

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

ELECTRONICALLY FILED

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

PLAINTIFFS RESPONSE TO AMICUS CURIAE BRIEF

The Family Trust Foundation of Kentucky, Inc. (“the Family Foundation” or “the Foundation”), in its amicus curiae brief, offers what it alleges are rational justifications for voiding Plaintiffs’ marriages. Plaintiffs disagree that rational basis review should apply because fundamental rights are implicated and they are a suspect class. However, Plaintiffs will limit their response to addressing the logical, precedential, and evidential flaws in The Family Foundation’s rational basis argument in favor of Kentucky’s law.

The Family Foundation’s argument is two-pronged. Despite the hyperbolic claim that “myriad legitimate state interests” exist, (Amicus Curiae Brief, DN 43 p.1) the two arguments advanced converge in a singular justification for the state’s exclusion of same-sex marriages: the well-being of children. The first argument begins with the dubious assumption that the “animating” purpose of marriage regulation is procreation. Same-sex couples cannot procreate within their relationship, therefore it is not a suitable institution for child rearing, and subjects children to harm. The second argument is that the state has an interest in

regulating the sexual conduct of adults. Non-marital sexual conduct is harmful to society, therefore same-sex relationships are not a suitable institution for child rearing, and children are subject to harm.

Plaintiffs are tempted to respond simply by relying on the current controlling precedent as eloquently stated by Justice Kennedy:

And it humiliates tens of thousands of children now being raised by same sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.

Under DOMA, same-sex married couples have their lives burdened, by reason of government decree, in visible and public ways. By its great reach, DOMA touches many aspects of married and family life, from the mundane to the profound.¹

This is an important response made even more compelling by the Foundation's failure to place the present case within the new landscape crafted by *Windsor*, or even acknowledge the existence of *Windsor* at all in its brief. The reality is that *Windsor* eliminates the precedential authority of each and every case relied upon by the amicus.

However, since the Plaintiffs have not yet had the opportunity to address the amicus' arguments directly, further discussion is warranted.

I. THE TRADITION OF MARRIAGE IS . . . COMPLICATED

The Family Foundation warns of the perils of a decision that would “fundamentally redefine and restructure an institution that has endured for millennia.” (Amicus Brief, DN 43, p.15). It claims that “the understanding of marriage as a union of one man and one woman, uniquely involving the rearing of children born of their union, is age-old, universal and

¹ *United States v. Windsor*, 133 S. Ct. 2675, 2694 (U.S. 2013).

enduring.” (*Id.*, p. 14). The Kentucky Senate expressed similar concerns during its brief floor debate.

The most direct response, as Plaintiffs discussed in their Memorandum, is that preserving tradition alone is not a rational basis for discrimination. (*See* DN 38, p. 14.) The “ancient lineage of a legal concept does not give it immunity from attack for lacking a rational basis.”² “[N]either the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries” can serve as a rational basis, which by itself justifies a discriminatory law.³

The much more interesting response examines the propriety of using “traditional” practices, laws, or beliefs about marriage as a justification to reject the current state-approved model. Accepting the amicus’s invitation to look at marriage as a millennial tradition, the sponsors of Ky. Const. §233A clearly believed that “traditional marriage” is the marriage of biblical times. The conclusion that “one man, one woman” is a model taken from the Bible is, to put it mildly, misguided. Polygamy was commonplace in biblical marriage,⁴ sexual slavery was a legitimate foundation for marriage,⁵ marriage to a foreigner was blasphemous,⁶ and

² *Heller v. Doe*, 509 U.S. 312, 320 (1993).

³ *Williams v. Illinois*, 399 U.S. 235, 239 (1970).

⁴ See Genesis 4:19 (Lamech has two wives); Genesis 26:34, 28:9 (Easau has three wives); Genesis 29:28, 30:4-9 (Jacob has four wives), Judges 8:30 (Gideon has “many” wives), and II Chronicles 13:21 (Abijah has fourteen wives).

⁵ Genesis 16:1-5 (Sarah gives Abraham her slave Hagar to bear his children). Numbers 31:17-18 (Moses instructs the Israelites to kill boy prisoners of war and keep the girls as a spoil of war), Exodus 21:4 (the wife and children of a slave belong to the master when the slave is freed).

⁶ Ezra 10:2-11.

rape victims were forced to marry their rapists.⁷ This is to say nothing of the fate of illegitimate children.⁸ While the prominence of the Judeo-Christian tradition in American culture is undeniable, rational people in a secular society do not rely on canonical arguments – especially those with no basis in historical fact or even the plain text of the Bible itself – when enacting secular laws.

Since biblical marriage cannot be the type of “traditional” marriage the Family Foundation refers to, we turn to more recent permutations of the institution. In 1883, the U.S. Supreme Court rejected a challenge to Alabama’s anti-miscegenation law, endorsing the South’s racist agenda on the intimate relationships of this country’s citizenry.⁹ Resisting change to the status quo, seventy years later the Virginia Supreme Court addressed the same issue, noting that “more than half of the States of the Union have miscegenation statutes. With only one exception they have been upheld in an unbroken line of decisions in every State in which it has been charged that they violate the Fourteenth Amendment.”¹⁰ Unfortunately, Kentucky was one of those states imposing popular bias upon the intimatedecisions of its citizenry.¹¹ Finally, in 1967 the Supreme Court revisited and

7 Deuteronomy 22:28-29.

8 See Deuteronomy 23:2.

9 *Pace v. Alabama*, 106 U.S. 583.

10 *Naim v. Naim*, 87 S.E.2d 749, 753 (Va. 1955).

11 *McGoodwin v. Shelby*, 181 Ky. 230, 244 (Ky. 1918); *McGoodwin v. Shelby*, 182 Ky. 377, 382 (Ky. 1918) (Holding “the negro ancestry of the third generation must be pure negro blood” in order for an interracial marriage to be void). *Theophanis v. Theophanis*, 244 Ky. 689, 692 (Ky. 1932) (validating the marriage of a woman of “copper color” with a “smooth and beautiful complexion” because she was not “of pure negro blood.”)

dispatched the “enduring tradition” of racial purity in the now famous case, *Loving v. Virginia*.¹²

No one would openly argue that anti-miscegenation is a part of the “traditional” marriage the Amicus is defending, but it arguably has a longer historical tradition than many other marital forms, including monogamy. In Kentucky, marriage has been of questionable benefit to the female participant until very recently. The prominent legal concept of “feme covert” prevented married women from having a separate legal identity from their husbands.¹³ As summarized by Harriet Beecher Stowe:

[T]he position of a married woman ... is, in many respects, precisely similar to that of the negro slave. She can make no contract and hold no property; whatever she inherits or earns becomes at that moment the property of her husband.... Though he acquired a fortune through her, or though she earn a fortune through her talents, he is the sole master of it, and she cannot draw a penny....[I]n the English common law a married woman is nothing at all. She passes out of legal existence.¹⁴

Kentucky has refused to allow a woman who left her husband to change her legal domicile.¹⁵ Kentucky marriages voided under the anti-miscegenation laws left the wife and children, regardless of their race, unable to inherit property from the husband and father.¹⁶ Surely this sort of marriage is not what the Foundation advocates, but it is certainly “traditional.”

¹² 388 U.S. 1 (1967).

¹³ See e.g. *Johnston v. Jones*, 51 Ky. 326 (Ky. 1851) (discussing protections to property owned by women before marriage in contrast to property acquired after marriage).

¹⁴ Homestead, Melissa J. (2005). [*American Women Authors and Literary Property, 1822-1869*](#). NY: Cambridge University Press. p. 29.

¹⁵ *Maguire v. Maguire*, 37 Ky. 181, 186 (Ky. 1838).

¹⁶ *Moore v. Moore*, 98 S.W. 1027 (Ky. Ct. App. 1907).

The concept of “traditional marriage” as used by opponents of same-sex marriage is a misnomer. If there is anything historically consistent about “marriage,” it is that it is an ever-changing institution that conforms to the realities and demands of the society that recognizes it.

II. PROCREATION AND THE STATE INTEREST IN KENTUCKIANS' SEXUAL BEHAVIOR

The Family Foundation claims that “no other purpose” than procreation “can plausibly explain the ubiquity of the institution” of marriage. It argues that the state’s discrimination is rational because of a “biological reality” that precludes same-sex couples from procreating. (Amicus Brief, p. 17).¹⁷ However, the Supreme Court stated clearly in *Griswold v. Connecticut* that married couples are more than just baby factories, and the institution of marriage has a broader purpose than mere procreative heterosexual intercourse:

Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony of living, not political faiths; a bilateral loyalty, not commercial or social projects.¹⁸

Later, in *Turner v. Safley*, the Supreme Court identified “many important attributes of marriage” beyond procreation, including emotional support, public commitment, personal dedication, exercise of religious faith, and the receipt of government benefits.¹⁹ These

17 The Family Foundation cites “a host of judicial decisions” in support of this premise, none of which are relevant in light of *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Loving v. Virginia*, *Romer v. Evans*, 517 U.S. 620 (1996); *Lawrence v. Texas*, 539 U.S. 558 (2003); and *Windsor v. United States*, 133 S. Ct. 2675 (2013).

18 381 U.S. 479, 486 (1965).

19 482 U.S. 78, 95-96 (1987).

“important attributes” found in opposite-sex marriages are just as applicable to same-sex marriages.

Directly undermining the Foundation’s argument, *Griswold* identifies the right of married couples to seek and acquire contraception – i.e. the right to be married but *not* procreate. The Family Foundation proceeds in its brief as if there is no such thing as a childless opposite-sex marriage. Even if child rearing is an animating purpose of marriage laws, reproduction is not a *requirement* of any marriage law anywhere. The “biology” argument asserts that the purpose of the state’s recognition of marriage is to counteract the harms of conceiving children outside of wedlock. Should the state then refuse to recognize the marriages of infertile couples? Couples who choose to adopt children? Elderly couples, or those that do not desire children? Should a marriage be voided in the event of a vasectomy? The obvious answer to these questions is that such laws are not rational. Marriage is not solely, or even predominantly, about procreation.

The Foundation goes on to argue that, “simply put, marriage regulates sexual relationships between men and women.” (Amicus Brief, p. 12). This argument, perhaps, reveals the true concerns of the Foundation, and also the reality that its argument must fail. For nearly fifty years the Supreme Court has clearly and repeatedly declared that states have no legitimate interest in the regulation of *any* private, sexual relationships between consenting adults, whether married or not.²⁰ “[L]iberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”²¹

²⁰ “Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.” *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965).

²¹ *Lawrence v. Texas*, 539 U.S. 558, 559 (2003).

III. VOIDING SAME-SEX MARRIAGES DOES NOT PROTECT CHILDREN; IT HARMS THEM

At the heart of The Family Foundation’s brief is the notion that children are harmed by recognizing same-sex unions. Plaintiffs agree that the stability of the family unit is an important societal interest. However, this legislation undermines this societal value. The ultimate conclusion of the Amicus ignores both the United States Supreme Court and the consensus opinion by sociologists who explicitly reject the most direct studies of the alleged harm same-sex relationships cause children. Rather than ensuring children are raised in loving, stable homes, the legislation at issue here “makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community.”²²

Indeed, voiding Plaintiffs’ marriages breaks up their legal familial relationships upon mere relocation. Recognizing that parental rights are fundamental, the Supreme Court requires a high standard in order to terminate them.²³ For same-sex families moving to Kentucky, parental rights are nullified without a modicum of due process.

Despite these obvious harms, the Foundation argue that sociologists support the claim that recognizing same-sex marriages harms children. However, the dubious social science offered by the amicus has been roundly rejected by the American Sociological Association. Indeed, in the ASA amicus brief in *Hollingsworth v. Perry*, an entire subsection is devoted to rejecting the findings of one sociologist cited by the Foundation. (Exhibit 1 pp. 16-22) The ASA debunks the Family Foundation’s claim that the stability of same sex families is “hotly

²² *Windsor*, 133 S. Ct. 2675, 2694.

²³ *Santosky v. Kramer*, 455 U.S. 745, 753, 769 (1982).

debated.” (Amicus Brief, p.17). Indeed, the ASA describes the view that married same-sex couples provide a nurturing environment for children as a “consensus.” (*Id.*, p. 22).²⁴

At this juncture, no prognostication is necessary. Seventeen states and the District of Columbia have fully legalized same-sex marriage. In Massachusetts, where same-sex marriage has been legal for over a decade, no dire social ramifications have been felt. New York, Iowa, Vermont, California, Connecticut, New Hampshire, Washington, Maine, Maryland, Rhode Island, Delaware, Minnesota, New Jersey, Hawai’i, Illinois, and New Mexico have demonstrated that the hysteria of “redefining marriage” does not produce dire social consequences. These states are home to more than 100 million Americans in total. It strains all credulity to suggest that “the impact of redefining marriage” still poses unanswered questions when nearly one third of the American population has already felt that impact (or not felt it at all).

CONCLUSION

For the foregoing reasons, the Family Foundation's Brief should be held for naught, or at least taken for what it truly is: an endorsement of unconstitutional, unjustifiable discrimination based on sexual orientation.

²⁴ Underlying the Amicus’s argument is the unstated assertion that traditional gender roles are important to child-rearing outcomes. To the huge number of working mothers and growing number of child-rearing fathers, this assertion chafes. It also further implicates the gender discrimination that looms over this legislation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 3, 2014, I electronically filed the foregoing with the clerk of the court by using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

/s/ Laura E. Landenwich