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

In The United States Court of Appeals For The Seventh Circuit

MARILYN RAE BASKIN, et al.,
Plaintiffs-Appellees,

v.

GREG ZOELLER, et al.,
Defendants-Appellants.

MIDORI FUJII, et al.,
Plaintiffs-Appellees,

v.

COMMISSIONER OF THE INDIANA STATE DEPARTMENT OF REVENUE, in his official capacity, et al.,
Defendants-Appellants.

PAMELA LEE, et al.,
Plaintiffs-Appellees,

v.

BRIAN ABBOTT, et al.,
Defendants-Appellants.

On Appeal From The United States District Court For The Southern District of Indiana

Case Nos. 1:14-cv-00355-RLY-TAB, 1:14-cv-00404-RLY-TAB, 1:14-cv-00406-RLY-MJD
The Honorable Richard L. Young Presiding

BRIEF OF PLAINTIFFS-APPELLEES

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Camilla B. Taylor
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Counsel for Plaintiffs-Appellees Marilyn Rae Baskin, et al.

Kenneth J. Falk (Counsel of Record)
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James Esseks
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Counsel for Plaintiffs-Appellees Midori Fujii, et al.

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Karen Celestino-Horseman
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Mark W. Sniderman
SNIDERMAN NGUYEN, LLP
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Indianapolis, Indiana 46204

Kathleen M. Sweeney
SWEENEY HAYES LLC
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Indianapolis, Indiana 46204

Counsel for Plaintiffs-Appellees Pamela Lee, et al.
Additional Counsel Listed on Signature Block

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 14-2386

Short Caption: Marilyn Rae Baskin, et al. v. Greg Zoeller, et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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[ ] **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Marilyn Rae Baskin, Esther Fuller, Bonnie Everly, Linda Judkins, Dawn Lynn Carver, Pamela Ruth Elease Eanes, Henry Greene and Glenn Funkhouser, their son, C.A.G., Nikole Quasney and Amy Sandler, and their daughters M.Q.-S., and A.Q.-S.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Lambda Legal Defense & Education Fund, Inc., Kirkland & Ellis LLP, Law Office of Barbara J. Baird

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: s/ Paul D. Castillo Date: 06/26/2014

Attorney's Printed Name: Paul D. Castillo

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ____

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 14-2386

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N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: s/ Camilla B. Taylor Date: 06/26/2014

Attorney's Printed Name: Camilla B. Taylor

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** _____ **No** X

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 14-2386

Short Caption: Marilyn Rae Baskin, et al. v. Greg Zoeller, et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: s/ Jordan M. Heinz Date: 06/26/2014

Attorney's Printed Name: Jordan M. Heinz

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

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E-Mail Address: jordan.heinz@kirkland.com

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 14-2386

Short Caption: Marilyn Rae Baskin, et al. v. Greg Zoeller, et al.

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N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: s/ Brent P. Ray Date: 06/26/2014

Attorney's Printed Name: Brent P. Ray

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

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E-Mail Address: brent.ray@kirkland.com

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 14-2386

Short Caption: Marilyn Rae Baskin, et al. v. Greg Zoeller, et al.

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N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: s/ Dmitriy Tishyevich Date: 06/26/2014

Attorney's Printed Name: Dmitriy Tishyevich

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** _____ **No** X

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E-Mail Address: dmitriy.tishyevich@kirkland.com

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 14-2386

Short Caption: Marilyn Rae Baskin, et al. v. Greg Zoeller, et al.

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N/A

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N/A

Attorney's Signature: s/ Melanie MacKay Date: 06/26/2014

Attorney's Printed Name: Melanie MacKay

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 14-2386

Short Caption: Marilyn Rae Baskin, et al. v. Greg Zoeller, et al.

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N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: s/ Scott Lerner Date: 06/26/2014

Attorney's Printed Name: Scott Lerner

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

Address: 300 North LaSalle, Chicago, IL 60654

Phone Number: 312-862-2000 Fax Number: 312-862-2200

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 14-2386

Short Caption: Marilyn Rae Baskin, et al. v. Greg Zoeller, et al.

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N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: s/ Barbara J. Baird Date: 06/26/2014

Attorney's Printed Name: Barbara J. Baird

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

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Phone Number: 317-637-2345 Fax Number: 317-637-2369

E-Mail Address: bjbaird@bjbairdlaw.com

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 14-2387

Short Caption: Fujii v. Commissioner, Indiana State Department of Revenue

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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Monica Wehrle, Harriet Miller, Gregory Hasty, Christopher Vallero, Rob MacPherson, Steven Stolen, A. M.S.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

ACLU of Indiana

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

not applicable

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

not applicable

Attorney's Signature: s/ Kenneth J. Falk Date: June 27, 2014

Attorney's Printed Name: Kenneth J. Falk

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ____

Address: ACLU of Indiana, 1031 E. Washington St., Indianapolis, IN 46202

Phone Number: 317/635-4059 ext. 104 Fax Number: 317/635-4105

E-Mail Address: kfalk@aclu-in.org

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 14-2387

Short Caption: Fujii v. Commissioner, Indiana State Department of Revenue

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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Midori Fujii, Melody Layne, Tara Betterman, Scott Moubray-Carrico, Rodney Moubray-Carrico, L.M.-C.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Lemieux Law

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not applicable

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

not applicable

Attorney's Signature: s/ Sean C. Lemieux Date: 7/1/2014

Attorney's Printed Name: Sean C. Lemieux

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ____

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E-Mail Address: sean@lemieuxlawoffices.com

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 14-2388

Short Caption Lee v. Abbott

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a governmental party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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Pamela Lee, Candace Batten-Lee, Teresa Welborn, Elizabeth J. Piette, Ruth Morrison, Martha Leverett, Karen Vaughn-Kajmowicz, Tammy Vaughn-Kajmowicz, J.S.V., T.S.V., and T.R.V., by their parents and next friends Karen Vaughn-Kajmowicz and Tammy Vaughn-Kajmowicz

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Of Counsel, Austin & Jones, PC, Fillenwarth Dennerline Groth & Towe, LLP, Sniderman Nguyen, LLP; Sweeney Law Group, LLC; Sweeney Hayes, LLC

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i) Identify all its parent corporations, if any; and
N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:
N/A

Attorney's Signature: /s/ Karen Celestino-Horseman Date: July 1, 2014
Attorney's Printed Name: Karen Celestino-Horseman

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d)
Yes ____ No X

Address: Austin & Jones, P.C.
One North Pennsylvania St., Suite 220
Indianapolis, Indiana 46204

Phone Number: (317) 632-5633 Fax Number: (317) 630-1040

E-Mail Address: Karen@KCHorseman.com

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 14-2388

Short Caption: Lee v. Abbott

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Pamela Lee, Candace Batten-Lee, Teresa Welborn, Elizabeth J. Piette, Ruth Morrison, Martha Leverett, Karen Vaughn-Kajmowicz, Tammy Vaughn-Kajmowicz, J.S.V., T.S.V., and T.R.V., by their parents and next friends Karen Vaughn-Kajmowicz and Tammy Vaughn-Kajmowicz

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Fillenwarth Dennerline Groth & Towe, LLP; Austin & Jones, PC; Sniderman Nguyen LLP; Sweeney Law Group, LLC; Sweeney Hayes, LLC

(3) If the party or amicus is a corporation:
i) Identify all its parent corporations, if any; and
N/A
ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:
N/A

Attorney's Signature: *s/ Mark W. Sniderman* Date: July 8, 2014
Attorney's Printed Name: Mark W. Sniderman

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d)
Yes ____ No X

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Attorney's Signature: *s/ Robert A. Katz* Date: July 8, 2014
Attorney's Printed Name: Robert A. Katz

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d)
Yes ____ No X

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N/A

Attorney's Signature: _____ Date: June 30, 2014
Attorney's Printed Name: William R. Groth

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d)
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N/A

Attorney's Signature: _____ Date: July 15, 2014

Attorney's Printed Name: Kathleen M. Sweeney

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d)
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JURISDICTIONAL STATEMENT

The Jurisdictional Statement of the Appellants is complete and correct.

STATEMENT OF ISSUES

Do Indiana laws prohibiting same-sex couples from marrying and denying recognition to marriages entered into by same-sex couples in other jurisdictions violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment?

STATEMENT OF CASE

I. The Indiana Marriage Ban

The Indiana Code bans same-sex couples from marrying and does not recognize their valid out-of-state marriages:

> (a) Only a female may marry a male. Only a male may marry a female.
>
> (b) A marriage between persons of the same gender is void in Indiana even if the marriage is lawful in the place where it is solemnized.

Ind. Code § 31-11-1-1.

This appeal arises from a facial and as applied constitutional challenge to Section 31-11-1-1, along with any other Indiana law preventing the celebration or recognition of marriage by same sex couples ("the marriage ban"), brought by Plaintiffs in three separate actions, consolidated on appeal: *Baskin v. Bogan* (No. 14-2386) ("*Baskin*"); *Fujii v. Commissioner of the Indiana State Department of Revenue* (No. 14-2387) ("*Fujii*"); and *Lee v. Abbott* (No. 14-2388) ("*Lee*").

II. The Plaintiffs-Appellees

Plaintiffs-Appellees are same-sex Hoosier couples who wish to marry in Indiana but cannot; same-sex couples married outside of Indiana, whose marriages Indiana does not recognize; and children raised by these couples, who seek full and equal recognition for the family to which they belong. They bring this suit against Defendant State officials and county clerks (collectively, the "State") acting under color of state law who execute or enforce Indiana's laws pertaining to marriage. As a result of the State's enforcement of the marriage ban, these couples are denied the status of marriage and they and their children are denied the numerous protections, benefits, rights, and responsibilities available under state and federal law to married people.

Couples who wish to marry in Indiana:

Appellees Rae Baskin and Esther Fuller, Bonnie Everly and Lyn Judkins, Dawn Carver and Pam Eanes, Henry Greene and Glenn Funkhouser, Monica Wehrle and Harriet Miller, and Gregory Hasty and Christopher Vallero are unmarried same-sex couples who have been in loving, committed relationships for years and wish to marry the person they love.[1] (B1.R. 221 at ¶ 3, B1.R. 222 at ¶ 7; B1.R. 226 at ¶¶ 3-4, B1.R. 227 at ¶ 11; B1.R. 229 at ¶¶ 3-4, B1.R. 231-232 at ¶¶ 15-17, 19; B1.R. 234 at ¶ 2, B1.R. 235-238 at ¶¶ 6-17; B1.R. 240 at ¶ 3, B1.R. 241 at ¶ 7; B1.R. 244 at ¶ 3, B1.R. 245 at ¶ 5; B1.R. 249 at ¶ 3, B1.R. 252-253 at ¶¶ 16-20; B1.R. 256 at ¶ 3,

[1] During the two-day period between the District Court's judgment and this Court's stay, both Monica Wehrle and Harriet Miller and Gregory Hasty and Christopher Vallero married.

B1.R. 257 at ¶¶ 9-10, B1.R. 258-259 at ¶¶ 14-17; F.R. 102 at ¶¶ 1-2; F.R. 103 ¶ 10; F.R. 105 at ¶¶ 1-4.)[2] These couples seek to secure for each other and their children the dignity and legal protections of civil marriage. There are no fewer than 614 statutes in Indiana that treat these families differently, to their disadvantage, because the State refuses to allow same-sex couples to marry (F.R. 248-309), including:

- the right to file joint state tax returns, Ind. Code § 6-3-4-2;
- the protection of the marital privilege, Ind. Code § 34-46-3-1.c;
- spousal support obligations, Ind. Code § 35-46-1-6; and
- child support obligations and custodial rights with respect to children of the marriage, Ind. Code § 31-9-2-13.

These rights and benefits also enable couples to care for each other in times of sickness and challenge:

- the right to make health care decisions for an incapacitated spouse, Ind. Code § 16-36-1-5;
- state retirement fund survivor benefits for spouses, Ind. Code §§ 5-10.2-3-7.6, 5-10.2-3-8, 5-10.3-12-27;
- preference for appointment as legal guardian for an incapacitated spouse, Ind. Code § 29-3-5-5(a)(2);

and provide security in times of overwhelming grief:

- spousal protections upon death, including rights to inheritance when spouse dies intestate, Ind. Code § 29-1-2-1;
- an elective share of a deceased spouse's estate against a will, Ind. Code § 29-1-3-1;

---

[2] Citations to the first volume of the *Baskin* record appear as "B1.R. __"; citations to the second volume of the *Baskin* record appear as "B2.R. __"; citations to the *Fujii* record appear as "F.R. __"; citations to the *Lee* record appear as "L.R. __"; citations to Appellants' Required Short Appendix (Dkt. No. 37) appear as "Short App. __"; citations to Appellants' Separate Appendix (Dkt. No. 38) appear as "App. __".

- survivor benefits for the spouse of a public safety officer killed in the line of duty, Ind. Code §§ 5-10-10-6, 5-10-10-6.5, 5-10-14-3; 10-12-2-6.

Should couples decide to terminate their marriages, the law provides an orderly process for divorce, including the fair division of marital property. Ind. Code § 31-15-7-4. The Plaintiff families are also denied numerous other tangible benefits and protections under state law, and more than 1,000 federal benefits made available to married same-sex couples in the wake of the June 2013 *Windsor* decision. *See United States v. Windsor*, 133 S. Ct. 2675, 2683 (2013).

Beyond the tangible harms these exclusions cause, the Plaintiff families suffer stigma and humiliation as a result of state-sanctioned discrimination. The marriage ban denies them the symbolic imprimatur and dignity that the label "marriage" uniquely confers. It is the only term in our society that, without further explanation, conveys that a relationship is deep and abiding, and commands instant respect for a relationship. The State's enforcement of the marriage ban harms same-sex couples in numerous tangible and intangible ways. (*See, e.g.*, B1.R. 252 at ¶¶ 16-18; B1.R. 258 at ¶ 15; F.R. 103 at ¶¶ 7-8, 10-14, F.R. 105-106 at ¶¶ 6-10.)

Couples married outside Indiana:

Appellees Nikole Quasney and Amy Sandler, Midori Fujii (whose spouse has passed away), Melody Layne and Tara Betterman, Scott and Rodney Moubray-Carrico, Rob MacPherson and Steven Stolen, Indianapolis Metropolitan Police ("IMPD") Officer Pamela Lee and Candace Batten-Lee, IMPD Officer Teresa Welborn and Elizabeth Peitte, Evansville Police Department Sergeant Karen Vaughn-Kajmowicz and Tammy Vaughn-Kajmowicz, Indianapolis Fire Department

Battalion Chief (Retired) Ruth Morrison and Martha Leverett, all entered into lawful marriages in other jurisdictions with their same-sex partners. (B1.R. 157 at ¶ 3, B1.R. 163 at ¶ 23; B1.R. 150-151 at ¶¶ 15-16; F.R. 88 at ¶ 5; F.R. 91 at ¶ 6; F.R. 95 at ¶ 10; F.R. 97 at ¶ 2; L.R. 66 at ¶ 2, L.R. 71 at ¶ 2, L.R. 77 at ¶ 2, L.R. 88 at ¶ 2.) The marriage ban prevents each of these individuals from being recognized as married in their home state of Indiana.

These couples urgently seek recognition of their out-of-state marriages to obtain, for example, an accurate death certificate in *Baskin*, tax equity in *Fujii*, and death benefits in *Lee*. Appellee Niki Quasney, age 37, is in the final stretch of her battle against Stage IV ovarian cancer. (B1.R. 148-149 at ¶ 10; B2.R. 92.) The need for recognition of her marriage to Amy Sandler is urgent. (B1.R. 150 at ¶ 14.) Niki wishes to be recognized as married while she is still alive, and Amy needs an accurate death certificate immediately after Niki's death to take care of Niki's affairs. (B1.R. 153-154 at ¶¶ 20-22; B1.R. 162-163 at ¶ 22; B1.R. 165 at ¶¶28-30.) Their local hospital refused to recognize their family, causing them to fear that other Indiana hospitals will not recognize their marriage during the course of Niki's medical care, and requiring them to travel to Chicago for chemotherapy appointments and even emergency medical care because Illinois recognizes the legal status of their relationship. (B1.R. 163-64 at ¶¶ 24-25.) The trial court accordingly granted Niki, Amy, and their children a temporary restraining order and preliminary injunction, requiring Indiana to recognize their marriage. (B2.R. 91-104; B1.R. 300-310; App. 97-110.) This Court subsequently lifted a stay it had

issued of the trial court's summary judgment order as applied to them during the pendency of this appeal. (7/1/2014 Order, Dkt. No. 20.)

The appellees in *Lee* are all active members of the 1977 Police Officers' and Firefighters' Pension and Disability Fund ("Pension Fund"). (L.R. 66 at ¶ 3, L.R. 71 at ¶ 3, L.R. 77 at ¶ 4, L.R. 88 at ¶ 3.) A surviving spouse of a first responder Pension Fund member who dies in the line of duty is paid a lump sum of $150,000.00, tax free. *See* Ind. Code § 36-8-8-13.8(c).[3] If a first responder dies in the line of duty, while on active duty, or while retired, his/her surviving spouse is entitled to receive a monthly benefit for life. *See* Ind. Code § 36-8-8-14.1.[4] The Pension Fund has refused to designate the same-sex spouses of the first responders as spouse beneficiaries, precluding the spouses of Officers Lee, Welborn, Sergeant Vaughn-Kajmowicz, and Chief Morrison from collecting death benefits in the event of their death. The *Lee* first responders worry about their families' well-being if they cannot receive these benefits. (L.R. 66 at ¶4; L.R. 68 at ¶¶ 10-12; L.R. 73-74 at ¶¶ 10-12; L.R. 81 at ¶ 15; L.R. 90-91 at ¶¶ 10-12.)

The children-appellees:

Many of the Plaintiff couples are parents to children, including A.Q.-S. and M.Q.-S., young daughters of Amy and Niki; C.A.G., the twelve-year old son of Henry

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[3] Indiana Public Retirement System, *Police and Firefighters Members Handbook*, Survivor Benefits Chart, http://www.in.gov/inprs/77fundmbrhandbooksurvivorbenefits.htm (last visited July 24, 2014).

[4] 1977 Police Officers' & Firefighters' Pension and Disability Fund, *1977 Fund at a Glance*, at 2, http://www.in.gov/inprs/files/77_fund_glance_membership.pdf (last visited July 24, 2014).

and Glenn; A.M.-S., the fifteen-year old daughter of Rob and Steven; L.M.-C., the six-year old son of Scott and Rodney; and six-year old J.S.V. and three-year old twins T.S.V. and T.R.V., the children of Karen and Tammy. (B1.R. 157 at ¶ 2; B1.R. 249 at ¶ 3, B1.R. 251-252 at ¶¶ 13-15; F.R. 93 at ¶ 3; F.R. 98-99 at ¶¶ 5, 12; F.R. 100 at ¶¶ 1-3; L.R. 79 at ¶¶ 10-11.) The parents of these children worry that the marriage ban sends the message that their family is not worthy of the same respect given to other families whose parents may marry (B1.R. 253 at ¶ 20; B1.R 268 at ¶ 25; B1.R. 163 at ¶ 23; B1.R. 165 at ¶¶ 28-30; B1.R. 152 at ¶ 18; F.R. 95 at ¶ 12; F.R. 98-99 at ¶ 12; L.R. 80 at ¶ 13; L.R. 91 at ¶ 12), and prevents their children from feeling pride in their family (F.R. 95 at ¶ 12; B1.R. 253 at ¶ 20; L.R. 80 at ¶ 12). The children themselves perceive that they and their families are being treated differently. (F.R. 95 at ¶ 12; F.R. 100-101 at ¶¶ 5-7.) Being able to marry would not only provide their families with financial and healthcare security, but would also demonstrate to their children the legitimacy and strength of their family union. (B1.R. 252-253 at ¶¶ 16-20; B1.R. 257 at ¶ 10, B1.R. 258 at ¶ 15; B1.R. 162-163 at ¶ 22, B1.R. 165 at ¶¶ 29-30; B1.R. 153-154 at ¶¶ 21-22; F.R. 88-89 at ¶¶ 9-10; F.R. 91 at ¶ 11; F.R. 94-95 at ¶¶ 6-7; F.R. 95 at ¶ 12; F.R. 103 at ¶¶ 7-8, 14; F.R. 105-106 at ¶¶ 8-9; L.R. 68 at ¶ 12; L.R. 81 at ¶ 15; L.R. 92 at ¶ 14.)

SUMMARY OF ARGUMENT

The Supreme Court explained in *United States v. Windsor* that when government relegates same-sex couples' relationships to a "second-tier" status, the government "demeans the couple," "humiliates…children now being raised by same-sex couples," 133 S. Ct. at 2694, deprives these families of equal dignity, and

"degrade[s]" them, *id.* at 2695, in addition to causing them countless tangible harms, all in violation of "basic due process and equal protection principles," *id*. at 2682. In the thirteen months since *Windsor* was decided, an avalanche of federal and state court decisions have struck down state marriage bans as unconstitutional.[5] In fact, no court has upheld a marriage ban against constitutional challenge since *Windsor*.

The Indiana marriage ban deserves the same fate. It deprives same-sex couples of equal dignity and autonomy in the most intimate sphere of their lives and brands them as inferior to other married couples in Indiana, denying them state and federal protections, responsibilities, and benefits, and inviting ongoing

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[5] *Bostic v. Schaefer*, No. 14-1167, slip op. (4th Cir. July 28, 2014), affirming *Bostic v. Rainey*, 970 F. Supp. 2d 456 (E.D. Va. 2014); *Bishop v. Smith*, Nos. 14-5003, 14-5006, 2014 WL 3537847 (10th Cir. July 18, 2014), affirming *Bishop v. U.S. ex rel. Holder,* 962 F. Supp. 2d 1252 (N.D. Okla. 2014); *Kitchen v. Herbert*, No. 13-4178, 2014 WL 2868044 (10th Cir. June 25, 2014), *affirming Kitchen v. Herbert*, 961 F. Supp. 2d 1181 (D. Utah 2013); *Burns v. Hickenlooper*, No. 14-cv-01817, 2014 WL 3634834 (D. Colo. July 23, 2014); *Love v. Beshear*, No. 3:13-cv-750, 2014 WL 2957671 (W.D. Ky. July 1, 2014); *Baskin v. Bogan*, No. 1:14-cv-00355, 2014 WL 2884868 (S.D. Ind. June 25, 2014); *Wolf v. Walker*, 986 F. Supp. 2d 982 (W.D. Wis. 2014); *Whitewood v. Wolf*, No. 1:13-cv-1861, 2014 WL 2058105 (M.D. Pa. May 20, 2014); *Geiger v. Kitzhaber*, Nos. 6:13-cv-01834, 6:13-cv-02256, 2014 WL 2054264 (D. Or. May 19, 2014); *Evans v. Utah*, No. 2:14-cv-00055, 2014 WL 2048343 (D. Utah, May 19, 2014); *Latta v. Otter*, No. 1:13-cv-00482, 2014 WL 1909999 (D. Idaho May 13, 2014); *Henry v. Himes*, No. 1:14-cv-129, 2014 WL 1418395 (S.D. Ohio Apr. 14, 2014); *DeBoer v. Snyder*, 973 F. Supp. 2d 757 (E.D. Mich. 2014); *Tanco v. Haslam*, No. 3:13-cv-01159, 2014 WL 997525 (M.D. Tenn. Mar. 14, 2014) (preliminary injunction); *De Leon v. Perry*, 975 F. Supp. 2d 632 (W.D. Tex. 2014) (preliminary injunction); *Lee v. Orr*, 13-cv-8719, 2014 WL 683680 (N.D. Ill. Feb. 21, 2014); *Bourke v. Beshear*, 3:13-cv-750-H, 2014 WL 556729 (W.D. Ky. Feb 12, 2014); *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968 (S.D. Ohio 2013); *Pareto v. Ruvin*, No. 14-1661 (Miami-Dade County Cir. Ct., July 25, 2014) (invalidating Florida's ban); *Huntsman v. Heavilin*, No. 2014-CA-305-K (Monroe County Cir. Ct., July 17, 2014) (same); *Brinkman v. Long*, No. 13-cv-32572, 2014 WL 3408024 (Adams County Dist. Ct., July 9, 2014) (invalidating Colorado's ban); *Griego v. Oliver*, 316 P.3d 865, 889 (N.M. 2013); *Wright v. Arkansas,* No. 60CV-13-2662, 2014 WL 1908815 (Pulaski County Cir. Ct., May 9, 2014) (invalidating Arkansas' ban); *Garden State Equal. v. Dow*, 82 A.3d 336 (N.J. Super. Ct. Law Div. 2013) (invalidating New Jersey's ban).

discrimination from third parties. This deprivation violates due process by infringing upon the fundamental right to marry, and it violates equal protection by treating same-sex and different-sex couples differently for no reason other than to impose second-class citizenship on a targeted group. Though the marriage ban warrants strict scrutiny by infringing fundamental rights, or at least heightened scrutiny by discriminating on the basis of gender and sexual orientation, it fails under even rational basis review. There is no conceivable governmental interest served by continuing to bar same-sex couples from marrying, or denying recognition to same-sex couples' out-of-state marriages, and the only interest advanced by the State—"responsible procreation"—certainly does not justify the ban. Marriage confers status and dignity on a relationship and a family, it is a public expression of love and support, and it accords benefits and responsibilities that are found nowhere else. The Constitution compels that the State may no longer deny lesbian and gay Hoosiers the ability to marry or recognition of their existing out-of-state marriages.

STANDARD OF REVIEW

Appellees agree with Appellants' discussion of the standard of review.

ARGUMENT

I. THE AUTHORITY OF A STATE TO REGULATE MARRIAGE IS CONSTRAINED BY THE CONSTITUTION.

The Plaintiff families challenge Indiana's "laws defining and regulating marriage" because they fail to "respect the constitutional rights of persons" by depriving Indiana same-sex couples of the guarantees of liberty and equality under

the Fourteenth Amendment. *Windsor*, 133 S. Ct. at 2691 ("State laws defining and regulating marriage, of course, must respect the constitutional rights of persons, *see, e.g.*, *Loving v. Virginia*, 388 U.S. 1 (1967)."). Against this framework, the State attempts a sleight-of-hand by recasting this appeal as a federalism battle over the State's right to regulate marriage, rather than the battle that it is—to protect the constitutional rights of its resident citizens. But no one here contests the State's authority, as a general matter, to define and regulate marriage.[6] The issue here is narrower: Can Indiana's laws excluding same-sex couples from marriage satisfy the "constitutional guarantees" required by *Windsor*? *Id.* at 2692 ("The States' interest in defining and regulating the marital relation, ***subject to constitutional guarantees***, stems from the understanding that marriage is more than a routine classification for purposes of certain statutory benefits.") (emphasis added).

The State would have this Court abdicate its role as adjudicator of challenges to protect constitutional rights and would grant the State unfettered discretion to determine who is and is not deserving of those protections. However, Indiana's marriage laws cannot contravene the Plaintiff families' constitutional rights. *See W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political

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[6] Indeed, no federalism issue is presented here at all. There is a clear "distinction between power-allocating and rights-securing provisions of the Constitution." *Dennis v. Higgins*, 498 U.S. 439, 454 (1991) (Kennedy, J., dissenting). Unlike constitutional provisions addressing the powers of the federal government *vis-à-vis* the states, the liberty and equality claims presented here "relate directly to the rights of persons within the States and as between the States and such persons therein," *id.* at 455, and, as such, Plaintiffs' claims are redressable under 28 U.S.C. § 1983.

controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."). As the Supreme Court recently reiterated, it is a "well-established principle that when hurt or injury is inflicted…by the encouragement or command of laws or other state action, the Constitution requires redress by the courts." *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1637 (2014); *see also Hall v. Florida*, 134 S. Ct. 1986, 2001 (2014) ("The States are laboratories for experimentation, but those experiments may not deny the basic dignity the Constitution protects."); *Bostic*, slip op. at 48 (4th Cir. July 28, 2014).[7]

Contradicting every court that has interpreted *Windsor*, the State misreads the opinion by asserting that *Windsor* protects state refusals to recognize marriages between same-sex couples as a "legitimate state prerogative[]over marriage." (Apps.'

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[7] In support of its attempt to reframe this appeal, the State cites *Baker v. Nelson*, 409 U.S. 810 (1972)—a forty-year-old summary dismissal of claims brought by a same-sex couple seeking to marry in early 1970s Minnesota—to argue that the Supreme Court has insulated challenges to marriage bans from lower court review. (Brief & Req. Short App'x of Appellants, Dkt. No. 37 ("Apps.' Br."), at 18-19.) However, summary dismissals are binding only to the extent that they have not been undermined by subsequent doctrinal developments. *See Hicks v. Miranda*, 422 U.S. 332, 344 (1975). In the decades since *Baker*, landmark developments have vastly changed the constitutional landscape. *Baker* rejected appellants' sex discrimination claims before the Supreme Court recognized that sex-based classifications require heightened scrutiny, *see Frontiero v. Richardson*, 411 U.S. 677, 688 (1973) (plurality op.); before *Romer v. Evans* held that a bare desire to harm gay people cannot constitute a legitimate government interest, *see* 517 U.S. 620, 634-35 (1996); before *Lawrence v. Texas* established that lesbian and gay individuals have the same liberty interest in developing and maintaining family relationships as heterosexuals, *see* 539 U.S. 558, 578 (2003); and before the Court invalidated federal anti-marriage legislation because it "impose[d] a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages," *Windsor*, 133 S. Ct. at 2693. *See, e.g.*, *Bostic*, slip op. at 34-35 (4th Cir. July 28, 2014) (collecting cases dismissing *Baker* as a reason to dismiss marriage equality challenges); *Kitchen*, 2014 WL 2868044, at *8 (10th Cir. June 25, 2014) (same).

Br. at 48.) But *Windsor* expressly cautioned that "State laws defining and regulating marriage, of course, must respect the constitutional rights of persons." *Windsor*, 133 S. Ct. at 2691 (citation omitted). Moreover, the *Windsor* Court expressly rejected any characterization of its decision as being based on federalism principles, stating that the Court found it "unnecessary to decide whether [the Defense of Marriage Act's ("DOMA")] federal intrusion on state power is a violation of the Constitution, because it disrupts the federal balance." *Id.* at 2692. Instead, *Windsor* held that DOMA "***violates basic due process and equal protection principles***," *id.* at 2693 (emphasis added), and held impermissible and unconstitutional DOMA's "avowed purpose" and "practical effect of…impos[ing] a disadvantage, a separate status, and so a stigma" on same-sex relationships. *Id.*; *see also id.* at 2709 (Scalia, J., dissenting) ("[T]he real rationale of today's opinion…is that DOMA is motivated by 'bare…desire to harm' couples in same-sex marriages. How easy it is, indeed how inevitable, to reach the same conclusion with regard to state laws denying same-sex couples marital status.").[8] The State's strained federalism interpretation of *Windsor* ignores the explicit text of that decision.

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[8] The Court commented upon the breadth of DOMA's reach and its unprecedented departure from traditional federal deference to states' authority over domestic relations for reasons "quite apart from principles of federalism," but instead because "'discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious'" to guarantees of due process and equal protection. *Id.* at 2692 (quoting *Romer*, 517 U.S. at 633). Thus, the Court's discussion of DOMA's unusual intrusion into an area traditionally left to states was simply evidence of the law's "unusual character," necessitating careful consideration to determine whether the law unconstitutionally infringes guarantees of equal protection and liberty.

II. THE MARRIAGE BAN INFRINGES ON THE FUNDAMENTAL RIGHT TO MARRY AND OTHER LIBERTY INTERESTS PROTECTED BY THE DUE PROCESS CLAUSE.

Indiana's marriage ban deprives unmarried same-sex couples of their fundamental right to marry, and deprives married same-sex couples of their fundamental right to continue to be married in their home state of Indiana. Each of these deprivations violates due process. The Due Process Clause of the Fourteenth Amendment provides that no "State [shall] deprive any person of life, liberty, or property, without due process of law," U.S. Const. Amend. XIV, § 1, and protects individuals from arbitrary governmental intrusion into fundamental rights. *See*, *e.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 719-20 (1997). When laws burden the exercise of a fundamental right, the government must show that the intrusion is narrowly tailored to serve a compelling government interest. *See Zablocki v. Redhail*, 434 U.S. 374, 388 (1978). Here, the State can identify no legitimate government interest, let alone a compelling one, in defense of the marriage ban. Nor can it show that the ban is rationally related, let alone narrowly tailored, to the interest it advances. Thus, as described in Section V, *infra*, the marriage ban does not survive even rational basis review, let alone strict scrutiny—the proper test under which the law should be analyzed.

A. The Marriage Ban Infringes Same-Sex Couples' Fundamental Right To Marry.

The right to marry is protected as fundamental under the due process guarantee because deciding whether and whom to marry is precisely the kind of personal matter about which government should have little say. *See, e.g.*, *Webster v. Reprod.*

Health Servs., 492 U.S. 490, 564-65 (1989) ("[F]reedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."); *Turner v. Safley*, 482 U.S. 78, 95-96 (1987); *Moore v. City of E. Cleveland*, 431 U.S. 494, 499 (1977); *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

Thus, in recognizing marriage as a fundamental right, courts have emphasized that the Constitution protects autonomy in personal decisions and specifically the free choice of one's spouse. *See, e.g.*, *Roberts v. U.S. Jaycees*, 468 U.S. 609, 620 (1984) (the Constitution "undoubtedly imposes constraints on the State's power to control the selection of one's spouse"); *Zablocki,* 434 U.S. at 387 (burden on right to marry unconstitutional because it affected individuals' "*freedom of choice* in an area in which we have held such freedom to be fundamental") (emphasis added); *Hodgson v. Minnesota,* 497 U.S. 417, 435 (1990) ("the regulation of constitutionally protected decisions, such as…whom [to] marry, must be predicated on legitimate state concerns other than disagreement with the choice the individual has made").[9]

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[9] The fundamental right to marry is among several closely-related, constitutionally-protected liberty interests, including the interests in association, integrity, autonomy, and self-definition. As such, the marriage ban burdens lesbian and gay adults' protected interest in autonomy over "personal decisions relating to…family relationships," *Lawrence*, 539 U.S. at 573-74, and impairs same-sex couples' ability to identify themselves and to participate fully in society as married couples, thus burdening their fundamental liberty interests in intimate association and self-definition. *See Windsor*, 133 S. Ct. at 2689; *Griswold v. Connecticut*, 381 U.S. 479, 482-483 (1965). For those same-sex couples who are parents, the ban interferes with their ability to secure legal recognition of their parent-child relationships through established legal mechanisms available to married parents, thus infringing their fundamental liberty interest in "direct[ing] the upbringing and education" of their child. *See Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534-35 (1925). Such infringements on the bonds between children and their parents violate the core of the substantive guarantees of the Due Process Clause. *See Moore*, 431

As the *Windsor* Court recognized (and lower courts since have repeatedly reaffirmed), this fundamental right is ***not*** limited to different-sex couples. In ruling that the federal government must provide marital benefits to married same-sex couples, and that married lesbian and gay persons and their children are entitled to equal dignity and treatment by their federal government, the Court acknowledged that marriage is not inherently defined by the sex or sexual orientation of the couples. To the contrary, marriage permits same-sex couples to "live with pride in themselves and their union and in a status of equality with all other married persons." *Windsor*, 133 S. Ct. at 2689. It is thus unconstitutional to "deprive some couples…but not other couples, of [the] rights and responsibilities [of marriage]." *Id.* at 2694; *see also Kitchen*, 2014 WL 2868044, at *16 (collecting cases).

B. The Fundamental Right To Marry Includes The Right Of Couples Married Out-Of-State To Remain Married Once They Return Home.

Just as the right to marry a spouse of one's own choosing has a deeply-rooted constitutional foundation, there is nothing novel about the principle that a couple has a fundamental right to have their marriage accorded legal recognition by the state in which the couple lives. That is precisely what the landmark case, *Loving v. Virginia,* was all about. In *Loving*, Mildred and Richard Loving, an interracial couple, left their home state of Virginia to marry in Washington, D.C., a jurisdiction that permitted persons of different races to marry, before returning home. 388 U.S. at 2. The Supreme Court struck down not only Virginia's law prohibiting interracial

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U.S. at 503. Thus, the same strict scrutiny analysis is appropriate as to the infringement on any these closely-related fundamental rights, including the marriage ban.

marriages within the state, but also its statutes that denied recognition to and criminally punished such marriages entered into outside the state. *Id.* at 4. Significantly, the Court held that Virginia's statutory scheme—including the penalties on out-of-state marriages and its voiding of marriages obtained elsewhere—"deprive[d] the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment." *Id.* at 12; *see also Zablocki*, 434 U.S. at 397 n.1 ("[T]here is a sphere of privacy or autonomy surrounding *an existing marital relationship* into which the State may not lightly intrude….") (emphasis added) (Powell, J., concurring).[10]

"When a state effectively terminates the marriage of a same-sex couple married in another jurisdiction, it intrudes into the realm of private marital, family, and intimate relations specifically protected by the Supreme Court." *Henry*, 2014 WL 1418395, at *9; *see also Windsor*, 133 S. Ct. at 2694 (explaining that when one jurisdiction refuses recognition of family relationships legally established in another, "[t]he differentiation demeans the couple, whose moral and sexual choices

[10] The expectation that a marriage, once entered into, will be respected throughout the land is deeply rooted in "[o]ur Nation's history, legal traditions, and practices." *Glucksberg*, 521 U.S. at 721. It is the "policy of the civilized world [] is to sustain marriages, not to upset them." *Madewell v. United States*, 84 F. Supp. 329, 332 (E.D. Tenn. 1949). Historically, certainty that a marital status once obtained will be universally recognized has been understood to be of fundamental importance both to the individual and to society more broadly. *See* 1 Joel Prentiss Bishop, *New Commentaries on Marriage, Divorce, and Separation* § 856, at 369 (1891). Accordingly, interstate recognition of marriage has been a defining and essential feature of American law. *See, e.g.*, Joseph Story, *Commentaries on the Conflict of Laws* § 113, at 187 (8th ed. 1883) ("[t]he general principle certainly is…that…marriage is decided by the law of the place where it is celebrated").

the Constitution protects, and whose relationship the State has sought to dignify") (internal citation omitted).[11]

The constitutionally-guaranteed right to marry would be meaningless if government were free to refuse recognition of a couple's marriage once entered, and effectively annul the marriage as if it had never occurred. The status of being married "is a far-reaching legal acknowledgment of the intimate relationship between two people," *Windsor*, 133 S. Ct. at 2692, a commitment of enormous import that spouses carry wherever they go throughout their married lives. Indiana may not strip same-sex spouses of "one of the vital personal rights essential to the orderly pursuit of happiness," *Loving,* 388 U.S. at 12, when they set foot in the State. Like Mildred and Richard Loving, Indiana same-sex spouses have a constitutional due process right "not to be deprived of one's already-existing legal

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[11] Indiana's own history and laws are consistent with the fundamental importance of the marriage recognition principle in U.S. legal history and tradition. The lower court aptly noted that "as a general rule, Indiana recognizes valid marriages performed in other states." (App. 83); *see also Mason v. Mason*, 775 N.E.2d 706, 709 (Ind. Ct. App. 2002) ("Indiana will accept as legitimate a marriage validly contracted in the place where it is celebrated."); *Roche v. Washington*, 19 Ind. 53, 54 (Ind. 1862) (out-of-state marriages generally recognized even when "not celebrated by the forms nor evidenced in the mode prescribed for marriages" in the forum state). This universal rule of inter-state marriage recognition, while often cast as comity rather than a constitutional principle, is an essential point in the constellation of protections accorded the institution of marriage.

The State relies on *Sclamberg v. Sclamberg*, 41 N.E.2d 801, 802-03 (Ind. 1942), for the proposition that Indiana follows the *lex loci* rule of recognizing marriages performed in other states "[u]nless strong public policy exceptions require otherwise[.]" (Apps.' Br. at 46.) But the validity of the marriage of an uncle and niece performed in Russia was *not an issue* before the court as the parties agreed the marriage was void. *Id.* at 802 ("The question is then whether a court of equity may…grant the appellee" a property settlement after the relationship ended.) Moreover, *Windsor* tells us that "the incidents, benefits, and obligations of marriages are uniform for all married couples within each State, though they may vary, *subject to constitutional guarantees*, from one State to the next." 133 S. Ct. at 2692 (emphasis added).

marriage and its attendant benefits and protections" once they return home. *Obergefell*, 962 F. Supp. 2d at 978.

C. Indiana Imposes Very Few Restrictions On Adults In Different-Sex Relationships Who Wish To Marry, And Does Not Require An Intention Or Ability To Procreate.

Consistent with the autonomy protected by the due process guarantee, Indiana (like all other states) imposes few restrictions on an individual's decision whether and whom to marry—the exception being the weighty restriction that the individual select a spouse of a different sex. A person may marry a different-sex spouse of another religion, with a criminal record, or with a history of abuse. Whether we choose to marry a scoundrel or a saint, or not to marry at all, the Constitution guarantees our liberty, for better or for worse, to choose for ourselves. *See generally Lawrence*, 539 U.S. at 562 ("[T]here are…spheres of our lives and existence…where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.").

Accordingly, Indiana permits a person to marry anyone he or she chooses, as long as the spouses meet age requirements, are unmarried, meet affinity and consanguinity limits, and evidence their consent on a joint license application. While the State argues that marriage is a mere "regulation" and "a means of enticing individuals whose sexual intercourse may produce children to enter voluntarily into a relationship that the government recognizes and regulates" (Apps.' Br. at 12), this narrow definition cannot be reconciled with the autonomy protected by the State for those who choose to marry. Married couples may have

children, but they need not and often do not. Spouses need not pass a fertility test, intend to procreate, be of childbearing age, have any parenting skills, or account for any history of childrearing or support.[12] Indeed, Indiana permits certain couples to marry only on condition that they *not* be procreative. *See* Ind. Code § 31-11-1-2 (permitting first cousins to marry only when both parties are at least 65 years old).

That the right to marry is not and has never been conditioned on procreation was expressly recognized in *Turner v. Safley*, 482 U.S. at 95-96 (marriage is a fundamental right for prisoners even though some may never have opportunity to "consummate" marriage; "important attributes" of marriage include "expressions of emotional support and public commitment," and, for some, "exercise of religious faith as well as an expression of personal dedication" and "precondition to the receipt of government benefits");[13] *cf. Lawrence*, 539 U.S. at 578 ("[D]ecisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment."). As *Windsor* acknowledged, an individual's choice of whom to marry often fulfills dreams and vindicates a person's dignity and desire for self-definition in ways that have nothing to do with a desire to

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[12] *See* Ind. Code § 31-11-1 ("Who May Marry") (laying out requirements for eligibility to marry, but without requiring any intention or capacity to procreate).

[13] Contrary to the State's misleading assertion (Apps.' Br. at 23-24), *Turner* made no distinction between prisoners capable and incapable of procreation. In fact, the marriage law *Turner* struck down generally allowed exceptions permitting prisoners bearing children to marry, but nonetheless offended the Constitution because it denied even non-procreating prisoners other "important attributes" of marriage. *Turner*, 482 U.S. at 82, 95. The Court made no mention of a "close fit between marriage and procreation" (Apps.' Br. at 24), and cautioned against relying on the lower-court opinion summarily affirmed in *Butler* and quoted by the State. *See Turner*, 482 U.S. at 96.

have children: marriage permits couples "to define themselves by their commitment to each other." *Windsor*, 133 S. Ct. at 2689; *see also Griswold*, 381 U.S. 479 (reaffirming the right of *married* couples to take steps *not* to have children and demonstrating that engaging in procreation is *not* the sine qua non of marriage).

D. The Fundamental Right Is To Marry, Not To Marry Someone Of The Same Sex.

The State tries to reframe this case as being about a right solely to "same-sex marriage," which it asserts is too recent a claim to be fundamental. (Apps.' Br. at 17-24.) However, the scope of a fundamental right is not defined by the identity of the people who seek to exercise it or who have been excluded from doing so in the past. Instead, the scope of a fundamental right is defined by *the attributes of the right itself*—in other words, the nature of the autonomy sought. "[I]n describing the liberty interest at stake, it is impermissible to focus on the identity or class-membership of the individual exercising the right." *Kitchen*, 2014 WL 2868044, at *18.

Thus, the Supreme Court has repeatedly rejected attempts to narrowly reframe the fundamental right to marry to include only those who have exercised it in the past. In *Loving*, for example, the Court did not describe the right asserted as a "new" right to "interracial marriage." Nor did the Court describe a right to "prisoner marriage" in *Turner*, 482 U.S. 78, or to "deadbeat parent marriage" in *Zablocki*, 434 U.S. 374. Similarly, the right that same-sex couples seek to exercise is simply the fundamental right to be married to the person of one's choice, which is among the most deeply rooted and cherished liberties identified by our courts. *See Windsor*,

133 S. Ct. at 2689 (in seeking to marry, same-sex couples seek to "occupy the same status and dignity as that of a man and woman in lawful marriage"); *Bostic*, slip op. at 42-43 (4th Cir. July 28, 2014).

The argument that same-sex couples seek a "new" right rather than the same right exercised by others repeats the very mistake made in *Bowers v. Hardwick,* 478 U.S. 186 (1986), and corrected in *Lawrence v. Texas*. In a challenge by a gay man to Georgia's sodomy statute, the *Bowers* Court recast the right at stake from a right, shared by all adults, to consensual intimacy with the person of one's choice, to a claimed "fundamental right" of "homosexuals to engage in sodomy." *Lawrence*, 539 U.S. at 566-67 (quoting *Bowers*, 478 U.S. at 190). In overturning *Bowers,* the *Lawrence* Court held that the constricted framing of the issue in *Bowers* "fail[ed] to appreciate the extent of the liberty at stake." *Id*. at 567.

E. The State Misapprehends The Role Of History When Considering The Scope Of Fundamental Rights.

The State argues that because same-sex couples historically have been excluded from marriage, the Plaintiff families seek to "redefine the right spoken of in *Loving*, *Turner*, and *Zablocki*." (Apps.' Br. at 22.) Not so. The Plaintiff families seek to enforce the very same fundamental right to marry. In numerous cases, the Supreme Court has struck down infringements of fundamental rights or liberty interests even though plaintiffs themselves were not historically afforded those rights. *See e.g.*, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847-48 (1992) ("[I]nterracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against

state interference by the substantive component of the Due Process Clause in *Loving*…."); *Turner*, 482 U.S. 78 (striking down restriction on inmates' ability to marry); *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971) (states may not burden divorced person's fundamental right to marry, even though no historical right to divorce and *remarry*); Virginia L. Hardwick, *Punishing the Innocent: Unconstitutional Restrictions on Prison Marriage and Visitation*, 60 N.Y.U. L. REV. 275, 277-79 (1985) (right to marry traditionally did not extend to prisoners).

The history of marriage in Indiana and elsewhere around the country belies any argument that marriage is static and defined by its historic limitations. As the State itself highlights, marriage laws have undergone radical changes in past generations to eliminate race-based requirements and the subordination of married women, and introduce no-fault divorce, among other things. (*See* Apps.' Br. at 3-4.) Today, nineteen states and the District of Columbia permit same-sex couples to marry, covering 44% of the U.S. population.[14]

The State's argument that the "traditional parameters of marriage…took no account of race" (Apps.' Br. at 22) is wrong. Most states banned marriage between persons of different races for much of this nation's history, and courts repeatedly upheld such laws against constitutional challenge, including in Indiana. *See State v. Gibson,* 36 Ind. 389 (Ind. 1871). Long into the twentieth century, the sheer weight of cases accepting the constitutionality of bans on interracial marriage was deemed

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[14] *See* Human Rights Campaign, *Percent of Population Living in States with Marriage Equality*, http://www.hrc.org/resources/entry/percent-of-population-living-in-states-with-marriage-equality (last visited July 24, 2014).

justification in and of itself to perpetuate these discriminatory laws.[15] Not until 1948 did a state high court critically examine these traditions, and strike down an anti-miscegenation law as violating rights of due process and equal protection. *See Perez v. Lippold*, 198 P.2d 17 (Cal. 1948). In *Perez*, the court acknowledged the traditional assumption that interracial marriages were "unnatural," *id.* at 22, but held that the long duration of a wrong cannot justify its perpetuation, *id.* at 26. It was not that the Constitution had changed; rather, its mandates had become more clearly recognized. *Id.* at 19-21, 32 (Carter, J., concurring) ("[T]he statutes now before us never were constitutional."); *see also Lawrence*, 539 U.S. at 579 ("[T]imes can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."); *Windsor*, 133 S. Ct. at 2689 (explaining that when permitting same-sex couples to marry, New York corrected "what its citizens and elected representatives perceived to be an injustice that they had not earlier known or understood").

Indiana's (and other states') marriage laws also have rejected differential treatment based on gender that was a signal element of marriage under common law. Under the doctrine of coverture, a married woman lost her separate legal existence as a person by operation of law, and the wife's legal being was subsumed

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[15] *See, e.g.*, *Jones v. Lorenzen,* 441 P.2d 986, 989 (Okla. 1965) (upholding Oklahoma anti-miscegenation law since the "great weight of authority holds such statutes constitutional"); *Scott v. State*, 39 Ga. 321, 325 (Ga. 1869) ("[M]oral or social equality between the different races…does not in fact exist, and never can."); *Jackson v. City & Cnty. of Denver*, 124 P.2d 240, 241 (Colo. 1942) ("It has generally been held that such acts are impregnable to the [constitutional] attack here made.").

by her husband. *See, e.g.*, *O'Daily v. Morris,* 31 Ind. 111 (Ind. 1869); *see also Thompson v. Thompson*, 218 U.S. 611, 614-15 (1910) ("[G]enerally speaking, the wife was incapable of making contracts, of acquiring property or disposing of the same without her husband's consent."). For centuries, through marriage laws, states reinforced the view that a man should be the legal head of the household, responsible for its support and links to external society, and having physical, sexual, economic and legal dominion over his wife. *See, e.g.*, *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872); *Brandt v. Keller,* 109 N.E.2d 729, 730 (Ill. 1952) (a married woman "was regarded as a chattel with neither property or other rights against anyone, for her husband owned all her property and asserted all her legal and equitable rights"). However, Indiana and all other states have rejected these past requirements for sex-differentiated roles within marriage. *See, e.g.*, *Bartrom v. Adjustment Bureau, Inc.*, 618 N.E.2d 1 (Ind. 1993). Today, the states and federal law treat both spouses equally and in gender-neutral fashion with respect to marriage, and the Supreme Court has confirmed that such gender-neutral treatment for marital partners is constitutionally required. *See Califano v. Goldfarb*, 430 U.S. 199 (1977); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975).[16]

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[16] The State also argues, just as proponents of interracial marriage bans did in generations past, that to recognize the claims by couples here as implicating the fundamental right to marry would send this nation on a slippery slope resulting in authorized polygamy. (Apps.' Br. at 42); *c.f. Perez,* 198 P.2d at 41 (comparing ban on interracial marriage to bans on incest, bigamy, and polygamy) (Shenk, J., dissenting). However, this Court, in affirming the court below, would change nothing about how marriage laws in Indiana operate except elimination of the gendered entry barrier. By contrast, in a polygamy ban challenge, the government would have a vast set of interests to assert that are different from those asserted here, such as issues with respect to who gets to consent to marry and how spousal presumptions should operate in a marriage with more

Though marriage today is a vastly different institution from marriage decades ago, the liberty interests at stake for same-sex couples who wish to be married are the same universal liberty interests protected by courts for generations, reflecting a societal understanding that respect for the choices we make about whom to marry is central to our dignity as human beings. As the District Court below concluded:

> 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.

(Short App. 33.)

III. THE MARRIAGE BAN MUST BE SUBJECTED TO HEIGHTENED SCRUTINY UNDER EQUAL PROTECTION ANALYSIS.

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State…[shall] deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 1. Equal protection ensures that similarly situated persons are not treated differently simply because of their membership in a class. *See City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) ("The Equal Protection Clause…is essentially a direction that all persons similarly situated should be treated alike.").[17]

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than two people. *See, e.g.*, *Potter v. Murray City*, 760 F.2d 1065, 1070 (10th Cir. 1985) (government justified in prohibiting polygamy in part because it "has established a vast and convoluted network of other laws clearly establishing its compelling state interest in and commitment to a system of domestic relations based exclusively upon the practice of monogamy as opposed to plural marriage").

[17] Gay and lesbian couples are similarly situated to heterosexual couples in every respect that is relevant to the purposes of marriage. *See Griswold*, 381 U.S. at 486 ("Marriage is a coming together for better or for worse, hopefully enduring, and intimate to

A. Sexual Orientation Classifications Must Be Subjected To Heightened Equal Protection Scrutiny.

1. The marriage ban discriminates based on sexual orientation.

The Indiana marriage ban directly classifies and prescribes "distinct treatment on the basis of sexual orientation." *See In re Marriage Cases*, 183 P.3d 384, 440-41 (Cal. 2008). Sexual orientation is relational and turns on whether a person is attracted to and wishes to form relationships with persons of the same or different sex. The marriage ban constitutes a categorical exclusion, preventing ***all*** lesbian and gay couples from marrying consistent with their sexual orientation.

The State argues that the marriage ban does not constitute a classification based on sexual orientation because lesbian and gay people remain free to marry someone of a different sex. (Apps.' Br. at 24-25.) This argument misunderstands sexual orientation and ignores controlling law. The act of falling in love with a person of the same sex, and the decision to marry and build a life with that person, are expressions of sexual orientation. As a matter of law, courts have held that laws targeting conduct closely associated with being gay or lesbian are laws classifying persons based on their sexual orientation.[18] In both *Lawrence* and *Windsor*, the

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the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects."); *Turner*, 482 U.S. at 95-96 (even where prisoner had no right to conjugal visits and therefore no possibility of consummating marriage or having children, "[m]any important attributes of marriage remain"). Here, Plaintiff couples "are in committed and loving relationships…just like heterosexual couples." *Varnum v. Brien*, 763 N.W.2d 862, 883 (Iowa 2009).

[18] *See Christian Legal Soc'y Ch. of the Univ. of Cal., Hastings Coll. of Law v. Martinez*, 130 S. Ct. 2971, 2990 (2010) (prohibition on same-sex intimate conduct no different from discrimination against the status of being gay or lesbian); *Lawrence*, 539 U.S. at 575 ("When homosexual conduct" is criminalized, that "in and of itself is an invitation to subject

Court held that laws targeting same-sex relationships targeted "homosexual persons."

2. This Court's prior decisions affording deferential scrutiny to classifications based on sexual orientation have been abrogated.

This Court's prior decisions applying rational basis review to sexual orientation classifications have been abrogated. In *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989), this Court held that "[i]f homosexual conduct may constitutionally be criminalized [as was true at the time based on *Bowers v. Hardwick*], then homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis scrutiny for equal protection purposes." *See also Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 950-51 (7th Cir. 2002) (citing cases, including *Bowers*, for the proposition that rational basis was the appropriate level of review). Notably, neither *Ben-Shalom* nor *Schroeder* addressed the multi-part test for whether government discrimination triggers heightened equal protection review, instead basing their conclusions on *Bowers* and other similar precedent. Thus, when the Supreme Court overruled *Bowers* in 2003, declaring that it "was not correct when it was decided, and it is not correct today," *Lawrence*, 539 U.S. at 578, it necessarily abrogated *Ben-Shalom*, *Schroeder*, and other decisions that relied on

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homosexual persons to discrimination."); *cf. Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) ("A tax on wearing yarmulkes is a tax on Jews."). Where, as here, the statute's discriminatory effect is more than "merely *disproportionate* in impact," but rather affects everyone in a class and "do[es] not reach anyone outside that class," a showing of discriminatory intent is not required. *See M.L.B. v. S.L.J.*, 519 U.S. 102, 126-28 (1996) (emphasis in original).

Bowers to foreclose heightened scrutiny for sexual-orientation classifications. *See Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 312 (D. Conn. 2012); *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 984 (N.D. Cal. 2012). The Court's decision in *Windsor* further calls into question this precedent. *See SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 484 (9th Cir. 2014) (noting "*Windsor* requires that we reexamine our prior precedents" and concluding that "we are required by *Windsor* to apply heightened scrutiny to classifications based on sexual orientation").

Accordingly, this Court should apply the considerations identified by the Supreme Court for determining whether the marriage ban is a classification that must receive heightened scrutiny: (1) whether the class has been historically "subjected to discrimination"; (2) whether the class has a defining characteristic that "frequently bears [a] relation to ability to perform or contribute to society"; (3) whether the class exhibits "obvious, immutable, or distinguishing characteristics that define them as a discrete group"; and (4) whether the class is "a minority or politically powerless." *Windsor v. United States*, 699 F.3d 169, 181 (2d Cir. 2012), *aff'd,* 133 S. Ct. 2675 (2013) (quoting and citing *Bowen v. Gilliard,* 483 U.S. 587, 602 (1987), and *Cleburne,* 473 U.S. at 440-41). The first two factors are the most important. *See id.*

3. Under the multi-part analysis, same-sex couples constitute a suspect or quasi-suspect class.

Tellingly, the State does not engage with the considerations identified by the Supreme Court for identifying a suspect or quasi-suspect classification, arguing

instead only that the Circuit has decided the issue in the past. (Apps.' Br. at 29.) Numerous federal courts since the Supreme Court's decision in *Windsor* have concluded that sexual orientation fulfills each of these factors. *See, e.g., SmithKline Beecham*, 740 F.3d at 483-84; *Wolf v. Walker,* 986 F. Supp. 2d at 1014; *Whitewood v. Wolf*, 2014 WL 2058105, at *14; *Latta v. Otter*, 2014 WL 1909999, at *18; *De Leon,* 975 F. Supp. 2d at 650-51; *Bassett v. Snyder,* 951 F. Supp. 2d 939, 960 (E.D. Mich. 2013).

In the course of this litigation, Indiana has never suggested that sexual orientation affects one's ability to contribute to society nor has it disagreed with the fact that lesbians and gay men have been subjected to a history of discrimination. Additionally, sexual orientation constitutes an immutable or distinguishing characteristic that one cannot or should not have to change. *See Windsor*, 699 F.3d at 184 (explaining that "sexual orientation is a sufficiently distinguishing characteristic to identify the discrete minority class of homosexuals").

For the purposes of identifying a suspect classification, the question regarding political power does not ask whether lesbians and gay men have achieved some measure of political success. Instead, the inquiry more appropriately asks "whether [lesbians and gay men] have the strength to politically protect themselves from wrongful discrimination." *Id*. In this regard, there is no Indiana or federal law protecting lesbians and gay men from discrimination in employment, housing, education, or public accommodations. While gay people have secured some limited

advances recently, they pale in comparison to the political progress of women at the time sex was recognized as a quasi-suspect classification.

This Court can and should rule that heightened scrutiny applies when the government discriminates based on sexual orientation, as Indiana does through the marriage ban.

B. Heightened Scrutiny Is Warranted Because The Marriage Ban Discriminates Based On Gender.

Indiana's marriage ban also warrants heightened scrutiny under the Equal Protection Clause because it classifies based on gender and impermissibly seeks to enforce conformity with gender-based stereotypes about the "proper" role of men and women. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 130-31 (1994). Laws that classify based on gender are invalid unless a state has an "exceedingly persuasive justification" showing that such laws substantially further important governmental interests. *United States v. Virginia* (*VMI*), 518 U.S. 515, 534 (1996).

The marriage ban discriminates facially by gender, explicitly stating that "[o]nly a female may marry a male" and "[o]nly a male may marry a female," Ind. Code § 31-11-1-1(a), and 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," Ind. Code § 31-11-1-1(b). Plaintiff Rae Baskin cannot marry the person she wishes to marry—Plaintiff Esther Fuller—because Rae is a woman, not a man. *See Baehr v. Lewin*, 852 P.2d 44, 58 (Haw. 1993); *see also Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 971 (Mass. 2003) (Greaney, J., concurring); *cf. Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 996 (N.D. Cal. 2010) ("Sexual orientation discrimination can

take the form of sex discrimination."). Viewed alternately, if Esther were a man instead of a woman, Rae would be free to marry her. *See Baker v. Vermont*, 744 A.2d 864, 905 (Vt. 1999) (Johnson, J., concurring and dissenting).

Additionally, the ban impermissibly enforces conformity with sex stereotypes. *See e.g.*, *J.E.B.*, 511 U.S. at 131, 142 n.14 (rejecting sex-based restrictions on jury selection because they enforced "stereotypes about [men and women's] competence or predispositions," especially where a sex-based distinction serves "to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women"). The State does not put forth any evidence suggesting that two men or two women cannot form the "expressions of emotional support and public commitment" required for marriage. *Turner*, 482 U.S. at 95.

C. Even Absent A Suspect Classification, The Marriage Ban Must Be Subjected To Strict Scrutiny Because It Prohibits A Class Of Citizens From Exercising The Fundamental Right To Marry And Remain Married.

Finally, strict scrutiny is required under equal protection because, irrespective of whether the marriage ban's classification is suspect, it discriminates with respect to the exercise of the fundamental right to marry and to remain married. *See* Section II, *supra*. When a legislative classification interferes with the exercise of fundamental rights, it is subjected to strict scrutiny and must be narrowly tailored to advance a compelling governmental interest. *See Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); Chemerinsky, Const. Law Principles and Policies, § 10.1. As

discussed in Section V, *infra*, the marriage ban cannot withstand any level of scrutiny, let alone strict scrutiny.[19]

IV. BOTH DUE PROCESS AND EQUAL PROTECTION REQUIRE THAT LAWS SINGLING OUT LESBIANS AND GAY MEN FOR DISFAVORED TREATMENT BE SUBJECTED TO CAREFUL CONSIDERATION.

Laws of "unusual character" that single out a certain class of citizens, such as lesbians and gay men, for disfavored legal status or general hardship require careful consideration by a reviewing court. *Windsor*, 133 S. Ct. at 2692 (citing *Romer*). In *Windsor*, the Supreme Court closely examined DOMA, which the Indiana marriage ban mirrors in design, purpose, and effect, and its harmful impact on same-sex couples and their children. The Court determined that Congress enacted DOMA primarily to treat same-sex couples unequally, rather than for a permissible purpose, concluding that "[t]he history of DOMA's enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages" was the "essence" of the statute. *Id.* at 2693. Regarding DOMA's effects, the Court observed that "[u]nder DOMA, same-sex married couples have their lives

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[19] That the State has singled out same-sex couples for differential treatment with respect to exercise of a fundamental right finds particular illustration in the exclusion of same-sex couples who have married in other states from the general rule that "[t]he validity of a marriage depends upon the law of the place where it occurs." *Bolkovac v. State*, 98 N.E.2d 250, 304 (Ind. 1951). Because "Indiana will accept as legitimate a marriage validly contracted in the place where it is celebrated," *Mason*, 775 N.E.2d at 709, even when such a marriage would not be permissible within Indiana, the State has honored marriages from other jurisdictions even if that couple could not meet Indiana's own marriage requirements. *See id.* (affirming trial court recognizing as a matter of comity the marriage of a Hoosier who traveled to Tennessee and there married his first cousin, "even though such a marriage could not be validly contracted between residents of Indiana"). Thus, Indiana's marriage ban created an exception to Indiana's long-standing rule of comity, specifically targeting same-sex couples to deny them recognition of their valid out-of-state marriages.

burdened, by reason of government decree, in visible and public ways…from the mundane to the profound." *Id.* at 2694. Such differential treatment "demeans the couple, whose moral and sexual choices the Constitution protects," and "humiliates tens of thousands of children now being raised by same-sex couples." *Id.* Because "no legitimate purpose" overcame these improper purposes, the Court held that DOMA violated due process and equal protection. *Id.* at 2696.

Windsor teaches, when considering laws that single out same-sex couples for disfavored treatment—as Indiana's marriage ban plainly does—that courts may not blindly defer to hypothetical justifications states proffer, but must carefully consider the actual purpose underlying their enactment and the harms they inflict. If the record demonstrates that the "principal purpose" and "necessary effect" of a challenged law is to "impose inequality," courts must strike down the law. *Id.* at 2694-95. After *Windsor*, "courts reviewing marriage regulations, by *either* the state or federal government, must be wary of whether 'defending' traditional marriage is a guise for impermissible discrimination against same-sex couples." *Bishop*, 962 F. Supp. 2d at 1279 (emphasis in original).[20]

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[20] Improper "animus" does not necessarily mean legislatures or proponents of the law harbored conscious prejudice or dislike of lesbians and gay men. Instead, the legislation may reflect "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable" by the government. *Cleburne,* 473 U.S. at 448. Moreover, "even the most familiar and generally accepted of social practices and traditions often mask an unfairness and inequality that frequently is not recognized or appreciated by those not directly harmed by those practices or traditions." *In re Marriage Cases*, 183 P.3d at 451. Such attitudes "may result as well from insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves." *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring).

The justifications advanced for Indiana's ban likewise require careful consideration. Discriminatory purpose is apparent on the face of Indiana's law, which expressly singles out same-sex couples for exclusion from marriage and purports to void out-of-state marriages. Indiana's marriage ban and similar laws are not neutral measures enacted for a legitimate purpose that adversely impact same-sex couples' families incidentally. Rather, these extraordinary measures were part of a national wave of laws intended to prevent same-sex couples from marrying or having their marriages recognized. *Cf. Windsor*, 133 S. Ct. at 2693 (examining historical context of DOMA); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-67 (1977) (explaining that the "historical background of the decision" is relevant when determining legislative intent).

Indiana's re-enactment of its traditional marriage law in 1997 was fatally tainted by discriminatory animus. (Short App. 32.) Indeed, the ban was passed in the wake of Hawaii litigation, where same-sex couples sought to marry, to prevent Indiana from recognizing such marriages. (*Id.* at 31.) Congress passed DOMA for the same reason, *Windsor*, 133 S. Ct. at 2682-83, and Indiana's motivation is similarly improper. Impermissible purpose can exist without overt bigotry or hostility. The absence of any logical connection to a legitimate purpose, which can "raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected," will suffice. *Romer*, 517 U.S. at 634-35.

Indiana argues that the ban is mere reaffirmation of "tradition." (Apps.' Br. at 1, 12, 34.) But "the fact that the governing majority in a State has traditionally viewed

a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack." *Lawrence*, 359 U.S. at 577-78 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)); *see also Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (when state "reaffirmed a particular course of action…because of…its adverse effects [on] identifiable group" constitutional concerns are raised) (internal quotations omitted).

"'[P]reserving the traditional institution of marriage' is just a kinder way of describing the State's *moral disapproval* of same-sex couples." *Lawrence*, 539 U.S. at 601 (Scalia, J., dissenting) (emphasis in original). Indiana's justifications similarly invoke the impermissible purpose of "promot[ing] an 'interest in protecting the traditional moral teachings reflected in heterosexual-only marriage laws.'" *Windsor*, 133 S. Ct. at 2693.

In creating a second-class status under the guise of "tradition," Indiana simply classified gay people "not to further a proper legislative end but to make them unequal to everyone else." *Romer*, 517 U.S. at 635. Labeling a provision a "definition" does not immunize it from constitutional scrutiny. *Kitchen*, 2014 WL 2868044, at *19 ("We see no reason to allow Utah's invocation of its power to 'define the marital relation' to become 'a talisman, by whose magic power the whole fabric which the law had erected…is at once dissolved.'") (quoting *Windsor*, 133 S. Ct. at 2692, and *Bank of the U.S. v. Dandridge*, 25 U.S. (12 Wheat.) 64, 113 (1827) (Marshall, C.J., dissenting)).

The "practical effect" of the marriage ban is "to impose a disadvantage, a separate status, and so a stigma upon" same-sex couples in the eyes of state officials and other Hoosiers. *Windsor*, 133 S. Ct. at 2693. Indiana's marriage ban "demeans the couple, whose moral and sexual choices the Constitution protects." *Id.* at 2694 (citing *Lawrence*, 539 U.S. 558). It "humiliates" "children now being raised by same-sex couples." *Id.* Such a total exclusion of same-sex couples and their families from legal status and protection is an impermissible form of "[c]lass legislation" that is "obnoxious to the prohibitions of the Fourteenth Amendment." *Romer*, 517 U.S. at 635 (internal quotation marks omitted). Indiana's marriage ban cannot survive the careful scrutiny required by *Windsor*.

V. THE MARRIAGE BAN CANNOT SURVIVE ANY LEVEL OF SCRUTINY APPLIED UNDER EQUAL PROTECTION OR DUE PROCESS.

A. The State Does Not Argue The Marriage Ban Satisfies Elevated Scrutiny.

The District Court properly concluded that even if heightened or strict scrutiny is not appropriate, the marriage ban fails rational basis review as it is not rationally related to a legitimate governmental objective. (Short App. 32-33.) The State does not argue that the challenged statute meets any level of elevated scrutiny—nor successfully could it because the ban utterly fails even the rational basis review.

B. The Marriage Ban Fails Rational Basis Review.

The District Court correctly held that the marriage ban is not rationally related to a legitimate governmental objective and therefore fails rational basis review. "[E]ven in the ordinary equal protection case calling for the most deferential of

standards, we insist on knowing the relation between the classification adopted and the object to be attained." *Romer*, 517 U.S. at 632. Although rational basis is a deferential standard, it is not toothless. *See, e.g.*, *id.* at 626-35; *Cleburne*, 473 U.S. at 447-50; *Plyler v. Doe*, 457 U.S. 202, 223-30 (1982); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 533-38 (1973); *Bell v. Duperrault*, 367 F.3d 703, 710 (7th Cir. 2004) (Posner, J., concurring) ("the 'rational purpose' test is no longer as toothless as it once seemed"). And, while courts resolving similar challenges post-*Windsor* have approached differently the proper level of review, those applying rational basis analysis uniformly held that laws prohibiting marriage equality to same-sex couples fail even under that standard.[21] Similarly, Indiana's asserted justification here fails to satisfy even this basic standard.

1. Equal protection requires a rational explanation for the line drawn by the statute, which includes looking both at who is excluded from the statutory protections and who is included.

Equal protection requires at least a rational explanation for the classification—that the line drawn rationally furthers a legitimate and independent state interest. *Romer,* 517 U.S. at 626-35. The State insists on a different analysis, one that looks only at whether "there is a rational reason to provide the right of marriage to

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[21] *See, e.g.*, *Love*, 2014 WL 2957671, at *5-7 (holding heightened scrutiny applicable but nonetheless deciding that the statute failed even rational basis review); *Wolf*, 986 F. Supp. 2d at 1016 (same); *Henry*, 2014 WL 1418395, at *14-15 (same); *Obergefell*, 962 F. Supp. 2d at 987-95 (same); *Geiger*, 2014 WL 2054264, at *8-9 (concluding that marriage laws fail rational basis review); *Bourke*, 2014 WL 556729, at *4-5 (same); *Tanco*, 2014 WL 997525, at *6 (concluding that plaintiffs were likely to prevail under rational basis review); *DeBoer*, 973 F. Supp. 2d at 769-70, 775 (declining to resolve whether heightened scrutiny is applicable and holding that the statute fails rational basis review); *De Leon*, 975 F. Supp. 2d at 652 (same); *Bostic*, 970 F. Supp. 2d at 482 (same); *Bishop*, 962 F. Supp. 2d at 1287 (same).

opposite-sex couples, not [whether] there is a rational basis to exclude" same-sex couples. (Apps.' Br. at 11.) That analysis is wrong for at least three reasons: it misunderstands *Johnson v. Robison*; it disregards extensive Supreme Court case law; and it ignores the fact that the marriage ban only excludes same-sex couples from marriage rather than provide anything to different-sex couples.

First, the State relies exclusively on *Johnson v. Robison*, 415 U.S. 361, 381-82 (1974), for the "inclusion-only" analysis by distorting what *Johnson* was about. *Johnson* upheld the constitutionality of a benefits scheme because the line the government drew rationally distinguished between two groups, not simply because (as the State asserts) including one group rationally furthered a government interest. In *Johnson*, the question was whether government could provide educational benefits to military draftees who served on active duty without providing those benefits to draftees who were conscientious objectors. The Court listed a range of reasons that the differential treatment made sense—the groups took different risks, made commitments for different time periods, and suffered different disruptions in their lives. There was no argument in *Johnson* (as the State advances here respecting non-procreative, different-sex couples) that groups other than conscientious objectors were provided benefits even though too they failed to advance the asserted state interests. *Johnson*'s analysis was not just about whether inclusion of the favored group furthered the government's interest, it was that the two groups were differently situated with regard to the government interest at stake. Thus the distinction was constitutional. The situation presented here is

dissimilar to *Johnson*'s. *See Bishop*, 962 F. Supp. 2d at 1292-93 ("[H]ere, the 'carrot' of marriage is equally attractive to procreative and non-procreative couples, is extended to most non-procreative couples, but is withheld from just one type of non-procreative couple.").

Second, the State's interpretation of *Johnson* conflicts with Supreme Court and Seventh Circuit decisions establishing that the focus in an equal protection case must be on whether there is a rational connection between the *exclusion* created by the challenged legislation and the governmental interests the legislation purportedly advances.[22]

Third, in any equal protection case, what must be explained is the law that causes the plaintiffs harm. Here that law is the marriage ban, which is the part of Indiana's marriage law that explicitly excludes same-sex couples from marriage. That provision of Indiana law grants no benefits to different-sex couples who marry; instead, its sole effect *is to exclude* same-sex couples from accessing the same benefits different-sex married couples already enjoy. (Short App. 29 ("Here, the challenged statute does not grant marriage benefits to opposite-sex couples. The

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[22] *See, e.g.*, *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 316-17 (1993) (considering government's interest in exempting dwellings under common ownership from being required to have franchised cable systems, not in requiring that public cable systems be franchised); *Cleburne,* 473 U.S. at 448-50 (examining city's interest in denying housing for people with disabilities, not the interests advanced by allowing housing for others); *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 315-16 (1976) (considering state's interest in excluding people over 50 from service as police officers, not the interests advanced by employing people under 50 as police officers); *Moreno,* 413 U.S. at 535-38 (considering government's interest in excluding unrelated persons from food stamp benefits, not in providing food stamps to households comprised of related persons); *Wis. Educ. Ass'n Council v. Walker*, 705 F.3d 640, 653 (7th Cir. 2013) (there must be "a rational relationship between the *disparity of treatment* and some legitimate government purpose") (emphasis added).

effect of [Indiana's marriage ban] is only to disallow same-sex couples from gaining access to these benefits.") (citing and quoting *Kitchen*, 961 F. Supp. 2d at 1210-11).) That is the law that causes these families harm, that is challenged here, and that must rationally further a legitimate and independent state interest in order to be constitutional. The State may not avoid having the "exclusion" side of the equation be part of the equal protection analysis.

2. Responsible procreation is not a rational justification for the challenged statute as it neither explains why same-sex couples are excluded from marriage nor why non-procreating different-sex couples are included within marriages.

Any State interest in channeling potentially procreative couples into marriage explains neither why Indiana excludes from marriage same-sex couples who do procreate nor why it permits marriages of different-sex couples who cannot (or do not) procreate. Indiana's marriage ban does not draw any line based on the couple's desire or ability to procreate (whether "biologically" or otherwise); the line is based on the couple's sexual orientation and sex.

Countless aspects of Indiana law are inconsistent with this asserted rationale and make clear how arbitrary that rationale is to explain the ban. For example, Indiana has not:

- Restricted the ability of different-sex couples who cannot or choose not to procreate to marry. Indeed, Indiana specifically allows first cousins to marry only if they are "both at least sixty-five (65) years of age," Ind. Code § 31-11-1-2—that is, beyond any ability to procreate.[23]

[23] Whatever separate interests the State might assert in ensuring that cousins do not procreate with one another, the fact that Indiana ensures that non-procreating cousins may get married belies the argument that marriage exists solely to "[e]ntic[e] individuals whose sexual intercourse may produce children" into marriage. (Apps.' Br. at 12.)

- Restricted the ability of unmarried different-sex couples to procreate.
- Restricted the ability of unmarried couples—same-sex or different-sex—to adopt or raise children.
- Restricted the ability of same-sex couples married in other jurisdictions to adopt or raise children.
- Restricted the ability of biological parents to place their children up for adoption.
- Restricted the ability of married couples with children to dissolve their marriages or to legally separate.
- Treated children who are adopted (by different-sex or same-sex couples) differently in any way from children who are the biological offspring of a couple (no matter how they were conceived).

Given these public policies, promoting "responsible procreation" is not a conceivable purpose for Indiana's marriage ban.

a. Excluding same-sex couples from marriage does not promote procreation, responsible or otherwise, among different-sex couples.

Banning marriage by same-sex couples does not affect the number of children born to different-sex couples (whether married or unmarried). No different-sex couple decides to have a child, or to get married, because gay couples cannot marry. *See Bishop*, 962 F. Supp. 2d at 1291 ("Marriage is incentivized for naturally procreative couples to precisely the same extent regardless of whether same-sex couples (or other non-procreative couples) are included."); *accord De Leon*, 975 F. Supp. 2d at 653; *Bourke*, 2014 WL 556729, at *10; *Kitchen*, 961 F. Supp. 2d at 1201; *Golinski*, 824 F. Supp. 2d at 998.

To the extent the State's interest is ensuring that children be raised by two married parents, that interest applies equally to the children of same-sex couples.

See Bishop, 962 F. Supp. 2d at 1292 ("If a same-sex couple is capable of having a child with or without a marriage relationship, and the articulated state goal is to reduce children born outside of a marital relationship, the challenged exclusion hinders rather than promotes that goal."). There is nothing distinctive about the needs of children of different-sex parents that makes it rational for Indiana to encourage different-sex couples to marry before or after they conceive a child, while denying the benefits of having married parents to children of same-sex couples. *See Bishop*, 2014 WL 3537847, at *16-18.

Rational basis review requires a state to explain how excluding same-sex couples from marriage furthers the asserted interest. The State offers no explanation (nor is there a rational connection to offer). The marriage ban violates equal protection even under rational basis review.

b. "Responsible procreation" does not rationally explain the inclusion within marriage of millions of different-sex couples who cannot procreate accidentally.

The marriage ban also fails rational basis review because an interest in advancing responsible procreation does not rationally explain Indiana's decision to include within marriage the millions of different-sex couples who cannot procreate accidentally.[24] This is not a matter of underinclusiveness and overinclusiveness at

[24] Millions of men and women in the United States today are incapable of having children as a result of infertility, and therefore cannot procreate by accident, but each of these men or women could marry a different-sex partner in Indiana tomorrow. For example, births among women age 50 and over are virtually non-existent. *See* Nat'l Health Stat. Rep., Births: Final Data for 2012, Nos. 62:9, at 6 (Dec. 30, 2013) (reporting only 600 such births nationwide, including those achieved with assisted reproductive technologies), *available at* http://www.cdc.gov/nchs/data/nvsr/nvsr62/nvsr62_09.pdf; *see also* Am. Soc'y of Reprod. Med., Age and Fertility: A Guide for Patients, at 4 (Rev. 2012), *available at*

the margins. The mismatch here is so extreme that the goal of encouraging responsible procreation simply is not a rational explanation for the line drawn by the marriage ban. *See Garrett*, 531 U.S. at 366 n.4 (explaining that in *Cleburne* there was no rational basis because "purported justifications for the ordinance made no sense in light of how the city treated other groups similarly situated in relevant respects"); *Romer*, 517 U.S. at 635 (protecting freedom of association and conserving resources could not explain why antidiscrimination protections were barred for gay people and no one else); *Hooper v. Bernalillo Cnty. Assessor*, 472 U.S. 612, 621-22 (1985) (distinction based on past residence not rationally related to interest in rewarding military service because "[t]he statute is not written to require any connection between the veteran's prior residence and military service"); *Eisenstadt v. Baird*, 405 U.S. 438, 449 (1972) (no rational basis where law was "riddled with exceptions" for similarly situated groups).

Unlike the statute in *Johnson,* marriage does not incentivize different-sex couples or their children in any way that is different from the incentives it provides to same-sex couples and their children. Thus under Indiana's marriage ban, same-sex couples are subjected to a requirement of "natural procreative" ability that is not imposed on different-sex couples, whether they are infertile, elderly, or simply do not wish to procreate. *Bishop*, 962 F. Supp. 2d at 1294. For Indiana to provide

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https://www.asrm.org/uploadedFiles/ASRM_Content/Resources/Patient_Resources/Fact_Sheets_and_Info_Booklets/agefertility.pdf ("most women become unable to have a successful pregnancy sometime in their mid-40s," even with the use of fertility treatments). And there are over 53 million women in America age 50 and over. *See* U.S. Census Bureau, Statistical Abstract of the United States: 2012, Table 7, Resident Population by Sex and Age: 1980 to 2010, *available at* http://www.census.gov/compendia/statab/2012/tables/12s0007.pdf.

different-sex couples who are unable or unwilling to have and raise children the benefits of marriage, while excluding all same-sex couples—including those who are already raising children—is irrational. Justice Scalia highlighted this fatal lack of rationality in his dissent in *Lawrence*, where he asked, given the majority's decision, "what justification could there possibly be for denying the benefits of marriage to homosexual couples…[s]urely not the encouragement of procreation, since the sterile and elderly are allowed to marry." *Lawrence*, 539 U.S. at 605 (Scalia, J., dissenting); *see also Bostic,* slip op. at 58 (4th Cir. July 28, 2014); *Bishop*, 962 F. Supp. 2d at 1293 (noting that "the infertile, the elderly, and those who simply do not wish to ever procreate" are permitted to marry in Oklahoma).

Thus, even indulging the State's incorrect idea that "inclusion" is the only proper analysis, responsible procreation does not rationally explain the ban.[25]

C. The Marriage Ban Does Not Rationally Further Any Other Potential, Unarticulated Interest.

Other potential justifications for the marriage ban, wisely not raised by the State, have been rejected quickly by other courts and fare no better here.[26]

First, the ban has no rational connection—or any connection—to an asserted goal of fostering an "optimal" parenting environment for the children of

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[25] The *Windsor* Court found the responsible procreation interest advanced here unpersuasive and rejected it. The Bipartisan Legal Advisory Group defending DOMA asserted the responsible procreation interest, Merits Brief of Bipartisan Legal Advisory Group of the U.S. House of Representatives, 2013 WL 267026, at *21, and the Court necessarily rejected it by holding that "no legitimate purpose" could justify the inequality and stigma that DOMA imposed on same-sex couples and their families. 133 S. Ct. at 2696.

[26] Given that the State did not rely on these arguments either in this Court or below, they should be deemed to have been waived. *See, e,g.*, *Williams v. Dieball*, 724 F.3d 957, 961 (7th Cir. 2013). Nonetheless, they are addressed out of an excess of caution.

heterosexual couples. The marriage ban does not prevent same-sex couples from having children. Indeed, Indiana already recognizes the parent-child relationship between non-biological parents and children, including gay and lesbian parents. *See In re Adoption of K.S.P.*, 804 N.E.2d 1253, 1259-60 (Ind. Ct. App. 2004) (noting that failing to recognize a non-biological lesbian mother as a parent is "inconsistent with the children's best interests and therefore with the public policy of this state, as expressed in our statutes affecting children"). "Prohibiting gays and lesbians from marrying does not stop them 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." *DeBoer*, 973 F. Supp. 2d at 771-72). Thus, "[e]ven if it were rational for legislators to speculate that children raised by heterosexual couples are better off than children raised by gay or lesbian couples, *which it is not*, there is simply no rational connection between the [exclusion of same-sex couples from marriage] and the asserted goal." *Obergefell*, 962 F. Supp. 2d at 994 (emphasis in original).

Given the lack of any logical connection between the marriage ban and any optimal parenting argument, the Court need not address the social science about parenting at all. Nevertheless, the premise that same-sex couples are less "optimal" parents than different-sex couples has been rejected by every major professional organization dedicated to children's health and welfare. "The overwhelming scientific consensus, based on decades of peer-reviewed scientific research, shows unequivocally that children raised by same-sex couples are just as well adjusted as

those raised by heterosexual couples." *Obergefell*, 962 F. Supp. 2d at 994 n.20; *Bostic,* slip op. at 59-60 (4th Cir. July 28, 2014) (discussing lack of evidence that same-sex couples are inferior parents); *accord DeBoer*, 973 F. Supp. 2d at 771-72 (drawing same conclusion after trial).[27] "Indeed, Justice Kennedy explained [in *Windsor*] that it was the government's failure to recognize same-sex marriages that harmed children, not having married parents who happened to be of the same sex." *Bourke*, 2014 WL 556729, at *8; *see also Obergefell*, 962 F. Supp. 2d at 994-95.

Second, as discussed in Section IV, *supra*, an interest in tradition does not, and cannot, satisfy rational basis review. Simply stated, "tradition" does not constitute "an independent and legitimate legislative end" for purposes of rational basis review. *Romer*, 517 U.S. at 633. The fact that a group of people has traditionally been treated unequally is not a justification for continuing that unequal treatment. "Ancient lineage of a legal concept does not give it immunity from attack for lacking a rational basis." *Heller v. Doe ex rel. Doe*, 509 U.S. 312, 326 (1993).

Last, an interest in proceeding with caution does not satisfy rational basis, as proceeding cautiously by continuing to deny equal treatment to an unpopular group is not a legitimate state interest. *See Pedersen*, 881 F. Supp. 2d at 345-46; *see also Golinski*, 824 F. Supp. 2d at 1001. If "caution" and "deliberation" alone could justify

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[27] *See also* L.R. 294 at ¶ 9, L.R. 297-301 at ¶ 13 (Expert Dr. Megan Fulcher noting that "[c]hildren of lesbian and gay parents do not differ in psychological adjustment or well being from children of heterosexual parents."); L.R. 331-333 at ¶¶ 15-17; L.R. 331-332 at ¶¶ 15-17; *De Boer*, 973 F. Supp. 2d at 770-772 (noting "approximately 150 sociological and psychological studies of children raised by same-sex couples have repeatedly confirmed Rosenfeld's findings that there is simply no scientific basis to conclude that children raised in same-sex households fare worse than those raised in heterosexual households").

discrimination, the development of civil rights for unpopular groups would be perpetually thwarted, and rational basis review would mean no judicial review at all. Every court to consider the proceeding-with-caution argument after *Windsor* has rejected it. As the district court in *Kitchen* court noted, "[t]he State can plead an interest in proceeding with caution in almost any setting. If the court were to accept the State's argument here, it would turn the rational basis analysis into a toothless and perfunctory review." *Kitchen*, 961 F. Supp. 2d at 1213.

CONCLUSION

The judgment of the District Court should be ***affirmed***.

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Respectfully submitted,

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CERTIFICATE OF RULE 32 COMPLIANCE

Pursuant to Rule 32(a)(7) of the Federal Rules of Appellate Procedure, I hereby certify that this brief complies with the stated type-volume limitations. The text of this brief was prepared in Century Schoolbook 12 point font, with footnotes in Century Schoolbook 11 point font. All portions of the brief, other than the Disclosure Statements, Table of Contents, Table of Authorities, and the Certificates of Counsel, contain 13,995 words. This certification is based on the word count function of the Microsoft Office Word word processing software, which was used in preparing this brief.

Dated: July 29, 2014 /s/ Jordan M. Heinz

CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2014, I caused a true and correct copy of the foregoing BRIEF OF PLAINTIFFS-APPELLEES to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: July 29, 2014 /s/ Jordan M. Heinz