IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 14-2386, 14-2387, and 14-2388

MARILYN RAE BASKIN, *et al.*,
Plaintiffs/Appellees,

v.

PENNY BOGAN, in her official capacity as Boone County Clerk, *et al.*,
Defendants/Appellants.

On Appeal from the United States District Court for the
Southern District of Indiana, Nos. 1:14-cv-355-RLY-TAB,
1:14-cv-404-RLY-TAB, and 1:14-cv-406-RLY-MJD
The Honorable Richard L. Young, Chief Judge

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JURISDICTIONAL STATEMENT

Same-sex couples, both married and unmarried, and their minor children brought three separate suits pursuant to 42 U.S.C. § 1983 seeking declaratory and injunctive relief against Defendants, state and local government officials, with regard to Indiana Code § 31-11-1-1, which sets forth Indiana's traditional definition of marriage. Appellants' App. 33-34, 58, 76-77 (hereafter "App."). Plaintiffs claimed that Section 31-11-1-1 violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. *Id*. at 33, 58, 75-76. The district court had subject-matter jurisdiction over this case under 28 U.S.C. §§ 1331 and 1343.

On June 25, 2014, the district court entered final judgment with respect to all three cases, declaring that "Indiana Code § 31-11-1-1(a), both facially and as applied to Plaintiffs, violates the Fourteenth Amendment's Due Process Clause and Equal Protection Clause," and permanently enjoining Defendants, their officers, agents, servants, employees, attorneys, and those acting in concert with them from "enforcing Indiana Code Section 31-11-1-1 and other Indiana laws preventing the celebration or recognition of same-sex marriages" and "from enforcing or applying any other state or local law, rule, regulation or ordinance as the basis to deny marriage to same-sex couples otherwise qualified to marry in Indiana, or to deny married same-sex couples any of the rights, benefits, privileges, obligations, responsibilities, and immunities that accompany marriage in Indiana." Short App. 35.

Defendants the Indiana Attorney General, the Commissioner of the Indiana State Department of Health, the Commissioner of the Indiana State Department of Revenue, the members of the Board of Trustees and Executive Director of the Indiana Public Retirement System, and the clerks of Allen, Boone, and Hamilton Counties, filed Notices of Appeal on June 25, 2014. *Baskin* District Court Docket Number ("Doc. No.") 91; *Fujii* Doc. No. 53; *Lee* Doc. No. 60. On June 27, 2014, the Court consolidated the three appeals and, on June 30, 2014, expedited briefing of this appeal. 7th Cir. Doc. Nos. 10, 14.[1] This Court has jurisdiction over all three appeals under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether, for purposes of government-regulated marriage, the Fourteenth Amendment's Due Process and Equal Protection Clauses require States to license and regulate same-sex marriages, just as the State licenses and regulates opposite-sex marriages.

2. Whether, for purposes of government-regulated marriage, the Fourteenth Amendment's Equal Protection and Due Process Clauses require a State to recognize and regulate same-sex marriages licensed in other States, just as the State recognizes and regulates opposite-sex marriages from other States.

[1] All citations to the docket in this appeal refer to the docket for the lead case, *Baskin v. Bogan*, No. 14-2386.

STATEMENT OF THE CASE

I. Indiana's Marriage Regulatory Scheme and Definition Statute

While Indiana's current marriage-definition statute was enacted in 1997, Indiana has always defined marriage as the union of one man and one woman and has never licensed, recognized, or regulated same-sex marriages. Initially, marriage was left to common law, but by 1818—only two years after Indiana became a State—the legislature had defined marriage as a matter of statutory law as an opposite-sex institution. *See* Act of Jan. 26, 1818, § 1, Laws of the State of Indiana 224 (1818) ("That male persons of the age of fourteen years, and female persons of the age of twelve years . . . may be joined in marriage.").

Indiana has preserved its man-woman definition of marriage for nearly two centuries. Before 1986, a statute provided that "[a] male who has reached his seventeenth birthday may marry a female who has reached her seventeenth birthday . . . ." Ind. Code § 31-1-1-1. From 1986 to 1997, it said that "[o]nly a female may marry a male[, and o]nly a male may marry a female." Pub. L. No. 180-1986, § 1, 2 Acts 1986 1800 (codified at Ind. Code § 31-7-1-2). In 1997, the legislature re-enacted this exact wording at Indiana Code Section 31-11-1-1(a), Pub. L. No. 1-1997, § 3, and added that "[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." Pub. L. No. 198-1997, § 1 (codified at Ind. Code § 31-11-1-1(b)).

Yet while the definition of marriage has remained constant, the regulatory implications of marriage have transformed over time. Formerly, marriage was the

only legal context for sexual intercourse, as Indiana (and many other States) enforced laws criminalizing fornication and adultery. *See, e.g.*, *Kearns v. State*, 3 Blackf. 334 (Ind. 1834) (adultery); *State v. Pearce*, 2 Blackf. 318 (Ind. 1830) (fornication). Those prohibitions grew moribund and were formally repealed in 1977. Act of Feb. 25, 1976, § 24, Laws of the State of Indiana 815 (1976).

In 1824, the General Assembly enacted the Nation's first no-fault divorce law, meaning that a spouse could successfully petition for dissolution without demonstrating any required grounds for divorce, such as adultery, impotence, or abandonment. Act of Jan. 22, 1824, § 1, Rev. Laws of Indiana 156 (1824). The legislature, apparently concerned about divorce tourism, enacted a divorce residency requirement in 1859. Act of Mar. 4, 1859, § 1, Laws of the State of Indiana 108 (1859).

Other reformations to the marriage regulatory scheme over the centuries include: (1) the use of a third of a deceased husband's estate for the remainder of a widow's life (dower), W. Johnston, Compend. of the Acts of Indiana 58 (1817), repealed in 1953, Act of Mar. 9, 1953, § 211, Laws of the State of Indiana 308 (1953); (2) forfeiture of dower and, later, estate, upon adulterous relationship, Act of Jan. 7, 1824, § 11, Rev. Laws of Indiana 159 (1824); Act of Mar. 9, 1953, § 214, Laws of the State of Indiana 309 (1953); (3) an equitable division of property upon dissolution of the marriage, Act of Jan. 22, 1824, § 5, Rev. Laws of Indiana 157 (1824); (4) the requirement of a marriage license, Act of Jan. 30, 1824, § 3, Rev. Laws of Indiana 263 (1824); (5) child support and spousal maintenance obligations,

Rev. Stat. of the State of Indiana 357-58 (1843); (6) provision and repeal of torts of criminal conversation and alienation of affections, Act of Mar. 11, 1935, § 1, Laws of the State of Indiana 1009 (1935); and (7) the codification of the marital testimonial privilege, Act of June 18, 1852, § 240, 2 Rev. Stat. of the State of Indiana 82 (1852).

II. *Baskin v. Bogan* (No. 14-2386)

Plaintiffs in the *Baskin* case—comprising five same-sex couples and three-minor children of two of the couples—filed a Complaint against Indiana Attorney General Greg Zoeller, Commissioner of the Indiana State Department of Health William C. VanNess II, M.D., Boone County Clerk Penny Bogan, Porter County Clerk Karen M. Martin, Lake County Clerk Michael A. Brown, and Hamilton County Clerk Peggy Beaver, seeking declaratory and injunctive relief with respect to Indiana Code § 31-11-1-1, which they allege violates their rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. App. 1-2.

Four of the plaintiff couples are not married: (1) Marilyn Rae Baskin and Esther Fuller; (2) Bonnie Everly and Linda Judkins; (3) Dawn Carver and Pamela Eanes; and (4) Henry Greene and Glenn Funkhouser. *Id.* at 3. They sought a series of injunctions related to licensure of same-sex marriages that would do the following: (1) require the Commissioner of the Department of Health to promulgate marriage license forms designed to accommodate same-sex couples; (2) prohibit the Attorney General from prosecuting clerks who issue marriage licenses to same-sex

couples; and (3) direct the clerks themselves to issue marriage licenses to same-sex couples. *Id.* at 33.

The fifth couple, Nikole Quasney and Amy Sandler, along with their minor children, filed a Motion for Temporary Restraining Order and Preliminary Injunction seeking immediate recognition of their Massachusetts marriage.[2] Doc. No. 31. Quasney suffers from Stage IV ovarian cancer, and these Plaintiffs sought (among other forms of recognition) an injunction requiring the Department of Health to issue, upon her death, a certificate of death that denotes her as married and that lists Sandler as her spouse. App. 25, 33-34. All Plaintiffs filed a Motion for Summary Judgment on April 3, 2014, and Defendants filed a Cross-Motion for Summary Judgment on April 22, 2014. Doc. Nos. 38, 55.

On April 10, 2014, the district court held a hearing on the Motion for Temporary Restraining Order. Doc. No. 44. The court orally granted the motion that same day, with a formal Order following on April 18, 2014. *Id.*; App. 78. On May 8, 2014, the district court issued an order granting the motion for preliminary injunction. App. 98. Defendants Zoeller, VanNess, Bogan, Brown, and Beaver filed their Notice of Appeal on May 8, 2014. Doc. No. 66. That same day, these Defendants filed in the district court a Motion for Stay Pending Appeal. Doc. No. 68.

The district court did not rule on that motion until June 25, 2014, when it entered final judgment with respect to all three cases and denied Defendants' motion for stay of the preliminary injunction as moot. Short App. 34. That same

[2] The remaining plaintiffs (Baskin, Fuller, Everly, Judkins, Carver, Eanes, Greene, Funkhouser, and C.A.G.) filed a separate Motion for Preliminary Injunction on April 3, 2014, but withdrew the motion before the district court could rule on it. Doc. Nos. 35, 65.

day, Defendants-Appellants filed in the district court a Notice of Appeal and Emergency Motion for Stay Pending Appeal. Doc. Nos. 91, 93. On June 27, 2014, having received no response from the district court, Defendants-Appellants filed in this Court a combined Emergency Motion for Stay Pending Appeal in all three cases. 7th Cir. Doc. No. 11. The Court granted the motion that same day and also consolidated the three appeals. 7th Cir. Doc. Nos. 10, 12.

On June 30, 2014, Plaintiffs Quasney and Sandler filed an Emergency Motion to Lift the Court's Stay in Part, requesting that the Court "lift the Court's June 27, 2014 stay as it applies to them and their family." 7th Cir. Doc. No. 13 at 20. The Court granted Quasney and Sandler's motion to lift the stay "on an emergency basis pending further order of the court." 7th Cir. Doc. No. 20.

III. *Fujii v. Commissioner* (No. 14-2387)

Plaintiffs Midori Fujii, Melody Layne, Tara Betterman, Scott Moubray-Carrico, Rodney Moubray-Carrico, Monica Wehrle, Harriet Miller, Gregory Hasty, Christopher Vallero, Rob MacPherson, Steven Stolen, the Moubray-Carrico's minor son, L.M.-C., and the MacPherson-Stolen's minor daughter A.M.-S., filed a Complaint against the Governor of the State of Indiana, the Commissioner of the Indiana State Department of Health, the Commissioner of the Indiana State Department of Health, the Allen County Clerk, and the Hamilton County Clerk, seeking declaratory and injunctive relief with respect to Indiana Code § 31-11-1-1, which they allege violates their rights under the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment. App. 36-38.

Plaintiff Fujii married her partner, Kristie Kay Brittain, in California in 2008. *Id.* at 40. Brittain passed away in October of 2011. *Id.* Fujii seeks an inheritance tax refund of $300,000.00 for taxes paid on property inherited from her late spouse. *Id.* at 41. Two couples are not married and seek marriage licenses from the Defendant Clerks: (1) Monica Wehrle and Harriet Miller; and (2) Gregory Hasty and Christopher Vallero. *Id.* at 37, 58. Three couples were married in other jurisdictions and wish to have their out-of-state marriages recognized in Indiana: (1) Melody Layne and Tara Betterman; (2) Scott Moubray-Carrico and Rodney Moubray-Carrico; and (3) Rob MacPherson and Steven Stolen. *Id.*

All Plaintiffs in *Fujii* sought an injunction directing the Commissioner of the Indiana Department of Health "to change all appropriate forms to recognize same-sex marriage applications and marriages," and directing the Commissioner of the Indiana Department of Revenue "to allow same-sex spouses to file state income-tax returns in the same manner as opposite-sex spouses[.]" *Id.* at 58.

Plaintiffs filed a Motion for Summary Judgment on April 11, 2014 (Doc. No. 33), and Defendants filed a Cross-Motion for Summary Judgment on May 7, 2014. Doc. No. 44.

The district court, in its Entry on Cross-Motions for Summary Judgment, dismissed Governor Pence as a Defendant, finding that he was "not a proper party." Short App. 38. As in *Baskin*, Defendants filed in the district court an Emergency Motion for Stay Pending Appeal, as well as a Notice of Appeal. Doc. Nos. 53, 55.

IV. *Lee v. Abbott* (No. 14-2388)

Plaintiffs Pamela Lee, Candace Batten-Lee, Teresa Welborn, Elizabeth J. Piette, Ruth Morrison, Martha Leverett, Karen Vaughn-Kajmowicz, Tammy Vaughn-Kajmowicz, and the Vaughn-Kajmowicz's minor children J.S.V., T.S.V., and T.R.V., filed a Complaint against Governor Pence and the members of the Board of Trustees and Executive Director of the Indiana Public Retirement System, seeking declaratory and injunctive relief with respect to Indiana Code § 31-11-1-1, which they allege violates their rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. App. 61-64, 67, 73.

All four plaintiff couples were legally married in other States. *Id.* at 65-66. One member of each of the couples is currently serving or has served in the past as a public safety officer. *Id.* Accordingly, all four women are members of the 1977 Police Officers' and Firefighters' Pension and Disability Fund ("Pension Fund") and have unsuccessfully sought to designate their same-sex partners as their "surviving spouses" for death benefit purposes. *Id.* at 65-68. They sought an injunction enabling such designations. *Id.* at 76-77.

Plaintiffs filed on April 21, 2014, a Motion for Summary Judgment and a Motion for Preliminary Injunction. Doc. Nos. 27, 29. Defendants filed a Cross-Motion for Summary Judgment on May 15, 2014. Doc. No. 41. The district court in its Entry on Cross-Motions for Summary Judgment dismissed Governor Pence as a Defendant, finding that he was "not a proper party." Short App. 38.

Defendants filed a Notice of Appeal on June 25, 2014, and an Emergency Motion for Stay Pending Appeal on June 27. Doc. Nos. 60, 66. After this Court issued its stay on June 27 (7th Cir. Doc. No. 12), Plaintiffs filed an Emergency Motion to Lift the Court's Stay in Part, requesting that "the stay should be lifted as regards all affected Indiana first responders or alternatively, only the Lee Plaintiffs." 7th Cir. Doc. No. 19 at 14. The Court denied this motion on July 2, 2014. 7th Cir. Doc. No. 21.

V. Summary of the Decision Below

In its combined order granting summary judgment, the district court held that "Indiana Code § 31-11-1-1(a), both facially and as applied to Plaintiffs, violates the Fourteenth Amendment's Due Process Clause and Equal Protection Clause," and that "Indiana Code § 31-11-1-1(b), both facially and as applied to Plaintiffs, violates the Fourteenth Amendment's Equal Protection Clause." Short App 35.

Regarding the due process claim, the district court rejected the argument that *Baker v. Nelson*, 409 U.S. 810 (1972), where the Court issued a decision on the merits rejecting appeal of a claim for same-sex marriage licensure under the Fourteenth Amendment, controls. It concluded, rather, that under *United States v. Windsor*, 133 S. Ct. 2675 (2013), the fundamental right to marry "necessarily entails the right to marry the person of one's choice," *id.* at 18, and, thus broadly defined, "encompasses the ability of same-sex couples to marry." *Id.* at 21. The appropriate standard of review, said the court, was strict scrutiny, which Indiana's marriage laws cannot overcome because they are "both over- and under-inclusive."

Id. at 22. They are "under-inclusive because they only prevent one subset of couples, those who cannot naturally conceive children, from marrying," and they are "over-inclusive" because they prohibit marriage by kin, *i.e.*, "some opposite-sex couples who can naturally and unintentionally procreate." *Id.* at 22-23.

Under equal protection analysis, the district court found that "the law impermissibly interferes with a fundamental right, and Defendants failed to satisfy strict scrutiny[, but, n]evertheless, [it would] evaluate the Equal Protection claim independent from that conclusion . . . ." *Id.* at 24. The court did not find "evidence of an invidious gender-based discrimination," *id.* at 25, but concluded that "Indiana's marriage laws discriminate based on sexual orientation," *id.* at 26, which is subject to rational basis review, as previously determined by the Seventh Circuit in *Schroeder v. Hamilton School District*, 282 F.3d 946, 950-51 (7th Cir. 2002). *Id.*

The district court concluded that same-sex couples are "similarly situated in all relevant aspects to opposite-sex couples for the purposes of marriage," *id.* at 28, and dismissed what it called "the one extremely limited difference between opposite-sex and same-sex couples," namely, "the ability of the couple to naturally and unintentionally procreate," because the difference is "too attenuated to support such a broad prohibition [against same-sex marriage]," *id.* at 30. Disagreeing with Defendants' assertion that *Johnson v. Robison*, 415 U.S. 361 (1974), narrows the constitutional question to whether "there is a rational reason to provide the right of marriage to opposite-sex couples, not [whether] there is a rational basis to exclude," *id.* at 27, the district court held that "the question is whether it is rational to treat

same-sex couples differently by excluding them from marriage and the hundreds of rights that come along with that marriage," *id.* at 29. The district court did not find any rational basis to so exclude same-sex couples. *Id.* at 30.

With respect to recognition of same-sex marriages solemnized in other States, the district court ruled that Indiana's statute refusing to recognize such marriages was "motivated by animus, thus violating the Equal Protection Clause." *Id.* at 32. The district court detected "animus" because (1) the statute was "passed during the time that Hawaii courts were deciding whether . . . to allow same-sex marriages"; (2) the bill's author commented that the "intent [was] to clarify present Indiana law and strengthen it"; and (3) it was "an unusual law for Indiana to pass" because Indiana usually recognizes marriages solemnized elsewhere. *Id.* at 31-32.

SUMMARY OF THE ARGUMENT

With respect to state government's involvement, marriage is regulation. It is a means of enticing individuals whose sexual intercourse may produce children to enter voluntarily into a relationship that the government recognizes and regulates for the sake of protecting and providing for any children the couple's sexual union may produce. The only couples that fall into this category are opposite-sex couples, which is why (at least as a governmental matter) marriage has traditionally been limited to them. Nowadays, challenges to traditional marriage definitions and regulatory structures are hardly novel, but they are no less startling and noteworthy for their stated objective—to extend voluntary government regulation, as a matter of constitutional imperative, to couples defined by sexual activity the

Supreme Court declared *off limits* to mandatory government regulation in *Lawrence v. Texas*.

The reason same-sex couples seek this recognition, of course, is that, while a form of regulation as a governmental matter, marriage *also* carries positive social and cultural connotations, as well as some exclusive governmental benefits and protections. But government is not society or culture and cannot compel social acceptance by fiat. And the point of marriage's associated benefits and protections is to encourage child-rearing environments where parents care for their biological children in tandem. Same-sex couples do not, as sexual intimates, prompt the same regulatory concerns as opposite-sex couples. Accordingly, States need not extend the marriage regulatory scheme to same-sex couples.

The rights Plaintiffs claim have no grounding in constitutional text, history, or structure. There is no due process or equal protection right to have one's out-of-state same-sex marriage recognized at home, and no due process or equal protection right to same-sex marriage outright. Supreme Court cases recognizing a right to marriage have only to do with opposite-sex couples, not same-sex couples. The Supreme Court's merits decision rejecting same-sex marriage claims in *Baker v. Nelson* still controls, and is unmitigated by last year's decision in *United States v. Windsor*—a case expressly confined to its facts that in any case reaffirms broad state authority over marriage.

The most troubling aspect of the constitutional argument for same-sex marriage, however, is that it has no limiting principle. Neither Plaintiffs in this

case, the district court below, nor courts awarding same-sex marriage rights in other cases have identified any government objective to be attained by regulating the relationships of same-sex couples. The short-range implication of the efforts to constitutionalize same-sex marriage is that all relationships are entitled to such recognition and regulation, whether they involve sex or not, whether they involve two people or more. The long-range implication is that government has no discernible reason to recognize and regulate marriage as a limited set of relationships. Ultimately, that is, there is no constitutional argument *for* same-sex marriage, only an argument *against* marriage. This Court should reject that argument and reverse the district court.

STANDARD OF REVIEW

This is an appeal from the grant of Plaintiffs' motions for summary judgment. The Court "appl[ies] de novo review to the district court's determination on issues of law," *United States v. Breedlove*, No. 13-3406, 2014 WL 2925284, at *2 (7th Cir. June 30, 2014), and "review[s] the underlying factual findings for clear error," *United States v. Chychula*, No. 12-3695, 2014 WL 2964597, at *2 (7th Cir. July 2, 2014).

ARGUMENT

I. The Fourteenth Amendment Does Not Protect a Right to Same-Sex Marriage, Either as a Matter of Due Process or Equal Protection

A. For state government, marriage is regulation

Fundamentally, as far as state government is concerned, marriage is a regulatory scheme. Government has a compelling interest in making sure children

are properly cared for, so among other regulatory mechanisms it uses marriage as a way to attract and regulate those whose sexual intercourse produces children, with the objective that they will stay together and raise the children together. A demand for same-sex marriage as a matter of constitutional right is about extending that carrot-and-stick regulation.

Some legal benefits of marriage—the regulatory carrots—are exclusive to that institution (meaning they cannot be replicated by private agreement). They include, among other things, testimonial privileges (Ind. Code § 34-46-3-1(4)), joint tax filing (Ind. Code § 6-3-4-2(d)), the right to receive a share of a deceased spouse's estate even against the spouse's will (Ind. Code §§ 29-1-2-1, -3-1), and the presumption that fathers are the legal parents of children born to their marriages (Ind. Code § 31-14-7-1).

But many exclusive "protections" of marriage carry the heavy hand of government and constitute regulatory sticks. These include not only the aforementioned presumption of parentage, but also spousal support obligations enforceable both by civil remedy (Ind. Code §§ 31-16-14-1, -4) and criminal sanction (Ind. Code § 35-46-1-6); joint liability for unpaid debts (*Bartrom v. Adjustment Bureau, Inc.*, 618 N.E.2d 1, 8 (Ind. 1993)); an adulterous spouse's forfeiture of a share in the estate or trust of a deceased spouse (Ind. Code § 29-1-2-14); prohibition on entering into another marriage absent legal dissolution (Ind. Code § 31-11-1-3); requirement of a judicial decree according to statutory standards and protocols to effectuate legal dissolution (Ind. Code §§ 31-15-2-3, -16); and the "just and

reasonable" division of all property upon legal dissolution, regardless of who acquired the property or when (Ind. Code § 31-15-7-4).

Nor is this a post-modern gloss on the State's interest in marriage, which has always been regulatory. As recounted above, marriage formerly was the only legal gateway available to sexual intercourse. *See, e.g.*, *Kearns v. State*, 3 Blackf. 334 (Ind. 1834); *State v. Pearce*, 2 Blackf. 318 (Ind. 1830). Along with that rather significant carrot, marriage traditionally provided other benefits, such as testimonial privilege and equitable division of property upon dissolution. But it also has imposed onerous restrictions, including mandatory monogamy on pain of criminal sanction, obligations of child and spousal support, forfeiture of inheritance rights upon entering into an adulterous relationship, and, for a time, coverture.

Over time, most of these regulatory shackles were removed. Divorce became available for the asking as early as 1824, and coverture was partially repealed in 1881 and fully repealed in 1923. *See* Act of Sept. 19, 1881, §§ 5115, 5119, 5120, Rev. Stat. of Indiana 1106-07 (1881); Act of Mar. 3, 1923, §§ 1, 3, Laws of the State of Indiana 190 (1923). Even the various prohibitions against non-marital sex were repealed, first informally through culture, but ultimately through formal legal enactment.

What remains, however, is still regulation. The benefits, protections, and burdens offered by the State may not be what they were 200 years ago, but the model holds. As the Court considers claims of constitutional right, it is important

that not to lose sight of the essential regulatory nature of government-conferred marriage.

B. No substantive constitutional right to same-sex marriage exists

The district court assumed that the Supreme Court has embraced a breathtakingly expansive definition of marriage as "the ability to form a partnership, hopefully lasting a lifetime, with that one special person of your choosing." Short App. 26. No Supreme Court case says this; indeed, all cases cited by the district court affirm the procreative aspect of traditional marriage as "the foundation of the family and of society, without which there would be neither civilization nor progress." *Maynard v. Hill*, 125 U.S. 190, 211 (1888); *accord United States v. Windsor*, 133 S. Ct. 2675, 2689 (2013); *Lawrence v. Texas*, 539 U.S. 558, 573-74 (2003); *Turner v. Safley*, 482 U.S. 78, 96 (1987); *Zablocki v. Redhail*, 434 U.S. 374, 385-86 (1978); *United States v. Kras*, 409 U.S. 434, 443-44 (1973); *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Skinner v. Oklahoma ex. rel. Williamson*, 316 U.S. 535, 541 (1942).

The historic definition of civil marriage is a limited, narrow, and very specific fundamental right long defined precisely by reference to opposite-sex couples. *See Windsor*, 133 S. Ct. at 2689; *Hernandez v. Robles*, 855 N.E.2d 1, 8 (N.Y. 2006) ("Until a few decades ago, it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex."). Notably, the Court in *Windsor* referred to same-sex couples as having "moral and sexual choices the Constitution protects,"

but "whose relationship the State [of New York] has sought to dignify." *Windsor*, 133 S. Ct. at 2694. If *Windsor* established same-sex marriage as a fundamental right under the Constitution, the Court would not have distinguished between the *Constitution*'s protection of moral and sexual choices and the *State*'s dignification of same-sex marriage.

While the Supreme Court has said that "[m]arriage is one of the basic civil rights of man, fundamental to our very existence and survival," *Loving*, 388 U.S. at 12 (internal quotation marks omitted), it has never said that the constitutional right to marry encompasses same-sex marriages. *Cf.* Richard A. Posner, *Sex and Reason* 312-13 (1992) ("[B]ut of course the Court [in *Loving*] was thinking of heterosexual marriage."). To the contrary, in *Baker v. Nelson*, 409 U.S. 810 (1972), decided just five years after *Loving*, the Court dismissed for want of a substantial federal question—a decision on the merits—a case presenting the right to same-sex marriage as both a matter of due process and equal protection. Accordingly, until *Windsor*, federal courts, including the Eighth Circuit, routinely concluded that traditional marriage definitions do not violate the Constitution. *See, e.g.*, *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006); *Sevcik v. Sandoval*, 911 F. Supp. 2d 996 (D. Nev. 2012); *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065 (D. Haw. 2012).

Decisions following *Windsor* have been a different story. Yet *Windsor*—which struck down Congress's decision to define marriage as an opposite-sex institution for federal purposes even if a same-sex marriage was recognized by a

State—does not overrule or even undermine *Baker*. First, in no uncertain terms, the *Windsor* majority forcefully stated that "[t]his opinion and its holding are confined to [New York's] lawful marriages." *Windsor*, 133 S. Ct. at 2696. It is therefore improper to extrapolate from "this opinion" any rule that affects any other State's marriage laws.

Second, the logic of *Windsor* does not imply that traditional state marriage laws are invalid. At the time Congress enacted Section 3 of the federal Defense of Marriage Act ("DOMA") in 1996, the federal government largely treated all marriages recognized by a State as valid. Congress's decision to change the terms for accepting state marriages—not the baseline definition of marriage itself—is what troubled the Court. *See id.* at 2693-94. The Court invalidated Section 3 of DOMA as having "the purpose and effect to disparage and to injure those whom *the State*, by its marriage laws, sought to protect in personhood and dignity." *Id.* at 2696 (emphasis added). It did so principally because Section 3 of DOMA was an "*unusual* deviation from the usual tradition of recognizing and accepting *state definitions* of marriage . . . ." *Id.* at 2693 (emphases added). It was critical to the Court's analysis that New York had *previously granted* marital interests that DOMA then threatened. *Id.* at 2689; *see* Short App. 15 (acknowledging that "the Court found that the purpose of DOMA is to ensure that if any State decides to recognize same-sex marriages, those unions will be treated as second-class marriages" (internal quotation marks omitted)).

While the Constitution gives its blessing to New York to recognize out-of-jurisdiction same-sex marriages, *Windsor*, 133 S. Ct. at 2692 (explaining that New York's "actions were without doubt a proper exercise of its sovereign authority within our federal system, [which] allow[s] the formation of consensus respecting the way the members of a discrete community treat each other in their daily contact and constant interaction with each other"), it is a considerable leap to conclude that *Windsor* establishes a singular vision of a fundamental right to marriage that must be respected by *all States*. *See* Richard A. Posner, *Should There Be Same-Sex Marriage? And If So, Who Should Decide?*, 95 Mich. L. Rev. 1578, 1579 (1997) (finding "unconvincing" the argument "that the courts in the name of the Constitution should force acceptance of same-sex marriage on all the states at once"). Traditional state marriage definitions are, as *Windsor* amply affirms, the "usual" course of business. *Windsor*, 133 S. Ct. at 2693.

Supreme Court precedent more broadly does not support the notion that there is a fundamental constitutional right to same-sex marriage, or that any fundamental right to marry includes same-sex couples. Fundamental rights are those that are "objectively, deeply rooted in this Nation's history and tradition . . . and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed[.]" *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (internal quotations and citations omitted).

No fundamental right to same-sex marriage is "deeply rooted in this Nation's history and tradition . . . and implicit in the concept of ordered liberty[.]" *Id.*; *see*

also Posner, *Should There Be Same-Sex Marriage?*, *supra*, at 1579 ("[H]omosexual marriage has nowhere been a common practice, even in societies in which homosexuality was common."). Even the district court seemed to acknowledge this point. *See* Short App. 18 ("The concept of same-sex marriage is not deeply rooted in history . . . .").

Yet the district court inferred from *Loving*, *Zablocki*, and *Turner* a "broad" right to marry "that one special person of your choosing." Short App. 26. Such a formless definition of marriage as a fundamental right defies *Glucksberg*'s mandate that a "careful description of the asserted fundamental liberty interest" is required, and courts must "exercise the utmost care whenever [they] are asked to break new ground in [the fundamental rights] field . . . ." *Glucksberg*, 521 U.S. at 720-21 (quotation marks omitted). Same-sex marriage cannot be transformed into a fundamental right by repackaging marriage as the freedom "to marry the person of one's choice," Short App. 18 (mistakenly assuming that all parties agree with that definition), because that definition leaves out the only part of the asserted right that matters: that the claimants seek this right as same-sex couples.

The district court inferred from *Loving* that the historical right to marriage must be understood to encompass marriage to any "one person." Short App. 19-20. It concluded that *Loving* invalidated a "'traditional' approach to marriage" based on "the nation's history [being] replete with statutes banning interracial marriages between Caucasians and African Americans." *Id.* But this is a distorted view of history. Unlike traditional marriage laws, anti-miscegenation laws *contravened*

common law and marriage tradition in Western society. The entire phenomenon originated in the American colonies: "[T]here was no ban on miscegenation at common law or by statute in England at the time of the establishment of the American Colonies." Harvey M. Applebaum, *Miscegenation Statutes: A Constitutional and Social Problem*, 53 Geo. L.J. 49, 49-50 (1964). Furthermore, miscegenation laws were never adopted by all States. The Court in *Loving*, in short, *upheld* the traditional parameters of marriage (which took no account of race), and struck down laws that contravened that tradition.

By contrast, marriage has always and everywhere, until the past 10-15 years, been defined as an opposite-sex institution. The same-sex characteristic of the couple seeking to enter into a marriage, therefore, *does* fundamentally redefine the right spoken of in *Loving*, *Turner*, and *Zablocki*. The district court improperly downplayed the significance of this shift by characterizing the "difference between opposite-sex and same-sex couples, the ability of the [opposite-sex] couple to naturally and unintentionally procreate," as "extremely limited[.]" Short App. 30. This is an arresting statement. The ability of men and women to reproduce through heterosexual intercourse is one of the most fundamental and necessary aspects of human existence. If making babies merely by acting on the (perhaps momentary) passion of mutual sexual attraction is not a distinguishing characteristic justifying an effort at voluntary regulation, it is hard to imagine what is.

For its part, Supreme Court jurisprudence has always acknowledged the essential link between marriage and procreation. *See, e.g.*, *Skinner*, 316 U.S. at 541

("Marriage and procreation are fundamental to the very existence and survival of the race."); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 685 (1977) ("The decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices," including marriage.). Decisions striking down anti-miscegenation laws (*Loving*, 388 U.S. at 12), prison regulations prohibiting inmates from marrying (*Turner*, 482 U.S. at 95-96), laws prohibiting marriage for non-custodial parents who are in arrears on their child support obligations (*Zablocki*, 434 U.S. at 391), and fee requirements for divorce proceedings (*Boddie v. Connecticut*, 401 U.S. 371, 382-83 (1971)), did not alter the definition of marriage in any way. Indeed, in those cases the Court stressed the procreative potential of opposite-sex couples as a rationale for enforcing the underlying right. *See Zablocki*, 434 U.S. at 386 (recognizing the "right to procreate" as part of "the fundamental character of the right to marry"); *Boddie*, 401 U.S. at 376; *see also Poe v. Gerstein*, 517 F.2d 787, 796 (5th Cir. 1975) ("[P]rocreation of offspring could be considered one of the major purposes of marriage[.]"), *aff'd sub nom. Gerstein v. Coe*, 428 U.S. 901 (1976).

Turner is especially telling on this point, as it distinguished between prisoners who might yet be released and have potential to procreate and those who faced life in prison, who would not. *See Turner*, 482 U.S. at 96. The Court distinguished *Butler v. Wilson*, 415 U.S. 953 (1974), which summarily affirmed a decision denying marriage rights to inmates serving life sentences, on the rationale that individuals facing lifelong imprisonment could not enjoy the essential "aspects

of marriage," which included "the begetting and raising of children." *Johnson v. Rockefeller*, 365 F. Supp. 377, 380 (S.D.N.Y. 1973). *Turner* is thus no exception to the close fit between marriage and procreation.

Supreme Court doctrine, accordingly, leaves no room for shoehorning a right to same-sex marriage into the Fourteenth Amendment, or for inferring that the "right to marriage," includes the right to marry a person of the same sex.

II. Indiana's Traditional Marriage Definition Does Not Discriminate Against a Suspect or Quasi-Suspect Class

The traditional definition of marriage existed at the very origin of the institution and predates by millennia the current political controversy over same-sex marriage. As the district court held, it neither targets, nor disparately impacts, either sex. Nor, contra the district court, does it classify based on sexual orientation. Accordingly, there is no basis for subjecting traditional marriage definitions to heightened scrutiny.

A. Traditional marriage does not target homosexuals for discrimination

Traditional marriage laws in no way target homosexuals as such. With traditional marriage, "the distinction is not by its own terms drawn according to sexual orientation. Homosexual persons may marry . . . but like heterosexual persons, they may not marry members of the same sex." *Sevcik v. Sandoval*, 911 F. Supp. 2d 996, 1004 (D. Nev. 2012). The prior opposite-sex marriages of Plaintiffs Everly, Judkins, and Carver are instructive in this regard. *See Baskin* Doc. Nos. 36-3 at 2, 36-4 at 2, and 36-6 at 2. They demonstrate that Indiana's marriage laws

do not negatively impact *all* homosexuals, some of whom marry members of the opposite sex and some of whom do not wish to marry at all. Nor do Indiana's marriage laws negatively affect *only* homosexuals, as Indiana law also precludes marriage by those interested in other non-traditional marriages. If marriage law must be scrutinized for impact on everyone's ability to marry based on their sexual preferences, such a rule would presumably set the stage for claims for plural marriages and marriages within prohibited lines of consanguinity.

While traditional marriage laws *impact* heterosexuals and homosexuals differently, they do not create classifications based on sexuality, particularly considering the benign history of traditional marriage laws generally. *See, e.g.*, *Washington v. Davis*, 426 U.S. 229, 242 (1976) (holding that disparate impact on a suspect class is insufficient to justify strict scrutiny absent evidence of discriminatory purpose). When a facially neutral statute is challenged on equal protection grounds, the plaintiff must show that "a state legislature[] selected or reaffirmed a particular course of action *at least in part because of, not merely in spite of,* its adverse effects [on] an identifiable group." *Pers. Adm'r of Mass. v. Feeney,* 442 U.S. 256, 279 (1979) (emphasis added) (internal quotation marks omitted).

Here, deducing any such discriminatory intent (unaccompanied by any actual statutory classification) is both unsupported and highly anachronistic, as Indiana has *never* licensed or recognized same-sex marriages. Modern-day accusations of "homosexual animus" quite plainly have no historical purchase. There is no

plausible argument that the traditional definition of marriage was invented as a way to discriminate against homosexuals. Indeed, in *Lawrence v. Texas*, 539 U.S. 558 (2003), the Supreme Court examined only the past fifty years for the history of laws directed at homosexuals because "there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter." *Id.* at 568. Implicit in this statement is an acknowledgement that a traditional marriage definition is *not* a "law[] directed at homosexual conduct as a distinct matter."

Yet the district court concluded that Indiana's re-enactment of its traditional marriage law in 1997 was fatally tainted by discriminatory animus. Short App. 32. There are several problems with this mode of analysis. First, it implies that a perfectly constitutional tradition and practice can suddenly, after hundreds of years, become unconstitutional simply because it is reaffirmed and re-enacted by legislators having unacceptable motivations. This is obviously a problematic way to view the Fourteenth Amendment. Second, it implies that traditional marriage might be invalid here, but valid in other States with no record of unacceptable views accompanying recent reaffirmations. The Fourteenth Amendment surely means the same thing in Indiana as it does in other States.

Third, the district court's "evidence" for supporting an inference of animus was non-existent and never subjected to adversarial testing, having never been introduced into the record by *any* party in *any* of these cases. The district court relied on seventeen-year-old archived newspaper reports of a single legislator's statement that his intent authoring the bill was "to clarify present Indiana law and

strengthen it." Short App. 32 (citation omitted). Such material, when used to attack a statute, does not qualify as evidence of legislative fact and is plainly objectionable as hearsay concerning historical fact. *See ACLU of Kentucky v. Grayson County*, 605 F.3d 426, 430 (6th Cir. 2010) (describing as "seriously concern[ing]" a dissenting opinion's "reference to and reliance on quotations from [newspaper] articles, which are not part of any record, . . . are not verified or supported by any affidavit or any deposition, and do not constitute legal evidence[, because] they are simply hearsay, and to rely in any way on what these articles say various [] legislators said is both incorrect and inappropriate"). Besides, the words of a single legislator do not convey the motives of the entire body. *United States v. O'Brien*, 391 U.S. 367, 384 (1968) ("What motivates one legislator to [speak] about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork.").

Regardless, it is impossible to glean anything damning from such a benign statement. If existing law is valid, an intent to clarify and strengthen it implies no discriminatory animus.

The district court also noted this legislator "did not see the statute as denying rights, because he considered marriage to be a privilege, rather than a right." Short App. 30. But if the district court's point was that this legislator misunderstood the legal status of marriage (however defined) in the constitutional pantheon, being wrong about constitutional law does not communicate animus toward homosexuals (or anyone else).

Perhaps the district court was more influenced by the comments of interest groups. The district court quoted opponents characterizing the bill as "'inflaming the biases and prejudices of individuals,' 'thumbing your nose' at the Constitution, and 'legislat[ing] hate.'" *Id.* at 32 (citation omitted). Again, no party submitted this material as evidence and it was never subjected to adversarial testing. In any event, state legislation is not subject to a heckler's veto, and statements made by a private interest group opposing a law have no bearing on the law's purpose or the motives underlying its enactment. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 120 (2001) (explaining that courts should not "attribute to [legislatures] an official purpose based on the motives of a particular group that lobbied for or against a certain proposal [because i]t is for the [legislatures], not the courts, to consult political forces and then decide how best to resolve conflicts in the course of writing the objective embodiments of law we know as statutes").

Accordingly, the statements cited by the district court do not show discriminatory animus. This is true principally as a matter of law, as no legal doctrine permits district courts to invalidate legislation based on the innocuous, 17-year-old statement of a single legislator or the demonstrations of an opposing faction. But if necessary, it is also true as a matter of factual proof. It was clear error for the district court to conclude as a factual matter that Section 31-11-1-1 was motivated by discriminatory animus toward homosexuals. There is simply no proof of this whatever.

B. Homosexuals do not constitute a suspect class

Regardless, the Supreme Court has never held that homosexuality constitutes a suspect class. As the district court has acknowledged, Short App. 24, the law in this circuit, as well as most others, is that homosexual persons do *not* constitute a suspect class. *See Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 953-54 (7th Cir. 2002) ("[H]omosexuals are not entitled to any heightened protection under the Constitution."); *see also Cook v. Gates*, 528 F.3d 42, 61 (1st Cir. 2008); *Veney v. Wyche*, 293 F.3d 726, 731-32 (4th Cir. 2002); *Baker v. Wade*, 769 F.2d 289, 292 (5th Cir. 1985) (en banc); *Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 294 (6th Cir. 1997); *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 866-67 (8th Cir. 2006); *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1113-14 & n.9 (10th Cir. 2008); *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2004); *Steffan v. Perry*, 41 F.3d 677, 684 n.3 (D.C. Cir. 1994) (en banc); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989). *But see SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 481 (9th Cir. 2014) (applying heightened scrutiny to juror challenges based on sexual orientation).

Neither *Windsor*, *Romer*, nor *Lawrence* supports heightened scrutiny for legislation governing marriage. *Romer* expressly applied rational basis scrutiny, while *Lawrence* and *Windsor* implied the same. *Romer v. Evans*, 517 U.S. 620, 631-32 (1996); *Lawrence*, 539 U.S. at 578; *Windsor*, 133 S. Ct. at 2696. In *Windsor* the Court invalidated Section 3 of DOMA because "no legitimate purpose"—a hallmark

of rational basis review—justified the law. *Windsor*, 133 S. Ct. at 2696. Accordingly, no doctrinal grounds exist for treating homosexuals as a suspect class.

III. Traditional Marriage Satisfies Constitutional Review

Because no fundamental rights or suspect classes are implicated, the proper test under the federal due process and equal protection clauses is rational basis review. Short App. 26. The district court purported to apply this standard, but it effectively (and improperly) raised the level of scrutiny when it restated the question as "whether it is rational to treat same-sex couples differently by excluding them from marriage and the hundreds of rights that come along with that marriage." *Id.* at 29. With rational basis review, courts must examine the issue from the State's perspective, not the challenger's perspective.

A. Rational basis review requires deference to the State's asserted ends and does not demand justification of "exclusion" where inclusion would not accomplish those ends

Under controlling Supreme Court doctrine, the State may justify limits on government benefits and burdens by reference to whether *including* additional groups would accomplish the government's underlying objectives. *Johnson v. Robison*, 415 U.S. 361, 383 (1974) ("When . . . the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not, we cannot say that the statute's classification of beneficiaries and nonbeneficiaries is invidiously discriminatory."). This framework accords with the longstanding principle that "[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same," *Tigner v. Texas*, 310

U.S. 141, 147 (1940), and, therefore, "where a group possesses distinguishing characteristics relevant to interests the State has the authority to implement, a State's decision to act on the basis of those differences does not give rise to a constitutional violation." *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 366-67 (2001) (internal quotations and citation omitted).

The district court rejected this approach because it "agree[d] with Plaintiffs that they are similarly situated in all relevant aspects to opposite-sex couples for the purposes of marriage." Short App. 28. Implicitly acknowledging that *Johnson* requires only a legitimate "distinguishing characteristic," the district court evaded that teaching by disparaging the "difference between opposite-sex and same-sex couples, the ability of the [opposite-sex] couple to naturally and unintentionally procreate," as "extremely limited[.]" *Id.* at 30. First, even if "extremely limited," this distinction is sufficient to survive rational basis review. *See FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314-15 (1993).

Second, if one accepts the State's rationale for marriage as a starting point—which rational basis review requires—the district court's conclusion is both literally and substantively false. It is surely undisputed that only opposite-sex couples can procreate naturally; accordingly, "the relevant question is whether an opposite-sex definition of marriage furthers legitimate interests that would not be furthered, or furthered to the same degree, by allowing same-sex couples to marry." *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065, 1107 (D. Haw. 2012); *see also Andersen v. King Cnty.*, 138 P.3d 963, 984 (Wash. 2006) (en banc); *Morrison v. Sadler*, 821 N.E.2d 15,

23 (Ind. Ct. App. 2005); *Standhardt v. Superior Court ex rel. Cnty. of Maricopa*, 77 P.3d 451, 463 (Ariz. Ct. App. 2003).

In other words, one can conclude that same-sex couples and opposite-sex couples are "similarly situated in all relevant respects" *only* if one first removes that purpose for marriage articulated by the State and then substitutes some alternative. This is precisely what the district court did when it declared by fiat that "the ability of the [opposite-sex] couple to naturally and unintentionally procreate . . . is too attenuated to support [Indiana's traditional marriage statute]." Short App. 30. The district court arrogated to itself the authority to define marriage as the open-ended "ability to form a partnership, hopefully lasting a lifetime, with that one special person of your choosing." *Id.* at 26. As stated in more detail below, *see* Part III.D, *infra*, such a definition provides *no* reason why the State would license, recognize, and regulate sexual relationships as marriages. Marriage as a regulatory scheme would have no justification to exist under the district court's definition of marriage. *See* Part I.A, *supra*.

Furthermore, demanding, as the district court did, *id.* at 29, a justification for "excluding" "access" to marriage inherently presupposes a right to such "access." It thereby amounts to a *rejection* of rational basis review, not an application of it. The State has no greater burden to justify its decision not to license, recognize, or regulate same-sex couples than it has to justify refusing to regulate *any* group. It need only articulate reasons to confer benefits and burdens on opposite-sex couples that do not apply to same-sex couples. The exclusive capacity and tendency of

heterosexual intercourse to produce children, and the State's need to ensure that those children are cared for, provide those reasons.

B. States recognize and regulate opposite-sex marriages to encourage responsible procreation, a rationale that does not apply to same-sex couples

Civil marriage recognition and regulation exists for important reasons having nothing to do with same-sex couples. It arises from the need to protect the only procreative sexual relationship that exists and to make it more likely that unintended children, among the weakest members of society, will be cared for. *See Morrison*, 821 N.E.2d at 29 (marriage exists "to encourage 'responsible procreation' by opposite-sex couples"); *id.* at 25 ("The institution of marriage not only encourages opposite-sex couples to form a relatively stable environment for the 'natural' procreation of children in the first place, but it also encourages them to stay together and raise a child or children together if there is a 'change in plans.'"). This analysis has been dominant in our legal system since the first same-sex marriage claims emerged over forty years ago and should continue to carry the day.[3]

[3] *See Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 867 (8th Cir. 2006); *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 818-19 (11th Cir. 2004); *Sevcik v. Sandoval*, 911 F. Supp. 2d 996, 1015-16 (D. Nev. 2012); *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065, 1112-13 (D. Haw. 2012); *Smelt v. County of Orange*, 374 F. Supp. 2d 861, 880 (C.D. Cal. 2005), *aff'd in part, vacated in part*, 477 F.3d 673 (9th Cir. 2006); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1309 (M.D. Fla. 2005); *In re Kandu*, 315 B.R. 123, 147-48 (Bankr. W.D. Wash. 2004); *Adams v. Howerton*, 486 F. Supp. 1119, 1124 (C.D. Cal. 1980), *aff'd*, 673 F.2d 1036 (9th Cir. 1982); *In re Marriage of J.B. & H.B.*, 326 S.W.3d 654, 677-78 (Tex. App. 2010); *Conaway v. Deane*, 932 A.2d 571, 619-21, 630-31 (Md. 2007); *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006); *Andersen v. King County*, 138 P.3d 963, 982-83 (Wash. 2006) (en banc); *Standhardt v. Superior Court ex rel. County of Maricopa*, 77 P.3d 451, 463-65 (Ariz. Ct. App. 2003); *Dean v. District of Columbia*, 653 A.2d 307, 337 (D.C. 1995) (opinion of Ferren, J.); *Singer v. Hara*, 522 P.2d 1187, 1195 (Wash. Ct. App. 1974); *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971).

Traditional marriage protects a norm where sexual activity that *can* beget children should occur in a long-term, cohabitive relationship. *See, e.g.*, *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006) ("The Legislature could rationally believe that it is better, other things being equal, for children to grow up with both a mother and a father."). It provides the opportunity for children born within it to have a biological relationship to those having original *legal* responsibility for their well-being, and accordingly is the institution that provides the greatest likelihood that both biological parents will nurture and raise the children they beget.

The district court belied its misunderstanding of this interest by describing marriage's purpose as "keep[ing] couple[s] together for the sake of their children." Short App. 29. Fundamentally, the Fourteenth Amendment does not permit courts to redefine the State's interest in a challenged law. When it comes to traditional marriage, Indiana is concerned with something far more compelling and precise than the district court was willing to acknowledge, *i.e.*, that unlike same-sex couples, opposite-sex couples, through their sexual activity, create babies, often unintentionally. Even if others might wish to premise marriage on something so general as "keep[ing] couple[s] together for the sake of their children," that need *not* be, and is not, Indiana's rationale for enticing opposite-sex couples into a marriage regulatory scheme. The focus here is on getting biological parents to care in tandem for the babies produced by their sexual intercourse.

Plainly, this regulatory interest does not arise with same-sex couples. Whether through adoption, surrogacy, or reproductive technology, same-sex couples

can become biological parents only by deliberately choosing to do so, requiring a serious investment of time, attention, and resources. *Morrison*, 821 N.E.2d at 24. Consequently, the State does not necessarily have the same need to provide such parents with the incentives and regulatory restraints of marriage. *Id.* at 25; *see also In re Marriage of J.B. & H.B.*, 326 S.W.3d 654, 677 (Tex. Ct. App. 2010) ("Because only relationships between opposite-sex couples can naturally produce children, it is reasonable for the state to afford unique legal recognition to that particular social unit in the form of opposite-sex marriage.").

C. Regulating opposite-sex couples based on procreative potential is not over- or under-inclusive

The district court rejected the State's responsible procreation rationale as being "both over- and under-inclusive." Short App. 22. According to the court, the State's laws are "under-inclusive because they only prevent one subset of couples, those who cannot naturally conceive children, from marrying," and they are "over-inclusive" because they prohibit marriage by kin, *i.e.*, "some opposite-sex couples[] who can naturally and unintentionally procreate[.]" *Id.* at 21-22.

First, under rational basis analysis, classifications need not be drawn with absolute precision, so even if the district court's estimation were accurate, it would hardly matter. *Vance v. Bradley*, 440 U.S. 93, 108 (1979) ("Even if the classification involved . . . is to some extent both underinclusive and overinclusive, and hence the line drawn by [the legislature] imperfect, it is nevertheless the rule that in a case like this perfection is by no means required") (citation and internal quotation marks omitted)); *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 822-23

& n.20 (11th Cir. 2004) ("The Supreme Court repeatedly has instructed that neither the fact that a classification may be overinclusive or underinclusive nor the fact that a generalization underlying a classification is subject to exceptions renders the classification irrational."). It suffices that the general capacity of opposite-sex couples to procreate through sexual intercourse justifies the voluntary marriage regulatory scheme offered by the State. But as it happens, the breadth of Indiana's marriage definition adheres very closely to the responsible procreation objective.

First, marriage for non-procreating opposite-sex couples achieves the State's responsible procreation goal by channeling sexual activities into a single relationship rather than multiple relationships that might yield unintentional babies. This is especially important given that, with infertile couples, often at least one spouse is fertile. *See, e.g.*, James F. Smith et al., *Sexual, Marital, and Social Impact of a Man's Perceived Infertility Diagnosis*, 6 J. Sexual Med. 2505, 2505 (2009), *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2888139/ (concluding that both partners experienced fertility issues in only 16% of infertile couples).

Moreover, non-procreating opposite-sex couples who marry model the optimal, socially expected behavior for other opposite-sex couples whose sexual intercourse may well produce children. *See Morrison*, 821 N.E.2d at 27 (explaining that reserving marriage for opposite-sex couples is rational regardless of whether "there are some opposite-sex couples that wish to marry but one or both partners are physically incapable of reproducing"); *see also Singer v. Hara*, 522 P.2d 1187,

1195 (Wash. Ct. App. 1974) (confirming marriage "as a protected legal institution primarily because of societal values associated with the propagation of the human race" even though "married couples are not required to become parents and even though some couples are incapable of becoming parents and even though not all couples who produce children are married").

Next, the district court's concern that Indiana does not permit opposite-sex kin to marry even though they can reproduce unintentionally through sexual intercourse is surprising. The State, of course, does not want kin to procreate *at all*, which is one very important reason why it criminalizes incest. Ind. Code § 35-46-1-3. So long as the State's rationale for marriage is responsible procreation, it would make no sense whatever to extend marital recognition to siblings or other close kin.[4] If, on the other hand, the State were required to license marriages without respect to the nature, consequences, or even existence of a sexual relationship between (or among) the participants, sibling marriage might gain a constitutional foothold. *See* Part III.D, *infra*.

Finally, inquiring of every applicant for a marriage license whether they can or intend to procreate would impose serious, constitutionally questionable intrusions on individual privacy. *See, e.g.*, *Kitchen v. Herbert*, No. 13-4178, 2014 WL 2868044, at *25 (10th Cir. June 25, 2014) ("A hypothetical state law restricting the institution of marriage to only those who are able and willing to procreate would

[4] The responsible procreation rationale also explains why the State is willing to license marriages of first cousins over 65, who are exceedingly unlikely to procreate via sexual intercourse, but who nonetheless model family life for younger, potentially procreative men and women.

plainly raise its own constitutional concerns."). The State is not required to go to such extremes simply to prove that the regulatory purpose of marriage is to promote responsible procreation. Only members of the opposite sex have even a chance at procreating together, so it is appropriate to limit marriage regulation to opposite-sex unions as an initial matter, regardless whether there are further regulations of marriage.

D. No other limiting principle for marriage is apparent

Neither the district court nor Plaintiffs has offered a meaningful alternative rationale or definition of marriage. At the hearing on the motions for preliminary injunction and summary judgment in *Baskin*, the district court directly asked counsel for Plaintiffs what alternative theory of marriage she would propose. The response was telling. Rather than offer a reason why the government would recognize and regulate marriage if not for the sake of encouraging biological parents to remain together for children produced of their sexual union, counsel stated as follows: "[W]hile all of us who are married might put it slightly differently, we might have different examples to use to show what marriage means to us and why it is so important to us, I think that there's something timeless and universal about our experience in choosing to marry that one unique and irreplaceable person who completes us." App. 95. In other words, counsel offered reasons why individuals

personally enter into marriages, but *no* reason why the State licenses, recognizes, and regulates sexual relationships as marriages.[5]

Yet the district court adopted this understanding of marriage without providing any further explanation as to why the State would regulate such relationships. Short App. 26 (defining marriage solely in terms of satisfying the individual desire "to form a partnership . . . with that one special person of your choosing"). Further, while the district court concluded that "there simply is no rational link between" the traditional definition of marriage and the State's interest in responsible procreation, *id.* at 30, it offered as an alternative rationale nothing but its own arbitrary line drawing. If there is nothing inherent about marriage that requires opposite-sex couples, then there is nothing inherent about marriage that requires a *couple*, as opposed to groups of three or more. Indeed, there would be nothing inherent in marriage that even requires a sexual relationship, meaning that state authority to prohibit some sexual relationships could have no bearing on state marriage definitions. If the desire for social recognition and validation of self-defined "intimate" relationships are the bases for civil marriage, no adult relationships can be excluded *a priori* from making claims upon the government for recognition (and, oddly, regulation).

A central argument for recognizing same-sex marriages arises from a fashionable insistence that the "modern family" is not what it used to be. Indeed, there seems to be no end to the variety of *de facto* family permutations that arise.

[5] Counsel's invocation of "timeless" and "universal" elements of marriage is especially surprising given that, if there is anything "timeless and universal about our experience in choosing to marry," it would be that (until recently) it involved members of opposite sexes.

By virtue of statutory amendment and judicial fiat, some States bestow parental rights and responsibilities even on entire groups of "co-parents." In recent years, Delaware and the District of Columbia have passed laws that recognize third "de facto" parents who have parental rights and responsibilities. *See* D.C. Code §§ 16-831.01 *et seq.*; 13 Del. Code § 8-201(c). Courts in several other States have also recognized three parents. *See In re Parentage of L.B.*, 122 P.3d 161, 176-77 (Wash. 2005) (*en banc*) (recognizing third "de facto" parent); *C.E.W. v. D.E.W.*, 845 A.2d 1146, 1152 (Me. 2004) (same); *V.C. v. M.J.B.*, 748 A.2d 539, 555 (N.J. 2000) (recognizing third "psychological" parent); *LaChappelle v. Mitten*, 607 N.W.2d 151, 168 (Minn. Ct. App. 2000) (recognizing third-parent rights); *see also In re M.C.*, 123 Cal. Rptr. 3d 856, 861 (Cal. Ct. App. 2011).

But none of these social changes—whether one views them as good, bad, or inconsequential—justifies regulation of same-sex couples as marriages. Surely no one argues that the liberty of adults to engage freely in consensual sex means States must also acknowledge and regulate each individual's sexuality; indeed, *Lawrence*, 539 U.S. at 578, holds to the contrary. Nor, then, does the government's interest in the sexuality of its citizens suddenly spring forth at the origination of particular romantic or cohabitational relationships as such.

With qualified opposite-sex couples, the natural capacity of their sexual relationships to produce children, especially unintentionally, justifies the government's interest. But the ability of same-sex couples to raise children together is not the same thing. The primary rationale for traditional marriage regulation is

responsible *procreation*, not responsible parenting more generally (which is regulated through other means). Hence, what is missing with same-sex couples is society's interest in encouraging couples to consider and plan for the children that frequently (and in the aggregate, inevitably) result from impulsive decisions to act on sexual desires. The sexual activities of same-sex couples imply no consequences similar to those of opposite-sex couples that demand a regulatory response.

The district court did not meet this argument by saying the State *also* has an interest in encouraging those who acquire parental rights without procreating (together) to maintain long-term, committed relationships for the sake of their children. Short App. 29. Such an interest is not the same as the interest that justifies marriage as a special regulation for *sexual* partners *as such*. Responsible *parenting* is not a theory supporting marriage for same-sex couples because it cannot answer two critical questions: Why two people? Why a sexual relationship?

In other words, if marriage rights must follow parental rights, and if States cannot restrict parental rights to opposite-sex couples, there would be no basis for precluding joint parentage—and, hence, marriage—by *any* social grouping, regardless of the existence of a sexual relationship. Sisters, brothers, platonic friends, groups of three or more—all would be on equal footing for purposes of the right to parent jointly and, thus, the right to marry.[6]

[6] In this regard it is important to bear in mind that, under this model, it is only the *potential* for a group of adults to acquire parental rights—not the *actual* conferral of parental rights on any particular grouping—that would be the necessary predicate for marriage. In other words, taken to its logical conclusion, Plaintiffs' argument for "marriage equality" would insist that, just as opposite-sex couples are eligible for marriage by reference to their *theoretical* procreative capacity, so too would other groups be eligible for

Consequently, responsible *parenting* is not a justification for same-sex-couple marriage, as distinguished from regulation of any other human relationships. It is instead a rationale for eliminating marriage as government recognition of a *limited* set of relationships. Once the natural limits that inhere in the sexual relationship between a man and a woman can no longer sustain the definition of marriage, the conclusion that follows is that any grouping of adults would have an equal claim to marriage. *See, e.g.*, Jonathan Turley, *One Big, Happy Polygamous Family*, NY Times, July 21, 2011, at A27 ("[Polygamists] want to be allowed to create a loving family according to the values of their faith.").

Marriage is not a device traditionally used simply to acknowledge acceptable sexuality, living arrangements, or parenting structures. It is a regulatory means to encourage and preserve something far more compelling and precise: the relationship between a man and a woman in their natural capacity to have children. Marriage attracts and then regulates couples whose sexual conduct may create children in order to ameliorate the burdens society ultimately bears when unintended children are not properly cared for. Neither same-sex couples nor any other social grouping presents the same need for government involvement, so there is no similar rationale for recognizing and regulating them as marriages.

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marriage by reference to *their* theoretical ability to acquire joint parental rights, regardless whether they actually (or even intend) to do so. The district court's understanding of marriage would seem to confirm as much, as it ordered recognition or licensure of the marriages of plaintiffs who have no children. Short App. 35-37.

IV. Equal Protection Principles Do Not Compel Recognition of Other States' Same-Sex Marriages

The district court also deemed invalid Indiana Code Section 31-11-1-1(b), which declares that "[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." The district court said it was "an unusual law for Indiana to pass" and constituted "animus" toward homosexuals. Short App. 32. To the contrary, Indiana's treatment of other States' same-sex marriages legitimately protects its own core-sovereign power to regulate marriage (as reaffirmed by *Windsor*). And the district court's insistence that a State's idiosyncratic case law addressing other marriages or the timing of enactment—rather than national constitutional norms—governs this issue deprives Indiana of equal footing under the Constitution. Whether Indiana can refuse to recognize out-of-state same-sex marriages turns entirely on whether it may adhere to the traditional definition of marriage, which it may.

A. As Indiana's Supreme Court has held for Indiana, States generally have the power not to recognize marriages from other States that contravene public policy

Interstate marriage-recognition principles are rooted in the common law of comity, not due process or any other substantive state or federal constitutional doctrine. The common law choice-of-law starting point is usually the *lex loci celebrationis* rule, which says a marriage valid in the State of licensure is valid in other States as well. But that is not, and never has been, the end of the matter. The Restatement (Second) of Conflict of Laws § 283(2) (1971) states that even if a marriage "satisfies the requirements of the state where the marriage was

contracted," that marriage will not "be recognized as valid [if] it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage." This "public policy" exception comports with the "Nation's history, legal traditions, and practices," and indeed dates back before the Fourteenth Amendment. *See* Joseph Story, *Commentaries on the Conflict of Laws* 168 (6th ed. 1865) (noting that exceptions to out-of-state marriage recognition included "those positively prohibited by the public law of a country from motives of policy").

Such public policy exceptions exist across the country. In at least thirty-four States, appellate courts have expressly adopted public policy exceptions to the *lex loci* rule in contexts unrelated to same-sex marriages: at least twenty-four courts have declared void opposite-sex marriages entered into in other States that violated public policy,[7] and at least another ten courts acknowledge public policy exceptions

[7] *Osoinach v. Watkins*, 180 So. 577, 581 (Ala. 1938); *In re Estate of Mortenson*, 316 P.2d 1106, 1107-08 (Ariz. 1957); *Loughlin v. Loughlin*, 910 A.2d 963, 972 (Conn. 2006); *Godt v. Godt*, No. 90C-JA-52, 1990 WL 123047, at *4-5 (Del. Super. Ct. 1990) (unpublished); *Weinberg v. Weinberg*, 242 Ill. App. 414, 417 (Ill. App. Ct. 1926); *Sclamberg v. Sclamberg*, 41 N.E.2d 801, 802-03 (Ind. 1942); *Beddow v. Beddow*, 257 S.W.2d 45, 47-48 (Ky. Ct. App. 1952); *Brinson v. Brinson*, 96 So.2d 653, 659 (La. 1957); *Davis v. Seller*, 108 N.E.2d 656, 658 (Mass. 1952); *Hesington v. Estate of Hesington*, 640 S.W.2d 824, 827 (Mo. Ct. App. 1982); *Bucca v. State*, 128 A.2d 506, 510-11 (N.J. Super. Ct. Ch. Div. 1957); *True v. Ranney*, 21 N.H. 52, 55-56 (1850); *Wilkins v. Zelichowski*, 140 A.2d 65, 67-69 (N.J. 1958); *Cunningham v. Cunningham*, 99 N.E. 845, 848 (N.Y. 1912); *First Nat'l Bank in Grand Forks v. N.D. Workmen's Comp. Bureau*, 68 N.W.2d 661, 663-64 (N.D. 1955); *Ross v. Bryant*, 217 P. 364, 366 (Okla. 1923); *McLennan v. McLennan*, 50 P. 802, 803-04 (Or. 1897); *In re Stull's Estate*, 39 A. 16, 17-18, 20 (Pa. 1898); *Pennegar v. State*, 10 S.W. 305, 308 (Tenn. 1889); *In re Vetas' Estate*, 170 P.2d 183, 195-96 (Utah 1946) (Wolfe, J., concurring); *Wheelock v. Wheelock*, 154 A. 665, 666 (Vt. 1931); *Kelderhaus v. Kelderhaus*, 467 S.E.2d 303, 304-06 (Va. Ct. App. 1996); *Johnson v. Johnson*, 106 P. 500, 501 (Wash. 1910); *Kitzman v. Kitzman*, 166 N.W. 789, 792-93 (Wis. 1918).

decreed by their respective State.[8] Indeed, the Supreme Court has recognized the District of Columbia's right to void out-of-state marriages "declared void by statute[.]" *Loughran v. Loughran*, 292 U.S. 216, 223 (1934).

In Indiana, the state supreme court has expressly said that the *lex loci* principle applies only where Indiana and the *lex loci* State generally agree as to what constitutes a valid marriage. More than one hundred forty years ago, the court asked, "What, then, constitutes the thing called a marriage? [W]hat is it in the eye of the *jus gentium* [or law of nations]? It is the union of one man and one woman, 'so long as they both shall live,' to the exclusion of all others, by an obligation which, during that time, the parties can not, of their own volition and act, dissolve, but which can be dissolved only by authority of the State." *Roche v. Washington*, 19 Ind. 53, 57 (1862). Continuing, the court said, "[n]othing short of this is a marriage. And nothing short of this is meant, when it is said, that marriages, valid where made, will be upheld in other States." *Id.*

The district court did not address this point that *lex loci* works only if all States basically agree on what constitutes a valid marriage (a missing prerequisite with same-sex marriage).

Instead, the district court quoted dicta from *Bolkovac v. State*, 98 N.E.2d 250, 254 (Ind. 1951), to support its contention that Indiana follows a strict *lex loci* rule

[8] *State v. Graves*, 307 S.W.2d 545, 547 (Ark. 1957); *McDonald v. McDonald*, 58 P.2d 163, 164 (Cal. 1936); *Spencer v. People*, 292 P.2d 971, 973 (Colo. 1956); *Rosenbaum v. Rosenbaum*, 210 A.2d 5, 7 (D.C. 1965); *Eubanks v. Banks*, 34 Ga. 407, 415-16 (1866); *Republic v. Li Shee*, 12 Haw. 329, 330 (1900); *People v. Steere*, 151 N.W. 617, 618 (Mich. 1915); *Bogen v. Bogen*, 261 N.W.2d 606, 609 (Minn. 1977); *Peefer v. State*, 182 N.E. 117, 121 (Ohio Ct. App. 1931); *Spradlin v. State Comp. Comm'r*, 113 S.E.2d 832, 834 (W. Va. 1960).

when recognizing marriages. Short App. 9. But the Indiana Supreme Court even more recently reaffirmed that *lex loci* applies "[u]nless strong public policy exceptions require otherwise[.]" *McPeek v. McCardle*, 888 N.E.2d 171, 174 & n.2 (Ind. 2008) (citing Indiana Code § 31-11-1-1(b) as one example). And in what is apparently the only Indiana Supreme Court decision that actually addresses an out-of-jurisdiction marriage that could not have been entered into in Indiana, the court refused to recognize the marriage on public policy grounds. *Sclamberg v. Sclamberg*, 41 N.E.2d 801, 802-03 (Ind. 1942) (treating as void a marriage between uncle and niece). The district court did not address *Sclamberg*.

Furthermore, the legislature has enacted an "evasion" statute that declares void in terms equally applicable to both same-sex *and* opposite-sex couples *any* out-of-state marriage entered into for the purpose of evading Indiana's marriage laws. *See* Ind. Code § 31-11-8-6. Indeed, given that each of the same-sex married couples in these cases were apparently Indiana residents when married out of state, their marriages would appear to be voided by Section 31-11-8-6 (which they have not challenged) in addition to Section 31-11-1-1(b). Accordingly, as raised to the district court, there is a substantial question as to their standing to challenge Section 31-11-1-1(b). Regardless, Indiana law generally adheres to the public policy exception to the *lex loci* rule, and not only with respect to same-sex couples.

B. Indiana's refusal to recognize out-of-state same-sex marriages does not convey "animus" toward homosexuals

Notwithstanding this background, the district court deemed Section 31-11-1-1(b) "unusual" and invalid on suspicion of "animus." Particularly given the history

and limits of the *lex loci* rule, there is nothing "unusual" about Indiana's express refusal to recognize out-of-state same-sex marriages on public-policy grounds.

In support of its misunderstanding that Indiana recognizes *all* opposite-sex marriages from other States (even if contrary to state public policy), the district court cited only one decision from the Indiana Court of Appeals that gave *retrospective* effect to a marriage from another jurisdiction that could not have been undertaken in Indiana, *Mason v. Mason*, 775 N.E.2d 706, 709 (Ind. Ct. App. 2002) (recognizing, for purposes of divorce action and division of property, marriage of first cousins who married under age 65). Short App. 32. But one recent intermediate appellate court decision that essentially seeks to do equity in a particular circumstance does not establish Indiana common law governing the *prospective* effect of out-of-state marriages that contravene Indiana public policy. And whatever else might be said of *Mason*, it cannot trump *Sclamberg*.

The district court also found it suspicious that the Indiana General Assembly passed Section 31-11-1-1(b) shortly after *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), *remanded to sub nom. Baehr v. Miike*, No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996), *aff'd*, 950 P.2d 1234 (Haw. 1997), gave rise to the possibility that at least one State might recognize same-sex marriages. But o*f course* the *Baehr* case explains the enactment of Section 31-11-1-1(b); a response to *Baehr* is an appropriate justification for the law, not a sign of animus. *Baehr* prompted concerns that, without contrary legislation, a radically new marriage policy from one State might dictate marriage policy for all others. It was entirely proper for

Indiana lawmakers to take steps to make sure Indiana law and policy define the marriages that exist in this State. One could easily imagine that if another State appeared on the verge of recognizing plural marriages, the General Assembly might likewise enact a statute specifically denying recognition to such marriages within the State.

Protective legislation of this sort is not born of animus toward anyone's sexual preferences, but of legitimate state prerogatives over marriage. *See Windsor*, 133 S. Ct. at 2689-90 ("By history and tradition, the definition of and regulation of marriage . . . has been treated as being within the authority and realm of the separate States."); *id.* at 2691 ("[R]egulation of domestic relations is an area that has long been regarded as a virtually exclusive province of the States.") (internal quotation marks omitted); *id.* ("The definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations . . . .").

In *Windsor*, what made Section 3 of DOMA "unusual" was that Congress has no such legitimate prerogative over marriage and yet had chosen to depart from the fundamental systemic deference it owes States on the subject. *See id.* at 2692. States owe one another no such systemic deference, as each is a primary regulator of marriage. It is not "unusual" for Indiana to assume control and responsibility for its own marriage policy rather than leave it to other States, particularly with respect to something so fundamentally radical (at least in 1997) as same-sex marriage.

The fundamental issue, moreover, is not about the particulars of Indiana

marriage-recognition precedents or the timing of Section 31-11-1-1(b)'s enactment, but about whether Indiana's statutory refusal to recognize out-of-state same-sex marriages, as a means of carrying out state public policy, is consistent with the American constitutional tradition. Ample case law from around the country, only some of which is cited in Part IV.A, *supra*, demonstrates that it is. A constitutional theory in contravention of that baseline principle would effectively require Indiana to conform its marriage policy to the varying marriage policies enacted in other States. Rather than fostering the States' freedom to experiment with different approaches to difficult social questions, a right to interstate marriage recognition would empower one laboratory to commandeer the others, essentially nationalizing the marriage policy of the most inventive State, including those that might one day permit plural marriages.

Nor does Indiana suffer some special disability in this regard simply because the out-of-state recognition issue has not been litigated enough to provide a robust body of Indiana non-recognition decisions. The Constitution does not mean one thing in other States but another in Indiana when it comes to out-of-state recognition of marriages that contravene state public policy. *See, e.g.*, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 231-32 (1995) (opinion of O'Connor, J.) (explaining that "the Constitution imposes upon federal, state, and local governmental actors the same obligation to respect the personal right to equal protection of the laws").

Finally, the district court invoked fragments of commentary surrounding the

1997 re-enactment of the law as if the Fourteenth Amendment cares only for curing improper attitudes rather than for substantive legitimacy. Yet its treatment was as factually unsupported as it was legally erroneous. It relied on a subject-matter heading for Section 31-11-1-1 ("Same-Sex Marriage Prohibited") that (1) was *not* included in the bill (or public law) enacted by the legislature; (2) was in fact supplied by West Publishing Company as an editorial enhancement;[9] and (3) is not part of the law in Indiana. *See* Ind. Code § 1-1-1-5(f) ("The headings of titles, articles, and chapters as they appear in the Indiana Code . . . are not part of the law[.] These descriptive headings . . . are not intended to affect the meaning, application, or construction of the statute they precede."). Yet the district court detected from this post-enactment, publisher-supplied shorthand guide a fatal legislative attitude of "exclusion." *See* Short App. 26, 29.

This is plainly *not* how Fourteenth Amendment animus doctrine works. Supposed animus underlying an enactment creates a constitutional problem only where *no legitimate explanation* is available. *See Lawrence*, 539 U.S. at 584 ("[T]he State cannot single out one identifiable class of citizens for punishment that does not apply to everyone else, with moral disapproval as the only asserted state interest for the law."); *Romer*, 517 U.S. at 632 ("[T]he amendment seems inexplicable by anything but animus toward the class it affects[.]"). As explained in more detail below, the State's longtime rationale for marriage and its desire to preserve and protect that rationale and the accompanying definition of marriage

[9] Confirming the point, the subject-matter heading for Section 31-11-1-1 in Burns Indiana Statutes Annotated is "Gender requirements."

explain both Sections 31-11-1-1(a) and 31-11-1-1(b).

C. Section 31-11-1-1(b) vindicates legitimate government objectives

To the extent out-of-state opposite-sex marriages are generally treated as valid under Indiana law but same-sex marriages are not, that differential treatment is fully justifiable. Generally speaking, opposite-sex couples whose marriages are recognized here could get married in Indiana anyway, but same-sex couples could not. While Indiana *could* refuse recognition to all opposite-sex marriages from other States, doing so would be pointless given that the vast majority of out-of-state opposite-sex couples who move here could easily obtain Indiana licenses and have their marriages solemnized.

Furthermore, laws pertaining to opposite-sex marriage do not differ significantly from one State to the next, and the population of opposite-sex couples who (1) wish to marry; (2) would not be authorized to marry in Indiana; (3) live in (or find) a State authorizing them to marry; and (4) return or relocate to Indiana, is self-evidently quite small. Accordingly, even if Indiana's general recognition of out-of-state opposite-sex marriages results in occasional retrospective recognition of a marriage that contravenes Indiana's marriage restrictions (such as in *Mason*), such a possibility does not present an existential threat to vindication of Indiana marriage policy.

In contrast, the population of same-sex couples married in other States who will return or relocate to Indiana is presumably quite large, and accepting those marriages on a *prospective* basis would permit wholesale evasion of Indiana's

traditional marriage definition and fatally undercut vindication of state marriage policy. The decision by some States to recognize same-sex marriages marks a significant departure not only from Indiana policy but also from the fundamental understanding of the purpose of marriage embodied by our State's laws. For Indiana, marriage is a regulatory scheme designed to encourage responsible procreation so as to ameliorate the consequences of unplanned pregnancies. *See Morrison v. Sadler*, 821 N.E.2d 15, 30-31 (Ind. Ct. App. 2005). For States recognizing same-sex marriages, the purpose of marriage is obviously something else—something that cannot be reconciled with Indiana's marriage philosophy.

Notably, the same philosophical dispute does *not* exist with respect to other variations in state marriage laws, which may reflect marginal differences about the proper age of majority or the proper distance of consanguinity, but which do not call into question the fundamental purpose of the entire enterprise. Indiana has a legitimate—indeed, compelling—interest in maintaining the integrity of its fundamental rationale for civil marriage rather than letting it be redefined by other States. A State that merely protects its legitimate definition of marriage is not "motivated by animus," Short App. 32. *See Sevcik*, 911 F. Supp. 2d at 1021 (explaining that "the protection of the traditional institution of marriage . . . is a legitimate state interest" and is "not based purely upon anti-homosexual animus"). The constitutional validity of Indiana's decision not to recognize out-of-state same-sex marriages thus turns on the constitutional validity of its traditional marriage definition. If Indiana may constitutionally adhere to that definition and thereby

refuse to license and regulate its own same-sex marriages, it can also refuse to recognize and regulate same-sex marriages from other States.

CONCLUSION

For the foregoing reasons, Defendants-Appellants respectfully request that this Court REVERSE and VACATE the judgment of the district court.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

I verify that this brief, including footnotes and issues presented, but excluding certificates, contains 13,980 words according to the word-count function of Microsoft Word, the word-processing program used to prepare this brief.

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CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent notification of such filing to the following:

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REQUIRED SHORT APPENDIX

Pursuant to Circuit Rule 30, Appellants submit the following as their Required Short Appendix. Appellants' Short Appendix contains all of the materials required under Circuit Rule 30(a).

By: *s/Thomas M. Fisher*
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

MARILYN RAE BASKIN and ESTHER FULLER; BONNIE EVERLY and LINDA JUDKINS; DAWN LYNN CARVER and PAMELA RUTH ELEASE EANES; HENRY GREENE and GLENN FUNKHOUSER, individually and as parents and next friends of C.A.G.; NIKOLE QUASNEY and AMY SANDLER, individually and as parents and next friends of A.Q.-S. and M.Q.-S.	)	
Plaintiffs,	)	
vs.	)	1:14-cv-00355-RLY-TAB
PENNY BOGAN, in her official capacity as BOONE COUNTY CLERK; KAREN M. MARTIN, in her official capacity as PORTER COUNTY CLERK; MICHAEL A. BROWN, in his official capacity as LAKE COUNTY CLERK; PEGGY BEAVER, in her official capacity as HAMILTON COUNTY CLERK; WILLIAM C. VANNESS II, M.D., in his official capacity as the COMMISSIONER, INDIANA STATE DEPARTMENT OF HEALTH; and GREG ZOELLER, in his official capacity as INDIANA ATTORNEY GENERAL,	)	
Defendants.	)	

FINAL JUDGMENT

The court, having this date granted Plaintiffs' Motion for Summary Judgment as to all Defendants, now enters final judgment in Plaintiffs' favor, and against the Defendants

herein. This case is now closed.

SO ORDERED this 25th day of June 2014.

RICHARD L. YOUNG, CHIEF JUDGE
United States District Court
Southern District of Indiana

Laura A. Briggs, Clerk

BY: Dina M. Doyle
Deputy Clerk, U.S. District Court

Distributed Electronically to Registered Counsel of Record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

MARILYN RAE BASKIN and ESTHER FULLER; BONNIE EVERLY and LINDA JUDKINS; DAWN LYNN CARVER and PAMELA RUTH ELEASE EANES; HENRY GREENE and GLENN FUNKHOUSER, individually and as parents and next friends of C.A.G.; NIKOLE QUASNEY, and AMY SANDLER, individually and as parents and next friends of A.Q.-S. and M.Q.-S.,	)	
Plaintiffs,	)	
vs.	)	1:14-cv-00355-RLY-TAB
PENNY BOGAN, in her official capacity as BOONE COUNTY CLERK; KAREN M. MARTIN, in her official capacity as PORTER COUNTY CLERK; MICHAEL A. BROWN, in his official capacity as LAKE COUNTY CLERK; PEGGY BEAVER, in her official capacity as HAMILTON COUNTY CLERK; WILLIAM C. VANNESS II, M.D., in his official capacity as the COMMISSIONER, INDIANA STATE DEPARTMENT OF HEALTH; and GREG ZOELLER, in his official capacity as INDIANA ATTORNEY GENERAL,	)	
Defendants.	)	

MIDORI FUJII; MELODY LAYNE and TARA BETTERMAN; SCOTT and Rodney MOUBRAY-CARRICO; MONICA WEHRLE and HARRIET MILLER; GREGORY HASTY and CHRISTOPHER VALLERO; ROB MACPHERSON and STEVEN STOLEN, individually and as parents and next friends of L. M.-C. and A. M.-S.,	)	
Plaintiffs,	)	
vs.	)	1:14-cv-00404-RLY-TAB
GOVERNOR, STATE OF INDIANA, in his official capacity; COMMISSIONER, INDIANA STATE DEPARTMENT OF HEALTH, in his official capacity; COMMISSIONER, INDIANA STATE DEPARTMENT OF REVENUE, in his official capacity; CLERK, ALLEN COUNTY, INDIANA, in her official capacity; CLERK, HAMILTON COUNTY, INDIANA, in her official capacity,	)	
Defendants.	)	
OFFICER PAMELA LEE, CANDACE BATTEN-LEE, OFFICER TERESA WELBORN, ELIZABETH J. PIETTE, BATALLION CHIEF RUTH MORRISON, MARTHA LEVERETT, SERGEANT KAREN VAUGHN-KAJMOWICZ, TAMMY VAUGHN-KAJMOWICZ, and J. S. V., T. S. V., T. R. V., by their parents and next friends SERGEANT KAREN VAUGHN-KAJMOWICZ and TAMMY VAUGHN-KAJMOWICZ,	)	

Plaintiffs,	)	
	)	
vs.	)	1:14-cv-00406-RLY-MJD
	)	
MIKE PENCE, in his official capacity as GOVERNOR OF THE STATE OF INDIANA; BRIAN ABBOTT, CHRIS ATKINS, KEN COCHRAN, STEVE DANIELS, JODI GOLDEN, MICHAEL PINKHAM, KYLE ROSEBROUGH, and BRET SWANSON, in their official capacities as members of the Board of Trustees of the Indiana Public Retirement System; and STEVE RUSSO, in his official capacity as Executive Director of the Indiana Public Retirement System,	)	
	)	
Defendants.	)	

ENTRY ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

The court has before it three cases, *Baskin v. Bogan*, *Fujii v. Pence*, and *Lee v. Pence*. All three allege that Indiana Code Section 31-11-1-1 ("Section 31-11-1-1"), which defines marriage as between one man and one woman and voids marriages between same-sex persons, is facially unconstitutional. Plaintiffs in the *Baskin* and *Fujii* cases challenge the entirety of Section 31-11-1-1, while Plaintiffs in the *Lee* case challenge only Section 31-11-1-1(b). Plaintiffs, in all three cases, allege that Section 31-11-1-1 violates their rights to due process and equal protection under the Fourteenth Amendment of the United States Constitution. In each case, Plaintiffs seek declaratory and injunctive relief against the respective Defendants. Also in each case, Plaintiffs and Defendants have moved for summary judgment, agreeing that there are no issues of

material fact. For the reasons set forth below, the court finds that Indiana's same sex marriage ban violates the due process clause and equal protection clause and is, therefore, unconstitutional. The court **GRANTS in part and DENIES in part** the Plaintiffs' motions for summary judgment and **GRANTS in part and DENIES in part** the Defendants' motions.

I. Background

A. The *Baskin* Plaintiffs

The court considers the case of *Baskin v. Bogan* to be the lead case and thus will recite only those facts relevant to that dispute. In *Baskin v. Bogan*, Plaintiffs are comprised of five same-sex couples and three minor children of two of the couples. (Amended Complaint ¶ 1, Filing No. 30).[1] Four couples, Marilyn Rae Baskin and Esther Fuller, Bonnie Everly and Linda Judkins, Dawn Carver and Pamela Eanes, Henry Greene and Glenn Funkhouser (collectively the "unmarried plaintiffs"), are not married; one couple, Nikole Quasney and Amy Sandler (collectively the "married plaintiffs"), married in Massachusetts while on their annual vacation to the Sandler family home. Each couple resides in Indiana and has been in a loving, committed relationship for over a decade. Each couple has their own set of fears and concerns should something happen to his or her significant other.

Plaintiffs challenge Section 31-11-1-1, which states:

> (a) Only a female may marry a male. Only a male may marry a female. (hereinafter "Section A")

[1] Filing Numbers will refer to those documents in *Baskin v. Bogan* unless stated otherwise.

> (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. (hereinafter "Section B")

In addition, Plaintiffs broadly challenge other Indiana statutes that have the effect of carrying out the marriage ban. (hereinafter, collectively, with Section 31-11-1-1, referred to as "Indiana's marriage laws"). On April 10, 2014, the court granted a temporary restraining order (Filing No. 51) prohibiting the *Baskin* Defendants from enforcing Section B against Nikole Quasney and Amy Sandler. The parties in *Baskin* agreed to fully brief their motions for preliminary injunction and summary judgments for a combined hearing held on May 2, 2014. The court granted a preliminary injunction extending the temporary restraining order. (Filing No. 65). The court now considers the cross motions for summary judgment in the three cases.

B. Indiana's Marriage Laws

In order to marry in the State of Indiana, a couple must apply for and be issued a marriage license. *See* Ind. Code § 31-11-4-1. The couple need not be residents of the state. *See* Ind. Code § 31-11-4-3. However, the two individuals must be at least eighteen years of age or meet certain exceptions. *See* Ind. Code § 31-11-1-4; Ind. Code § 31-11-1-5. An application for a marriage license must include information such as full name, birthplace, residence, age, and information about each person's parents. *See* Ind. Code § 31-11-4-4.[2] The application only has blanks for information from a male and female applicant. *See* Marriage License Application, *available at*

[2] The State Department of Health is charged under Ind. Code § 31-11-4-4(c) with developing a uniform application for marriage licenses.

www.in.gov/judiciary/2605.htm. It is a Class D Felony to provide inaccurate information in the marriage license or to provide inaccurate information about one's physical condition.[3] *See* Ind. Code § 31-11-11-1; Ind. Code § 31-11-11-3. The clerk may not issue a license if an individual has been adjudged mentally incompetent or is under the influence of alcohol or drugs. *See* Ind. Code § 31-11-4-11.

The marriage license serves as the legal authority to solemnize a marriage. *See* Ind. Code § 31-11-4-14. The marriage may be solemnized by religious or non-religious figures. *See* Ind. Code § 31-11-6-1. If an individual attempts to solemnize a marriage in violation of Indiana Code Chapter 31-11-1, which includes same-sex marriages, then that person has committed a Class B Misdemeanor. *See* Ind. Code § 31-11-11-7.

In addition to prohibiting same-sex marriages, Indiana prohibits bigamous marriages and marriages between relatives more closely related than second cousins unless they are first cousins over the age of sixty-five. *See* Ind. Code § 31-11-1-2 (cousins); *see* Ind. Code § 31-11-1-3 (polygamy). Nevertheless, when evaluating the legality of marriages, the Indiana Supreme Court found that "the presumption in favor of matrimony is one of the strongest known to law." *Teter v. Teter*, 101 Ind. 129, 131-32 (Ind. 1885). In general, Indiana recognizes out-of-state marriages that were valid in the

[3] In an official opinion concerning the authority of clerks to issue marriage licenses and only referencing one occasion where they cannot –same-sex marriages, the Attorney General appeared to consider inaccurate physical information to include gender. *See* 2004 Ind. Op. Att'y Gen. No. 4 (Apr. 29, 2004). The Attorney General noted that a clerk can be charged with a misdemeanor for issuing a marriage license knowing the information concerning the physical condition of the applicant is false. *See id.*

location performed. *Bolkovac v. State*, 98 N.E.2d 250, 304 (Ind. 1951) ("[t]he validity of a marriage depends upon the law of the place where it occurs.").

II. Summary Judgment Standard

The purpose of summary judgment is to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 587 (1986). Summary judgment is appropriate if the record "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED R. CIV. P. 56(a). A genuine issue of material fact exists if there is sufficient evidence for a reasonable jury to return a verdict in favor of the non-moving party on the particular issue. *See Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986).

On a motion for summary judgment, the burden rests with the moving party to demonstrate "that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). After the moving party demonstrates the absence of a genuine issue for trial, the responsibility shifts to the non-movant to "go beyond the pleadings" and point to evidence of a genuine factual dispute precluding summary judgment. *Id*. at 322-23. "If the non-movant does not come forward with evidence that would reasonably permit the finder of fact to find in her favor on a material question, then the court must enter summary judgment against her." *Waldridge v. Am. Hoechst Corp*., 24 F.3d 918, 920 (7th Cir. 1994) (citing *Matsushita Elec. Indus. Co.*, 475 U.S. at 585-87); *see Celotex*, 477 U.S. at 322-24; *see also Anderson*, 477 U.S. at 249-52.

Prior to discussing the merits of the summary judgment motions, the court must decide several threshold issues. First, the court must determine whether Defendants Attorney General Zoeller, Governor Pence, and the Commissioner of the Indiana State Department of Revenue ("Department of Revenue Commissioner") are proper parties, and second, whether *Baker v. Nelson*, 409 U.S. 810 (1972) bars the present lawsuit.

III. Proper Party-Defendants

Under the Eleventh Amendment, a citizen cannot sue their state in federal court unless the state consents. However, the Supreme Court created an important exception to that immunity in *Ex Parte Young*. 209 U.S. 123 (1908). Under that doctrine, "a private party can sue a state officer in his or her official capacity to enjoin prospective action that would violate federal law." *Ameritech Corp. v. McCann*, 297 F.3d 582, 585-86 (7th Cir. 2002)(quoting *Dean Foods Co. v. Brancel*, 187 F.3d 609, 613 (7th Cir. 1999)). Because Plaintiffs seek an injunction to enjoin actions which violate federal law, *Ex Parte Young* applies. The question here rather, is who is a proper defendant?

The proper defendants are those who bear "'legal responsibility for the flaws [plaintiffs] perceive in the system' and not one[s] from whom they 'could not ask anything . . . that could conceivably help their cause.'" *Sweeney v. Daniels*, No. 2:12-cv-81-PPS/PRC, 2013 WL 209047, * 3 (N.D. Ind. Jan. 17, 2013) (quoting *Hearne v. Bd. of Educ.*, 185 F.3d 770, 777 (7th Cir. 1999)). Defendants Zoeller, Pence, and the Department of Revenue Commissioner assert that they are not the proper parties. For the reasons explained below, the court agrees with Governor Pence and disagrees with Attorney General Zoeller and the Department of Revenue Commissioner.

A. Defendant Zoeller

Defendant Zoeller, sued in *Baskin v. Bogan*, asserts that he neither has the authority to enforce nor has any other role respecting Section 31-11-1-1 as the Attorney General. However, the *Baskin* Plaintiffs' complaint broadly challenges Section 31-11-1-1 and the State's other laws precluding such marriages, and requests that the court declare Section 31-11-1-1 "and all other sources of Indiana law that preclude marriage for same-sex couples or prevent recognition of their marriages" unconstitutional. (Amended Complaint §§ 3, 80, Filing No. 30, at ECF p. 2, 26). This relief would encompass such criminal statutes as listed above in Part I.B.

The Attorney General has the broad authority to assist in the prosecution of any offense if he decides that it is in the public interest. *See* Ind. Code. § 4-6-1-6. Noting this broad authority, the court has previously found that the Attorney General is a proper party when challenging statutes regarding abortion. *See Arnold v. Sendak*, 416 F. Supp. 22, 23 (S.D. Ind. 1976), *aff'd*, 429 U.S. 476 (1976) (finding "[t]he Attorney General thus has broad powers in the enforcement of criminal laws of the state, and is accordingly a proper defendant."); *see also Gary-Northwest Indiana Women's Services, Inc. v. Bowen*, 496 F. Supp. 894 (N.D. Ind. 1980) (attorney general as a party to a law challenging statute criminalizing abortion). Although Section 31-11-1-1 does not specifically define criminal penalties, Indiana has criminal provisions in place to prevent individuals from marrying in violation of it. *See* Ind. Code §§ 31-11-11-7; 31-11-11-1; and 31-11-11-13. Because the Attorney General has broad powers in the enforcement of such criminal statutes, he has a sufficient connection and role in enforcing such statutes for purposes of

Ex Parte Young. 209 U.S. at 157. Therefore, the court **DENIES** the Attorney General's motion for summary judgment on that ground. (Filing No. 55).

B. Governor Pence

Governor Pence is sued in the *Fujii* and *Lee* cases. As the court found in *Love v. Pence*, another case challenging the constitutionality of Section 31-11-1-1, the Governor is not a proper party because the Plaintiffs' injuries are not fairly traceable to him and cannot be redressed by him. (*Love v. Pence*, No. 4:14-cv-15-RLY-TAB, Filing No. 32 (S.D. Ind. June 24, 2014). Therefore, the court **GRANTS** the Governor's motions for summary judgment (*Fujii* Filing No. 44) (*Lee* Filing No. 41).

C. Commissioner of the Indiana State Department of Revenue

The *Fujii* Plaintiffs also brought suit against the Department of Revenue Commissioner. The Commissioner claims he is the wrong party because any harms caused by him do not constitute a concrete injury. The court disagrees and finds that Plaintiffs have alleged a concrete injury by having to fill out three federal tax returns in order to file separate returns for Indiana. *See e.g. Harris v. City of Zion, Lake County, Ill.*, 927 F.2d 1401, 1406 (7th Cir. 1991) ("[a]n identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation."). The court finds that this is an identifiable trifle. Therefore, the court **DENIES** the Department of Revenue Commissioner's motion for summary judgment on that ground. (*Fujii* Filing No. 44).

IV. The Effect of *Baker v. Nelson*

Defendants argue that this case is barred by *Baker v. Nelson*. In *Baker*, the United States Supreme Court dismissed an appeal from the Supreme Court of Minnesota for want of a substantial federal question. 409 U.S. at 810. The Supreme Court of Minnesota held that: (1) the absence of an express statutory prohibition against same-sex marriages did not mean same-sex marriages are authorized, and (2) state authorization of same-sex marriages is not required by the United States Constitution. *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *aff'd*, 409 U.S. 810 (1972).

The parties agree that the Supreme Court's ruling has the effect of a ruling on the merits. *See Ill. Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 182-83 (1979) ("a summary disposition affirms only the judgment of the court below, and no more may be read into [the] action than was essential to sustain the judgment."). Defendants contend that this case raises the precise issue addressed by *Baker* and thus binds the court to find in Defendants' favor. *See Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975) (quotation omitted) ("the lower courts are bound . . . until such time as the [Supreme] Court tells them that they are not.").

The court agrees that the issue of whether same-sex couples may be constitutionally prohibited from marrying is the exact issue presented in *Baker*. Nevertheless, the Supreme Court created an important exception that "when doctrinal developments indicate," lower courts need not adhere to the summary disposition. *Id.* Plaintiffs argue that three decisions in particular are such developments: *Romer v. Evans*,

517 U.S. 620 (1996), *Lawrence v. Texas*, 539 U.S. 558 (2003), and *United States v. Windsor*, 133 S. Ct. 2675 (2013), and thus, the court no longer must adhere to *Baker*.

The Supreme Court decided *Baker* at a different time in the country's equal protection jurisprudence. The following are examples of the jurisprudence at and around the time of *Baker*. The Court struck down a law for discriminating on the basis of gender for the first time only one year before *Baker*. *Reed v. Reed*, 404 U.S. 71 (1971). Moreover, at the time *Baker* was decided, the Court had not yet recognized gender as a quasi-suspect classification. Regarding homosexuality, merely four years after *Baker*, the Supreme Court granted a summary affirmance in a case challenging the constitutionality of the criminalization of sodomy for homosexuals. *Doe v. Commonwealth's Attorney for City of Richmond*, 425 U.S. 901 (1976). Thus, the Supreme Court upheld the district court's finding that "[i]t is enough for upholding the legislation that the conduct is likely to end in a contribution to moral delinquency." *Doe v. Commonwealth's Attorney for City of Richmond*, 403 F. Supp. 1199, 1202 (E.D. Va. 1975), *aff'd* 425 U.S. 901 (1976). Nine years later in 1985, the Eleventh Circuit found that particular summary affirmance was no longer binding. *Hardwick v. Bowers*, 760 F.2d 1202 (11th Cir. 1985), *rev'd* 478 U.S. 186 (1986). However, on review, the Supreme Court held that states were permitted to criminalize private, consensual sex between adults of the same-sex based merely on moral disapproval. *See Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by Lawrence*, 539 U.S. at 578. For ten more years, states were free to legislate against homosexuals based merely on the majority's disapproval of such conduct.

Then in 1996, the Supreme Court decided *Romer* – the first case that clearly shows a change in direction away from *Baker*. The Court held that an amendment to the Colorado Constitution, specifically depriving homosexual persons from the protection of anti-discrimination measures, violated the Equal Protection Clause. *Romer*, 517 U.S. at 635. The next change occurred in 2003 with *Lawrence* when the Supreme Court overruled *Bowers*, finding that the promotion of morality is not a legitimate state interest under the Equal Protection Clause and the state may not criminalize sodomy between individuals of the same sex. *Lawrence*, 539 U.S. at 582.

Finally, in the last year even more has changed in the Supreme Court's jurisprudence shedding any doubt regarding the effect of *Baker*. The Supreme Court granted certiorari for two cases involving the constitutionality of laws adversely affecting individuals based on sexual orientation. First, in *United States v. Windsor*, the Supreme Court invalidated Section 3 of The Defense of Marriage Act ("DOMA"), which defined marriage for purposes of federal law as "only a legal union between one man and one woman." 133 S. Ct. at 2694 (quoting 1 U.S.C. § 7). The Court noted that the differentiation within a state caused by DOMA "demeans the couple, whose moral and sexual choices the Constitution protects." *Windsor*, 133 S. Ct. at 2694. Additionally, the Court found that the purpose of DOMA "is to ensure that if any State decides to recognize same-sex marriages, those unions will be treated as second-class marriages." *Id.* at 2693. Second, the Supreme Court dismissed an appeal of California's prohibition on same-sex marriages, not because *Baker* rendered the question insubstantial, but because the law's supporters lacked standing to defend it. *Hollingsworth v. Perry*, 133 S.

Ct. 6252 (2013). These developments strongly suggest, if not compel, the conclusion that *Baker* is no longer controlling and does not bar the present challenge to Indiana's laws. *See Windsor v. United States*, 699 F.3d 169, 178 (2d Cir. 2012), *aff'd*, 133 S. Ct. 2675 (2013) (holding that *Baker* was not controlling as to the constitutionality of DOMA, reasoning that "[i]n the forty years after *Baker*, there have been manifold changes to the Supreme Court's equal protection jurisprudence" and that "[e]ven if *Baker* might have had resonance . . . in 1971, it does not today").

The court acknowledges that this conclusion is shared with all other district courts that have considered the issue post-*Windsor*. *See Wolf v. Walker*, No. 3:14-cv-00064-bbc, 2014 WL 2558444, ** 3-6 (W.D. Wisc. June 6, 2014); *Whitewood v. Wolf*, No. 1:13-cv-1861, 2014 WL 2058105, ** 4-6 (M.D. Penn. May 20, 2014); *Geiger v. Kitzhaber*, No. 6:13-cv-01834-MC, 2014 WL 2054264, *1 n. 1 (D. Or. May 19, 2014); *Latta v. Otter*, 1:13-cv-482-CWD, 2014 WL 1909999, ** 7-10 (D. Idaho May 13, 2013); *DeBoer v. Snyder*, 973 F. Supp. 2d 757, 773 n. 6 (E.D. Mich. 2014); *DeLeon v. Perry*, 975 F. Supp. 2d 632, 648 (W.D. Tex. 2014) (order granting preliminary injunction); *Bostic v. Rainey*, 970 F. Supp. 2d 456, 469-70 (E.D. Va. 2014); *Bishop v. U.S. ex rel. Holder*, 962 F. Supp. 2d 1252, 1274-77 (N.D. Okla. 2014); *McGee v. Cole*, No. 3:13-cv-24068, 2014 WL 321122, ** 8-10 (S.D.W. Va. Jan. 29, 2014); *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1195 (D. Utah 2013). Finding that *Baker* does not bar the present action, the court turns to the merits of Plaintiffs' claims.

V. Right to Marry Whom?

As the court has recognized before, marriage and domestic relations are traditionally left to the states; however, the restrictions put in place by the state must comply with the United States Constitution's guarantees of equal protection of the laws and due process. *See Windsor*, 133 S. Ct. at 2691 (citing *Loving v. Virginia*, 388 U.S. 1 (1967)). Plaintiffs assert that Indiana's marriage laws violate those guarantees.

A. Due Process Clause

1. Fundamental Right

The Due Process Clause of the Fourteenth Amendment guarantees that no state shall "deprive any person of life, liberty, or property without the due process of law." U.S. Const. amend. XIV § 1. The purpose of the Due Process Clause is to "protect[] those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty . . . ." *Washington v. Glucksburg*, 521 U.S. 702, 720-21 (1997) (quotations and citations omitted). Because such rights are so important, "an individual's fundamental rights may not be submitted to vote." *DeLeon*, 975 F. Supp. 2d at 657 (citing *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943)). Plaintiffs assert that the State of Indiana impedes upon their fundamental right to marry, and thus, violates the Due Process Clause.

The parties agree that a fundamental right to marry exists; however they dispute the scope of that right. The fact that the right to marry is a fundamental right, although not explicitly stated by the Supreme Court, can hardly be disputed. *See, e.g., Zablocki v.*

Redhail, 434 U.S. 374, 384 (1978) ("[D]ecisions of this Court confirm that the right to marry is of fundamental importance for all individuals."); *United States v. Kras*, 409 U.S. 434, 446 (1973) (concluding the Court has come to regard marriage as fundamental); *Loving*, 388 U.S. at 12 ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."); *Skinner v. Okla. ex. rel. Williamson*, 316 U.S. 535 (1942) (noting marriage is one of the basic civil rights of man fundamental to our existence and survival); *Maynard v. Hill*, 125 U.S. 190, 205 (1888) (characterizing marriage as "the most important relation in life" and as "the foundation of the family and society, without which there would be neither civilization nor progress."). Additionally, the parties agree that the right to marry necessarily entails the right to marry the person of one's choice. *See Lawrence*, 539 U.S. at 574 (2003) ("Our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.").

Defendants, relying on *Glucksberg*, argue that the fundamental right to marry should be limited to its traditional definition of one man and one woman because fundamental rights are based in history. The concept of same-sex marriage is not deeply rooted in history; thus, according to Defendants, the Plaintiffs are asking the court to recognize a new fundamental right. Plaintiffs counter that Defendants' reliance on *Glucksberg* is mistaken because the Supreme Court has repeatedly defined the fundamental right to marry in broad terms.

The court agrees with Plaintiffs. "Fundamental rights, once recognized, cannot be denied to particular groups on the ground that these groups have historically been denied those rights." *In re Marriage Cases*, 183 P.3d 384, 430 (Cal. 2008) (superseded by constitutional amendment). In fact, "the history of our Constitution . . . is the story of the extension of constitutional rights and protections to people once ignored or excluded." *United States v. Virginia*, 518 U.S. 515, 557 (1996). The reasoning in *Henry v. Himes* is particularly persuasive on this point:

> The Supreme Court has consistently refused to narrow the scope of the fundamental right to marry by reframing a plaintiff's asserted right to marry as a more limited right that is about the characteristics of the couple seeking marriage. . . **[T]he Court consistently describes a general 'fundamental right to marry' rather than 'the right to interracial marriage,' 'the right to inmate marriage,' or 'the right of people owing child support to marry.'**

No.1:14-cv-129, 2014 WL 1418395, *7 (S.D. Ohio Apr. 14, 2014) (emphasis added) (citing *Loving*, 388 U.S. at 12; *Turner v. Safley*, 482 U.S. 78, 94-96 (1987); *Zablocki*, 434 U.S. at 383-86).

The court finds *Loving v. Virginia* best illustrates that concept. In that case, the Court held that Virginia's ban on interracial marriage violated the plaintiffs' rights under the Due Process Clause. 388 U.S. at 12. The *Loving* Court stated "[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," and further recognized that, "marriage is one of the 'basic civil rights of man.'" *Id.* If the Court in *Loving* had looked only to the "traditional" approach to marriage prior to 1967, the Court would not have recognized that there was a fundamental right for Mildred and Richard Loving to be married,

because the nation's history was replete with statutes banning interracial marriages between Caucasians and African Americans. Notably, the Court did not frame the issue of interracial marriage as a "new" right, but recognized the fundamental right to marry regardless of that "traditional" classification.

Unfortunately, the courts have failed to recognize the breadth of our Due Process rights before in cases such as *Bowers*. 478 U.S. at 186, *overruled by Lawrence*, 539 U.S. at 578. There, the court narrowly framed the issue as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy . . . ." *Id.* at 190. Not surprisingly, with the issue framed so narrowly and applying only to a small classification of people, the Court found that there was no fundamental right at issue because our history and tradition proscribed such conduct. *Id.* at 192-94. In 2003, the Supreme Court recognized its error and reversed course. *Lawrence*, 539 U.S. at 567 (finding that the *Bowers* Court's statement of the issue "discloses the Court's own failure to appreciate the extent of the liberty interest at stake."). The court found that the sodomy laws violated plaintiffs' Due Process right to engage in such conduct and intruded into "the personal and private life of the individual." *Id.* at 578. Notably, the Court did not limit the right to a classification of certain people who had historical access to that right.

Here, Plaintiffs are not asking the court to recognize a new right; but rather, "[t]hey seek 'simply the same right that is currently enjoyed by heterosexual individuals: the right to make a public commitment to form an exclusive relationship and create a family with a partner with whom the person shares an intimate and sustaining emotional

bond.'" *Bostic*, 970 F. Supp. 2d at 472 (quoting *Kitchen*, 961 F. Supp. 2d at 1202-03). The courts have routinely protected the choices and circumstances defining sexuality, family, marriage, and procreation. As the Supreme Court found in *Windsor*, "[m]arriage is more than a routine classification for purposes of certain statutory benefits," and "[p]rivate, consensual intimacy between two adult persons of the same sex . . . can form 'but one element in a personal bond that is more enduring.'" *Windsor*, 133 S. Ct. at 2693 (quoting *Lawrence*, 539 U.S. at 567). The court concludes that the right to marry should not be interpreted as narrowly as Defendants urge, but rather encompasses the ability of same-sex couples to marry.

2. Level of Scrutiny

The level of scrutiny describes how in depth the court must review the Defendants' proffered reasons for a law. Scrutiny ranges from rational basis (the most deferential to the State) to strict scrutiny (the least deferential to the State). Defendants agree that if the court finds that the fundamental right to marry encompasses same-sex marriages, then heightened scrutiny is appropriate. (Transcript 40:9-17). "When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." *Zablocki*, 434 U.S. at 388. Strict scrutiny requires the government to show that the law is narrowly tailored to a compelling government interest. *See id.* The burden to show the constitutionality of the law rests with the Defendants. *See id.*

For strict scrutiny to be appropriate, the court must find: (1) there is a fundamental right, and (2) the classification significantly interferes with the exercise of that right. *Id.* First, as stated above, the court finds that the fundamental right to marry includes the right of the individual to marry a person of the same sex. Second, Section 31-11-1-1 significantly interferes with that right because it completely bans the Plaintiffs from marrying that one person of their choosing. Therefore, Indiana's marriage laws are subject to strict scrutiny. *See Bostic*, 970 F. Supp. 2d at 473.

3. Application

Section 31-11-1-1, classifying same-sex couples, "cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." *Zablocki*, 434 U.S. at 388. Here, Defendants proffer that the state's interest in conferring the special benefit of civil marriage to only one man and one woman is justified by its interest in encouraging the couple to stay together for the sake of any unintended children that their sexual union may create. The court does not weigh whether or not this is a sufficiently important interest, but will assume that it is.

Defendants have failed to show that the law is "closely tailored" to that interest. Indiana's marriage laws are both over- and under-inclusive. The marriage laws are under-inclusive because they only prevent one subset of couples, those who cannot naturally conceive children, from marrying. For example, the State's laws do not consider those post-menopausal women, infertile couples, or couples that do not wish to have children. Additionally, Indiana specifically allows first cousins to marry once they reach the age that procreation is not a realistic possibility. *See* Ind. Code § 31-11-1-2.

On the other hand, Indiana's marriage laws are over-inclusive in that they prohibit some opposite-sex couples, who can naturally and unintentionally procreate, from marriage. For example, relatives closer in degree than second cousins can naturally and unintentionally procreate; however, they still may not marry.[4] Most importantly, excluding same-sex couples from marriage has absolutely no effect on opposite-sex couples, whether they will procreate, and whether such couples will stay together if they do procreate. Therefore, the law is not closely tailored, and the Defendants have failed to meet their burden.

The state, by excluding same-sex couples from marriage, violates Plaintiffs' fundamental right to marry under the Due Process Clause. *See Wolf*, 2014 WL 2558444, at * 21; *Lee v. Orr*, No. 1:13-cv-08719, 2014 WL 683680, * 2 (N.D. Ill. Feb. 21, 2014) ("This Court has no trepidation that marriage is a fundamental right to be equally enjoyed by all individuals of consenting age regardless of their race, religion, or sexual orientation."); *Whitewood*, 2014 WL 2058105 at ** 8-9; *Latta*, 2014 WL 1909999 at * 13; *DeLeon*, 975 F. Supp. 2d at 659; *Bostic*, 970 F. Supp. 2d at 483; *Kitchen*, 961 F. Supp. 2d at 1204.

B. Equal Protection Clause

Plaintiffs also argue that Section 31-11-1-1 violates the Fourteenth Amendment's Equal Protection Clause. The Equal Protection Clause "commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is

[4] The court does not evaluate the constitutionality of such laws, but merely uses this example to show that the present law would be over-inclusive in regard to Defendants' stated reason for marriage.

essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985) (quoting U.S. Const., amend. XIV., § 1). The clause must take into account the fact that governments must draw lines between people and groups. *See Romer*, 517 U.S. at 631.

1. Level of Scrutiny

"[I]f a law neither burdens a fundamental right nor targets a suspect class, [the court] will uphold the legislative classification so long as it bears a rational relation to some legitimate end." *Romer*, 517 U.S. at 631. The court must "insist on knowing the relation between the classification adopted and the object to be attained." *Id.* at 632. This is to ensure that the classification was not enacted for the purpose of disadvantaging the group burdened by the law. *See id.* at 633. If a law "impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class" then the court applies strict scrutiny. *See Zablocki*, 434 U.S. at 383. To survive strict scrutiny, Indiana must show that the law is narrowly tailored to a compelling government interest. *See id.* at 388. As indicated in Part V.A. above, the court finds that the law impermissibly interferes with a fundamental right, and Defendants failed to satisfy strict scrutiny. Nevertheless, the court will evaluate the Equal Protection claim independent from that conclusion and as an alternative reason to find the marriage law unconstitutional.

a. Form of Discrimination

Plaintiffs argue that Indiana's marriage laws discriminate against individuals on the basis of gender and sexual orientation.

i. Gender

According to Plaintiffs, Indiana's marriage laws discriminate against them based on their gender. For example, if Rae Baskin was a man she would be allowed to marry Esther Fuller; however, because she is a female, she cannot marry Esther. Additionally, Plaintiffs allege the law enforces sex stereotypes, requiring men and women to adhere to traditional marital roles. *See e.g., J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994). Defendants respond that the laws do not discriminate on the basis of gender because the laws do not affect any gender disproportionately. Plaintiffs respond that a mere equal application of the law was rejected by the Court in *Loving*.

The court is not persuaded by Plaintiffs' arguments and finds *Loving* to be distinguishable on this point. Unlike *Loving*, where the court found evidence of an invidious racial discrimination, the court finds no evidence of an invidious gender-based discrimination here. *See Geiger*, 2014 WL 2054264 at * 7. Moreover, there is no evidence that the purpose of the marriage laws is to ratify a stereotype about the relative abilities of men and women or to impose traditional gender roles on individuals. *See id.*; *see also Bishop*, 962 F. Supp. 2d at 1286.

ii. Sexual Orientation

Plaintiffs also argue that Indiana's marriage laws classify individuals based on their sexual orientation, because they prevent all same-sex couples from marrying the person of their choice. Defendants respond that the marriage laws do not discriminate against same-sex couples because they may marry just like opposite-sex couples may marry; the law merely impacts them differently. The court rejects this notion. As the

court stated above, the right to marry is about the ability to form a partnership, hopefully lasting a lifetime, with that one special person of your choosing. Additionally, although Indiana previously defined marriage in this manner, the title of Section 31-11-1-1 – "Same sex marriages prohibited" – makes clear that the law was reaffirmed in 1997 not to define marriage but to prohibit gays and lesbians from marrying the individual of their choice. Thus, the court finds that Indiana's marriage laws discriminate based on sexual orientation.

b. Level of Scrutiny

The Seventh Circuit applies rational basis review in cases of discrimination based on sexual orientation. *See Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 950-51 (7th Cir. 2002) ("Homosexuals are not entitled to any heightened protection under the Constitution."). The Seventh Circuit relied on *Bowers* and *Romer* for this conclusion. Plaintiffs argue that since *Bowers* has since been overruled, the court is no longer bound by *Schroeder*. The court disagrees and believes it is bound to apply rational basis because one of the cases the Court relied on in *Schroeder*, e.g. *Romer*, is still valid law. The court agrees with Plaintiffs that it is likely time to reconsider this issue, especially in light of the Ninth Circuit's decision in *SmithKline Beecham Corp. v. Abbott Labs*, 740 F.3d 471, 481 (9th Cir. 2014) (interpreting *Windsor* to mean that gay and lesbian persons constitute a suspect class). However, the court will leave that decision to the Seventh Circuit, where this case will surely be headed. The court will, therefore, apply rational basis review.

c. Application

Defendants rely on *Johnson v. Robison* for the proposition that "when . . . the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not, we cannot say that the statute's classification of beneficiaries and nonbeneficiaries is invidiously discriminatory." 415 U.S. 361, 383 (1974). According to Defendants, *Johnson* means that they must only show that there is a rational reason to provide the right of marriage to opposite-sex couples, not that there is a rational basis to exclude. In essence, Defendants assert that the opposite-sex couples have distinguishing characteristics, the ability to naturally and unintentionally procreate as a couple, that allow the State to treat them differently from same-sex couples.

Plaintiffs, on the other hand, allege that the primary purpose of the statute is to exclude same-sex couples from marrying and thus the Defendants must show a rational basis to exclude them. The court agrees with Plaintiffs. According to Plaintiffs, the purpose is evident by the timing of the statute, which was passed in an emergency session near the time that DOMA was passed and immediately after and in response to a Hawaiian court's pronouncement in *Baehr v. Miike*, CIV. No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996), *aff'd* 950 P.2d 1234 (Haw. 1997), that same-sex couples should be allowed to marry. *See* Family Law – Marriage – Same Sex Marriages Void, 1997 Ind. Legis. Serv. P.L. 198-1997 (H.E.A. 1265). Because the effect of the law is to exclude and void same-sex marriages, the Plaintiffs argue that the court should analyze whether there is a rational basis to exclude same-sex marriages. Additionally, Plaintiffs

assert they are similar in all relevant aspects to opposite-sex couples seeking to marry– they are in long-term, committed, loving relationships and some have children.

The *Johnson* case concerned a challenge brought by a conscientious objector seeking to declare the educational benefits under the Veterans' Readjustment Benefits Act of 1966 unconstitutional on Equal Protection grounds. 415 U.S. at 364. In reviewing whether or not the classification was arbitrary, the Court looked to the purpose of that Act and found that the legislative objective was to (1) make serving in the Armed Forces more attractive and (2) assist those who served on active duty in the Armed Forces in "readjusting" to civilian life. *See id.* at 376-377. The Court found that conscientious objectors were excluded from the benefits that were offered to the veterans because the benefits could not make service more attractive to a conscientious objector and the need to readjust was absent. *See id.* The Supreme Court found that the two groups were not similarly situated and thus, Congress was justified in making that classification. *See id.* at 382-83.

The court agrees with Plaintiffs that they are similarly situated in all relevant aspects to opposite-sex couples for the purposes of marriage. Also of great importance is the fact that unlike the statute at issue in *Johnson*, "[m]arriage is more than a routine classification for purposes of certain statutory benefits." *Windsor*, 133 S. Ct. at 2693. In fact having the status of "married" comes with hundreds of rights and responsibilities under Indiana and federal law. *See* 614 Reasons Why Marriage Equality Matters in Indiana, *Fujii*, Filing No. 46-2). As the court in *Kitchen* stated in analyzing the Equal Protection claim before it:

> [T]he State poses the wrong question. The court's focus is not on whether extending marriage benefits to heterosexual couples serves a legitimate governmental interest. No one disputes that marriage benefits serve not just legitimate, but compelling governmental interests, which is why the Constitution provides such protection to an individual's fundamental right to marry. Instead, courts are required to determine whether there is a rational connection between the challenged statute and a legitimate state interest. Here, the challenged statute does not grant marriage benefits to opposite-sex couples.[5] The effect of [Utah's marriage ban] is only to disallow same-sex couples from gaining access to these benefits. The court must therefore analyze whether the State's interests in responsible procreation and optimal child-rearing are furthered by prohibiting same-sex couples from marrying.

961 F. Supp. 2d at 1210-11 (reference and footnote added). Like Utah's laws, the effect of Indiana's marriage laws is to exclude certain people from marrying that one special person of their choosing. This is evident by the title of Section 31-11-1-1 – "Same sex marriages prohibited." Consequently, the question is whether it is rational to treat same-sex couples differently by excluding them from marriage and the hundreds of rights that come along with that marriage. *See e.g. City of Cleburne, Tex.*, 473 U.S. at 449.

The court finds that there is no rational basis to exclude same-sex couples. The purpose of marriage – to keep the couple together for the sake of their children – is served by marriage regardless of the sexes of the spouses. In order to fit under *Johnson*'s

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[5] Section 30–1–4.1 of the Utah Code, provides:
(1) (a) It is the policy of this state to recognize as marriage only the legal union of a man and a woman as provided in this chapter.
(b) Except for the relationship of marriage between a man and a woman recognized pursuant to this chapter, this state will not recognize, enforce, or give legal effect to any law creating any legal status, rights, benefits, or duties that are substantially equivalent to those provided under Utah law to a man and woman because they are married.
Amendment 3 provides: "(1) Marriage consists only of the legal union between a man and a woman.
(2) No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect."

rationale, Defendants point to the one extremely limited difference between opposite-sex and same-sex couples, the ability of the couple to naturally and unintentionally procreate, as justification to deny same-sex couples a vast array of rights. The connection between these rights and responsibilities and the ability to conceive unintentionally is too attenuated to support such a broad prohibition. *See Romer*, 517 U.S. at 635. Furthermore, the exclusion has no effect on opposite-sex couples and whether they have children or stay together for those children. Defendants proffer no reason why excluding same-sex couples from marriage benefits opposite-sex couples. The court concludes that there simply is no rational link between the two. *See Tanco*, 2014 WL 997525 at * 6; *see also Bishop*, 962 F. Supp. 2d at 1290-93 (finding there is no rational link between excluding same-sex marriages and "steering 'naturally procreative' relationships into marriage, in order to reduce the number of children born out of wedlock and reduce economic burdens on the State); *see also DeBoer*, 973 F. Supp. 2d at 771-72 (noting that prohibiting same-sex marriages "does not stop [gay men and lesbian women] from forming families and raising children. Nor does prohibiting same-sex marriage increase the number of heterosexual marriages or the number of children raised by heterosexual parents.").

VI. Recognition of Out-of-state Marriages

Defendants concede that whether Indiana can refuse to recognize out-of-state, same-sex marriages turns entirely on whether Indiana may enforce Section A. Because the court finds that Indiana may not exclude same-sex couples from marriage, the court also finds it cannot refuse to recognize out-of-state, same-sex marriages. *See e.g. Loving*,

388 U.S. at 4, 11. Nevertheless, the court finds that Section B violates the Equal Protection Clause independent of its decision regarding Section A.

The parties agree that out-of-state, same-sex marriages are treated differently than out-of-state, opposite-sex marriages. Thus, the question is whether that difference violates the Equal Protection Clause. In *Windsor*, the Supreme Court concluded that by treating same-sex married couples differently than opposite-sex married couples, Section 3 of DOMA "violate[d] basic due process and equal protection principles applicable to the Federal Government." 133 S. Ct. at 2693. The Eastern District of Kentucky found two guiding principles from *Windsor* that strongly suggest the result here. *See Bourke v. Beshear*, No. 3:13-cv-750-H, 2014 WL 556729, * 7 (W.D. Ky. Feb 12, 2014). First, the court should look to the actual purpose of the law. *Id.* The second principle is that such a law "demeans the couple, whose moral and sexual choices the Constitution protects." *Id.* (quoting *Windsor*, 133 S. Ct. at 2694).

The purpose of the law is to prevent the recognition of same-sex marriage in Indiana, which Plaintiffs assert was motivated by animus. If Section 31-11-1-1 was in fact motivated by animus, it violates the principles of the Equal Protection Clause. *See Romer*, 517 U.S. at 633-35 ("[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* state interest.") (emphasis in original) (quoting *Dep't of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973)). Section 31-11-1-1, like DOMA, was passed during the time that Hawaii courts were deciding whether the United States Constitution required it to allow same-sex marriages.

According to the bill's author, his "intent [was] to clarify present Indiana law and strengthen it." Barb Albert, *Same-sex Marriage Takes Hit in Senate*, Indianapolis Star, Feb. 11, 1997, at B2. He did not see the statute as denying rights, because he considered marriage to be a privilege, rather than a right. *Id.* Opponents of the bill saw it as "inflaming the biases and prejudices of individuals," "thumbing your nose" at the Constitution, and "legislat[ing] hate." *Id.*; *see also* Stuart A. Hirsch, *Ban on Gay Marriages to go to Governor*, Indianapolis Star, Apr. 26, 1997, at B1.

Additionally, Section 31-11-1-1 is an unusual law for Indiana to pass. As described above, in Indiana "[t]he validity of a marriage depends upon the law of the place where it occurs." This includes recognizing marriages between first cousins despite the fact that they cannot marry in Indiana unless they are over 65 years of age. *See Mason v. Mason*, 775 N.E.2d 706, 709 (Ind. Ct. App. 2002). The State of Indiana chose one group to single out for disparate treatment. The State's laws place same-sex marriages in a second class category, unlike other marriages performed in other states. Thus, like the Supreme Court in *Windsor*, this court can conclude that this law is motivated by animus, thus violating the Equal Protection Clause.

Even if it were not, the law fails rational basis review. Defendants proffer that the state refuses to recognize same-sex marriages because it conflicts with the State's philosophy of marriage – that is that marriage is to ameliorate the consequences of unintended children. Recognizing the valid same-sex marriages performed in other states, however, has no link whatsoever to whether opposite-sex couples have children or stay together for those children. Thus, there is no rational basis to refuse recognition and

void out-of-state, same-sex marriages. Therefore, Part B violates the Fourteenth Amendment's Equal Protection Clause. *See Tanco v. Haslem*, No. 3:13-cv-01159, 2014 WL 997525 (M.D. Tenn. Mar. 14, 2014); *see also Bourke*, 2014 WL 556729.

VII. Conclusion

The court has never witnessed a phenomenon throughout the federal court system as is presented with this issue. In less than a year, every federal district court to consider the issue has reached the same conclusion in thoughtful and thorough opinions – laws prohibiting the celebration and recognition of same-sex marriages are unconstitutional. It is clear that the fundamental right to marry shall not be deprived to some individuals based solely on the person they choose to love. In time, Americans will look at the marriage of couples such as Plaintiffs, and refer to it simply as a marriage – not a same-sex marriage. These couples, when gender and sexual orientation are taken away, are in all respects like the family down the street. The Constitution demands that we treat them as such. Today, the "injustice that [we] had not earlier known or understood" ends. *Windsor*, 133 S. Ct. at 2689 (citing Marriage Equality Act, 2011 N.Y. Laws 749). Because "[a]s the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom." *Lawrence*, 539 U.S. at 579.

Therefore, the court finds as follows:

1. The *Baskin* Plaintiffs' motion for summary judgment (No. 1:14-cv-355, Filing No. 38) is **GRANTED**;
2. The *Baskin* Defendants' motion for summary judgment (No. 1:14-cv-355, Filing No. 55) is **DENIED**;

3. The *Baskin* Plaintiffs' motion to consolidate preliminary injunction proceedings with final trial on the merits (No. 1:14-cv-355, Filing No. 37) and the *Baskin* Defendants' motion for stay of the preliminary injunction (No. 1:14-cv-355, Filing No. 68) are **DENIED as moot**.
4. The *Fujii* Plaintiffs' motion for summary judgment (No. 1:14-cv-404, Filing No. 33) is **GRANTED in part** for all Defendants except Governor Pence and **DENIED in part** as to Governor Pence;
5. The *Fujii* Defendants' motion for summary judgment (No. 1:14-cv-404, Filing No. 44) is **GRANTED in part** for Governor Pence and **DENIED in part** for the other Defendants;
6. The *Fujii* Plaintiffs' motion for preliminary injunction (No. 1:14-cv-404, Filing No. 23) and motion to consolidate preliminary injunction proceedings with final trial on the merits (No. 1:14-cv-404, Filing No. 24) are **DENIED as moot**.
7. The *Lee* Plaintiffs' motion for summary judgment (No. 1:14-cv-406, Filing No. 27) is **GRANTED in part** for all Defendants except Governor Pence and **DENIED in part** as to Governor Pence;
8. The *Lee* Defendants' motion for summary judgment (No. 1:14-cv-406, Filing No. 41) is **GRANTED in part** for Governor Pence and **DENIED in part** for the other Defendants;
9. The *Lee* Plaintiffs' motion for preliminary injunction (No. 1:14-cv-406, Filing No. 29), motion to consolidate preliminary injunction proceedings with final trial on

the merits (No. 1:14-cv-406, Filing No. 31), and the *Lee* Defendants' motion for extension of time (No. 1:14-cv-406, Filing No. 53) are **DENIED as moot**.

ORDER

Pursuant to the reasoning contained above, the court **DECLARES** that Indiana Code § 31-11-1-1(a), both facially and as applied to Plaintiffs, violates the Fourteenth Amendment's Due Process Clause and Equal Protection Clause. Additionally, the court **DECLARES** that Indiana Code § 31-11-1-1(b), both facially and as applied to Plaintiffs, violates the Fourteenth Amendment's Equal Protection Clause. Because this is a facial challenge, same-sex couples, who would otherwise qualify to marry in Indiana, have the right to marry in Indiana.

Having found that Indiana Code § 31-11-1-1 and the laws in place enforcing such violate the Plaintiffs' rights under the Due Process Clause and the Equal Protection Clause, Defendants and their officers, agents, servants, employees and attorneys, and those acting in concert with them are **PERMANENTLY ENJOINED** from enforcing Indiana Code Section 31-11-1-1 and other Indiana laws preventing the celebration or recognition of same-sex marriages. Additionally, Defendants and officers, agents, servants, employees and attorneys, and those acting in concert with them**,** are **PERMANENTLY ENJOINED** from enforcing or applying any other state or local law, rule, regulation or ordinance as the basis to deny marriage to same-sex couples otherwise qualified to marry in Indiana, or to deny married same-sex couples any of the rights, benefits, privileges, obligations, responsibilities, and immunities that accompany marriage in Indiana.

Specifically, this permanent injunction requires the following, and the court **ORDERS** the following:

1. The Defendant Clerks, their officers, agents, servants, employees and attorneys, and all those acting in concert with them, are **PERMANENTLY ENJOINED** from denying a marriage license to a couple because both applicants for the license are the same sex. Thus they must act pursuant to their authority under Indiana Code Chapter 31-11-4 and issue marriage licenses to couples who, but for their sex, satisfy all the requirements to marry under Indiana law;
2. The Attorney General, Greg Zoeller, his officers, agents, servants, employees and attorneys, and all those acting in concert with them, are **PERMANENTLY ENJOINED** from prosecuting or assisting in the prosecution, using his authority from Indiana Code § 4-6-1-6, of the following:
    a. same-sex couples who fill out the current marriage license application where the spaces provided only allow for a male and female (Ind. Code §§ 31-11-11-1 and 31-11-11-3),
    b. clerks who grant the marriage licenses to qualified same-sex couples (Ind. Code § 31-11-11-4), or
    c. those who choose to solemnize same-sex marriages (Ind. Code §§ 31-11-11-5 and 31-11-11-7). .
3. William C. Vanness II, M.D., the Commissioner of the Indiana State Department of Health, his officers, agents, servants, employees and attorneys,

and all those acting in concert with them, are **PERMANENTLY ENJOINED** to:

a. Act pursuant to their authority under Indiana Code § 16-37-1 to change the death certificate form to allow for same-sex spouses,

b. Act pursuant to their authority under Indiana Code § 16-37-3 to issue death certificates listing same-sex spouses, and

c. Act pursuant to their authority under Indiana Code § 31-11-4-4 to revise the marriage license application to allow for same-sex applicants.

4. The Commissioner of the Indiana State Department of Revenue, his officers, agents, servants, employees and attorneys, and all those acting in concert with them, are **PERMANENTLY ENJOINED** to exercise their authority under Indiana Code § 6-8.1-3 to revise the filing guidelines to allow and process joint tax returns for same-sex married couples as they do for opposite-sex married couples.

5. The Board of Trustees of the Indiana Public Retirement System and Steve Russo, the Executive Director of the Indiana Public Retirement System, and their officers, agents, servants, employees and attorneys, and all those acting in concert with them, are **PERMANENTLY ENJOINED** to administer the Pension Fund pursuant to Indiana Code Chapters 5-10.5-3, 5-10.5-4, and 5-10.5-6, so as to provide the same benefits for all married couples, regardless of whether the couples are of the opposite sex or the same sex.

This Order does not apply to Governor Pence, who the court found was not a proper party. This Order takes effect on the 25th day of June 2014.

SO ORDERED this 25th day of June 2014.

RICHARD L. YOUNG, CHIEF JUDGE
United States District Court
Southern District of Indiana

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