IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

ELECTRONICALLY FILED

MELISSA LOVE, *et al*	)	
	)	
	)	CIVIL ACTION NO.
	)	
PLAINTIFFS	)	4:14-cv-15-RLY-TAB
vs.	)	
	)	
	)	
MICHAEL RICHARD PENCE	)	
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	)	
DEFENDANT	)	

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MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF

This Court is presented with the opportunity to restore constitutional rights to Indiana citizens who are the target of state-sanctioned discrimination. Moreover, this case presents the Court with an opportunity to join an increasing number of courts that have refused to end up on the wrong side of history.

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 Indiana. Like many married couples in the state, some Plaintiffs were actually 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 these marriages, and extends certain benefits to them as

a result.[1] Other Plaintiffs wish to be married, and want to do so in their home state. But, the State of Indiana refuses to acknowledge the commitments made by these couples because their spouses are of the same sex.

The law challenged in this case, IC 31-11-1-1 ("Indiana Defense of Marriage Act") enables and enshrines Indiana's ongoing discrimination against Plaintiffs. Plaintiffs and their families are deprived of critical privileges, benefits, rights and responsibilities afforded to opposite-sex couples and are humiliated and degraded by Indiana's ongoing refusal to recognize and acknowledge their unions.

The decision in this case, and others like it, will affect the lives of Hoosiers 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. Indiana's Defense of Marriage Act violates numerous provisions of the U.S. Constitution, and in numerous ways. These Plaintiffs, seek to have their commitments recognized and legitimized by Indiana. This Court can look to any one of the Constitutional protections discussed below to provide a basis for preliminary and permanent injunctive relief.

FACTS

Plaintiffs, Melissa Love, Erin Brock, Lane Stumler, and Michael Drury (the Love Plaintiffs), want to marry their partners in a civil ceremony in the state of Indiana among their family and friends. Melissa Love is a registered nurse and has known Erin Brock for fifteen years. (Affidavits of Melissa Love and Erin Brock, attached as Exhibits 1 and 2). They have been living together as a couple for two years and are engaged to be married. (*Id.*) Lane Stumler and Michael Drury also wish to be married. Jo Ann Dale, Carol Uebelhoer, Jennifer Redmond, and Jana Kohorst (the Dale Plaintiffs), are seeking recognition by the State of Indiana of their marriages, validly performed in other jurisdictions. Jo Ann Dale and Carol Ubelhoer have been living together in Indiana as a couple for thirty-five years.

[1] *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 March 28, 2013).

(Affidavits of Dale and Ubelhoer, Exhibits 3 and 4). They raised a daughter together, and are retired from professional careers. Dale and Ubelhoer were finally married in Boston, Massachusetts on December 26, 2008. Jana Kohorst and Jennifer Redmond have been in a committed relationship for sixteen years. (Affidavit of Jana Kohorst, Exhibit 5). They wed in Niagara Falls, NY on October 20, 2013. They live in Clark County, Indiana where they are currently raising a young son. (*Id.*).

On May 13, 1997 the Indiana Governor signed into law IC 31-11-1-1, the "Indiana Defense of Marriage Act." The statute provides: "(a) Only a female may marry a male. Only a male may marry a female. (b) A marriage between persons of the same gender is void in Indiana even if the marriage is lawful in the place where it is solemnized."[2]

Plaintiffs have suffered a variety of harms as a result of Indiana's refusal to extend marital status to their relationships. They are subjected to higher income and estate taxes. They endure the additional expense of being excluded from family insurance coverage resulting in separate premiums and separate deductibles. They are unable to benefit from family leave policies at work. 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 1-5). The Plaintiffs with minor children have the additional burden of disproportionate parental rights to those children. All Plaintiffs fear that they may be excluded from important moments in the event of serious illness or death.

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,

[2] This statute was challenged under the Indiana state constitution in 2005. The Indiana Court of Appeals found no violation, but did not review the statute under a federal constitutional framework. *See Morrison v. Sadler*, 821 N.E.2d 15 (Ind. Ct. App. 2005).
[3] 133 S. Ct. 2652 (2013).

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." (Amicus Brief, Exhibit 6, p. 14 (internal 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 Indiana 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

[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).

heightened judicial scrutiny, but fail under any standard of review. Furthermore, to the extent the statute reflects a religious preference by the General Assembly, it violates 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, and the Supremacy Clause.

I. INDIANA'S REFUSAL TO RECOGNIZE AND EXTEND MARITAL BENEFITS TO PLAINTIFFS 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 law challenged by the Plaintiffs in this case implicates 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..."[7] The Constitutional promise of equal protection is violated when a law creates "an indiscriminate imposition of inequalities."[8] "The guaranty of equal protection of the laws is a pledge of the protection of equal laws."[9] 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

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

disparity of treatment and some legitimate governmental purpose."[10] 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..."[11] 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..."[12]

Because the law at issue here infringes Plaintiffs' fundamental rights to marry and to travel they violate the due process protections of the Fifth and Fourteenth Amendments. And since Plaintiffs are gay and lesbian, the law also infringes equal protection (discussed below). The marriage ban can withstand constitutional scrutiny only if this Court finds it is narrowly tailored to serve a compelling state interest.

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.[13] 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,"[14] the Supreme Court has declared, "the decision to marry is a fundamental right."[15]

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[10] *Heller v. Doe*, 509 U.S. 312, 320 (1993).
[11] U.S. Const. amend. XIV.
[12] U.S. Const. amend. XIV § 1.
[13] *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639 (U.S. 1974).
[14] *Loving v. Virginia*, 388 U.S. 1, 12 (1967).
[15] *Turner v. Safley*, 482 U.S. 78, 95 (1987).

As a fundamental right, marriage implicates numerous liberty interests, including the right to privacy,[16] the right to intimate choice,[17] and the right to free association.[18] Marriage involves "the most intimate and personal choices a person may make in a lifetime, choices central to dignity and autonomy..."[19] As such, the Constitution demands respect "for the autonomy of the person in making these choices."[20] And there is no constitutional basis to deny gays and lesbians the same autonomy in familial decisions that heterosexuals enjoy.[21] All parties will likely agree that the right to marry is "of fundamental importance to all individuals."[22]

Similarly, the United States Supreme Court has long recognized a fundamental constitutional right to travel.[23] 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."[24] As such, the judiciary has zealously guarded it for decades. The "*virtually unconditional* personal right, guaranteed by the Constitution to us all,"[25] 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,"[26] "has repeatedly been recognized as a basic constitutional freedom."[27] This right is firmly embedded in our country's jurisprudence, and is one that is essential to our federal system of government.[28]

"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

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[16] *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).
[17] *Lawrence*, 539 U.S. 574.
[18] *M.L.B*. v. S.L.J., 519 U.S. 102, 116 (1996).
[19] *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992).
[20] *Lawrence*, 539 U.S. at 574.
[21] *Id*.
[22] *Zablocki v.Redhail*, 434 U.S. 374, at 384 (1978).
[23] *Shapiro v. Thompson*, 394 U.S. 618 (1969).
[24] *United States v. Guest*, 383 U.S. 745, 757 (1966).
[25] *Saenz v. Roe*, 426 U.S. 489, 499 (1999)(emphasis added and quotation marks omitted).
[26] *Id.* at 498 (internal quotation marks omitted).
[27] *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 254 (1974).
[28] *Saenz*, 426 U.S. at 498, 503–04.

exercise of that right."[29] In cases where state legislation impedes the right to travel, the state must justify the law only with "a compelling state interest." [30]

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."[31] 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."[32] Personal decisions about marriage and family relationships must be made "without unjustified government interference."[33]

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."[34] "[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

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[29] *Attorney Gen. of New York v. Soto-Lopez*, 476 U.S. 898, 903, 106 (1986)(internal quotation marks and citations omitted).
[30] *Maricopa County*, 415 U.S. at 258; *see also Shapiro*, 394 U.S. at 634.
[31] *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 (U.S. 1976), citing *Rodriguez*, 411 U.S. at 16.
[32] *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977).
[33] *Carey v. Population Services International*, 431 U.S. 678, 684-85 (1977).
[34] *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).

command extraordinary protection from the majoritarian political process."[35] Additionally, discrete and insular minorities are marked by the immutable characteristics class members share.[36]

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."[37] Across the United States, particularly in recent years, laws have been enacted at both the state and federal level targeting gays and lesbians for unequal treatment. Some of those laws have subsequently been declared unconstitutional precisely for that reason.[38] Plaintiffs are members of this minority group and are "politically powerless" to prevent discrimination by the majority through legislative means.[39] 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. Since 2004, the Indiana General Assembly has made an annual and well-publicized effort to enshrine its discriminatory scheme in the Indiana Constitution in the form of an amendment banning same-sex marriage. In contrast, there have been no efforts aimed at repealing the existing ban.

Additionally, the law at issue in this case classifies citizens 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 6, 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,

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[35] *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).
[36] *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.").
[37] *Murgia*, 427 U.S. at 313; and *see Lawrence v. Texas*, 539 U.S. 558, 571 (2003).
[38] *See*, *e.g.*, *Romer*, 517 U.S. 620; *Lawrence,* 539 U.S. 558; and *Windsor*, 133 S. Ct. 2675.
[39] *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987).

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.[40] 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. [41]

The law challenged here must be subject to strict scrutiny both because it discriminates against a suspect group and because it infringes 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."[42] Or, stated somewhat differently, a challenged law must demonstrate that it is narrowly tailored to further a compelling state interest.[43]

The types of compelling state interests recognized by the U.S. Supreme Court include the prohibition and regulation of drugs,[44] remedying past and present racial discrimination,[45] and protecting the interests of minor children. [46] To date, the State of Indiana has not identified a compelling interest for its refusal to extend marital benefits to same-sex couples. Even if it could, a blanket refusal to exclude all same-sex couples from civil 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, regardless of any claimed state interest for doing so.

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[40] *Bassett v. Snyder*, 2013 U.S. Dist. LEXIS 93345 (E.D. Mich. 2013), quoting *Lyng*, 477 U.S. at 638.
[41] It should be noted that courts have 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 that persons *should not be required to change them*, such as religious beliefs.") (Emphasis added)).
[42] *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).
[43] *See*, *e.g.*, *Harper*, 383 U.S. at 670; and *Kramer*, 395 U.S. at 632-33.
[44] *Employment Div. v. Smith*, 494 U.S. 872, 905-906 (1990).
[45] *United States v. Paradise*, 480 U.S. 149, 167 (1987).
[46] *Palmore*, 466 U.S. at 433.

Therefore, should this honorable Court apply the appropriate standard review of strict scrutiny, IC 31-11-1-1 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 facts that could provide a rational basis for the classification."[47] "Such a classification does not run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose."[48] 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."[49]

As deferential as rational basis review may be, it is still Indiana's burden to articulate a legitimate governmental purpose to justify the challenged legislation or regulations. While the means may be given wide latitude, the ends must still make sense. Several states in recent months have attempted to articulate a rational basis. Not one has been successful, and there is no reason to believe that Indiana has unique and pertinent justifications for its discrimination. Rather, Indiana will also expose that its discrimination against Plaintiffs is the result of animus, the pursuit of indoctrinating public life with religious doctrine, or general ill will. Below, the Plaintiffs will briefly address the most

[47] *FCC v. Beach Communications, Inc*., 508 U.S. 307, 313 (1993).
[48] *Heller v. Doe*, 509 U.S. 312, 320 (1993).
[49] *Id*. at 321.

common rational bases claimed by proponents of discriminatory marriage laws such as Indiana's, as well as the malevolent basis those proponents often deny or attempt to hide.

a. Tradition

The preservation of tradition is one of the most common justifications for discriminating against same-sex couples. 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."[50] As a preliminary matter, "traditional marriage," as a Biblical concept, was far different than the tidy one-man-one-woman model we've more recently embraced. Polygamy was rampant in biblical marriage,[51] sexual slavery was a legitimate foundation for marriage,[52] marriage to a foreigner was blasphemous,[53] and rape victims were forced to marry their rapists.[54] This is to say nothing of the fate of illegitimate children.[55] While we all recognize the prominence of the Judeo-Christian tradition in American culture, rational people in a secular society do not rely on canonical arguments when enacting secular laws.

Looking towards more recent forms of "traditional" marriage, in 1883, the U.S. Supreme Court rejected a challenge to Alabama's anti-miscegenation law, enshrining the South's racist agenda on the intimate relationships of this country's citizenry.[56] Resisting change to the status quo, seventy years later the Virginia Supreme Court addressed the same issue, noting that "more than half of the States of

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[50] *Id.* at 326.
[51] See Genesis 4:19 (Lamech has two wives); Genesis 26:34, 28:9 (Easau has three wives); Genesis 29:28, 30:4-9 (Jacob has four wives), Judges 8:30 (Gideon has "many" wives), and II Chronicles 13:21 (Abijah has fourteen wives).
[52] Genesis 16:1-5 (Sarah gives Abraham her slave Hagar to bear his children). Numbers 31:17-18 (Moses instructs the Israelites to kill boy prisoners of war and keep the girls as a spoil of war), Exodus 21:4 (the wife and children of a slave belong to the master when the slave is freed).
[53] Ezra 10:2-11.
[54] Deuteronomy 22:28-29.
[55] *See* Deuteronomy 23:2.

[56] *Pace v. Alabama*, 106 U.S. 583.

the Union have miscegenation statutes. With only one exception they have been upheld in an unbroken line of decisions in every State in which it has been charged that they violate the Fourteenth Amendment." [57] In 1967 the Supreme Court revisited and dispatched the "enduring tradition" of racial purity in the now famous case, *Loving v. Virginia*.[58]

No one would openly argue that anti-miscegenation is a part of the "traditional" marriage states now claim the right to preserve, but it arguably has a longer historical tradition than many other marital forms, including monogamy. In Indiana, marriage has been of questionable benefit to the female participant. As summarized by Harriet Beecher Stowe:

> [T]he position of a married woman ... is, in many respects, precisely similar to that of the negro slave. She can make no contract and hold no property; whatever she inherits or earns becomes at that moment the property of her husband.... Though he acquired a fortune through her, or though she earn a fortune through her talents, he is the sole master of it, and she cannot draw a penny....[I]n the English common law a married woman is nothing at all. She passes out of legal existence.[59]

The concept of "traditional marriage" as used by opponents of same-sex marriage is a misnomer. If there is anything historically consistent about "marriage," it is that it is an ever-changing institution that conforms to the realities and demands of the society that recognizes it. Even if the historical reality was as stable same-sex marriage opponents claim, "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."[60] 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

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[57] *Naim v. Naim*, 87 S.E.2d 749. 753 (1955).
[58] 388 U.S. 1 (1967).
[59] Homestead, Melissa J. (2005). *American Women Authors and Literary Property, 1822-1869*. NY: Cambridge University Press. p. 29.

[60] *Williams v. Illinois*, 399 U.S. 235, 239 (1970).

law prohibiting the practice."[61] Thus, tradition alone cannot form a rational basis for discriminatory government action.

b. Procreation and Childrearing

Serious proponents of discriminatory laws like Indiana'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 any sort of proof of procreative ability. 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. This argument was implicitly rejected when 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.[62]

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.[63] These "important attributes" found in opposite-sex marriages are just as applicable to same-sex marriages.

Further undermining this argument, *Griswold* identifies the right of married couples to seek and acquire contraception – i.e. the right to be married but *not* procreate. The Court cannot ignore the reality of the many childless opposite-sex marriages. Even if childrearing were an animating purpose of marriage laws, reproduction is not a *requirement* of any marriage law anywhere. The "biology"

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[61] *Lawrence*, 539 US at 577 (quoting *Bowers*, 478 US at 216 (Stevens, J., dissenting)).
[62] 381 U.S. 479, 486 (1965).
[63] 482 U.S. 78, 95-96 (1987).

argument asserts that the purpose of the state's recognition of marriage is to counteract the harms of conceiving children outside of wedlock. Should the state then refuse to recognize the marriages of infertile couples? Couples who choose to adopt children? Elderly couples, or those that do not desire children? Should a marriage be voided in the event of a vasectomy? The obvious answer to these questions is that such laws are not rational. Marriage is not solely, or even predominantly, about procreation.

Plaintiffs agree that the stability of the family unit is an important societal interest, but contend that the statute here actually works to undermine this societal value. Both the United States Supreme Court and the national associations of sociologists, psychologists, and medical experts explicitly reject the claim that children are harmed by same-sex relationships.[64] Rather than ensuring children are raised in loving, stable homes, the legislation at issue here "makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community."[65]

Indeed, voiding Plaintiffs' marriages breaks up their legal familial relationships upon mere relocation. Recognizing that parental rights are fundamental, the Supreme Court requires a high standard in order to terminate them.[66] For same-sex families moving to Indiana, parental rights are nullified without a modicum of due process.

At this juncture, no prognostication is necessary. Sixteen states and the District of Columbia have fully legalized same-sex marriage. In Massachusetts, where same-sex marriage has been legal for over a decade, no dire social ramifications have been felt. New York, Iowa, Vermont, California,

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[64] *See, e.g*. Exhibit 6 and Exhibit 7, American Sociological Association amicus brief from *Hollingsworth v. Perry*, describing the view that married same-sex couples provide a nurturing environment for children as a "consensus." (p. 22).
[65] *Windsor*, 133 S. Ct. 2675, 2694.
[66] *Santosky v. Kramer*, 455 U.S. 745, 753, 769 (1982).

Connecticut, New Hampshire, Washington, Maine, Maryland, Rhode Island, Delaware, Minnesota, New Jersey, Hawai'i, Illinois, and New Mexico have demonstrated the hysteria of "redefining marriage" does not produce dire social consequences.

Indiana's exclusion of same-sex couples from marriage does not encourage better childrearing; it hinders it. As Justice Kennedy says, this discrimination humiliates "tens of thousands of children now being raised by same-sex couples," because it makes it "even more difficult for the children to understand the integrity and closeness of their own family."[67] For these reasons, procreation and responsible childrearing cannot constitute rational bases for Indiana to prohibit same-sex marriages within its borders, and must fail under even the most deferential standard of review.

c. 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."[68] In the 19th Century case of *Pennoyer v. Neff*, the Supreme Court declared that states have "absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created."[69] 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. Most recently, in *Windsor*, the Supreme Court reaffirmed that "state laws defining and regulating marriage, of course, must respect the constitutional rights of persons."[70] Even though some

[67] *Windsor*, 133 S.Ct. at 2694.
[68] *Sosna v. Iowa*, 419 U.S. 393, 404 (1975).
[69] 95 U.S. 714, 734-35 (1878), overruled by *International Shoe v. Washington*, 326 U.S. 310 (1945).
[70] *United States v. Windsor*, 133 S. Ct. 2675, 2691 (2013), citing *Loving v. Virginia*, 388 U.S. 1, 87

language in *Windsor* recognizes the importance of state self-determination,[71] the states do not in fact enjoy *absolute* sovereignty over issues of marriage and domestic relations. They cannot, for instance, limit marriage to couples of the same race.[72]

Though recent polls show growing opposition to a proposed Indiana constitutional amendment specifically prohibiting same-sex marriage, the Bellwether Research polling service has shown that a slight majority of Indiana citizens remain opposed to same-sex marriage.[73] However, democratic popularity cannot insulate state laws from constitutional challenge. A law passed by even the greatest of margins at the ballot box can still be ruled unconstitutional.

The Bill of Rights and subsequent amendments to the U.S. Constitution protect individual rights from popular federal and state government interference. As the Supreme Court has explained:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and properly, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.[74]

Therefore, where even the most popular of state laws interferes with fundamental individual rights, the U.S Constitution prevails. The Plaintiffs' fundamental right to marriage has been infringed by Indiana's marriage law, and no margin of popular support for that law or a proposed state constitutional amendment can supersede the U.S. Constitution.

(1967).
[71] *Windsor*, 133 S. Ct. at 2692.
[72] *See*, *Loving*, 388 U.S. 1. (1967).
[73] IN Ballot Bellweather Research for Howey Politics (April 2013), http://www.scribd.com/doc/150402929/IN-Ballot-Bellwether-Research-for-Howey-Politics-April-2013.
[74] *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

d. A Bare Desire to Harm

More pertinent to the matter before this Court, "[a]rbitrary and invidious discrimination" cannot be a legitimate purpose for laws challenged under the U.S. Constitution.[75] 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."[76] "[T]he governmental objective must be a legitimate and neutral one."[77] 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."[78] The Virginia anti-miscegenation statutes struck down 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."[79]

In this case, the analogy should be obvious. The Court need only substitute "race" with "sexual orientation" to see that the Indiana statute at issue here rests solely upon irrational distinctions for which there is patently no legitimate overriding purpose independent of invidious discrimination. The Indiana Defense of Marriage Act was 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 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

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[75] *Loving*, 388 U.S. 1, 10 (1967).
[76] *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985); *see, e.g.*, *Turner v. Safl*ey, 482 U.S. 78, 89-90 (1987).
[77] *Turner*, 482 U.S. at 90.
[78] *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (emphasis in original).
[79] 388 U.S. at 11.

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.[80] 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."[81] The Court in *Romer* went on, quoting *Moreno*: "[A] bare desire to harm a politically unpopular group cannot constitute a legitimate government interest."[82]

In *Lawrence v. Texas*, the Court considered a state law that criminalized specific, private sexual behaviors common among consenting homosexual couples.[83] 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.[84] 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.[85] Even in his dissent, Justice Scalia acknowledged the obvious constitutional conflict presented by laws such as those at issue here:

[80] 517 U.S. at 631-32.
[81] *Id*. at 635.
[82] *Id*. at 634.
[83] 539 U.S. 558 (2003).
[84] *Id*. at 578.
[85] *Id*.

> 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?"[86]

More recently, in the case of *United States v. Windsor*, the Supreme Court considered the constitutionality of the federal DOMA § 3, which defined marriage at the federal level as an institution exclusive to opposite-sex couples.[87] 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."[88] In so doing, "it violate[d] basic due process and equal protection principles..."[89] 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.[90] 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."[91]

In sum, the analysis in this case should be no different from that in *Romer*, *Lawrence*, or *Windsor*. Indiana cannot articulate any basis for its law other than: 1) the supposed "antiquity of a practice," i.e., a "traditional" interpretation of marriage; 2) a vague interest in stable procreation and childrearing; 3) a reliance on state sovereignty irrespective of the federal constitution; 4) a "bare desire" to do harm to homosexuals, a politically unpopular group; or 5) an excuse which is excessively and inextricably entangled with a particular religion, as discussed below. None of these bases are

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[86] *Id.* at 604-05 (SCALIA, J. dissenting; citations omitted).
[87] 133 S. Ct. 2675 (U.S. 2013).
[88] *Id*. at 2695.
[89] *Id*. at 2693.
[90] *Id*. at 2695.
[91] *Id*.

permissible or "rational" within the meaning of Supreme Court jurisprudence. Therefore, Indiana's discriminatory marriage law cannot withstand even the most deferential standard of review, and must be rule unconstitutional under the Fourteenth Amendment.

II. IC 31-11-1-1 VIOLATES THE ESTABLISHMENT CLAUSE

The First Amendment provides that "Congress shall make no law respecting an establishment of religion . . ."[92] 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[.]"[93] "The touchstone for our analysis is the principle that the 'First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.'"[94] IC 31-11-1-1 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.*[95] and *Van Orden v. Perry*.[96] [97] 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*.[98] 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.[99]

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[92] Like 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).
[93] *McCreary Co. Ky. v. ACLU*, 545 U.S. 844, 876 (2005).
[94] *Id*. at 860 (quoting *Epperson v. Arkansas*, 393 U.S. 97 (1968)).
[95] 545 U.S. 844 (2005).
[96] 545 U.S. 677 (2005).
[97] 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.
[98] 403 U.S. 602 (1971).
[99] See *Van Orden*, 454 U.S. 844.

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.[100] On at least five occasions, our highest Court has found an impermissible religious purpose is enough to invalidate challenged legislation under *Lemon*.[101] 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 . . . [.]"[102]

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.[103] 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."[104] It may be that Christians view Christian marriages 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

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[100] *Lemon*, 403 U.S. at 612-613.
[101] *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).
[102] 545 U.S. at 861.
[103] 545 U.S. at 861.
[104] *Id.*

members of the political community."[105] To the extent that the statute is justified by the moral and religious beliefs of the majority, it must be invalidated.

III. THE FIRST AMENDMENT'S GUARANTEE OF FREEDOM OF ASSOCIATION INVALIDATES IC 31-11-1-1

Roberts v. United States Jaycees,[106] 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 marital 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."[107]

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.[108] 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.[109] "[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."[110]

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[105] *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)).
[106] 468 U.S. 609, 617-19 (1984).
[107] *Roberts*, 468 U.S. at 619 (Internal citations omitted).
[108] *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).
[109] 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).
[110] *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

Of particular interest is the analysis set forth by the Michigan District Court in *Briggs v. North Muskegon Police Dep't.*[111] 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."[112]

> 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.[113]

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.[114]

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,[115] 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

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marry or the First Amendment right of intimate association.") (Internal quotations omitted)).

[111] 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).

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

[113] *Id.* at 589.

[114] *Id.* at 590.

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

"directly and substantially interferes" with Plaintiffs' right to intimately associate with whomever they choose.[116] The state can offer no justification for its intrusion.

IV. IC 34-11-1-1 AND SEC. 2 OF DOMA VIOLATE THE FULL FAITH AND CREDIT CLAUSE

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

> 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.[117]

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."[118]

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."[119] 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

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[116] *Wolford,* 38 F. Supp. 2d at 463
[117] *U.S. Const. art. IV,* § 1.
[118] *U.S. Const. art. IV*, §§ 1-2.
[119] *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").

sitting."[120] 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."[121] And another 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."[122] 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."[123] Governor Morris proposed amending this draft, to replace all the

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[120] *Thompson v. Thompson*, 484 U.S. 174, 182-183 (1988).
[121] *The Records of the Federal Convention of 1787* Vol.4 Art.4 Sec.l Doc.4 (Max Farrand ed., Yale University Press 1937).
[122] *Id*.
[123] *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))).

wording after "effect" with "thereof."[124] 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.*[125] 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.[126] 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 State of Indiana to reject Plaintiff's valid out-of-state marriages, IC 31-11-1-1 violates the Full Faith and Credit Clause. Moreover, insofar as these provisions deny access to Indiana courts for divorce or other proceeding premised upon a valid marriage, it violates 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."[127]

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

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[124] *Id.*
[125] *Id.*
[126] *Id.* see *U.S. Const. art. IV*, § 1.
[127] *See Broderick v. Rosner,* 294 U.S. 629, 642-643 (1935).

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."[128] 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.[129] 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 Indiana Statute considered herein, must be declared unconstitutional.

V. THE SUPREMACY CLAUSE BARS INDIANA 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. 2) to the same extent as though expressly written into every state law."[130] State constitutions and amendments thereto are no less subject to the applicable prohibitions and limitations of the Federal Constitution.[131] The proper interpretation of the U.S. Constitution is, of course, set forth by the United

[128] U.S. Const. art. IV, § 1.
[129] 28 U.S.C. § 1738C.
[130] *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).)
[131] *See, e.g., Harbert v County Court,* 39 S.E.2d 177 (W.Va. 1946); *Gray v Moss,* 156 So. 262 (Fla.

States Supreme Court. The decisions of the nation's high court are thus conclusive and binding on state courts.[132]

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.[133]

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.

1934); *Gray v Winthrop*, 156 So. 270 (Fla. 1934).

[132] *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).

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

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.[134] And finally, legal scholars agree with this view as well.[135] 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 state statute or constitution. Quite simply, regardless of the proper amendment or analysis to be applied, *Windsor* stands for the proposition that the government must recognize a lawful same-sex marriage. It is beyond dispute 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 Indiana continues to do by enforcing its discriminatory law. The "principal purpose and necessary effect" of Indiana's DOMA, no less than the federal DOMA, is to "demean those persons who are in a lawful same-sex marriage." The Dale Plaintiffs in this case have entered into lawful same-sex marriages. Because of the Supremacy Clause, Indiana is not allowed to tell these plaintiffs 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 Indiana's enforcement of IC 31-11-1-1.

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[134] 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); *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.").

[135] *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.").

VI. PLAINTIFFS ARE ENTITLED TO PRELIMINARY INJUNCTIVE RELIEF

Preliminary injunctive relief is appropriate where the moving party has (1) no adequate remedy at law and will suffer irreparable harm if a preliminary injunction is denied and (2) some likelihood of success on the merits."[136] If the moving party meets this threshold burden, the court then weighs the potential harms to the moving and nonmoving parties.[137] In cases that involve constitutional freedoms, the likelihood of success on the merits is the weightiest of all factors.[138] This practice acknowledges the well-established notion that the loss of a constitutional right, "for even minimal periods of time," constitutes irreparable harm.[139]

As detailed in the Complaint and attached Affidavits, Plaintiffs have suffered, and will continue to suffer, irreparable harm by Indiana's refusal to extend marital benefits to these couples. These harms include tax penalties, a lack of evidentiary privilege in their communications, exclusion from Indiana's inheritance laws, exclusion from the courts for recovery in the event of a wrongful death, and the exclusion from family health insurance policies at considerable cost. At least one federal court concluded that discrimination against same-sex couples in the administration of state health insurance benefits was enough harm to justify a preliminary injunction.[140] And, just two weeks ago, a federal district court in Tennessee granted preliminary injunctive relief to same-sex couples seeking recognition of their out-of-state marriages.[141]

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[136] *Ezell v. City of Chicago*, 651 F.3d 684, 694 (7th Cir. 2011).
[137] *Id.*
[138] *See Joelner v. Village of Washington Park,* 378 F.3d 613, 620 (7th Cir. 2004).
[139] *See Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *see also Mills v. District of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009); *Overstreet v. Lexington-Fayette Urban County Gov't*, 305 F.3d 566, 578 (6th Cir. 2002).
[140] *See Collins v. Brewer*, 727 F. Supp. 2d 797 (D. Ariz. 2010).
[141] *Tanco v. Haslam*, 2014 U.S. Dist. LEXIS 33463 (MD Tenn. 2014).

More importantly, these Plaintiffs are subject to exclusion from those important moments in life that give life depth and meaning. Plaintiffs are subject to exclusion by disapproving family members in the event of serious illness or death, which can strike at any time. (*See* attached Affidavits) These moments cannot be reclaimed once lost. Justice Kennedy eloquently described the harm suffered by these families in his recent opinion in *United States v. Windsor*:

> And it humiliates tens of thousands of children now being raised by same sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.
>
> Under DOMA, same-sex married couples have their lives burdened, by reason of government decree, in visible and public ways. By its great reach, DOMA touches many aspects of married and family life, from the mundane to the profound.[142]

Although Plaintiffs can point to real, ongoing harms, it is well-settled law in almost every jurisdiction, including the Seventh Circuit, that in the context of a motion for preliminary injunction, when a constitutional right is involved, no further showing of irreparable injury is necessary.[143] Plaintiffs satisfy the first prong of the analysis.

The United States Supreme Court's decision in *United States v. Windsor*,[144] and the decisions of federal courts since *Windsor*, make success on the merits likely. Of the federal courts to review the constitutionality of same-sex marriage bans since *Windsor*, not one has upheld a ban. Indeed, the federal bench is currently unanimous in its view that same-sex marriage bans violate the Equal

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[142] *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013).

[143] *See, e.g.*, *Nat'l People's Action v. Village of Wilmette,* 914 F.2d 1008, 1013 (7th Cir. 1990); *Miller v City of Cincinnati*, 709 F. Supp. 2d 605 (S.D. Ohio 2008) (aff'd, remanded *Miller v. City of Cincinnati*, 2010 FED App. 0312P, 622 F.3d 524 (6th Cir. 2009)); *Raker v Frederick County Pub. Schs.*, 470 F. Supp. 2d 634 (W.D. Va. 2007) (Loss of First Amendment freedoms, for even *minimal* periods of time, unquestionably constitutes irreparable injury); *Appel v Spiridon,* 463 F. Supp. 2d 255 (D. Conn. 2006); *Mich. Rehab. Clinic Inc. v City of Detroit*, 310 F. Supp. 2d 867 (E.D. Mich. 2004); *McClendon v. City of Albuquerque,* 272 F. Supp. 2d 1250 (D.C. N.M. 2003); *Haynes v. Office of the Attorney Gen.*, 298 F. Supp. 2d 1154 (D. Kan. 2003).

[144] *Windsor,* 133 S.Ct. at 2675.

Protection Clause of the Fourteenth Amendment.[145] This case raises the same legal issues. Without even a single court ruling otherwise, there is no basis for this Court to find that Plaintiffs are anything other than likely to succeed on the merits.

The above matters, as well as countless other rights, privileges, and responsibilities afforded to opposite-sex couples, constitute a violation of Plaintiffs' rights, and therefore ongoing harm. Defendants cannot claim an injury beyond bureaucratic inconvenience in continuing to advance its unconstitutional position. By contrast, the Love Plaintiffs have already suffered losses, and will suffer immediate and irreparable injury, loss, or damage if they are not allowed to exercise their fundamental right to marry. The Dale Plaintiffs have already suffered losses, and will suffer immediate and irreparable injury, loss, or damage if their marriages continue to go unrecognized by the state.

For the foregoing reasons, Plaintiffs respectfully request an immediate preliminary injunction, and permanent injunctive relief, in an order directing Defendant to require the executive branch to issue marriage licenses and otherwise recognize valid same-sex marriages in the same way that opposite-sex marriages are recognized.

[145] *See, e.g.*, *DeBoer v. Snyder*, No. 12-CV-10285, 2014 U.S. Dist. LEXIS 37274 (ED Mich. Mar. 21m 2014); *Tanco v. Haslam*, No. 3:13-cv-01159, 2014 U.S. Dist. LEXIS 33463 (M.D. Tenn. Mar. 14, 2014); *Bourke v. Beshear,* No. 3:13-CV-750-H, 2014 U.S. Dist. LEXIS 17457 (W.D. Ky. Feb. 12, 2014); *Bishop v. United States ex rel. Holder*, No. 04-CV-848-TCK-TLW, 2014 U.S. Dist. LEXIS 4374 (N.D. Okla. Jan. 14, 2014); *Kitchen v. Herbert*, No. 2:13-CV-217, 2013 U.S. Dist. LEXIS 179331 (D. Utah Dec. 20, 2013); *Obergefell v. Wymyslo*, No. 1:13-CV-501, 2013 U.S. Dist. LEXIS 179550 (S.D. Ohio Dec. 23, 2013); *Bostic v. Rainey*, No. 2:13-cv-00395-AWA-LRL, 2014 U.S. Dist. LEXIS 19110 (E.D. Va. Feb. 13, 2014); *De Leon v. Perry*, No. 5:13-cv-00982-OLG, 2014 U.S. Dist. LEXIS 26236 (W.D. Tex. Feb. 26, 2014).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 31, 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 all having entered their appearance in this case.

/s/ Laura E. Landenwich