NO. 14-5818

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TIMOTHY LOVE, et al.
INTERVENING PLAINTIFFS/APPELLEES

v.

STEVE BESHEAR, in his official capacity as Governor of Kentucky
INTERVENING DEFENDANT/APPELLANT

On Appeal from United States District Court
for the Western District of Kentucky
Hon. John G. Heyburn II, Judge
Civil Action No. 3:13-CV-750-JGH

BRIEF FOR INTERVENING DEFENDANT/APPELLANT, STEVE BESHEAR, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF KENTUCKY

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES Page

STATUTES **Page**

STATE CONSTITUTIONS

FEDERAL CONSTITUTION

PROCEDURAL RULES

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Upon joint motion, this appeal has been consolidated with *Bourke v. Beshear*, Case No. 14-5291, and is set for oral arguments on August 6, 2014.

JURISDICTIONAL STATEMENT

This case is on appeal from the Western District of Kentucky. The district court had subject matter jurisdiction pursuant to 42 U.S.C. § 1983, 28 U.S.C. §1331 and 28 U.S.C. § 1343.

The Sixth Circuit Court of Appeals has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 and Federal Rules of Appellate Procedure Rules 3-4. The trial court's final judgment was entered on July1, 2014. [Memorandum Opinion and Order, RE 91, Page ID #1289-1307]. Intervening Defendant Governor Beshear filed a timely notice of appeal on July 8, 2014. [Notice of Appeal, RE 92, Page ID #1308]

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether the district court erred as a matter of law when it found that Kentucky's adherence to a traditional definition of marriage by adopting Section 233A of the Kentucky Constitution and enacting KRS §§ 402.005, 402.020(1)(d), 402.040(2), and 402.045 violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and whether the district court erred

when it found that homosexuals are a quasi-suspect class whose claims should be reviewed under an intermediate scrutiny standard.

STATEMENT OF THE CASE

The district court removed from debate what the Supreme Court held in *United States v. Windsor*, 133 S.Ct. 2675, 2692 (2013), should be left to the sovereign discretion of states: "the formation of consensus respecting the way the members of a discrete community treat each other in their daily contact and constant interaction with each other." Kentucky has never defined marriage to include same-sex couples, and the Kentucky courts have long-established that such unions do not constitute a marriage. *S.J.L.S. v. T.L.S.*, 265 S.W.3d 804, 822 (Ky. Ct. App. 2008). The district court, however, ignored the sovereign right of Kentucky citizens to adhere to a traditional model of marriage and declared that Kentucky must adopt the standards of other states who define marriage differently in accordance with new standards. The district court went so far as to conclude that no serious person in the legislature or otherwise could believe that the state's interest in furtherance of population growth could be furthered by only granting marriage licenses to traditional man-woman couples. According to the district court's Equal Protection rationale, legislation providing benefits must be provided to all citizens who may be advantaged by the legislation regardless of whether the state's interest is furthered by providing the benefit to all citizens. State

legislatures, by necessity "paint with a broad brush" and, constitutionally, are granted wide latitude in enacting legislation to further economic goals. The Equal Protection analysis does not rest upon whether excluding same-sex couples from marriage results in greater natural procreation, but whether there is any rational basis for granting tax and other marriage benefits to opposite-sex couples who are uniquely suited to further the state's interest.

Additionally, the district court pushed the issue one step further and, contrary to its express rulings in *Bourke v. Beshear*, held that homosexuals are a suspect class entitled to a heightened standard review in an Equal Protection analysis. These erroneous holdings of the district court should be reversed.

Kentucky has never permitted the issuance of a marriage license to a man seeking to marry another man or a woman seeking to marry another woman. Kentucky has limited marriage to persons of the opposite sex since the formation of the Commonwealth. *S.J.L.S.*, 265 S.W.3d at 822. A state's right to regulate domestic relations is firmly established and the federal government was not granted any power to regulate marriage. *Windsor*, 133 S.Ct. at 2691. Further, the Supreme Court has upheld a state's limitation of marriage to the traditional man-woman definition as passing constitutional muster. *See Baker v. Nelson*, 409 U.S. 810 (1972).

The marriage laws challenged by Plaintiffs are laws that codified what has always been the law in Kentucky regarding the definition of marriage. In 1998, the Kentucky legislature enacted a number of statutes confirming that only traditional man-woman marriages would be recognized as marriages in Kentucky and that same-sex unions will not be recognized as a marriage in Kentucky, including KRS §§ 402.005, 402.020(1)(d), 402.040(2), and 402.045.[1]

Less than ten years ago, the Kentucky General Assembly and 74% of participating voters, whose number totaled 1,222,125, passed and adopted the following amendment to Kentucky's constitution, re-affirming Kentucky's man-woman definition of marriage:

> 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. CONST. § 233A. Read together, these laws codify Kentucky's original and only definition of marriage being between one man and one woman public policy and prohibit the creation of non-traditional same-sex marriages. Via the acts of its legislature and the voters of the Commonwealth, Kentucky was confirming its sovereign authority to define marriage in accordance with the standards of its communities. The codification of what has always been the law in Kentucky was not unconstitutional.

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[1] The text of these statutes is set forth in the attached Addendum.

This case is a companion case to *Bourke v. Beshear,* in which four same-sex couples challenged Kentucky's marriage laws that prohibit recognition of same-sex marriages issued by other jurisdictions. Civil Action No. 3:13-CV-750-JGH (W.D. Ky.). The district court granted summary judgment to the *Bourke* plaintiffs and that matter is currently on appeal before this Court. Case No. 14-5291. The appellants in this action ("Intervening Plaintiffs") are two same-sex couples who were denied marriage licenses in Kentucky. The Intervening Plaintiffs intervened in *Bourke* after the *Bourke* Plaintiffs were awarded summary judgment. [Motion to Intervene, RE 49, Page ID# 748-50].[2]

The district court granted summary judgment to Intervening Plaintiffs on July 1, 2014 after full briefing from the parties and amicus briefs from The Family Foundation and the American Civil Liberties Union. [RE 86, Page ID # 1119-1222 and RE # 83, Page ID #1166-1184]. The district court stayed enforcement of its Order "until further order of the Sixth Circuit." [Memorandum Opinion and Order, RE 91, Page ID#1307]. Intervening Plaintiffs have not moved this Court to lift the stay.

The district court, ignoring controlling authority from this Court and the Supreme Court and effectively removing the regulation of marriage from the

[2] The *Bourke* appeal has been consolidated with this case and oral arguments are currently scheduled to take place August 6, 2014 along with the other same-sex marriage cases arising from the district courts in Ohio, Tennessee and Michigan.

legislature and the citizens of Kentucky, judicially re-wrote Kentucky's marriage laws. The ramifications of the district court's action not only affect the sovereignty of this Commonwealth, but also create a new suspect class of persons within the Western District of Kentucky. For the reasons set forth below, summary judgment should be reversed.

SUMMARY OF ARGUMENT

The district court erroneously concluded that Kentucky's adherence to a traditional man-woman marriage model for its marriage laws violates the Equal Protection Clause of the Fourteenth Amendment and that homosexuals constitute a quasi-suspect class. The power to define and regulate marriage is one uniquely within the realm of the state legislatures. The Supreme Court affirmed the states' role as such in *Windsor*. Additionally, *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), appeal dismissed by 409 U.S. 810 (1972), affirmatively rejected the notion that state law same-sex marriage prohibitions violate the Equal Protection Clause. *Baker* remains valid binding precedent upon the lower federal courts.

Even if *Baker* were not preclusive, Intervening Plaintiffs' equal protection claims fail. Same-sex couples are materially different from traditional man-woman couples. Only man-woman couples can naturally procreate. Fostering population growth serves a legitimate interest that is rationally related to the traditional man-

woman marriage model. Thus, the distinction drawn by Kentucky's statutes is constitutionally sound.

The district court justified its finding of no rational relation by adopting a "no harm" test (essentially finding that granting homosexuals marriage rights would do "no harm" to the state's interest in procreation). It also required the Commonwealth to draw exact lines between its classifications and its legislative interests.

Additionally, the district court erroneously – and gratuitously - found that homosexuals are a quasi-suspect class and therefore the acts of the Kentucky legislature and the Commonwealth's voters are subject to intermediate scrutiny. The district court did not apply the heightened standard, but offered its opinion on the issue nonetheless.

Same-sex couples are not a protected class, and they do not seek access to a recognized fundamental right. They seek recognition of a new right. The Commonwealth has a legitimate interest in encouraging procreation through a traditional man-woman model. Thus, Kentucky's refusal to allow same-sex couples to be married in Kentucky does not violate the Equal Protection Clause of the Fourteenth Amendment. Entry of summary judgment for Plaintiffs was erroneous, and the decision of the district court should be reversed.

STANDARD OF REVIEW

The court of appeals reviews *de novo* an order granting summary judgment. *Henderson v. Walled Lake Consol. Schools,* 469 F.3d 479, 486 (6th Cir. 2006). Summary judgment is appropriate when there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). Determining whether a particular legislative scheme is rationally related to a legitimate government interest is a question of law. *Seal v. Morgan*, 229 F.3d 567, 580 (6th Cir. 2000).

ARGUMENT

I. The district court erred by judicially re-defining and regulating Kentucky's constitutional and statutory marriage laws.

The Supreme Court in *U.S. v. Windsor,* 133 S.Ct. 2675 (2013), did not remove from political debate or the democratic process the sovereign right of Kentucky to decide the important social issue of whether same-sex marriage would constitute a valid marriage in Kentucky. *Windsor* is a case about federalism and the proper restriction of the federal government in interfering with the sovereign rights of the states to define marriage based upon the standards within discrete local communities. The inherent function and role of the states to define and regulate marriage is beyond dispute. *Windsor* re-affirmed the states' province to define marriage:

> The recognition of civil marriages is central to state domestic relations law applicable to residents and citizens. See *Williams v. North Carolina*, 317 U.S. 287, 63 S.Ct. 207, 87 L.Ed. 279 (1942) ("Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders.") The definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the "[p]rotection of offspring, property interests, and the enforcement of marital responsibilities." *Ibid.* "[T]he state, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce . . . [and] the Constitution delegated no authority to the Government of the United States on the subject of marriage and divorce." *Haddock v. Haddock*, 201 U.S. 562, 575, 26 S.Ct. 525, 50 L.Ed. 867 (1906); *see also In re Burrus*, 136 U.S. 586, 593-594, 10 S.Ct. 850, 34 L.Ed. 500 (1890) ("The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.").

Id. at 2691. The Supreme Court has long recognized the strict rules prohibiting the judiciary's interference with these rights:

> [T]he power to make rules to establish, protect, and strengthen family life as well as to regulate the disposition of property left in [the States by its citizens] is committed by the Constitution of the United States and the people of the [State] to the legislature of that State. Absent a specific constitutional guarantee, it is for that legislature, not the life-tenured judges of this Court, to select from among possible laws.

Labine v. Vincent, 401 U.S. 532, 538-39 (1971). The Supreme Court has further instructed that "[w]hen social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude, and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic

process." *City of Cleburne, Texas v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985) (citations omitted)(emphasis added).

The *Windsor* majority recognized that when states (like New York) act to accept and sanction same-sex marriage, those "actions were without doubt a proper exercise of [New York's] sovereign authority within our federal system, all in the way that the Framers of the Constitution intended." *Windsor*, 133 S.Ct. at 2692. The Court held that "[t]he dynamics of state government in the federal system are to ***allow the formation of consensus respecting the way the members of a discrete community treat each other in their daily contact and constant interaction with each other***." *Id*. (emphasis added). The consensus of the Kentucky legislature and the citizens of the Commonwealth to promote traditional man-woman marriage is no less a proper exercise of Kentucky's sovereign authority within the federal system than New York's exercise of its sovereign authority to recognize same-sex marriage.

Thus, contrary to the district court's expression otherwise, *Windsor* does not compel judicial re-writing of Kentucky's traditional marriage laws. Following *Windsor*, the Supreme Court reaffirmed that "[s]ave and unless the state, county or municipal government runs afoul of a federally protected right, it has vast leeway in the management of its internal affairs." *Schuette v. Coalition to Defend Affirmative Action*, 134 S.Ct. 1623, 1638 (Apr. 22, 2014). The *Windsor* Court did

not conclude that same-sex marriage is a federally mandated right or that states no longer maintained independent sovereignty to decide that issue. ***Windsor* instructs that *if* a state exercises its independent sovereign authority to offer same-sex marriages, then Congress lacks the authority to strip the benefit from the citizens who had been conferred that benefit.** *Windsor* does not compel ***all states***, however, to provide that benefit nor to recognize same-sex marriages authorized in other states. Instead, *Windsor* confirms that these decisions should be made on the local level and once made the federal government lacks authority to interfere with that decision if not based upon a discriminatory animus.

What occurred in Kentucky with regard to adoption of the constitutional amendment and enactment marriage statutes is not comparable to Congress' passage of § 3 of DOMA, which invaded the State's rights. Kentucky's enactment of its marriage statutes and adoption of CONST. AMEND. § 233A codified what has always been the law in the Commonwealth of Kentucky – prohibition of same-sex marriages. *See S.J.L.S.*, 265 S.W.3d at 822 ("Such marriages have been prohibited by statute since 1998, KRS 402.020(1)(d), **and by common law since the formation of the Commonwealth."**)(emphasis added). *See also Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973) (affirming that Kentucky has never permitted the issuance of marriage licenses to same-sex couples). In 1998, when the Kentucky legislature enacted statutes confirming that only marriages between

one man and woman would be granted or recognized as valid in Kentucky, the law did not change. Rather, the existing common law was codified. Likewise, in 2004, when 1,222,125 Kentuckians, representing 74% of participating voters, adopted constitutional amendment § 233A, the citizens of the Commonwealth did not change the law.

Kentucky's passage of statutes and a constitutional amendment to *reflect this "community's considered perspective"* with regard to the state domestic matter is reflective of the state sovereignty that the *Windsor* Court declared to be "all in the way the Framers of the Constitution intended." *Windsor*, 133 S.Ct. at 2692. *Windsor* expressly recognized that the issue of same-sex marriage recognition is a local issue left to be determined by the states – not the federal government. Under Intervening Plaintiffs' view, Kentucky citizens should be compelled to adhere to the "formation of consensuses" of other communities, and not based upon the consensus of Kentuckians despite the clear intention of the Framers of the Constitution that such decisions remain with each state's sovereign authority. *Windsor* recognized the unique role of the states to decide this sensitive issue; *Windsor* did not take it away.

"'Same-sex marriage presents a highly emotional and important question of public policy—but not a difficult question of constitutional law' at least when it comes to the States' right to enact laws preserving or altering the traditional

composition of marriage." *Kitchen v. Herbert*, 13-4178, 2014 WL 2868044 at *33 (10th Cir. June 25, 2014) (Kelly, J. Dissent) (internal citation omitted). When the Supreme Court in *Schuette* determined that the Michigan voters' decision to amend the Michigan constitution to prohibit race-based preferences as part of the admissions process for state universities was within their authority, the Court confirmed that even sensitive issues involving federally protected rights can be decided through the political process:

> This case is not about how the debate about racial preferences should be resolved. It is about who may resolve it. There is no authority in the Constitution of the United States or in this Court's precedents for the Judiciary to set aside Michigan laws that commit this policy determination to the voters. *See Sailors Board of Ed. of County of Kent.*, 387 U.S. 105 (1967) ("Save and unless the state, county or municipal government runs afoul of a federally protected right, it has vast leeway in the management of its internal affairs"). 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, 134 S.Ct. at 1638.

In sum, *Windsor* does not stand for the proposition that the federal constitution compels states to allow same-sex marriages. As the Supreme Court held in *Labine,* "absent a specific constitutional guarantee, it is for the legislature, not the life-tenured judges of this Court, to select from among possible laws." *Labine*, 401 U.S. at 538-39. "If the States are the laboratories of democracy,

requiring every state to recognize same-gender unions—contrary to the views of its electorate and representatives—turns the notion of a limited national government on its head." *Kitchen*, 2014 WL 2868044 at 33 (10th Cir. June 25, 2014) (Kelly, J. Dissent) (internal citation omitted).

II. The district court erred by concluding that the Equal Protection Clause guarantees the right to same-sex marriage.

A. *Baker v. Nelson* remains binding precedent.

The Supreme Court declined the opportunity in *Windsor* to declare that states were required to recognize same-sex marriages, confirming that the matter is properly left to the states. The only definitive statement from the Supreme Court regarding the constitutionality of same-sex-marriage prohibitions came in *Baker v. Nelson*, 409 U.S. 810 (1972), when the Supreme Court "dismissed for want of a substantial federal question" the Minnesota Supreme Court's determination that the Equal Protection Clause of the United States Constitution does *not* guarantee the right to same-sex marriage. *Windsor* did not disturb the *Baker* holding. *Baker* remains binding precedent.

In *Baker*, two men applied for and were denied the issuance of a marriage license in Minnesota. The basis of the denial was a Minnesota statute that indicated marriage was to be only between a man and a woman. The men argued they were denied a marriage license based solely on their sex and that the statute was unconstitutional. *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971).

Like Kentucky, Minnesota did not recognize same-sex marriages. Like this case *Baker* involved the issuance of a marriage license to same-sex couples and the state's assertion that only man-woman marriages were permitted. The *Baker* plaintiffs, like Plaintiffs here, alleged that the state's denial of a same-sex marriage license deprived them of their liberty to marry and their property without due process of law under the Fourteenth Amendment and violated their rights under the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 186.

The Minnesota Supreme Court rejected these constitutional challenges. In reaching its decision, the Minnesota Supreme Court quoted *Skinner v. State of Okl. ex rel. Williamson,* 316 U.S. 535, 541 (1942):

> "Marriage and procreation are fundamental to the very existence and survival of the race." The 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 of the Fourteenth Amendment is not a charter for restructuring it by judicial legislation.

Baker, 191 N.W. at 186 (internal citations omitted). Following this, the Minnesota Supreme Court held: "The equal protection clause of the Fourteenth Amendment, like the due process clause, is not offended by the state's classification of persons authorized to marry. There is no irrational or invidious discrimination." *Id.* at 187.

The *Baker* plaintiffs appealed to the United States Supreme Court and presented three questions in the Jurisdictional Statement: (1) whether Minnesota's "refusal to sanctify appellants' [same-sex] marriage deprives appellants of their

liberty to marry and of their property without due process of law under the Fourteenth Amendment"; (2) whether Minnesota's "refusal, pursuant to Minnesota marriage statutes, to sanctify appellants' [same-sex] marriage because both are of the male sex violates their rights under the equal protection clause of the Fourteenth Amendment"; and (3) whether Minnesota's "refusal to sanctify appellants' [same-sex] marriage deprives appellants of their right to privacy under the Ninth and the Fourteenth Amendments." *Baker*, Jurisdictional Statement, No. 71-1027, at 3 (Feb. 11, 1971). In response, the Supreme Court then issued an order of "dismiss[al] for want of a substantial federal question." *Baker*, 409 U.S. at 810.

The Supreme Court's summary dismissal of the appeal operated to affirm the Minnesota Supreme Court's decision and creates binding precedent upon all lower courts until the Supreme Court directs otherwise or except when "doctrinal developments indicate otherwise." *Hicks v. Miranda*, 422 U.S. 332, 344-45 (1972). A summary dismissal "without doubt reject[s] the specific challenges presented in the statement of jurisdiction," and "prevent[s] lower courts from coming to opposite conclusions [1] on the precise issues presented and [2] necessarily decided by those actions." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (per curiam). *Baker* has not been overruled either expressly or by implication. "Summary dismissals are merit rulings as to those questions raised in

the jurisdictional statement." *Kitchen*, 2014 WL 2868044 at 34 (Kelly, J. Dissent) (internal citation omitted).

The district court relied upon *Hicks* to justify its dismissal of the controlling authority of *Baker*, stating that "doctrinal developments" indicate that the Supreme Court would rule differently now and that any reliance on *Baker* as a bar to the claims of the Intervening Plaintiff is "difficult to take seriously." [Memorandum Opinion and Order, RE 91 Page ID# 1293]. This approach ignores the clear direction from *Hicks* that lower courts are "bound by summary decisions by this Court 'until such time *as the Court informs [them] that [they] are not*.'" *Hicks*, 422 U.S. at 344-45 (emphasis added)(citation omitted); *see also Kitchen*, 2014 WL 2868044 at 34. There is not a single opinion of the Supreme Court regarding forcing a state to recognize same-sex marriage since *Baker*, much less one that explicitly, or by implication, overrules *Baker*. Thus, *Baker* is binding on this Court and dispositive of the Intervening Plaintiffs' Equal Protection claims. *See Caban v. Mohammed*, 441 U.S. 380, 390 n.9 (1979). None of the cases cited by the district court as "doctrinal development," *Romer v. Evans*, 517 U.S. 620 (1996), *Lawrence v. Texas*, 539 U.S. 558 (2003), or *Windsor*, deals with the question of whether or not a state has to allow same sex marriage; *Baker* does. "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). *Baker* is the controlling authority in this case, and this Court is bound to follow that precedent.

B. Kentucky's traditional man-woman marriage laws do not violate the Equal Protection Clause.

1. Rational basis is the appropriate standard of review.

"Under the Equal Protection Clause, courts apply strict scrutiny to statutes that involve suspect classifications or infringe upon fundamental rights." *Moore v. Detroit School Reform Bd.*, 293 F.3d 352, 368 (6th Cir. 2002). However, laws that do not involve suspect classifications and do not infringe upon fundamental rights "will be upheld if they are rationally related to a legitimate state interest." *Id.* (internal citation omitted). Simply stated, the rational basis test applies in this case if same-sex marriage is not a fundamental right and if homosexuality is not a suspect class.

In the *Bourke v. Beshear* segment of this case, the district court correctly recognized that "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." [Memorandum Opinion, RE 47, Page ID # 23]. The district court was also correct when it concluded that under binding Sixth Circuit precedent "sexual orientation is not a suspect classification and thus is not subject to heightened

scrutiny." [Memorandum Opinion, RE 47, Page ID # 731 (citing *Davis v. Prison Health Servs.*, 679 F.3d 433, 438 (6th Cir. 2012))]. As a result, the district court, in *Bourke*, correctly adopted the rational basis test as the standard of review.

In this case, however, the district court, while not reaching so far as to classify same-sex marriage as a fundamental right, went against the controlling authority of this Court and held that homosexuals constitute a quasi-suspect class and that review of the Kentucky Constitution and laws at issue should be conducted under intermediate scrutiny. [Memorandum Opinion and order, RE No. 91, Page ID# 1302]. This holding could have implications reaching far beyond the issue of same-sex marriage. Interestingly, the district court did not actually apply intermediate scrutiny, stating that Kentucky's laws fail "regardless of the standard" and applied the rational basis test, albeit improperly. [Memorandum Opinion and Order, RE 91, Page ID# 1302]. This finding is clearly erroneous given the clear precedent of this circuit and the Supreme Court.

a. <u>The district court erred by concluding that homosexuals are a quasi-suspect class.</u>

The district court previously, and correctly, concluded that under Sixth Circuit precedent "sexual orientation is not a suspect classification and thus is not subject to heightened scrutiny." [Memorandum Opinion, RE 47, Page ID # 731] (citing *Davis*, 679 F.3d at 438). Indeed, the Sixth Circuit has repeatedly held that "this court has not recognized sexual orientation as a suspect classification" for

Equal Protection analysis. *Davis*, 679 F.3d at 438. However, the district court reversed course in this case and determined that homosexuals are a suspect class entitled to heightened scrutiny. [Memorandum Opinion and Order, RE No. 91, Page ID# 1298]. The district court's logic is fundamentally flawed for multiple reasons.

First, the district court's reasoning completely ignores that *Davis* was decided some nine years after *Lawrence*. *Davis* was not the first time, post-*Lawrence*, that the Sixth Circuit clearly decided this issue. "Homosexuality is not a suspect class in this circuit." *Scarbrough v. Morgan Co. Bd. of Educ.*, 470 F.3d 250, 261 (6th Cir. 2006). The Sixth Circuit's position on this issue post-*Lawrence* could not be more clear. This Circuit has had the opportunity on two occasions since *Lawrence* to classify homosexuals as a suspect class, and twice declined. While the district court ignored the controlling precedent of this Circuit, this Court, as would be any panel of the Sixth Circuit, is bound to apply the clear precedent of rational basis test review. *See Darrah v. City of Oak Park*, 255 F.3d 301, 309 (6th Cir. 2001) ("a panel of this Court cannot overrule the decision of another panel. The prior decision remains controlling authority unless an inconsistent decision of the United States Supreme Court required modification of the decision or this Court sitting en banc overrules the prior decision.") (citation omitted). There has been no inconsistent Supreme Court decision or any *en banc* decision of the Sixth

Circuit which would allow for either *Scarbrough* or *Davis* to be ignored. For this reason alone, the district court's decision should be overruled, and Plaintiffs' argument that they are a suspect class and entitled to a heightened level of scrutiny should be rejected.

Second, the district court's reasoning ignores the precedential value of *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 294 (6th Cir. 1997). In *Equality Foundation*, the Sixth Circuit upheld an amendment to the city charter of Cincinnati which offered legal protection to homosexuals after the application of the rational basis test as set forth in *Romer*. In its reliance and interpretation of *Romer*, not *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003), the Sixth Circuit set forth that:

> In so ruling, the Court, *inter alia*, (1) reconfirmed the traditional tripartite equal protection assessment of legislative measures; and (2) resolved that the deferential "rational relationship" test, that declared the constitutional validity of a statute or ordinance if it rationally furthered any conceivable valid public interest, was the correct point of departure for the evaluation of laws which uniquely burdened the interests of homosexuals.

Id. at 294. The precedential value of *Equality Foundation* has not been overruled by the Supreme Court or by this Circuit and should be applied in this case.

Third, even if the district court's repudiation of the controlling precedent of this Circuit was accepted, the district court's application of the factors is an

impermissible overreach. Specifically, the Court's determination that homosexuals are "politically powerless," based upon the decision of the Second Circuit in *Windsor v. United States*, 699 F.3d 169, 176 (2d Cir. 2012), whose determination as to suspect classification was not adopted by the Supreme Court, is clearly erroneous given the guidance provided by the Supreme Court in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985). The *Cleburne* Court defined the test as whether or not the affected group has "no ability to attract the attention of lawmakers." *Id*. at 445. It cannot reasonably be argued that homosexuals cannot attract lawmakers' attention and achieve political influence. As well, the district court's comparison of gender and homosexuality as analogous quasi-suspect classes is also clearly against the precedent of the Supreme Court. The district court cites to the Second Circuit *Windsor* decision, not the Supreme Court decision, and a Middle District of Pennsylvania opinion in support of its conclusion that homosexuality is a suspect class. The Supreme Court clearly has not treated gender and sexual orientation the same. Compare *Craig v. Boren*, 429 U.S. 190 (1976) (applying intermediate scrutiny to gender classifications) with *Romer* (applying rational basis review to sexual orientation classification). The controlling precedent clearly shows that the district court came to the wrong conclusion.

Finally, but significantly, the district court overreached by deciding the issue of whether homosexuals are considered to be suspect class and therefore entitled to heightened scrutiny because the court applied the lower rational basis standard. The district court's gratuitous declaration – which could have implications in other cases involving homosexual rights - violated a fundamental principle of judicial restraint that courts should not "decide questions of a constitutional nature unless absolutely necessary to a decision of the case." *Burton v. United States*, 196 U.S. 283, 295 (1905). The Supreme Court has stated that such an unnecessary exercise exceeds federal court jurisdiction:

> In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered: one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other, never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. These rules are safe guides to sound judgment. It is the dictate of wisdom to follow them closely and carefully.

Liverpool, N.Y. & P.S.S. Co. v. Emigration Comm'rs, 113 U.S. 33, 39 (1885). The district court's unnecessary classification of homosexuals as a quasi-suspect class was wholly unnecessary to its decision and should be reversed.

b. <u>There is no fundamental right to same-sex marriage.</u>

The institution of the man-woman marriage is deeply rooted in the history and traditions of our country. A right to same-sex marriage is not. The *Windsor* Court's historical description of society's views on traditional marriage and same-

sex marriage precludes any argument that Plaintiffs are seeking access to a fundamental right:

> It seems fair to conclude that, until recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage. For marriage between a man and a woman no doubt 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 the civilization. . . . The limitation of lawful marriage to heterosexual couples, which for centuries had been deemed both necessary and fundamental, came to be seen in New York and certain other States as an unjust exclusion.

Windsor, 133 S.Ct. at 2689. The Supreme Court's description of this nation's view of traditional man-woman marriage as "necessary and fundamental" is consistent with other Supreme Court descriptions of this right, such as in *Skinner v. State of Okl. ex rel. Williamson,* 316 U.S. 535, 541 (1942) (finding that "marriage and procreation are fundamental to the very existence and survival of the race"); *Maynard v. Hill*, 125 U.S. 190, 211 (1888) (characterizing marriage as "the foundation of the family and of society, without which there would be neither civilization nor progress"); and *Lawrence,* 539 U.S. at 585 (O'Connor concurring) (stating that state courts have a "legitimate state interest . . . [in] preserving the traditional institution of marriage" providing a basis to distinguish between homosexuals and heterosexuals).

Intervening Plaintiffs do not allege violation of this fundamental, deeply-rooted right. Instead, they want to re-define the right and create a new right – a new institution, one never recognized by the Supreme Court, as a fundamental right and until relatively recently never associated with the institution of marriage.

The district court did not find that same-sex marriage is a fundamental right. The court presumptively rejected Intervening Plaintiffs' argument that it is, stating, "…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**." [Memorandum Opinion and Order, RE No. 91, Page ID # 1297](Emphasis added). The district court further stated that it wanted to avoid "overreaching" in its own "constitutional analysis" and in the face of "relevant constitutional jurisprudence" and did not find that same-sex marriage is a fundamental right. [Memorandum Opinion and Order, RE 91, Page ID # 1298]. The district court is correct that the Supreme Court has not, at any time, made the leap requested by Intervening Plaintiffs.

It is well-established that courts should not readily create new fundamental rights. *See Does v. Munoz*, 507 F.3d 961, 964 (6th Cir. 2007) ("[I]dentifying a new fundamental right subject to the protections of substantive due process is often an 'uphill battle' as the list of fundamental rights 'is short.'")(internal

citations omitted) [3] and *San Antonio School District v. Rodriquez*, 411 U.S. 1, 33 (1973) ("It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws."). Further, "to qualify such rights must be 'deeply rooted in this Nation's history and tradition,' or 'implicit in the concept of ordered liberty,' such that neither liberty nor justice would exist if they were sacrificed.'" *Does*, 507 F.3d at 964 (citing *Moore*, 431 U.S. at 503, and *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

The fundamental right being asserted must be articulated with a "careful description." *Id.* at 720-21. See also *Kitchen*, 2014 WL 2868044 at 37 (10th Cir. June 25, 2014) (Kelly, J. Dissent) ("But we should be reluctant to announce a fundamental right by implication. Not only is that beyond our power, it is completely arbitrary and impractical; as in this case, a state should be allowed to adopt change if desired and implement it"). Here, Intervening Plaintiffs are not asserting a right to a traditional man-woman marriage, of which procreation can be a natural result. Rather, they are seeking access to a different institution – a same-sex marriage, from which procreation can never naturally result. Thus, Intervening

[3] *See McGuire v. Ameritech Services, Inc.*, 253 F.Supp.2d 988, 999, n. 9 (S.D. Ohio 2003)(explaining that claims regarding the interference with "fundamental rights" are at times analyzed under the Due Process Clause and sometimes under the Equal Protection Clause, and at times under other Constitution provisions such as the Privileges and Immunities Clause, but recognizing that "in truth, whether invoked under the Equal Protection Clause, the Due Process Clause, the Privileges or (sic) Immunities Clause, or a more explicit provision of the Constitution, the fundamental rights analysis is the same.").

Plaintiffs' newly asserted "right" is not one esteemed in the tradition and history of this Nation. It is a new "right" – a new concept - and recognized by only a minority of the States in the United States. As such, Intervening Plaintiffs' deprivation of their claimed "right" is not subject to a heightened scrutiny.

c. The "class of one" theory mandates rational basis review.

Because Intervening Plaintiffs do not belong to a suspect class and there is no fundamental right to same-sex marriage, the only theory upon which Intervening Plaintiffs can allege a violation of the Equal Protection Clause is the "class of one theory" originally recognized by the Supreme Court in *Village of Willowbrook v. Olech*, 528 U.S. 562, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000) (per curiam). *See TriHealth, Inc. v. Bd. of Com'rs, Hamilton Co. Ohio,* 430 F.3d 783, 788 (6th Cir. 2005) ("The Equal Protection Clause prohibits discrimination by government which either burdens a fundamental right, targets a suspect class, or intentionally treats one differently than others similarly situated without any rational basis for the difference.") (internal citation omitted).

In "class of one" cases the plaintiffs must overcome a heavy burden, either negating every conceivable basis which might support the complained of government action, or by showing that the challenged action was motivated by animus. *Id*. In both *Bourke* and this case, the district court did not find a clear showing of animus to be the motivating factor in the Commonwealth's regulation

of marriage. [Memorandum, Opinion and Order, RE 47, Page ID # 735-36; Memorandum Opinion and Order, RE 91, Page ID# 1302]. As this Circuit has noted, "class of one" cases are generally viewed with skepticism as they, in essence, question the legislative process:

> In the wake of *Olech,* the lower courts have struggled to define the contours of class-of-one cases. All have recognized that, unless carefully circumscribed, the concept of a class-of-one equal protection claim could effectively provide a federal cause of action for review of almost every executive and administrative decision made by state actors. It is always possible for persons aggrieved by government action to allege, and almost always possible to produce evidence, that they were treated differently from others, with regard to everything from zoning to licensing to speeding to tax evaluation. It would become the task of federal courts and juries, then, to inquire into the grounds for differential treatment and to decide whether those grounds were sufficiently reasonable to satisfy equal protection review. This would constitute the federal courts as general-purpose second-guessers of the reasonableness of broad areas of state and local decision making: a role that is both ill-suited to the federal courts and offensive to state and local autonomy in our federal system.

Loesel v. City of Frankenmuth, 692 F.3d 452, 461-62 (6th Cir. 2012) (internal citation omitted).

Time and again, the Supreme Court has recognized this attempted intrusion into the legislative process and affirmed the rights of the States to establish classifications for the purpose of serving a legitimate public purpose:

> The Equal Protection Clause directs that "all persons similarly circumstanced shall be treated alike." But so too, "[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." The initial determination of what is "different" and what is "the same" resides in

> the legislatures of the States. A legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of the state to remedy every ill. In applying the Equal Protection Clause to most forms of state action, we thus seek only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose.

Plyler v. Doe, 457 U.S. 202, 216 (1982)(internal citations omitted). Further, the Supreme Court "has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways." *Reed v. Reed,* 404 U.S. 71, 75 (1971).

Intervening Plaintiffs bear the burden of demonstrating that they were treated differently than man-woman couples "in all material respects." *See Loesel* 692 F.3d at 462-63. "Materiality is an integral element of the rational basis inquiry. Disparate treatment of similarly situated persons who are dissimilar only in immaterial respects is not rational. Conversely, disparate treatment of persons is reasonably justified if they are dissimilar in some material respect." *TriHealth, Inc,*. 430 F.3d at 790. "It is unnecessary to say that the 'equal protection of the laws' required by the Fourteenth Amendment does not prevent the states from resorting to classifications for the purposes of legislation." *F.S. Royster Guano Co. v. Commonwealth of Virginia*, 253 U.S. 412, 415 (1920).

Man-man and woman-woman couples are not similarly situated to man-woman couples in a significant material aspect. Only man-woman couples have

the ability to naturally procreate. The distinction in natural procreation abilities between man-woman and same-sex couples should not be interpreted to mean that same-sex couples cannot have stable, loving familial relationships or contribute to society in important and meaningful ways. Nonetheless, as set forth more fully below, a stable birth rate is reasonably related to the object of Kentucky's traditional marriage laws and therefore those laws do not offend the Equal Protection Clause.

2. Kentucky's marriage laws are rationally related to the state's interest of preserving the traditional man-woman marriage model.

a. The rational basis threshold is minimal.

The Supreme Court has articulated the considerable deference to be given to the state under a rational-basis review:

> [The] rational-basis review in equal protection analysis "is not a license for courts to judge the wisdom, fairness or logic or legislative choices." Nor does it authorize "the judiciary [to] sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." For these reasons, a classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity. Such classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose. Further, a legislature that creates these categories need not "actually articulate at any time the purpose or rationale supporting its classification." Instead, a classification "must be upheld against equal protection challenge **if there is any**

> **reasonably conceivable state of facts that could provide a rational basis for the classification**."

Heller v. Doe, 509 U.S. 312, 319-20 (1993) (emphasis added) (internal citations omitted). In performing a rational basis analysis, courts are obligated to look to any "conceivable basis" for the challenged law, and their analysis is not limited to those articulated, established, recorded, or those that may have even occurred to the defendant. *See FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993); *Railroad Retirement Board v. Fritz*, 449 U.S. 166, 101 S.Ct. 453, 66 L.Ed.2d 368 (1980); *Maxwell's Pic-Pac, Inc.*, 739 F.3d 936, 940 (6th Cir. 2014) (rejecting the equal protection challenge based upon a finding of "reasonably conceived facts" to support the challenged legislation).

b. Promotion of birth rates is a legitimate interest.

The district court did not question the argument that marriage between opposite-sex couples furthers Kentucky's interest in procreation and promotes a stable birth rate. Encouraging, promoting, and supporting the formation of relationships that have the natural ability to procreate furthers the Commonwealth's fundamental interest in ensuring humanity's continued existence.

The Court failed to recognize, however, that in the furtherance of population growth, it is entirely rational for Kentucky to limit the granting of tax and other benefits to the broad class of opposite-sex couples even though not all

opposite-sex couples may choose to, or can, have biological children. State legislatures, by necessity "paint with a broad brush" and, constitutionally, are granted wide latitude in enacting legislation to further economic goals. The issue is not whether excluding same-sex couples from marriages results in greater natural procreation, but whether there is any rational basis for granting tax and other benefits to only heterosexual couples.

c. The district court erred by adopting a "no harm" approach.

The district court reasoned that since the Commonwealth had not explained how Kentucky's prohibition on same-sex marriage would further its interest in fostering population growth, then allowing same-sex couples to marry would not harm or diminish the Commonwealth's interest in procreation. [Memorandum Opinion and Order, RE 91 Page ID# 1303]. This "no-harm" premise is not grounded in any legal authority and misses the mark altogether. It is well-established that Kentucky's legislation is required to be "presumed constitutional [with] "[t]he burden [] on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record." *Heller v. Doe*, 509 U.S. 312, 320 (1993). Adoption of this no-harm standard would make short work of Equal Protection and Due Process claims. The Commonwealth had "no obligation to produce evidence to sustain the rationality of a statutory classification. '[A] legislative choice is not

subject to courtroom fact finding and may be based upon rational speculation unsupported by evidence or empirical data.'" *Id.* (internal citations omitted).

The same no-harm theory could be argued by many plaintiffs who make Equal Protection or Due Process challenges when denied a government benefit. The Supreme Court has clearly expressed that "when . . . the inclusion of one group promotes a legitimate government purpose, and the addition of other groups would not, we cannot say that the statute's classification of beneficiaries and non-beneficiaries is invidiously discriminatory." *Johnson v. Robison*, 415 U.S. 361, 383 (1974). Same-sex couples cannot naturally promote Kentucky's legitimate purpose of procreation. The exclusion of same-sex couples from receipt of marriage benefits (*i.e.*, tax and other benefits) when they do not promote Kentucky's legitimate purpose is not invidiously discriminatory.

Johnson demonstrates that even though same-sex couples may benefit from the benefits associated with marriage and even though same-sex couples may share characteristics with opposite sex couples, those factors are not enough to require the state to make the benefit available to them. In *Johnson*, the Supreme Court considered whether the government violated former Selective Service registrants' Equal Protection rights where veterans' educational benefits were offered to draftees who served on active duty in the Armed Forces but not to Selective Service registrants who were conscientious objectors and served in alternative

civilian service. Both groups were out of the job force during the time of their service, both had their lives disrupted as a result of their mandatory service and both would have benefited from receipt of the government benefits.

The Supreme Court, however, found no Equal Protection violation by Congress' decision to limit educational benefits to those who served on active duty. The Court held that the statutory classification was rationally related to the objectives of the statute which were to help induce registrants to volunteer for the draft or seek a lower Selective Service classification and to make military service more palatable to a draftee and thus reduce the draftee's unwillingness to be a soldier. 415 U.S. at 382. The Court found that the two groups were not similarly situated because military service with educational benefits was more attractive to an active service draftee than military service without benefits. Educational benefits made no difference to the attractiveness of the military for a conscientious objector whose refusal to actively serve was based upon deeply held religious beliefs. The Court also rejected the notion that even though both groups had been displaced from their routines during the time of their service and even though both would have benefited from the educational benefit, "a common characteristic shared by beneficiaries and non-beneficiaries alike, is not sufficient to invalidate a statute when other characteristics peculiar to only one group rationally explain the statute's different treatment of the two groups." *Id.* at 378. Thus, the Court held

that offering educational benefits to the conscientious objectors would not have promoted the government's interest in making the Armed Service more attractive and there was no violation of the Equal Protection clause based upon the classifications.

Similarly, even though same-sex couples and opposite-sex couples may share some similarities and even if recognizing marriage between same-sex couples would not reduce procreation, as Plaintiffs allege, offering same-sex couples the state benefit of marriage recognition does not promote Kentucky's legitimate interest in fostering population growth. Offering the benefit to opposite-sex couples does, however. Thus, there is no "invidious discrimination" by excluding same-sex couples from the state benefit.

d. <u>The district court erred by requiring exact lines to be drawn for the state's classification.</u>

The Minnesota Supreme Court in *Baker* rejected the same "line drawing" argument mandated by the district court below::

> Petitioners note that the state does not impose upon heterosexual married couples a condition that they have a proved capacity or declared willingness to procreate, posing a rhetorical demand that this court must read such condition into the statute if same-sex marriages are to be prohibited. Even assuming that such a condition would be neither unrealistic nor offensive under the *Griswold* rationale, the classification is no more than theoretically imperfect. We are reminded, however, that 'abstract symmetry' is not demanded by the Fourteenth Amendment.

Baker, 191 N.W.2d at 187. Further, the Supreme Court has repeatedly stated that the state is not required to draw perfect lines in its classifications. "[C]ourts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between the means and ends. 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*, 509 U.S. at 321 (internal citations omitted). Thus, that man-woman couples who may not choose, or may not be able, to have children are allowed to marry does not nullify the rational basis for a man-woman marriage classification. *See Dandridge v. Williams*, 397 U.S. 471, 486-87 (1970)("[T]he Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all. It is enough that the State's action be rationally based and free from invidious discrimination.")(internal citations omitted). Thus, the district court's symmetry requirement was erroneous.

III. ***Loving v. Virginia*** **is Not Applicable to a Same-Sex Marriage Analysis.**

Although not relied upon by the district court, the Intervening Plaintiffs have made an analogy between race and sexual orientation as prohibited classifications in reliance upon *Loving v. Virginia*, 388 U.S. 1 (1967). This reliance is misplaced. Virginia's miscegenation laws at issue in *Loving* prohibited marriages between couples of mixed races. The Supreme Court correctly concluded that race had no

bearing upon any legitimate interest of the government with regard to marriage and that the laws violated the Fourteenth Amendment. In contrast, it cannot be said that sexual orientation has no bearing on the government's interest with regard to marriage. *See Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973) (rejecting constitutional challenge of lesbian couple denied a Kentucky marriage license). Sexual orientation clearly has a bearing on the issue of marriage, particularly with regard to natural procreation. Therefore, the *Loving* case cannot be used as a basis to strike Kentucky's man-woman marriage laws.

CONCLUSION

The Commonwealth of Kentucky has never defined marriage to include same-sex couples. Marriages have since the formation of the Commonwealth been between a man and a woman. When Kentucky enacted legislation to protect this model based upon the formation of the consensus of Kentucky communities, Kentucky citizens and its legislature did so according to Kentucky's sovereign right as a State. That other communities may have come to define marriage differently – based upon the considered perspectives of their communities – does not compel Kentucky to adopt those standards.

Obviously same-sex marriage presents a highly emotional issue that must be decided. The question before this Court is who should make this determination – the judiciary or the citizens of Kentucky. Kentucky's duly enacted gender based

marriage laws are rationally related to a legitimate interest of the Commonwealth of Kentucky, and the decision of the district court should be reversed.

Respectfully submitted,

/s/ Leigh Gross Latherow
Counsel for Appellant
Steve Beshear, in his official capacity as Governor of Kentucky

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this Brief does not exceed the page limitation set forth in Fed. R. App. P. 32(a)(7)(B). The type-volume if Appellant's principal brief contains 9,072 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

/s/ Leigh Gross Latherow
Counsel for Appellant
Steve Beshear, in his official capacity
as Governor of Kentucky
Dated: July 17, 2014

CERTIFICATE OF SERVICE

It here hereby certified that on July 17, 2014, I electronically filed the foregoing with the Clerk of Court for the Sixth Circuit Court of Appeals using the CM/ECF system.

/s/ Leigh Gross Latherow
Counsel for Appellant Steve Beshear,
in his official capacity
as Governor of Kentucky
Dated: July 17, 2014

DESIGNATION OF RECORD

Record Entry	Document Description	Page ID# Range
31	Second Amended Complaint	282-300
47	Memorandum Opinion	724-746
49	Motion to Intervene	748-750
77	Motion for Summary Judgment	1067-68
87	Response to Motion for Summary Judgment	1223-42
91	Memorandum Opinion and Order	1289-1307
92	Notice of Appeal	1308

ADDENDUM

KRS 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.

KRS 402.020 Other Prohibited Marriages

(1) Marriage is prohibited and void
* * * *
(d) Between members of the same sex.

KRS 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.

KRS 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.

Kentucky Constitution §233A

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.