See United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

Instead, from the claimants' perspective, we have an eleven-year record marked by nearly as many successes as defeats and a widely held assumption that the future holds more promise than the past—if the federal courts will allow that future to take hold. Throughout that time, other advances for the claimants' cause are manifest. Nationally, "Don't Ask, Don't Tell" is gone. Locally, the Cincinnati charter amendment that prevented gay individuals from obtaining certain preferences from the city, upheld by our court in 1997, *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997), is no more. The Fourteenth Amendment does not insulate influential, indeed eminently successful, interest groups from a defining attribute of all democratic initiatives—some succeed, some fail—particularly when succeeding more and failing less are in the offing.

Why, it is worth asking, the sudden change in public opinion? If there is one thing that seems to challenge hearts and minds, even souls, on this issue, it is the transition from the abstract to the concrete. If twenty-five percent of the population knew someone who was openly gay in 1985, and seventy-five percent knew the same in 2000, Klarman, *supra*, at 197, it is fair to wonder how few individuals still have not been forced to think about the

matter through the lens of a gay friend or family member. *That* would be a discrete and insular minority.

The States' undoubted power over marriage provides an independent basis for reviewing the laws before us with deference rather than with skepticism. An analogy shows why. When a *state* law targets noncitizens—a group marked by its lack of political power and its history of enduring discrimination—it must in general meet the most demanding of constitutional tests in order to survive a skirmish with a court. But when a *federal* law targets noncitizens, a mere rational basis will save it from invalidation. This disparity arises because of the Nation's authority (and the States' corresponding lack of authority) over international affairs. *Mathews v. Diaz*, 426 U.S. 67, 84–85 (1976). If federal preeminence in foreign relations requires lenient review of federal immigration classifications, why doesn't state preeminence in domestic relations call for equally lenient review of state marriage definitions?

G.

Evolving meaning. If all else fails, the plaintiffs invite us to consider that "[a] core strength of the American legal system . . . is its capacity to evolve" in response to new ways of thinking about old policies. *DeBoer* Appellees' Br. at 57–58. But even if we accept this invitation and put aside the past—original meaning, tradition, time-respected doctrine—that does not take the plaintiffs where they wish to go. We could, to be sure, look at this case alongside evolving moral and policy

considerations. The Supreme Court has done so before. *Lawrence*, 539 U.S. at 573. It may do so again. "A prime part of the history of our Constitution . . . is the story of the extension of constitutional rights . . . to people once ignored or excluded." *United States v. Virginia*, 518 U.S. 515, 557 (1996). Why not do so here?

Even on this theory, the marriage laws do not violate the Constitution. A principled jurisprudence of constitutional evolution turns on evolution in *society's* values, not evolution in *judges'* values. Freed of federal-court intervention, thirty-one States would continue to define marriage the old-fashioned way. *Lawrence*, by contrast, dealt with a situation in which just thirteen States continued to prohibit sodomy, and even then most of those laws had fallen into desuetude, rarely being enforced at all. On this record, what right do we have to say that societal values, as opposed to judicial values, have evolved toward agreement in favor of same-sex marriage?

The theory of the living constitution rests on the premise that every generation has the right to govern itself. If that premise prevents judges from insisting on principles that society has moved past, so too should it prevent judges from anticipating principles that society has yet to embrace. It follows that States must enjoy some latitude in matters of timing, for reasonable people can disagree about just when public norms have evolved enough to require a democratic response. Today's case captures the point. Not long ago American society took for granted the rough correlation between marriage

and creation of new life, a vision under which limiting marriage to opposite-sex couples seemed natural. Not long from now, if current trends continue, American society may define marriage in terms of affirming mutual love, a vision under which the failure to add loving gay couples seems unfair. Today's society has begun to move past the first picture of marriage, but it has not yet developed a consensus on the second.

If, *before* a new consensus has emerged on a social issue, federal judges may decide when the time is ripe to recognize a new constitutional right, surely the people should receive some deference in deciding when the time is ripe to move from one picture of marriage to another. So far, not a single United States Supreme Court Justice in American history has written an opinion maintaining that the traditional definition of marriage violates the Fourteenth Amendment. No one would accuse the Supreme Court of acting irrationally in failing to recognize a right to same-sex marriage in 2013. Likewise, we should hesitate to accuse the States of acting irrationally in failing to recognize the right in 2004 or 2006 or for that matter today. Federal judges engaged in the inherent pacing that comes with living constitutionalism should appreciate the inherent pacing that comes with democratic majorities deciding within reasonable bounds when and whether to embrace an evolving, as opposed to settled, societal norm. The one form of pacing is akin to the other, making it anomalous for the Court to hold that the States act unconstitutionally when making reasonable pacing decisions of their own.

From time to time, the Supreme Court has looked beyond our borders in deciding when to expand the meaning of constitutional guarantees. *Lawrence*, 539 U.S. at 576. Yet foreign practice only reinforces the impropriety of tinkering with the democratic process in this setting. The great majority of countries across the world—including such progressive democracies as Australia and Finland—still adhere to the traditional definition of marriage. Even more telling, the European Court of Human Rights ruled only a few years ago that European human rights laws do not guarantee a right to same-sex marriage. *Schalk & Kopf v. Austria*, 2010-IV Eur. Ct. H.R. 409. "The area in question," it explained in words that work just as well on this side of the Atlantic, remains "one of evolving rights with no established consensus," which means that States must "enjoy [discretion] in the timing of the introduction of legislative changes." *Id.* at 438. It reiterated this conclusion as recently as this July, declaring that "the margin of appreciation to be afforded" to States "must still be a wide one." *Hämäläinen v. Finland*, No. 37359/09, HUDOC, at *19 (Eur. Ct. H.R. July 16, 2014). Our Supreme Court relied on the European Court's gay-rights decisions in *Lawrence*. 539 U.S. at 576. What neutral principle of constitutional interpretation allows us to ignore the European Court's same-sex marriage decisions when deciding this case? If the point is relevant in the one setting, it is relevant in the other, especially in a case designed to treat like matters alike.

Other practical considerations also do not favor the creation of a new constitutional right here. While these cases present a denial of access to many benefits, what

is "[o]f greater importance" to the claimants, as they see it, "is the loss of . . . dignity and respect" occasioned by these laws. *Love* Appellees' Br. at 5. No doubt there is much to be said for "dignity and respect" in the eyes of the Constitution and its interpreters. But any loss of dignity and respect on this issue did not come from the Constitution. It came from the neighborhoods and communities in which gay and lesbian couples live, and in which it is worth trying to correct the problem in the first instance—and in that way "to allow the formation of consensus respecting the way the members" of a State "treat each other in their daily contact and constant interaction with each other." *Windsor*, 133 S. Ct. at 2692.

For all of the power that comes with the authority to interpret the United States Constitution, the federal courts have no long-lasting capacity to change what people think and believe about new social questions. If the plaintiffs are convinced that litigation is the best way to resolve today's debate and to change heads and hearts in the process, who are we to say? Perhaps that is not the only point, however. Yes, we cannot deny thinking the plaintiffs deserve better—earned victories through initiatives and legislation and the greater acceptance that comes with them. But maybe the American people too deserve better—not just in the sense of having a say through representatives in the legislature rather than through representatives in the courts, but also in the sense of having to come face to face with the issue. Rights need not be countermajoritarian to count. *See, e.g.*, Civil Rights Act of 1964, Pub. L. No. 88352, 78 Stat. 241. Isn't the goal to create a culture in which a majority of citizens

dignify and respect the rights of minority groups through majoritarian laws rather than through decisions issued by a majority of Supreme Court Justices? It is dangerous and demeaning to the citizenry to assume that *we*, and only *we*, can fairly understand the arguments for and against gay marriage.

Last, but not least, federal courts never expand constitutional guarantees in a vacuum. What one group wants on one issue from the courts today, another group will want on another issue tomorrow. The more the Court innovates under the Constitution, the more plausible it is for the Court to do still more—and the more plausible it is for other advocates on behalf of other issues to ask the Court to innovate still more. And while the expansion of liberal and conservative constitutional rights will solve, or at least sidestep, the amendment-difficulty problem that confronts many individuals and interest groups, it will exacerbate the judge- confirmation problem. Faith in democracy with respect to issues that the Constitution has not committed to the courts reinforces a different, more sustainable norm.

III.

Does the Constitution prohibit a State from denying recognition to same-sex marriages conducted in other States? That is the question presented in the two Ohio cases (*Obergefell* and *Henry*), one of the Kentucky cases (*Bourke*), and the Tennessee case (*Tanco*). Our answer to the first question goes a long way toward answering this one. If it is constitutional for a State to define marriage

as a relationship between a man and a woman, it is also constitutional for the State to stand by that definition with respect to couples married in other States or countries.

The Constitution in general does not delineate when a State must apply its own laws and when it must apply the laws of another State. Neither any federal statute nor federal common law fills the gap. Throughout our history, each State has decided for itself how to resolve clashes between its laws and laws of other sovereigns—giving rise to the field of conflict of laws. The States enjoy wide latitude in fashioning choice-of-law rules. *Sun Oil Co. v. Wortman*, 486 U.S. 717, 727–29 (1988); *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 307–08 (1981).

The plaintiffs in these cases do not claim that refusal to recognize out-of-state gay and lesbian marriages violates the Full Faith and Credit Clause, the principal constitutional limit on state choice-of-law rules. Wisely so. The Clause "does not require a State to apply another State's law in violation of its own legitimate public policy." *Nevada v. Hall*, 440 U.S. 410, 422 (1979). If defining marriage as an opposite-sex relationship amounts to a legitimate public policy—and we have just explained that it does—the Full Faith and Credit Clause does not prevent a State from applying that policy to couples who move from one State to another.

The plaintiffs instead argue that failure to recognize gay marriages celebrated in other States violates the Due Process and Equal Protection Clauses. But we do not think that the invocation of these different clauses

justifies a different result. As shown, compliance with the Due Process and Equal Protection Clauses in this setting requires only a rational relationship between the legislation and a legitimate public purpose. And a State does not behave irrationally by insisting upon its own definition of marriage rather than deferring to the definition adopted by another State. Preservation of a State's authority to recognize, or to opt not to recognize, an out- of-state marriage preserves a State's sovereign interest in deciding for itself how to define the marital relationship. It also discourages evasion of the State's marriage laws by allowing individuals to go to another State, marry there, then return home. Were it irrational for a State to adhere to its own policy, what would be the point of the Supreme Court's repeated holdings that the Full Faith and Credit Clause "does not require a State to apply another State's law in violation of its own public policy"? *Id.*

Far from undermining these points, *Windsor* reinforces them. The case observes that "[t]he definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the protection of offspring, property interests, and the enforcement of marital responsibilities." 133 S. Ct. at 2691 (internal quotation marks omitted). How could it be irrational for a State to decide that the foundation of its domestic- relations law will be *its* definition of marriage, not somebody else's? *Windsor* adds that "[e]ach state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders." *Id.* How could it be

irrational for a State to apply its definition of marriage to a couple in whose marital status the State as a sovereign has a rightful and legitimate concern?

Nor does the policy of nonrecognition trigger *Windsor*'s (or *Romer*'s) principle that unprecedented exercises of power call for judicial skepticism. States have always decided for themselves when to yield to laws of other States. Exercising this power, States often have refused to enforce all sorts of out-of-state rules on the grounds that they contradict important local policies. *See* Restatement (First) of Conflict of Laws § 612; Restatement (Second) of Conflict of Laws § 90. Even more telling, States in many instances have refused to recognize marriages performed in other States on the grounds that these marriages depart from cardinal principles of the State's domestic-relations laws. *See* Restatement (First) of Conflict of Laws § 134; Restatement (Second) of Conflict of Laws § 283. The laws challenged here involve routine rather than anomalous uses of state power.

What of the reality that Ohio recognizes some heterosexual marriages solemnized in other States even if those marriages could not be performed in Ohio? *See, e.g.*, *Mazzolini v. Mazzolini*, 155 N.E.2d 206, 208 (Ohio 1958). The only reason Ohio could have for banning recognition of same-sex marriages performed elsewhere and not prohibiting heterosexual marriages performed elsewhere, the Ohio plaintiffs claim, is animus or "discrimination[] of an unusual character." *Obergefell* Appellees' Br. at 18 (quoting *Windsor*, 133 S. Ct. at 2692).

But, in making this argument, the plaintiffs misapprehend Ohio law, wrongly assuming that Ohio would recognize as valid *any* heterosexual marriage that was valid in the State that sanctioned it. That is not the case. Ohio law recognizes some out-of-state marriages that could not be performed in Ohio, but not all such marriages. *See, e.g.*, *Mazzolini*, 155 N.E.2d at 208 (marriage of first cousins); *Hardin v. Davis*, 16 Ohio Supp. 19, 20 (Ohio Ct. Com. Pl. 1945) (marriage by proxy). In *Mazzolini*, the most relevant precedent, the Ohio Supreme Court stated that a number of heterosexual marriages—ones that were "incestuous, polygamous, shocking to good morals, unalterably opposed to a well defined public policy, or prohibited"—would not be recognized in the State, even if they were valid in the jurisdiction that performed them. 155 N.E.2d at 208–09 (noting that first-cousin marriages fell outside this rule because they were "not made void by explicit provision" and "not incestuous"). Ohio law declares same-sex marriage contrary to the State's public policy, placing those marriages within the longstanding exception to Ohio's recognition rule. *See* Ohio Rev. Code § 3101.01(C).

IV.

That leaves one more claim, premised on the constitutional right to travel. In the Tennessee case (*Tanco*) and one of the Ohio cases (*Henry*), the claimants maintain that a State's refusal to recognize out-of-state same-sex marriages illegitimately burdens the right to travel—in the one case by penalizing couples who move into the State by refusing to recognize their marriages,

in the other by preventing their child from obtaining a passport because the State refused to provide a birth certificate that included the names of both parents.

The United States Constitution does not mention a right to travel by name. "Yet the constitutional right to travel from one State to another is firmly embedded in our jurisprudence." *Saenz v. Roe*, 526 U.S. 489, 498 (1999) (internal quotation marks omitted). It provides three guarantees: (1) "the right of a citizen of one State to enter and to leave another State"; (2) "the right to be treated as a welcome visitor rather than an unfriendly alien" when visiting a second State; and (3) the right of new permanent residents "to be treated like other citizens of that State." *Id.* at 500.

Tennessee's nonrecognition law does not violate these prohibitions. It does not ban, or for that matter regulate, movement into or out of the State other than in the respect all regulations create incentives or disincentives to live in one place or another. Most critically, the law does not punish out-of-state new residents in relation to its own born and bred. Nonresidents are "treated" just "like other citizens of that State," *id.*, because the State has not expanded the definition of marriage to include gay couples in all settings, whether the individuals just arrived in Tennessee or descend from Andrew Jackson.

The same is true for the Ohio law. No regulation of movement or differential treatment between the newly resident and the longstanding resident occurs. All Ohioans must follow the State's definition of marriage. With respect

to the need to obtain an Ohio birth certificate before obtaining a passport, they can get one. The certificate just will not include both names of the couple. The "just" of course goes to the heart of the matter. In that respect, however, it is due process and equal protection, not the right to travel, that govern the issue.

* * *

This case ultimately presents *two* ways to think about change. One is whether the Supreme Court will constitutionalize a new definition of marriage to meet new policy views about the issue. The other is whether the Court will begin to undertake a different form of change—change in the way we as a country optimize the handling of efforts to address requests for new civil liberties.

If the Court takes the first approach, it may resolve the issue for good and give the plaintiffs and many others relief. But we will never know what might have been. If the Court takes the second approach, is it not possible that the traditional arbiters of change—the people—will meet today's challenge admirably and settle the issue in a productive way? In just eleven years, nineteen States and a conspicuous District, accounting for nearly forty-five percent of the population, have exercised their sovereign powers to expand a definition of marriage that until recently was universally followed going back to the earliest days of human history. That is a difficult timeline to criticize as unworthy of further debate and voting. When the courts do not let the people resolve

new social issues like this one, they perpetuate the idea that the heroes in these change events are judges and lawyers. Better in this instance, we think, to allow change through the customary political processes, in which the people, gay and straight alike, become the heroes of their own stories by meeting each other not as adversaries in a court system but as fellow citizens seeking to resolve a new social issue in a fair-minded way.

For these reasons, we reverse.

DISSENT

MARTHA CRAIG DAUGHTREY, Circuit Judge, dissenting.

"The great tides and currents which engulf the rest of men do not turn aside in their course to pass the judges by."

Benjamin Cardozo,
The Nature of the Judicial Process (1921)

The author of the majority opinion has drafted what would make an engrossing TED Talk or, possibly, an introductory lecture in Political Philosophy. But as an appellate court decision, it wholly fails to grapple with the relevant constitutional question in this appeal: whether a state's constitutional prohibition of same-sex marriage violates equal protection under the Fourteenth Amendment. Instead, the majority sets up a false premise—that the question before us is "who should decide?"—and leads us through a largely irrelevant

discourse on democracy and federalism. In point of fact, the real issue before us concerns what is at stake in these six cases for the individual plaintiffs and their children, and what should be done about it. Because I reject the majority's resolution of these questions based on its invocation of *vox populi* and its reverence for "proceeding with caution" (otherwise known as the "wait and see" approach), I dissent.

In the main, the majority treats both the issues and the litigants here as mere abstractions. Instead of recognizing the plaintiffs as persons, suffering actual harm as a result of being denied the right to marry where they reside or the right to have their valid marriages recognized there, my colleagues view the plaintiffs as social activists who have somehow stumbled into federal court, inadvisably, when they should be out campaigning to win "the hearts and minds" of Michigan, Ohio, Kentucky, and Tennessee voters to their cause. But these plaintiffs are not political zealots trying to push reform on their fellow citizens; they are committed same-sex couples, many of them heading up *de facto* families, who want to achieve equal status—*de jure* status, if you will—with their married neighbors, friends, and coworkers, to be accepted as contributing members of their social and religious communities, and to be welcomed as fully legitimate parents at their children's schools. They seek to do this by virtue of exercising a civil right that most of us take for granted—the right to marry.[1]

1. *See, e.g.*, *Loving v. Virginia*, 388 U.S. 1, 12 (1967) ("Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival.") (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)). The Supreme Court has described the

Readers who are familiar with the Supreme Court's recent opinion in *United States v. Windsor*, 133 S. Ct. 2675 (2013), and its progeny in the circuit courts, particularly the Seventh Circuit's opinion in *Baskin v. Bogan*, 766 F.3d 648, 654 (7th Cir. 2014) ("Formally these cases are about discrimination against the small homosexual minority in the United States. But at a deeper level, . . . they are about the welfare of American children."), must have said to themselves at various points in the majority opinion, "But what about the children?" I did, and I could not find the answer in the opinion. For although my colleagues in the majority pay lip service to marriage as an institution conceived for the purpose of providing a stable family unit "within which children may flourish," they ignore the destabilizing effect of its absence in the homes of tens of thousands of same-sex parents throughout the four states of the Sixth Circuit.

Indeed, with the exception of Ohio, the defendants in each of these cases—the proponents of their respective "defense of marriage" amendments—spent virtually their entire oral arguments professing what has come to be known as the "irresponsible procreation" theory: that limiting marriage and its benefits to opposite-sex couples is rational, even necessary, to provide for "unintended offspring" by channeling their biological procreators into the bonds of matrimony. When we asked counsel why that goal required the simultaneous exclusion of same-

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right to marry as "of fundamental importance for all individuals" and as "part of the fundamental 'right of privacy' implicit in the Fourteenth Amendment's Due Process Clause." *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978).

sex couples from marrying, we were told that permitting same-sex marriage might denigrate the institution of marriage in the eyes of opposite-sex couples who conceive out of wedlock, causing subsequent abandonment of the unintended offspring by one or both biological parents. We also were informed that because same-sex couples cannot themselves produce wanted or unwanted offspring, and because they must therefore look to non-biological means of parenting that require planning and expense, stability in a family unit headed by same-sex parents is assured without the benefit of formal matrimony. But, as the court in *Baskin* pointed out, many "abandoned children [born out of wedlock to biological parents] are adopted by homosexual couples, and those children would be better off both emotionally and economically if their adoptive parents were married." *Id.* How ironic that irresponsible, unmarried, opposite-sex couples in the Sixth Circuit who produce unwanted offspring must be "channeled" into marriage and thus rewarded with its many psychological and financial benefits, while same-sex couples who become model parents are punished for their responsible behavior by being denied the right to marry. As an obviously exasperated Judge Posner responded after puzzling over this same paradox in *Baskin*, "Go figure." *Id*. at 662.

In addressing the "irresponsible procreation" argument that has been referenced by virtually every state defendant in litigation similar to this case, the *Baskin* court noted that estimates put the number of American children being raised by same-sex parents at over 200,000. *Id.* at 663. "Unintentional offspring are

the children most likely to be put up for adoption," *id.* at 662, and because statistics show that same-sex couples are many times more likely to adopt than opposite-sex couples, "same-sex marriage improves the prospects of unintended children by increasing the number and resources of prospective adopters." *Id.* at 663. Moreover, "[i]f marriage is better for children who are being brought up by their biological parents, it must be better for children who are being brought up by their adoptive parents." *Id.* at 664.

The concern for the welfare of children that echoes throughout the *Baskin* opinion can be traced in part to the earlier opinion in *Windsor*, in which the Supreme Court struck down, as unconstitutional on equal-protection grounds, section 3 of the federal Defense of Marriage Act (DOMA), which defined the term "marriage" for federal purposes as "mean[ing] only a legal union between one man and one woman as husband and wife," and the term "spouse" as "refer[ring] only to a person of the opposite sex who is a husband or a wife." *Id.* at 2683 (citing 1 U.S.C. § 7). Although DOMA did not affect the prerogative of the states to regulate marriage within their respective jurisdictions, it did deprive same-sex couples whose marriages were considered valid under state law of myriad federal benefits. As Justice Kennedy, writing for the majority, pointed out:

> DOMA's principal effect is to identify a subset of state-sanctioned marriages and make them unequal. The principal purpose is to impose inequality, not for other reasons like

> governmental efficiency .... The differentiation demeans the [same- sex] couple, whose moral and sexual choices the Constitution protects, see *Lawrence* [*v. Texas*], 539 U.S. 558 [(2003)], and whose relationship the State has sought to dignify. And it humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.

Id. at 2694.

Looking more closely at the situation of just one of the same-sex couples from the six cases before us brings Justice Kennedy's words on paper to life. Two of the Michigan plaintiffs, April DeBoer and Jayne Rowse, are unmarried, same-sex partners who have lived as a couple for eight years in a home they own together. They are both trained and employed as nurses, DeBoer in a hospital neonatal department and Rowse in an emergency department at another hospital. Together they are rearing three children but, due to existing provisions in Michigan's adoption laws, DeBoer and Rowse are prohibited from adopting the children as joint parents because they are unmarried. Instead, Rowse alone adopted two children, who are identified in the record as N and J. DeBoer adopted the third child, who is identified as R.

All three children had difficult starts in life, and two of them are now characterized as "special needs" children. N was born on January 25, 2009, to a biological mother who was homeless, had psychological impairments, was unable to care for N, and subsequently surrendered her legal rights to N. The plaintiffs volunteered to care for the boy and brought him into their home following his birth. In November 2009, Rowse completed the necessary steps to adopt N legally.

Rowse also legally adopted J after the boy's foster care agency asked Rowse and DeBoer initially to serve as foster parents and legal guardians for him, despite the uphill climb the baby faced. According to the plaintiffs' amended complaint:

> J was born on November 9, 2009, at Hutzel Hospital, premature at 25 weeks, to a drug addicted prostitute. Upon birth, he weighed 1 pound, 9 ounces and tested positive for marijuana, cocaine, opiates and methadone. His birth mother abandoned him immediately after delivery. J remained in the hospital in the NICU for four months with myriad different health complications, and was not expected to live. If he survived, he was not expected to be able to walk, speak or function on a normal level in any capacity. . . . With Rowse and DeBoer's constant care and medical attention, many of J's physical conditions have resolved.

The third adopted child, R, was born on February 1, 2010, to a 19-year-old girl who received no prenatal care and who gave birth at her mother's home before bringing the infant to the hospital where plaintiff DeBoer worked. R continues to experience issues related to her lack of prenatal care, including delayed gross motor skills. She is in a physical-therapy program to address these problems.

Both DeBoer and Rowse share in the responsibilities of raising the two four-year-olds and the five-year-old. The plaintiffs even have gone so far as to "coordinate their work schedules so that at least one parent is generally home with the children" to attend to their medical needs and perform other parental duties. Given the close-knit, loving environment shared by the plaintiffs and the children, DeBoer wishes to adopt N and J legally as a second parent, and Rowse wishes to adopt R legally as her second parent.

Although Michigan statutes allow married couples and single persons to adopt, those laws preclude unmarried couples from adopting each other's children. As a result, DeBoer and Rowse filed suit in federal district court challenging the Michigan adoption statute, Michigan Compiled Laws § 710.24, on federal equal-protection grounds. They later amended their complaint to include a challenge to the so-called Michigan Marriage Amendment, *see* Mich. Const. art. I, § 25, added to the Michigan state constitution in 2004, after the district court suggested that the plaintiffs' "injury was not traceable to the defendants' enforcement of section [710.24]" but, rather, flowed from the fact that the

plaintiffs "were not married, and any legal form of same-sex union is prohibited" in Michigan. The case went to trial on the narrow legal issue of whether the amendment could survive rational basis review, *i.e.*, whether it proscribes conduct in a manner that is rationally related to any conceivable legitimate governmental purpose.

The bench trial lasted for eight days and consisted of testimony from sociologists, economists, law professors, a psychologist, a historian, a demographer, and a county clerk. Included in the plaintiffs' presentation of evidence were statistics regarding the number of children in foster care or awaiting adoption, as well as testimony regarding the difficulties facing same-sex partners attempting to retain parental influence over children adopted in Michigan. Gary Gates, a demographer, and Vivek Sankaran, the director of both the Child Advocacy Law Clinic and the Child Welfare Appellate Clinic at the University of Michigan Law School, together offered testimony painting a grim picture of the plight of foster children and orphans in the state of Michigan. For example, Sankaran noted that just under 14,000 foster children reside in Michigan, with approximately 3,500 of those being legal orphans. Nevertheless, same-sex couples in the state are not permitted to adopt such children as a couple. Even though one person can legally adopt a child, should anything happen to that adoptive parent, there is no provision in Michigan's legal framework that would "ensure that the children would necessarily remain with the surviving non-legal parent," even if that parent went through the arduous, time-consuming, expensive adoption-approval process. Thus, although the

State of Michigan would save money by moving children from foster care or state care into adoptive families, and although same-sex couples in Michigan are almost three times more likely than opposite-sex couples to be raising an adopted child and twice as likely to be fostering a child, there remains a legal disincentive for same-sex couples to adopt children there.

David Brodzinsky, a developmental and clinical psychologist, for many years on the faculty at Rutgers University, reiterated the testimony that Michigan's ban on adoptions by same-sex couples increases the potential risks to children awaiting adoptions. The remainder of his testimony was devoted to a systematic, statistic-based debunking of studies intimating that children raised in gay or lesbian families, *ipso facto*, are less well-adjusted than children raised by heterosexual couples. Brodzinsky conceded that marriage brings societal legitimatization and stability to children but noted that he found no statistically significant differences in general characteristics or in development between children raised in same-sex households and children raised in opposite-sex households, and that the psychological well-being, educational development, and peer relationships were the same in children raised in gay, lesbian, or heterosexual homes.

Such findings led Brodzinsky to conclude that the gender of a parent is far less important than the quality of the parenting offered and that family processes and resources are far better predictors of child adjustment than the family structure. He testified that those studies

presuming to show that children raised in gay and lesbian families exhibited more adjustment problems and decreased educational achievement were seriously flawed, simply because they relied on statistics concerning children who had come from families experiencing a prior traumatic breakup of a failed heterosexual relationship. In fact, when focusing upon children of lesbian families created through donor insemination, Brodzinsky found no differences in comparison with children from donor insemination in heterosexual families or in comparison with children conceived naturally in heterosexual families. According to Brodzinsky, such a finding was not surprising given the fact that all such children experienced no family disruption in their past. For the same reason, few differences were noted in studies of children adopted at a very early age by same-sex couples and children naturally born into heterosexual families.

Nancy Cott, a professor of history at Harvard University, the director of graduate studies there, and the author of *Public Vows: A History of Marriage and the Nation,* also testified on behalf of the plaintiffs. She explained how the concept of marriage and the roles of the marriage partners have changed over time. As summarized by Cott, the wife's identity is no longer subsumed into that of her husband, interracial marriages are legal now that the antiquated, racist concept of preserving the purity of the white race has fallen into its rightful place of dishonor, and traditional gender-assigned roles are no longer standard. Cott also testified that solemnizing marriages between same-sex partners would create tangible benefits for Michigan citizens because

spouses would then be allowed to inherit without taxation and would be able to receive retirement, Social Security, and veteran's benefits upon the death of an eligible spouse. Moreover, statistics make clear that heterosexual marriages have not suffered or decreased in number as a result of states permitting same-sex marriages. In fact, to the contrary, Cott noted that there exists some evidence that many young people now refuse to enter into heterosexual marriages until their gay or lesbian friends can also enjoy the legitimacy of state-backed marriages.

Michael Rosenfeld, a Stanford University sociologist, testified about studies he had undertaken that confirmed the hypothesis that legitimation of same-sex relationships promotes their stability. Specifically, Rosenfeld's research established that although same-sex couples living in states without recognition of their commitments to each other did have a higher break- up rate than heterosexual married couples, the break-up rates of opposite-sex married couples and same-sex couples in recognized civil unions were virtually identical. Similarly, the break-up rates of same-sex couples not living in a state-recognized relationship approximated the break-up rate of heterosexual couples cohabiting without marriage.

Rosenfeld also criticized the methodology of studies advanced by the defendants that disagreed with his conclusions. According to Rosenfeld, those critical studies failed to take into account the stability or lack of stability of the various groups examined. For example, he testified that one such study compared children who had experienced no adverse family transitions with

children who had lived through many such traumatic family changes. Not surprisingly, children from broken homes with lower-income-earning parents who had less education and lived in urban areas performed more poorly in school than other children. According to Rosenfeld, arguments to the contrary that failed to control for such differences, taken to their extreme, would lead to the conclusion that only high-income individuals of Asian descent who earned advanced degrees and lived in suburban areas should be allowed to marry.

To counteract the testimony offered by the plaintiffs' witnesses, the defendants presented as witnesses the authors or co-authors of three studies that disagreed with the conclusions reached by the plaintiffs' experts. All three studies, however, were given little credence by the district court because of inherent flaws in the methods used or the intent of the authors. For example, the New Family Structures Study reported by Mark Regnerus, a sociologist at the University of Texas at Austin, admittedly relied upon interviews of children from gay or lesbian families who were products of broken heterosexual unions in order to support a conclusion that living with such gay or lesbian families adversely affected the development of the children. Regnerus conceded, moreover, that his own department took the highly unusual step of issuing the following statement on the university website in response to the release of the study:

> [Dr. Regnerus's opinions] do not reflect the views of the sociology department of the University of Texas at Austin. Nor do they

> reflect the views of the American Sociological Association which takes the position that the conclusions he draws from his study of gay parenting are fundamentally flawed on conceptual and methodological grounds and that the findings from Dr. Regnerus'[s] work have been cited inappropriately in efforts to diminish the civil rights and legitimacy of LBGTQ partners and their families.

In fact, the record before the district court reflected clearly that Regnerus's study had been funded by the Witherspoon Institute, a conservative "think tank" opposed to same-sex marriage, in order to vindicate "the traditional understanding of marriage."

Douglas Allen, the co-author of another study with Catherine Pakaluk and Joe Price, testified that children raised by same-sex couples graduated from high school at a significantly lower rate than did children raised by heterosexual married couples. On cross-examination, however, Allen conceded that "many of those children who . . . were living in same-sex households had previously lived in an opposite sex household where their parents had divorced, broken up, some kind of separation or transition." Furthermore, Allen provided evidence of the bias inherent in his study by admitting that he believed that engaging in homosexual acts "means eternal separation from God, in other words[,] going to hell."

The final study advanced by the defendants was conducted by Loren Marks, a professor in human ecology at Louisiana State University, in what was admittedly

an effort to counteract the "groupthink" portrayed by perceived "liberal psychologists." But although Marks criticized what he perceived to be "a pronounced liberal lean on social issues" by many psychologists, he revealed his own bias by acknowledging that he was a lay clergyman in the Church of Jesus Christ of Latter Day Saints (LDS) and that the LDS directive "for a couple to be married by God's authority in God's house, the holy temple, and then to have children per the teaching that God's commandment for his children to multiply and replenish the earth remains in force."

Presented with the admitted biases and methodological shortcomings prevalent in the studies performed by the defendant's experts, the district court found those witnesses "largely unbelievable" and not credible. *DeBoer v. Snyder*, 973 F. Supp.2d 757, 768 (E.D. Mich. 2014). Proceeding to a legal analysis of the core issue in the litigation, the district court then concluded that the proscriptions of the marriage amendment are not rationally related to any legitimate state interest. Addressing the defendants' three asserted rational bases for the amendment,[2] the district court found each such proffered justification without merit.

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2. In the district court, the state did not advance an "unintended pregnancy" argument, nor was that claim included in the state's brief on appeal, although counsel did mention it during oral argument. In terms of "optimal environment," the state emphasized the need for children to have "both a mom and a dad," because "men and women are different," and to have a "biological connection to their parents."

Principally, the court determined that the amendment is in no way related to the asserted state interest in ensuring an optimal environment for child-rearing. The testimony adduced at trial clearly refuted the proposition that, all things being equal, same-sex couples are less able to provide for the welfare and development of children. Indeed, marriage, whether between same- sex or opposite-sex partners, increases stability within the family unit. By permitting same-sex couples to marry, that stability would not be threatened by the death of one of the parents. Even more damning to the defendants' position, however, is the fact that the State of Michigan allows heterosexual couples to marry even if the couple does not wish to have children, even if the couple does not have sufficient resources or education to care for children, even if the parents are pedophiles or child abusers, and even if the parents are drug addicts.

Furthermore, the district court found no reason to believe that the amendment furthers the asserted state interests in "proceeding with caution" before "altering the traditional definition of marriage" or in "upholding tradition and morality." As recognized by the district court, there is no legitimate justification for delay when constitutional rights are at issue, and even adherence to religious views or tradition cannot serve to strip citizens of their right to the guarantee of equal protection under the law.

Finally, and relatedly, the district court acknowledged that the regulation of marriage traditionally has been seen as part of a state's police power but concluded

that this fact cannot serve as an excuse to ignore the constitutional rights of individual citizens. Were it otherwise, the court observed, the prohibition in Virginia and in many other states against miscegenation still would be in effect today. Because the district court found that "regardless of whoever finds favor in the eyes of the most recent majority, the guarantee of equal protection must prevail," the court held the amendment and its implementing statutes "unconstitutional because they violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution." *Id.* at 775.

If I were in the majority here, I would have no difficulty in affirming the district court's opinion in *DeBoer*. The record is rich with evidence that, as a pragmatic matter, completely refutes the state's effort to defend the ban against same-sex marriage that is inherent in the marriage amendment. Moreover, the district court did a masterful job of supporting its legal conclusions. Upholding the decision would also control the resolution of the other five cases that were consolidated for purposes of this appeal.

Is a thorough explication of the legal basis for such a result appropriate? It is, of course. Is it necessary? In my judgment, it is not, given the excellent—even eloquent—opinion in *DeBoer* and in the opinions that have come from four other circuits in the last few months that have addressed the same issues involved here: *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014) (holding Utah statutes and state constitutional amendment banning same-sex marriage unconstitutional under the

Fourteenth Amendment); *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014) (same, Virginia); *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014) (same, Indiana statute and Wisconsin state constitutional amendment); and *Latta v. Otter*, Nos. 14-35420, 14-35421, 12- 17668, 2014 WL 4977682 (9th Cir. Oct. 7, 2014) (same, Idaho and Nevada statutes and state constitutional amendments.[3]

Kitchen was decided primarily on the basis of substantive due process, based on the Tenth Circuit's determination that under Supreme Court precedents, the right to marry includes the right to marry the person of one's choice. The court located the source of that right in Supreme Court opinions such as *Maynard v. Hill*, 125 U.S. 190, 205 (1888) (recognizing marriage as "the most important relation in life"); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (holding that the liberty protected by the Fourteenth Amendment includes the freedom "to marry, establish a home and bring up children"); *Loving*, 388 U.S. at 12 ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."); *Zablocki*, 434 U.S. at 384 (recognizing that "the right to marry is of fundamental importance for all

3. On October 6, the Supreme Court denied *certiorari* and lifted stays in *Kitchen*, *Bostic*, and *Baskin*, putting into effect the district court injunctions entered in each of those three cases. A stay of the mandate in the Idaho case in *Latta* also has been vacated, and the appeal in the Nevada case is not being pursued. As a result, marriage licenses are currently being issued to same-sex couples throughout most—if not all—of the Fourth, Seventh, Ninth, and Tenth Circuits.

individuals"); and *Turner v. Safley*, 482 U.S. 78, 95-96 (1987) (in the context of a prison inmate's right to marry, "[such] marriages are expressions of emotional support and public commitment[,] . . . elements [that] are important and significant aspects of the marital relationship" even in situations in which procreation is not possible). *Kitchen*, 755 F.3d at 1209-11. The Tenth Circuit also found that the Utah laws violated equal protection, applying strict scrutiny because the classification in question impinged on a fundamental right. In doing so, the court rejected the state's reliance on various justifications offered to establish a compelling state interest in denying marriage to same-sex couples, finding "an insufficient causal connection" between the prohibition on same-sex marriage and the state's "articulated goals," which included a purported interest in fostering biological reproduction, encouraging optimal childrearing, and maintaining gendered parenting styles. *Id.* at 1222. The court also rejected the state's prediction that legalizing same-sex marriage would result in social discord, citing *Watson v. City of Memphis*, 373 U.S. 526, 535 (1963) (rejecting "community confusion and turmoil" as a reason to delay desegregation of public parks). *Id.* at 1227.

The Fourth Circuit in *Bostic* also applied strict scrutiny to strike down Virginia's same- sex-marriage prohibitions as infringing on a fundamental right, citing *Loving* and observing that "[o]ver the decades, the Supreme Court has demonstrated that the right to marry is an expansive liberty interest that may stretch to accommodate changing societal norms." 760 F.3d at 376. In a thoughtful opinion, the court analyzed each of

the state's proffered interests: maintaining control of the "definition of marriage," adhering to the "tradition of opposite-sex marriage," "protecting the institution of marriage," "encouraging responsible procreation," and "promoting the optimal childrearing environment." *Id.* at 378. In each instance, the court found that there was no link between the state's purported "compelling interest" and the exclusion of same-sex couples "from participating fully in our society, which is precisely the type of segregation that the Fourteenth Amendment cannot countenance." *Id.* at 384. As to the state's interest in federalism, the court pointed to the long-recognized principle that "[s]tate laws defining and regulating marriage, of course, must respect the constitutional rights of persons," *id.* at 379 (quoting *Windsor*, 133 S. Ct. at 2691), and highlighted *Windsor*'s reiteration of "*Loving*'s admonition that the states must exercise their authority without trampling constitutional guarantees." *Id.* Addressing the state's contention that marriage under state law should be confined to opposite-sex couples because unintended pregnancies cannot result from same-sex unions, the court noted that "[b]ecause same-sex couples and infertile opposite-sex couples are similarly situated, the Equal Protection Clause counsels against treating these groups differently." *Id.* at 381-82 (citing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985)).

The Seventh Circuit's *Baskin* opinion is firmly grounded in equal-protection analysis. The court proceeded from the premise that "[d]iscrimination by a state or the federal government against a minority, when

based on an immutable characteristic of the members of that minority (most familiarly skin color and gender), and occurring against an historical background of discrimination against the persons who have that characteristic, makes the discriminatory law or policy constitutionally suspect." 766 F.3d at 654. But the court also found that "discrimination against same-sex couples is irrational, and therefore unconstitutional even if the discrimination is not subjected to heightened scrutiny." *Id.* at 656. This conclusion was based on the court's rejection of "the only rationale that the states put forth with any conviction—that same-sex couples and their children don't *need* marriage because same-sex couples can't *produce* children, intended or unintended," an argument "so full of holes that it cannot be taken seriously." *Id.* (emphasis in original). The court therefore found it unnecessary to engage in "the more complex analysis found in more closely balanced equal-protection cases" or under the due process clause of the Fourteenth Amendment." *Id.* at 656-57.

The Ninth Circuit's opinion in *Latta* also focuses on equal-protection principles in finding that Idaho's and Nevada's statutes and constitutional amendments prohibiting same-sex marriage violate the Fourteenth Amendment. Because the Ninth Circuit had recently held in *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 481 (9th Cir. 2014), that classifications based on sexual orientation are subject to heightened scrutiny, a conclusion the court drew from its reading of *Windsor* to require assessment more rigorous than rational-basis review, the path to finding an equal-protection violation was less than arduous. As did the Tenth Circuit in

Kitchen, the court in *Latta* found it "wholly illogical" to think that same-sex marriage would affect opposite-sex couples' choices with regard to procreation. *Latta*, 2014 WL 4977682, *5 (citing *Kitchen*, 755 F.3d at 1223).

These four cases from our sister circuits provide a rich mine of responses to every rationale raised by the defendants in the Sixth Circuit cases as a basis for excluding same-sex couples from contracting valid marriages. Indeed, it would seem unnecessary for this court to do more than cite those cases in affirming the district courts' decisions in the six cases now before us. Because the correct result is so obvious, one is tempted to speculate that the majority has purposefully taken the contrary position to create the circuit split regarding the legality of same- sex marriage that could prompt a grant of *certiorari* by the Supreme Court and an end to the uncertainty of status and the interstate chaos that the current discrepancy in state laws threatens. Perhaps that is the case, but it does not relieve the dissenting member of the panel from the obligation of a rejoinder.

Baker v. Nelson

If ever there was a legal "dead letter" emanating from the Supreme Court, *Baker v. Nelson*, 409 U.S. 810 (1972), is a prime candidate. It lacks only a stake through its heart. Nevertheless, the majority posits that we are bound by the Court's aging one-line order denying review of an appeal from the Minnesota Supreme Court "for want of a substantial federal question." As the majority notes, the question concerned the state's refusal to issue a marriage license to a same-sex couple,

but the decision came at a point in time when sodomy was legal in only one state in the country, Illinois, which had repealed its anti-sodomy statute in 1962. The Minnesota statute criminalizing same-sex intimate relations was not struck down until 2001, almost 30 years after *Baker* was announced.[4] The Minnesota Supreme Court's denial of relief to a same-sex couple in 1971 and the United States Supreme Court's conclusion that there was no *substantial* federal question involved in the appeal thus is unsurprising. As the majority notes— not facetiously, one hopes—"that was then; this is now."

At the same time, the majority argues that we are bound by the eleven words in the order, despite the Supreme Court silence on the matter in the 42 years since it was issued. There was no recognition of *Baker* in *Romer v. Evans*, 517 U.S. 620 (1996), nor in *Lawrence v. Texas*, 539 U.S. 558 (2003), and not in *Windsor*, despite the fact that the dissenting judge in the Second Circuit's opinion in *Windsor* made the same argument that the majority makes in this case. *See Windsor v. United States*, 699 F.3d 169, 189, 192-95 (2d Cir. 2012) (Straub, J., dissenting in part and concurring in part). And although the argument was vigorously pressed by the DOMA proponents in their Supreme Court brief in *Windsor*,[5] neither Justice Kennedy

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4. *See Doe v. Ventura*, No. 01-489, 2001 WL 543734 (D. Ct. of Hennepin Cnty. May 15, 2001) (unreported).

5. *See United States v. Windsor*, Brief on the Merits for Respondent the Bipartisan Legal Advisory Group of the U.S. House of Representatives, No. 12-307, 2013 WL 267026 at 16-19, 25-26 (Jan. 22, 2013).

in his opinion for the court nor any of the four dissenting judges in their three separate opinions mentioned *Baker*. In addition, the order was not cited in the three orders of October 6, 2014, denying *certiorari* in *Kitchen*, *Bostic*, and *Baskin*. If this string of cases—*Romer*, *Lawrence*, *Windsor*, *Kitchen*, *Bostic*, and *Baskin*—does not represent the Court's overruling of *Baker sub silentio*, it certainly creates the "doctrinal development" that frees the lower courts from the strictures of a summary disposition by the Supreme Court. *See Hicks v. Miranda*, 422 U.S. 332, 344 (1975) (internal quotation marks and citation omitted).

Definition of Marriage

The majority's "original meaning" analysis strings together a number of case citations but can tell us little about the Fourteenth Amendment, except to assure us that "the people who adopted the Fourteenth Amendment [never] understood it to require the States to change the definition of marriage." The quick answer is that they undoubtedly did not understand that it would also require school desegregation in 1955 or the end of miscegenation laws across the country, beginning in California in 1948 and culminating in the *Loving* decision in 1967. Despite a civil war, the end of slavery, and ratification of the Fourteenth Amendment in 1868, extensive litigation has been necessary to achieve even a modicum of constitutional protection from discrimination based on race, and it has occurred primarily by judicial decree, not by the democratic election process to which the majority suggests we should defer regarding discrimination based on sexual orientation.

Moreover, the majority's view of marriage as "a social institution defined by relationships between men and women" is wisely described in the plural. There is not now and never has been a universally accepted definition of marriage. In early Judeo-Christian law and throughout the West in the Middle Ages, marriage was a religious obligation, not a civil status. Historically, it has been pursued primarily as a political or economic arrangement. Even today, polygynous marriages outnumber monogamous ones—the practice is widespread in Africa, Asia, and the Middle East, especially in countries following Islamic law, which also recognizes temporary marriages in some parts of the world. In Asia and the Middle East, many marriages are still arranged and some are even coerced.

Although some of the older statutes regarding marriage cited by the majority do speak of the union of "a man and a woman," the picture hardly ends there. When Justice Alito noted in *Windsor* that the opponents of DOMA were "implicitly ask[ing] us to endorse [a more expansive definition of marriage and] to reject the traditional view," *Windsor*, 133 S. Ct. at 2718 (Alito, J., dissenting), he may have been unfamiliar with all that the "traditional view" entailed, especially for women who were subjected to coverture as a result of Anglo-American common law. Fourteenth Amendment cases decided by the Supreme Court in the years since 1971 that "invalidat[ed] various laws and policies that categorized by sex have been part of a transformation that has altered the very institution at the heart of this case, marriage." *Latta*, 2014 WL 4977682, at *20 (Berzon, J., concurring).

Historically, marriage was a profoundly unequal institution, one that imposed distinctly different rights and obligations on men and women. The law of coverture, for example, deemed the "the husband and wife . . . one person," such that "the very being or legal existence of the woman [was] suspended . . . or at least [was] incorporated and consolidated into that of the husband" during the marriage. 1 William Blackstone, Commentaries on the Laws of England 441 (3d rev. ed. 1884). Under the principles of coverture, "a married woman [was] incapable, without her husband's consent, of making contracts . . . binding on her or him." *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring). She could not sue or be sued without her husband's consent. *See, e.g.*, Nancy F. Cott, *Public Vows: A History of Marriage and the Nation* 11–12 (2000). Married women also could not serve as the legal guardians of their children. *Frontiero v. Richardson*, 411 U.S. 677, 685 (1973) (plurality op.).

Marriage laws further dictated economically disparate roles for husband and wife. In many respects, the marital contract was primarily understood as an economic arrangement between spouses, whether or not the couple had or would have children. "Coverture expressed the legal essence of marriage as reciprocal: a husband was bound to support

his wife, and in exchange she gave over her property and labor." Cott, *Public Vows,* at 54. That is why "married women traditionally were denied the legal capacity to hold or convey property . . . ." *Frontiero*, 411 U.S. at 685. Notably, husbands owed their wives support even if there were no children of the marriage. *See, e.g.*, Hendrik Hartog, *Man and Wife in America: A History* 156 (2000).

There was also a significant disparity between the rights of husbands and wives with regard to physical intimacy. At common law, "a woman was the sexual property of her husband; that is, she had a duty to have intercourse with him." John D'Emilio & Estelle B. Freedman, *Intimate Matters: A History of Sexuality in America* 79 (3d ed. 2012). Quite literally, a wife was legally "the possession of her husband, . . . [her] husband's property." Hartog, *Man and Wife in America*, at 137. Accordingly, a husband could sue his wife's lover in tort for "entic[ing]" her or "alienat[ing]" her affections and thereby interfering with his property rights in her body and her labor. *Id.* A husband's possessory interest in his wife was undoubtedly also driven by the fact that, historically, marriage was the only legal site for licit sex; sex outside of marriage was almost universally criminalized. *See, e.g.*, Ariela R. Dubler, *Immoral Purposes: Marriage and the Genus of Illicit Sex*, 115 Yale L.J. 756, 763–64 (2006).

Notably, although sex was strongly presumed to be an essential part of marriage, the ability to procreate was generally not. *See, e.g.*, Chester Vernier, American Family Laws: A Comparative Study of the Family Law of the Forty-Eight American States, Alaska, the District of Columbia, and Hawaii (to Jan. 1, 1931) (1931) I § 50, 239–46 (at time of survey, grounds for annulment typically included impotency, as well as incapacity due to minority or "non-age"; lack of understanding and insanity; force or duress; fraud; disease; and incest; but not inability to conceive); II § 68, at 38–39 (1932) (at time of survey, grounds for divorce included "impotence"; vast majority of states "generally held that impotence. . . does not mean sterility but must be of such a nature as to render complete sexual intercourse practically impossible"; and only Pennsylvania "ma[d]e sterility a cause" for divorce).

The common law also dictated that it was legally impossible for a man to rape his wife. Men could not be prosecuted for spousal rape. A husband's "incapacity" to rape his wife was justified by the theory that "'the marriage constitute[d] a blanket consent to sexual intimacy which the woman [could] revoke only by dissolving the marital relationship.'" *See, e.g.*, Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 Calif. L. Rev 1373, 1376 n.9 (2000) (quoting Model Penal Code and

> Commentaries, § 213.1 cmt. 8(c), at 342 (Official Draft and Revised Comments 1980)).
>
> Concomitantly, dissolving the marital partnership via divorce was exceedingly difficult. Through the mid-twentieth century, divorce could be obtained only on a limited set of grounds, if at all. At the beginning of our nation's history, several states did not permit full divorce except under the narrowest of circumstances; separation alone was the remedy, even if a woman could show "cruelty endangering life or limb." Peter W. Bardaglio, *Reconstructing the Household: Families, Sex, and the Law in the Nineteenth-Century South* 33 (1995); *see also id.* 32–33. In part, this policy dovetailed with the grim fact that, at English common law, and in several states through the beginning of the nineteenth century, "a husband's prerogative to chastise his wife"—that is, to beat her short of permanent injury—was recognized as his marital right. Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 Yale L.J. 2117, 2125 (1996).

Id. at *20-21.

Women were not the only class deprived of equal status in "traditional marriage." Until the end of the Civil War in 1865, slaves were prohibited from contracting legal marriages and often resorted to "jumping the broomstick" to mark a monogamous conjugal relationship. Informal

"slave marriage" was the rule until the end of the war, when Freedmen's Bureaus began issuing marriage licenses to former slaves who could establish the existence of long-standing family relationships, despite the fact that family members were sometimes at great distances from one another. The ritual of jumping the broomstick, thought of in this country in terms of slave marriages, actually originated in England, where civil marriages were not available until enactment of the Marriage Act of 1837. Prior to that, the performance of valid marriages was the sole prerogative of the Church of England, unless the participants were Quakers or Jews. The majority's admiration for "traditional marriage" thus seems misplaced, if not naïve. The legal status has been through so many reforms that the marriage of same-sex couples constitutes merely the latest wave in a vast sea of change.

Rational-Basis Review.

The principal thrust of the majority's rational-basis analysis is basically a reiteration of the same tired argument that the proponents of same-sex-marriage bans have raised in litigation across the country: marriage is about the regulation of "procreative urges" of men and women who therefore do not need the "government's encouragement to have sex" but, instead, need encouragement to "create and maintain stable relationships within which children may flourish." The majority contends that exclusion of same-sex couples from marriage must be considered rational based on "the biological reality that couples of the same sex do not have children in the same way as couples of opposite sexes

and that couples of the same sex do not run the risk of unintended children." As previously noted, however, this argument is one that an eminent jurist has described as being "so full of holes that it cannot be taken seriously." *Baskin*, 766 F.3d at 656 (Posner, J.).

At least my colleagues are perceptive enough to acknowledge that "[g]ay couples, no less than straight couples, are capable of sharing such relationships . . . [and] are capable of raising stable families." The majority is even persuaded that the "quality of [same-sex] relationships, and the capacity to raise children within them, turns not on sexual orientation but on individual choices and individual commitment." All of which, the majority surmises, "supports the policy argument made by many that marriage laws should be extended to gay couples." But this conclusion begs the question: why reverse the judgments of four federal district courts, in four different states, and in six different cases that would do just that?

There are apparently two answers; first, "let the people decide" and, second, "give it time." The majority posits that "just as [same-sex marriage has been adopted in] nineteen states and the District of Columbia," the change-agents in the Sixth Circuit should be "elected legislators, not life-tenured judges." Of course, this argument fails to acknowledge the impracticalities involved in amending, re-amending, or un-amending a state constitution.[6] More

6. In Tennessee, for example, a proposed amendment must first be approved by a simple majority of both houses. In the succeeding legislative session, which can occur as long as a

to the point, under our constitutional system, the courts are assigned the responsibility of determining individual rights under the Fourteenth Amendment, regardless of popular opinion or even a plebiscite. As the Supreme Court has noted, "It is plain that the electorate as a whole, whether by referendum or otherwise, could not order [government] action violative of the Equal Protection Clause, and the [government] may not avoid the strictures of that Clause by deferring to the wishes or objections of some fraction of the body politic." *City of Cleburne*, 473 U.S. at 448 (internal citation omitted).

Moreover, as it turns out, legalization of same-sex marriage in the "nineteen states and the District of Columbia" mentioned by the majority was not uniformly the result of popular vote or legislative enactment. Nine states now permit same-sex marriage because of *judicial* decisions, both state and federal: Massachusetts, Connecticut, Iowa, New Mexico, and Colorado (state supreme court decisions); New Jersey (state superior court decision not appealed by defendant); California

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year or more later, the same proposed amendment must then be approved "by two-thirds of all the members elected to each house." Tenn. Const. art. XI,§ 3. The proposed amendment is then presented "to the people at the next general election in which a Governor is to be chosen," *id.*, which can occur as long as three years or more later. If a majority of all citizens voting in the gubernatorial election also approve of the proposed amendment, it is considered ratified. The procedure for amending the constitution by convention can take equally long and is, if anything, more complicated. In Michigan, a constitutional convention, one of three methods of amendment, can be called no more often than every 16 years. *See* Mich. Const. art. XII, § 3.

(federal district court decision allowed to stand in ruling by United States Supreme Court); and Oregon and Pennsylvania (federal district court decisions not appealed by defendants). Despite the majority's insistence that, as life-tenured judges, we should step aside and let the voters determine the future of the state constitutional provisions at issue here, those nine federal and state courts have seen no acceptable reason to do so. In addition, another 16 states have been or soon will be added to the list, by virtue of the Supreme Court's denial of *certiorari* review in *Kitchen*, *Bostick*, and *Baskin*, and the Court's order dissolving the stay in *Latta*. The result has been the issuance of hundreds—perhaps thousands—of marriage licenses in the wake of those orders. Moreover, the 35 states that are now positioned to recognize same-sex marriage are comparable to the 34 states that permitted interracial marriage when the Supreme Court decided *Loving*. If the majority in this case is waiting for a tipping point, it seems to have arrived.

The second contention is that we should "wait and see" what the fallout is in the states where same-sex marriage is now legal. The majority points primarily to Massachusetts, where same-sex couples have had the benefit of marriage for "only" ten years—not enough time, the majority insists, to know what the effect on society will be. But in the absence of hard evidence that the sky has actually fallen in, the "states as laboratories of democracy" metaphor and its pitch for restraint has little or no resonance in the fast-changing scene with regard to same-sex marriage. Yet, whenever the expansion of a constitutional right is proposed, "proceed with caution" seems to be the universal mantra of the

opponents. The same argument was made by the State of Virginia in *Loving*. And, in *Frontiero v. Richardson*, 411 U.S. 677 (1973), the government asked the Court to postpone applying heightened scrutiny to allegations of gender discrimination in a statute denying equal benefits to women until the Equal Rights Amendment could be ratified. If the Court had listened to the argument, we would, of course, still be waiting. One is reminded of the admonition in Martin Luther King, Jr.'s "Letter from Birmingham Jail" (1963): "For years now I have heard the word "Wait"! . . . [But h]uman progress never rolls in on wheels of inevitability . . . [and] time itself becomes an ally of the forces of social stagnation."

Animus

Finally, there is a need to address briefly the subject of unconstitutional animus, which the majority opinion equates only with actual malice and hostility on the part of members of the electorate. But in many instances involving rational-basis review, the Supreme Court has taken a more objective approach to the classification at issue, rather than a subjective one. Under such an analysis, it is not necessary for a court to divine individual malicious intent in order to find unconstitutional animus. Instead, the Supreme Court has instructed that an exclusionary law violates the Equal Protection Clause when it is based not upon relevant facts, but instead upon only a general, ephemeral distrust of, or discomfort with, a particular group, for example, when legislation is justified by the bare desire to exclude an unpopular group from a social institution or arrangement. In *City of Cleburne*, for example, the Court struck down a zoning regulation

that was justified simply by the "negative attitude" of property owners in the community toward individuals with intellectual disabilities, not necessarily by actual malice toward an unpopular minority. In doing so, the Court held that "the City may not avoid the strictures of the [Equal Protection] Clause by deferring to the wishes or objections of some fraction of the body politic," 473 U.S. at 448, and cited *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984), for the proposition that "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." In any event, as the majority here concedes, we as a country have such a long history of prejudice based on sexual orientation that it seems hypocritical to deny the existence of unconstitutional animus in the rational-basis analysis of the cases before us.

To my mind, the soundest description of this analysis is found in Justice Stevens's separate opinion in *City of Cleburne*:

> In every equal protection case, we have to ask certain basic questions. What class is harmed by the legislation, and has it been subjected to a "tradition of disfavor" by our laws? What is the public purpose that is being served by the law? What is the characteristic of the disadvantaged class that justifies the disparate treatment? In most cases the answer to these questions will tell us whether the statute has a "rational basis."

Id. at 453 (Stevens, J., concurring) (footnotes omitted). I would apply just this analysis to the constitutional

amendments and statutes at issue in these cases, confident that the result of the inquiry would be to affirm the district courts' decisions in all six cases. I therefore dissent from the majority's decision to overturn those judgments.

Today, my colleagues seem to have fallen prey to the misguided notion that the intent of the framers of the United States Constitution can be effectuated only by cleaving to the legislative will and ignoring and demonizing an independent judiciary. Of course, the framers presciently recognized that two of the three co-equal branches of government were representative in nature and necessarily would be guided by self-interest and the pull of popular opinion. To restrain those natural, human impulses, the framers crafted Article III to ensure that rights, liberties, and duties need not be held hostage by popular whims.

More than 20 years ago, when I took my oath of office to serve as a judge on the United States Court of Appeals for the Sixth Circuit, I solemnly swore to "administer justice without respect to persons," to "do equal right to the poor and to the rich," and to "faithfully and impartially discharge and perform all the duties incumbent upon me . . . under the Constitution and laws of the United States." *See* 28 U.S.C. § 453. If we in the judiciary do not have the authority, and indeed the responsibility, to right fundamental wrongs left excused by a majority of the electorate, our whole intricate, constitutional system of checks and balances, as well as the oaths to which we swore, prove to be nothing but shams.

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF KENTUCKY AT LOUISVILLE, FILED JULY 1, 2014

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CIVIL ACTION NO. 3:13-CV-750-H

TIMOTHY LOVE, *et al.*,

Plaintiffs,

v.

STEVE BESHEAR,

Defendant.

July 1, 2014, Decided
July 1, 2014, Filed

MEMORANDUM OPINION AND ORDER

Two same-sex couples who wish to marry in Kentucky have challenged Kentucky's constitutional and statutory provisions that prohibit them from doing so. *See* KY. CONST. § 233A; KY. REV. STAT. ANN. §§ 402.005, .020(1)(d) (West 2014).[1] On February 12, 2014, this Court held that, insofar

1. Sections 402.040(2) and .045 were also challenged, but these provisions address "[m]arriage in another state" and

as these provisions denied state recognition to same-sex couples who were validly married outside Kentucky, they violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *See Bourke v. Beshear*, 3:13-CV-750-H, 2014 U.S. Dist. LEXIS 17457, 2014 WL 556729 (W.D. Ky. Feb. 12, 2014). Since then, these four Plaintiffs have intervened to assert their own related claims.[2]

Since the Supreme Court's landmark decision in *United States v. Windsor*, 133 S.Ct. 2675, 186 L. Ed. 2d 808 (2013), every federal court to consider state bans on

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the recognition and enforceability of "[s]ame-sex marriage [solemnized] in another jurisdiction," respectively. KY. REV. STAT. ANN. §§ 402.040(2), .045 (West 2014). These sections do not seem to affect Plaintiffs' right to marry in the Commonwealth. To the extent that they do, this Memorandum Opinion and Order likewise applies to them.

2. On February 26, the Court granted Plaintiffs Timothy Love, Lawrence Ysunza, Maurice Blanchard, and Dominique James's motion to intervene. On the same date, the *Bourke* order became final. On February 28, the Court stayed its enforcement to allow the state to prepare for compliance, and on March 19, the Court extended the stay pending resolution of the state's appeal before the Sixth Circuit Court of Appeals. On March 21, the Court dismissed Defendant Attorney General of Kentucky Jack Conway from this action upon his motion indicating that he would no longer defend the challenged provisions.

As *amici curiae*, the American Civil Liberties Union of Kentucky submitted a brief supporting the intervening Plaintiffs, and the Family Trust Foundation of Kentucky, Inc. submitted a brief in opposition.

same-sex marriage and recognition has declared them unconstitutional. Most of these courts have done so under both the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.[3] This Court's opinion differs in that it does not determine whether Kentucky's laws interfere with a fundamental right. The Court's chief reason for declining to do so is its careful reading of *Windsor*, which suggests that the Supreme Court is unwilling and unlikely to view the right Plaintiffs seek to exercise as fundamental under the Constitution.

For the reasons that follow, this Court holds that the Commonwealth's exclusion of same-sex couples from civil marriage violates the Equal Protection Clause.

I.

This case arises from the same history discussed at length in *Bourke*, which the Court incorporates by reference. *See* 2014 U.S. Dist. LEXIS 17457, 2014 WL 556729, at *1-2. Briefly, in 1998, Kentucky enacted

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3. The Fourteenth Amendment to the U.S. Constitution provides, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

statutory provisions that defined marriage as between one man and one woman and voided marriages between persons of the same sex.[4] Six years later, in 2004, Kentucky citizens voted to approve the following state constitutional amendment:

> Only a marriage between one man and one woman shall be valid or recognized as a marriage in Kentucky. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized.

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4. The pertinent text of these provisions is:

> 402.005: As used and recognized in the law of the Commonwealth, "marriage" refers only to the civil status, condition, or relation of one (1) man and one (1) woman united in law for life, for the discharge to each other and the community of the duties legally incumbent upon those whose association is founded on the distinction of sex.
>
> 402.020(1): Marriage is prohibited and void: (d) Between members of the same sex.
>
> 402.040(2): A marriage between members of the same sex is against Kentucky public policy and shall be subject to the prohibitions established in KRS 402.045.
>
> 402.045: (1) A marriage between members of the same sex which occurs in another jurisdiction shall be void in Kentucky. (2) Any rights granted by virtue of the marriage, or its termination, shall be unenforceable in Kentucky courts.

Ky. Rev. Stat. Ann. §§ 402.005-.045 (West 2014).

KY. CONST. § 233A. Plaintiffs here are Kentucky citizens who want to marry in Kentucky but are prevented from doing so under these laws because they are same-sex couples.

Timothy Love and Lawrence Ysunza reside in Louisville, Kentucky and have lived together for 34 years. On February 13, 2014, they requested a Kentucky marriage license from the Jefferson County Clerk's Office, presenting the requisite identification and filing fees. The Commonwealth refused to issue them a license because they are a same-sex couple. They allege that their inability to obtain a marriage license has affected them in many ways. For example, last summer, Love underwent emergency heart surgery, which had to be delayed in order to execute documents allowing Ysunza access and decision-making authority for Love. As another surgery for Love is imminent, the couple fears what will happen if complications arise. The couple fears that healthcare providers and assisted living facilities may not allow them to be together or care for each other as they age. In addition, the couple has had difficulties with professional service providers; they found out after they purchased their home that their real estate attorney disregarded their request to include survivorship rights in the deed.

Maurice Blanchard and Dominique James reside in Louisville, Kentucky and have been together for ten years. On June 3, 2006, they had a religious marriage ceremony in Louisville. On January 22, 2013, they requested a Kentucky marriage license from the Jefferson County Clerk's Office, presenting the requisite identification and

filing fees. The Commonwealth refused to issue them a license because they are a same-sex couple. They too have faced challenges as a result. For example, they allege that their neighborhood association will not recognize them as a married couple because Kentucky does not allow them to marry. In addition, their inability to obtain parental rights as a married couple has deterred them from adopting children. They also share a number of Love and Ysunza's concerns.

Plaintiffs assert that Kentucky's laws violate the Equal Protection Clause by denying them a marriage license and refusing them the accompanying benefits that opposite-sex spouses enjoy. *See Bourke*, 2014 U.S. Dist. LEXIS 17457, 2014 WL 556729, at *2-3 (describing these benefits in detail). These benefits include but are not limited to: lower income and estate taxes, leave from work under the Family and Medical Leave Act, family insurance coverage, the ability to adopt children as a couple, the participation in critical legal and medical decisions on behalf of one's partner, and, perhaps most importantly, the intangible and emotional benefits of civil marriage. Plaintiffs seek an order declaring the state's pertinent constitutional and statutory provisions unconstitutional and enjoining their enforcement.

Although many courts have discussed the Equal Protection and Due Process Clauses in tandem, ultimately, this Court sees this case as more clearly about the imposition of a classification than about the contours of a due process right. The constitutional question is whether a state can lawfully exclude a certain class of individuals,

i.e. homosexual persons, from the status and dignity of marriage. The Court will resolve Plaintiffs' claims solely on equal protection grounds.[5]

No one disputes that Kentucky's laws treat same-sex couples differently than opposite-sex couples who wish to marry in Kentucky. No one disputes that the equal protection issue before the Court involves purely questions of law. Therefore, Plaintiffs' challenge is properly resolved on summary judgment. The Court must decide whether Kentucky's laws violate Plaintiffs' federal constitutional rights.

II.

Before reaching the constitutional issues, the Court must address Defendant's preliminary argument that *Baker v. Nelson*, 409 U.S. 810, 93 S. Ct. 37, 34 L. Ed. 2d 65 (1972), bars Plaintiffs' challenge to the Commonwealth's ban on same-sex marriage.[6] In *Baker*, the Supreme Court dismissed "for want of a substantial federal question" a challenge to a Minnesota Supreme Court ruling, which

5. Plaintiffs also allege that Kentucky's laws violate (1) the Due Process Clause of the Fourteenth Amendment, (2) the Establishment Clause of the First Amendment, (3) freedom of association as guaranteed by the First Amendment, and (4) the Supremacy Clause of Article VI.

6. This Court's *Bourke* analysis was limited in scope to the distribution of state benefits to same-sex couples validly married outside Kentucky. *See Bourke v. Beshear*, 3:13-CV-750-H, 2014 U.S. Dist. LEXIS 17457, 2014 WL 556729, at *1 (W.D. Ky. Feb. 12, 2014). Therefore, the precedential value of *Baker* was not at issue.

found that a same-sex couple did not have the right to marry under the federal Due Process or Equal Protection Clauses. *Id.* (per curiam); *see Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185, 187 (Minn. 1971). Such a summary dismissal is usually binding precedent, *see Mandel v. Bradley*, 432 U.S. 173, 176, 97 S. Ct. 2238, 53 L. Ed. 2d 199 (1977), unless doctrinal developments indicate that the Court would rule differently now, *see Hicks v. Miranda*, 422 U.S. 332, 344, 95 S. Ct. 2281, 45 L. Ed. 2d 223 (1975). Today, it is difficult to take seriously the argument that *Baker* bars Plaintiffs' challenge.

Since 1972, a virtual tidal wave of pertinent doctrinal developments has swept across the constitutional landscape. For example, *Romer v. Evans* invalidated under the Equal Protection Clause a state constitutional amendment that discriminated on the basis of sexual orientation. 517 U.S. 620, 635-36, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996). Shortly thereafter, *Lawrence v. Texas* invalidated under the Due Process Clause a state law criminalizing homosexual sodomy. 539 U.S. 558, 578, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003). Most recently, *Windsor* held unconstitutional Section 3 of the Defense of Marriage Act ("DOMA"), 1 U.S.C. § 7, which defined "marriage" and "spouse" for the purposes of federal law in a way that excluded same-sex partners. 133 S.Ct. at 2695. In *Windsor*, the Supreme Court ignored the *Baker* issue in oral argument and in its opinion, even though the Second Circuit had ruled on it. *See Windsor v. United States*, 699 F.3d 169, 178-79 (2d Cir. 2012). The Court's silence

supports a view that *Baker* is a dead letter.[7] *See Wolf v. Walker*, 14-CV-64-BBC, 986 F. Supp. 2d 982, 2014 U.S. Dist. LEXIS 77125, 2014 WL 2558444, at *5 (W.D. Wis. June 6, 2014). Indeed, since *Windsor*, almost every court to confront this issue has found that *Baker* is not controlling.[8]

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7. In addition, at the oral argument for *Windsor's* companion case *Hollingsworth v. Perry*, 133 S.Ct. 2652, 186 L. Ed. 2d 768 (2013), Justice Ginsburg interrupted counsel's argument that *Baker* precluded the Court's consideration of the claim by saying: "Mr. Cooper, *Baker v. Nelson* was 1971. The Supreme Court hadn't even decided that gender-based classifications get any kind of heightened scrutiny." Transcript of Oral Argument at *12, *Hollingsworth v. Perry*, 133 S.Ct. 2652, 186 L. Ed. 2d 768 (2013) (No. 12-144), *available at* 2013 WL 1212745.

8. *See, e.g., Kitchen v. Herbert*, No. 13-4178, 2014 U.S. App. LEXIS 11935, 2014 WL 2868044, at *10 (10th Cir. June 25, 2014); *Baskin v. Bogan*, 1:14-CV-00355-RLY-TAB, 2014 U.S. Dist. LEXIS 86114, 2014 WL 2884868, at *6 (S.D. Ind. June 25, 2014); *Wolf v. Walker*, 14-CV-64-BBC, 986 F. Supp. 2d 982, 2014 U.S. Dist. LEXIS 77125, 2014 WL 2558444, at *6 (W.D. Wis. June 6, 2014); *Whitewood v. Wolf*, 1:13-CV-1861, 2014 U.S. Dist. LEXIS 68771, 2014 WL 2058105, at *6 (M.D. Pa. May 20, 2014); *Geiger v. Kitzhaber*, 6:13-CV-01834-MC, 2014 U.S. Dist. LEXIS 68171, 2014 WL 2054264, at *1 n.1 (D. Or. May 19, 2014); *Latta v. Otter*, 1:13-CV-00482-CWD, 2014 U.S. Dist. LEXIS 66417, 2014 WL 1909999, at *9 (D. Idaho May 13, 2014); *De Leon v. Perry*, 975 F. Supp. 2d 632, 648-49 (W.D. Tex. 2014); *DeBoer v. Snyder*, 973 F. Supp. 2d 757, 773 n.6 (E.D. Mich. 2014); *Bostic v. Rainey*, 970 F. Supp. 2d 456, 470 (E.D. Va. 2014); *Bishop v. United States ex rel. Holder*, 962 F. Supp. 2d 1252, 1277 (N.D. Okla. 2014); *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1195 (D. Utah 2013). The only post-*Windsor* case disallowing a challenge to a state ban on same-sex marriage is *Merritt v. Attorney Gen.*, CIV.A. 13-00215-BAJ, 2013 U.S. Dist. LEXIS 162583, 2013 WL 6044329, at *2 (M.D. La.

This Court concludes that, due to doctrinal developments, *Baker* does not bar consideration of Plaintiffs' claims.

III.

The most difficult part of the equal protection analysis here is determining the proper standard of review. Courts consider two factors. First, courts look to the "individual interests affected" by the challenged law. *Zablocki v. Redhail*, 434 U.S. 374, 383, 98 S. Ct. 673, 54 L. Ed. 2d 618 (1978) (quotation omitted). If a statutory classification "significantly interferes with the exercise of [a fundamental] right," heightened scrutiny applies. *Id.*

Next, courts examine the "nature of the classification" imposed by the law. *Id.* The Supreme Court has fashioned three different levels of scrutiny that correspond to certain statutory classifications. Most statutory classifications receive rational basis review, under which the classification must only be "rationally related to a legitimate governmental purpose." *Clark v. Jeter*, 486 U.S. 456, 461, 108 S. Ct. 1910, 100 L. Ed. 2d 465 (1988) (citation omitted). Under this deferential standard, the law must be upheld if there is "any reasonably conceivable" set of facts that could provide a rational basis for the classification, and the state need not present any evidence. *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313, 113 S. Ct. 2096, 124 L. Ed. 2d 211 (1993).

Nov. 14, 2013). The Court does not find *Merritt* persuasive, as the viability of *Baker* was not briefed, and the court did not clearly state that it was dismissing on *Baker* grounds.

The two heightened tiers of scrutiny demand more exacting judicial review. Under strict scrutiny, the state must show that the statutory classification is "narrowly tailored" to further a "compelling governmental interest[]." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995). This standard is reserved for certain "suspect" classifications such as those based on race, alienage, and national origin. *See Graham v. Richardson*, 403 U.S. 365, 371-72, 91 S. Ct. 1848, 29 L. Ed. 2d 534 (1971). For a small number of "*quasi*-suspect" classifications, such as gender and illegitimacy, the courts apply intermediate scrutiny, under which the statutory classification must be "substantially related to an important governmental objective." *Clark*, 486 U.S. at 461.

The Court will first consider whether heightened review applies here based on the individual interest affected and will next consider the nature of the statutory classification.

A.

If the classification imposed by Kentucky's laws significantly interferes with the exercise of a fundamental right, "critical examination of the state interests advanced in support of that classification is required," *i.e.* strict scrutiny applies. *Zablocki*, 434 U.S. at 383 (quotation omitted). Kentucky's laws prevent all same-sex couples from marrying. This acts as a complete bar to Plaintiffs' ability to marry each other, thus satisfying the "significant interference" threshold. The only question that remains

is whether the right Plaintiffs seek to exercise is a fundamental right—a question that neither the Supreme Court nor the Sixth Circuit has answered.

The right to marry is a fundamental right situated within the due process right to liberty. *See Loving v. Virginia*, 388 U.S. 1, 12, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967) (marriage is a "fundamental freedom"); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942) (marriage is "one of the basic civil rights"); *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S. Ct. 625, 67 L. Ed. 1042 (1923) (the right to marry is a central part of Due Process liberty); *Maynard v. Hill*, 125 U.S. 190, 205, 8 S. Ct. 723, 31 L. Ed. 654 (1888) (marriage is "the most important relation in life"). The right to marry is a nonenumerated fundamental right; that is, it is not written in the Constitution. Its constitutional significance arises from various protected liberty interests, such as the right to privacy and freedom of association. *See Griswold v. Connecticut*, 381 U.S. 479, 486, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965) (marriage is a "right of privacy older than the Bill of Rights"); *M.L.B. v. S.L.J.*, 519 U.S. 102, 116, 117 S. Ct. 555, 136 L. Ed. 2d 473 (1996) ("[c]hoices about marriage . . . are among associational rights this Court has ranked as 'of basic importance in our society'" (quoting *Boddie v. Connecticut*, 401 U.S. 371, 376, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971))).

Most of our liberty interests—*e.g.* privacy, autonomy, procreation, travel—exist independent of the government. By contrast, civil marriage and the government are inseparable. The state institution of marriage—the

issuance of marriage licenses and the distribution of benefits based on marital status—has become an integral component of the fundamental right to marry. It is in this way that civil marriage has become "objectively, deeply rooted in this Nation's history and tradition . . . and implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 720-21, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (1997) (quotations omitted). This atypical tie to the government makes the fundamental right to marry all the more challenging to consider.

The three foundational right-to-marry Supreme Court cases are *Loving*, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010, *Zablocki*, 434 U.S. 374, 98 S. Ct. 673, 54 L. Ed. 2d 618, and, most recently, *Turner v. Safley*, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987). *Loving* declared Virginia's anti-miscegenation law unconstitutional on both equal protection and due process grounds. *See* 388 U.S. at 11-12. *Zablocki* held that a state statute requiring a father to pay his past-due court-ordered child support payments before marrying violated the Equal Protection Clause. *See* 434 U.S. at 390-91. *Turner* found that prisoners retain their fundamental right to marry. *See* 482 U.S. at 95. In that case, the Court's discussion of "elements" or "incidents" of marriage suggests that evaluating the application of the fundamental right to marry to this case might involve a discussion of the scope or contours of the right to marry. *Id.* at 95-96. Under this view, the question before the Court can be distilled to: is same-sex marriage part of or included in the fundamental right to marry, or is it something else altogether?

Appendix B

The best evidence of the Supreme Court's thinking on this question is found in Justice Kennedy's recent opinions involving sexual orientation-based classifications, *Lawrence*, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508, and *Windsor*, 133 S.Ct. 2675, 186 L. Ed. 2d 808. Both of these postdate the Supreme Court's major right-to-marry cases mentioned above. Both can be interpreted to have employed something more than rational basis review, but neither explicitly applied heightened scrutiny, even when intimacy, a right that seems firmly rooted in the fundamental right to privacy and autonomy, was directly at issue. *See Lawrence*, 539 U.S. at 564.

Just last year, *Windsor* held Section 3 of DOMA unconstitutional on both equal protection and due process grounds. *See* 133 S.Ct. at 2695. However, Justice Kennedy's opinion neither articulated a standard of review nor discussed the fundamental right to marry, despite having had the opportunity to do so. Although *Windsor* did not need to squarely address the application of the fundamental right to marry to reach its holding, Justice Kennedy's choice to remain silent on the question is significant. Justice Kennedy could have much more easily resolved the case by finding that DOMA implicated a fundamental right.

If the inquiry here is viewed as a contours-of-the-right question, holding that the fundamental right to marry encompasses same-sex marriage would be a dramatic step that the Supreme Court has not yet indicated a willingness to take. Further, it is a step that is unnecessary to the ultimate result in this action. Given the current posture

of relevant constitutional jurisprudence, this Court finds caution here a more appropriate approach to avoid overreaching in its own constitutional analysis.[9]

B.

The Court next considers whether the statutory classification at issue justifies heightened equal protection scrutiny, that is, whether homosexual persons constitute a suspect class. The Supreme Court has never explicitly decided this question. For the reasons that follow, the Court holds that they do.[10]

The Supreme Court's most recent case involving sexual orientation did not discuss this specific issue, nor did it declare what precise equal protection standard it applied. *See Windsor*, 133 S.Ct. 2675, 186 L. Ed. 2d 808. In a different context, the Sixth Circuit has suggested that sexual orientation classifications should not receive heightened scrutiny. *See Davis v. Prison Health Servs.*, 679 F.3d 433, 438 (6th Cir. 2012). However, as this Court previously noted, "It would be no surprise . . . were the Sixth Circuit to reconsider its view." *Bourke*, 2014 U.S.

9. Under the inapplicable but analogous canon of constitutional avoidance, courts are instructed to exercise judicial restraint to avoid unnecessarily reaching a question of constitutional law. *Cf. Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346-48, 56 S. Ct. 466, 80 L. Ed. 688 (1936) (Brandeis, J. concurring) (listing seven situations in which constitutional avoidance is appropriate).

10. This Court's *Bourke* opinion discussed but did not decide this issue. *See* 2014 U.S. Dist. LEXIS 17457, 2014 WL 556729, at *4-5.

Dist. LEXIS 17457, 2014 WL 556729, at *4. The *Davis* decision applied rational basis review based on a line of cases explicitly relying on *Bowers v. Hardwick*, 478 U.S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986). The Supreme Court unambiguously repudiated *Bowers* in its 2003 *Lawrence* decision. *See* 539 U.S. at 578 ("*Bowers* was not correct when it was decided, and it is not correct today."); *id.* at 575 ("[*Bowers's*] continuance as precedent demeans the lives of homosexual persons."). This Court, like other district courts in the Sixth Circuit, concludes that it must now conduct its own analysis to determine whether sexual orientation classifications should receive heightened scrutiny. *See, e.g., Bassett v. Snyder*, 951 F. Supp. 2d 939, 961 (E.D. Mich. 2013) ("The tarnished provenance of *Davis* and the cases upon which it relies provides ample reasons to revisit the question of whether sexual orientation is a suspect classification under equal protection jurisprudence."); *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 986 (S.D. Ohio 2013).

1.

The Supreme Court has identified four factors that determine whether a group of persons is a disadvantaged class for the purposes of equal protection analysis: (1) historical discrimination, *see Lyng v. Castillo*, 477 U.S. 635, 638, 106 S. Ct. 2727, 91 L. Ed. 2d 527 (1986); (2) the ability to contribute to society, *see City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440-41, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985); (3) immutable defining characteristics, *see Lyng*, 477 U.S. at 638; and (4) political

powerlessness, *see id.*[11] For the reasons that follow, the Court concludes that gay and lesbian persons are a disadvantaged class.

Historical discrimination against homosexual persons is readily apparent and cannot reasonably be disputed. Further, the Court cannot think of any reason why homosexuality would affect a person's ability to contribute to society. No court has concluded otherwise. The remaining two factors, immutability and political powerlessness, are slightly less straightforward.[12]

As to immutability, the relevant inquiry is not whether a person *could*, in fact, change a characteristic, but rather whether the characteristic is so integral to a person's identity that it would be inappropriate to require her

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11. Since *Windsor*, every court to consider these factors has concluded that each applies to homosexual persons. *See, e.g., Wolf*, 2014 U.S. Dist. LEXIS 77125, 2014 WL 2558444, at *27-29; *Whitewood*, 2014 U.S. Dist. LEXIS 68771, 2014 WL 2058105, at *11-14.

12. "Immutability and lack of political power are not strictly necessary factors to identify a suspect class." *Windsor v. United States*, 699 F.3d 169, 181 (2d Cir. 2012) (citing *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 442 n.10, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985) ("'[T]here's not much left of the immutability theory, is there?'") (internal quotation omitted)); *id.* (citing *City of Cleburne*, 473 U.S. at 472 n.24 (Marshall, J., concurring in part and dissenting in part) ("The 'political powerlessness' of a group may be relevant, but that factor is neither necessary, as the gender cases demonstrate, nor sufficient, as the example of minors illustrates.") (internal quotation omitted)).

to change it to avoid discrimination. *Accord Wolf*, 2014 U.S. Dist. LEXIS 77125, 2014 WL 2558444, at *28; *see also Griego v. Oliver*, 2014-NMSC-003, 316 P.3d 865, 884 (N.M. 2013). For example, strictly speaking, a person *can* change her citizenship, religion, and even gender. Legislative classifications based on these characteristics nevertheless receive heightened scrutiny because, even though they are in a sense subject to choice, no one should be forced to disavow or change them. That is, these characteristics are "an integral part of human freedom" entitled to constitutional protection, as is sexual expression. *Lawrence*, 539 U.S. at 577. Thus, even if sexual orientation is not strictly immutable, it fits within the realm of protected characteristics "fundamental to a person's identity," which satisfies the immutability factor. *De Leon v. Perry*, 975 F. Supp. 2d 632, 651 (W.D. Tex. 2014); *see Wolf*, 2014 U.S. Dist. LEXIS 77125, 2014 WL 2558444, at *28; *Bassett*, 951 F. Supp. 2d at 960.

Finally, the Court finds that homosexual persons are "politically powerless" within the constitutional meaning of this phrase. In discussing this factor, the Second Circuit noted: "The question is not whether homosexuals have achieved political influence and success over the years; they clearly have. The question is whether they have the strength to politically protect themselves from wrongful discrimination." *Windsor*, 699 F.3d at 184. Indeed, if the standard were whether a given minority group had achieved any political successes over the years, virtually no group would qualify as a suspect or *quasi*-suspect class. A more effective inquiry looks to the vulnerability of a class in the political process due to its size or political or

cultural history. *See Wolf*, 2014 U.S. Dist. LEXIS 77125, 2014 WL 2558444, at *29. Under this inquiry, Kentucky's laws against homosexual persons are "Exhibit A" of this powerlessness.

2.

Having found that all four factors clearly weigh in favor of heightened scrutiny, the Court must identify which level of heightened scrutiny applies. The Supreme Court has not fully explained how to distinguish between suspect and *quasi*-suspect classes.

Among the protected classifications, sexual orientation seems most similar to the *quasi*-suspect classes. Sexual orientation is not obvious in the way that race, a suspect class, is.[13] *Cf. Mathews v. Lucas*, 427 U.S. 495, 506, 96 S. Ct. 2755, 49 L. Ed. 2d 651 (1976) (finding illegitimacy a *quasi*-suspect class where "perhaps in part because illegitimacy does not carry an obvious badge, as race or sex do, . . . discrimination against illegitimates has never approached the severity or pervasiveness of the historic legal and political discrimination against women and Negroes"). It is certainly not more apparent than a person's sex, which is a *quasi*-suspect class. *See Craig v. Boren*, 429 U.S. 190, 197, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976) (applying intermediate scrutiny to gender classifications); *Frontiero v. Richardson*, 411 U.S. 677, 685-86, 93 S. Ct. 1764, 36 L. Ed. 2d 583 (1973) (plurality

13. Of course, national origin and alienage are often not apparent and yet are suspect classifications.

opinion) (women face "pervasive" discrimination "in part because of the high visibility of the sex characteristic"). For this reason, to afford greater protection to sexual orientation than gender would seem inappropriate.

In addition, some courts have found sexual orientation similar to gender in various ways. *See Windsor*, 699 F.3d at 184-85 (listing parallels between the status of women at the time the Court found they constituted a suspect class and homosexual individuals today, and finding homosexual persons to be *quasi*-suspect class based in part on analogy to gender); *accord Wolf*, 2014 U.S. Dist. LEXIS 77125, 2014 WL 2558444, at *29; *Whitewood v. Wolf*, 1:13-CV-1861, 2014 U.S. Dist. LEXIS 68771, 2014 WL 2058105, at *14 (M.D. Pa. May 20, 2014). For example, although the acceptance of homosexual persons has "improved markedly in recent decades," they still face "pervasive, although at times more subtle, discrimination . . . in the political arena." *Windsor*, 699 F.3d at 184 (quoting *Frontiero*, 411 U.S. at 685-86) (internal quotation marks omitted).

This Court finds that homosexual persons constitute a *quasi*-suspect class "based on the weight of the factors and on analogy to the classifications recognized as suspect and *quasi*-suspect." *Windsor*, 699 F.3d at 185. In so doing, it agrees with the Second Circuit and the many other district courts to confront this question. *See id.*; *see, e.g., Whitewood*, 2014 U.S. Dist. LEXIS 68771, 2014 WL 2058105, at *14; *Wolf*, 2014 U.S. Dist. LEXIS 77125, 2014 WL 2558444, at *29. *Quasi*-suspect classes are given intermediate scrutiny. *See Clark*, 486 U.S. at

461. Therefore, here, the state must show that the sexual orientation classification imposed by Kentucky's laws is "substantially related to an important governmental objective." *Id.*

IV.

Ultimately, Kentucky's laws banning same-sex marriage cannot withstand constitutional review regardless of the standard. The Court will demonstrate this by analyzing Plaintiffs' challenge under rational basis review.[14]

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14. In *Bourke*, the Court explored the question whether *Windsor* altered the application of rational basis review in the same-sex marriage context. *See Bourke v. Beshear*, 3:13-CV-750-H, 2014 U.S. Dist. LEXIS 17457, 2014 WL 556729, at *6-7 (W.D. Ky. Feb. 12, 2014). The Court identified two principles from Justice Kennedy's opinion. The first is that "the actual purpose of Kentucky's laws is relevant to this analysis to the extent that their purpose and principal effect was to treat two groups differently." 2014 U.S. Dist. LEXIS 17457, [WL] at *6. The legislative history of Kentucky's constitutional ban clearly demonstrates the intent to permanently prevent the performance of same-sex marriages in Kentucky, which suggests *animus* against same-sex couples. *See* 2014 U.S. Dist. LEXIS 17457, [WL] at *7 n.15. The second principle is that such a ban "demeans one group by depriving them of rights provided for others." 2014 U.S. Dist. LEXIS 17457, [WL] at *7. Kentucky's laws undoubtedly burden the lives of same-sex couples by excluding them from the institution of marriage and all of its associated benefits. While there is some evidence of *animus* against homosexual persons, many people likely supported Kentucky's laws based on sincere religious and traditional reasons. *Bourke* thus concluded that, absent a clear showing of *animus*, the Court must apply traditional rational basis review. *See id.*

Under this standard, Plaintiffs have the burden to prove either that there is no conceivable legitimate purpose for the law or that the means chosen to effectuate a legitimate purpose are not rationally related to that purpose. "Rational basis review, while deferential, is not 'toothless.'" *Peoples Rights Org., Inc. v. City of Columbus*, 152 F.3d 522, 532 (6th Cir. 1998) (quoting *Mathews*, 427 U.S. at 510). Courts "insist on knowing the relation between the classification adopted and the object to be attained." *Romer*, 517 U.S. at 632. This "ensure[s] that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Id.* at 633.

A.

The Court will begin with Defendant's only asserted justification for Kentucky's laws prohibiting same-sex marriage: "encouraging, promoting, and supporting the formation of relationships that have the natural ability to procreate." Perhaps recognizing that procreation-based arguments have not succeeded in this Court, *see Bourke*, 2014 U.S. Dist. LEXIS 17457, 2014 WL 556729, at *8, nor any other court post-*Windsor*, Defendant adds a disingenuous twist to the argument: traditional marriages contribute to a stable birth rate which, in turn, ensures the state's long-term economic stability.

These arguments are not those of serious people. Though it seems almost unnecessary to explain, here are the reasons why. Even assuming the state has a legitimate interest in promoting procreation, the Court fails to see, and Defendant never explains, how the exclusion of same-

sex couples from marriage has any effect whatsoever on procreation among heterosexual spouses. Excluding same-sex couples from marriage does not change the number of heterosexual couples who choose to get married, the number who choose to have children, or the number of children they have. *See Bishop v. United States ex rel. Holder*, 962 F. Supp. 2d 1252, 1291 (N.D. Okla. 2014) ("Marriage is incentivized for naturally procreative couples to precisely the same extent regardless of whether same-sex couples (or other non-procreative couples) are included."). The Court finds no rational relation between the exclusion of same-sex couples from marriage and the Commonwealth's asserted interest in promoting naturally procreative marriages.

The state's attempts to connect the exclusion of same-sex couples from marriage to its interest in economic stability and in "ensuring humanity's continued existence" are at best illogical and even bewildering. These arguments fail for the precise reasons that Defendant's procreation argument fails.[15]

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15. *Amicus* the Family Trust Foundation phrased the state's interest slightly differently: "to channel the presumptive procreative potential of man-woman couples into committed unions for the good of children and society." It then went on to make the exact same arguments—chiefly, responsible procreation and child-rearing, steering naturally procreative relationships into stable unions, and promoting the optimal childrearing environment—that this Court in *Bourke* and other federal courts have rejected. *See* 2014 U.S. Dist. LEXIS 17457, 2014 WL 556729, at *8. The Court sees no need to readdress these arguments and incorporates its *Bourke* discussion by reference.

Numerous courts have repeatedly debunked all other reasons for enacting such laws. The Court can think of no other conceivable legitimate reason for Kentucky's laws excluding same-sex couples from marriage.

B.

To sidestep these obvious deficiencies, Defendant argues that the state is not required to draw perfect lines in its classifications. By this argument, the state can permissibly deny marriage licenses to same-sex couples but not other couples who cannot or choose not to procreate "naturally."

It is true that "[a] classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality." *Heller v. Doe*, 509 U.S. 312, 321, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993) (quoting *Dandridge v. Williams*, 397 U.S. 471, 485, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970)) (internal quotation marks omitted). However, that Kentucky's laws do not deny licenses to other non-procreative couples reveals the true hypocrisy of the procreation-based argument. *Cf. Bishop*, 962 F. Supp. 2d at 1291-92 (finding state laws' failure to deny marriage licenses to other non-procreative couples to be probative of a lack of rationality under the logic of *City of Cleburne*, 473 U.S. at 448, as explained by *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 366, 121 S. Ct. 955, 148 L. Ed. 2d 866 (2001)). Even "[r]ationality review has a limit, and this well exceeds it." *Id.* at 1293.

More importantly, the imperfect line-drawing argument assumes incorrectly that the Court bases its ruling on a comparison between same-sex couples and other non-procreative couples. On the contrary, this Court bases its ruling primarily upon the utter lack of logical relation between the exclusion of same-sex couples from marriages and any conceivable legitimate state interest. Any relationship between Kentucky's ban on same-sex marriage and its interest in procreation and long-term economic stability "is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne*, 473 U.S. at 446. This Court agrees with the many other federal courts that have found procreation-related arguments incapable of withstanding rational basis review. *See, e.g., Baskin v. Bogan*, 1:14-CV-00355-RLY-TAB, 2014 U.S. Dist. LEXIS 86114, 2014 WL 2884868, at *13 (S.D. Ind. June 25, 2014); *Geiger v. Kitzhaber*, 6:13-CV-01834-MC, 2014 U.S. Dist. LEXIS 68171, 2014 WL 2054264, at *13 (D. Or. May 19, 2014); *DeBoer v. Snyder*, 973 F. Supp. 2d 757, 764-65 (E.D. Mich. 2014); *Bishop*, 962 F. Supp. 2d at 1291; *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1211-12 (D. Utah 2013).

In sum, the laws challenged here violate Plaintiffs' constitutional rights and do not further any conceivable legitimate governmental purpose. Therefore, Kentucky's laws cannot withstand rational basis review.

V.

In *Bourke,* this Court devoted considerable thought and effort to addressing the sincere questions and

concerns of Kentuckians about the recognition of same-sex marriage. *See* 2014 U.S. Dist. LEXIS 17457, 2014 WL 556729, at *10-12. All those comments are equally true today.

Not surprisingly, the *Bourke* opinion received significant attention and response, both in support and in opposition. Those opposed by and large simply believe that the state has the right to adopt a particular religious or traditional view of marriage regardless of how it may affect gay and lesbian persons. But, as this Court has respectfully explained, in America even sincere and long-held religious views do not trump the constitutional rights of those who happen to have been out-voted.

On the other side, many responses reinforced in very personal ways how unconstitutional discrimination harms individuals and families to their very core. These responses reinforce the notion that invalidating Kentucky's laws validates the enduring relationships of same-sex couples in the same way that opposite-sex couples' relationships are validated.

Since this Court's *Bourke* opinion, the legal landscape of same-sex marriage rights across the country has evolved considerably, with eight additional federal district courts and one circuit court invalidating state constitutional provisions and statutes that denied same-sex couples the right to marry. *See Kitchen v. Herbert*, No. 13-4178, 2014 U.S. App. LEXIS 11935, 2014 WL 2868044 (10th Cir. June 25, 2014); *Baskin*, 2014 U.S. Dist. LEXIS 86114, 2014 WL 2884868; *Wolf*, 2014 U.S. Dist. LEXIS 77125, 2014 WL

2558444; *Whitewood*, 2014 U.S. Dist. LEXIS 68771, 2014 WL 2058105; *Geiger*, 2014 U.S. Dist. LEXIS 68171, 2014 WL 2054264; *Latta v. Otter*, 1:13-CV-00482-CWD, 2014 U.S. Dist. LEXIS 66417, 2014 WL 1909999 (D. Idaho May 13, 2014); *De Leon*, 975 F. Supp. 2d 632; *DeBoer*, 973 F. Supp. 2d 757; *Bostic v. Rainey*, 970 F. Supp. 2d 456 (E.D. Va. 2014). With this opinion, this Court joins their company.

Sometimes, by upholding equal rights for a few, courts necessarily must require others to forebear some prior conduct or restrain some personal instinct. Here, that would not seem to be the case. Assuring equal protection for same-sex couples does not diminish the freedom of others to any degree. Thus, same-sex couples' right to marry seems to be a uniquely "free" constitutional right. Hopefully, even those opposed to or uncertain about same-sex marriage will see it that way in the future.

The Court's holding today is consistent with *Bourke*, although it requires different relief. The ability to marry in one's state is arguably much more meaningful, to those on both sides of the debate, than the recognition of a marriage performed in another jurisdiction. But it is for that very reason that the Court is all the more confident in its ruling today.

Being otherwise sufficiently advised,

IT IS HEREBY ORDERED THAT to the extent Ky. Rev. Stat. §§ 402.005 and .020(1)(d) and Section 233A of the Kentucky Constitution deny same-sex couples the right

to marry in Kentucky, they violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and they are void and unenforceable.

IT IS FURTHER ORDERED that for all the reasons set forth in this Court's Memorandum Opinion and Orders in this case dated February 28, 2014 and March 19, 2014, the order here is STAYED until further order of the Sixth Circuit.

This is a final and appealable order.

Date: July 1, 2014

/s/_____
John G. Heyburn II
Senior Judge, U.S. District Court

APPENDIX C — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF KENTUCKY AT LOUISVILLE, FILED FEBRUARY 12, 2014

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CIVIL ACTION NO. 3:13-CV-750-H

GREGORY BOURKE, *et al.*,

Plaintiffs,

v.

STEVE BESHEAR, *et al.*,

Defendants.

February 12, 2014, Decided
February 12, 2014, Filed

MEMORANDUM OPINION

Four same-sex couples validly married outside Kentucky have challenged the constitutionality of Kentucky's constitutional and statutory provisions that exclude them from the state recognition and benefits of marriage available to similarly situated opposite-sex couples.

While Kentucky unquestionably has the power to regulate the recognition of civil marriages, those regulations must comply with the Constitution of the United States. This court's role is not to impose its own political or policy judgments on the Commonwealth or its people. Nor is it to question the importance and dignity of the institution of marriage as many see it. Rather, it is to discuss the benefits and privileges that Kentucky attaches to marital relationships and to determine whether it does so lawfully under our federal constitution.

From a constitutional perspective, the question here is whether Kentucky can justifiably deny same-sex spouses the recognition and attendant benefits it currently awards opposite-sex spouses. For those not trained in legal discourse, the questions may be less logical and more emotional. They concern issues of faith, beliefs, and traditions. Our Constitution was designed both to protect religious beliefs and prevent unlawful government discrimination based upon them. The Court will address all of these issues.

In the end, the Court concludes that Kentucky's denial of recognition for valid same-sex marriages violates the United States Constitution's guarantee of equal protection under the law, even under the most deferential standard of review. Accordingly, Kentucky's statutes and constitutional amendment that mandate this denial are unconstitutional.

Appendix C

I.

No case of such magnitude arrives absent important history and narrative. That narrative necessarily discusses (1) society's evolution on these issues, (2) a look at those who now demand their constitutional rights, and (3) an explication of their claims. For most of Kentucky's history, the limitation of marriage to opposite-sex couples was assumed and unchallenged. Those who might have disagreed did so in silence. But gradual changes in our society, political culture and constitutional understandings have encouraged some to step forward and assert their rights.

A.

In 1972, two Kentucky women stepped forward to apply for a marriage license. The Kentucky Supreme Court ruled that they were not entitled to one, noting that Kentucky statutes included neither a definition of "marriage" nor a prohibition on same-sex marriage. *Jones v. Hallahan*, 501 S.W.2d 588, 589 (Ky. 1973). The court defined "marriage" according to common usage, consulting several dictionaries. It held that no constitutional issue was involved and concluded, "In substance, the relationship proposed . . . is not a marriage." *Id.* at 590. This view was entirely consistent with the then-prevailing state and federal jurisprudence. *See Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185, 187 (Minn. 1971), *appeal dismissed for want of a substantial federal question*, 409 U.S. 810, 93 S. Ct. 37, 34 L. Ed. 2d 65 (1972); *Anonymous v. Anonymous*, 67 Misc. 2d 982, 325 N.Y.S.2d 499, 501 (N.Y. Spec. Term 1971). A lot has changed since then.

Twenty-one long years later, the Hawaii Supreme Court first opened the door to same-sex marriage. *See Baehr v. Lewin*, 74 Haw. 530, 852 P.2d 44, 61 (Haw. 1993) (ruling that the state's prohibition on same-sex marriage was discriminatory under the Hawaii Constitution and remanding to allow the state to justify its position). The reaction was immediate and visceral. In the next few years, twenty-seven states passed anti-same-sex marriage legislation,[1] and Congress passed the Defense of Marriage Act (DOMA).[2]

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1. *See* Ala. Code § 30-1-19 (2013); Ariz. Rev. Stat. Ann. §§ 25-101, -125 (2013); Ark. Code Ann. §§ 9-11-208(b), -107(b) (West 2013); Colo. Rev. Stat. Ann. § 14-2-104 (West 2013); Fla. Stat. Ann. § 741.212 (West 2013); Ga. Code Ann. § 19-3-3.1 (West 2013); Haw. Rev. Stat. §§ 572-1, -1.6 (West 2013) (repealed 2011); Idaho Code Ann. § 32-209 (West 2013); 750 Ill. Comp. Stat. Ann. 5/212(a)(5), 5/213.1 (West 2013); Ind. Code Ann. § 31-11-1-1 (West 2013); Kan. Stat. Ann. §§ 23-2501, 23-2508 (West 2013); La. Civ. Code Ann. art. 89, 3520 (2013); Mich. Comp. Laws Ann. §§ 551.1, .271(2) (West 2013); Miss. Code Ann. §§ 93-1-1(2) (West 2013); Mo. Ann. Stat. § 451.022 (West 2013); Mont. Code Ann. § 40-1-401(1)(d) (2013); N.C. Gen. Stat. Ann. § 51-1.2 (West 2013); N.D. Cent. Code Ann. §§ 14-03-01, -08 (West 2013); Okla. Stat. tit. 43, § 3.1 (2013); 23 Pa. Cons. Stat. Ann. §§ 1102, 1704 (West 2013); S.C. Code Ann. §§ 20-1-10, -15 (2013); S.D. Codified Laws §§ 25-1-1, -38 (2013); Tenn. Code Ann. § 36-3-113 (West 2013); Tex. Fam. Code Ann. §§ 1.103, 2.001 (West 2013); Utah Code Ann. § 30-1-2 (West 2013), invalidated by *Kitchen v. Herbert*, No. 2:13-CV-217, 961 F. Supp. 2d 1181, 2013 U.S. Dist. LEXIS 179331, 2013 WL 6697874 (D. Utah Dec. 20, 2013)); Va. Code Ann. § 20-45.2 (West 2013); W. Va. Code Ann. §§ 48-2-104, -401 (West 2013).

2. The bill included commentary that stated: "a redefinition of marriage in Hawaii to include homosexual couples could make such

In 1998, Kentucky became one of those states, enacting new statutory provisions that (1) defined marriage as between one man and one woman, K.R.S. § 402.005; (2) prohibited marriage between members of the same sex, K.R.S. § 402.020(1)(d); (3) declared same-sex marriages contrary to Kentucky public policy, K.R.S. § 402.040(2); and (4) declared same-sex marriages solemnized out of state void and the accompanying rights unenforceable, K.R.S. § 402.045.[3]

Five years later, the Massachusetts Supreme Judicial Court declared that the state's own ban on same-sex

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couples eligible for a whole range of federal rights and benefits." H.R. Rep. NO. 104-664, at 4-11 (1996).

3. The pertinent text of these provisions is:

> 402.005: As used and recognized in the law of the Commonwealth, "marriage" refers only to the civil status, condition, or relation of one (1) man and one (1) woman . . . .
>
> 402.020: (1) Marriage is prohibited and void (d) Between members of the same sex.
>
> 402.040: (2) A marriage between members of the same sex is against Kentucky public policy and shall be subject to the prohibitions established in K.R.S. 402.045.
>
> 402.045: (1) A marriage between members of the same sex which occurs in another jurisdiction shall be void in Kentucky. (2) Any rights granted by virtue of the marriage, or its termination, shall be unenforceable in Kentucky courts.

Ky. Rev. Stat. Ann. §§ 402.005-.045 (West 2013).

marriage violated their state constitution. *Goodridge v. Dep't of Pub. Health*, 440 Mass. 309, 798 N.E.2d 941, 969 (Mass. 2003). In May 2004, Massachusetts began marrying same-sex couples. In response, anti-same-sex marriage advocates in many states initiated campaigns to enact constitutional amendments to protect "traditional marriage."[4]

Like-minded Kentuckians began a similar campaign, arguing that although state law already prohibited same-sex marriage, a constitutional amendment would foreclose any possibility that a future court ruling would allow same-sex marriages to be performed or recognized in Kentucky. *See* S. DEBATE, 108TH CONG., 2ND SESS. (Ky. 2004), ECF No. 38-6. The legislature placed such an amendment on the ballot. It contained only two sentences:

> Only a marriage between one man and one woman shall be valid or recognized as a marriage in Kentucky. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized.

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4. States passing constitutional amendments banning same-sex marriage in 2004 include Arkansas, Georgia, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, North Dakota, Ohio, Oklahoma, Oregon, and Utah. Other states followed suit: in 2005, Kansas and Texas; in 2006, Alabama, Colorado, Idaho, South Carolina, South Dakota, Tennessee, Virginia, and Wisconsin; in 2008, Arizona, California, and Florida; and in 2012, North Carolina. Alaska passed its constitutional ban in 1998, and Nebraska and Nevada did so in 2000. California's, Utah's, and Oklahoma's constitutional bans have since been overturned.

KY. CONST. § 233A. Consequently, the amendment and Kentucky's statutes have much the same effect. On November 2, 2004, approximately 74% of participating voters approved the Amendment.[5]

Kentucky's same-sex marriage legal framework has not changed since. In the last decade, however, a virtual tidal wave of legislative enactments and judicial judgments in other states have repealed, invalidated, or otherwise abrogated state laws restricting same-sex couples' access to marriage and marriage recognition.[6]

B.

In many respects, Plaintiffs here are average, stable American families.

Gregory Bourke and Michael Deleon reside in Louisville, Kentucky and have been together for 31 years. They were lawfully married in Ontario, Canada in 2004 and have two minor children who are also named

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5. 53.6% of Kentucky's registered voters participated.

6. Recognition by legislation and by popular vote has occurred in Vermont (Apr. 7, 2009), New Hampshire (June 3, 2009), District of Columbia (Dec. 18, 2009), New York (June 24, 2011), Washington (Nov. 6, 2012), Maine (Nov. 6, 2012), Maryland (Nov. 6, 2012), Delaware (May 7, 2013), Minnesota (May 14, 2013), Rhode Island (May 2, 2013), Hawaii (Nov. 13, 2013), and Illinois (Nov. 20, 2013) (effective June 1, 2014). State and federal court judgments have occurred in Massachusetts, Connecticut, Iowa, California, New Jersey, New Mexico, Utah, and Oklahoma. The Utah and Oklahoma decisions are currently being appealed.

Plaintiffs: a 14-year-old girl; and a 15-year-old boy. Jimmy Meade and Luther Barlowe reside in Bardstown, Kentucky and have been together 44 years. They were lawfully married in Davenport, Iowa in 2009. Randell Johnson and Paul Campion reside in Louisville, Kentucky and have been together for 22 years. They were lawfully married in Riverside, California in 2008 and have four minor children who are named Plaintiffs: twin 18-year-old boys; a 14-year-old boy; and a 10-year-old girl. Kimberly Franklin and Tamera Boyd reside in Cropper, Kentucky.[7] They were lawfully married in Stratford, Connecticut in 2010.

Collectively, they assert that Kentucky's legal framework denies them certain rights and benefits that validly married opposite-sex couples enjoy. For instance, a same-sex surviving spouse has no right to an inheritance tax exemption and thus must pay higher death taxes. They are not entitled to the same healthcare benefits as opposite-sex couples; a same-sex spouse must pay to add their spouse to their employer-provided health insurance, while opposite-sex spouses can elect this option free of charge. Same-sex spouses and their children are excluded

7. Plaintiffs Franklin and Boyd are residents of Shelby County and originally filed suit in the Eastern District of Kentucky. Judge Gregory Van Tatenhove granted Plaintiffs and Defendants' joint motion for change of venue pursuant to 28 U.S.C. § 1404 to the Western District of Kentucky. The case was assigned to Judge Thomas Russell, who transferred it here in the interest of judicial economy and to equalize the docket. Although the cases were not consolidated, Plaintiffs here subsequently added Franklin and Boyd to this action in their Second Amended Complaint.

from intestacy laws governing the disposition of estate assets upon death. Same-sex spouses and their children are precluded from recovering loss of consortium damages in civil litigation following a wrongful death. Under Kentucky's workers compensation law, same-sex spouses have no legal standing to sue and recover as a result of their spouse's fatal workplace injury.

Moreover, certain federal protections are available only to couples whose marriage is legally recognized by their home state. For example, a same-sex spouse in Kentucky cannot take time off work to care for a sick spouse under the Family Medical Leave Act. 29 C.F.R. § 825.122(b). In addition, a same-sex spouse in Kentucky is denied access to a spouse's social security benefits. 42 U.S.C. § 416(h)(1)(A)(i). No one denies these disparities.

Finally, Plaintiffs assert additional non-economic injuries as well. They say that Kentucky's laws deny them "a dignity and status of immense import," stigmatize them, and deny them the stabilizing effects of marriage that helps keep couples together. Plaintiffs also allege injuries to their children including: (1) a reduction in family resources due to the State's differential treatment of their parents, (2) stigmatization resulting from the denial of social recognition and respect, (3) humiliation, and (4) harm from only one parent being able to be listed as an adoptive parent—the other being merely their legal guardian.

Appendix C

C.

Plaintiffs advance six primary claims under 42 U.S.C. § 1983: (1) deprivation of the fundamental right to marry in violation of the Due Process Clause of the Fourteenth Amendment; (2) discrimination on the basis of sexual orientation in violation of the Equal Protection Clause of the Fourteenth Amendment;[8] (3) discrimination against same-sex couples in violation of the freedom of association guaranteed by the First Amendment; (4) failure to recognize valid public records of other states in violation of the Full Faith and Credit Clause of Article IV, Section 1; (5) deprivation of the right to travel in violation of the Due Process Clause of the Fourteenth Amendment; and (6) establishment of a religious definition of marriage in violation of the Establishment Clause of the First Amendment.[9] Plaintiffs seek an order enjoining the State from enforcing the pertinent constitutional and statutory provisions.

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8. In their Second Amended Complaint, Plaintiffs also alleged discrimination on the basis of sex. However, the current motion before the Court does not mention any such basis. Therefore, the Court will construe this claim to allege only discrimination based on sexual orientation.

9. Plaintiffs also seek a declaration that Section 2 of the Defense of Marriage Act (DOMA), 28 U.S.C. § 1738C, as applied to Plaintiffs and similarly situated same-sex couples violates the Due Process, Equal Protection, Freedom of Association, and Full Faith and Credit clauses of the United States Constitution. The Court finds that Section 2 of DOMA, as a permissive statute, is not necessary to the disposition of Plaintiffs' case and therefore will not analyze its constitutionality.

While Plaintiffs have many constitutional theories, the Fourteenth Amendment's Equal Protection Clause provides the most appropriate analytical framework.[10] If equal protection analysis decides this case, the Court need not address any others. No one disputes that the same-sex couples who have brought this case are treated differently under Kentucky law than those in comparable opposite-sex marriages. No one seems to disagree that, as presented here, the equal protection issue is purely a question of law. The Court must decide whether the Kentucky Constitution and statutes violate Plaintiffs' federal constitutional rights.

II.

Before addressing the substance of equal protection analysis, the Court must first determine the applicable standard of review. Rational basis review applies unless Kentucky's laws affect a suspect class of individuals or significantly interfere with a fundamental right. *Zablocki v. Redhail*, 434 U.S. 374, 388, 98 S. Ct. 673, 54 L. Ed. 2d 618 (1978).

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10. The Fourteenth Amendment to the U.S. Constitution provides, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV § 1.

Appendix C

A.

The Kentucky provisions challenged here impose a classification based on sexual orientation. Barely seven months ago, the Supreme Court issued a historic opinion applying equal protection analysis to federal non-recognition of same-sex marriages. *United States v. Windsor*, 133 S.Ct. 2675, 186 L. Ed. 2d 808 (2013).[11] Although the majority opinion covered many topics, it never clearly explained the applicable standard of review. Some of Justice Kennedy's language corresponded to rational basis review. *See id.* at 2696 ("no legitimate purpose overcomes the purpose and effect to disparage and to injure . . . ."). However, the scrutiny that the Court actually applied does not so much resemble it. *See id.* at 2706 (Scalia, J., dissenting) (the majority "does not apply strict scrutiny, and [although] its central propositions are taken from rational basis cases . . . the Court certainly does not *apply* anything that resembles that deferential

11. In *Windsor*, the state of New York enacted legislation recognizing same-sex marriages performed out of state and later amended its own laws to permit same-sex marriage. Section 3 of the Defense of Marriage Act (DOMA) denied recognition to same-sex marriages for the purposes of federal law. As a result of DOMA, a same-sex spouse did not qualify for the marital exemption from the federal estate tax. She brought an action challenging the constitutionality of Section 3 of DOMA in federal court. The *Windsor* Court applied Fifth Amendment due process and equal protection analysis to the plaintiff's challenge of a federal statute. Our case involves a challenge to a state constitutional provision and state statutes, thus falling under the protections of the Fourteenth Amendment, which is subject to the same substantive analysis.

framework.") (emphasis in original). So, we are left without a clear answer.

The Sixth Circuit has said that sexual orientation is not a suspect classification and thus is not subject to heightened scrutiny. *Davis v. Prison Health Servs.*, 679 F.3d 433, 438 (6th Cir. 2012) (citing *Scarbrough v. Morgan Cnty. Bd. of Educ.*, 470 F.3d 250, 261 (6th Cir. 2006)). Though *Davis* concerned slightly different circumstances, it would seem to limit the Court's independent assessment of the question. *Accord Bassett v. Snyder*, 951 F. Supp. 2d 939, 961 (E.D. Mich. 2013).

It would be no surprise, however, were the Sixth Circuit to reconsider its view. Several theories support heightened review. *Davis* based its decision on a line of cases relying on *Bowers v. Hardwick*, 478 U.S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986), which has since been overruled by *Lawrence v. Texas. Lawrence*, 539 U.S. 558, 578, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003) ("*Bowers* was not correct when it was decided, and it is not correct today.").[12] Recently, several courts, including the Ninth Circuit, have held that classifications based on sexual orientation are subject to heightened scrutiny. *See SmithKline Beecham Corp. v. Abbott Labs.*, Nos. 11-17357, 11-17373, 740 F.3d 471, 2014 U.S. App. LEXIS 1128, 2014

12. Indeed, one district court in this Circuit has found that *Lawrence* destroyed the jurisprudential foundation of *Davis's* line of Sixth Circuit cases, thus leaving the level of scrutiny an open question for lower courts to resolve. *See Obergefell v. Wymyslo*, No. 1:13-CV-501, 962 F. Supp. 2d 968, 2013 U.S. Dist. LEXIS 179550, 2013 WL 6726688, at *13 (S.D. Ohio Dec. 23, 2013).

WL 211807, at *9 (9th Cir. Jan. 21, 2014) (finding that *Windsor* employed heightened scrutiny).

Moreover, a number of reasons suggest that gay and lesbian individuals do constitute a suspect class. They seem to share many characteristics of other groups that are afforded heightened scrutiny, such as historical discrimination, immutable or distinguishing characteristics that define them as a discrete group, and relative political powerlessness. *See Lyng v. Castillo*, 477 U.S. 635, 638, 106 S. Ct. 2727, 91 L. Ed. 2d 527 (1986). Further, their common characteristic does not impair their ability to contribute to society. *See City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440-41, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985).

All of these arguments have merit. To resolve the issue, however, the Court must look to *Windsor* and the Sixth Circuit. In *Windsor*, no clear majority of Justices stated that sexual orientation was a suspect category.

B.

Supreme Court jurisprudence suggests that the right to marry is a fundamental right. *See Loving v. Virginia*, 388 U.S. 1, 12, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967) ("Marriage is one of the 'basic civil rights of man,' fundamental to our existence and survival" (quoting *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942))); *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S. Ct. 625, 67 L. Ed. 1042 (1923) (the right to marry is a central part of Due

Process liberty); *Maynard v. Hill*, 125 U.S. 190, 205, 8 S. Ct. 723, 31 L. Ed. 654 (1888) (marriage creates "the most important relation in life"). The right to marry also implicates the right to privacy and the right to freedom of association. *Griswold v. Connecticut*, 381 U.S. 479, 486, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965) (marriage involves a "right of privacy older than the Bill of Rights"); *M.L.B. v. S.L.J.*, 519 U.S. 102, 116, 117 S. Ct. 555, 136 L. Ed. 2d 473 (1996) ("Choices about marriage . . . are among associational rights this Court has ranked 'of basic importance in our society'" and are protected under the Fourteenth Amendment (quoting *Boddie v. Connecticut*, 401 U.S. 371, 376, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971))).

Despite this comforting language, neither the Supreme Court nor the Sixth Circuit has stated that the fundamental right to marry includes a fundamental right to marry someone of the same sex. Moreover, Plaintiffs do not seek the right to marry in Kentucky. Rather, they challenge the State's lack of recognition for their validly solemnized marriages.[13]

To resolve the issue, the Court must again look to *Windsor*. In *Windsor*, the Supreme Court did not clearly

13. Some courts have construed the right to marry to include the right to remain married. *See, e.g., Obergefell v. Wymyslo*, No. 1:13-CV-501, 962 F. Supp. 2d 968, 2013 U.S. Dist. LEXIS 179550, 2013 WL 6726688 (S.D. Ohio Dec. 23, 2013). The logic is that Kentucky's laws operate to render Plaintiffs' marriage invalid in the eyes of state law. This could amount to a functional deprivation of Plaintiffs' lawful marriage, and therefore a deprivation of liberty. *See* 2013 U.S. Dist. LEXIS 179550, [WL] at *5-6.

state that the non-recognition of marriages under Section 3 of DOMA implicated a fundamental right, much less significantly interfered with one. Therefore, the Court will apply rational basis review. Ultimately, the result in this case is unaffected by the level of scrutiny applied.

C.

Under this standard, the Court must determine whether these Kentucky laws are rationally related to a legitimate government purpose. Plaintiffs have the burden to prove either that there is no conceivable legitimate purpose for the law or that the means chosen to effectuate a legitimate purpose are not rationally related to that purpose. This standard is highly deferential to government activity but is surmountable, particularly in the context of discrimination based on sexual orientation. "Rational basis review, while deferential, is not 'toothless.'" *Peoples Rights Org., Inc. v. City of Columbus*, 152 F.3d 522, 532 (6th Cir. 1998) (quoting *Mathews v. Lucas*, 427 U.S. 495, 510, 96 S. Ct. 2755, 49 L. Ed. 2d 651 (1976)). This search for a rational relationship "ensure[s] that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Romer v. Evans*, 517 U.S. 620, 633, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996). Even under this most deferential standard of review, courts must still "insist on knowing the *relation* between the classification adopted and the object to be attained." *Id.* at 632 (emphasis added).

Appendix C

III.

In a democracy, the majority routinely enacts its own moral judgments as laws. Kentucky's citizens have done so here. Whether enacted by a legislature or by public referendum, those laws are subject to the guarantees of individual liberties contained within the United States Constitution. *Windsor*, 133 S.Ct. at 2691; *see e.g., Loving*, 388 U.S. at 12 (statute prohibiting interracial marriage violated equal protection).

Ultimately, the focus of the Court's attention must be upon Justice Kennedy's majority opinion in *Windsor*. While Justice Kennedy did not address our specific issue, he did address many others closely related. His reasoning about the legitimacy of laws excluding recognition of same-sex marriages is instructive. For the reasons that follow, the Court concludes that Kentucky's laws are unconstitutional.

A.

In *Windsor*, Justice Kennedy found that by treating same-sex married couples differently than opposite-sex married couples, Section 3 of DOMA "violate[d] basic due process and equal protection principles applicable to the Federal Government." *Windsor*, 133 S.Ct. at 2693. His reasoning establishes certain principles that strongly suggest the result here.[14]

14. Indeed, Justice Scalia stated that *Windsor* indicated the way the Supreme Court would view future cases involving same-

The first of those principles is that the actual purpose of Kentucky's laws is relevant to this analysis to the extent that their purpose and principal effect was to treat two groups differently. *Id.* As described so well by substituting our particular circumstances within Justice Kennedy's own words, that principle applies quite aptly here:

> [Kentucky's laws'] principal effect is to identify a subset of state-sanctioned marriages and make them unequal. The principal purpose is to impose inequality, not for other reasons like governmental efficiency.

Id. at 2694. The legislative history of Kentucky's laws clearly demonstrates the intent to permanently prevent the recognition of same-sex marriage in Kentucky.[15]

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sex marriage "beyond mistaking." 133 S.Ct. at 2709 (Scalia, J., dissenting).

15. Senate Bill 245 proposed the amendment to the Kentucky Constitution. The bill's sponsor, state senator Vernie McGaha said:

> Marriage is a divine institution designed to form a permanent union between man and woman. . . . [T]he scriptures make it the most sacred relationship of life, and nothing could be more contrary to the spirit than the notion that a personal agreement ratified in a human court satisfies the obligation of this ordinance. . . . [I]n First Corinthians 7:2, if you notice the pronouns that are used in this scripture, it says, 'Let every man have *his* own wife, and let every woman have *her* own husband.' The Defense of Marriage Act, passed in 1996 by Congress, defined marriage for the purpose of federal law as the legal

> union between one man and one woman. And while Kentucky's law did prohibit the same thing, in '98 we passed a statute that gave it a little more strength and assured that such unions in other states and countries also would not be recognized here. There are similar laws across 38 states that express an overwhelming agreement in our country that we should be protecting the institute [*sic*] of marriage. Nevertheless this institution of marriage is under attack by judges and elected officials who would legislate social policy that has already been in place for us for many, many years. . . . In May of this year, Massachusetts will begin issuing marriage licenses to same-sex couples. . . . We in the legislature, I think, have no other choice but to protect our communities from the desecration of these traditional values. . . . Once this amendment passes, no activist judge, no legislature or county clerk whether in the Commonwealth or outside of it will be able to change this fundamental fact: the sacred institution of marriage joins together a man and a woman for the stability of society and for the greater glory of God.

S. Debate, 108th Cong., 2nd Sess. (Ky. 2004), ECF No. 38-6 at 1:00:30-1:05:10. Similarly, cosponsor state senator Gary Tapp proclaimed:

> For many years, Kentucky has had laws that define marriage as one man and one woman, and in 1998, the General Assembly did strengthen those laws ensuring that same-sex marriages performed in other states or countries would not be recognized here. . . . While we're not proposing any new language regarding the institution of marriage in Kentucky, this pro-marriage constitutional amendment will solidify existing law so that even an activist judge cannot question the definition of marriage according

Whether that purpose also demonstrates an obvious animus against same-sex couples may be debatable. But those two motivations are often different sides of the same coin.

The second principle is that such an amendment demeans one group by depriving them of rights provided for others. As Justice Kennedy would say:

> to Kentucky law. . . . [W]hen the citizens of Kentucky accept this amendment, no one, no judge, no mayor, no county clerk, will be able to question their beliefs in the traditions of stable marriages and strong families.

Id. at 1:05:43-1:07:45. The final state senator to speak on behalf of the bill, Ed Worley, said that the bill was not intended to be a discrimination bill. *Id.* at 1:26:10. However, he offered no other purpose other than reaffirming the historical and Biblical definition of marriage. *See, e.g., id.* at 1:26:20-1:26:50.

> One state senator, Ernesto Scorsone, spoke out against the constitutional amendment. He said: The efforts to amend the U.S. Constitution over the issue of interracial marriage failed despite repeated religious arguments and Biblical references. . . . The proposal today is a shocking departure from [our constitutional] principles. . . . To institutionalize discrimination in our constitution is to turn the document on its head. To allow the will of the majority to forever close the door to a minority, no matter how disliked, to any right, any privilege, is an act of political heresy. . . . Their status will be that of second-class citizens forever . . . . Discrimination and prejudices will not survive the test of time.

Id. at 1:16:07-1:24:00.

> Responsibilities, as well as rights, enhance the dignity and integrity of the person. And [Kentucky's laws] contrive[] to deprive some couples [married out of state], but not other couples [married out of state], of both rights and responsibilities. By creating two contradictory marriage regimes within the same State, [Kentucky's laws] force[] same-sex couples to live as married for the purpose of [federal law] but unmarried for the purpose of [Kentucky] law. . . . This places same-sex couples [married out of state] in an unstable position of being in a second-tier marriage [in Kentucky]. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects, see *Lawrence*, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508.

Id. Under Justice Kennedy's logic, Kentucky's laws burden the lives of same-sex spouses by preventing them from receiving certain state and federal governmental benefits afforded to other married couples. *Id.* Those laws "instruct[] all . . . officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others." *Id.* at 2696. Indeed, Justice Kennedy's analysis would seem to command that a law refusing to recognize valid out-of-state same-sex marriages has only one effect: to impose inequality.

From this analysis, it is clear that Kentucky's laws treat gay and lesbian persons differently in a way that

demeans them. Absent a clear showing of animus, however, the Court must still search for any rational relation to a legitimate government purpose.

B.

The State's sole justification for the challenged provisions is: "the Commonwealth's public policy is rationally related to the legitimate government interest of preserving the state's institution of traditional marriage." Certainly, these laws do further that policy.

That Kentucky's laws are rooted in tradition, however, cannot alone justify their infringement on individual liberties. *See Heller v. Doe*, 509 U.S. 312, 326, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993) ("Ancient lineage of a legal concept does not give it immunity from attack for lacking a rational basis."); *Williams v. Illinois*, 399 U.S. 235, 239, 90 S. Ct. 2018, 26 L. Ed. 2d 586 (1970) ("[N]either the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack . . . ."). Over the past forty years, the Supreme Court has refused to allow mere tradition to justify marriage statutes that violate individual liberties. *See, e.g., Loving*, 388 U.S. at 12 (states cannot prohibit interracial marriage); *Lawrence*, 539 U.S. at 577-78 (states cannot criminalize private, consensual sexual conduct); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 733-35, 123 S. Ct. 1972, 155 L. Ed. 2d 953 (2003) (states cannot act based on stereotypes about women's assumption of primary childcare responsibility). Justice Kennedy restated the principle most clearly: "'[T]he fact

that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice . . . .'" *Lawrence*, 539 U.S. at 577 (quoting *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting)). Justice Scalia was more blunt, stating that "'preserving the traditional institution of marriage' is just a kinder way of describing the State's *moral disapproval* of same-sex couples." *Id.* at 601 (Scalia, J., dissenting) (emphasis in original).

Usually, as here, the tradition behind the challenged law began at a time when most people did not fully appreciate, much less articulate, the individual rights in question. For years, many states had a tradition of segregation and even articulated reasons why it created a better, more stable society. Similarly, many states deprived women of their equal rights under the law, believing this to properly preserve our traditions. In time, even the most strident supporters of these views understood that they could not enforce their particular moral views to the detriment of another's constitutional rights. Here as well, sometime in the not too distant future, the same understanding will come to pass.

C.

The Family Trust Foundation of Kentucky, Inc. submitted a brief as *amicus curiae* which cast a broader net in search of reasons to justify Kentucky's laws. It offered additional purported legitimate interests including: responsible procreation and childrearing, steering naturally procreative relationships into stable

unions, promoting the optimal childrearing environment, and proceeding with caution when considering changes in how the state defines marriage. These reasons comprise all those of which the Court might possibly conceive.

The State, not surprisingly, declined to offer these justifications, as each has failed rational basis review in every court to consider them post-*Windsor*, and most courts pre-*Windsor*. *See, e.g.*, *Bishop v. United States ex rel. Holder*, No. 04-CV-848-TCK-TLW, 962 F. Supp. 2d 1252, 2014 U.S. Dist. LEXIS 4374, 2014 WL 116013, at *28-33 (N.D. Okla. Jan. 14, 2014) (responsible procreation and childrearing, steering naturally procreative relationships into stable unions, promoting the ideal family unit, and avoiding changes to the institution of marriage and unintended consequences); *Kitchen v. Herbert*, No. 2:13-CV-217, 961 F. Supp. 2d 1181, 2013 U.S. Dist. LEXIS 179331, 2013 WL 6697874, at *25-27 (D. Utah Dec. 20, 2013) (responsible procreation, optimal childrearing, proceeding with caution); *Obergefell v. Wymyslo*, No. 1:13-CV-501, 962 F. Supp. 2d 968, 2013 U.S. Dist. LEXIS 179550, 2013 WL 6726688, at *20 (S.D. Ohio Dec. 23, 2013) (optimal childrearing). The Court fails to see how having a family could conceivably harm children. Indeed, Justice Kennedy explained that it was the government's failure to recognize same-sex marriages that harmed children, not having married parents who happened to be of the same sex:

> [I]t humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for

> the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.

Windsor, 133 S.Ct. at 2694.

As in other cases that have rejected the *amicus*'s arguments, no one in this case has offered factual or rational reasons why Kentucky's laws are rationally related to any of these purposes. Kentucky does not require proof of procreative ability to have an out-of-state marriage recognized. The exclusion of same-sex couples on procreation grounds makes just as little sense as excluding post-menopausal couples or infertile couples on procreation grounds. After all, Kentucky allows gay and lesbian individuals to adopt children. And no one has offered evidence that same-sex couples would be any less capable of raising children or any less faithful in their marriage vows. Compare this with Plaintiffs, who have not argued against the many merits of "traditional marriage." They argue only that they should be allowed to enjoy them also.

Other than those discussed above, the Court cannot conceive of any reasons for enacting the laws challenged here. Even if one were to conclude that Kentucky's laws do not show animus, they cannot withstand traditional rational basis review.

Appendix C

D.

The Court is not alone in its assessment of the binding effects of Supreme Court jurisprudence, particularly Justice Kennedy's substantive analysis articulated over almost two decades.

Nine state and federal courts have reached conclusions similar to those of this Court. After the Massachusetts Supreme Judicial Court led the way by allowing same-sex couples to marry, five years later the Connecticut Supreme Court reached a similar conclusion regarding its state constitution on equal protection grounds. *Kerrigan v. Comm'r of Pub. Health*, 289 Conn. 135, 957 A.2d 407, 482 (Conn. 2008). Other courts soon began to follow. *See Varnum v. Brien*, 763 N.W.2d 862, 907 (Iowa 2009) (holding that banning same-sex marriage violated equal protection as guaranteed by the Iowa Constitution); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1003 (N.D. Cal. 2010) (holding that the state's constitutional ban on same-sex marriage enacted via popular referendum violated the Equal Protection and Due Process clauses of the Fourteenth Amendment to the United States Constitution) *aff'd sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012) *vacated and remanded sub nom. Hollingsworth v. Perry*, 133 S.Ct. 2652, 186 L. Ed. 2d 768 (2013); *Garden State Equality v. Dow*, 434 N.J. Super. 163, 82 A.3d 336, 367-68 (N.J. Super. Ct. Law Div. 2013) (holding that disallowing same-sex marriage violated the New Jersey Constitution, and the governor withdrew the state's appeal); *Griego v. Oliver*, No. 34,306, 2014 - NMSC 003, 316 P.3d 865, 2013 N.M. LEXIS 414, 2013 WL

6670704, at *3 (N.M. Dec. 19, 2013) (holding that denying same-sex couples the right to marry violated the state constitution's equal protection clause).

Over the last several months alone, three federal district courts have issued well-reasoned opinions supporting the rights of non-heterosexual persons to marriage equality in similar circumstances. *See Bishop*, 2014 U.S. Dist. LEXIS 4374, 2014 WL 116013, at *1 (holding that the state's ban on same-sex marriage violated the Equal Protection Clause of the Fourteenth Amendment); *Obergefell*, 2013 U.S. Dist. LEXIS 179550, 2013 WL 6726688, at*1 (holding that Ohio's constitutional and statutory ban on the recognition of same-sex marriages validly performed out-of-state was unconstitutional as applied to Ohio death certificates); *Kitchen*, 2013 U.S. Dist. LEXIS 179331, 2013 WL 6697874, at *1 (holding that the state's constitutional and statutory ban on same-sex marriage violated the Equal Protection and Due Process clause of the Fourteenth Amendment).

Indeed, to date, all federal courts that have considered same-sex marriage rights post-*Windsor* have ruled in favor of same-sex marriage rights. This Court joins in general agreement with their analyses.

IV.

For many, a case involving these issues prompts some sincere questions and concerns. After all, recognizing same-sex marriage clashes with many accepted norms in Kentucky—both in society and faith. To the extent courts clash with what likely remains that majority opinion

here, they risk some of the public's acceptance. For these reasons, the Court feels a special obligation to answer some of those concerns.

A.

Many Kentuckians believe in "traditional marriage." Many believe what their ministers and scriptures tell them: that a marriage is a sacrament instituted between God and a man and a woman for society's benefit. They may be confused—even angry—when a decision such as this one seems to call into question that view. These concerns are understandable and deserve an answer.

Our religious beliefs and societal traditions are vital to the fabric of society. Though each faith, minister, and individual can define marriage for themselves, at issue here are laws that act outside that protected sphere. Once the government defines marriage and attaches benefits to that definition, it must do so constitutionally. It cannot impose a traditional or faith-based limitation upon a public right without a sufficient justification for it. Assigning a religious or traditional rationale for a law, does not make it constitutional when that law discriminates against a class of people without other reasons.

The beauty of our Constitution is that it accommodates our individual faith's definition of marriage while preventing the government from unlawfully treating us differently. This is hardly surprising since it was written by people who came to America to find both freedom of religion and freedom from it.

Appendix C

B.

Many others may wonder about the future of marriages generally and the right of a religion or an individual church to set its own rules governing it. For instance, must Kentucky now allow same-sex couples to marry in this state? Must churches now marry same-sex couples? How will this decision change or affect my marriage?

First, the Court was not presented with the particular question whether Kentucky's ban on same-sex marriage is constitutional. However, there is no doubt that *Windsor* and this Court's analysis suggest a possible result to that question.

Second, allowing same-sex couples the state recognition, benefits, and obligations of marriage does not in any way diminish those enjoyed by opposite-sex married couples. No one has offered any evidence that recognizing same-sex marriages will harm opposite-sex marriages, individually or collectively. One's belief to the contrary, however sincerely held, cannot alone justify denying a selected group their constitutional rights.

Third, no court can require churches or other religious institutions to marry same-sex couples or any other couple, for that matter. This is part of our constitutional guarantee of freedom of religion. That decision will always be based on religious doctrine.

What this opinion does, however, is make real the promise of equal protection under the law. It will profoundly affect validly married same-sex couples' experience of living in the Commonwealth and elevate their marriage to an equal status in the eyes of state law.

C.

Many people might assume that the citizens of a state by their own state constitution can establish the basic principles of governing their civil life. How can a single judge interfere with that right?

It is true that the citizens have wide latitude to codify their traditional and moral values into law. In fact, until after the Civil War, states had almost complete power to do so, unless they encroached on a specific federal power. *See Barron v. City of Baltimore*, 32 U.S. 243, 250-51, 8 L. Ed. 672 (1833). However, in 1868 our country adopted the Fourteenth Amendment, which prohibited state governments from infringing upon our individual rights. Over the years, the Supreme Court has said time and time again that this Amendment makes the vast majority of the original Bill of Rights and other fundamental rights applicable to state governments.

In fact, the first justice to articulate this view was one of Kentucky's most famous sons, Justice John Marshall Harlan. *See Hurtado v. California*, 110 U.S. 516, 558, 4 S. Ct. 111, 28 L. Ed. 232 (1884) (Harlan, J., dissenting). He wrote that the Fourteenth Amendment "added greatly to the dignity and glory of American citizenship, and to

the security of personal liberty, by declaring that . . . 'no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.'" *Plessy v. Ferguson*, 163 U.S. 537, 555, 16 S. Ct. 1138, 41 L. Ed. 256 (1896) (Harlan, J., dissenting) (quoting U.S. CONST. amend. XIV).

So now, the Constitution, including its equal protection and due process clauses, protects all of us from government action at any level, whether in the form of an act by a high official, a state employee, a legislature, or a vote of the people adopting a constitutional amendment. As Chief Justice John Marshall said, "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177, 2 L. Ed. 60 (1803). Initially that decision typically rests with one judge; ultimately, other judges, including the justices of the Supreme Court, have the final say. That is the way of our Constitution.

D.

For many others, this decision could raise basic questions about our Constitution. For instance, are courts creating new rights? Are judges changing the meaning of the Fourteenth Amendment or our Constitution? Why is all this happening so suddenly?

The answer is that the right to equal protection of the laws is not new. History has already shown us that, while the Constitution itself does not change, our understanding of the meaning of its protections and structure evolves.[16] If this were not so, many practices that we now abhor would still exist.

Contrary to how it may seem, there is nothing sudden about this result. The body of constitutional jurisprudence that serves as its foundation has evolved gradually over the past forty-seven years. The Supreme Court took its first step on this journey in 1967 when it decided the landmark case *Loving v. Virginia*, which declared that Virginia's refusal to marry mixed-race couples violated equal protection. The Court affirmed that even areas such as marriage, traditionally reserved to the states, are subject to constitutional scrutiny and "must respect the constitutional rights of persons." *Windsor*, 133 S.Ct. at 2691 (citing *Loving*).

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16. The Supreme Court in *Lawrence v. Texas* explained:

> Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

539 U.S. at 578-79.

Years later, in 1996, Justice Kennedy first emerged as the Court's swing vote and leading explicator of these issues in *Romer v. Evans*. *Romer*, 517 U.S. at 635 (holding that Colorado's constitutional amendment prohibiting all legislative, executive, or judicial action designed to protect homosexual persons violated the Equal Protection Clause). He explained that if the "'constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.'" *Id.* at 634-35 (emphasis in original) (quoting *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534, 93 S. Ct. 2821, 37 L. Ed. 2d 782 (1973)). These two cases were the virtual roadmaps for the cases to come next.

In 2003, Justice Kennedy, again writing for the majority, addressed another facet of the same issue in *Lawrence v. Texas*, explaining that sexual relations are "but one element in a personal bond that is more enduring" and holding that a Texas statute criminalizing certain sexual conduct between persons of the same sex violated the Constitution. 539 U.S. at 567. Ten years later came *Windsor*. And, sometime in the next few years at least one other Supreme Court opinion will likely complete this judicial journey.

So, as one can readily see, judicial thinking on this issue has evolved ever so slowly. That is because courts usually answer only the questions that come before it. Judge Oliver Wendell Holmes aptly described this process: "[J]udges do and must legislate, but they can do so only

interstitially; they are confined from molar to molecular motions." *S. Pac. Co. v. Jensen*, 244 U.S. 205, 221, 37 S. Ct. 524, 61 L. Ed. 1086 (1917) (Holmes, J., dissenting). In *Romer, Lawrence*, and finally, *Windsor*, the Supreme Court has moved interstitially, as Holmes said it should, establishing the framework of cases from which district judges now draw wisdom and inspiration. Each of these small steps has led to this place and this time, where the right of same-sex spouses to the state-conferred benefits of marriage is virtually compelled.

The Court will enter an order consistent with this Memorandum Opinion.

February 12, 2014

/s/
John G. Heyburn II, Judge
United States District Court

APPENDIX D — RELEVANT STATUTES

U.S. Const. Amend. 14, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ky. Const. § 233a (2014)

§ 233a. Valid or recognized marriage — Status of unmarried individuals.

Only a marriage between one man and one woman shall be valid or recognized as a marriage in Kentucky. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized.

Ky. Rev. Stat. Ann. § 402.005 (2014)

402.005. Definition of marriage.

As used and recognized in the law of the Commonwealth, "marriage" refers only to the civil status, condition, or relation of one (1) man and one (1) woman united in law for life, for the discharge to each other and the community of the duties legally incumbent upon those whose association is founded on the distinction of sex.

Appendix D

Ky. Rev. Stat. Ann. § 402.020 (2014)

402.020. Other prohibited marriages.

(1) Marriage is prohibited and void:

(a) With a person who has been adjudged mentally disabled by a court of competent jurisdiction;

(b) Where there is a husband or wife living, from whom the person marrying has not been divorced;

(c) When not solemnized or contracted in the presence of an authorized person or society;

(d) Between members of the same sex;

(e) Between more than two (2) persons; and

(f) 1. Except as provided in subparagraph 3. of this paragraph, when at the time of the marriage, the person is under sixteen (16) years of age;

2. Except as provided in subparagraph 3. of this paragraph, when at the time of marriage, the person is under eighteen (18) but over sixteen (16) years of age, if the marriage is without the consent of:

a. The father or the mother of the person under eighteen (18) but over sixteen (16), if the parents are married, the parents are not legally separated, no legal guardian has been appointed for the person under eighteen (18) but over sixteen (16), and no court order has

been issued granting custody of the person under eighteen (18) but over sixteen (16) to a party other than the father or mother;

b. Both the father and the mother, if both be living and the parents are divorced or legally separated, and a court order of joint custody to the parents of the person under eighteen (18) but over sixteen (16) has been issued and is in effect;

c. The surviving parent, if the parents were divorced or legally separated, and a court order of joint custody to the parents of the person under eighteen (18) but over sixteen (16) was issued prior to the death of either the father or mother, which order remains in effect;

d. The custodial parent, as established by a court order which has not been superseded, where the parents are divorced or legally separated and joint custody of the person under eighteen (18) but over sixteen (16) has not been ordered; or

e. Another person having lawful custodial charge of the person under eighteen (18) but over sixteen (16), but

3. In case of pregnancy the male and female, or either of them, specified in subparagraph 1. or 2. of this paragraph, may apply to a District Judge for permission to marry, which application may be granted, in the form of a written court order, in the discretion of the judge. There shall be a fee of five dollars ($5) for hearing each such application.

(2) For purposes of this section "parent," "father," or "mother" means the natural parent, father, or mother of a child under eighteen (18) unless an adoption takes place pursuant to legal process, in which case the adoptive parent, father, or mother shall be considered the parent, father, or mother to the exclusion of the natural parent, father, or mother, as applicable.

Ky. Rev. Stat. Ann. § 402.040 (2014)

402.040. Marriage in another state.

(1) If any resident of this state marries in another state, the marriage shall be valid here if valid in the state where solemnized, unless the marriage is against Kentucky public policy.

(2) A marriage between members of the same sex is against Kentucky public policy and shall be subject to the prohibitions established in KRS 402.045.

Ky. Rev. Stat. Ann. § 402.045 (2014)

402.045. Same-sex marriage in another jurisdiction void and unenforceable.

(1) A marriage between members of the same sex which occurs in another jurisdiction shall be void in Kentucky.

(2) Any rights granted by virtue of the marriage, or its termination, shall be unenforceable in Kentucky courts.