No. 14-574

IN THE

Supreme Court of the United States

GREGORY BOURKE, ET AL., & TIMOTHY LOVE, ET AL.,

Petitioners,

v.

STEVE BESHEAR, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF KENTUCKY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. Does the Fourteenth Amendment require a state to license a marriage of two people of the same sex?

2. Does the Fourteenth Amendment require a state to recognize a marriage of two people of the same sex when their marriage was lawfully licensed and performed out-of-state?

PARTIES TO THE PROCEEDING

The following were parties to the proceedings in the United States Court of Appeals for the Sixth Circuit:

Petitioners Gregory Bourke, Michael De Leon, Kimberly Franklin, Tamera Boyd, Randell Johnson, Paul Campion, Jimmy Meade, Luther Barlowe, Timothy Love, Lawrence Ysunza, Maurice Blanchard, and Dominique James.

Respondent herein, and Defendant-Appellant below, is Steve Beshear, in his official capacity as Governor of the Commonwealth of Kentucky. Jack Conway, in his official capacity as the Attorney General of Kentucky, was a defendant in the district court but did not appeal from the judgment against him.

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BRIEF FOR PETITIONERS

Petitioners Gregory Bourke, et al., and Timothy Love, et al., respectfully request that this Court reverse the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (Pet. App. 1a) is reported at 772 F.3d 388. The opinions of the United States District Court for the Western District of Kentucky (Pet. App. 96a and 124a) are reported at 989 F. Supp. 2d 536 and 996 F. Supp. 2d 542.

JURISDICTION

The opinion of the court of appeals was entered on November 6, 2014. Pet. App. 3a. Petitioners filed a timely petition for a writ of certiorari on November 18, 2014, which this Court granted on January 16, 2015. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the United States Constitution provides in relevant part: "No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The relevant provisions of Kentucky law are reprinted at Pet. App. 158a-61a.

INTRODUCTION

Petitioners are same-sex couples from all walks of life. Some have been together for decades and are now retired and confronting end-of-life caregiving; some are middle-aged and are parenting their children through college; others are young and desire to start families of their own. They come together here to make no extreme demands. Instead, they ask merely to be treated like everyone else – that is, free to enter into society's most revered form of mutual association and support, and worthy of the stature and crucial protections that marriage affords. They are met by calls for patience and judicial "humility." Pet. App. 23a. "[O]ur ancestors," they are told, viewed the institution of marriage as restricted to a man and a woman, and "a significant number of the States" still share that view. *Id.*

The Framers of the Fourteenth Amendment, however, "knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress." *Lawrence v. Texas*, 539 U.S. 558, 578-79 (2003). The same Congress, for example, that proposed the Fourteenth Amendment also passed laws segregating schools. *See Carr v. Corning*, 182 F.2d 14, 18 (D.C. Cir. 1950). State laws prohibiting interracial marriage were also commonplace for the majority of our Nation's history. Yet when faced with the impact of such laws on the equal dignity of all people, this Court unanimously struck them down. *See Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Loving v. Virginia*, 388 U.S. 1 (1967).

Similarly, "[l]ong after the adoption of the Fourteenth Amendment, and well into [the twentieth] century, legal distinctions between men and women were thought to raise no question under the Equal Protection Clause." *United States v. Virginia*, 518 U.S. 515, 560 (1996) (Rehnquist, C.J., concurring in judgment). Yet this Court began in the 1970s to recognize that discrimination based on sex – including different duties legally assigned to husbands and wives – often rested on "archaic" generalizations and "outdated assumptions" that could not stand when subjected to close examination. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725, 726 (1982).

This Court's decisions regarding gay people and their intimate relationships have traced a similar arc. Through most of our history, state laws "sought to prohibit nonprocreative sexual activity," based in part on societal voices "condemn[ing] homosexual conduct as immoral." *Lawrence*, 539 U.S. at 568, 571. But this Court has made clear that the Constitution forbids laws criminalizing intimate sexual conduct between persons of the same sex, *id.* at 578-79, or excluding same-sex couples from the federal protections that come with marriage, *United States v. Windsor*, 133 S. Ct. 2675 (2013). Lesbians and gay men, in short, may no more be relegated to second-tier status in our society than any other class.

The time has come to apply this principle to state laws excluding same-sex couples from the institution of marriage. As a result of exhaustive litigation across the country, it has become clear that these laws degrade lesbians, gay men, their children, and their families for no legitimate reason. The laws

consign their most intimate and meaningful relationships – their very identities – to official disfavor. And the laws unjustifiably wall off same-sex couples from legal protections, benefits, and responsibilities that envelop the nuclear family in America. It thus falls upon this Court to declare that the laws violate the Fourteenth Amendment's guarantee of liberty and equality for all persons.

STATEMENT OF THE CASE

A. Kentucky's Marriage Ban

For the first two centuries of its statehood, no Kentucky statute defined "marriage." Nor did any explicitly prohibit marriages between same-sex couples. Indeed, only one source of legal authority addressed the issue at all. In *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973), Kentucky's highest court relied on popular reference books such as *Webster's* and *The Century Dictionary and Encyclopedia* to conclude that two women could not marry "because what they propose[d] is not a marriage." *Id.* at 589-90.

In 1993, the Hawaii Supreme Court suggested (but did not hold) that Hawaii might be required to issue marriage licenses to same-sex couples. *See Baehr v. Lewin*, 852 P.2d 44, 67-68 (Haw. 1993). In response, Congress enacted the Defense of Marriage Act ("DOMA"), and Kentucky, like some other states, moved for the first time to codify a restrictive definition of marriage. In a series of 1998 statutes, Kentucky's General Assembly defined marriage as between one man and one woman, Ky. Rev. Stat. § 402.005; declared "marriage between members of the same sex . . . against Kentucky public policy," *id.*

§ 402.040(2); and expressly prohibited marriage between members of the same sex, *id.* § 402.020(1)(d). These statutes also provide that "[a] marriage between members of the same sex which occurs in another jurisdiction shall be void in Kentucky." *Id.* § 402.045(1).

Over the next several years, respect for the rights of same-sex couples gained ground in the United States. California created "domestic partnerships" for same-sex couples in 1999 and Vermont passed a law recognizing "civil unions" for same-sex couples the next year. Act of Oct. 2, 1999, ch. 588, 1999 Cal. Stat. 4157; 2000 Vermont Laws P.A. 91 (H. 847). Three years later, this Court held that the Constitution prohibits states from criminalizing the intimate relationships of same-sex couples. *Lawrence v. Texas*, 539 U.S. 558 (2003). Then, the Massachusetts Supreme Judicial Court became the first state high court to hold (on state constitutional law grounds) that same-sex couples have the right to marry. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

"In response, anti-same-sex marriage advocates in many states," including Kentucky, "initiated campaigns to enact constitutional amendments to protect 'traditional marriage'" from ordinary political processes and state-court decision-making. Pet. App. 129a. The Kentucky General Assembly voted to initiate a referendum to amend the state constitution by adding the following language:

> Only a marriage between one man and one woman shall be valid or recognized as a marriage in Kentucky. A legal

> status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized.

2004 Ky. Acts ch. 128, sec. 1. Even though Kentucky "already prohibited same-sex marriage," Pet. App. 129a, the sponsor of the amendment described it as necessary to "protect our communities" from "judges and elected officials who would legislate social policy" contrary to "traditional values," *id.* 141a-42a n.15. "Once this amendment passes," the sponsor explained, "no activist judge, no legislature or county clerk whether in the Commonwealth or outside of it will be able to change this fundamental fact: [T]he sacred institution of marriage joins together a man and a woman for the stability of society and for the greater glory of God." *Id.* The bill's co-sponsor echoed this sentiment, asserting that "[w]hen the citizens of Kentucky accept this amendment, no one, no judge, no mayor, no county clerk, will be able to question their beliefs in the traditions of stable marriages and strong families." *Id.* 143a n.15.

After the General Assembly passed the measure, the amendment was placed on the ballot. Echoing the sponsor's remarks, the voter pamphlet explained that the proposed amendment was modeled after Section 3 of DOMA and was designed to thwart any state court decisions or legislative enactments giving same-sex couples "legal status identical to or similar to marriage." Kentucky

Legislative Research Commission, *Proposed Marriage Amendment* (2004).[1]

On November 2, 2004, voters ratified the amendment. It is now codified as Kentucky Constitution § 233A.

B. Facts And Procedural History

Roughly two years ago, this Court ruled in *United States v. Windsor*, 133 S. Ct. 2675 (2013), that DOMA's refusal to recognize marriages between same-sex couples contravened due process and equal protection principles. *Id.* at 2695-96. Shortly thereafter, petitioners filed the first of these two lawsuits in the United States District Court for the Western District of Kentucky. Petitioners contend that the Commonwealth's refusal to license or recognize marriages between same-sex couples likewise violates the Fourteenth Amendment – unconstitutionally devaluing virtually every aspect of their daily lives, "from the mundane to the profound." *Id.* at 2694.

1. a. *The License-Seeking Petitioners*. Petitioners Timothy ("Tim") Love and Lawrence ("Larry") Ysunza have lived together in a committed relationship for thirty-five years and share a home in Louisville. Although Kentucky does not give their relationship any legal status, they have remained in the Commonwealth to be near family and friends. Among other things, Tim and Larry were the primary care providers for Tim's mother for thirteen years, until her death in 2012. J.A. 608-09.

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[1] http://lrc.ky.gov/lrcpubs/2004_const_amendment_1.pdf.

In 2013, Tim required emergency heart surgery. Because Tim and Larry were not married, they could not be sure that hospital staff would allow Larry to make medical decisions for Tim in the event he became incapacitated. As a result, they had to expend precious time and resources to execute powers of attorney and healthcare surrogate forms not required of married couples. But that paperwork will not protect them if a relative challenges the distribution of estate assets when one of them dies or tries to prevent the surviving partner from attending the funeral. And as they age and their health declines, Tim and Larry also fear they may be separated at health care facilities and prevented from caring for one another. J.A. 609-10.

Petitioners Maurice Blanchard and Dominique James have been together for ten years. They, too, live in Louisville where Maurice is an ordained minister of the Baptist Church. In 2006, he and Dominique had a religious commitment ceremony officiated by Maurice's father, who is also a minister. When Maurice and Dominique purchased a home they had to seek out real estate professionals with experience working with same-sex couples to ensure that their joint rights to the property were protected as much as possible. J.A. 612-13.

Both couples attempted, with the requisite identification and filing fees, to apply for marriage licenses at the Jefferson County (Kentucky) Clerk's Office. Both couples are otherwise qualified to receive marriage licenses: they are over the age of 18, not married to anyone else, not adjudged mentally disabled, and not "nearer of kin to each other . . . than second cousins." Ky. Rev. Stat. §§ 402.010-020.

Pursuant to the laws challenged here, however, the clerk refused to issue a marriage license to either couple. J.A. 608-09, 612.

b. *The Recognition-Seeking Petitioners*. Gregory ("Greg") Bourke and Michael De Leon met in college and have been together for thirty-three years. They were married in Canada in 2004 but have continued to live in Kentucky to be close to family. J.A. 585-86.

Greg and Michael are parents to a teenage boy and girl whom they adopted into their family as infants. As parents, they are both involved in their children's school, church, and extra-curricular activities. But Kentucky allows only married spouses to jointly adopt or to adopt one another's children, so the children have only one legal parent: Michael. Greg is relegated to the status of "legal guardian." *See S.J.L.S. v. T.L.S*, 265 S.W.3d 804 (Ky. Ct. App. 2008); Ky. Rev. Stat. § 387.010 *et seq*. If Michael dies, Greg's lack of a permanent parent/child relationship with the children would threaten the stability of the surviving family. J.A. 586-87.

Petitioners Randell ("Randy") Johnson and Paul Campion were married in California in 2008. They have lived together in Louisville for twenty-three years. They have four children, but Kentucky's recognition ban legally splits their family in two. Paul is the sole adoptive parent of their three sons, and Randy is the sole adoptive parent of their daughter. Only Paul can consent to medical treatment for their sons, and only Randy can consent to medical treatment for their daughter. In order to fend off questions concerning their legal status as co-

parents, Randy and Paul carry their adoption papers with them wherever they go. J.A. 593-96.

Petitioners Kimberly ("Kim") Franklin and Tamera ("Tammy") Boyd were married in Connecticut in 2010. They are both from the same small town in Kentucky and have known each other for over twenty-five years. As with other petitioners, Kentucky's refusal to recognize their marriage imposes an ever-present reminder of their disfavored status. For example, Tammy is ineligible to receive health insurance through Kim's employer because she is not considered a family member. Kim has also increased her life insurance coverage to account for the inheritance taxes Tammy would have to pay if Kim died – taxes that would not be levied if their marriage were respected. J.A. 598-90.

Petitioners Jimmy ("Jim") Meade and Luther ("Luke") Barlowe were both born and raised in Kentucky. They met in 1968 at Morehead State University and have been together for forty-seven years. They were married in Iowa in 2009 and now live together in Bardstown, Kentucky. Jim is a sixty-five-year-old retired accountant and business owner. Luke is seventy-two and a retired optician. J.A. 599-600.

Jim was diagnosed with lymphoma in 2002, a diagnosis that still affects his health today. In order to approximate some of the protections of marriage, they have had to create powers of attorney for each other in times of medical emergencies. Because they cannot rely on their marital status to avoid the probate process or inheritance tax, they have had to create living trusts for each other to ensure that, if one of them dies, the surviving spouse will be

financially secure. But no amount of legal paperwork will change the reality that, because of the recognition ban, Kentucky will tax them as strangers when one of them dies. J.A. 599-601.

2. The district court granted summary judgment in both cases in favor of petitioners, holding that Kentucky's marriage ban "violates the United States Constitution's guarantee of equal protection under the law." Pet. App. 125a (recognition holding); *see also id.* 116a (licensing holding).

The district court began by noting that "[s]everal theories support heightened review" of Kentucky's marriage ban. Pet. App. 136a. First, "Supreme Court jurisprudence suggests that the right to marry is a fundamental right." *Id.* 137a. Second, the district court explained that the Commonwealth's marriage ban "demeans one group by depriving them of rights provided for others." *Id.* 143a. Third, the district court noted that "a number of reasons suggest that gay and lesbian individuals [are] a suspect class," *id.* 137a, or a "*quasi*-suspect class" such that "heightened scrutiny" applies to the Commonwealth's classification based on sexual orientation, *id.* 114a.

Ultimately, however, the district court concluded that "the result in this case is unaffected by the level of scrutiny applied." Pet. App. 139a. "[E]ven under the most deferential standard of review," *id.* 125a, neither the purported state interest in "preserving the state's institution of traditional marriage" nor in "steering naturally procreative relationships into stable unions" provides a rational basis for Kentucky's marriage ban. *Id.*

145a-47a (internal quotation marks omitted). Nor, the district court reasoned, does the Commonwealth have a legitimate reason to "proceed[] with caution when considering changes in how the state defines marriage." *Id.* 147a. "For years," the district court explained, "many states had a tradition of [racial] segregation" and subjugation of women, yet courts held that "they could not enforce their particular moral views to the detriment of another's constitutional rights." *Id.* 146a.

3. The Sixth Circuit consolidated these cases with similar cases from Michigan, Ohio, and Tennessee. A divided panel then reversed, holding that states may refuse to license or recognize marriages between same-sex couples.

The majority acknowledged that the institution of marriage is "fundamentally important" and recognized "the lamentable reality that gay individuals have experienced prejudice in this country." Pet. App. 37a, 42a. The majority also conceded that laws excluding same-sex couples from marriage are haunted by "foolish, [and] sometimes offensive, inconsistencies." *Id.* 27a.

The Sixth Circuit nevertheless perceived no basis for applying any form of enhanced scrutiny to Kentucky's marriage ban. Instead, the majority held that the most deferential form of rational-basis review applied and that the ban sufficiently furthers two state interests: (1) regulating "the intended and unintended effects of male-female intercourse" and (2) "wait[ing] and see[ing]" how marriages between

same-sex couples play out in other states. Pet. App. 23a, 26a.[2]

Turning to the issue of recognition, the Sixth Circuit held that no federal constitutional rule requires Kentucky to apply "another State's law in violation of its own public policy." Pet. App. 55a (internal quotation marks omitted). And under the Fourteenth Amendment, "a State does not behave irrationally by insisting upon its own definition of marriage rather than deferring to the definition adopted by another State." *Id*.

Judge Daughtrey dissented. Like the district court, she concluded that the Commonwealth's ban lacks any rational basis. The majority's "irresponsible procreation" theory, she pointed out, does not explain the "exclusion of same-sex couples from marrying." Pet. App. 62a-63a. As for the majority's "wait and see" reasoning, Judge Daughtrey noted that "[t]he same argument was

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[2] The Sixth Circuit also suggested that it was bound by this Court's summary dismissal for want of a substantial federal question in *Baker v. Nelson*, 409 U.S. 810 (1972), to reject petitioners' challenge to Kentucky's licensing ban. Pet. App. 13a-18a. But as the Sixth Circuit recognized, "[t]his type of summary decision . . . does not bind *the Supreme Court* in later cases." Pet. App. 14a (emphasis added); *see also Lunding v. N.Y. Tax Appeals Tribunal*, 522 U.S. 287, 307 (1998) (finding a constitutional violation despite having previously dismissed a case raising the issue for want of a substantial federal question); *Caban v. Mohammed*, 441 U.S. 380, 390 n.9 (1979) (same); *Edelman v. Jordan*, 415 U.S. 651, 671 (1974) (same). Even in lower courts, summary dismissals do not constitute binding precedent where, as here, there are significant, intervening "doctrinal developments." *Hicks v. Miranda*, 422 U.S. 332, 344 (1975).

made by the State of Virginia" – and unanimously rejected by this Court in *Loving v. Virginia*, 388 U.S. 1 (1967). *Id.* 92a-93a. States may not deny equal treatment "by deferring to the wishes or objections of some fraction of the body politic" to delay social change. *Id.* 91a (internal quotation marks omitted). This is especially so, she asserted, where, as here, the state law demeans the dignity of families and harms "the welfare of children." *Id.* 64a.

SUMMARY OF THE ARGUMENT

Kentucky's refusal to license or recognize marriages between same-sex couples violates the Fourteenth Amendment.

I. Kentucky's refusal to license marriages between same-sex couples demands close judicial examination because it impinges upon the liberty of such couples and treats them unequally under the law. Marriage is "a central part of the liberty protected by the Due Process Clause" – a "fundamental" right upon which our culture's familial rights and responsibilities are built. *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978). And same-sex couples "may seek autonomy" under the Fourteenth Amendment for such intimate relationships "just as heterosexual persons do." *Lawrence v. Texas*, 539 U.S. 558, 574 (2003). Even if the Sixth Circuit were correct that marriage for same-sex couples is merely "fundamentally important without being a fundamental right" under the Constitution, Pet. App. 37a, enhanced scrutiny of Kentucky's ban would still be warranted. Marriage is a foundational means in our society of seeking personal fulfillment and acquiring community esteem. Excluding a class of

people from that institution, therefore, can "hardly be considered rational unless it furthers some substantial goal of the State." *Plyler v. Doe*, 457 U.S. 202, 224 (1982).

Kentucky's marriage ban also requires enhanced scrutiny because the purpose and effect of the ban are to brand same-sex couples and their families as less worthy than other families. The marriage ban relegates a class of couples and their children to a second-tier status, precluding them from participating in the normalcies of adult, family, and community life. This categorical exclusion not only stigmatizes same-sex couples and their children; it denies them equal *protection* of the laws in a most literal sense, for marriage is the gateway to innumerable legal safeguards and accommodations, concerning matters ranging from adoption rights to estate planning. What is more, Kentucky's ban imposes this second-tier status by classifying individuals on the basis of sexual orientation and sex. These characteristics are "so seldom relevant to the achievement of any legitimate state interest," *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985), that any classification on these grounds necessarily triggers heightened scrutiny.

II. Under any standard of review, however, no legitimate interest justifies the marriage ban's infringement on the equal dignity of same-sex couples and their families. The bare desire to control the pace of social change is not, by itself, a legitimate interest that warrants imposing tangible harm on same-sex couples and their families. Nor is moral disapproval. *Lawrence*, 539 U.S. 558. And nor can Kentucky's marriage ban be rationalized as a

measure designed to protect the democratic process or to enable "further debate and voting," contrary to the Sixth Circuit's related suggestions. Pet. App. 59a. Constitutional protections "may not be submitted to vote; they depend on the outcome of no elections." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). And even if they did, the design and effect of Kentucky's constitutional amendment is to forestall debate and future legislation, not to facilitate it.

That leaves the Sixth Circuit's acceptance of the notion that Kentucky's marriage ban is reasonably necessary to encourage "responsible procreation" between heterosexual couples. Outside the context of litigation, no one would seriously suggest that this is the purpose of civil marriage. And for good reason: marriages are celebrated and honored in our society regardless of whether couples have, intend to have, or are even capable of having, children. At any rate, even if incentivizing responsible procreation were a goal of marriage, there would be no need to exclude same-sex couples from the institution to achieve that objective. Even less would it be necessary – or morally acceptable – to deprive the children of same-sex couples of the protection and security from having married parents in order to regulate the activities of others. Finally, the other common defense of marriage bans – that same-sex couples should be prohibited from marrying because they are not "optimal parents" – has been so discredited that the Sixth Circuit rejected it.

III. Kentucky's refusal to recognize the legal marriages of same-sex couples from other jurisdictions is unconstitutional for reasons beyond those fatal to its licensing ban. Once a state deems a

couple "worthy" of marriage, this decision confers "a dignity and status of immense import" – a determination that their marriage ought to be "deemed . . . equal with all other marriages." *United States v. Windsor*, 133 S. Ct. 2675, 2692 (2013). Kentucky's recognition ban negates this protected status. Furthermore, like DOMA, the recognition ban departs from the longstanding tradition of recognizing marriages based on their place of celebration, subject only to rare, case-by-case exceptions. In departing from this tradition, the recognition ban categorically "impose[s] a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of [other sovereign] States." *Id*. No legitimate public policy interest justifies imposing these injuries.

ARGUMENT

Four of the five federal courts of appeals to consider the issue, as well as the vast majority of district courts from across the country, have held that refusing to license or recognize marriages between same-sex couples violates the Fourteenth Amendment.[3] This Court should validate this

[3] *Compare Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014); *Baskin v. Bogan*, 766 F.3d 648 (7th Cir.) *cert. denied*, 135 S. Ct. 316, *and cert. denied sub nom. Walker v. Wolf*, 135 S. Ct. 316 (2014); *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir.) *cert. denied,* 135 S. Ct. 308, *and cert. denied sub nom. Rainey v. Bostic*, 135 S. Ct. 286, *and cert. denied sub nom. McQuigg v. Bostic*, 135 S. Ct. 314 (2014); and *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir.), *cert. denied,* 135 S. Ct. 265 (2014), *with* Pet. App. 60a. For a compilation of district court opinions, see *Marriage Litigation*, Freedom to Marry, http://www. freedomtomarry.org/litigation.

overwhelming consensus and ensure marriage equality in the dwindling number of states that still resist it.

I. THE FOURTEENTH AMENDMENT REQUIRES A CLOSE EXAMINATION OF THE PURPORTED JUSTIFICATIONS FOR KENTUCKY'S MARRIAGE BAN.

The Fourteenth Amendment's guarantees of liberty and equality are "linked in important respects." *Lawrence v. Texas*, 539 U.S. 558, 575 (2003). The former "withdraws from [states] the power to degrade or demean" individuals' choices regarding intimate personal matters, while the equal protection guarantee makes this protection "all the more specific and all the better understood and preserved." *United States v. Windsor*, 133 S. Ct. 2675, 2695 (2013). Together, these mutually reinforcing rights command that Kentucky's denial of the "equal dignity" of same-sex couples necessitates close judicial examination. *Id.* at 2693.

A. The Marriage Ban Impinges Upon The Liberty Of Same-Sex Couples To Participate In One Of The Most Vital Relationships In Life.

This Court's "past decisions make clear that the right to marry is of fundamental importance," and that state laws forbidding a class of persons from becoming married therefore demand a "'critical examination' of the state interests advanced in support of the classification." *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978) (quoting *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312, 314 (1976)). The Sixth Circuit attempted to sidestep this precedent by

characterizing marriage for same-sex couples – like other societal essentials such as "education" – as "fundamentally important without being a fundamental right under the Constitution," thereby, in its view, triggering only rational-basis review. Pet. App. 37a.

This reasoning is doubly misguided. Marriage – as the Fourth and Tenth Circuits have held – is indeed a fundamental right for all persons, including same-sex couples. *See Bostic v. Schaefer*, 760 F.3d 352, 375-77 (4th Cir. 2014); *Kitchen v. Herbert*, 755 F.3d 1193, 1208-18 (10th Cir. 2014). And even if it were not, the crucial place that marriage holds in American society would still require courts to closely examine laws categorically excluding same-sex couples from that institution.

1. a. "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Loving v. Virginia*, 388 U.S. 1, 12 (1967). It is, indeed, one of our "'basic civil rights,'" *id.* (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)); "the most important relation in life," *Maynard v. Hill*, 125 U.S. 190, 205 (1888); and "intimate to the degree of being sacred," *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965). This is because marriage reflects a "bilateral loyalty" that provides a legal foundation for forming a family and rearing children. *Id.*; *see also Windsor*, 133 S. Ct. at 2692. It signals to close relations and strangers alike that two people are committed to engaging in our culture's most meaningful form of "intimate relationship" and mutual support. *Windsor*, 133 S. Ct. at 2692. Last but by no means least, marriage is "a precondition to

the receipt of [various] government benefits." *Turner v. Safley*, 482 U.S. 78, 96 (1987). It is an official designation that safeguards spouses and their children against unforeseen events, providing legal certainty and protection in times of hardship.

This Court has thus recognized for over a century that "the right 'to marry, establish a home and bring up children' is a central part of the liberty protected by the Due Process Clause." *Zablocki*, 434 U.S. at 384 (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)); *see also Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974) ("This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause."). States, of course, retain authority to regulate the "incidents, benefits, and obligations" of marriage. *Windsor*, 133 S. Ct. at 2692. But when a statutory classification prevents a class of persons from being or becoming married, "it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." *Zablocki*, 434 U.S. at 388.

In *Zablocki*, for example, this Court considered a state law prohibiting persons from marrying if they were delinquent on their child support responsibilities. 434 U.S. at 375. The Court invalidated the law because the interests the state law purportedly advanced "c[ould] be achieved" in alternative ways, and the state law was both a "grossly underinclusive" and a "substantially overinclusive" means of pursuing those ends. *Id.* at 390. This Court has subjected other state laws preventing classes from marrying to the same mode

of analysis, invalidating laws that prohibited people of different races from marrying, *see Loving*, 388 U.S. at 12, and prohibiting prisoners from marrying, *see Turner*, 482 U.S. at 99.

b. The Sixth Circuit refused to treat this case as involving the "fundamental right" to marriage, reasoning that that right must be limited to "opposite-sex marriage." Pet. App. 38a (internal quotation marks omitted). But that reasoning repeats the error of *Bowers v. Hardwick*, 478 U.S. 186 (1986). There, this Court asked whether due process confers "a fundamental right upon homosexuals to engage in sodomy." *Id.* at 190. As the Court later acknowledged in overruling *Bowers*, however, that framing characterized "the liberty at stake" too narrowly. *Lawrence*, 539 U.S. at 567. The proper constitutional inquiry was whether an adult – regardless of sexual orientation – has a fundamental right to form an intimate relationship with another consenting adult that includes private sexual conduct. *Id.*

The same analysis applies here. The question is not whether there is a fundamental right to "same-sex marriage." It is whether the Constitution safeguards a fundamental right to marriage in general. There can be no doubt that it does. Same-sex couples, therefore, "may seek autonomy for these purposes, just as heterosexual persons do." *Lawrence*, 539 U.S. at 574.

This analysis also disposes of the Sixth Circuit's objection that the specific concept of "same-sex marriage" is not "'deeply rooted in this Nation's history and tradition.'" Pet. App. 37a (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

It is true that this Court's cases require "a 'careful description' of the asserted fundamental liberty interest." *Glucksberg*, 521 U.S. at 721 (citation omitted). But this admonition applies to the *nature* of the protected interest, not to the *classes of people* entitled to claim protection. Accordingly, this Court held in *Loving* that interracial couples have a fundamental right to marry, 388 U.S. at 12, even though "interracial marriage was illegal in most States in the 19th century," *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847-48 (1992). Similarly, the fundamental right to marry extends to prisoners, *Turner*, 482 U.S. at 95-97, even though incarcerated individuals were not traditionally allowed to marry, *see* Virginia L. Hardwick, Note, *Punishing the Innocent: Unconstitutional Restrictions on Prison Marriage and Visitation*, 60 N.Y.U. L. Rev. 275, 277-79 (1985). "[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry." *Lawrence*, 539 U.S. at 572 (quoting *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)).

Any other approach would be antithetical to the Constitution's basic promise of equal dignity for all persons. When, as here, a disfavored class comes to court seeking to enjoy a fundamental right on equal terms with – and for exactly the same reasons as – other similarly situated persons, the Constitution demands more from the state than a simple reliance on tradition. Instead, it requires the state to explain why "exten[ding] constitutional rights and protections to people once ignored or excluded" would actually subvert some legitimate

state interest that cannot otherwise be furthered. *United States v. Virginia*, 518 U.S. 515, 557 (1996).[4]

2. Even if the Sixth Circuit were correct that marriage for same-sex couples is "fundamentally important without being a fundamental right," Pet. App. 37a, close examination of the Commonwealth's marriage ban would still be required.

A comparison to education is instructive. Education, as the Sixth Circuit noted, is not a "fundamental right." Pet. App. 37a (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973)). But that does not mean that denying equal access to education triggers no intensified constitutional scrutiny. To the contrary, in *Brown v. Board of Education*, 347 U.S. 483 (1954), this Court relied in part upon "the importance of education to our democratic society," *id.* at 493, in holding that laws segregating public schools on the basis of race

[4] The Sixth Circuit also suggested that applying a fundamental-rights analysis here would require courts in the future to apply strict scrutiny to laws concerning the "*duration* of a marriage," the "*number* of people" one may marry, and the "age of consent." Pet. App. 40a-41a (emphases in original). Not so. This case concerns only consenting adult couples. And *Lawrence* already indicates that rights respecting "marriage" and "family relationships" cannot be limited based on sexual orientation. *See* 539 U.S. at 574. Reasonable regulations based on criteria other than sexual orientation, and that do not "directly and substantially" interfere with this right, "may legitimately be imposed." *Zablocki*, 434 U.S. at 386-87; *see also Lawrence*, 539 U.S. at 578 (distinguishing laws involving "minors" or "persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused").

violate the equal protection guarantee of the Fourteenth Amendment.

The Court followed a similar approach in *Plyler v. Doe*, 457 U.S. 202 (1982), when striking down a state law banning undocumented children from public schools. While "reject[ing] the claim that 'illegal aliens' are a 'suspect class,'" *id.* at 219 n.19, the Court once again stressed that it "cannot ignore the significant social costs borne by our Nation" when "we deny [people] the ability to live within the structure of our civic institutions," *id.* at 221, 223. Education, in other words, is not "merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation." *Id.* at 221. It plays "a fundamental role in maintaining the fabric of our society" and is "the means by which [a] group might raise the level of esteem in which it is held by the majority." *Id.* at 221, 222. Consequently, denying educational access to "a discrete class of children not accountable for their disabling status" could "hardly be considered rational unless it further[ed] some substantial goal of the State." *Id.* at 223-24; *see also id.* at 226 ("[T]he State must demonstrate that the classification is reasonably adapted to the purposes for which the state desires to use it." (internal quotation marks, emphasis, and citation omitted)).

This reasoning applies with full force to laws denying same-sex couples access to marriage. Marriage "is more than a routine classification for purposes of certain statutory benefits." *Windsor*, 133 S. Ct. at 2692. Like education, marriage is a cornerstone of our society. It is a foundation upon which our culture's most important familial rights and responsibilities are built. Consequently, denying

access to that institution to "a discrete class . . . will mark them [with a stigma] for the rest of their lives." *Plyler*, 457 U.S. at 223. It will deny gay people, as well as their children, "the ability to live within the structure of our civic institutions." *Id.* States should not be able to impose such an exclusion without showing that it is at least reasonably adapted to further some substantial goal.

B. The Marriage Ban Codifies Inequality For Petitioners And Their Children.

The Sixth Circuit recognized that "[g]ay couples, no less than straight couples," are capable of "love, affection, and commitment" and of "raising children and providing stable families for them." Pet. App. 24a, 28a. Yet Kentucky law relegates same-sex couples, and their children, to second-tier status in our society – denying them legal affirmation for their most vital relationships. This imposition of inequality, like the Commonwealth's impingement upon the liberty of same-sex couples, demands close judicial examination. Whether Kentucky's marriage ban is viewed in terms of: (1) creating a disfavored social caste; (2) discriminating based on sexual orientation; or (3) classifying on the basis of sex, this Court's decisions require the Commonwealth, at a minimum, to demonstrate a substantial interest to which its law is reasonably adapted.

The court of appeals resisted heightened scrutiny and instead asserted that the marriage ban must be presumed constitutional and upheld "[s]o long as judges can conceive of some 'plausible' reason for the law," no matter how "unfair, unjust, or unwise" the law may be. Pet. App. 23a. This

approach not only contravenes this Court's precedent but – however unintentional – is stigmatizing in its own right. When a court declares that it is presumptively legitimate for the government to treat people differently based solely on their sexual orientation, "that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres." *Lawrence*, 539 U.S. at 575. Affirming such a judicial presumption here, without requiring an empirically sustainable justification for the state's categorical exclusions, would be "practically a brand upon" lesbians and gay men, "affixed by the law, an assertion of their inferiority." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 142 (1994) (quoting *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880)).

1. The Marriage Ban Relegates Lesbians And Gay Men To Second-Class Status.

a. The abiding purpose of the Equal Protection Clause is to closely scrutinize laws singling out certain classes of people for disfavored social treatment. "[T]he Constitution 'neither knows nor tolerates classes among citizens.'" *Romer v. Evans*, 517 U.S. 620, 623 (1996) (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)). And this admonition applies to lesbians and gay men as much as anyone else. Any law that subjects such citizens to "disfavored legal status or general hardships" is at war with "equal protection of the laws in the most literal sense." *Romer*, 517 U.S. at 633.

Romer and *Windsor* exemplify this anti-caste principle. In *Romer*, this Court confronted a popularly enacted amendment to the Colorado Constitution. The amendment precluded gays or lesbians from obtaining protections under state anti-discrimination law – "protections taken for granted by most people . . . against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society." 517 U.S. at 631. Because the law "identifie[d] persons by a single trait" and "ma[d]e them unequal to everyone else," this Court invalidated it. *Id.* at 633, 635.

Similarly, in *Windsor*, this Court invalidated Section 3 of DOMA, which excluded same-sex couples from all federal marriage-based rights and duties. The law "single[d] out a class of persons" – married same-sex couples – "deemed by a State entitled to recognition and protection to enhance their own liberty. It impose[d] a disability on the class by refusing to acknowledge a status the State [found] to be dignified and proper." *Windsor*, 133 S. Ct. at 2695-96.

Kentucky's marriage ban suffers from the same defects. The sponsor of the ban and the voter pamphlet, in fact, explicitly linked it to DOMA, signaling that the ban was necessary to protect marriage from an unworthy group. Pet. App. 141a-42a n.15; Kentucky Legislative Research Commission, *Proposed Marriage Amendment* (2004).[5] Like the laws at issue in *Romer* and *Windsor*, Kentucky's ban also arose from an "immediate and

[5] http://lrc.ky.gov/lrcpubs/2004_const_amendment_1.pdf.

visceral" reaction to the suggestion from other legal corners that gay and lesbian couples might attain equal status. Pet. App. 127a; *see also* Proposed Marriage Amendment Voter Pamphlet, *supra* (explaining that the amendment was necessary because of protections being afforded in other states). The ban preemptively denied marital status, as well as any "legal status . . . *substantially similar* to that of marriage" to same-sex couples. Ky. Const. § 233A (emphasis added).

Moreover, by excluding lesbians and gay men from the institution of marriage, the ban denies them equal *protection* in a most literal sense, walling off same-sex couples and their children from our society's wide panoply of familial rights and responsibilities "taken for granted by most people." *Romer*, 517 U.S. at 631. By way of illustration, in Kentucky:

- married couples may jointly adopt children. Ky. Rev. Stat. § 199.470;
- a spouse may make health care decisions, in the absence of an advance directive, on behalf of an incapacitated spouse. *Id.* § 311.631;
- a spouse has the right to share in the estate of a spouse who dies intestate. *Id.* § 391.010. Surviving spouses can also inherit a deceased spouse's estate with a reduced tax burden. *Id.* § 140.080; and
- a spouse receives benefits when a spouse dies as the result of a work-related injury, *id.* § 342.750, and

spouses can be awarded damages for loss of consortium, *id.* § 411.145.

Married couples also enjoy federal protections and benefits ranging from Social Security to housing to veterans' benefits. *Windsor*, 133 S. Ct. at 2694. Under the Family and Medical Leave Act, as one example, only a spouse's employment is protected when taking leave to care for an ailing husband or wife. 29 C.F.R. § 825.100.

This sweeping exclusion from the normalcies of adult family and community life necessarily imparts second-tier status on same-sex couples. Just as DOMA instructed married same-sex couples that "their marriage[s are] less worthy than the marriages of others," *Windsor*, 133 S. Ct. at 2696, Kentucky's ban tells same-sex couples and their children that their relationships are less worthy of respect than others. It demeans those families and "prohibits them from participating fully in our society, which is precisely the type of segregation that the Fourteenth Amendment cannot countenance." *Bostic*, 760 F.3d at 384.

Finally, like the federal law invalidated in *Windsor*, Kentucky's marriage ban is borne of moral disapproval of couples "whose moral and sexual choices the Constitution protects." *Windsor*, 133 S. Ct. at 2694; *see also Lawrence*, 539 U.S. 558. In *Windsor*, the Court concluded that the moral disapproval animating DOMA was readily apparent because "[t]he stated purpose of the law was to promote an 'interest in protecting the traditional moral teachings reflected in heterosexual-only marriage laws.'" 133 S. Ct. at 2693 (quoting H.R. Rep. No. 104-664, at 16 (1996)). The same is true

here. The sponsor of Kentucky's ban expressly designed it "to protect our communities from the desecration of . . . traditional values." Pet. App. 142a n.15. Indeed, just six years before expressly prohibiting same-sex couples from marrying, Kentucky defended its law criminalizing sex between same-sex couples on the ground that it was "immoral, without regard to whether the activity is conducted in private between consenting adults" or not. *Commonwealth v. Wasson*, 842 S.W.2d 487, 490 (Ky. 1992). The State's current effort to "protect 'traditional marriage,'" Pet. App. 129a, plainly has the same roots in this now-unenforceable moral perspective, *see Lawrence*, 539 U.S. at 571.

b. The Sixth Circuit implicitly acknowledged that Kentucky's law marks same-sex couples as "unworthy" of the institution of marriage. *See* Pet. App. 28a, 30a. It also conceded that the law was driven, at least in part, by "a rough sense of morality." *Id.* 34a. But the court of appeals deemed these facts irrelevant because it was unable to detect "animosity toward gays" as a motivating force behind the law. *Id.* 31a-32a (internal quotation marks omitted).

Animosity – that is, outright hostility or bigotry – is not a prerequisite to enhanced judicial scrutiny. Discrimination warranting close judicial scrutiny "rises not from malice or hostile animus alone. It 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). Such

discrimination can also come from a simple lack of familiarity or understanding – from "[h]abit, rather than analysis." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 453 n.6 (1985) (Stevens, J., concurring) (internal quotation marks omitted).

This remains true, contrary to the Sixth Circuit's suggestions, regardless of whether "people of good faith care deeply about" an issue. Pet. App. 32a. In *Lawrence*, this Court acknowledged that Texas's ban on the sexual intimacy of gay people was based on "profound and deep convictions accepted as ethical and moral principles to which [the ban's supporters] aspire and which thus determine the course of their lives." 539 U.S. at 571. But "[t]hese considerations [did] not answer the question" before the Court. *Id.* The real question is "whether the majority may use the power of the State to enforce these views on the whole society." *Id.* It could not do so through the criminal law in *Lawrence*, and it cannot do so through the marriage law here.

In short, the common thread in cases in which this Court has engaged in more searching scrutiny than ordinary rational-basis review is that the law at issue reflected "a view that those in the burdened class are not as worthy or deserving as others." *Cleburne*, 473 U.S. at 440. Once this sort of "negative attitude[]," *id.* at 448, is present – and even the Sixth Circuit conceded that it is in the instant case – it triggers the Constitution's distrust of "laws singling out a certain class of citizens for disfavored legal status or general hardships." *Romer*, 517 U.S. at 633.

2. The Marriage Ban Discriminates Based On Sexual Orientation.

In relegating same-sex couples to second-tier status, Kentucky's marriage ban necessarily discriminates against such couples based on their sexual orientation. As three federal courts of appeals have held, government discrimination based on sexual orientation is subject to heightened scrutiny. *See Windsor v. United States*, 699 F.3d 169, 180-85 (2d Cir. 2012), *aff'd*, 133 S. Ct. 2675 (2013); *Baskin v. Bogan*, 766 F.3d 648, 657-59 (7th Cir. 2014); *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 480-84 (9th Cir. 2014). Regardless of whether this Court's examination of this classification takes the form of a balancing test, *Baskin*, 766 F.3d at 656-60, or the traditional tiers of scrutiny, *Windsor*, 699 F.3d at 181-85, this Court should squarely reject the Sixth Circuit's assumption that even the most blatant forms of de jure discrimination against gay people are subject to no more skepticism than laws regulating purely business interests. *See, e.g.*, *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307 (1993).

In identifying classifications requiring heightened scrutiny, this Court has examined: (a) whether the class at issue has been historically "subjected to discrimination," *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987) (internal quotation marks and citation omitted); (b) whether the class's defining characteristic "frequently bears [a] relation to ability to perform or contribute to society," *Cleburne*, 473 U.S. at 440-41 (internal quotation marks and citation omitted); (c) whether the class exhibits "obvious, immutable, or distinguishing characteristics that define them as a discrete group," *Gilliard*, 483 U.S.

at 602 (internal quotation marks and citation omitted); and (d) whether the class is "a minority or politically powerless," *id.* (internal quotation marks and citation omitted). These factors dictate that classifications based on sexual orientation are at least quasi-suspect.

a. It is beyond serious dispute that gay people have suffered a pervasive history of discrimination. Indeed, lesbians and gay men "are among the most stigmatized, misunderstood, and discriminated-against minorities in the history of the world." *Baskin*, 766 F.3d at 658. Until recently, the marginalization of gay and lesbian people from society included laws criminalizing their sexual intimacy, *see Lawrence*, 539 U.S. at 562; barring them from government jobs, *see Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009, 1010 (1985) (Brennan, J., dissenting from denial of certiorari); excluding them from military service, 10 U.S.C. § 654 (1993) (repealed 2010); and preventing their entry into the United States, *see Boutilier v. INS*, 387 U.S. 118 (1967).

While acknowledging the "lamentable reality" that governments have historically discriminated against gay people, Pet. App. 42a-43a, the Sixth Circuit deemed that history irrelevant here because, in its estimation, "the institution of marriage arose independently of this record of discrimination." *Id.* 43a. The Sixth Circuit's historical assertion is factually inaccurate. "[F]or centuries there have been powerful voices to condemn homosexual conduct as immoral." *Lawrence*, 539 U.S. at 571. Kentucky's statutory and constitutional marriage bans are present-day manifestations of those views.

At any rate, the Sixth Circuit asked the wrong question. In determining whether a classification requires closer scrutiny, courts must "look to the likelihood that governmental action premised on a particular classification is valid *as a general matter*, not merely to the specifics" of a particular case. *Cleburne*, 473 U.S. at 446 (emphasis added). In other words, it makes no difference if the particular law challenged is itself the clear result of a history of discrimination. As long as the history exists more generally, courts are right to be skeptical when the government relies on the same classification that has historically been used to discriminate. Accordingly, heightened scrutiny would also apply if a state today, for the first time ever, enacted a law barring marriages between people of different national origins or religions. It thus applies here as well.

b. Apart from a history of discrimination, the other critical factor in the Court's heightened-scrutiny analysis is whether the group in question is different from other groups in a way that "frequently bears [a] relation to ability to perform or contribute to society." *Cleburne*, 473 U.S. at 440-41 (internal quotation marks and citation omitted). Sexual orientation has *no* bearing on an individual's ability to perform in or contribute to society, and the Sixth Circuit did not contend otherwise. Over forty years ago, the American Psychiatric Association and the American Psychological Association recognized that homosexuality is not correlated with any "impairment in judgment, stability, reliability or general social and vocational capabilities." Am. Psychiatric Ass'n, Resolution (Dec. 15, 1973), *reprinted in* 131 Am. J. Psychiatry 497 (1974); Minutes of the Annual Meeting of the Council of

Representatives, 30 Am. Psychologist 620, 633 (1975); *see also* Am. Psychiatric Ass'n, Position Statement on Homosexuality and Civil Rights, 131 Am. J. Psychiatry 436, 497 (1974).

c. The Sixth Circuit also did not contest that sexual orientation is an "obvious, immutable, or distinguishing characteristic[]" that makes a group particularly vulnerable to discrimination. *Bowen*, 483 U.S. at 602 (internal quotation marks and citation omitted); *see also Mathews v. Lucas*, 427 U.S. 495, 506 (1976). Nor would there be any basis to dispute this fact: There is a broad medical and scientific consensus that sexual orientation "is an immutable (and probably an innate, in the sense of in-born) characteristic rather than a choice." *Baskin*, 766 F.3d at 657. Moreover, this Court has already refused to distinguish between the "status" of being gay and physical intimacy between same-sex couples. *Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 689 (2010) (citing *Lawrence*, 539 U.S. at 575, and *id.* at 583 (O'Connor, J., concurring in judgment)). One ought not to be forced to choose between one's sexual orientation and one's rights as an individual – even if such a choice could be made.[6]

[6] At any rate, a characteristic need not be immutable in a literal sense in order to trigger heightened scrutiny. Classifications based on alienage and "illegitimacy" are subject to such scrutiny even though "[a]lienage and illegitimacy are actually subject to change." *Windsor*, 699 F.3d at 183 n.4; *see Nyquist v. Mauclet*, 432 U.S. 1, 9 n.11 (1977) (rejecting the argument that alienage did not deserve strict scrutiny because it was mutable).

d. Lesbians and gay men also have a sufficiently limited ability to protect themselves in the political process. A historical comparison to women proves the point. When *Frontiero v. Richardson* held that classifications based on sex trigger heightened scrutiny, Congress had already passed Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963 to protect women from discrimination in the workplace. 411 U.S. 677, 687-88 (1973) (plurality opinion). If the civil rights protections that existed for women in 1973 did not preclude heightened scrutiny for sex discrimination, the limited success of gay people in obtaining "protections taken for granted by most people," *Romer*, 517 U.S at 631, can hardly be disqualifying. There is still no express federal ban on sexual orientation discrimination in employment, housing, education, or credit. Nor does any such protection exist in a majority of states. And at least part of the reason why such legal protections are still lacking is because of continuing negative stereotypes of lesbians and gay men.

Furthermore, when gay people *have* achieved civil rights protections, direct democracy often has been used to take them away. *See, e.g.*, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013); *Romer*, 517 U.S. 620. The successful use of referenda to strip gay people of protections that most people either "already have" or "do not need," *Romer*, 517 U.S at 631, began decades ago and continues to this day. During the past several months, voters in Fayetteville, Arkansas repealed a city ordinance protecting gay people from employment discrimination, *see* Joel Walsh, *Voters Repeal Fayetteville Civil Rights Administration Ordinance*,

Ark. Democrat Gaz. (Dec. 29, 2014),[7] and in Chattanooga, Tennessee voters repealed a domestic partnership law, Joy Lukachick Smith, *Chattanooga Voters Reject Partner Benefits for City Employees*, Chattanooga Times Free Press (Aug. 8, 2014);[8] *see also* Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 Am. J. Pol. Sci. 245, 257-60 (1997); Donald P. Haider-Markel et al., *Lose, Win, or Draw?: A Reexamination of Direct Democracy and Minority Rights*, 60 Pol. Res. Q. 304, 312 (2007). No group whose advances are so regularly rolled back can be characterized – as the Sixth Circuit would have it – as "eminently successful" in the legislative arena. Pet. App. 47a.

e. All that remains is the Sixth Circuit's observation that this Court "has never held" – at least not expressly – "that legislative classifications based on sexual orientation receive heightened review." Pet. App. 42a. True enough. But it has been common for this Court first to subject classifications to rational-basis scrutiny (at least in label), and then later to hold that heightened scrutiny applies upon firm realization that those classifications "generally provide[d] no sensible ground for differential treatment," *Cleburne*, 473 U.S. at 440. See, for example, *Jimenez v. Weinberger*, 417 U.S. 628 (1974) ("illegitimacy") and *Reed v. Reed*, 404 U.S. 71 (1971) (sex). Following that same path here by explicitly holding that heightened scrutiny applies – rather

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[7] http://www.arkansasonline.com/news/2014/dec/09/voters-repeal-fayetteville-civil-rights-administra/?latest.

[8] http://www.timesfreepress.com/news/local/story/2014/aug/08/partner-benefits-rejected/263896.

than a presumption of constitutionality – would be consistent with that practice.

3. The Marriage Ban Discriminates On The Basis Of Sex.

"'[A]ll gender-based classifications today' warrant 'heightened scrutiny.'" *Virginia*, 518 U.S. at 555 (quoting *J.E.B.*, 511 U.S. at 136). On its face, Kentucky's marriage ban classifies based on sex: "Only women may marry men, and only men may marry women." *Latta v. Otter*, 771 F.3d 456, 480 (9th Cir. 2014) (Berzon, J., concurring). Like any other classification based on sex, the marriage ban should therefore be subject to heightened scrutiny – regardless of whether they were passed for the purpose of disadvantaging women or men more generally. *Id.* at 479-80.

In addition, laws restricting marriage to opposite-sex couples rely on "stereotypes" about the relative capabilities of men and women like those that this Court has repeatedly rejected as constitutionally suspect. *See, e.g.*, *Califano v. Westcott*, 443 U.S. 76, 89 (1979) (impermissible to "presum[e] the father has the 'primary responsibility to provide a home and its essentials,' while the mother is the 'center of the home and family life'" (internal quotation marks and citations omitted)). The notion that "gender diversity or complementarity" is necessary because "men and women 'naturally' behave differently from one another in marriage and as parents," whether explicit or implicit, "underscore[s] that the same-sex marriage prohibitions discriminate on the basis of sex, not only in their form . . . but also in reviving the very infirmities that led the Supreme Court to adopt

an intermediate scrutiny standard for sex classifications in the first place." *Latta*, 771 F.3d at 486 (Berzon, J., concurring).

II. KENTUCKY'S MARRIAGE BAN IS NOT SUPPORTED BY ANY LEGITIMATE STATE INTEREST.

The Sixth Circuit credited two state interests as sufficient to sustain Kentucky's marriage ban. First, while hypothesizing that someday "American law will allow gay couples to marry," Pet. App. 4a, the court of appeals held that Kentucky has a legitimate interest in freezing its restrictive definition of marriage into place for the indefinite future, to ensure that social change takes place through "customary political processes," *id.* 60a. Second, the Sixth Circuit held that states may exclude same-sex couples from the institution of marriage to regulate "the intended and unintended effects of male-female intercourse." *Id.* 23a.

Neither of these proffered grounds, nor any other, justifies Kentucky's marriage ban under any standard of review.

A. A Desire To Forestall Social Change Is Not Itself A Legitimate State Interest.

This is not the first time – not even in the context of discrimination against gay people – that this Court has been confronted with the argument that states should be able to exclude a group from full participation in society in order to defer to the democratic process or respect tradition. This Court has consistently rejected such arguments and should do so again here. States have no legitimate interest

in halting the progression of social change, untethered to any tangible goal that the state might constitutionally seek to accomplish.

1. A premise of our constitutional democracy is that constitutional protections "may not be submitted to vote; they depend on the outcome of no elections." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). Thus, "[i]t is plain that the electorate as a whole, whether by referendum or otherwise, could not order [governmental] action violative of the Equal Protection Clause." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) (citation omitted). Indeed, the law struck down under rational-basis review in *Romer v. Evans* was ratified by the voters as part of a statewide referendum. 517 U.S. 620, 623-24 (1996). "A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be." *Lucas v. Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713, 736-37 (1964). Nor can they be infringed by legislative bodies.

In this case, however, the Sixth Circuit's "democratic process" argument is not just doctrinally unsound. It also ignores the purpose of amending a constitution and the history of Kentucky's marriage ban. Constitutional amendments are not designed to facilitate political debate; they are designed to end it. This is especially true where, as here, functionally identical statutes are already on the books, *see* Ky. Rev. Stat. § 402.005 *et seq.* – leaving permanency and

insularity as the only reasons to constitutionalize a matter.[9]

Accordingly, Kentucky did not enact its 2004 constitutional amendment to "allow change through customary political processes," Pet. App. 60a. Quite the opposite; the co-sponsors of the bill that became the amendment designed it to *remove* the issue from the reach of the state judiciary and all other "elected officials," including those in the "legislature," who might wish to allow same-sex couples to marry. *Id.* 142a n.15.

Characterizing the Commonwealth's amendment as a stop-gap designed to enable "further debate and voting," Pet. App. 59a, blinks reality.

2. Nor is blocking social change, simply to allow time to pass, a legitimate state interest.[10] Even

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[9] While is it *possible* in Kentucky, as at the federal level, to repeal a constitutional amendment, it is exceedingly rare. There has only been one instance in Kentucky history when an amendment to the state constitution (adopted in 1891) has been repealed: the 1919 amendment establishing prohibition. *See* Kentucky Legislative Research Commission, Informational Bulletin No. 59 (Jan. 2013), at 67, *available at* www.lrc.ky.gov/lrcpubs/ib59.pdf.

[10] The premise that the marriage bans actually preserve "traditional marriage" is itself questionable because contemporary marriage laws in Kentucky, as in other states, "bear little resemblance to those in place a century ago." *Latta v. Otter*, 771 F.3d 456, 475 (9th Cir. 2014). "[W]ithin the past century," for instance, "married women had no right to own property, enter into contracts, retain wages, make decisions about children, or pursue rape allegations against their husbands." *Id.* "[A]t most," bans like Kentucky's "preserve the status quo with respect to one aspect of marriage – exclusion of same-sex couples." *Id.*

where a tradition of exclusion exists, states may not lock in a group's second-class status to preempt any progress it might make toward equality. To the contrary, this Court has been "extremely sensitive when it comes to basic civil rights . . . and ha[s] not hesitated to strike down an invidious classification even though it had history and tradition on its side." *Levy v. Louisiana*, 391 U.S. 68, 71 (1968); *see also Harper v. Va. Bd. of Elections*, 383 U.S. 663, 669 (1966) ("In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality."). "Ancient lineage" of a legal classification "does not give it immunity from attack for lacking a rational basis" or any other legitimate justification. *Heller v. Doe*, 509 U.S. 312, 326 (1993).

By the same token, this Court has repeatedly rejected a desire to "go slowly" in the face of social change as a legitimate reason to deny equal dignity to classes of people. *Hunter v. Erickson*, 393 U.S. 385, 392 (1969); *see also Watson v. City of Memphis*, 373 U.S. 526, 528, 535 (1963) (rejecting city's attempt to "justify its further delay in conforming fully and at once to constitutional mandates by urging the need and wisdom of proceeding slowly and gradually in its desegregation efforts"). In *Windsor* itself, the Bipartisan Legal Advisory Group ("BLAG") sought to defend DOMA by pointing to "the need for caution [before] changing such an important institution" as marriage. *See* Brief on the Merits for Respondent BLAG at 10, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307), 2013 WL 267026. This Court was unmoved, holding that no "legitimate purpose" supported DOMA. *Windsor*, 133 S. Ct. at 2696.

To justify "waiting and seeing," there has to be some genuine harm – or potential turn of events – that a state is legitimately worried about. Yet sometimes there is just no credible source of concern. Consider *Loving v. Virginia*, 388 U.S. 1 (1967). States historically banned marriages between interracial couples, and while that traditional prohibition was receding in 1967, sixteen states still prohibited the practice. *Id.* at 6. In this Court, therefore, Virginia urged the Court to avoid constitutionalizing the issue, arguing that debate was still occurring on the subject and that "[t]oo little [wa]s known of the biological consequences" of mixing races. Brief of Appellee Virginia at 50 & App. E, *Loving v. Virginia*, 388 U.S. 1 (1967) (No. 395), 1967 WL 113931. As evidence of that debate, Virginia pointed to its own supreme court's holding that "nations and races have better advanced in human progress when they cultivated their own distinctive characteristics." *Naim v. Naim*, 87 S.E. 2d 749, 756 (Va. 1955). Virginia also referenced the Louisiana Supreme Court's declaration that laws banning interracial marriage plausibly "prevent[ed] the propagation of half-breed children," who would "have difficulty in being accepted by society." *State v. Brown*, 108 So. 2d 233, 234 (La. 1959).

No doubt these various jurists held their views on the issue of miscegenation – as the Sixth Circuit described Kentucky's beliefs here – in the utmost "good faith." Pet. App. 32a. No doubt many persons "care[d] passionately" about the subject. *Id*. 33a. In fact, polling at the time showed that nearly eighty percent of the U.S. population disapproved of interracial unions. Gallup News Service, *Gallup Poll Social Series: Minority Rights and Relations*

2 (2013).[11] But this Court did not buckle in the face of such tradition or defer to voices urging a more gradual approach to social change.

Nothing about this case calls for a different approach. Kentucky has no legitimate interest in excluding same-sex couples from the institution of marriage simply to allow time to pass. "[I]nertia and apprehension are not legitimate bases for denying same-sex couples due process and equal protection of the laws." *Bostic v. Schaefer*, 760 F.3d 352, 384 (4th Cir. 2014). Not for one day longer.

3. The Sixth Circuit seemingly sought comfort for its "go slow" thesis in the technical truism that deeming a law consistent with the Constitution does not necessarily entail approval of the policy the law establishes. But upholding Kentucky's law would not be a neutral act.

As Alexander Bickel explained, "though not a compliment," upholding a law "amounts to a significant intervention in the political process, different in degree only from a declaration of unconstitutionality." Alexander M. Bickel, *The Supreme Court 1960 Term – Foreword: The Passive Virtues*, 75 Harv. L. Rev. 40, 48 (1961). When this Court upholds contentious laws as constitutional, "[t]he Court's prestige, the spell it casts as a symbol, enable it to entrench and solidify measures that may have been tentative in the conception or that are on the verge of abandonment." *Id.*; *see also* Charles L. Black, Jr., *The People and the Court* 56-86 (1960)

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[11] http://www.gallup.com/file/poll/163703/Interracial_marriage_130725.pdf.

(discussing the Court's power of "legitimizing" statutory policy).

One need look no further than *Bowers v. Hardwick* to see an illustration of this danger. The anti-sodomy statutes that this Court legitimized in *Bowers* "served to equate homosexuality with criminality." Christopher R. Leslie, Lawrence v. Texas *as the Perfect Storm*, 38 U.C. Davis L. Rev. 509, 511 (2005). This equation, "in and of itself," constituted "an invitation to subject homosexual persons to discrimination both in the public and in the private spheres." *Lawrence v. Texas*, 539 U.S. 558, 575 (2003). The *Bowers* decision also facilitated a sharp rise in anti-gay rhetoric and violence more generally. *See, e.g.*, Mary C. Dunlap, *Gay Men and Lesbians Down by Law in the 1990's USA: The Continuing Toll of* Bowers v. Hardwick, 24 Golden Gate U. L. Rev. 1, 12-16 (1994). It took nearly two decades – during which untold personal pain occurred – for this Court to correct its error.

The Court should not repeat that mistake. No matter how worded, any opinion upholding Kentucky's marriage ban will inescapably be viewed as validating the Commonwealth's decision to deny equal treatment to same-sex couples and their families. Hence, instead of preserving the status quo, a decision upholding Kentucky's marriage ban would have the practical effect of re-imposing inequality in many states where same-sex couples currently have access to the same status and dignity as all other committed couples.

B. No Other State Interest Rationally Supports Kentucky's Marriage Ban.

"[E]ven in the ordinary equal protection case calling for the most deferential of standards, [the Court] insist[s] on knowing the relation between the classification adopted and the object to be obtained." *Romer*, 517 U.S. at 632. The justifications offered must have a "footing in the realities of the subject addressed by the legislation." *Heller*, 509 U.S. at 321. And even when the government offers an ostensibly legitimate purpose, "[t]he State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *Cleburne*, 473 U.S. at 446.

None of the commonly submitted justifications for marriage bans meets this standard.

1. "Responsible Procreation"

The only tangible governmental interest the Sixth Circuit was willing to identify in support of Kentucky's marriage ban was the so-called "responsible procreation" theory. According to the court of appeals majority, "[b]y creating a status (marriage) and by subsidizing it (e.g., with tax-filing privileges and deductions), the States created an incentive for two people who procreate together to stay together for purposes of rearing offspring." Pet. App. 25a-26a. And, the majority continued, because "of the biological reality that couples of the same sex do not have children in the same way" – *i.e.*, through sexual intercourse – "couples of the same sex do not run the risk of unintended offspring" and therefore Kentucky does not need to include them in its incentive program. *Id.* 26a.

"These arguments are not those of serious people." Pet. App. 117a (district court opinion). As an initial matter, the Commonwealth's conception of marriage as a government-run incentive program that channels heterosexuals toward "responsible procreation" bears no relation to "the popular understanding of the institution" of marriage "as it applies to heterosexual couples." *Windsor*, 133 S. Ct. at 2718 (Alito, J., dissenting). Just as "it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse," *Lawrence*, 539 U.S. at 567, it demeans married couples to say that marriage is simply about the capacity to procreate. *All* marriages are celebrated and respected, regardless of whether couples are capable of procreating. Marriage signifies an enduring bond that society honors even when procreation is impossible, *see Turner v. Safley*, 482 U.S. 78, 95-96 (1987), or a couple chooses to impede its own procreative abilities, *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

Even if the Sixth Circuit's characterization of marriage had some basis in reality, it still would not salvage Kentucky's law. Nothing about treating marriage between different-sex couples as an incentive program would require excluding same-sex couples from the institution. Different-sex couples decide whether to marry or stay married irrespective of whether same-sex couples also have the freedom to marry. Put another way, "it is wholly illogical to believe that state recognition of the love and commitment between same-sex couples will alter the most intimate and personal decisions of opposite-sex couples." *Kitchen v. Herbert*, 755 F.3d 1193, 1223 (10th Cir. 2014).

Or consider the irrationality of the assertion that only families headed by couples who can accidentally procreate need the protections of marriage to "stay together for purposes of rearing offspring." Pet. App. 26a. It is true that same-sex couples – like other couples who require assisted reproduction – cannot procreate by accident. But "family is about raising children and not just about producing them." *Baskin v. Bogan*, 766 F.3d 648, 663 (7th Cir. 2014). That is, the protections of marriage help keep both fertile and infertile couples together to provide a stable environment the whole time the child is raised, not just at the point of conception. Nothing about couples who cannot procreate accidentally (whether they are heterosexual or gay) makes the stability of marriage less important for their children.

The notion that some children should receive fewer legal protections than others based on the circumstances of their conception is not only irrational; it is constitutionally repugnant. "Obviously, no child is responsible for his birth." *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972). Thus, "penalizing the . . . child is an ineffectual – as well as an unjust – way of deterring [his or her] parent." *Id.*; *see also Plyler v. Doe*, 457 U.S. 202, 220 (1982); *Levy*, 391 U.S. at 72 (circumstances of birth "ha[ve] no relation" to entitlement to any legal benefit from the child's parents). It is all the more unjust and ineffectual to punish the child in order to influence not the child's parents, but *someone else's* parents.

If all of this were not bad enough, the illogic of the "responsible procreation" theory runs still deeper. Different-sex couples in Kentucky, as elsewhere, can marry regardless of how the children they raise are brought into the world. They can also marry regardless of whether they want children or not – and regardless of whether they are fertile or infertile. Indeed, millions of married different-sex couples in this country are not raising (and never intend to raise) children.[12] Meanwhile, over one hundred thousand same-sex couples *are* raising children.[13]

The "procreation theory," in short, is "so riddled with exceptions" and inconsistencies, *Eisenstadt v. Baird*, 405 U.S. 438, 449 (1972), that it cannot possibly sustain Kentucky's marriage ban. *See also Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 366 n.4 (2001) (explaining that in *Cleburne*

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[12] More than 31 million women in the United States are married, and 19.4% of them (over 6 million) have never had a child. U.S. Census Bureau, Fertility of American Women: 2010 – Detailed Tables, tbl.1, http://www.census.gov/hhes/fertility/data/cps/2010.html. In fact, among women old enough to marry (even using age 15 as the threshold), the majority are beyond normal child-bearing age (45 and older), Lindsay M. Howden & Julie A. Meyer, U. S. Census Bureau, *Age and Sex Composition: 2010*, at 4 (2011), available at http://www.census.gov/prod/cen2010/briefs/c2010br-03.pdf, but they are free to marry in Kentucky as long as they marry a man.

[13] *See* Brief of Amicus Curiae Gary J. Gates in Support of Plaintiffs-Appellees and Affirmance at 19, *Brenner v. Armstrong*, No. 14-14061-AA (11th Cir. Dec. 22, 2014) (noting that based on U.S. Census data, "more than 125,000 same-sex-couple households collectively include nearly 220,000 children in their homes").

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"). Any decision from this Court crediting a conception of marriage so divorced from reality would wilt in the glare of the public eye and mystify Americans for generations to come.

2. "Optimal Parenting"

The Sixth Circuit declined to accept the sometimes-peddled notion that the marriage bans promote an "optimal" childrearing environment of a family headed by a man and a woman, and rightly so. The premise of this argument – that marriage bans "safeguard children by preventing same-sex couples from marrying and starting inferior families," *Bostic*, 760 F.3d at 383 – is itself an affront to the equal dignity of same-sex couples.

As a matter of simple logic, banning same-sex couples from marrying does absolutely nothing to steer children into what some assert are more "optimal" families. The only impact Kentucky's marriage ban has on children's welfare is that it *deprives* thousands of children of stability and protection based upon the sexual orientation of their parents. In addition, the ban "humiliates" children now being raised by same-sex couples and makes it more "difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Windsor*, 133 S. Ct. at 2694.

Moreover, the reality is that "gay couples, no less than straight couples, are capable of raising children and providing stable families for them." Pet. App. 24a. Based on decades of scientific research on same-sex parent families, every major professional organization in the country dedicated to children's health and well-being rejects the notion that same-sex couples are less capable parents than different-sex couples. These include the American Psychological Association, the American Academy of Pediatrics, and the American Psychiatric Association. *See Bostic*, 760 F.3d at 383 (summarizing scientific consensus). As these organizations explain, "'there is no scientific evidence that parenting effectiveness is related to parental sexual orientation.'" *Id.* (quoting from amicus brief). "'[T]he same factors' – including family stability, economic resources, and the quality of parent-child relationships – 'are linked to children's positive development, whether they are raised by heterosexual, lesbian, or gay parents.'" *Id.*; *see also* Pet. App. 68a-74a (Daughtrey, J., dissenting) (discussing evidentiary record in *DeBoer v. Snyder*).

Of course, rational-basis review allows a legislature to engage in "'rational speculation'" without being subject to "'courtroom' factfinding." Pet. App. 25a (quoting *FCC v. Beach Commc'ns*, 508 U.S. 307, 315 (1993)). But when a state brands a disfavored group of families as sub-optimal in the face of the overwhelming scientific consensus to the contrary, it is not engaging in rational speculation. It is simply enacting into law the sort of irrational prejudices that the Constitution forbids.

III. KENTUCKY'S RECOGNITION BAN INFRINGES UPON THE EQUAL DIGNITY OF SAME-SEX COUPLES FOR ADDITIONAL REASONS.

Kentucky's refusal to recognize valid, out-of-state marriages between same-sex couples violates the Fourteenth Amendment no less than its refusal to license those marriages in the first place. But there are still more reasons why the Commonwealth's recognition ban is particularly repugnant to the Fourteenth Amendment's guarantee of equal dignity for all people.

A. The Recognition Ban Demands Close Examination.

In addition to the explanations set forth above in Part I, the Commonwealth's recognition ban demands close judicial examination for two reasons: (1) it impinges upon the equal dignity of couples who are already married; and (2) it constitutes a significant deviation from ordinary state recognition practices.

1. In *United States v. Windsor*, 133 S. Ct. 2675 (2013), this Court subjected DOMA to close examination because its "principal effect [was] to identify a subset of state-sanctioned marriages and make them unequal," and its "principal purpose [was] to impose inequality." *Id.* at 2694. When same-sex couples legally marry under the laws of a sovereign state, this Court explained, their union becomes endowed with "a dignity and status of immense import." *Id.* at 2692. "This status is a far-reaching legal acknowledgment of the intimate relationship between two people, a relationship

deemed by the State worthy of dignity in the community equal with all other marriages." *Id.* A state's refusal to recognize a marriage nullifies the "stability and predictability of basic personal relations" that another sovereign state "has found it proper to acknowledge and protect." *Id.* at 2694.

The same is true here. The principal purpose and effect of Kentucky's recognition ban is to "identify a subset of state-sanctioned marriages and make them unequal." *Windsor*, 133 S. Ct. at 2694. It tells "all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others." *Id.* at 2696. Indeed, Kentucky's ban tells all the world that these marriages are not only less worthy, but that they are void. This recognition ban "touches many aspects of married and family life" for same-sex couples, "from the mundane to the profound." *Id.* at 2694. To take but one example: petitioners Greg Bourke, Paul Campion, and Randy Johnson, and other parents like them in Kentucky cannot be legally recognized as parents to their own children and live in fear that, in a medical emergency, they may not have the legal paperwork to ensure that their parental relationship will be respected.

It makes no difference that *Windsor* involved federal recognition of a state marriage, whereas this case involves Kentucky's recognition. Whether recognition is denied by state or federal government, the impingement on equal dignity for individuals is every bit as severe. Once a couple makes solemn vows and undertakes to live as a lawfully wedded couple, they acquire a "sphere of privacy or autonomy

surrounding an existing marital relationship." *Zablocki v. Redhail*, 434 U.S. 374, 397 n.1 (1978) (Powell, J., concurring in judgment); *see also Michael H. v. Gerald D.*, 491 U.S. 110, 127 (1989) (plurality opinion) (describing historical protections extended to "an extant marital union that wishes to embrace [a] child"). Neither the federal government nor the states "may . . . lightly intrude" into that sphere. *Zablocki*, 434 U.S. at 397 n.1 (Powell, J., concurring in judgment).

2. Kentucky's recognition ban also requires close examination because it departs from the longstanding practice of recognizing marriages based on their validity in the place where celebrated.

"'[D]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.'" *Windsor*, 133 S. Ct. at 2692 (quoting *Romer v. Evans*, 517 U.S. 620, 633 (1996)). In *Windsor*, therefore, this Court emphasized that DOMA dramatically departed from the federal government's past practice of recognizing all state marriages despite variations "from State to State." 133 S. Ct. at 2691.

Kentucky and other states have traditionally followed a similar practice. Under the longstanding "place of celebration" rule, states generally recognize marriages validly performed in another state, even if they would not themselves have licensed the marriage. *See* 2 Restatement (Second) of Conflict of Laws § 283 cmt. h (1971); William M. Richman & William L. Reynolds, *Understanding Conflict of Laws* § 119[a], at 398-99 (3d ed. 2002); Joseph Story, Commentaries on the Conflict of Laws § 113, at 187

(8th ed. 1883); *see also Hopkins Cnty. Coal Co. v. Williams*, 292 S.W. 1088, 1089 (Ky. 1927) ("A marriage, valid where it takes place, is valid everywhere.").

Kentucky, for example, requires in-state marriages to be formally licensed and solemnized, but it recognizes common-law marriages from other jurisdictions. *See Brown's Adm'r v. Brown*, 215 S.W.2d 971, 975 (Ky. 1948). Kentucky also recognizes marriages from out of state that would violate Kentucky's age of consent. *Robinson v. Commonwealth*, 212 S.W.3d 100, 105-06 (Ky. 2006); *Mangrum v. Mangrum*, 220 S.W.2d 406, 407-08 (Ky. 1949). Kentucky has even recognized a marriage between an aunt and her nephew even though the marriage would have been "technically incestuous" under Kentucky law at the time. *Stevenson v. Gray*, 56 Ky. (17 B. Mon.) 193, 209 (1856).

The Commonwealth also customarily recognizes out-of-state marriages even when a couple domiciled in Kentucky travels to another state to evade Kentucky's restrictions on who can marry. *Stevenson*, 56 Ky. (17 B. Mon.) at 207-08. As Kentucky's highest court has explained, "[t]he sanctity of the home and every just and enlightened sentiment require uniformity in the recognition of the marital status." *Beddow v. Beddow*, 257 S.W.2d 45, 47 (Ky. 1952). Thus, even when a couple from the Commonwealth marries elsewhere and immediately returns to the state, the Commonwealth typically bows to "[t]he necessity that persons legally married according to the laws of one jurisdiction shall not be considered as living in adultery in another, and that children begotten in lawful wedlock in one place shall

not be regarded as illegitimate in another." *Id.*; *see also Williams v. North Carolina*, 317 U.S. 287, 303 (1942) (society "has an interest . . . in the protection of innocent offspring of marriages deemed legitimate in other jurisdictions").

Recognizing marriages performed in other states is critical not only to resolve questions of status but also to impart stability. The place-of-celebration principle "provides stability in an area where stability (because of children and property) is very important, and it avoids the potentially hideous problems that would arise if the legality of a marriage varied from state to state." Richman & Reynolds, *supra*, § 119[a]; *see also* 2 Restatement (Second) of Conflict of Laws § 283 cmt. h ("[T]here is a strong inclination to uphold a marriage because of the hardship that might otherwise be visited upon the parties and their children."). Indeed, the prospect of being married in one state and unmarried in another is one of "the most perplexing and distressing complications in the domestic relations of . . . citizens." *Williams*, 317 U.S. at 299 (internal quotation marks and citation omitted). "In an age of widespread travel and ease of mobility, it would create inordinate confusion and defy the reasonable expectations of citizens whose marriage is valid in one state to hold that marriage invalid elsewhere." *In re Lenherr Estate*, 314 A.2d 255, 258 (Pa. 1974).

Imagine, for instance, a married woman who lives in Louisville, Kentucky, but works across the river in Indiana. If Kentucky refuses to recognize her marriage because her spouse is a woman, and she is involved in a serious accident while commuting to the office, her spouse's hospital visitation rights will

likely turn on which side of the bridge the accident occurred. This makes no sense. When two people join their lives together through marriage, they vow mutual support and care without reference to state lines. Kentucky's recognition ban undermines that commitment and creates searing uncertainty for the couple.

To be sure, states have sometimes "refused to recognize marriages performed in other States on the grounds that these marriages depart from cardinal principles of the State's domestic relations laws." Pet. App. 56a. But the Sixth Circuit's assertion that there are "many instances" of such non-recognition, *id.*, at best reflects a historical past (which included the non-recognition of interracial marriages); it does not reflect the current practice in Kentucky or the vast majority of states. As a matter of actual practice, courts in Kentucky and elsewhere "have been quite reluctant to use the exception and quite liberal in recognizing marriages celebrated in other states." Barbara J. Cox, *Same-Sex Marriage and the Public Policy Exception in Choice-of-Law: Does It Really Exist?*, 16 Quinnipiac L. Rev. 61, 68 (1996); *see also* Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 Yale L.J. 1965, 1971 (1997) (exceptions to the "place of celebration" rule have traditionally been "used with considerable reluctance").

Here, by contrast, Kentucky has categorically "single[d] out" the marriages of lesbians and gay men for unequal treatment. *Windsor*, 133 S. Ct. at 2695. Kentucky refuses to allow the government, including the courts, *under any circumstances*, to recognize marriages between same-sex couples. The marriage

ban "has only one effect: to impose inequality." Pet App. 144a. "It is not within our constitutional tradition to enact laws of this sort." *Romer*, 517 U.S. at 633.

B. The Recognition Ban Is Unjustified.

Like the underlying marriage prohibition, Kentucky's recognition ban fails under any standard of review. For the same reasons described above in Part II.B, the Commonwealth's recognition ban fails to advance any public-policy interest in regulating procreation or parenting. And as described in Part II.A, the Sixth Circuit's "wait and see" theory is not a legitimate state interest at all. But even if it were, Kentucky resolved to avoid ever "seeing" at all when it passed its recognition ban. Like the Congress that passed DOMA, the Kentucky General Assembly rushed to ban recognition of the marriages of same-sex couples "before any State had acted to permit" them. *Windsor*, 133 S. Ct. at 2682. In that legislation and its subsequent constitutional amendment, the Commonwealth resolved never to recognize a single marriage inside its borders between a same-sex couple.

That the Commonwealth's anti-marriage laws strain not only to forbid licensing marriages between same-sex couples but also to categorically and preemptively prohibit any recognition of the marriages that already exist suggests that something other than merely a desire to "wait and see" was at work when those laws were enacted. That "something," as the Sixth Circuit itself recognized, was "likely" "a rough sense of morality." Pet. App. 34a. Yet *Windsor* made clear that the government may not rely on such considerations to demean the

marriages of same-sex couples, "whose moral and sexual choices the Constitution protects." 133 S. Ct. at 2694. Thus, as in *Windsor*, "no legitimate purpose overcomes the purpose and effect" of Kentucky's recognition ban "to disparage and to injure those whom [another] State, by its marriage laws, sought to protect in personhood and dignity." *Id.* at 2696.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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