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

ELECTRONICALLY FILED

GREGORY BOURKE, ET AL.	)	
	)	
PLAINTIFFS	)	
	)	CIVIL ACTION NO.
v.	)	
	)	3:13-CV-750-JGH
STEVE BESHEAR, ET AL.	)	
	)	
DEFENDANTS	)	

PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

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This Court is presented with the opportunity to restore constitutional rights to Kentuckians who are the target of state-sanctioned discrimination. Moreover, this case presents the Court with an opportunity to join an increasing number of courts – including those within the Sixth Circuit – which have refused to end up on the wrong side of history.[1]

Plaintiffs are ordinary married couples. They go to work, attend school, raise their children, go to church, pay taxes, and in most respects live as any other married couple in Kentucky. Like many married couples in the Commonwealth, Plaintiffs were wed in other jurisdictions. Their marriages were in all respects valid under the laws of the jurisdictions in which they were solemnized and registered. The federal government recognizes Plaintiffs' marriages, and extends certain benefits to them as a result.[2] And yet, the Commonwealth of Kentucky refuses to acknowledge the commitments made by these couples because their spouses are of the same sex.

The laws challenged in this case, KRS 402.040, KRS 402.045 and Ky. Const. § 233A, enable and enshrine Kentucky's ongoing discrimination against Plaintiffs. As a result, Plaintiffs have

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[1] S*ee Obergefell v. Kasich*, 2013 U.S. Dist. LEXIS 102077 (S.D. Ohio July 22, 2013) (attached hereto as Exhibit 1).

[2] *See, e.g.*, *Federal Marriage Benefits Available to Same-Sex Couples*, http://www.nolo.com/legal-encyclopedia/same-sex-couples-federal-marriage-benefits-30326.html (accessed December 13, 2013).

taken extraordinary measures to achieve the legal protections automatically afforded to opposite-sex couples by operation of law. Even though these measures have been taken, Plaintiffs are still deprived of critical privileges, benefits, rights and responsibilities afforded to opposite-sex couples. Perhaps more importantly, Plaintiffs' families have been humiliated and degraded by Kentucky's ongoing refusal to recognize the validity of their unions.

The decision in this case, and others like it, will affect the lives of Kentuckians for generations to come. And while the issues in this case may be mired in controversy, the discrete questions of law facing this Court are not difficult. Kentucky's discriminatory laws violate numerous provisions of the U.S. Constitution, and in numerous ways. These Plaintiffs, along with their minor children, seek to have their marriages recognized and legitimized by Kentucky. This Court can look to any one of the Constitutional protections discussed below to provide a basis for temporary and permanent injunctive relief.

FACTS

Plaintiffs are four same-sex couples who are legally married in other jurisdictions, and currently live in the Commonwealth of Kentucky. Plaintiffs Bourke-De Leon were married in Ontario, Canada in March, 2004. (Bourke-De Leon Affidavit, Exhibit 2). Plaintiffs Franklin-Boyd were married in Stratford, Connecticut in July, 2010. (Franklin-Boyd Affidavit, Exhibit 3). Plaintiffs Johnson-Campion were married in Riverside, California in July, 2008 (Johnson-Campion Affidavit, Exhibit 4). Plaintiffs Meade-Barlowe were married in Davenport, Iowa in July, 2009. (Meade-Barlowe Affidavit, Exhibit 5).

On March 11, 2004, 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. 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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> ★★★★ ★★★★ ★★★★
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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.

(Senate Chambers March 11, 2004, Exhibit 6 at 1:00:30—1:05:15).

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." (*Id.* at 1:07:45). The only other senator to speak in favor of the bill, Sen. Ed Worley, described marriage as a "cherished" institution (*Id.* at 1:25:55). He bemoaned that "liberal judges" changed the law so that "children can't say the Lord's Prayer in school." (*Id.* at 1:27:19). Soon, he concluded, we will all be prohib-

ited from saying "the Pledge to the Legiance[*sic*] in public places because it has the words 'in God we trust.'" (*Id.* at 1:27:46). In support of the amendment, he cited to the Bible's "constant" reference to men and women being married. (*Id.* at 1:29:55). By way of example, he quoted a passage from Proverbs 21:19, "Better to live in the desert than with a quarrelsome, ill-tempered wife." (*Id.* at 1:30:15). 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.

This discriminatory provision of the Kentucky Constitution is not all that stands between Plaintiffs and marriage equality in their home state. In addition, KRS 402.040(2) states, "A marriage between members of the same sex is against Kentucky public policy. . . ." KRS 402.045 declares, "A marriage between members of the same sex which occurs in another jurisdiction shall be void in Kentucky." Finally, 28 U.S.C. §1738C, commonly known as the Defense of Marriage Act (DOMA) § 2, purports to give Kentucky safe harbor for its state-sanctioned discrimination by stating that "No State...shall be required to give effect to any public act, record, or judicial proceeding of any other State...respecting a relationship between persons of the same sex treated as a marriage under the laws of such other State...or a right or claim arising from such relationship."

Plaintiffs have suffered a variety of harms as a result of Kentucky's refusal to recognize their marriages. 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 do not have the burden and privilege of making medical or legal decisions for the other without the creation and expense of contractual relationships. Should they desire to divorce, they are unable to do so. (*See* Exhibits 2-5). The Plaintiffs with minor children have the additional burden of disproportionate parental rights to those children. Same-sex couples cannot adopt children in the Commonwealth of Kentucky, and the non-adoptive spouse is thus not afforded the parental rights inherent in the parent-child relationship. (Exhibits 2 & 4).

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 amicus brief to the United States Supreme Court in *Hollingsworth v. Perry*,[3] the American Psychological Association, American Medical Association, American Academy of Pediatrics, and several other healthcare organizations argued that marriage provides a "positive

[3] 133 S. Ct. 2652 (2013).

sense of identity, self-worth, and mastery." (Amicus Brief, Exhibit 7, p. 14 (citation omitted)). They argued that scientific studies show that marriage results in greater physical and mental well-being when compared to cohabiting couples. (*Id.* at 15-16). 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 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." (*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.*). Finally, the medical associations assert that failing to recognize same-sex couples' marriages results in a stigma that devalues and delegitimizes their familial relationships. (*Id.* p. 34-36).

ARGUMENT

The regulation of marriage occupies "an area that has long been regarded as a virtually exclusive province of the States."[4] However, "state laws defining and regulating marriage, of course, must respect the constitutional rights of persons,"[5] 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 Fifth and Fourteenth Amendments, which protect individual life, liberty, and property from unjustified restriction by the federal and state governments and require equality for all citizens under the law. By rejecting the Plaintiffs' marriages, the laws at issue here infringe the fundamental rights of marriage and travel. As such, these laws are subject to heightened judicial scrutiny, but 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, the full faith and credit guarantee in the U.S. Constitution, as well as the Supremacy Clause.

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[4] *Sosna v. Iowa*, 419 U.S. 393, 404 (1975).

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

I. KENTUCKY'S REFUSAL TO RECOGNIZE PLAINTIFFS' MARRIAGES VIOLATES 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."[6] There is significant interplay between the Constitution's Amendments and the rights they protect. The Kentucky and federal laws challenged by the Plaintiffs in this case implicate both Due Process and Equal Protection.

The Constitutional promise of equal protection is violated when a law creates "an indiscriminate imposition of inequalities."[7] "The guaranty of equal protection of the laws is a pledge of the protection of equal laws."[8] 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."[9] 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.

The Fifth Amendment to the U.S. Constitution limits the power of the federal government to regulate the lives of individuals. "No person shall be ... deprived of life, liberty, or property, without due process of law..."[10] This Due Process Clause also appears in the Fourteenth Amendment, which provides due process for state actions: "No state shall...deprive any person of life, liberty, or property, without due process of law..."[11]

Because the laws at issue here infringe Plaintiffs' fundamental rights to marry and to travel by denying recognition of their valid marriages, they violate the due process protections of the Fifth and Fourteenth Amendments. And since Plaintiffs are homosexuals, these laws also infringe equal protection (discussed below). These laws can withstand constitutional scrutiny only if this Court finds they are narrowly tailored to serve a compelling state interest.

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[6] *Lawrence v. Texas*, 539 U.S. 558, 575 (2003).
[7] *Sweatt v. Painter*, 339 U.S. 629, 635 (1950).
[8] *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (internal quotations omitted).
[9] *Heller v. Doe*, 509 U.S. 312, 320 (1993).
[10] U.S. Const. amend. XIV.
[11] U.S. Const. amend. XIV § 1.

A. Marriage and Travel Are Fundamental Rights

The right to marry is a liberty interest for which individuals are entitled to due process under both the Fifth and Fourteenth Amendments.[12] 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,"[13] the Supreme Court has declared, "the decision to marry is a fundamental right."[14]

Marriage as a fundamental right implicates numerous liberty interests, including the right to privacy,[15] the right to intimate choice,[16] and the right to free association.[17] Marriage involves "the most intimate and personal choices a person may make in a lifetime, choices central to dignity and autonomy..."[18] As such, the Constitution demands respect "for the autonomy of the person in making these choices."[19] And there is no constitutional basis to deny homosexuals the autonomy in familial decisions that heterosexuals enjoy.[20] The right to marriage is "of fundamental importance to all individuals."[21]

Similarly, the United States Supreme Court has long recognized a fundamental constitutional right to travel.[22] The right to unfettered interstate travel "occupies a fundamental concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized."[23] As such, it has been zealously guarded by the judiciary for decades. The "*virtually unconditional* personal right, guaranteed by the Constitution to us all,"[24] to "be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement,"[25] "has repeatedly been recognized as a basic constitutional freedom."[26] This right is firmly embedded in our coun-

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[12] *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639 (U.S. 1974).
[13] *Loving v. Virginia*, 388 U.S. 1, 12 (1967).
[14] *Turner v. Safley*, 482 U.S. 78, 95 (1987).
[15] *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).
[16] *Lawrence*, 539 U.S. 574.
[17] *M.L.B.* v. S.L.J., 519 U.S. 102, 116 (1996).
[18] *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992).
[19] *Lawrence*, 539 U.S. at 574.
[20] *Id.*
[21] *Zablocki v. Redhail*, 434 U.S. 374, at 384 (1978).
[22] *Shapiro v. Thompson*, 394 U.S. 618 (1969).
[23] *United States v. Guest*, 383 U.S. 745, 757 (1966).
[24] *Saenz v. Roe*, 426 U.S. 489, 499 (1999)(emphasis added and quotation marks omitted).
[25] *Id.* at 498 (internal quotation marks omitted).
[26] *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 254 (1974).

try's jurisprudence, and is one which is essential to our federal system of government.[27]

"A state law implicates the right to travel when it actually deters such travel, when impeding travel is its primary objective, or when," as here, "it uses any classification which serves to penalize the exercise of that right."[28] In cases where state legislation impedes the right to travel, the state must justify the law only with "a compelling state interest." [29]

B. The Appropriate Level of Scrutiny

1. *Strict Scrutiny*

Because marriage is a fundamental right, 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 disadvantage of a suspect class."[30] 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."[31] Personal decisions about marriage and family relationships must be made "without unjustified government interference."[32]

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."[33] "[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 political powerlessness as to command extraordinary protection from the majoritarian political process."[34] Additionally, a "discrete and insular minority" can

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[27] *Saenz*, 426 U.S. at 498, 503–04.
[28] *Attorney Gen. of New York v. Soto-Lopez*, 476 U.S. 898, 903, 106 (1986)(internal quotation marks and citations omitted).
[29] *Maricopa County*, 415 U.S. at 258; *see also Shapiro*, 394 U.S. at 634.
[30] *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 (U.S. 1976), citing *Rodriguez*, 411 U.S. at 16.
[31] *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977).
[32] *Carey v. Population Services International*, 431 U.S. 678, 684-85 (1977).
[33] *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938); *see, e.g.*, *Adarand Constructors v. Pena*, 515 U.S. 200, 227 (1995) (strict scrutiny applied to a racial classification).
[34] *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

be determined by the immutable characteristics which its members share.[35]

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."[36] Across the United States, particularly in recent years, laws have been enacted at both the state and federal level targeting homosexuals for unequal treatment. Some of those laws have subsequently been declared unconstitutional precisely for that reason.[37] Plaintiffs and other homosexuals are a minority of our population and are "politically powerless" to prevent discrimination by the majority.[38] They have had to rely largely on litigation and the judicial system's eventual recognition of their constitutional rights 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 classifications trigger heightened scrutiny because sexual orientation is one of a person's defining characteristics and is beyond a person's control. (See Exhibit 7, pp.7-10: "Homosexuality Is a Normal Expression of Human Sexuality, Is Generally Not Chosen, and Is Highly Resistant to Change."). Among medical scholars, sexual orientation is now widely recognized as "immutable." 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 discreet group" because sexual orientation is an integral part of personal identity and cannot be changed through conscious decision or any other method.[39] And even if some individuals' sexual orientation *were* to change over time, the state cannot produce any evidence that it would be the result of a conscious choice. [40]

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[35] *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.").

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

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

[38] *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987).

[39] *Bassett v. Snyder*, 2013 U.S. Dist. LEXIS 93345 (E.D. Mich. 2013), quoting *Lyng*, 477 U.S. at 638. (Exhibit 8).

[40] Courts have even ruled that the conscious ability to change certain characteristics doesn't 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

The laws challenged here must be subject to strict scrutiny both because they discriminate against a suspect group and because they infringe fundamental rights. 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."[41] Or, stated somewhat differently, a challenged law must demonstrate that it is narrowly tailored to further a compelling state interest.[42]

The types of compelling state interests recognized by the U.S. Supreme Court include the prohibition and regulation of drugs,[43] remedying past and present racial discrimination,[44] and protecting the interests of minor children. [45] To date, the Commonwealth of Kentucky has not identified a compelling interest for its refusal to recognize same-sex marriages lawfully performed in other states. Even if it could, a blanket prohibition on the recognition of any foreign 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 the appropriate standard review of strict scrutiny, each of the laws at issue here must be ruled unconstitutional under the Fifth and Fourteenth Amendments of the United States Constitution.

2. *Rational Basis*

Even if this Court were to apply the more lenient, "rational basis" level of scrutiny, the laws at issue in this case still fail to pass constitutional muster. Where fundamental rights and suspect classes are not affected by challenged laws, courts apply the more permissive "rational basis" standard of review. Unlike strict scrutiny, rational basis review is deferential to legislative discretion. Even facially discriminatory classifications can be "upheld against equal protection challenge if there is any reasonable conceivable state of

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that persons *should not be required to change them*, such as religious beliefs.") (Emphasis added)).

[41] *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).

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

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

[44] *United States v. Paradise*, 480 U.S. 149, 167 (1987).

[45] *Palmore*, 466 U.S. at 433.

facts that could provide a rational basis for the classification."[46] "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."[47] 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."[48]

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, Kentucky cannot articulate any legitimate purpose for its blatant discrimination against the Plaintiffs, and the legislators who promulgated this legislation certainly did not.

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 U.S. 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."[49] "[N]either 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."[50] Thus, tradition alone cannot form a rational basis for discriminatory government action.

More pertinent to the matter before this Court, "[a]rbitrary and invidious discrimination" cannot be a legitimate purpose.[51] 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."[52] "[T]he governmental objective must be a legitimate and neutral one."[53] 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 inter-

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[46] *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993).
[47] *Heller v. Doe*, 509 U.S. 312, 320 (1993).
[48] *Id.* at 321.
[49] *Id.* at 326.
[50] *Williams v. Illinois*, 399 U.S. 235, 239 (1970).
[51] *Loving*, 388 U.S. 1, 10 (1967).
[52] *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).
[53] *Turner*, 482 U.S. at 90.

est."[54] The Virginia statutes in *Loving* 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."[55]

In this case, the analogy should be obvious. The Court need only substitute one minority group for another to see that the Kentucky and federal statutes 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, and 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 Supreme Court on several occasions. This Court should note that on every occasion this issue has been presented to the high Court, no proponent has *ever* 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.[56] 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."[57] The Court in *Romer* went on, quoting *Moreno*: "[A] bare desire to harm a politically unpopular group cannot constitute a legitimate government interest."[58]

In *Lawrence v. Texas*, the Court considered a state law which criminalized specific, private sexual behaviors common among consenting homosexual couples.[59] 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

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[54] *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (emphasis in original).
[55] 388 U.S. at 11.
[56] 517 U.S. at 631-32.
[57] *Id.* at 635.
[58] *Id.* at 634.
[59] 539 U.S. 558 (2003).

law.[60] 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.[61] 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?"[62]

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.[63] 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."[64] In so doing, "it violate[d] basic due process and equal protection principles..."[65] 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.[66] 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."[67]

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 "bare desire" to do harm to homosexuals; or 3) an excuse which is excessively and inextricably entangled with a particular religion, as discussed below.

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[60] *Id.* at 578.
[61] *Id.*
[62] *Id.* at 604-05 (SCALIA, J. dissenting; citations omitted).
[63] 133 S. Ct. 2675 (U.S. 2013).
[64] *Id.* at 2695.
[65] *Id.* at 2693.
[66] *Id.* at 2695.
[67] *Id.*

None of these bases are permissible or "rational" within the meaning of Supreme Court jurisprudence.

II. SECTION 233A VIOLATES THE ESTABLISHMENT CLAUSE

The First Amendment provides that "Congress shall make no law respecting an establishment of religion . . ."[68] 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[.]"[69] "The touchstone for our analysis is the principle that the 'First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.'"[70] 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.*[71] and *Van Orden v. Perry*.[72] [73] 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. Kurtsman*.[74] 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.[75]

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 act must not foster an excessive government entanglement with religion.[76] 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

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[68] 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).
[69] *McCreary Co. Ky. v. ACLU*, 545 U.S. 844, 876 (2005).
[70] *Id.* at 860 (quoting *Epperson v. Arkansas*, 393 U.S. 97 (1968)).
[71] 545 U.S. 844 (2005).
[72] 545 U.S. 677 (2005).
[73] 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.
[74] 403 U.S. 602 (1971).
[75] See *Van Orden*, 454 U.S. 844.
[76] *Lemon*, 403 U.S. at 612-613.

legislation under *Lemon*.[77] 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 . . . [.]"[78]

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.[79] 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 religious motive of Sunday closing laws and the practical, secular purpose of a day off.[80] 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."[81] 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

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[77] *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).
[78] 545 U.S. at 861.
[79] 482 U.S. 578, 586-588 (1987).
[80] 545 U.S. at 861.
[81] *Id.*

a favored political class, and outsiders are "not full members of the political community."[82] Since the stated purpose of the bill is to further the religious beliefs of the majority, the amendment must be invalidated.

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,[83] 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—marriage, childbirth, the raising and education of children, and cohabitation with one's relatives."[84]

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.[85] Therefore, Plaintiff again urges the Court to apply the strict scrutiny standard advocated above, but in any event recognize that the laws fail even rational basis review.[86] "[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."[87]

Of particular interest is the analysis set forth by the Michigan District Court in *Briggs v. North Muskegon Police Dep't.*[88] Decades before *Romer, Lawrence*, and *Windsor*, the court identified bed-

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[82] *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)).
[83] 468 U.S. 609, 617-19 (1984).
[84] *Roberts*, 468 U.S. at 619 (Internal citations omitted).
[85] *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).
[86] 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).
[87] *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)).
[88] 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).

rock 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."[89]

> 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.[90]

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.[91]

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,[92] 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 recognize Plaintiffs' lawful marriages "directly and substantially interferes" with Plaintiffs' right to intimately associate with whomever they choose.[93] The state can offer no justification for its intrusion.

IV. THE PROVISIONS OF KENTUCKY LAW AND SECTION 2 OF DOMA VIOLATE THE FULL FAITH AND CREDIT CLAUSE

The Full Faith and Credit Clause of the federal Constitution states:

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[89] *Id.* at 588 (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977)).
[90] *Id.* at 589.
[91] *Id.* at 590.
[92] *See, e.g.*, *Trop v. Dulles*, 356 U.S. 86, 101 (1958).
[93] *Wolford*, 38 F. Supp. 2d at 463

> Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be provided, and the Effect thereof.[94]

Pursuant to this Clause, Congress enacted 28 U.S.C. § 1738 which states, in pertinent part:

> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

Further, Article IV, § 2 provides: "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."[95]

The "animating purpose of the full faith and credit command," was "to make [the several states] integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin."[96] In effect, the Full Faith and Credit Clause imposes a constitutional "rule of decision" on state courts; that is, "a rule by which courts ... are to be guided when a question arises in the progress of a pending suit as to the faith and credit to be given by the court to the public acts, records, and judicial proceedings of a State other than that in which the court is sitting."[97] The "rule of decision" is that the forum state shall give full faith and credit to those acts, records, and proceedings of the sister state.

Few U.S. Supreme Court decisions address the Full Faith and Credit Clause. It is therefore useful to reexamine the original intent and actual text of the constitutional provision. James Madison's early draft read: "Full faith shall be given in each State to the acts of the Legislatures, and to the records and judicial proceedings of the Courts and Magistrates of every other State."[98] And another

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[94] *U.S. Const. art. IV,* § 1.
[95] *U.S. Const. art. IV,* §§ 1-2.
[96] *Baker by Thomas v. General Motors Corp.*, 522 U.S. 222, 232 (1998); see also *Estin v. Estin, 334 US 541, 546 (1948)* (the Full Faith and Credit Clause "substituted a command for the earlier principles of comity and thus basically altered the status of the States as independent sovereigns").
[97] *Thompson v. Thompson,* 484 U.S. 174, 182-183 (1988).
[98] *The Records of the Federal Convention of 1787* Vol.4 Art.4 Sec.l Doc.4 (Max Farrand ed., Yale University Press 1937).

version was proposed: "Whensoever the act of any State, whether legislative [,] executive[,] or judiciary[,] shall be attested and exemplified under the seal thereof, such attestation and exemplification shall be deemed in other State[s] as full proof of the existence of that act -- and its operation shall be binding in every other State."[99] Thus, the Full Faith and Credit Clause was originally intended to be quite expansive in its requirement that each state honor the laws and actions of other states.

At the Philadelphia Convention, a draft was submitted based on Madison's version, which read: "Full faith and credit ought to be given in each state to the public acts, records, and judicial proceedings, of every other state; and the legislature shall, by general laws, prescribe the manner in which such acts, records, and proceedings, shall be proved, and the effect which judgments, obtained in one state, shall have in another."[100] Gouverneur Morris proposed amending this draft, to replace all the wording after "effect" with "thereof."[101] There was concern that this might authorize Congress to modify the effect of legislative acts. Critically, support for Morris's amendment was offered only with the understanding that Congress's power was limited to prescribing the effect of judgments.[102] The provision was further amended to change "ought to" to "shall," in the first clause, making "full faith and credit" mandatory; and "shall" was replaced with "may" in the second clause-making Congress's ability to "prescribe" merely permissive.[103] In other words, the Founders' intent was still to require each state to give "full faith and credit" to the operative effect of the laws – particularly the *legislation* – of other states, and to diminish Congress's ability to alter this obligation.

Thus, by parsing the intent of the Founders and the plain language of the Constitution, a number of conclusions relevant to the instant case may be reached. First, a state legislature cannot pass a law with the express purpose of ignoring the laws and records of a sister state. By allowing the Commonwealth to give no recognition whatsoever to Plaintiffs' out-of-state marriages, KRS 405.040(2), KRS 405.045, and Ky. Const. §233A violate the Full

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[99] *Id.*
[100] *James Madison, Debates on the Adoption of the Federal Constitution* 503-504 (J.B. Lippincott & Co. 1861) (1787), available at http://bit.ly/pH8R6J. (The creation of the links to the secondary sources cited herein, and much of the argument in this section, are to be credited to able counsel for the Petitioner in *In re Marriage of J.B. & H.B.*, 326 S.W.3d 654 (Tex. App. Dallas 2010) (petition for review granted by the Texas Supreme Court, *In re Marriage of J.B.*, 2013 Tex. LEXIS 608 (Tex., Aug. 23, 2013))).
[101] *Id.*
[102] *Id.*
[103] *Id.* see *U.S. Const. art. IV*, § 1.

Faith and Credit Clause. Moreover, insofar as these provisions deny access to Kentucky courts for divorce or other proceeding premised upon a valid marriage, they violate the Privileges and Immunities Clause as well. Refusing access to the benefits enjoyed by other lawfully married couples, including divorce, creates conflict and confusion between the states and violates Full Faith and Credit by discriminating against the laws of other states "under the guise of merely affecting the remedy."[104]

Additionally, it must be concluded that DOMA's limitation on a state's obligation to give full faith and credit to a marriage legally created in another state should be invalidated. Section 2 of DOMA (28 U.S.C. 1738C) purports to enable states to escape their obligations under Full Faith and Credit when it comes to same-sex marriage. But the plain text of the enforcement provision of the Constitution itself states that Congress may only prescribe (a) "the manner in which" the acts, records, and proceedings of other states "shall be proved," which plainly refers to evidentiary matters, and (b) "the effect thereof."[105] DOMA appears to have nothing to say about (a) and instead focuses on (b), purporting to relieve the states of any obligation "to give effect" to an act, record, or proceeding that creates or recognizes a same-sex marriage.[106] Thus, on its face, DOMA would allow states to give no effect whatsoever to the marriage laws and records of a sister state. Such action flies in the face of both the plain language and the original intent of the Full Faith and Credit Clause (to say nothing of the plain language of 28 U.S.C. § 1738). Section 2 of DOMA, like the Kentucky provisions considered herein, must be declared unconstitutional.

V. 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 (U. S. Const., art. VI, sec.

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[104] *See Broderick v. Rosner,* 294 U.S. 629, 642-643 (1935).
[105] U.S. Const. art. IV, § 1.
[106] 28 U.S.C. § 1738C.

2) to the same extent as though expressly written into every state law."[107] State constitutions and amendments thereto are no less subject to the applicable prohibitions and limitations of the Federal Constitution.[108] 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.[109]

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.[110]

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[107] *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).)

[108] *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).

[109] *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 P.2d 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).

[110] *Windsor*, 133 S. Ct. at 2695 (2013) (internal citations omitted).

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 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.[111] This conclusion is shared by other district courts within the Sixth Circuit.[112] And finally, legal scholars agree with this view as well.[113] 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* stands for the proposition that a lawful same-sex marriage must be recognized 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 recognition of same-sex 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 Kentucky's laws, no less than DOMA, is to "demean those persons who are in a lawful same-sex marriage." All plaintiffs in this case (save the minor children) have entered into lawful same-sex marriages. Because of the Supremacy Clause, Kentucky is not allowed to tell these plain-

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[111] 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).

[112] *See Obergefell v. Kasich*, 2013 U.S. Dist. LEXIS 102077 (S.D. Ohio July 22, 2013) (Exhibit 1) ("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.").

[113] *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.").

tiffs that the scope of their rights as married persons 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 immediate and permanent injunctive relief. Kentucky's discriminatory laws violate multiple Constitutional protections, any one of which can serve as a basis for the Court granting Plaintiffs' Motion.

Respectfully submitted,

/s/ Laura E. Landenwich
Laura E. Landenwich
Daniel J. Canon
L. Joe Dunman
Louis P. Winner
CLAY DANIEL WALTON & ADAMS PLC
101 Meidinger Tower
462 South Fourth Street
Louisville, KY 40202
(502) 561-2005 – phone
(502) 415-7505 - fax
laura@justiceky.com
dan@justiceky.com
joe@justiceky.com
louis@justiceky.com
Co-Counsel for Plaintiffs

and

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

CERTIFICATE OF SERVICE

I hereby certify that on December 16, 2013 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 the following:

Clay A. Barkley
Brian Judy
Assistant Attorney Generals
OFFICE OF THE ATTORNEY GENERAL
Suite 118
700 Capital Avenue
Frankfort, KY 40601
Counsel for Defendant Steve Beshear and Jack Conway

/s/ Laura E. Landenwich