NO. 14-5818

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TIMOTHY LOVE, et al.

INTERVENING PLAINTIFFS/APPELLEES

vs.

STEVE BESHEAR, in his official capacity as Governor of Kentucky

INTERVENING DEFENDANT/APPELLANT

On Appeal From The United States District Court
for the Western District of Kentucky
Judge John G. Heyburn
CASE NO. 3:13-CV-750-JGH

BRIEF FOR INTERVENING PLAINTIFFS/APPELLEES TIMOTHY LOVE, ET AL.

Shannon R. Fauver
Dawn R. Elliott
FAUVER LAW OFFICE, PLLC
1752 Frankfort Avenue
Louisville, KY 40206
(502) 569-7710
Counsel for Plaintiffs

Daniel J. Canon
Laura E. Landenwich
L. Joe Dunman
CLAY DANIEL WALTON & ADAMS, PLC
101 Meidinger Tower
462 S. Fourth Street
Louisville, KY 40202
(502) 561-2005
Counsel for Plaintiffs

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

CONSTITUTIONAL PROVISIONS

RULES

STATEMENT REGARDING ORAL ARGUMENT

Oral argument in this case is scheduled to take place on August 6, 2014.

STATEMENT OF JURISDICTION

This case is on appeal from the Western District of Kentucky's grant of summary judgment to Intervening Plaintiffs, entered on July 1, 2014. Federal jurisdiction is proper pursuant to 28 U.S.C. § 1331, and 28 U.S.C. § 1343 which confer subject matter jurisdiction for claims brought under 42 U.S.C. § 1983. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

ISSUE PRESENTED

Section 233A of the Kentucky Constitution and KRS §§ 402.005, 402.020, 402.040, and 402.045 prohibit same-sex marriages performed in the Commonwealth of Kentucky. Does this prohibition violate the Equal Protection Clause of the Fourteenth Amendment?

INTRODUCTION

Marriage occupies a unique place in our society, where social and intimate commitments converge into an institution sacred to individuals and their communities. It is "central to personal dignity and autonomy." *Lawrence v. Texas*, 539 U.S. 558, 574 (2003). It has been described as "the most important relation in life," and "of fundamental importance for all individuals." *Zablocki v. Redhail*, 434 U.S. 374, 384 (1972). Marriage is "one of the basic civil rights of [humankind]." *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942), and as such, "the freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness . . ." *Loving v. Virginia*, 388 U.S. 1, 12 (U.S. 1967).

Intervening Plaintiffs are two same-sex couples who seek to marry in their home state of Kentucky. They seek the same respect and recognition for their commitments that their fellow citizens already enjoy. They do not seek special rights, or a new institution. They seek dignity, autonomy, and respect for their fundamental right to marry the person they love.

"A prime part of the history of our Constitution . . . is the story of the extension of constitutional rights and protections to people once ignored or excluded." *United States v. Virginia*, 518 U.S. 515, 557 (U.S. 1996). Intervening Plaintiffs and all other same-sex couples suffer an irrational indignity at the hands of Kentucky's

constitutional and statutory marriage bans. Kentucky's refusal to allow Intervening Plaintiffs to marry does not further any legitimate interest of the Commonwealth, and it irrevocably harms all same-sex couples, their families, and society as a whole. It singles them out, demeans them, and denies them equal protection of the law guaranteed by the Fourteenth Amendment of the United States Constitution.

"The guaranty of equal protection of the laws is a pledge of the protection of equal laws." *Skinner*, 316 U.S. at 541. Kentucky, however, created a purposeful inequity, drawing irrational lines between same-sex couples and opposite-sex couples. The Fourteenth Amendment does not permit such inequity. The Western District of Kentucky rightly concluded that Kentucky's marriage laws "violate [Intervening] Plaintiffs' constitutional rights and do not further any conceivable legitimate government purpose." [Memorandum Opinion and Order, RE 91, PageID # 1305].

Defendant Governor Steve Beshear argues that the district court erred because Kentucky has a legitimate interest in "natural" procreation among married couples to promote "stable birth rates," and excluding same-sex couples from the institution furthers that interest. But Defendant's myopic view of marriage – as a mere vessel for human reproduction – demeans married couples and fails to acknowledge the full scope of the intimate relationship and "the extent of the liberty at stake." *Lawrence*, 539 U.S. at 567. The equal protection guarantee of the U.S.

Constitution will not tolerate this inequity, and this Court should affirm the opinion of the district court.

STATEMENT OF THE CASE

This case arises as a companion to *Bourke, et al. v. Beshear, et al.*, a constitutional challenge to Kentucky's marriage laws which prohibit recognition of same-sex marriages issued in other jurisdictions. Civil Action No. 3:13-CV-750-JGH (W.D. Ky.). The district court granted summary judgment to the *Bourke* plaintiffs on February 12, 2014 [Memorandum Opinion, RE 47], and a final and appealable Order was filed on February 27, 2014 [Order, RE 55]. The *Bourke* case is currently on appeal before this Court. Case No. 14-5291.[1]

Appellees in this case ("Intervening Plaintiffs") are two same-sex couples who were denied marriage licenses in Kentucky. On February 27, 2014, shortly after the *Bourke* plaintiffs were granted summary judgment, the district court granted Intervening Plaintiffs' motion to intervene. [Order Granting Intervention, RE 53, Page ID #766]. The Intervening Complaint alleged violations of the Fourteenth Amendment, the First Amendment, the Full Faith and Credit Clause, and the Supremacy of the U.S. Constitution. [RE 49-1, Page ID # 751-755].

1. In their Appellee Brief, the *Bourke* plaintiffs described the language and extensive legislative history of the Kentucky statutes and constitutional amendment challenged in this case, which the Intervening Plaintiffs in this case incorporate by reference. (Case No. 14-5291, DN 38, pgs. 14-17).

In their Motion for Summary Judgment, Intervening Plaintiffs argued that they suffered a number of harms caused by Kentucky's marriage laws. Among those tangible harms are higher income and estate taxes, a denial of benefits under the Family Medical Leave Act, a denial of insurance coverage and benefits, an inability 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 a loss of inheritance rights under the state's intestacy laws. Of greater importance, however, is the loss of other intangible benefits of marriage: the dignity and respect that comes from public acknowledgment of their relationships. [Intervening Plaintiffs' Memorandum of Support for Summary Judgment, RE 77-1, Page ID # 1069-1098].

Defendant Beshear filed a response to Intervening Plaintiffs' motion which alleged two primary legitimate state interests justifying Kentucky's marriage laws: "natural procreation" and stable birth rates. [Defendant's Response to Intervening Plaintiffs' Motion for Summary Judgment, RE 87, Page ID # 1232]. Additional briefing was provided by *amici* The Family Foundation of Kentucky and the American Civil Liberties Union. [RE 86, Page ID # 1119-1222 and RE 83, Page ID # 1166-1184].

On July 1, 2014, the district court granted Intervening Plaintiffs' Motion for Summary Judgment, ruling that Kentucky's marriage laws violated the Equal Protection Clause of the Fourteenth Amendment by denying Intervening Plaintiffs and

all same-sex couples the right to marry in Kentucky. [Memorandum Opinion and Order, RE 91, Page ID # 1307]. The district court also stayed enforcement of its final Order "until further notice of the Sixth Circuit." [*Id*.].

Defendant appealed the district court's ruling and, with the Intervening Plaintiffs, filed a Joint Motion to Consolidate this case with the *Bourke* case. (DN 4). This Court granted the motion and the cases were consolidated on July 16, 2014. (Order, Case No. 14-5291, DN 142-2).

STANDARD OF REVIEW

The Sixth Circuit Court of Appeals reviews a district court's grant of summary judgment *de novo*. *Henderson v. Walled Lake Consol. Sch.*, 469 F.3d 479, 486 (6th Cir. 2006). Summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. Determining the appropriate level of judicial scrutiny for laws challenged under the Fourteenth Amendment is a question of law. *See, e.g., Seal v. Morgan*, 229 F.3d 567, 580 (6th Cir. 2000). "Under the Equal Protection Clause. . . courts apply strict scrutiny to statutes that involve suspect classifications or infringe upon fundamental rights. . .[whereas] [l]aws that do not involve suspect classifications and do not implicate fundamental rights. . .will be upheld if they are rationally related to a legitimate state interest." *Moore v. Detroit Sch. Reform Bd*., 293 F.3d 352, 368 (6th Cir. 2002) (internal quotations and citations omitted).

SUMMARY OF ARGUMENT

The district court correctly held that Section 233A of the Kentucky Constitution and KRS §§ 402.005 and 402.020(1)(d), collectively denying same-sex couples the right to marry in the Commonwealth, violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The judgment below should be affirmed.

Baker v. Nelson, 409 U.S. 810 (1972) is not binding precedent and does not control this case. Jurisdictional developments in subsequent Supreme Court cases regarding marriage and discrimination against homosexuals and same-sex couples have eroded *Baker*'s precedential effect. Every federal district court to consider the question of same-sex marriage since *United States v. Windsor*, 133 S. Ct. 2675 (2013), has recognized that *Baker* is not controlling.

Laws which infringe fundamental rights or target a suspect class, such as Kentucky's marriage laws, are subject to heightened scrutiny. Marriage is a fundamental right belonging to all individuals. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Turner v. Safley*, 482 U.S. 78, 95 (1987). The understanding of that fundamental right has evolved over time and has become inclusive of relationships not historically recognized or protected. *See, e.g.*, *Loving*, 388 U.S. 1. Heightened scrutiny is further appropriate because gays and lesbians are a "discrete and insular" minority which has been subject to "a history of purposeful unequal treat-

ment." *United States v. Carolene Products Co*., 304 U.S. 144, 152, n.4 (1938); *see also San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

Even under rational basis review, Kentucky's marriage laws cannot survive. The district court properly considered and rejected the state interest alleged below: "natural procreation." Defendant argues that procreation and "stable birth rates" are a legitimate state interest, and that excluding same-sex couples from the benefits of marriage rationally relates to that interest. However, Defendant's rational basis argument is both illogical and belied by the fact that Kentucky's marriage laws are properly mute on the subject of procreation and do not exclude the infertile or voluntarily childless.

Finally, Kentucky's marriage laws were designed to impose "a disadvantage . . . and so a stigma" on same-sex couples by excluding them from the benefits of marriage enjoyed by opposite-sex couples. *Windsor*, 133 S. Ct. at 2693. The laws were enacted to carry out "[a]rbitrary and invidious discrimination," motivated by "a bare desire to harm a politically unpopular group," and thus lack legitimacy. *Loving*, 388 U.S. at 10; *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

ARGUMENT

I. The Fourteenth Amendment Limits States' Authority to Regulate Marriage.

A. *Baker v. Nelson* Is Not Controlling.

As he did in the companion case *Bourke v. Beshear*, Defendant argues that the forty year-old summary dismissal of *Baker v. Nelson*, 409 U.S. 810 (1972), is binding precedent, preventing federal courts from considering challenges to discriminatory state marriage laws. (Beshear Br., Case: 14-5291, DN 21, Pgs. 17-20; Beshear Br., Case: 14-5818, DN 20, Pgs. 21-25). The *Bourke* plaintiffs have rebutted this claim, and the Intervening Plaintiffs incorporate those arguments by reference. (Plaintiff's Brief, Case: 14-5291, DN 38, Pgs. 24-27).

Defendant now adds to his argument that the district court ignored "the clear direction from *Hicks* that lower courts are bound by summary decisions" such as *Baker*, "until such time as the Court informs [them] that [they] are not." (Beshear Br., DN 20, page 24, quoting *Hicks v. Miranda*, 422 U.S. 332, 344-45 (1972) (internal quotations and emphasis omitted)). But Defendant himself ignores the clear direction from *Hicks* that "doctrinal developments" also diminish the precedential power of a summary dismissal. 422 U.S. at 344. These doctrinal developments render Defendant's reliance on *Baker* unavailing.

Since the *Bourke* parties briefed the precedential value of *Baker* before this Court, the Tenth Circuit issued decisions in the cases of *Kitchen v. Herbert*, 2014 U.S. App. LEXIS 11935 (10th Cir. June 25, 2014) and *Bishop v. Smith*, 2014 U.S. App. LEXIS 13733 (10th Cir. July 18, 2014). Both rulings specifically declare that

Baker does not prohibit federal challenges to state same-sex marriage bans. The Tenth Circuit agreed with both the Oklahoma and Utah district courts that doctrinal developments have superseded *Baker*, specifically citing two landmark cases: *Lawrence v. Texas* and *United States v. Windsor*. Though *Windsor* dealt with a federal law rather than a state marriage ban,

> the similarity between the claims at issue in *Windsor* and those asserted by the plaintiffs in this case cannot be ignored. This is particularly true with respect to plaintiffs . . . Although reasonable judges may disagree on the merits of the same-sex marriage question, we think it is clear that doctrinal developments foreclose the conclusion that the issue is, as *Baker* determined, wholly insubstantial.

Kitchen, 2014 U.S. App. LEXIS 11935 at *30-31. For their part, every single federal district court to consider the question of *Baker*, including the district court in this case, has consistently ruled that it does not preclude challenges to state marriage laws.[2]

---

2. *See Love v. Beshear*, No. 3:13-CV-750-H, 2014 U.S. Dist. LEXIS 89119 (W.D. Ky. July 1, 2014); *Baskin v. Bogan*, 1:14-cv-00355-RLY-TAB, 1:14-cv-00404-RLY-TAB, 1:14-cv-00406-RLY-MJD, 2014 U.S. Dist. LEXIS 86114 (S.D. Ind. June 25, 2014); *Wolf v. Walker*, No. 14-cv-64-bbc, 2014 U.S. Dist. LEXIS 77125, at *10-18 (W.D. Wis. June 6, 2014); *Whitewood v. Wolf*, No. 1:13-cv-1861, 2014 U.S. Dist. LEXIS 68771, at *14-18 (M.D. Pa. May 20, 2014); *Geiger v. Kitzhaber*, Nos. 6:13-cv-01834-MC & 6:13-cv-02256-MC, 2014 U.S. Dist. LEXIS 68171, at *7 n.1 (D. Or. May 19, 2014); *Latta v. Otter*, No. 1:13-cv-00482-CWD, 2014 U.S. Dist. LEXIS 66417, at *28 (D. Idaho May 13, 2014); *DeBoer v. Snyder*, No. 12-CV-10285, 973 F. Supp. 2d 757, 2014 U.S. Dist. LEXIS 37274, at *46 n.6 (E.D. Mich. Mar. 21, 2014); *De Leon v. Perry*, 975 F. Supp. 2d 632, 2014 U.S. Dist. LEXIS 26236, at *28-29 (W.D. Tex. 2014); *Bostic v. Rainey*, 970 F. Supp. 2d 456, 470 (E.D. Va. 2014); *McGee v. Cole*, No. 3:13-24068, 2014 U.S. Dist. LEXIS

Like the Tenth Circuit in *Kitchen* and many of its counterparts in other federal districts, the district court in this case conducted a thorough analysis of Supreme Court precedent including *Romer v. Evans*, 517 U.S. 620 (1996), *Lawrence*, and *Windsor*, and correctly concluded that "a virtual tidal wave of pertinent doctrinal developments has swept across the constitutional landscape." [DE 91, Page ID # 1293]. Defendant's contention that every one of these courts has misinterpreted the instructions of *Hicks* should be summarily disregarded. *Baker* is not controlling.

B. State Sovereignty is Not Unlimited.

The states' authority to regulate is bounded by the rights guaranteed to the individual by the Fourteenth Amendment. Defendant argues that *Windsor* "is a case about federalism" and insists that Kentucky's marriage laws are outside the bounds of judicial scrutiny. (Beshear Br., DN 20, pg. 15). Defendant's position misrepresents the holding in *Windsor*, and is unsupported by any decision to consider *Windsor's* effect.

Defendant argues that *Windsor* holds that a state's consensus about whether to include same-sex couples in its martial scheme is controlling. While *Windsor* acknowledges that "regulation of domestic relations is an area that has long been

---

10864, at *32 (S.D.W. Va. Jan. 29, 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).

regarded as a virtually exclusive province of the States.," the Supreme Court goes on to reassert that this regulation is not without limits. 133 S. Ct. at 2691. "State laws defining and regulating marriage, of course, must respect the constitutional rights of persons." *Id*. (citing *Loving*, 388 U.S. 1 (1967)). Though each state does retain "vast leeway in the management of its internal affairs," federal courts are charged with striking down state laws which "[run] afoul of a federally protected right." *Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623, 1638 (2014).

Defendant argues for an interpretation of *Windsor* that no federal court has accepted.[3] *Windsor* dispatched a federal law that interfered with the liberty interests of New York same-sex couples. "Rather than relying on federalism principles," the Supreme Court struck down DOMA because it was "a deprivation of an essential part of the liberty protected by the Fifth Amendment." *Kitchen*, 2014 U.S. App. LEXIS 11935 at *33. *Windsor* did not declare that all state marriage laws are beyond scrutiny. It reaffirmed the role of the federal courts to step in where popular consensus runs afoul of the federal constitution. 133 S. Ct. at 2691.

3. This interpretation was even rejected by Justice Scalia in his dissent to *Windsor*. "[T]he opinion starts with seven full pages about the traditional power of States to define domestic relations — initially fooling many readers, I am sure, into thinking that this is a federalism opinion." 133 S. Ct. at 2705 (Scalia, J., dissenting).

II. Kentucky's Marriage Laws Violate the Equal Protection Clause.

A. The Court Should Apply Heightened Scrutiny.

"Under the Equal Protection Clause, courts apply [heightened] scrutiny to statutes that involve suspect classifications or infringe upon fundamental rights." *Moore v. Detroit Sch. Reform Bd.*, 239 F.3d at 368. Here, the Court is presented with exclusionary laws that both burden the fundamental right to marriage and target a suspect class. Should this Court agree with the district court that gay and lesbian individuals are a quasi-suspect class, intermediate scrutiny requires that the challenged law be "substantially related to an important governmental objective." *Clark v. Jeter*, 486 U.S. 456, 461 (1988). If this Court follows the recent holding by the Tenth Circuit in *Kitchen* that marriage is a fundamental right, strict scrutiny must be applied and Kentucky must show that its marital scheme is "the least restrictive means" or to achieve a compelling state interest. *See Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 718 (1981); *Reno v. Flores*, 507 U.S. 292, 301-02 (1993). Kentucky's marriage laws cannot survive either form of heightened scrutiny (or even rational basis review).

1. Kentucky's Marriage Laws Target a Suspect Class.

a. Same-Sex Couples Satisfy the Four Factors for Suspectness.

Following the lead of the U.S. Supreme Court in similar equal protection cases, the district court applied the prevailing "disadvantaged class" factors test to

determine whether Plaintiffs ought to be regarded as a suspect or quasi-suspect class. [RE 91, Page ID # 1298]. There are four factors the Supreme Court identifies as bearing on the suspectness of a class: (1) historical discrimination, *see Lyng v. Castillo*, 477 U.S. 635, 638 (1986); (2) immutable defining characteristics, *see id*.; (3) relative political powerlessness, *see id*.; and (4) the effect of the group's defining characteristic on its ability to contribute to society, *see City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985).

Considering each factor, the district court first concluded that gays and lesbians have been subjected to a history of discrimination and that sexual orientation has no effect on one's ability to contribute to society. [RE 91, Page ID #1299]. Defendant does not contest these findings. Next, the district court concluded that sexual orientation satisfies the immutability factor: even if it is possible to change a person's sexual orientation, "no one should be forced to disavow or change" it and "it fits within the realm of protected characteristics fundamental to a person's identity." [*Id.*, Page ID # 1300 (internal quotations omitted)] (*See also* Amicus Brief of the American Psychological Society, et al., Case No. 14-5291, DN 51, pgs. 22-23). Finally, the district court held that gays and lesbians are politically powerless "within the constitutional meaning of the phrase." [*Id.*].

Defendant specifically attacks the finding of political powerlessness, arguing that the district court's finding is clearly erroneous because it conflicts with the Su-

preme Court's "guidance" in *City of Cleburne*. (Beshear Br., DN 20, pg. 29). According to Defendant, a group is politically powerless only when it "has no ability to attract the attention of lawmakers."[4] *Id*. (internal quotations omitted). Defendant's reliance on dicta in *Cleburne* is misplaced.[5]

The U.S. Supreme Court considered the idea of "political powerlessness" (and the other "traditional indicia of suspectness") for the purposes of equal protection scrutiny first in *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. at 28 (a class is suspect when "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."). Two months later, the Supreme Court specifically declared sex to be a suspect classification in part because women "still face pervasive . . . discrimination . . . perhaps most conspicuously, in the political arena," regardless of the fact that "the position of women in America has improved markedly in recent decades." *Frontiero v. Richardson*, 411 U.S. 677, 685-686 (U.S. 1973). Footnote 17 of the *Frontiero* decision is particularly instructive:

---

4. Defendant argues that "[i]t cannot reasonably be argued that homosexuals cannot attract lawmakers' attention and achieve political influence." (Beshear Br., DN 20, page 29). Indeed, homosexuals have twice attracted the keen and disapproving attention of the Kentucky General Assembly, first in 1998 and again in 2004, resulting in the discriminatory marriage laws now being challenged by Intervening Plaintiffs.

5. In fact, the dicta cited by Defendant has not been relied upon in any relevant subsequent case.

> It is true, of course, that when viewed in the abstract, women do not constitute a small and powerless minority. Nevertheless, in part because of past discrimination, women are vastly under-represented in this Nation's decisionmaking councils. There has never been a female President, nor a female member of this Court. Not a single woman presently sits in the United States Senate, and only 14 women hold seats in the House of Representatives. And, as appellants point out, this underrepresentation is present throughout all levels of our State and Federal Government.

Id. at n. 17.[6] Three years later, the Supreme Court again applied a heightened level of scrutiny to gender-based classifications, partially on the basis of *Frontiero*. *Craig v. Boren*, 429 U.S. 190, 198 (U.S. 1976).

The Second Circuit relied upon this line of Supreme Court cases to hold that gay and lesbian citizens were politically powerless, and ultimately conclude that they constitute a suspect class. *Windsor v. United States*, 699 F.3d 169, 184-185 (2d Cir. 2012). "The question is not whether homosexuals have achieved political successes over the years; they clearly have. The question is whether they have the strength to politically protect themselves from wrongful discrimination." *Id*. at 184.

The district court in this case ruled consistently with the Second Circuit and the Supreme Court's reasoning in *Frontiero*. Regardless of recent improvements,

---

6. At the present time, there has never been an openly gay president, nor an openly gay or lesbian member of the Supreme Court. The U.S. Senate has just one openly lesbian member, and the U.S. House of Representatives has only seven openly gay or lesbian members out of 435. This underrepresentation is common throughout all levels of our State and Federal government.

gays and lesbians remain a "politically powerless" group. [DN 91, Page ID # 1300]. "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." [*Id.*]. The ascension of Barack Obama to the White House in 2008, for example, did not eliminate race as a suspect classification. Recent incremental improvements in the political standing of gays and lesbians in some states does not, for the same reason, make sexual orientation any less suspect as a classification.

Defendant next argues that the district court's "comparison of gender and homosexuality as analogous quasi-suspect classes is also clearly against the precedent of the Supreme Court." (Beshear Br., page 29). However, the district court's comparison was made because "the Supreme Court has not fully explained how to distinguish between suspect and quasi-suspect classes." [DN 91, Page ID # 1301]. The district court held that sexual orientation was more similar to the quasi-suspect classes because it lacks the physical obviousness of race or even sex, yet is still similar in that homosexuals are targeted for discrimination based only on their sexual orientation and no other reason. [*Id.*].

Defendant urges this Court to infer that *Romer v. Evans* rejected the contention that sexual orientation is a suspect classification. Defendant argues that since the Supreme Court applied rational basis review in *Romer*, it implicitly rejected the

notion of sexual orientation as a suspect classification. (Beshear Br., DN 20, pg. 29).

This argument grossly overstates the holding in *Romer*. After stating the standard for rational basis scrutiny, the Court immediately attacked the discriminatory state law:

> Amendment 2 fails, indeed defies, *even this* conventional inquiry. First, the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and, as we shall explain, invalid form of legislation. Second, its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.

Romer, 517 U.S. at 632 (emphasis added).

The Supreme Court in *Romer* did not reject heightened scrutiny or the suspect class analysis. *Romer* was decided on the basis of animus. The challenged law was so "obnoxious" and so blatantly intended to deny equal protection to a discrete class of citizens that a heightened level of scrutiny was not necessary. *Id*. at 633. This is demonstrated by the Court's repeated qualifications preceding its rational basis analysis, particularly the acknowledgement that a law targeting gays and lesbians for exclusion from equal protection is "unprecedented" and "confounds this normal process of judicial review." *Id*.

b. Sixth Circuit Doctrine Does Not Prevent This Court from Reconsidering *Davis* and Related Precedent.

As recently as 2012, without conducting any analysis of suspectness, this Circuit stated that "this court has not recognized sexual orientation as a suspect classification," *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, 260 (6th Cir. 2006), citing *Equality Found. v. City of Cincinnati*, 128 F.3d 289, 292-293 (6th Cir. 1997).[7] While it is true that this Circuit has never determined that gays and lesbians are a suspect class, it also has not applied the four factor "disadvantaged class" test or considered the effect of *Lawrence v. Texas*.

Defendant argues that *Davis* prohibits the Court from revisiting its holding by overruling previous panels. However, a panel's "prior decision remains controlling *unless* an inconsistent decision of the United States Supreme Court required modification of the decision," *Darrah v. City of Oak Park*, 255 F.3d 301, 309 (6th Cir. 2001) (internal quotations omitted, emphasis added), Defendant is mistaken that "[t]here has been no inconsistent Supreme Court decision . . . which would allow for either *Scarbrough* or *Davis* to be ignored." (Beshear Br., DN 20, pgs. 27-28). *Lawrence v. Texas* is inconsistent with these decisions, because it expressly

[7] Therefore, the basis for *Davis*' holding that sexual orientation is not a suspect class is *Equality Foundation*, which predated *Lawrence v. Texas* by six years.

overruled the precedent upon which those cases relied. The fact that *Scarbrough* and *Davis* were decided after *Lawrence* does not change the analysis.

Davis, in passing, relies upon *Scarbrough*, and *Scarbrough*, also in passing reference, relies upon *Equality Foundation*, which relies upon *Bowers v. Hardwick*, 478 U.S. 186 (1986), for the proposition that homosexuals cannot constitute a suspect class because they are defined by constitutionally proscribable conduct. *Equality Foundation* was actually the second opinion in an extended challenge to the "Cincinnati Charter Amendment" which denied any special class status based upon sexual orientation. 128 F.3d 289, 291 (6th Cir. 1997).[8] The court explained why it did not apply the "suspect class" factors in the original case:

> [T]his court . . . resolved that, under *Bowers v. Hardwick*, 478 U.S. 186, 92 L. Ed. 2d 140, 106 S. Ct. 2841 (1986) (directing that homosexuals possessed no fundamental substantive due process right to engage in homosexual conduct or constitutional protection against criminalization of that activity) and its progeny,[2] homosexuals did not constitute either a "suspect class" or a "quasi-suspect class" because the conduct which defined them as homosexuals was constitutionally proscribable. *Equality Foundation I*, 54 F.3d at 266-67 & n. 2. This court further observed that any attempted identification of homosexuals by non-behavioral attributes could have no meaning, because the law could not successfully categorize persons "by subjective and un-

8. The original opinion, *Equality Found. v. City of Cincinnati*, 54 F.3d 261 (6th Cir. Ohio 1995), was vacated and remanded by the U.S. Supreme Court in *Equality Found. v. City of Cincinnati*, 518 U.S. 1001 (U.S. 1996) ("The judgment is vacated and the case is remanded to the United States Court of Appeals for the Sixth Circuit for further consideration in light of *Romer v. Evans*, 517 U.S. 620, 134 L. Ed. 2d 855, 116 S. Ct. 1620 (1996).").

> apparent characteristics such as innate desires, drives, and thoughts." *Id*. at 267.

Id. at 292-293. In the associated footnote number two, the court explored *Bowers*' "progeny" and how it precluded any suspect class analysis:

> *See Steffan v. Perry*, 309 U.S. App. D.C. 281, 41 F.3d 677, 684 n.3 (D.C. Cir. 1994) (*en banc*) (following *Padula v. Webster*, 261 U.S. App. D.C. 365, 822 F.2d 97, 103 (D.C. Cir. 1987) ("It would be quite anomalous, on its face, to declare status defined by conduct that states may constitutionally criminalize as deserving of strict scrutiny under the equal protection clause")); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990) ("If homosexual conduct may constitutionally be criminalized, then homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis scrutiny for equal protection purposes"); *High Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990) (same); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989), *cert. denied*, 494 U.S. 1003, 108 L. Ed. 2d 473, 110 S. Ct. 1295 (1990) (explaining that homosexuality is primarily behavioral in nature and as such is not immutable; "after *Hardwick* it cannot logically be asserted that discrimination against homosexuals is constitutionally infirm").

Id. at 293 n.2.

The court in *Equality Foundation* affirmed its previous reasoning that suspect class analysis was inapposite due the nature of homosexual conduct. That reasoning was based upon *Bowers*, which was explicitly overruled by *Lawrence*. 539 U.S. at 578 ("*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and

now is overruled."). Homosexual conduct is *not* constitutionally proscribable, and therefore the foundation underlying *Equality Foundation* (and subsequently *Davis* and *Scarbrough*) has crumbled. *See, e.g.*, *Bassett v. Snyder*, 951 F. Supp. 2d 939, 961 (E.D. Mich. 2013).

Notably, no panel of this Court has applied the *Lying* and *Cleburne* suspectness factors to gays and lesbians as a class. The appropriate level of scrutiny was not a dispositive issue in *Scarbrough* or in *Davis*, nor was it meaningfully analyzed in either case. *Scarbrough* and *Davis* both reversed summary judgment on equal protection grounds because the plaintiffs in those cases alleged they had been singled out for disparate treatment, and this Court found that there was sufficient evidence of animus on the part of the government actors. Both opinions assume that rational basis is the proper standard. Neither opinion indicates whether any argument for heightened scrutiny was ever made or considered in the lower courts. Thus, whether the issue of suspectness has been affirmatively decided by this Court at any time post-*Lawrence* is questionable.

Though this Court made no mention at all of *Lawrence* in either *Davis* or in *Scarbrough*, that clearly inconsistent United States Supreme Court opinion cuts the legs from under *Equality Foundation* and its progeny. Therefore, under the rule articulated by *Darrah*, this panel is no longer bound by *Davis*, *Scarbrough*, or *Equality Foundation*.

2. Kentucky's Marriage Laws Burden the Fundamental Right to Marriage.

"There can be little doubt that the right to marry is a fundamental liberty." *Kitchen*, 2014 U.S. App. LEXIS 11935 at *34. *See, e.g.*, *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"); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639 (1942); and *Meyer*, 262 U.S. at 399. Marriage as a fundamental right implicates numerous liberty interests, including the right to privacy, the right to intimate choice, and the right to free association. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965); *Lawrence*, 539 U.S. at 574; and *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996). Marriage involves "the most intimate and personal choices a person may make in a lifetime, choices central to dignity and autonomy. . ." *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992). As such, the Constitution demands respect "for the autonomy of the person in making these choices." *Lawrence*, 539 U.S. at 574. "[T]he Constitution undoubtedly imposes constraints on the State's power to control the selection of one's spouse . . ." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 620 (1984).

"[A]ll fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States." *Casey*, 505 U.S. at 846-47 (quotations omitted). "Fundamental" rights are those "objectively, 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." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). As such, fundamental rights exist "in addition to the specific freedoms protected by the Bill of Rights." *Id*. at 720.

According to Defendant, though the right to marry is fundamental, it necessarily excludes same-sex couples for two reasons: (1) they have been traditionally excluded; and (2) "procreation can never naturally result" from a same-sex marriage. (Beshear Br., DN 20, pgs. 32-33).

Defendant argues that same-sex couples may constitutionally be denied marriage rights because they have always been denied. The assertion that same-sex couples "are excluded from the institution of marriage is wholly circular." *Kitchen*, 2014 U.S. App. LEXIS 11935 at *19. "[N]either history nor tradition [can] save a law" which interferes with a liberty interest. *Lawrence*, 539 U.S. at 577-78 (quotation omitted). In the substantive due process analysis of fundamental rights such as marriage, "[h]istory and tradition are the starting point but not in all cases the ending point . . ." *Id*. at 572. "[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." *Williams v. Illinois*, 399 U.S. 235, 239 (1970).

Prior to *Loving v. Virginia*, the Supreme Court had never formally declared that the fundamental right to marry included a right to marry someone of a different race. 388 U.S. 1. But by 1967, the vast weight of the Court's precedent on is-

sues of familial relations made that conclusion irresistible. As the Court noted two decades before *Windsor*:

> Marriage is mentioned nowhere in the Bill of Rights and interracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by [the Fourteenth Amendment].

Casey, 505 U.S. at 847-48 (1992).

That precedent has only grown more inclusive with time. More recently, the Supreme Court, in *Windsor*, synthesized this collective body of precedent:

> [M]arriage is more than a routine classification for purposes of certain statutory benefits. Private, consensual sexual intimacy between two adult persons of the same sex may not be punished by the State, and it can form "but one element in a personal bond that is more enduring." *Lawrence v. Texas*, 539 U. S. 558, 567, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003) . . . For same-sex couples who wished to be married, the State acted to give their lawful conduct a lawful status. This status is a far-reaching legal acknowledgment of the intimate relationship between two people, a relationship deemed by the State worthy of dignity in the community equal with all other marriages.

133 S. Ct. at 2692. The Supreme Court makes clear that same-sex marriages do not, in any way, run afoul of the fundamental concept of marriage as an "intimate relationship . . . deemed . . . worthy of dignity . . ." *Id.*

Furthermore, "the Supreme Court has traditionally described the right to marry in broad terms independent of the persons exercising it." *Kitchen* , 2014 U.S. App. LEXIS 11935 at *53. In *Loving v. Virginia*, for example, the Court did not

consider whether interracial marriage is a fundamental right, it considered whether a restriction on interracial marriage interfered with "the freedom of choice to marry." 388 U.S. at 12. In *Zablocki v. Redhail*, the Court considered a challenge to a law prohibiting marriage by individuals who had not paid child support. "The right at issue was characterized as the right to marry, not as the right of child-support debtors to marry." *Kitchen*, 2014 U.S. App. LEXIS 11935 at *38. And in *Turner v. Safley*, "the right at issue was never framed as 'inmate marriage'; the Court simply asked whether the fact of incarceration made it impossible for inmates to benefit from the 'important attributes of marriage.'" *Id.*, quoting *Turner*, 482 U.S. at 95; *see also, Latta v. Otter*, 2014 U.S. Dist. LEXIS 66417, *37 (2014), and *Obergefell v. Wymsylo*, 962 F. Supp. 2d 968, 982 n. 10 (S.D. Ohio 2013).

Defendant next argues that the "traditional" limitation of marriage to opposite-sex couples is justified because "procreation can never naturally result" from a same-sex marriage, (Beshear Br., DN 20, pg. 33), and "marriage and procreation are fundamental to the very existence and survival of the race." *Skinner*, 316 U.S. at 541.

This argument fails for two reasons. First, the Kentucky marriage laws challenged by Intervening Plaintiffs in this case include no procreative requirement. Infertile opposite-sex couples, for whom "procreation can never naturally result" are not prohibited from marrying in the state of Kentucky. And such a procreative

mandate would be unconstitutional, because the Supreme Court has long recognized the fundamental right of all individuals, including married opposite-sex couples, to choose against procreation. "If the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted government intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (emphasis omitted).

Second, the marital relationship has many "important attributes" beyond reproduction. *Turner v. Safley*, 482 U.S. at 95. Marriages are "expressions of emotional support and public commitment," which have "spiritual significance" and receive government benefits regardless of the procreative ability of their members. *Id*. Even couples who are actively *prevented* from procreating by the government (such as prison inmates) retain their fundamental right to marry. *Id*. Truly, the marital relationship includes many freedoms, "to choose one's spouse, to decide whether to conceive or adopt a child, to publicly proclaim an enduring commitment to remain together through thick and thin," and "such freedoms support the dignity of each person . . ." *Kitchen*, 2014 U.S. App. LEXIS 11935 at *45-46.

After an exhaustive analysis of relevant Supreme Court precedent, as well as careful consideration of the state of Utah's arguments against same-sex marriage (many identical to Defendant Beshear's), the Tenth Circuit determined that the

fundamental right to marry is shared by all citizens, not just those who are members of opposite-sex couples:

> The drafters of the Fifth and Fourteenth Amendments 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. A generation ago, recognition of the fundamental right to marry as applying to persons of the same sex might have been unimaginable. A generation ago, the declaration by gay and lesbian couples of what may have been in their hearts would have had to remain unspoken. Not until contemporary times have laws stigmatizing or even criminalizing gay men and women been felled, allowing their relationships to surface to an open society. . . . Consistent with our constitutional tradition of recognizing the liberty of those previously excluded, we conclude that plaintiffs possess a fundamental right to marry and to have their marriages recognized.

Kitchen, 2014 U.S. App. LEXIS 11935 at *62-63. The Tenth Circuit used the same reasoning to strike down Oklahoma's ban on same-sex marriage less than a month later. *Bishop*, 2014 U.S. App. LEXIS 13733.

Whether the fundamental right to marry includes same-sex couples as well as opposite-sex couples is an issue of first impression in the Sixth Circuit. A careful consideration of Supreme Court precedent compels the conclusion that "the right to marry is of fundamental importance to all individuals." *Zablocki*, 434 U.S. at 384. This Court, in concert with its sister circuit, should apply strict scrutiny to Kentucky's marriage laws.

B. The "Class of One" Theory is Inapplicable to this Case.

"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." *Loesel v. City of Frankenmuth*, 692 F.3d 452, 461 (6th Cir. 2012) (internal quotations omitted). Defendant argues that the "class of one" theory applies to Intervening Plaintiffs in this case, requiring extreme deference to legislative prerogatives. (Beshear Br., DN 20, pg. 35).

"Class of one" claims are brought "where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment," but the difference is unrelated to a protected classification such as race, sex, or national origin. *Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). The analysis of "class of one" claims turns on whether the plaintiff is "similarly situated" to others not targeted by a law, and rational basis scrutiny is applied. *Trihealth, Inc. v. Bd. of Comm'rs*, 430 F.3d 783, 788 (6th Cir. 2005). "Disparate treatment of similarly situated persons who are dissimilar only in immaterial respects is not rational." *Id. at* 790. Similarity does "not demand exact correlation, but should instead seek *relevant* similarity." *Loesel*, 692 F.3d at 462 (internal quotations omitted, emphasis added).

Cases brought under the "class of one" theory are markedly dissimilar to the equal protection challenge in this case. In *Willowbrook*, homeowners sued over a municipal drainage easement demand. 528 U.S. at 563. In *Trihealth*, a group of hospitals opposed the award of county funding to a competitor. 430 F.3d at 786. In *Rondigo, L.L.C. v. Twp. of Richmond*, 641 F.3d 673 (6th Cir. 2011), a Michigan farm contested environmental restrictions imposed upon it. And in *Loesel*, the owners of a tract of land in Frankenmuth, Michigan challenged a local zoning restriction. 692 F.3d at 455. "Class of one" cases involve individuals singled out from others like them for unfair treatment. The Intervening Plaintiffs in this case belong to a class of people – same-sex couples – excluded as a whole from the institution of marriage.

Nevertheless, Defendant argues the "class of one" theory applies because same-sex couples are not similarly situated with opposite-sex couples. (Beshear Br., DN 20, pg 37). However, Defendant frames the inquiry too narrowly. For the purpose of the state's marital institution, same-sex couples and opposite-sex couples are not materially dissimilar under the standard articulated in *Trihealth*, 430 F.3d at 790.

As Defendant admits, same-sex couples are capable of having "stable, loving familial relationships" and can "contribute to society in important and meaningful ways." (Beshear Br., DN 20, pg. 37). The members of same-sex couples are

human beings, just like opposite-sex couples, with the same capacities to love, to bond, to be loyal, to be supportive, and to raise children. And despite Defendant's selective perception of "natural" procreation, members of many same-sex couples also retain the ability to procreate. The only difference between same-sex couples and opposite-sex couples is the sex of the partners. The Davis court rejected arguments similar to Defendant's: "Davis has not alleged a 'class-of-one' equal protection claim because he has alleged that he was discriminated against because of his sexual orientation and not simply that he was arbitrarily treated differently . . ." 679 F.3d at 442. The "class of one" analysis cannot salvage Defendant Beshear's argument.

C. Kentucky's Marriage Laws Fail Rational Basis Review.

1. Rational Basis Scrutiny Is Not Toothless.

"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 *Matthews v. Lucas*, 427 U.S. 495, 506 (1976)). "The rational basis test requires the court to ensure that the government has employed rational means to further its legitimate interest." *Id.*, citing *Vacco v. Quill*, 521 U.S. 793, 799 (1997). For a state action to survive rational basis review, it must be "rationally based and free from invidious discrimination." *Dandridge v. Williams*, 397 U.S. 471, 487 (1970).

In *Romer v. Evans*, the Supreme Court reaffirmed that even under the rational basis standard, courts must "insist on knowing the relation between the classification adopted and the object to be attained." 517 U.S. at 632. The Court described this nexus as giving "substance to the Equal Protection Clause." *Id*. The Court clarified that in its cases upholding state actions under rational basis review, the laws "were narrow enough in scope and grounded in a sufficient factual context for us to ascertain some relation between the classification and the purpose it served." *Id*. at 632-33. At the very least, this inquiry ensures "that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Id*. at 633. This standard is not, as Defendant argues, one in which any articulated purpose for a statute would survive regardless of its scope or rationality.

Defendant claims that the state of Kentucky has an interest in procreation which "promotes a stable birth rate," as well as "a fundamental interest in ensuring humanity's continued existence." (Beshear Br., DN 20, pg. 38). Defendant also claims that the "district court did not question" this argument. (*Id*.). On the contrary, the court forcefully rejected it as "a disingenuous twist" to "procreation-based arguments" which "have not succeeded in this Court...nor in any other court post-

Windsor." [RE 91, Page ID # 1303]. Notably, Defendant cites to no authority suggesting that procreation is itself even a legitimate government interest.[9]

Even if Kentucky has a legitimate interest in promoting "natural procreation," the state has not adopted a rational way to promote it by excluding same-sex couples from marrying. The question is whether the state's purpose can be advanced by excluding some couples who do not procreate "naturally" from marriage, but allowing other couples who cannot or do not procreate "naturally" to participate in the institution and receive its benefits.

2. There is No Rational Relation Between the Exclusion of Same-Sex Couples from Marriage and Kentucky's Asserted Interest.

The district court was correct when it concluded that Kentucky's marriage laws do not affect in any way the state's claimed interest. Defendant misrepresents this conclusion by arguing that the court inserted a "no-harm premise" into the rational basis standard. (Beshear Br., DN 20, page 39). However, the district court's opinion does not include the word "harm," and there is no basis for Defendant's claim that a novel "no-harm" test was utilized at all. In the district court's words:

> Even assuming the state has a legitimate interest in promoting procreation, the Court fails to see . . . how the exclusion of same-sex couples

9. For their part, the *Bourke v. Beshear* Plaintiffs directly challenge whether any government has a legitimate interest in procreation, which necessarily implicates private intimate relationships. (Plaintiff's Brief, Case No. 14-5291, DN 38, pgs. 44-47).

> from marriage has *any effect whatsoever* on procreation among heterosexual spouses. Excluding same-sex couples from marriage does not change the number of heterosexual spouses who choose to get married, the number who choose to have children, or the number of children they have. . . . 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.

[RE 91, Page ID # 1303 (emphasis added)]. At no point did the court suggest that excluding same-sex couples from marriage is irrational because including them would not harm the Commonwealth's alleged interest. Instead, the district court found that excluding same-sex couples has "no effect whatsoever" on the Commonwealth's interest. [*Id*.]. Recognizing the logical disjunction, the court necessarily concluded that the relationship "is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne*, 473 U.S. at 446.

Defendant complains that the trial court required it to draw "exact lines" between the purpose and effect of its marriage ban. (Beshear Br., DN 20, pg. 42). Intervening Plaintiffs agree that classifications need not be made "with mathematical nicety," but they must still be rational. *Heller v. Doe*, 509 U.S. 312, 321 (1993).

Defendant relies extensively on *Johnson v. Robison* to obfuscate the question before the Court. 415 U.S. 361 (1974). *Johnson* examined a law excluding conscientious objectors from certain veterans benefits following the Vietnam War. The government there argued that veterans benefits were designed to promote active-

duty service and since those who refused to serve were not participants in the government interest, it was rational to exclude them from the incentive benefits. *Id*. Defendant quotes from *Johnson* 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 nonbeneficiaries is invidiously discriminatory." 415 U.S. at 383.[10]

Defendant's reliance on *Johnson* is simply an attempt to reframe the issue before this Court. For *Johnson* to be comparable, Kentucky's laws would exclude from marriage any couple who does not procreate through "natural" means. Or, conversely, the regulation in *Johnson* would have been challenged by religious objectors who were given benefits while nonreligious ethical objectors were excluded.[11] Both forms of objectors would fall outside the scope of the incentives, prompting the question, "is it rational to exclude nonreligious ethical objectors from the benefits when the religious objectors are included?" As addressed by a district court in Oklahoma:

> In *Johnson*, the "carrot" of educational benefits could never actually incentivize military service for the excluded group due to their reli-

10. Interestingly, this premise is generally referenced by only one subsequent Supreme Court case, *Kassel v. Consol. Freightways Corp*., a challenge under the Commerce Clause. *Kassel* includes a lengthy and interesting (if not authoritative) debate on the judicial consideration of actual statutory purposes compared to *post-hoc* justifications by lawyers for a state. 450 U.S. 662, 682 (1981).

11. The distinction between "religious objectors" and "nonreligious ethical objectors" was articulated in *Welsh v. U.S.*, 398 U.S. 333 (1970).

> gious beliefs. In contrast here, the "carrot" of marriage is equally attractive to procreative and non-procreative couples, is extended to most non-procreative couples, but is withheld from just one type of non-procreative couple. Same-sex couples are being subjected to a "naturally procreative" requirement to which no other Oklahoma citizens are subjected, including the infertile, the elderly, and those who simply do not wish to ever procreate. Rationality review has a limit, and this well exceeds it.

Bishop v. United States ex rel. Holder, 962 F. Supp. 2d 1252, 1293 (N.D. Okla. 2014), *aff'd*, *Bishop*, 2014 U.S. App. LEXIS 13733. *See*, *e.g.*, *Baskin v. Bogan*, 2014 U.S. Dist. LEXIS 86114, *35-41 (S.D. Ind. June 25, 2014) ("In order to fit under *Johnson*'s rationale, Defendants point to the one extremely limited difference between opposite-sex and same-sex couples, the ability of the couple to naturally and unintentionally procreate, as justification to deny same-sex couples a vast array of rights. The connection between these rights and responsibilities and the ability to conceive unintentionally is too attenuated to support such a broad prohibition."); and *Wolf v. Walker*, 2014 U.S. Dist. LEXIS 77125, *104-105 (W.D. Wis. June 6, 2014) ("Treating such a fundamental right as just another government benefit that can be offered or withheld at the whim of the state is an indicator either that defendants fail to appreciate the implications for equal citizenship that the right to marry has or that they do not see same-sex couples as equal citizens.").

Defendant asserts that a state interest in "procreation" and "population growth" is promoted by excluding same-sex couples from marriage. That exclusion

is justified because same-sex couples cannot "naturally" procreate. (Beshear Br., DN 20, pg. 40). But Kentucky law imposes no procreative mandate upon to couples who marry. Marriages are not invalidated or denied to opposite-sex couples who are infertile, unwilling to have children, prefer to adopt, or procreate through the assistance of modern technology.

Defendant cannot craft a logical argument for stigmatizing and excluding the many same-sex couples who have and raise children, while legitimizing the children of opposite-sex couples who are adopted or born through assistive means. "[T]hat Kentucky's laws do not deny licenses to other non-procreative couples reveals the true hypocrisy of the procreation-based argument." [RE 91, Page ID # 1304]. This hypocrisy, in the district court's view, was fatal to Defendant's argument. This Court should agree.

D. Kentucky's Marriage Laws Were Motivated by Animus.

A more likely basis for Kentucky's refusal to recognize valid same-sex marriages from other states is "animus" – in this case, a bare desire to exclude same-sex couples from government recognition and benefits. Such "[a]rbitrary and invidious discrimination" cannot be a legitimate purpose. *Loving*, 388 U.S. at 10. [T]he governmental objective must be a legitimate and neutral one." *Turner*, 482 U.S. at 90. Classifications driven by animus against a minority are particularly prone to constitutional attack because "bare congressional desire to harm a politically un-

popular group cannot constitute a *legitimate* government interest." *Moreno*, 413 U.S. 528, 534 (1973) (emphasis in original).

"Animus" sufficient to invalidate a discriminatory law need not only be an overt, "bare desire" to harm an unpopular group. "[M]ere negative attitudes, or fear" may also lead a majority to treat a minority group unequally. *City of Cleburne*, 473 U.S. at 448. Negative attitudes may result from "insensitivity caused by simple want of careful, rational reflection or from instinctive mechanism to guard against people who appear to be different in some respects from ourselves." *Bd. of Trs. of Univ. of Alabama v. Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring). Therefore, this Court need not find an express legislative intent to demean or exclude in order to find the purpose of Kentucky's laws to be improper due to animus. An implied intent is sufficient.

In *Loving v. Virginia*, the Supreme Court ruled that anti-miscegenation laws (which were still in effect in Kentucky at the time) rested "solely upon distinctions drawn according to race," for which there was "patently no legitimate overriding purpose independent of invidious racial discrimination which justifies the classification." 388 U.S. at 11.

Defendant attempts to distinguish *Loving*, claiming that the case is irrelevant to the Court's consideration because it only addresses the state's interest in

race, not procreation. (Beshear Br., DN 20, pg. 36). This argument invites a brief analysis the history of anti-miscegenation laws and their procreative justifications.

In 1869, the Supreme Court of Georgia rejected a challenge to Georgia's anti-miscegenation statute, finding that the state legislature's "power over the subject matter" of marriage "will not . . . be questioned." *Scott v. State*, 39 Ga. 321, 324 (Ga. 1869). In the judge's opinion, the Georgia law was justified because, "[t]he amalgamation of the races is not only unnatural, but is always productive of deplorable results," such as children who "are generally sickly and effeminate, and . . . inferior in physical development and strength, to the fullblood of either race." *Id.* at 323.

In 1883, the Supreme Court of Missouri upheld that state's prohibition of interracial marriage on similar grounds:

> It may interfere with the taste of negroes who want to marry whites, or whites who wish to intermarry with negroes, but . . . [i]f the State desires to preserve the purity of the African blood by prohibiting intermarriages between whites and blacks, we know of no power on earth to prevent such legislation.

State v. Jackson, 80 Mo. 175, 176 (Mo. 1883).

A distinct concern for the "offspring of these unnatural connections" is what drove state policy to prohibit interracial marriage. This reality was thoroughly discussed in *Perez v. Sharp*, 32 Cal. 2d 711 (Cal. 1948), a California Supreme Court opinion which was the first to strike down an anti-miscegenation statute. The court

gave a detailed account of how every anti-miscegenation statute in the United States had been justified by a state interest in procreation. *Id*. at 752.

After *Perez* but prior to *Loving*, in 1955, the Virginia anti-miscegenation law survived a constitutional challenge. At that time, "more than half of the States of the Union [had] miscegenation statutes." *Naim v. Naim,* 197 Va. 80, 85 (Va. 1955).[12] The Supreme Court of Virginia ruled that prohibiting interracial marriages was proper in part because "the preservation of racial integrity is the unquestioned policy of this State, and that it is sound and wholesome, cannot be gainsaid." *Id*. at 83 (internal quotations omitted). Further,

> We are unable to read in the Fourteenth Amendment to the Constitution, or in any other provision of that great document, any words or any intendment which prohibit the State from enacting legislation to preserve the racial integrity of its citizens, or which denies the power of the State to regulate the marriage relation so that it shall not have a mongrel breed of citizens.

Id. at 90.

In 1966, the Virginia Supreme Court again upheld the constitutionality of that state's anti-miscegenation statute, refusing to reverse *Naim*. *Loving v. Commonwealth*, 206 Va. 924 (Va. 1966). Interestingly, that court cited heavily the case of *Maynard v. Hill*, 125 U.S. 190 (1888), to which Defendant also relies in this

12. *Perez*, the *Naim* Court noted, was still the lone judicial opinion anywhere in the United States ruling that anti-miscegenation statutes were unconstitutional. *Id*. at 85.

case. "Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the Legislature." *Loving*, 206 Va. at 929 (quoting *Maynard*, 125 U.S. at 657). The Virginia Supreme Court explicitly upheld *Naim* and its procreation-centered concern for "the preservation of racial integrity." *Loving*, 206 Va. at 929 ("We find no sound judicial reason . . . to depart from our holding in the *Naim* case.").

Following this defeat, Mildred and Richard Loving took their case to the U.S. Supreme Court. In its landmark opinion striking down all anti-miscegenation statutes, the Court quoted the Virginia trial judge who convicted the Lovings for breaking state law:

> Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.

Loving, 538 U.S. at 3.

In a relevant and illustrative passage, the Supreme Court observed that, "[i]n *Naim*, the state court concluded that the State's legitimate purposes were 'to preserve the racial integrity of its citizens,' and to prevent 'the corruption of blood,' 'a mongrel breed of citizens,' and 'the obliteration of racial pride,' obviously an endorsement of the doctrine of White Supremacy." *Id*. (quoting *Naim*, 197 Va. at 90).

Though contemporary eyes may now see that race has "no bearing on any legitimate interest of the government with regard to marriage," (Beshear Br., DN 20, page 44), that certainly was not the case prior to *Loving*. Defendant's attempt to distinguish *Loving* from the questions of government interest now before this Court is blind to an important and instructive history. When states still sought to keep the races separate by prohibiting interracial marriage, they used an interest in "racial integrity" to justify it. Perhaps more than any other interest, including state sovereignty, concern for procreation drove racist marriage laws.

The analogy between *Loving* and this case should be obvious. This Court need only substitute one discrete minority group for another to see that Kentucky's marriage laws rest solely upon distinctions for which there is no legitimate overriding purpose independent of invidious discriminations against same-sex couples.

But this Court need not analogize. The question of laws which classify and exclude same-sex couples from marriage or otherwise single them out for unequal treatment has already been addressed by the Supreme Court on several occasions. And on every such occasion, no proponent of discrimination against same-sex couples has been able to prove a single legitimate purpose for which such laws are a reasonable means to achieve. Unable to survive even rational basis review, the Court has consistently held such laws unconstitutional.

In *Romer v. Evans*, the Supreme Court concluded that Colorado's constitutional amendment to exclude homosexuals from the protection of anti-discrimination laws "failed, indeed defied, even the conventional inquiry" of rational basis review. 517 U.S. at 631-32. Having considered numerous possible justifications for Colorado's law, the court dismissed all of them and concluded that it "classified homosexuals not to further a proper legislative end but to make them unequal to everyone else." *Id*. at 635. "[A] bare desire to harm a politically unpopular group cannot constitute a legitimate government interest." *Id*. at 634 (quoting *Moreno*, 413 U.S. at 534).

In *Lawrence v. Texas*, the Court considered a state law which criminalized specific, private sexual behaviors common among consenting homosexual couples. 539 U.S. 558. None of the state's proposed justifications for the law convinced the Court, which even proposed some possible legitimate purposes of its own (such as the protection of minors, the prevention of coercion or injury, the regulation of public conduct, or the prohibition of prostitution) but found none of these present in the language, purpose, or application of the Texas law. *Id*. at 578. Applying rational basis review, the Court ruled that "[t]he Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual" and was therefore unconstitutional. *Id*. Even in dissent, Justice Scalia

acknowledged the obvious constitutional conflict presented by laws such as those at issue here:

> If moral disapprobation of homosexual conduct is "no legitimate state interest" for purposes of proscribing that conduct; and if . . . "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring;" what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising "[t]he liberty protected by the Constitution?"

Id. at 604-05 (Scalia, J., dissenting; citations omitted).

More recently, in the case of *United States v. Windsor*, the Supreme Court considered the constitutionality of DOMA § 3, which defined marriage at the federal level as an institution exclusive to opposite-sex couples. 133 S. Ct. 2675. The Court considered each possible justification for the law but disregarded them all, instead finding that DOMA § 3 operated only to "demean those persons who are in a lawful same-sex marriage." *Id*. at 2695. In so doing, "it violate[d] basic due process and equal protection principles." *Id*. at 2693. Relying on language from cases that applied rational basis review such as *Moreno* and *Romer* (though not mentioning the standard explicitly), the Court found the law unconstitutional. *Id*. at 2695. Further, "[w]hile the Fifth Amendment withdraws from the Government the power to degrade or demean in the way this law does, the equal protection guarantee of

the Fourteenth Amendment makes that Fifth Amendment right all the more specific and all the better understood and preserved." *Id.*

Relying on the analysis of *Windsor*, the district court in this case ruled that "the legislative history of Kentucky's laws clearly demonstrates the intent to permanently prevent the performance of same-sex marriages in Kentucky, which suggests animus against same-sex couples." [RE 91, Page ID # 1302, n. 14]. Further, the court found that "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." [*Id.*]. Though the district court recognized that "there is some evidence of animus," it stopped short of finding a clear showing of such. [*Id.*].

Plaintiffs encourage this Court to consider the express language of Kentucky's marriage laws, their legislative history, and the social climate in which they were formulated and enacted. The discriminatory and demeaning effects of those laws were not a coincidental or unintended consequence at all, but the anticipated and inevitable result of a bare desire to harm an unpopular group. Such a desire is present on the very face of the challenged laws, which specifically single out same-sex couples and their children, excluding them from marriage and refusing to rec-

ognize valid marriages from other states.[13] The very purpose and effect of Kentucky's marriage laws is arbitrary and invidious discrimination.

Kentucky has not articulated, and cannot articulate, any permissible or "rational" basis for its laws within the meaning of Supreme Court jurisprudence. Therefore, Kentucky's discriminatory marriage laws cannot withstand even the most deferential standard of review, and were correctly ruled unconstitutional under the Fourteenth Amendment.

CONCLUSION

Intervening Plaintiffs Timothy Love, Lawrence Ysunza, Maurice Blanchard, and Dominique James are committed couples who wish not to change or disrupt the institution of marriage in Kentucky. They only want to be a part of it, by being married in their home state and by receiving the same respect and dignity that opposite-sex couples receive every day in the Commonwealth. They have a right to such dignity; a right which is protected by the U.S. Constitution.

For the foregoing reasons, this Court should affirm the judgment of the district court.

13. *See also Secsys, LLC v. Vigil*, 666 F.3d 678, 685 (10th Cir. 2012) ("When a distinction between groups of persons appears on the face of a state law or action, an intent to discriminate is presumed and no further examination of legislative purpose is required.").

Dated: July 24, 2014

Respectfully submitted,

s/ L. Joe Dunman

Shannon Fauver
Dawn Elliott
FAUVER LAW OFFICE, PLLC
1752 Frankfort Avenue
Louisville, Kentucky 40206
(502) 569-7710
Counsel for Intervening Plaintiffs

L. Joe Dunman
Daniel J. Canon
Laura E. Landenwich
CLAY DANIEL WALTON & ADAMS, PLC
101 Meidinger Tower
462 S. Fourth Street
Louisville, Kentucky 40202
(502) 561-2005
Counsel for Intervening Plaintiffs

CERTIFICATE OF COMPLIANCE

1. The undersigned certifies that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). This brief contains 11,793 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. The undersigned certifies that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). This brief has been prepared in 14-point Times New Roman font.

s/ L. Joe Dunman
Counsel for Intervening Plaintiffs-Appellees
Dated: July 24, 2014

CERTIFICATE OF SERVICE

It is hereby certified that on July 24, 2014, I electronically filed the foregoing Brief for Intervening Plaintiffs/Appellees with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system, and service was accomplished through same.

s/ L. Joe Dunman
Counsel for Intervening Plaintiffs-Appellees
Dated: July 24, 2014

DESIGNATION OF RECORD

Record Entry	Document Description	Page ID # Range
47	Memorandum Opinion	724-746
49-1	Intervening Complaint	751-755
53	Order Granting Intervention	766-767
55	Order	773
77-1	Intervening Plaintiffs' Memorandum of Support for Summary Judgment	1069-1099
83	Amicus Brief, American Civil Liberties Union	1166-1184
86	Amicus Brief, Family Foundation of Kentucky	1119-1222
87	Defendant's Response to Intervening Plaintiffs' Motion for Summary Judgment	1223-1242
91	Memorandum Opinion and Order	1289-1307