

**IN THE UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF KENTUCKY  
AT LOUISVILLE**

***ELECTRONICALLY FILED***

<b>TIMOTHY LOVE, ET AL.</b>	)	
	)	
<b>PLAINTIFFS</b>	)	
	)	<b>CIVIL ACTION NO.</b>
<b>v.</b>	)	
	)	<b>3:13-CV-750-H</b>
<b>STEVE BESHEAR, ET AL.</b>	)	
	)	
<b>DEFENDANTS</b>	)	

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

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This Court is presented with another opportunity to restore constitutional rights to Kentuckians who suffer from state-sanctioned discrimination, by extending to in-state same-sex couples the right to be married. This Court has already found a right for out-of-state same-sex marriages to be recognized.<sup>1</sup> The Intervening Plaintiffs seek to be married as any opposite-sex couples may be, as their loving relationships are no less intimate, dignified, or entitled to fundamental protection than any other.

To restore the constitutional rights of these Plaintiffs, this Court does not need to determine any "traditional" meaning of marriage, or even who should define what that term means. The only question this Court must decide is whether Kentucky's current marriage laws are permissible under the United States Constitution. In other words, can the Commonwealth justifiably deny same-sex couples the fundamental right to marry and to enjoy the attendant benefits of marriage that it already extends to opposite-sex couples? In light of *U.S. v. Windsor*,

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<sup>1</sup> DN 47.

this Court's prior ruling, and the rapidly growing precedent around the country, the Commonwealth cannot.

## **FACTUAL BACKGROUND**

### **I. Procedural History**

This action is an intervention in an existing challenge to Kentucky's marriage laws. After this Court issued its Memorandum Opinion of February 12, 2014 in this case, formerly known as *Bourke v. Beshear*,<sup>2</sup> two additional Kentucky couples filed a Motion to Intervene under Federal Rule of Civil Procedure 24.<sup>3</sup> After a conference with counsel for all parties, and hearing no objection, this Court granted Plaintiffs' Motion to Intervene on February 27, 2014.

### **II. The Plaintiffs**

Plaintiffs are two same-sex couples who wish to marry, but are prohibited by existing Kentucky marriage laws. Plaintiffs Timothy Love and Lawrence Ysunza share a home in Louisville, Kentucky. They have lived together in a committed relationship for thirty-four years. Last summer, Love had to undergo emergency heart surgery. The surgery had to be delayed in order to execute documents allowing Ysunza access and decision-making authority for his partner. Love and Ysunza have had some difficulty in establishing a legal relationship outside of marriage. For example, the real estate attorney handling the purchase of their home refused to include survivorship rights. The couple fears that health care providers and assisted living facilities may not allow them to be together and care for one another as they age.<sup>4</sup>

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<sup>2</sup> *Id.*

<sup>3</sup> DN 49.

<sup>4</sup> Love/Ysunza Affidavit, attached hereto.

Plaintiffs Maurice Blanchard and Dominique James also live together in Louisville, Kentucky. Their relationship has endured for ten years. They have faced challenges similar to those experienced by Love and Ysunza. For example, their own neighborhood association will not recognize them as a married couple, because the Commonwealth will not officially recognize their right to be married.<sup>5</sup>

Both couples have attempted, with the requisite identification and filing fees, to apply for marriage licenses at the Jefferson County Clerk's Office in Louisville, Kentucky. Both couples are otherwise qualified to receive a marriage license in the state of Kentucky; they are over the age of 18, not married to anyone else, not mentally disabled, not first cousins, and not otherwise "nearer in kin to each other...than second cousins." KRS 402.010-020. However, pursuant to KRS 402.020 *et seq.* and Kentucky Constitution § 233A, the Clerk refused to issue a marriage license to either couple because of their sex and sexual orientation.

### **III. Kentucky's Marriage Laws**

The Kentucky laws challenged by the Plaintiffs confine the issuance of marriage licenses to opposite-sex couples, and formally declare that same-sex marriages violate the public policy of the Commonwealth. A brief history of those laws follows.

Prior to 1998, Kentucky statutes included no definition of "marriage," nor did they specifically prohibit marriages by same-sex couples. However, in 1973, the Kentucky Supreme Court relied on dictionaries in use at the time to define marriage as the exclusive province of opposite-sex couples; one man and one woman.<sup>6</sup> An attempt by two Kentucky women to obtain

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<sup>5</sup> Blanchard/James Affidavit, attached hereto.

<sup>6</sup> *Jones v. Hallahan*, 501 S.W.2d 588, 589 (Ky. 1973).

a marriage license was rejected because their same-sex relationship did not qualify under that definition.<sup>7</sup>

In 1998, Kentucky's General Assembly passed a series of statutes explicitly enforcing the conception of marriage popular at the time. KRS § 402.005 defines marriage as between one man and one woman. KRS § 402.020(1)(d) prohibits marriage between members of the same sex. KRS § 402.040(2) states, "A marriage between members of the same sex is against Kentucky public policy. . . ." And KRS § 402.045 declares, "A marriage between members of the same sex which occurs in another jurisdiction shall be void in Kentucky."

Subsequent events elsewhere led to additional legislative action in Kentucky. In 2003, the Massachusetts Supreme Judicial Court struck down that state's prohibition of same-sex marriage.<sup>8</sup> A visceral, nationwide response by anti-same-sex marriage advocates ensued. On March 11, 2004, in explicit response to the Massachusetts case, the Kentucky Senate passed Senate Bill 245, which proposed the following amendment to the Kentucky Constitution:

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

The amendment was sponsored by Sen. Vernie McGaha, who gave the following justification for the bill on the Senate floor:

Marriage is a divine institution designed to form a permanent union between man and woman. According to the principles that have been laid down, marriage is not merely a civil contract; the scriptures make it the most sacred relationship of life, and nothing could be more contrary to the spirit than the notion that a personal agreement ratified in a human court satisfies the obligation of this ordinance. Mr.

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<sup>7</sup> *Id.* The *Jones* reasoning can no longer be controlling, because the marriage laws at issue in this case have subsequently attempted to formally define marriage.

<sup>8</sup> *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

President, I'm a firm believer in the Bible. And Genesis 1, it tells us that God created man in his own image, and the image of God created he him; male and female created he them. And I love the passage in Genesis 2 where Adam says 'this is now a bone of my bones and flesh of my flesh. She shall be called woman because she was taken out of man. Therefore shall a man leave his father and his mother and cleave to his wife and they shall be one flesh.' The first marriage, Mr. President. And in First Corinthians 7:2, if you notice the pronouns that are used in this scripture, it says, 'Let every man have his own wife, and let every woman have her own husband.'

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We in the legislature, I think, have no other choice but to protect our communities from the desecration of these traditional values. We must stand strong and against arbitrary court decisions, endless lawsuits, the local officials who would disregard these laws, and we must protect our neighbors and our families and our children. Decisive action is needed and that's why I have sponsored Senate Bill 245, which is a constitutional amendment that defines marriage as being between one man and one woman. Once this amendment passes, no activist judge, no legislature or county clerk whether in the Commonwealth or outside of it will be able to change this fundamental fact: The sacred institution of marriage joins together a man and a woman for the stability of society and for the greater glory of God.<sup>9</sup>

Sen. Gary Tapp, the bill's co-sponsor, then declared, "Mr. President when the citizens of Kentucky accept this amendment, no one, no judge, no mayor, no county clerk will be able to question their beliefs in the traditions of stable marriages and strong families."<sup>10</sup> The only other senator to speak in favor of the bill, Sen. Ed Worley, described marriage as a "cherished" institution.<sup>11</sup> He bemoaned that "liberal judges" changed the law so that "children can't say the Lord's Prayer in school."<sup>12</sup> Soon, he concluded, we will all be prohibited from saying "the Pledge to the Legiance[sic] in public places because it has the words 'in God we trust.'"<sup>13</sup> In support of the amendment, he cited to the Bible's "constant" reference to men and women being married.<sup>14</sup> By way of example, he quoted a passage from Proverbs 21:19, "Better to live in the desert than

<sup>9</sup> DN 38-7, Kentucky senate chambers video, March 11, 2004, at 1:00:30—1:05:15. Plaintiffs have avoided duplicative filing of exhibits in this case to the extent possible.

<sup>10</sup> *Id.* at 1:07:45.

<sup>11</sup> *Id.* at 1:25:55.

<sup>12</sup> *Id.* at 1:27:19.

<sup>13</sup> *Id.* at 1:27:46.

<sup>14</sup> *Id.* at 1:29:55.

with a quarrelsome, ill-tempered wife.”<sup>15</sup> The Senate passed the bill, and the amendment was placed on the ballot. It was ratified on November 2, 2004, and is codified as Kentucky Constitution § 233A.

#### **IV. Plaintiffs’ Injuries**

Plaintiffs in this case have suffered a variety of harms as a result of Kentucky’s marriage laws. They are prohibited from exercising their fundamental, constitutional right to marry. They are subjected to higher income and estate taxes. They are unable to benefit from leave under the Family Medical Leave Act, or from family insurance coverage. They may not participate in critical legal or medical decisions with or on behalf of their partners without the creation and expense of specific contractual relationships. Also, unmarried same-sex couples like the Intervening Plaintiffs are prohibited from adopting children in the Commonwealth of Kentucky.

In addition to these legal and financial harms, it is well recognized that the intangible benefits of marriage form a significant underpinning to the social fabric of our society. In their joint amicus brief to the United States Supreme Court in *Hollingsworth v. Perry*,<sup>16</sup> the American Psychological Association, American Medical Association, American Academy of Pediatrics, and several other healthcare organizations argued that marriage provides a “positive sense of identity, self-worth, and mastery.”<sup>17</sup> They argued that scientific studies show that marriage results in greater physical and mental well-being when compared to cohabiting couples.<sup>18</sup> With respect to the children of same-sex couples, the American Academy of Pediatrics takes the position that “If a child has 2 living and capable parents who choose to create a permanent bond by way of

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<sup>15</sup> *Id.* at 1:30:15.

<sup>16</sup> 133 S. Ct. 2652 (2013).

<sup>17</sup> DN 38-8, at p.14.

<sup>18</sup> *Id.* at 15-16.

civil marriage, it is in the best interests of their child(ren) that legal and social institutions allow and support them to do so, irrespective of their sexual orientation.”<sup>19</sup>

## V. Similar Recent Cases

At the time of this Court’s ruling in the original *Bourke v. Beshear* action, three federal district courts had already ruled in favor of the right for same-sex couples to wed or be recognized as wed in the wake of *Windsor*: in the Utah case of *Kitchen v. Herbert*<sup>20</sup>; in the Ohio case of *Obergefell v. Wymyslo*<sup>21</sup>; and in the Oklahoma case of *Bishop v. United States ex rel. Holder*.<sup>22</sup> Since then, four additional federal district courts have followed suit. Constitutional and statutory bans on same-sex marriage have been struck down either broadly or narrowly in Virginia<sup>23</sup>, Texas<sup>24</sup>, Michigan<sup>25</sup>, and Tennessee.<sup>26</sup>

## ARGUMENT

The regulation of marriage occupies “an area that has long been regarded as a virtually exclusive province of the States.”<sup>27</sup> However, “state laws defining and regulating marriage, of course, must respect the constitutional rights of persons,”<sup>28</sup> which brings Kentucky in conflict with the rights and freedoms guaranteed by the United States Constitution. The laws at issue in this case contravene a number of rights guaranteed to Plaintiffs by the federal Constitution. These include the rights to due process and equal protection articulated in the Fourteenth

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19 *Id.* at p. 29, quoting Am. Acad. Of Pediatrics, Committee of Psychosocial Aspects of Child and Family Health, *Policy Statement: Promoting the Well-Being of Children Whose Parents are Gay or Lesbian*.

20 No. 2:13-CV-217, 2013 WL 6697874 (D. Utah 2013).

21 No. 1:13-CV-501, 2013 WL 6726688 (S.D. Ohio 2013).

22 No. 04-CV-848-TCK-TLW, 2014 WL 116013 (N.D. Okla. 2014).

23 *Bostic v. Rainey*, No. 2:13-CV-395, 2014 U.S. Dist. LEXIS 19110 (E.D. Va. 2014).

24 *De Leon v. Perry*, No. SA-13-CA-00982-OLG, 2014 U.S. Dist. LEXIS 26236 (W.D. Tex. 2014).

25 *Deboer v. Snyder*, No. 12-CV-10285, 2014 U.S. Dist. LEXIS 37274 (E.D. Mich. 2014).

26 *Tanco v. Haslam*, No. 3:13-CV-01159, 2014 U.S. Dist. LEXIS 36823 (M.D. Tenn. 2014).

27 *Sosna v. Iowa*, 419 U.S. 393, 404 (1975).

28 *United States v. Windsor*, 133 S. Ct. 2675, 2691 (2013), citing *Loving v. Virginia*, 388 U.S. 1, 87 (1967).

Amendment, which protect individual life, liberty, and property from unjustified restriction by state governments and require equality for all citizens under the law.

By prohibiting the Plaintiffs from being married, their fundamental right to marriage is infringed by the Kentucky marriage laws at issue in this case. As such, these laws are subject to heightened judicial scrutiny, but nevertheless fail under any standard of review. Furthermore, the legislative history of Ky. Const. § 233A unquestionably demonstrates that it was created with the express purpose of advancing a very narrow view of Christianity, thereby violating the Establishment Clause of the First Amendment. In addition, these laws violate the First Amendment's guarantee of freedom of intimate association, as well as the Supremacy Clause.

#### **I. KENTUCKY'S MARRIAGE LAWS VIOLATE THE DUE PROCESS AND EQUAL PROTECTION GUARANTEES OF THE FEDERAL CONSTITUTION.**

Though due process and equal protection are discrete legal concepts, courts often apply similar analyses and standards of review for both. "Equality of treatment and the due process right [to protect] the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests."<sup>29</sup> There is significant interplay between the Constitution's Amendments and the rights they protect. The Kentucky laws challenged by the Plaintiffs in this case implicate both Due Process and Equal Protection.

The Fourteenth Amendment to the U.S. Constitution limits the power of state governments to regulate and interfere with the lives of individuals. "No state shall...deprive any person of life, liberty, or property, without due process of law..."<sup>30</sup> That Amendment's promise of equal protection is violated when a law creates "an indiscriminate imposition of inequalities."<sup>31</sup> "The

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29 *Lawrence v. Texas*, 539 U.S. 558, 575 (2003).

30 U.S. Const. amend. XIV § 1.

31 *Sweatt v. Painter*, 339 U.S. 629, 635 (1950).

guaranty of equal protection of the laws is a pledge of the protection of equal laws.”<sup>32</sup> While both federal and state governments are given some discretion to enact laws and regulations based upon classifications of citizens, this discretion is not without bounds. As a baseline, there must be “a rational relationship between the disparity of treatment and some legitimate governmental purpose.”<sup>33</sup> Where a classification implicates a fundamental right such as marriage or otherwise targets a suspect classification such as race, courts must apply a very strict form of judicial scrutiny.

#### **A. Determining the Appropriate Standard of Review**

As stated in this Court’s previous Memorandum Opinion, there are (at least) two possible standards of review for legal challenges under the Fourteenth Amendment: rational basis or strict scrutiny.<sup>34</sup> Rational basis review is the default standard, and it applies unless the challenged laws interfere with a fundamental right or target a suspect class.<sup>35</sup> In this case, strict scrutiny is appropriate, because Plaintiffs are members of a suspect class and Kentucky’s marriage laws interfere with the Plaintiffs’ fundamental right to marry. However, Kentucky’s marriage laws cannot survive even rational basis review.

##### *1. Marriage is a Fundamental Right For All Individuals*

Marriage is a fundamental right for all people, therefore laws that affect or interfere with an individual’s right to marry are subject to very close judicial consideration. “Equal protection analysis requires strict scrutiny of a legislative classification...when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disad-

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32 *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (internal quotations omitted).

33 *Heller v. Doe*, 509 U.S. 312, 320 (1993).

34 *Bourke*, DN 47, p.7.

35 *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978).

vantage of a suspect class.”<sup>36</sup> And “[w]hen the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation.”<sup>37</sup> Personal decisions about marriage and family relationships must be made “without unjustified government interference.”<sup>38</sup>

The right to marry is a liberty interest for which individuals are entitled to due process under both the Fifth and Fourteenth Amendments.<sup>39</sup> Because “[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men,”<sup>40</sup> the Supreme Court has declared, “the decision to marry is a fundamental right.”<sup>41</sup>

As this Court notes in its previous Memorandum Opinion, neither the Sixth Circuit nor the U.S. Supreme Court has specifically stated that the fundamental right to marry includes a fundamental right to marry someone of the same sex.<sup>42</sup> But prior to the case of *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. This comparison is valuable because it illustrates how our legal concepts of marriage and equality have grown to become more inclusive over time, even in the face of hostile precedent.

As long ago as 1888, the Supreme Court acknowledged that marriage is “the most important relation in life.”<sup>43</sup> In 1942, that Court formally declared marriage to be “one of the basic

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36 *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 (U.S. 1976), citing *Rodriguez*, 411 U.S. at 16.

37 *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977).

38 *Carey v. Population Services International*, 431 U.S. 678, 684-85 (1977).

39 *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639 (U.S. 1974).

40 *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

41 *Turner v. Safley*, 482 U.S. 78, 95 (1987).

42 DN 47, p.10.

43 *Maynard v. Hill*, 125 U.S. 190, 205 (1888).

civil rights of man.”<sup>44</sup> Though it would take another 25 years before anti-miscegenation laws were finally ruled unconstitutional, the fact that interracial relationships had not been previously included in the fundamental right to marriage did not stop the Supreme Court from declaring them so. The vast weight of the Court’s precedent on issues of familial relations by 1967 made that conclusion inescapable:

Marriage is mentioned nowhere in the Bill of Rights and interracial marriage was illegal in most States in the 19<sup>th</sup> 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].<sup>45</sup>

That precedent has only grown more inclusive with time. Marriage as a fundamental right implicates numerous liberty interests, including the right to privacy,<sup>46</sup> the right to intimate choice,<sup>47</sup> and the right to free association.<sup>48</sup> Marriage involves “the most intimate and personal choices a person may make in a lifetime, choices central to dignity and autonomy...”<sup>49</sup> As such, the Constitution demands respect “for the autonomy of the person in making these choices.”<sup>50</sup> There is simply no constitutional basis to deny homosexuals the right to autonomy in familial decisions that heterosexuals already enjoy.<sup>51</sup> The right to marriage is “of fundamental importance to *all* individuals.”<sup>52</sup>

More recently, Justice Kennedy, writing in *Windsor*, synthesized this collective body of precedent to express the basic concept of marriage as a fundamental right for all – including same-sex couples:

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44 *Skinner*, 316 US at 541.

45 *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 847-48 (1992).

46 *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

47 *Lawrence*, 539 U.S. 574.

48 *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996).

49 *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992).

50 *Lawrence*, 539 U.S. at 574.

51 *Id.*

52 *Zablocki v. Redhail*, 434 U.S. 374, at 384 (1978) (emphasis added).

The States' interest in defining and regulating the marital relation, subject to constitutional guarantees, stems from the understanding that marriage 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). By its recognition of the validity of same-sex marriages performed in other jurisdictions and then by authorizing same-sex unions and same-sex marriages, [States may give] further protection and dignity to that bond. 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.<sup>53</sup>

Justice Kennedy 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..."<sup>54</sup> In the same way that the Supreme Court in *Loving* did not require prior case law to expressly include interracial relationships within the idea of marriage as a fundamental right, this Court has no need for precedent to expressly include same-sex relationships. Our collective legal understanding of marriage and familial relationships already demands that discriminatory laws denying the right to marry according to the sex or sexual orientation of the spouses be subject to heightened scrutiny.

## 2. *Homosexuals are a Suspect Class*

Strict scrutiny also applies whenever a law discriminates on the basis of a suspect classification. "Prejudice against discrete and insular minorities" calls for "a correspondingly more searching judicial inquiry."<sup>55</sup> "[T]he traditional indicia of suspectness" include when a class is "subjected to such a history of purposeful unequal treatment, or relegated to such a position of

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<sup>53</sup> *Windsor*, 133 S. Ct. at 2692.

<sup>54</sup> *Id.*

<sup>55</sup> *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938); see, e.g., *Adarand Constructors v. Peña*, 515 U.S. 200, 227 (1995) (strict scrutiny applied to a racial classification).

political powerlessness as to command extraordinary protection from the majoritarian political process.”<sup>56</sup> Additionally, a “discrete and insular minority” can be determined by the immutable characteristics which its members share.<sup>57</sup>

Undeniably, gay men and lesbians as a group have experienced a “history of purposeful unequal treatment or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities.”<sup>58</sup> Across the United States, particularly in recent years, laws have been enacted at both the state and federal level specifically targeting homosexuals for unequal treatment. Some of those laws have subsequently been declared unconstitutional precisely for that reason.<sup>59</sup> Plaintiffs and other homosexuals are a minority of our population and are “politically powerless” to prevent discrimination by the majority.<sup>60</sup> They have had to rely largely on litigation to defeat discriminatory legislation enacted by majorities of voters and state legislators.

Additionally, the laws at issue in this case classify people on the basis of sexual orientation. Such a classification triggers heightened scrutiny because sexual orientation is one of a person’s defining characteristics and is beyond a person’s control.<sup>61</sup> Among medical scholars, sexual orientation is now widely recognized as “immutable.”

This Court noted in its previous Memorandum Opinion that the Sixth Circuit “has said that sexual orientation is not a suspect classification.”<sup>62</sup> But the Sixth Circuit has so far only re-

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56 *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

57 *Lyng v. Castillo*, 477 U.S. 635, 638 (1986); see, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (“sex, like race and national origin, is an immutable characteristic.”).

58 *Murgia*, 427 U.S. at 313; and see *Lawrence v. Texas*, 539 U.S. 558, 571 (2003).

59 See, e.g., *Romer*, 517 U.S. 620; *Lawrence*, 539 U.S. 558; and *Windsor*, 133 S. Ct. 2675.

60 *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987).

61 See DN 38-8 at pp.7-10 (“Homosexuality Is a Normal Expression of Human Sexuality, Is Generally Not Chosen, and Is Highly Resistant to Change.”).

62 DN 47, p.8, citing *Davis v. Prison Health Servs.*, 679 F.3d 433, 438 (6th Cir. 2012).

lied upon the reasoning of *Bowers v. Hardwick*, which was overruled by *Lawrence v. Texas*.<sup>63</sup> And other courts, such as the Ninth Circuit, have applied heightened scrutiny to cases involving sexual orientation.<sup>64</sup> Quite recently, a District Court within the Sixth Circuit declared that gays and lesbians, “exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group” because sexual orientation is an integral part of personal identity and cannot be changed through conscious decision or any other method.<sup>65</sup> And even if some individuals’ sexual orientation *were* to change over time, the Commonwealth cannot produce any evidence that it would be the result of a conscious choice.<sup>66</sup>

## **B. Strict Scrutiny Analysis**

As explained above, the laws challenged here must be subject to strict scrutiny both because they discriminate against a suspect group and because they infringe the fundamental right to marry. Once strict scrutiny is chosen as the appropriate standard of review, the proponent of the law in question must prove that “it is the least restrictive means of achieving some compelling state interest.”<sup>67</sup> Or, stated somewhat differently, a challenged law must demonstrate that it is narrowly tailored to further a compelling state interest.<sup>68</sup>

The types of compelling state interests recognized by the U.S. Supreme Court include the prohibition and regulation of drugs,<sup>69</sup> remedying past and present racial discrimination,<sup>70</sup> and

63 *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

64 *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 481 (9th Cir. 2014).

65 DN 38-9, *Bassett v. Snyder*, 2013 U.S. Dist. LEXIS 93345 ( E.D. Mich. 2013), quoting *Lyng*, 477 U.S. at 638.

66 Courts have even ruled that the conscious ability to change certain characteristics does not make them any less immutable. *Zavaleta-Lopez v. AG of the United States*, 360 Fed. Appx. 331, 333 (3d Cir. 2010) (“[W]e focus on whether putative group members possess common, immutable characteristics such as race, gender, or a prior position, status, or condition, or characteristics that are capable of being changed but are of such fundamental importance that persons *should not be required to change them*, such as religious beliefs.”) (Emphasis added)).

67 *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 718 (1981); *see, e.g., Palmore v. Sidoti*, 466 U.S. 429, 432 (1984).

68 *See, e.g., Harper*, 383 U.S. at 670; and *Kramer*, 395 U.S. at 632-33.

69 *Employment Div. v. Smith*, 494 U.S. 872, 905-906 (1990).

70 *United States v. Paradise*, 480 U.S. 149, 167 (1987).

protecting the interests of minor children.<sup>71</sup> To date, the Defendants have not and cannot identify a compelling interest for their prohibition of same-sex marriage. Even if they could, a blanket prohibition of same-sex marriage is not going to be “the least restrictive means” for furthering that interest. Extending all the rights and benefits of marriage to all opposite-sex couples while denying them to all same-sex couples solely upon distinctions drawn according to sexual orientation is exceptionally broad and restrictive, regardless of any possible compelling state interest for doing so.

Therefore, should this honorable Court apply strict scrutiny, each of the laws at issue here must be ruled unconstitutional under the Fifth and Fourteenth Amendments of the United States Constitution.

### **C. Rational Basis Review**

Though strict scrutiny is the more appropriate standard of review, the laws at issue in this case are still unconstitutional even under the more lenient “rational basis” standard. Unlike strict scrutiny, rational basis review is deferential to legislative prerogatives. Even facially discriminatory classifications can be “upheld against equal protection challenge if there is any reasonably conceivable set of facts that could provide a rational basis for the classification.”<sup>72</sup> “Such a 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.”<sup>73</sup> Further, “courts are compelled under rational-basis review to accept a legislature’s generalizations even when there is an imperfect fit between means and ends.”<sup>74</sup>

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71 *Palmore*, 466 U.S. at 433.

72 *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993).

73 *Heller v. Doe*, 509 U.S. 312, 320 (1993).

74 *Id.* at 321.

As deferential as rational basis review may be, it is still the government's burden to articulate a legitimate governmental purpose to justify the challenged legislation or regulations. In other words, while the means may be given wide latitude, the ends must still make sense. And in this case, the Defendants cannot articulate any legitimate purpose for the blatant discrimination against the Plaintiffs, and the legislators who promulgated this legislation certainly did not. Below, the Plaintiffs will briefly address the most common rational bases claimed by proponents of discriminatory marriage laws such as Kentucky's, as well as the malevolent basis those proponents often deny or attempt to hide.

### 1. *Tradition*

The preservation of tradition is one of the most common justifications for laws which discriminate against gay and lesbian citizens. It is true that opposite-sex marriage has been the only legally recognized form of marriage in most states for a very long time. However, the "ancient lineage of a legal concept does not give it immunity from attack for lacking a rational basis."<sup>75</sup> Ignoring the fact that "traditional marriage," in the Biblical sense, was far different than the tidy one-man-one-woman model we have more recently embraced, "neither the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries" can insulate a discriminatory law from "constitutional attack."<sup>76</sup> Further, "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."<sup>77</sup> Thus, tradition alone cannot form a rational basis for discriminatory government action.

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<sup>75</sup> *Id.* at 326.

<sup>76</sup> *Williams v. Illinois*, 399 U.S. 235, 239 (1970).

<sup>77</sup> *Lawrence*, 539 US at 577 (quoting *Bowers*, 478 US at 216 (Stevens, J., dissenting)).

## 2. *Procreation and Childrearing*

Serious proponents of discriminatory laws like Kentucky's invariably claim that legal marriage must exclude same-sex couples because the purpose of marriage is to promote responsible procreation and ensure children are raised in the most statistically supportive environment possible. This argument must fail because no marriage laws anywhere *require* procreation or "proof of procreative ability."<sup>78</sup> By the logic of discrimination proponents, marriage laws should similarly exclude anyone who is not able or is unwilling to bear children, not just same-sex couples. However, the U.S. Supreme Court separated marriage from the lone task of baby making nearly fifty years ago. In *Griswold v. Connecticut*, the Court explained:

Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony of living, not political faiths; a bilateral loyalty, not commercial or social projects.<sup>79</sup>

Later, in *Turner v. Safley*, the Supreme Court identified "many important attributes of marriage" beyond procreation, including emotional support, public commitment, personal dedication, exercise of religious faith, and the receipt of government benefits.<sup>80</sup>

Furthermore, laws which exclude same-sex couples from marriage do not enable better childrearing but in fact hinder it. Discriminatory laws like the federal Defense of Marriage Act and its state counterparts actually humiliate "tens of thousands of children now being raised by same-sex couples," because they make it "even more difficult for the children to understand the integrity and closeness of their own family."<sup>81</sup>

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78 DN 47, p.16.

79 381 U.S. 479, 486 (1965).

80 482 U.S. 78, 95-96 (1987).

81 *Windsor*, 133 S.Ct. at 2694.

For these reasons, procreation and responsible childrearing cannot constitute rational bases for Kentucky to prohibit same-sex marriages within its borders, and must fail under even the most deferential standard of review.

### 3. *State Sovereignty and Democratic Majorities*

Plaintiffs acknowledge that the “regulation of domestic relations” occupies “an area that has long been regarded as a virtually exclusive province of the States.”<sup>82</sup> In the 19th Century case of *Pennoyer v. Neff*, the Supreme Court declared that states have an “absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created.”<sup>83</sup> Additionally, the Tenth Amendment to the U.S. Constitution, ratified in 1792, anticipates some powers reserved exclusively to states by declaring, “the powers not delegated to the United States by the Constitution, nor prohibited it by the States, are reserved for the States respectively, or to the people.”

However, the Supreme Court has long acknowledged limits to state sovereignty. The Fourteenth Amendment explicitly extends the due process and equal protection rights of the Fifth Amendment to the states. As this Court has already recognized, “the Supreme Court has said time and time again that this Amendment makes the vast majority of the original Bill of Rights and other fundamental rights applicable to state governments.”<sup>84</sup> Most recently, in *Windsor*, the Supreme Court reaffirmed that “state laws defining and regulating marriage, of course, must respect the constitutional rights of persons.”<sup>85</sup> Even though some language in *Windsor* recognizes the importance of state self-determination,<sup>86</sup> the states do not in fact enjoy

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82 *Sosna v. Iowa*, 419 U.S. 393, 404 (1975).

83 95 U.S. 714, 734-35 (1878), overruled by *International Shoe v. Washington*, 326 U.S. 310 (1945).

84 DN 47, p. 20.

85 *Windsor*, 133 S. Ct. at 2691, citing *Loving*, 388 U.S. at 87.

86 *Id.* at 2692.

*absolute* sovereignty over issues of marriage and domestic relations. They cannot, for instance, limit marriage to couples of the same race.<sup>87</sup>

### 3. *A Bare Desire to Harm*

More pertinent to the matter before this Court, “[a]rbitrary and invidious discrimination” cannot be a legitimate purpose.<sup>88</sup> And the government “may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.”<sup>89</sup> “[T]he governmental objective must be a legitimate and neutral one.”<sup>90</sup> Classifications driven by animus against a minority are particularly prone to constitutional attack because “bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.”<sup>91</sup> The Virginia anti-miscegenation statutes in *Loving v. Virginia* 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.”<sup>92</sup>

In this case, the analogy should be obvious. The Court need only substitute one minority group for another to see that the Kentucky laws at issue here rest solely upon distinctions drawn according to sexual orientation, for which there is patently no legitimate overriding purpose independent of invidious discrimination. The laws were motivated by animus against homosexuals.

But the Court need not analogize; the question of laws which classify and exclude homosexuals or otherwise single them out for unequal treatment has been addressed by the

<sup>87</sup> See, *Loving*, 388 U.S. 1.

<sup>88</sup> *Loving*, 388 U.S. 1, 10 (1967).

<sup>89</sup> *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985); see, e.g., *Turner v. Safley*, 482 U.S. 78, 89-90 (1987).

<sup>90</sup> *Turner*, 482 U.S. at 90.

<sup>91</sup> *United States Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (emphasis in original).

<sup>92</sup> 388 U.S. at 11.

Supreme Court on several occasions. This Court should note that on every occasion this issue has been presented to the high Court since at least *Romer v. Evans*, no proponent has been able to articulate or 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 and declined to even consider whether strict scrutiny is appropriate. For example, in *Romer*, 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.<sup>93</sup> 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."<sup>94</sup> The Court in *Romer* went on, quoting *Moreno*: "[A] bare desire to harm a politically unpopular group cannot constitute a legitimate government interest."<sup>95</sup>

In *Lawrence v. Texas*, the Court considered a state law which criminalized specific, private sexual behaviors common among consenting homosexual couples.<sup>96</sup> 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.<sup>97</sup> 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

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93 517 U.S. at 631-32.

94 *Id.* at 635.

95 *Id.* at 634.

96 539 U.S. 558 (2003).

97 *Id.* at 578.

unconstitutional.<sup>98</sup> Even in his 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?”<sup>99</sup>

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.<sup>100</sup> 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.”<sup>101</sup> In so doing, “it violate[d] basic due process and equal protection principles...”<sup>102</sup> 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.<sup>103</sup> 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.”<sup>104</sup>

As this Court has already found, “the legislative history of Kentucky’s laws clearly demonstrate the intent to permanently prevent the recognition of same-sex marriage in Kentucky.”<sup>105</sup> Just as the only effect of “a law refusing to recognize valid out-of-state same-sex mar-

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98 *Id.*

99 *Id.* at 604-05 (SCALIA, J. dissenting; citations omitted).

100 133 S. Ct. 2675 (U.S. 2013).

101 *Id.* at 2695.

102 *Id.* at 2693.

103 *Id.* at 2695.

104 *Id.*

105 DN 47, p.12

riages” is “to impose inequality,”<sup>106</sup> identical is the effect of Kentucky’s laws prohibiting in-state same-sex marriages. Though this Court recognized that “Kentucky’s laws treat gay and lesbian persons differently in a way that demeans them,” it stopped short of finding “a clear showing of animus.”<sup>107</sup> Plaintiffs encourage the Court to reconsider the legislative history and social climate in which Kentucky’s marriage laws 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 desired result of a bare desire to harm an unpopular group.

In sum, the analysis in this case should be no different from that in *Romer*, *Lawrence*, or *Windsor*. Kentucky has not articulated, and cannot articulate, any basis for its laws other than: 1) the supposed “antiquity of a practice,” i.e., the “traditional,” “Biblical” marriage envisioned by Senators McGaha and Worley; 2) a vague interest in stable procreation and childrearing not actually related to laws which cannot mandate fertility or reproduction; 3) a reliance on state sovereignty irrespective of the federal constitution; 4) a “bare desire” to do harm to homosexuals; or 5) an excuse which is excessively and inextricably entangled with a particular religion, as discussed below. None of these bases are permissible or “rational” within the meaning of Supreme Court jurisprudence. Therefore, Kentucky’s discriminatory marriage laws cannot withstand even the most deferential standard of review, and must be ruled unconstitutional under the Fourteenth Amendment.

## II. KENTUCKY’S MARRIAGE LAWS VIOLATE THE ESTABLISHMENT CLAUSE

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106 *Id.*, p.13.

107 *Id.*

The First Amendment provides that “Congress shall make no law respecting an establishment of religion . . .”<sup>108</sup> The First Amendment’s religion clauses both protect the individual’s ability to exercise his or her own conscience, and also “guard against the civic divisiveness that follows when the government weighs in on one side of religious debate[.]”<sup>109</sup> “The touchstone for our analysis is the principle that the ‘First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.’”<sup>110</sup> Section 233A of the Kentucky Constitution violates these principles.

There has been substantial scholarly debate over the analytical framework for assessing Establishment Clause cases since a conflicting pair of 2005 cases challenging Ten Commandments displays, *ACLU v. McCreary County, Ky.*<sup>111</sup> and *Van Orden v. Perry.*<sup>112 113</sup> Any conflict in these two cases, however, is not implicated in this particular challenge. The Court in *McCreary Co.* declined an invitation to abandon the Establishment Clause test outlined in *Lemon v. Kurtzman.*<sup>114</sup> Although the *Van Orden* plurality declined to apply the *Lemon* test, it did not abandon the test. Instead, its holding was that “passive” government actions did not require the *Lemon* analysis.<sup>115</sup>

Under *Lemon*, the first requirement to pass constitutional muster under the Establishment Clause is that the government action must have a genuine secular purpose. Second, the primary effect of the legislation must neither advance nor inhibit religion. Third, the

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108 Like all other amendments contained in the Bill of Rights, the *First Amendment* is made applicable to the states through the Fourteenth Amendment. *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290 (2000).

109 *McCreary Co. Ky. v. ACLU*, 545 U.S. 844, 876 (2005).

110 *Id.* at 860 (quoting *Epperson v. Arkansas*, 393 U.S. 97 (1968)).

111 545 U.S. 844 (2005).

112 545 U.S. 677 (2005).

113 When weighting the precedential value of these two cases, it should be noted that *Van Orden* was a plurality decision, while *McCreary Co.* had a majority.

114 403 U.S. 602 (1971).

115 See *Van Orden*, 454 U.S. 844.

act must not foster an excessive government entanglement with religion.<sup>116</sup> On at least five occasions (two of which involve Kentucky legislation), our highest Court has found an impermissible religious purpose is enough to invalidate challenged legislation under *Lemon*.<sup>117</sup> Indeed, the Court in *McCreary Co.* thoroughly rejected the government's request to remove purpose from the Establishment Clause analysis, calling purpose a "staple of statutory interpretation . . . [.]"<sup>118</sup>

This clear pronouncement alleviates any need to parse the many cases dealing with a legislature that has articulated a secular purpose in order to conceal a religious motive. That is not the case here. It may be that other states enacting marriage restrictions between same-sex couples expressed a secular desire to promote a narrow view of stable family structure. That cannot be said for Kentucky's constitutional amendment. The three senators who spoke in favor of the amendment each offered particularized Biblical, Judeo-Christian justifications for the bill. Indeed, the bill's sponsor identified marriage as an institution designed to promote "the greater glory of God." In *Edwards v. Aguillard*, the Court used a bill sponsor's public comments as a basis for discerning the impermissible religious purpose of a bill requiring creationism be taught in public schools.<sup>119</sup> There is no need for conjecture when it comes to the purpose underlying Section 233A. The only argument offered in favor of the bill was the furtherance of the religious beliefs of the majority in the legislature.

The Court in *McCreary Co.* acknowledged the permissibility of Sunday closing laws because of the minimal advancement of religion and the historical distance between the

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116 *Lemon*, 403 U.S. at 612-613.

117 *Stone v. Graham*, 449 U.S. 39, 41, 66 L. Ed. 2d 199, 101 S. Ct. 192 (1980) (*per curiam*); *Wallace v. Jaffree*, 472 U.S. 38, 56-61, 86 L. Ed. 2d 29, 105 S. Ct. 2479 (1985); *Edwards v. Aguillard*, 482 U.S. 578, 586-593, 96 L. Ed. 2d 510, 107 S. Ct. 2573 (1987); *Santa Fe*, 530 U.S., at 308-309, 147 L. Ed. 2d 295, 120 S. Ct. 2266; *McCreary Co. Ky v. ACLU*, 545 U.S. 844 (2005).

118 545 U.S. at 861.

119 482 U.S. 578, 586-588 (1987).

religious motive of Sunday closing laws and the practical, secular purpose of a day off.<sup>120</sup> But the Court went on to say, “if the government justified its decision with a stated desire for all Americans to honor Christ, the divisive thrust of the official action would be inescapable.”<sup>121</sup> It may be that Christian marriages are viewed by Christians as furthering God’s divine plan. However, marriage is not simply a religious institution in this country. The state long ago determined that certain burdens and benefits granted and enforced by the state would accompany this traditionally religious relationship. Since the state has determined to grant married couples a secular social status, the institution itself cannot be said to be an inherently religious one. When the government acts with the purpose of favoring religious preferences, it sends a clear message that the religious adherents are a favored political class, and outsiders are “not full members of the political community.”<sup>122</sup> Since the stated purpose of the bill is to further the religious beliefs of the majority, the amendment must be invalidated as to couples who wish to be married, just as it was for couples who are already married.

### **III. THE FIRST AMENDMENT'S GUARANTEE OF FREEDOM OF ASSOCIATION INVALIDATES AND PROHIBITS ENFORCEMENT OF THE LAWS AT ISSUE IN THIS CASE**

*Roberts v. United States Jaycees*,<sup>123</sup> explicitly recognizes that the right to marry and to enter into intimate relationships may be protected not only by the Fifth and Fourteenth amendments, but also by the First Amendment's guarantee of freedom of association. The right to intimate association primarily protects the right to marry and other familial relationships, or, in the words of the Supreme Court, “those that attend the creation and sustenance of a family—

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120 545 U.S. at 861.

121 *Id.*

122 *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290 (2000) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984)(O'Connor, J., concurring)).

123 468 U.S. 609, 617-19 (1984).

marriage, childbirth, the raising and education of children, and cohabitation with one's relatives."<sup>124</sup>

Courts that have considered the First Amendment issue have concluded that the same level of scrutiny applied under a Due Process analysis should also apply to the First Amendment.<sup>125</sup> Therefore, Plaintiffs again urge the Court to apply the strict scrutiny standard advocated above, but in any event recognize that the laws fail even rational basis review.<sup>126</sup> "[A] regulation cannot be sustained where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational."<sup>127</sup>

Of particular interest is the analysis set forth by the Michigan District Court in *Briggs v. North Muskegon Police Dep't*.<sup>128</sup> Decades before *Romer*, *Lawrence*, and *Windsor*, the court identified bedrock constitutional principles that operate with no less force today. *Briggs* involved the privacy and association interests of non-married couples. The Court expressed suspicion of any attempt to regulate "choices concerning family living arrangements."<sup>129</sup>

As Justice Powell stated in *Moore*, extending constitutional protection beyond the traditional family, "unless we close our eyes to the basic reasons why certain rights associated with the family have been accorded shelter under the Fourteenth Amendment's Due Process Clause, we cannot avoid applying the force and rationale of these precedents to the family choice involved in this case." 431 U.S. at 501.<sup>130</sup>

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124 *Roberts*, 468 U.S. at 619 (Internal citations omitted).

125 *Cross v. Balt. City Police Dep't*, 213 Md. App. 294, 308 (Md. Ct. Spec. App. 2013)(citing *Windsor*); *Wolford v. Angelone*, 38 F. Supp. 2d 452 (W.D. Va. 1999); *Parks v. City of Warner Robins*, 43 F.3d 609, 615 (11th Cir. 1995).

126 See, e.g., *Via v. Taylor*, 224 F. Supp. 2d 753 (D. Del. 2002) (applying both intermediate and rational basis scrutiny and concluding that the state's infringement upon a prison guard's right to marry a former inmate could withstand neither).

127 *Id.* at 764, citing *Turner v. Safley*, 482 U.S. 78 (U.S. 1987). See also *Wolford*, 38 F. Supp. 2d at 463 ("[W]here a policy does not order individuals not to marry, nor . . . directly and substantially interfere with the right to marry, the plaintiff has failed to show that the regulation infringes on either the right to marry or the First Amendment right of intimate association.") (Internal quotations omitted)).

128 563 F. Supp. 585 (W.D. Mich. 1983), affirmed by the Sixth Circuit, 746 F.2d 1475 (6th Cir. 1984), cert. denied 473 U.S. 909 (1985).

129 *Id.* at 588 (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977)).

130 *Id.* at 589.

The Court went on to apply strict scrutiny to the statute, and rejected the state's justification:

This Court rejects the notion that an infringement of an important constitutionally protected right is justified simply because of general community disapproval of the protected conduct. The very purpose of constitutional protection of individual liberties is to prevent such majoritarian coercion.<sup>131</sup>

On the basis of these longstanding, long-recognized constitutional principles, the *Briggs* court found that a public employee's right to freedom of association protected him from discipline based upon an intimate relationship, even though he was unmarried. Even if one does not take into account the concept of "evolving standards of decency that mark the progress of a maturing society," which has been a central idea in the Supreme Court's jurisprudence,<sup>132</sup> there is ample support in case law that is now thirty years old suggesting that even a "non-traditional" relationship cannot be impeded by the state without adequate justification. The obstinate refusal to issue marriage licenses to Plaintiffs "directly and substantially interferes" with Plaintiffs' right to intimately associate with whomever they choose.<sup>133</sup> The state can offer no justification for its intrusion.

#### **IV. THE SUPREMACY CLAUSE BARS KENTUCKY FROM INTERPRETING LAWS AFFECTING SAME-SEX MARRIAGE IN A MANNER CONTRARY TO THE DECISIONS OF THE U.S. SUPREME COURT**

The U.S. Constitution, art. VI, Cl 2 states: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." As such, "[t]he Constitution of the United States and all laws enacted pursuant to the powers conferred by it on the Congress are the supreme law of the land

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131 *Id.* at 590.

132 *See, e.g., Trop v. Dulles*, 356 U.S. 86, 101 (1958).

133 *Wolford*, 38 F. Supp. 2d at 463.

(U. S. Const., art. VI, sec. 2) to the same extent as though expressly written into every state law.”<sup>134</sup> State constitutions and amendments thereto are no less subject to the applicable prohibitions and limitations of the Federal Constitution.<sup>135</sup> The proper interpretation of the U.S. Constitution is, of course, set forth by the United States Supreme Court. The decisions of the nation's high court are thus conclusive and binding on state courts.<sup>136</sup>

With these basic principles in mind, the Supreme Court's opinion in *Windsor* sets forth the constitutional standard by which laws which hinder same-sex marriage should be evaluated. Justice Kennedy writes:

The power the Constitution grants it also restrains. And though Congress has great authority to design laws to fit its own conception of sound national policy, it cannot deny the liberty protected by the Due Process Clause of the Fifth Amendment.

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

The liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws. . . . While the Fifth Amendment itself withdraws from 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.<sup>137</sup>

There is much back and forth between the majority and the dissents in *Windsor* about whether the opinion is about federalism, due process, equal protection, or something else. For these purposes, it is important to note that Justice Kennedy clearly articulates two separate

134 *People ex rel. Happell v. Sischo*, 23 Cal. 2d 478, 491 (Cal. 1943) (citing *Hauenstein v. Lynham*, 100 U.S. 483, 490 (1880); *Florida v. Mellon*, 273 U.S. 12, 17 (1927).)

135 See, e.g., *Harbert v. County Court*, 39 S.E.2d 177 (W.Va. 1946); *Gray v. Moss*, 156 So. 262 (Fla. 1934); *Gray v. Winthrop*, 156 So. 270 (Fla. 1934).

136 See *Thompson v. Atlantic C. L. R. Co.*, 38 SE2d 774 (Ga. 1946), *aff'd* 332 U.S. 168 (1947); *Walker v. Gilman*, 171 P2d 797 (Wash. 1946); *Chicago, R. I. & P. R. Co. v. S. L. Robinson & Co.*, 298 SW 873 (Ark. 1927); *Weber Showcase & Fixture Co. v. Co-Ed Shop*, 56 P2d 667 (Ariz. 1936); *Pennsylvania Rubber Co. v. Brown*, 143 A. 703 (N.H. 1928); *Lawyers' Coop. Publishing Co. v. Bauer*, 244 NW 327 (S.D. 1932).

137 *Windsor*, 133 S. Ct. at 2695 (2013) (internal citations omitted).

constitutional grounds for the majority opinion (i.e., the Fifth and Fourteenth amendments), and that these constitutional grounds are implicated by the government's infringement upon individual rights.

Finally, it is worth pointing out that the handful of lower-court opinions that have analyzed *Windsor* have interpreted its holding as one of basic individual rights under the Constitution.<sup>138</sup> This conclusion is shared by other district courts within the Sixth Circuit.<sup>139</sup> And finally, legal scholars agree with this view as well.<sup>140</sup> For this reason, it matters little whether *Windsor* is characterized as a federalism case, an equal protection case, or a substantive due process case. The obvious point of the decision is that those individual rights are protected by the Federal Constitution, and therefore cannot be circumvented by any statute or state constitution. Quite simply, regardless of the proper amendment or analysis to be applied, *Windsor* ultimately stands for the proposition that same-sex marriages cannot be denied by the government. It is beyond cavil that the Supreme Court is the final arbiter of the scope of such individual rights under the U.S. Constitution. Therefore, a state may not impose its own interpretation of the Constitution to exclude same-sex couples from the rights and privileges of marriage without ignoring the holding in *Windsor*, and thereby violating the Supremacy Clause.

Nonetheless, this is precisely what Kentucky continues to do by enforcing its discriminatory statutes and Ky. Const. § 233A. The “principal purpose and necessary effect” of

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138 See, e.g., *Jenkins v. Miller*, 2013 U.S. Dist. LEXIS 152846, 6-78 (D. Vt. Oct. 24, 2013); *Cross v. Balt. City Police Dep't*, 213 Md. App. 294, 308-309 (Md. Ct. Spec. App. 2013).

139 See *Obergefell v. Kasich*, 2013 U.S. Dist. LEXIS 102077 (S.D. Ohio July 22, 2013) (“Under Supreme Court jurisprudence, states are free to determine conditions for valid marriages, but these restrictions must be supported by legitimate state purposes because they infringe on important liberty interests around marriage and intimate relations.”).

140 See, e.g., Douglas NeJaime, *Windsor's Right to Marry*, 123 YALE L.J. ONLINE 219 (2013), <http://yalelawjournal.org/2013/9/15/nejaime.html> (“Reading *Windsor* as a right-to-marry case has important implications for fundamental rights jurisprudence. The view of marriage that Justice Kennedy embraces suggests that the fundamental right to marry as presently understood safeguards a right that applies with equal force to same-sex couples.”).

Kentucky's laws, no less than DOMA, is to "demean those persons" who seek to be in a lawful same-sex marriage. Because of the Supremacy Clause, Kentucky is not allowed to tell these plaintiffs that the scope of their rights is anything less than what the U.S. Constitution provides. For now, *Windsor* is the final word as to what the Constitution provides, and clearly prohibits Kentucky's enforcement of its discriminatory laws.

### **CONCLUSION**

Plaintiffs are entitled to summary judgment. Kentucky's discriminatory marriage laws violate multiple constitutional protections, any one of which can serve as a basis for the Court granting Plaintiffs' Motion.

Respectfully submitted,

s/Daniel J. Canon

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**CERTIFICATE OF SERVICE**

I hereby certify that on April 18, 2014, I electronically filed the foregoing with the clerk of the court by using the CM/ECF system, which will send a notice of electronic filing to counsel of record.

/s/ Daniel J. Canon