NO. A14-_____

In the
Supreme Court of the United States

ROBERT MOSER, M.D., in his official capacity as Secretary of the Kansas Department of Health and Environment, DOUGLAS A. HAMILTON, in his official Capacity as Clerk of the District Court for the 7th Judicial District (Douglas County Kansas), and BERNIE LUMBRERAS, in her official capacity as Clerk of the District Court for the 18th Judicial District (Sedgwick County Kansas),

Applicants,

v.

KAIL MARIE and MICHELLE L. BROWN, and KERRY WILKS, Ph.D., and DONNA DITRANI,

Respondents.

Emergency Application to Stay Preliminary Injunction Pending Appeal

**DIRECTED TO THE HONORABLE SONIA SOTOMAYOR
ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES
AND CIRCUIT JUSTICE FOR THE TENTH CIRCUIT**

DEREK SCHMIDT
Attorney General of Kansas
JEFFREY A. CHANAY
Chief Deputy Attorney General
STEVE R. FABERT
Assistant Attorney General
(Counsel of Record)
M.J. WILLOUGHBY
Assistant Attorney General

120 S.W. 10th Avenue
Topeka, Kansas 66612-1597
Tel: (785) 296-2215
Fax: (785) 291-3767
steve.fabert@ag.ks.gov

Counsel for Secretary Robert Moser and for Clerks Douglas Hamilton and Bernie Lumbreras

November 10, 2014

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To the Honorable Sonia Sotomayor, Associate Justice of the Supreme Court of the United States and Circuit Justice for the United States Court of Appeals for the Tenth Circuit:

Applicants Robert Moser, M.D., Secretary of the Kansas Department of Health and Environment, Douglas Hamilton, Clerk of the Court for the 7th Kansas Judicial District, and Bernie Lumbreras, Clerk of the Court for the 18th Kansas Judicial District, respectfully apply for an emergency stay pending appeal of a preliminary injunction entered by the United States District Court for the District of Kansas. That court ordered Applicants to commence issuing marriage licenses to same-sex applicants even though that practice violates a prior order of the Kansas Supreme Court, violates Kansas law, and exposes Applicants Hamilton and Lumbreras to the potential of criminal prosecution. The district court's preliminary injunction will take effect at 5:00 p.m. on Tuesday, November 11, 2014, and the Tenth Circuit has denied Applicants' requests for a full stay pending appeal, without opinion. App. D.

INTRODUCTION

This Application seeks to stay a District Court's preliminary injunction that would cause irreparable harm to Applicants by altering the status quo during litigation of issues related to the continued validity of Kansas state constitutional and statutory prohibitions on same-sex marriage. The various issues that are the subject of the underlying litigation in both federal and state courts have arisen as a result of this Court's denial of certiorari in *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014) and *Bishop v. Smith*, 760 F.3d 1070 (10th Cir. 2014) on October 6, 2014.

Most urgently, this Application addresses a *de facto* circumvention of an order of the Kansas Supreme Court prohibiting the issuance of marriage licenses to same-sex couples pending the outcome of a mandamus proceeding now pending before that court. The Kansas Supreme Court issued an order on October 10, 2014, staying the issuance of marriage licenses to same-sex

couples until it could act to determine the effect of the denial of certiorari in the cases of *Kitchen v. Herbert and Bishop v. Smith* on the Kansas constitutional provision and statutes defining marriage as between one man and one woman and on a prior Kansas case that had upheld the constitutionality of the Kansas prohibition on same-sex marriage. *See In the Matter of the Estate of Marshall G. Gardiner*, 273 Kan. 191, 42 P.3d 120 (2002), *cert. denied sub nom Gardiner v. Gardiner*, 537 U.S. 825, 123 S. Ct. 113, 154 L.Ed.2d 36 (2002). In its order of October 10, 2014, the Kansas Supreme Court scheduled oral arguments to decide the mandamus action for the morning of Thursday, November 6, 2014.

Approximately one hour *after* the Kansas Supreme Court issued its October 10 order temporarily prohibiting the issuance of same-sex marriage licenses, the plaintiffs in this case, two same-sex couples, filed their complaint in the United States District Court for the District of Kansas seeking declaratory and injunctive relief against two of the 105 Kansas court clerks who, along with 246 Kansas judges, receive applications for marriage licenses and the head of the state agency that supplies blank forms for marriage applications and marriage licenses to those court clerks, seeking to compel issuance of marriage licenses to Plaintiffs. On October 13, 2014, Plaintiffs filed a motion seeking both a temporary restraining order and a preliminary injunction compelling issuance of the marriage license for which they had previously applied which had been denied by direction of the Chief Judges of the 7th and 18th Judicial Districts, respectively. The request for a temporary restraining order was withdrawn and arguments on the motion for a preliminary injunction were heard on Friday, October 31, 2014. At the hearing and in their written responses to that motion, Applicants raised a number of objections and defenses including Eleventh Amendment immunity, the impropriety under 42 U.S.C. § 1983 of a preliminary injunction directed to state judicial officers, and the impropriety of issuing a preliminary injunction that would seek to nullify the prior order of the Kansas Supreme Court imposing a

temporary stay on the issuance of same-sex marriage licenses in the interests of maintaining statewide uniformity.

On Tuesday, November 4, 2014 – two days before the arguments ordered by the Kansas Supreme Court were scheduled to occur on November 6 – the United States District Court for the District of Kansas issued a 38-page order granting Plaintiffs' motion for a preliminary injunction. The preliminary injunction order stated that injunctive relief against the defendant court clerks was appropriate under 42 U.S.C. § 1983 because they are not engaged in a judicial or quasi-judicial function when they issue marriage licenses, despite the uncontroverted fact that the defendant court clerks in denying marriage license applications were acting on direct orders of their respective chief judges who, in turn, were acting in conformance with the October 10 order of the Kansas Supreme Court. The District Court's Order acknowledged the conflict between its proceeding and that of the Kansas Supreme Court but indicated that its interpretation of Kansas marriage licensing trumped whatever interpretation the Kansas Supreme Court might have; the District Court also wrote that the proceedings might not conflict depending upon which issues the Kansas Supreme Court decided to reach in its proceeding. App. B at 18, 20-27. The District Court's November 4 order delayed the effect of the temporary injunction until 5:00 p.m. on November 11, 2014, to allow time to seek an order from the Tenth Circuit Court of Appeals extending the stay indefinitely. App. B at 37-38.

On Wednesday, November 5, 2014, Defendants filed their notice of appeal from the November 4 preliminary injunction order. Later that same day, the Kansas Supreme Court responded to the federal District Court's preliminary injunction order by canceling the hearing on the mandamus action pending before it and ordering additional briefing on the legal effect of the conflict of jurisdiction between itself and the United States District Court for the District of Kansas. In its

November 5 Order, the Kansas Supreme Court declared its intention to reach the merits of the constitutional challenge, if it did not decide to stay the mandamus proceedings in deference to the federal District Court action:

> In the federal district court's rulings, it exercised jurisdiction over the constitutionality of Kansas' same-sex marriage ban. If Schmidt's mandamus action in our court were to proceed, we would also likely reach the same constitutional questions reviewed in Marie. App. C at 2.

The Order went on to direct the filing of additional briefs in the mandamus proceeding, to address the conflict between the Kansas Supreme Court's jurisdiction and the jurisdiction of the United States District Court over the same issues.

On Thursday, November 6, 2014, Defendants filed with the Tenth Circuit an emergency motion for stay of the District Court's preliminary injunction during the appeal. That same day, the Sixth Circuit Court of Appeals issued its order affirming the constitutionality of state laws prohibiting same-sex marriages in Michigan, Ohio, Kentucky, and Tennessee. *See DeBoer v. Snyder*, No. 14-1341, 2014 WL 5748990 (6th Cir. Nov. 6, 2014). The *DeBoer* decision was promptly brought to the attention of the Tenth Circuit Court of Appeals in defendants' motion for initial hearing *en banc* of their appeal from the preliminary injunction. The unsuccessful litigants in *DeBoer v. Snyder* have stated that they intend to petition this Court for certiorari review of the Sixth Circuit's decision, according to news reports.

On Friday, November 7, 2014, the Tenth Circuit denied Applicants' emergency motion to stay the effect of the preliminary injunction for the duration of their appeal from the District Court's order without opinion, in an order signed by the clerk of the court. Tenth Circuit rules do not permit an application for stay addressed to the *en banc* court. *See* 10th Cir. R. 35.7 ("The en banc court does not consider procedural and interim matters such as stay orders, injunctions pending appeal ….").

STATEMENT

At its heart, Plaintiffs' suit challenges the Kansas constitutional and statutory provisions defining marriage exclusively as between one man and one woman as violating the Fourteenth Amendment. Article 15, § 16 of the Kansas Constitution, adopted by nearly 70% of Kansas voters, provides: "Marriage shall be constituted by one man and one woman only," and that "All other marriages are declared to be contrary to the public policy of this state and are void." Kansas Const. art. 15, § 16. Kansas statutes likewise state: "[t]he marriage contract is to be considered in law as a civil contract between two parties who are of opposite sex. All other marriages are declared to be contrary to the public policy of this state and are void." K.S.A. 2014 Supp. 23-2501.

One hour after the Kansas Supreme Court announced that it would stay issuance of same-sex marriage licenses "in the interest of establishing statewide consistency" pending resolution of a mandamus action filed by the Kansas Attorney General, Plaintiffs filed their complaint in the United States District Court for the District of Kansas seeking to compel district court clerks in two of the state's 105 counties to begin issuing marriage licenses to same-sex couples. To obtain the relief they seek Plaintiffs must either have the October 10 State Supreme Court Order set aside or wait for the Kansas Supreme Court to withdraw it. No federal district court has the authority to block an order of a state supreme court, issued to protect its subject matter jurisdiction over a legal dispute. It is well settled that federal district courts have no jurisdiction to review the orders of state supreme courts, which are subject to federal review solely by means of a petition for certiorari to the United States Supreme Court. The preliminary injunction also seeks to nullify rulings made by the Chief Judges of the 7th and 18th Kansas Judicial Districts determining that these plaintiffs were not legally entitled to the issuance of marriage licenses under K.S.A. 2014 Supp. 23-2505. Under *D.C. Court of Appeals v. Feldman*,

460 U.S. 462, 103 S. Ct. 1303, 75 L. Ed. 2d 206 (1983), no such right of review exists. Since injunctive relief is dependent on a reversal of the decision previously made by the court of each district involved, the relief granted by way of the preliminary injunction is barred under the *Rooker Feldman* Doctrine and its progeny.

Accordingly, the preliminary injunction violates the rule stated in *Exxon Mobile Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 125 S. Ct. 1517, 161 L. Ed. 2d 454 (2005). *Exxon* prevents a federal district court from granting direct relief from an adverse state court decision, even if the state action is alleged to be unconstitutional, because such relief is only available by way of a petition for certiorari to the United States Supreme Court. A federal court should not enjoin concurrent state court proceedings addressing the same equitable issues, and should instead defer to state court orders. *See Growe v. Emison*, 507 U.S. 25, 113 S. Ct. 1075, 122 L. Ed. 2d 388 (1993); *Atl. Coast Line R.R. Co. v. Bhd. of Locomotive Engineers*, 398 U.S. 281, 90 S. Ct. 1739, 26 L. Ed. 2d 234 (1970). Plaintiffs are limited to challenging ongoing violations of federal rights by the named defendants under the rule of *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 113 S. Ct. 684, 121 L. Ed. 2d 605 (1993), but any ongoing refusal by Kansas district courts to issue marriage licenses to same-sex couples in Kansas is compelled by the temporary restraining order issued by the Kansas Supreme Court in the case of *State ex rel. Schmidt v. Moriarty*, case number 112,590, which bars such issuances. To obtain relief by way of temporary injunction, a federal district court must necessarily set aside that state temporary restraining order, or limit it to avoid its application to these Plaintiffs. That relief required the district court to act, in effect, as an appellate court reviewing the decision of the Kansas Supreme Court.

By disregarding the pending efforts of the Kansas Supreme Court to address the issue of same-sex marriage, the preliminary injunction order ignored the principle of comity:

> We now hold, however, that the principles of *Younger* and *Huffman* are not confined solely to the types of state actions which were sought to be enjoined in those cases. As we emphasized in *Huffman*, the "more vital consideration" behind the *Younger* doctrine of nonintervention lay not in the fact that the state criminal process was involved but rather in "the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Huffman*, 420 U.S., at 601, 95 S.Ct., at 1206, quoting *Younger*, 401 U.S., at 44, 91 S.Ct., at 750. This is by no means a novel doctrine. In *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), the watershed case which sanctioned the use of the Fourteenth Amendment to the United States Constitution as a sword as well as a shield against unconstitutional conduct of state officers, the Court said:
>
> > 'But the Federal court cannot, of course, interfere in a case where the proceedings were already pending in a state court. *Taylor v. Taintor*, 16 Wall. 366-370, 21 L.Ed. 287-290; *Harkrader v. Wadley*, 172 U.S. 148, 19 S.Ct. 119, 43 L.Ed. 399.' Id., at 162, 28 S.Ct., at 455.
>
> These principles apply to a case in which the State's contempt process is involved. A State's interest in the contempt process, through which it vindicates the regular operation of its judicial system, so long as that system itself affords the opportunity to pursue federal claims within it, is surely an important interest. (*See Juidice v. Vail*, 430 U.S. 327, 334-35, 97 S. Ct. 1211, 1217, 51 L. Ed. 2d 376 (1977))

The mandamus proceedings against Chief Judge Moriarty serve the same function within the Kansas judicial system as a citation in contempt. No federal court should intervene to interrupt that adjudicative process under the rule of *Juidice*.

The preliminary injunction is contrary to the Anti-Injunction Act, 28 U.S.C. § 2283, which provides: "[a] court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." As this Court has stated, "any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy." *Vendo Co. v. LektroVend Corp.*, 433 U.S. 623, 630, 97 S. Ct. 2881, 53 L. Ed 2d 1009 (1977)(internal citations omitted). The District Court rejected this argument by citing *Mitchum v. Foster*, 407 U.S. 225, 242-43, 92 S. Ct. 2151, 32 L. Ed. 2d 701 (1972) without analysis of how or

whether the requested injunction fit within the narrow exceptions recognized in *Mitchum*. The District Court did not address defendants' argument that *Mitchum* was inapplicable here given the 1996 amendments to Section 1983 in the Federal Courts Improvement Act of 1996, Pub. L. 104-317, 110 Stat. 3847 (Oct. 19, 1996), and also did not address defendants' argument that *Mitchum* is limited solely to situations where the state court proceeding is itself alleged to be unconstitutional. *Hickey v. Duffy,* 827 F.2d 234, 238 (7th Cir. 1987); *Trustees of Carpenters' Health and Welfare Trust Fund v. Darr,* 694 F.3d 803 (7th Cir. 2012) (citing *Hickey v. Duffy).*

The District Court's preliminary injunction against state judicial action was improperly entered and should be stayed pending litigation of the underlying issues.

JURISDICTION

Applicants seek a stay pending appeal of a U.S. District Court's preliminary injunction, dated November 4, 2014, on federal claims that were properly preserved in the courts below. The District Court temporarily stayed its preliminary injunction until November 11, 2014. App. B. The Tenth Circuit refused to issue a stay pending appeal. App. D. The final judgment of the Tenth Circuit on appeal is subject to review by this Court under 28 U.S.C. § 1254(1), and this Court therefore has jurisdiction to entertain and grant a request for a stay pending appeal under 28 U.S.C. § 2101(f). *See, e.g., San Diegans for the Mt. Soledad Nat'l War Memorial* v. *Paulson*, 548 U.S. 1301, 1302, 126 S. Ct. 2856, 165 L. Ed. 2d 941 (2006) (Kennedy, J., in chambers); *Heckler* v. *Lopez,* 463 U.S. 1328, 1330, 104 S. Ct. 10, 77 L. Ed. 2d 1431 (1983) (Rehnquist, J., in chambers) (affirming that there is "no question" the Court has jurisdiction to "grant a stay of the District Court's judgment pending appeal to the Ninth Circuit when the Ninth Circuit itself has refused to issue the stay"). In addition, this Court has authority to issue stays and injunctions in aid of its own jurisdiction under 28 U.S.C. § 1651(a) and U.S. Supreme Court Rule 23.

REASONS FOR GRANTING THE STAY

The standards for granting a stay pending review are "well settled." *Deaver* v. *United States*, 483 U.S. 1301, 1302, 107 S. Ct. 3177, 97 L. Ed 2d 784 (1987) (Rehnquist, C.J., in chambers). Preliminarily, this Court's rules require a showing that, as is the case here, "the relief is not available from any other court or judge," Sup. Ct. R. 23.3. A stay is appropriate if there is at least: "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth* v. *Perry*, 558 U.S. 183, 190, 130 S. Ct. 705, 175 L. Ed. 2d 657 (2010) (per curiam). Moreover, "[i]n close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent." *Id.* (citing *Lucas* v. *Townsend*, 486 U.S. 1301, 1304, 108 S. Ct. 1763, 100 L. Ed. 2d 589 (1988) (Kennedy, J., in chambers); *Rostker* v. *Goldberg*, 448 U.S. 1306, 1308, 101 S. Ct. 1, 65 L. Ed. 2d 1098 (1980) (Brennan, J., in chambers)); *accord, e.g.*, *Conkright* v. *Frommert*, 556 U.S. 1401, 1401, 129 S. Ct. 1861, 173 L. Ed. 2d 865 (2009) (Ginsburg, J., in chambers); *Barnes* v. *E-Systems, Inc. Group Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1302, 1305, 112 S. Ct. 1, 115 L. Ed. 2d 1087 (1991) (Scalia, J., in chambers).

In short, on an application for stay pending appeal, a Circuit Justice must "try to predict whether four Justices would vote to grant certiorari should the Court of Appeals affirm the District Court order without modification; try to predict whether the Court would then set the order aside; and balance the so-called 'stay equities."' *San Diegans*, 548 U.S. at 1302 (granting stay pending appeal and quoting *INS* v. *Legalization Assistance Project of Los Angeles Cnty Fed'n of Labor*, 510 U.S. 1301, 1304, 114 S. Ct. 422, 126 L. Ed. 2d 410 (1993) (O'Connor, J., in chambers)). In this case, each of these considerations points decisively to a stay.

I. If the Court of Appeals affirms, there is at least a reasonable probability that certiorari will be granted and at least a fair prospect of reversal.

There is a reasonable likelihood that certiorari will be granted to resolve the conflict between the First, Sixth, and Tenth Circuits in cases addressing the constitutionality of state laws that prohibit same-sex marriages, which is the fundamental question underlying the District Court's preliminary injunction in this case. The conclusion reached by the Tenth Circuit Court of Appeals in *Kitchen v. Herbert* and *Bishop v. Smith*, on which the validity of the preliminary injunction depends, is squarely contradicted by the opinion of the First Circuit Court of Appeals in *Massachusetts v. United States Dept. of Health and Human Servs.*, 682 F.3d 1 (1st Cir. 2012), and the recent decision of the Sixth Circuit Court of Appeals in *DeBoer*. Even if the unsuccessful litigants in the *DeBoer* case do not seek certiorari (an unlikely possibility), Applicants in this case undoubtedly will do so based on this irreconcilable conflict. This Court denied prior petitions for certiorari on similar issues October 6, 2014, but at that time no clear split among the federal circuits existed. Now it does. The *DeBoer* decision has created a clear split of authority among the Circuits on the applicability of the Fourteenth Amendment to state constitutional prohibitions on same-sex marriages, like the one in Kansas, and the final resolution of these important constitutional questions by this Court will certainly be required. As the Sixth Circuit pointed out in *DeBoer*, not only is there now a split among the circuits as to the ultimate question of the constitutional viability of state-law prohibitions on same-sex marriage but there also is a significant split among the Circuits that have struck down state-law prohibitions as to the *reason* state-law prohibitions fail and, consequently, as to what test is to be applied. *See DeBoer*, 2014 WL 5748990, at * 7 (citing *Bostic v. Schaefer,* 760 F .3d 352 (4th Cir.2014) (fundamental rights); *Baskin v. Bogan,* 766 F.3d 648 (7th Cir.2014) (rational basis, animus); *Latta v. Otter,* No. 14–35420, 2014 WL 4977682 (9th Cir. Oct. 7, 2014) (animus, fundamental rights, suspect classification); *Bishop v. Smith*, 760 F.3d 1070 (10th Cir.2014) (fundamental rights); *Kitchen v.*

Herbert, 755 F.3d 1193 (10th Cir.2014) (same)).

The District Court's decision also conflicts in principle with this Court's decision in *United States* v. *Windsor*, 133 S. Ct. 2675 (2013)–especially this Court's express and repeated recognition of the State's primacy in defining and regulating marriage. The majority's decision to invalidate Section 3 of DOMA– which implemented a *federal* policy of refusing to recognize *state* laws defining marriage to include same-sex unions—was based in significant part on the States' historic control over the marriage institution. *Windsor*, 133 S. Ct. at 2692 ("The State's power in defining the marital relation is of central relevance in this case . . . ."). The majority emphasized that, "[b]y history and tradition the definition and regulation of marriage . . . has been treated as being within the authority and realm of the separate States." *Id.* at 2689–90. Citing this Court's earlier statement in *Williams* v. *North Carolina*, 317 U.S. 287, 298, 63 S.Ct. 207, 87 L. Ed. 279 (1942), that "[e]ach state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders," the *Windsor* majority noted that "[t]he definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the '[p]rotection of offspring, property interests, and the enforcement of marital responsibilities.'" *Windsor*, 133 S. Ct. at 2691 (quoting *Williams*, 317 U.S. at 298) (alteration in original).

The *Windsor* majority further observed that "[t]he significance of state responsibilities for the definition and regulation of marriage dates to the Nation's beginning; for 'when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States.'" *Id.* (quoting *Ohio ex rel. Popovici* v. *Agler*, 280 U.S. 379, 383–84, 50 S. Ct. 154, 74 L. Ed. 489 (1930)). And the majority concluded that DOMA's refusal to respect a *State's* authority to define marriage as it sees fit represented a significant– and in the majority's view, unwarranted– "federal intrusion on

state power." *Id.* at 2692. The federal government had no basis, the Court concluded, to deprive same-sex couples of a marriage status made valid and recognized by *State* law. *Id.* at 2695–96.

Here, by contrast, Kansas law has never allowed, recognized or otherwise validated same-sex marriage. Three of the dissenting Justices in *Windsor* clearly indicated a belief that the States can constitutionally retain the traditional definition of marriage. *See Windsor*, 133 S. Ct. at 2707–08 (Scalia, J., dissenting, joined in relevant part by Thomas, J.); *id.* at 2715–16 (Alito, J., joined in relevant part by Thomas, J.). And Chief Justice Roberts pointedly emphasized that "while '[t]he State's power in defining the marital relation is of central relevance' to the majority's decision to strike down DOMA here, . . . that power will come into play on the other side of the board in future cases about the constitutionality of state marriage definitions. So too will the concerns for state diversity and sovereignty that weigh against DOMA's constitutionality in this case." *Id.* at 2697 (Roberts, C.J., dissenting) (quoting majority opinion). By themselves, the views expressed by these four Justices—without any contrary expression from the Court's other Members—create a strong prospect that this Court will affirm the *DeBoer* decision and sustain the laws of Kansas, once the issue is directly decided.

In *Windsor*, this Court held that the federal government had no business rejecting same-sex marriages that were indisputably valid under the laws of New York. *Windsor*, 133 S. Ct. at 2695–96 ("The class to which DOMA directs its restrictions and restraints are those persons who are joined in same-sex marriages made lawful by the State. . . . It imposes a disability on the class by refusing to acknowledge a status the State finds dignified and proper.") *Windsor* simply cannot be read as supporting the *Kitchen* Court's decision to impose same-sex marriage *against* the democratically expressed desires of Utah's people, especially considering the *Windsor* Majority's express limitation of its "opinion and its holding . . . to those lawful marriages" that

had been solemnized *in accordance* with the democratically expressed desires of the people of New York. *Id.* at 2696. The District Court's misreading of *Windsor* in this case is yet another reason that four Justices are sufficiently likely to vote for plenary review, and that the entire Court is sufficiently likely to overturn the District Court's reading of that decision.

In addition to the primary and central issue of the constitutionality of state laws that prohibit same-sex marriage, this case presents the equally fundamental issue of the authority of a state supreme court to interpret its own state laws, and decide whether they are or are not constitutional, unimpeded by the efforts of tardy litigants to interfere with that jurisdiction. There is no doubt that state courts are competent to decide questions arising under the United States Constitution. State supreme courts that decide federal constitutional questions in error are subject to correction by this Court, not by federal district courts. Lower federal courts lack the authority to impede or interrupt the state judicial process while it is in progress. If the Kansas Supreme Court decides in a case in which it has undoubted prior jurisdiction to answer the same questions that these Plaintiffs would prefer to have answered by a federal district court, the only lawful way to prevent or review that result is to seek review by this Court; a lawsuit filed under 42 U.S.C. § 1983 is impermissible constitutionally under the Eleventh Amendment and impermissible statutorily by reason of the plain language of 42 U.S.C. § 1983 itself. As the case of *Atl. Coast Line R.R. Co. v. Bhd. of Locomotive Engineers*, 398 U.S. 281, 90 S. Ct. 1739, 26 L. Ed. 2d 234 (1970) established, it is not proper for a lower federal court to enjoin a state court's injunction, even if that injunction is plainly erroneous under federal law and the federal court has priority in time. In this case the state court has temporal priority and the likelihood that any decision it may render will be mistaken is reduced significantly every time another federal circuit decides the same issues in a manner contrary to the Tenth Circuit.

For any or all of these reasons, if the Tenth Circuit affirms the District Court decision here, there is at least a reasonable probability that this Court would grant a writ of certiorari, and that it would ultimately reverse.

II. Absent a stay, there is a likelihood—indeed, a certainty—of irreparable harm to the Applicants and to the State.

Applicants Hamilton and Lumbreras will be subjected to risks of irreparable harm if they are ordered to disobey directly the orders issued by the Chief Judges of their respective judicial districts and also to disobey indirectly the October 10 Order issued by the Kansas Supreme Court. The preliminary injunction also compels them to issues marriage licenses in violation of the Kansas criminal code, subjecting these two Applicants to the risk of criminal prosecution. *See* K.S.A. 2014 Supp. 23-2513 (making it a misdemeanor for any court clerk or judge to issue a marriage license to persons who are not statutorily qualified to enter into a marriage). The Plaintiffs have not named as a defendant any party with authority to bring, or to decline to bring, criminal charges in Kansas and, consequently, the preliminary injunction ordered by the District Court, even if it were otherwise proper, cannot alleviate the threat that it poses to these defendants of irreparable injury from criminal prosecution.

The preliminary injunction here also imposes certain—not merely likely—irreparable harm on the State and its citizens. Members of this Court, acting as Circuit Justices, repeatedly have acknowledged that "any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *New Motor Vehicle Bd.* v. *Orrin W. Fox Co.*, 434 U.S. 1345, 1351, 98 S. Ct. 359, 54 L. Ed. 2d 439 (1977) (Rehnquist, J., in chambers); *accord Maryland* v. *King*, 133 S. Ct. 1, 3, 183 L. Ed. 2d 667 (2012) (Roberts, C.J., in chambers) (granting a stay); *Planned Parenthood of Greater Tex. Surgical Health Servs.* v. *Abbott*, 134 S. Ct. 506, 506, 187 L. Ed. 2d 465 (2013) (Scalia, J., concurring in denial of application to vacate stay). That same principle supports a finding of

irreparable injury in this case, for the District Court's Order enjoins the State from enforcing not only ordinary statutes, but a constitutional provision approved by the people of Kansas in the core exercise of their sovereignty.

This high degree of irreparable harm tilts in favor, and itself is sufficient, for the Court to grant a stay. *See In re Bart*, 82 S. Ct. 675, 676, 7 L. Ed. 2d 767 (1962) (Warren, C.J., Circuit Justice) (granting motion to stay execution of contempt citation, in part because "the normal course of appellate review might otherwise cause the case to become moot by the petitioner serving the maximum term of commitment before he could obtain a full review of his claims"); *John Doe Agency* v. *John Doe Corp.*, 488 U.S. 1306, 1309–10, 109 S. Ct. 852, 102 L. Ed 2d 952 (1989) (Marshall, J., Circuit Justice) (granting stay pending certiorari petition in a FOIA case because "disclosure would moot that part of the Court of Appeals' decision [and] create an irreparable injury").

Absent a stay, the State and its people will also suffer severe harm to their sovereign dignity. As the *Windsor* majority put it, "[e]ach state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders." *Windsor*, 133 S. Ct. at 2691 (quoting *Williams*, 317 U.S. at 298). Indeed, *Windsor* emphasized that "[t]he recognition of civil marriages is *central* to state domestic relations law applicable to its residents and citizens." *Id.* (emphasis added).

The sovereign interest of Kansas in determining who is eligible for a marriage license is bolstered by principles of federalism, which affirm the State's constitutional authority over the entire field of family relations. As the *Windsor* majority explained, "'regulation of domestic relations' is 'an area that has long been regarded as a *virtually exclusive* province of the States.'" 133 S. Ct. at 2691 (quoting *Sosna* v. *Iowa*, 419 U.S. 393, 404, 95 S. Ct. 553, 42 L. Ed. 2d 532 (1975)) (emphasis added). An inferior federal court's order that seeks to strip the

Kansas Supreme Court of its authority to decide what its laws mean and to determine, subject only to review by this Court, whether they are constitutionally valid reduces the Kansas Judiciary to the status of mere servants of the federal courts, a result that no sovereign can condone.

A federal intrusion of this magnitude in the absence of clear direction by this Court not only injures the State's sovereignty, it also infringes the right of Kansans to government by consent within our federal system. For, as Justice Kennedy has explained:

> The Constitution is based on a theory of original, and continuing, consent of the governed. Their consent depends on the understanding that the Constitution has established the federal structure, which grants the citizen the protection of two governments, the Nation and the State. Each sovereign must respect the proper sphere of the other, for the citizen has rights and duties as to both.

United States v. *Lara*, 541 U.S. 193, 212, 124 S. Ct. 1628, 158 L. Ed. 2d 420 (2004) (Kennedy, J., concurring in the judgment); *see also, Bond* v. *United States.*, 131 S. Ct. 2355, 2364, 180 L. Ed. 2d 269 (2011) ("When government acts in excess of its lawful powers" under our system of federalism, the "liberty [of the individual] is at stake."). The refusal to stay the preliminary injunction pending further review places in jeopardy the democratic right of hundreds of thousands of Kansans to choose for themselves what marriage will mean in their community. *See, e.g., Schuette v. Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary* 134 S. Ct. 1623, 1636–37, 188 L. Ed. 2d 613 (2014) ("Yet freedom does not stop with individual rights. Our constitutional system embraces, too, the right of citizens to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course of their own times . . . .").

III. The balance of equities favors a stay.

The case for the requested stay is not "close." However, even if it were, "the relative harms to the applicant and to the respondent" strongly tilt the balance of equities in favor of a stay. *Hollingsworth*, 558 U.S. at 190. Even accepting as true all of the harms alleged by Plaintiffs as a

result of being denied the ability to lawfully marry, the relief they seek in this lawsuit cannot alleviate those harms – and, therefore, delaying that relief pending adjudication of their claims on the merits does not further any harm to the Plaintiffs. The only relief Plaintiffs have sought here is the issuance of the paperwork that is the first step toward a legal Kansas marriage; they have not sought, and cannot obtain in this lawsuit as they have chosen to posture it, an order requiring the Kansas Judiciary to recognize their planned marriage ceremonies as legally valid. Under Kansas law, even a formally complete ceremonial marriage does not produce a legally enforceable marriage relationship if the parties are not persons of opposite sex. *See In the Matter of the Estate of Marshall G. Gardiner*, 273 Kan. 191, 42 P.3d 120 (2002), *cert. denied sub nom Gardiner v. Gardiner*, 537 U.S. 825, 123 S. Ct. 113, 154 L.Ed.2d 36 (2002) (declaring a formally lawful marriage void after the fact because the spouses were both legally men, though one appeared to be a woman).

Moreover, Plaintiffs cannot claim irreparable harm from violation of their constitutional rights. While violation of an *established* constitutional right certainly inflicts irreparable harm, that doctrine does not apply where, as here, Plaintiffs seek in the first instance to establish a novel constitutional right through litigation—and based upon a non-final decision. It is a far cry from this Court's pertinent pronouncements on the constitutional matters at issue here to the legal conclusions reached by the Tenth Circuit in *Kitchen* and *Bishop*. *Compare Baker v. Nelson,* 409 U.S. 810, 810, 93 S. Ct. 37, 34 L. Ed. 2d 65 (1972) (same-sex marriage did not state "a substantial federal question"); *Romer v. Evans,* 517 U.S. 620, 634-35, 116 S. Ct. 1620 (1996) (reviewing municipal ordinances "born of animosity toward" gays); *Lawrence v. Texas,* 539 U.S. 558, 578, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003) (explaining the case did not involve formal recognition of same-sex relationships); and *Windsor* (the traditional state authority to define marriage constitutionally forbids a federal definition) *with Kitchen,* 755 F.3d at 1205;

Bishop, 760 F.3d at 1080 (holding that this Court's "doctrinal developments" require lower courts to recognize a "fundamental right" that disposes of the issues at hand). Indeed, even among the lower federal courts that have struck down state prohibitions on same-sex marriage, there is no uniformity as to what constitutional right is implicated. *See DeBoer*, 2014 WL 5748990, at * 7 (citing *Bostic v. Schaefer*, 760 F .3d 352 (4th Cir.2014) (fundamental rights); *Baskin v. Bogan*, 766 F.3d 648 (7th Cir.2014) (rational basis, animus); *Latta v. Otter*, No. 14–35420, 2014 WL 4977682 (9th Cir. Oct. 7, 2014) (animus, fundamental rights, suspect classification); *Bishop v. Smith*, 760 F.3d 1070 (10th Cir.2014) (fundamental rights); *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir.2014) (same)). Because neither constitutional text nor any final decision by a court of last resort yet requires recognition of their same-sex marriage under the present circumstances, Plaintiffs suffer no constitutional injury from awaiting a final judicial determination of their claims before receiving the relief they seek. *See Rostker*, 448 U.S. at 1310 (reasoning that the act of compelling Respondents to register for the draft while their constitutional challenge is finally determined does not "outweigh[ ] the gravity of the harm" to the government "should the stay requested be refused"). In the meantime a stay does not harm Plaintiffs because it would not decide or ultimately dispose of their claims.

Issuing a stay would also serve the public's interest in certainty and clarity in the law. A stay issued here would be consistent with the Kansas Supreme Court's decision to issue a stay in the case before it "in the interest of establishing statewide consistency". Conversely, failure to issue a stay will result in public confusion because only two of the one hundred five Kansas district court clerks are being ordered to issue marriage licenses. Declining to issue a stay would upset the status quo restored by the Kansas Supreme Court's own stay, and threaten "the orderly, decorous, rational traditions that courts rely upon to ensure the integrity of their own judgments." *Hollingsworth*,

558 U.S. at 197.

For all these reasons, the balance of equities favors a stay.

CONCLUSION

Numerous cases currently pending throughout the country that challenge the continued validity of state definitions of marriage "all come down to the same question: Who decides? Is this a matter that the National Constitution commits to resolution by federal courts or leaves to the less expedient, but usually reliable, work of the state democratic processes?" *DeBoer*, 2014 WL 5748990, at * 1. Unless and until this Court provides the answer to that important constitutional question, Applicants respectfully request that lower federal courts in this case not be allowed by preliminary injunction to disable a democratically-enacted provision of the Kansas Constitution or to case aside traditional deference to the prior exercise of jurisdiction over these questions by the Kansas Supreme Court. Therefore, the Applicants respectfully request that the Circuit Justice issue the requested stay of the district court's order and preliminary injunction pending appeal. If the Circuit Justice is either disinclined to grant the requested relief or simply wishes to have the input of the full Court on this Application, Applicants respectfully request that it be referred to the full Court.

Respectfully submitted,

DEREK SCHMIDT
Attorney General of Kansas
JEFFREY A. CHANAY
Chief Deputy Attorney General
STEVE R. FABERT
Assistant Attorney General
(Counsel of Record)
M.J. WILLOUGHBY
Assistant Attorney General

120 S.W. 10th Avenue
Topeka, Kansas 66612-1597
Tel: (785) 296-2215
Fax: (785) 291-3767

steve.fabert@ag.ks.gov

November 10, 2014

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of November, 2014, a true, correct and complete copy of the foregoing Application for Stay Pending Appeal and accompanying exhibits was filed with the United States Supreme Court and served on the following via electronic mail and United States Mail:

Stephen Douglas Bonney
ACLU Foundation of Kansas
3601 Main Street, Kansas City, MO 64111
dbonney@aclukansas.org

Mark P. Johnson
Dentons US, LLP
4520 Main Street, Suite 1100
Kansas City, MO 64111
mark.johnson@dentons.com

Joshua A. Block
American Civil Liberties Foundation
125 Broad Street, 18th Floor
New York, NY 10004
jblock@aclu.org

s/ Steve R. Fabert
Steve R. Fabert
Counsel of Record

APPENDIX

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 112,590

STATE OF KANSAS ex rel. DEREK SCHMIDT, ATTORNEY GENERAL,
Petitioner,

v.

KEVIN P. MORIARTY, CHIEF JUDGE, TENTH JUDICIAL DISTRICT,
AND SANDRA MCCURDY, CLERK OF THE DISTRICT COURT,
TENTH JUDICIAL DISTRICT,
Respondents.

ORDER

This original action was filed October 10, 2014, by petitioner Attorney General Derek Schmidt, alleging that respondent Chief Judge Kevin P. Moriarty of the Tenth Judicial District exceeded his administrative authority and contravened Kansas constitutional, statutory, and common law by issuing Amended Administrative Order 14-11. This Order permitted marriage licenses to be issued to same-sex couples. Respondent Sandra McCurdy is the Clerk of the District Court in the Tenth Judicial District. Her office is responsible for complying with Amended Administrative Order 14-11 in the acceptance of applications for, and issuance of, marriage licenses.

In the Attorney General's petition, he seeks the following relief "on an expedited basis":

"(a) An order directing the Respondents to *immediately* cease from issuing marriage applications or licenses to same gender couples in contravention of existing Kansas law;

"(b) A *peremptory* writ of mandamus barring the Respondents from following or otherwise implementing Administrative Order 14-11;

"(c) An order vacating Administrative Order 14-11 and declaring it null and void; and

"(d) Such other and further relief as the Court deems just and proper attributable to Respondents' failure to follow the law." (Emphases added.)

The court has carefully reviewed the Attorney General's petition and memorandum in support. Given the nature of his claim—based in part as it is on what he believes to be inconsistent practice among the state's 31 judicial districts—it is appropriate that jurisdiction remain in this court. Relief is not available in the district court. See Supreme Court Rule 9.01(b) (2013 Kan. Ct. Rule Annot. 82).

On the Attorney General's petition and memorandum, we do not discern a need for an immediate or peremptory grant of relief under K.S.A. 60-802(b), nor for an ex parte grant of relief under Supreme Court Rule 9.01(c)(2). Simply put, the Attorney General's right to relief on the merits is not clear, nor is it apparent per the Rule "that no valid defense to the petition can be offered," given the interpretation and application of the United States Constitution by panels of the United States Tenth Circuit Court of Appeals. See *Bishop v. Smith*, 760 F.3d 1070 (10th Cir. 2014); *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014).

Nevertheless, in the interest of establishing statewide consistency, we grant the Attorney General's alternative request, advanced in his memorandum, for a temporary stay of Chief Judge Moriarty's Amended Administrative Order 14-11, insofar as this Order allows issuance of marriage licenses. Applications for marriage licenses may continue to be accepted during the period of the stay. The stay shall remain in force pending further order by this court.

In addition, we order the following:

(1) Respondents shall file a response to the petition by 5:00 p.m. on October 21, 2014. Under Supreme Court Rule 9.01(c)(3)(B), the respondents may file a joint response. But Chief Judge Moriarty also remains free to invoke Supreme Court Rule 9.01(c)(3)(C), which provides that he may decide not to appear in this proceeding.

(2) Any additional briefing the parties wish to submit on any currently pending issue must be filed by 5:00 p.m. on October 28, 2014. The currently pending issues include but are not limited to:

(a) Whether Chief Judge Moriarty possessed authority to issue Amended Administrative Order 14-11;

(b) Whether Chief Judge Moriarty was correct in asserting that the interpretations and applications of the United States Constitution by panels of the Tenth Circuit Court of Appeals are supreme and therefore modify any Kansas state constitutional, statutory, or common law ban on same-sex marriage; and

(c) Even if the Tenth Circuit rulings on federal constitutional law are supreme, whether Kansas' state constitutional, statutory, or common law bans on same-sex marriage are permissible under the United States Constitution.

(3) No extensions of the filing deadlines set out above in (1) and (2) will be considered or permitted.

(4) Counsel for any party appearing in this action must appear for oral argument at 10:00 a.m. on November 6, 2014. Each side will be allowed 15 minutes of argument. Should both respondents appear, they will be responsible for allocating the 15 minutes allowed to their side of the case between them. The court will not entertain any motion for a continuance of this setting.

IT IS SO ORDERED THIS 10th day of October 2014.

Lawton R. Nuss
Chief Justice

A true copy ATTEST

Heather L. Smith
Clerk Supreme Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

KAIL MARIE, et al.,

Plaintiffs,

v.

ROBERT MOSER, M.D., in his official capacity as Secretary of the Kansas Department of Health and Environment, et al.,

Defendants.

Case No. 14-cv-02518-DDC/TJJ

MEMORANDUM AND ORDER

Plaintiffs in this lawsuit seek injunctive and declaratory relief under 42 U.S.C. § 1983. Specifically, they ask the Court to declare unconstitutional and enjoin defendants from enforcing certain provisions of Kansas law that prohibit plaintiffs and other same-sex couples from marrying.[1] Plaintiffs also ask the Court to order defendants (and their officers, employees, and agents) to issue marriage licenses to same-sex couples on the same terms they apply to couples consisting of a man and a woman, and to recognize marriages validly entered into by plaintiffs.

The case, now pending on plaintiffs' motion for a preliminary injunction (Doc. 3), requires the Court to decide whether Kansas' laws banning same-sex marriages violate the Constitution of the United States. Judging the constitutionality of democratically enacted laws is among "the gravest and most delicate" enterprises a federal court ever undertakes.[2] But just as

[1] Plaintiffs' Complaint targets Article 15, § 16 of the Kansas Constitution, K.S.A. §§ 23-2501 and 23-2508 and "any other Kansas statute, law, policy or practice."

[2] *Blodgett v. Holden*, 275 U.S. 142, 147-48 (1927) (Holmes, J., concurring).

surely, following precedent is a core component of the rule of law. When the Supreme Court or the Tenth Circuit has established a clear rule of law, our Court must follow it.[3]

Defendants have argued that a 1972 Supreme Court decision controls the outcome here. The Tenth Circuit has considered this proposition and squarely rejected it.[4] Consequently, this Order applies the following rule, adopted by the Tenth Circuit in *Kitchen v. Herbert*, to the Kansas facts:

> We hold that the Fourteenth Amendment [to the United States Constitution] protects the fundamental right to marry, establish a family, raise children, and enjoy the full protection of a state's marital laws. A state may not deny the issuance of a marriage license to two persons, or refuse to recognize their marriage, based solely upon the sex of the persons in the marriage union.[5]

Because Kansas' constitution and statutes indeed do what *Kitchen* forbids, the Court concludes that Kansas' same-sex marriage ban violates the Fourteenth Amendment to the Constitution. Accordingly, the Court grants plaintiffs' request for preliminary relief and enters the injunction described at the end of this Order. The following discussion explains the rationale for the Court's decision and addresses the litany of defenses asserted by defendants.

Background

Plaintiffs are two same-sex couples who wish to marry in the state of Kansas. Defendants are the Secretary of the Kansas Department of Health and Environment and the

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[3] *See Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) (quoted in *Kitchen v. Herbert*, 755 F.3d 1193, 1232 (10th Cir. 2014) (Kelly, J., dissenting)); *United States v. Spedalieri*, 910 F.2d 707, 709 n.2 (10th Cir. 1990) (when no Supreme Court decision establishes controlling precedent, a district court "must follow the precedent of [its] circuit, regardless of its views [about] the advantages of" precedent from elsewhere).

[4] *Kitchen*, 755 F.3d at 1208 (rejecting argument that *Baker v. Nelson*, 409 U.S. 810 (1972) controls challenges to the constitutionality of bans against same-sex marriage), *cert. denied*, No. 14-124, 2014 WL 3841263 (U.S. Oct. 6, 2014).

[5] *Id.* at 1199.

Clerks of the Sedgwick and Douglas County District Courts. Plaintiffs' affidavits establish the facts stated below. Defendants never contest the factual accuracy of the affidavits, so the Court accepts them as true for the purpose of the current motion. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1146 (10th Cir. 2013) (a court deems uncontested facts established by affidavit as admitted for purpose of deciding a motion for preliminary injunction) (citations and subsequent history omitted).

A. Plaintiffs

1. Kail Marie and Michelle Brown

Plaintiffs Kail Marie and Michelle Brown live together in Lecompton, Kansas, which is located in Douglas County. Ms. Marie and Ms. Brown assert they have lived in a committed relationship for twenty years. Except that they both are women, Ms. Marie and Ms. Brown meet all other qualifications for marriage in the state of Kansas. On October 8, 2012, Ms. Marie appeared at the office of the Clerk of the Douglas County District Court to apply for a marriage license so that she and Ms. Brown could marry. The deputy clerk, working under the supervision of Clerk Hamilton, asked for Ms. Marie and Ms. Brown's personal information and identification, and wrote down their information on an application form. The deputy clerk then gave the form to Ms. Marie and instructed her to return it no sooner than Monday, October 13, after Kansas' statutory three-day waiting period for issuing a marriage license had expired.

The next day, Chief Judge Robert Fairchild of the Seventh Judicial District, which consists of Douglas County, issued Administrative Order 14-13. In pertinent part, it states:

> The court performs an administrative function when it issues a marriage license. . . . The Court's role in administrative matters is to apply and follow the existing laws of the State of Kansas. Recently, the United States Supreme Court declined to review several cases in which the Circuit Courts held that similar provisions contained in the constitutions of other states violate the United States Constitution. Included in these cases were two cases from the Tenth Circuit Court

> of Appeals. While Kansas is [] within the jurisdiction of the Tenth Circuit, none of these cases involved Article 15, §16 of the Kansas Constitution. This court may not make a determination as to the validity of this constitutional provision without a judiciable case before it concerning the court's issuance of or failure to issue a marriage license.

Seventh Judicial District Administrative Order 14-13 (Doc. 23-7 at 3-4). Plaintiffs never say whether Ms. Marie submitted the marriage application or whether the clerk actually denied it, but Judge Fairchild's order makes it clear: the clerk would have denied Ms. Marie's application.

2. Kerry Wilks and Donna DiTrani

Plaintiffs Kerry Wilks and Donna DiTrani assert they have lived in a committed relationship for five years. The two reside together in Wichita, Kansas, in Sedgwick County. Except that they both are women, Ms. Wilks and Ms. DiTrani meet all other qualifications for marriage in the state of Kansas. On October 6, 2014, Ms. Wilks and Ms. DiTrani appeared in person at the office of the Clerk of the Sedgwick County District Court to apply for a marriage license. A deputy clerk and the clerk's supervisor—both working under the supervision of Clerk Lumbreras—refused to give plaintiffs an application for a marriage license because they sought to enter a same-sex marriage. Plaintiffs returned to the office of the Clerk of the Sedgwick County District Court on October 7 and October 8. Each time, a deputy clerk refused to give Ms. Wilks and Ms. DiTrani an application for a marriage license.

On October 9, 2014, Ms. Wilks and Ms. DiTrani again returned to the office of the Clerk of the Sedgwick County District Court to apply for a marriage license. This time, a deputy clerk asked them for pertinent information and wrote it down on a marriage application form, which the two signed under oath. After Ms. Wilks and Ms. DiTrani completed and submitted the marriage license application form, the deputy clerk—reading from a prepared statement—informed them that their application was denied. The deputy clerk announced that same-sex

marriage violates provisions of the Kansas Constitution, and that the Sedgwick County District Court would not issue marriage licenses to same-sex couples "until the Supreme Court otherwise rules differently."

B. Defendants

1. Robert Moser, M.D.

Defendant Robert Moser is the Secretary of the Kansas Department of Health and Environment. Secretary Moser is responsible for directing Kansas' system of vital records, and supervising and controlling the activities of personnel who operate the system of vital records. As part of his duties, Secretary Moser furnishes forms for marriage licenses, marriage certificates, marriage license worksheets and applications for marriage licenses used throughout Kansas; maintains a publicly available vital records index of marriages; and publishes aggregate data on the number of marriages occurring in the state of Kansas. Secretary Moser is also responsible for ensuring that all of these functions comply with Kansas law, including those that prohibit same-sex couples from marrying. Plaintiffs believe that Secretary Moser's responsibilities include furnishing forms that exclude same-sex couples from marriage by requiring applicants to designate a "bride" and a "groom." Plaintiffs name Secretary Moser in his official capacity, and allege that he acted under color of state law at all relevant times.

2. Douglas Hamilton

Defendant Douglas Hamilton is the Clerk of the District Court for Kansas' Seventh Judicial District (Douglas County). Mr. Hamilton's responsibilities as Clerk of the Court include: issuing marriage licenses; requiring couples who contemplate marriage to swear under oath to information required for marriage records; collecting a tax on each marriage license; authorizing qualified ministers to perform marriage rites; filing, indexing and preserving

marriage licenses after the officiants return them to the court; forwarding records of each marriage to the Kansas Department of Health and Environment; and correcting and updating marriage records. Mr. Hamilton must ensure that he performs each of these functions in compliance with all applicable Kansas laws, including the prohibition against same-sex marriage. Plaintiffs name Mr. Hamilton in his official capacity, and allege that he acted under color of state law at all times relevant to this suit.

3. Bernie Lumbreras

Defendant Bernie Lumbreras is the Clerk of the District Court for Kansas' Eighteenth Judicial District (Sedgwick County). Ms. Lumbreras holds the same position in Sedgwick County as Mr. Hamilton holds in Douglas County, and is responsible for administering the same marriage-related functions. When she performs these functions, Ms. Lumbreras also must ensure that each of these functions complies with Kansas law, including the same-sex marriage ban. Plaintiffs allege that the deputy clerk who denied Ms. Wilks and Ms. DiTrani's marriage license application worked under the direction and supervision of Ms. Lumbreras. Plaintiffs name Ms. Lumbreras in her official capacity, and allege that she acted under color of state law at all times relevant to this suit.

C. Challenged Laws

Plaintiffs contend the Court should declare the state laws banning same-sex marriages in Kansas invalid under the Fourteenth Amendment to the United States Constitution. Plaintiffs specifically challenge Article 15, § 16 of the Kansas Constitution and K.S.A. §§ 23-2501 and 23-2508, but also seek to enjoin "any other Kansas statute, law, policy, or practice that excludes [p]laintiffs and other same-sex couples from marriage." Doc. 4 at 1. Article 15, § 16 of the Kansas Constitution provides:

> (a) The marriage contract is to be considered in law as a civil contract. Marriage shall be constituted by one man and one woman only. All other marriages are declared to be contrary to the public policy of this state and are void.
>
> (b) No relationship, other than a marriage, shall be recognized by the state as entitling the parties to the rights or incidents of marriage.

K.S.A. § 23-2501 codifies Kansas' same-sex marriage prohibition as part of the state's statutes, providing:

> The marriage contract is to be considered in law as a civil contract between two parties who are of opposite sex. All other marriages are declared to be contrary to the public policy of this state and are void. The consent of the parties is essential. The marriage ceremony may be regarded either as a civil ceremony or as a religious sacrament, but the marriage relation shall only be entered into, maintained or abrogated as provided by law.

By their plain terms, Article 15, § 16 of the Kansas Constitution and K.S.A. § 23-2501 prohibit same-sex couples from marrying. But K.S.A. § 23-2501 also declares all "other [non-opposite sex] marriages . . . contrary to the public policy of this state and . . . void." K.S.A. § 23-2508 extends this rule to same-sex marriages performed under the laws of another state:

> All marriages contracted without this state, which would be valid by the laws of the country in which the same were contracted, shall be valid in all courts and places in this state. It is the strong public policy of this state only to recognize as valid marriages from other states that are between a man and a woman.

When read together, K.S.A. §§ 23-2501 and 23-2508 dictate a choice-of-law rule that prevents Kansas from recognizing any same-sex marriages entered in other states, even if the marriage is otherwise valid under the laws of the state where it was performed. Thus, Kansas law both prohibits same-sex couples from marrying and refuses to recognize same-sex marriages performed consistent with the laws of other states. Plaintiffs' Complaint challenges both features of Kansas' marriage laws.

Analysis

I. Jurisdiction and Justiciability

Before a federal court can reach the merits of any case, it must determine whether it has jurisdiction to hear the case. Here, this exercise consists of two related parts. First, does the Court have subject matter jurisdiction to decide the claims presented in the Complaint? Title 28 U.S.C. § 1331, among other statutes, answers this question by conferring jurisdiction on federal courts to decide questions arising under the Constitution of the United States. Plaintiffs' claims here easily fall within this statute's grant of jurisdiction. This leads to the second piece of the analysis: Do plaintiffs have standing to pursue the claims they assert in their Complaint?

A. Standing

"Article III of the Constitution limits the jurisdiction of federal courts to actual cases or controversies." *Chamber of Commerce of United States v. Edmondson*, 594 F.3d 742, 756 (10th Cir. 2010). Standing is an indispensable component of the Court's jurisdiction and plaintiffs bear the burden to show the existence of an actual Article III case or controversy. *Id.* at 756. The Court must consider standing issues sua sponte to ensure the existence of an Article III case or controversy. *Dias v. City & Cnty. of Denver*, 567 F.3d 1169, 1176 (10th Cir. 2009).

To establish Article III standing, a plaintiff must show that (1) he or she has "suffered an injury in fact;" (2) the injury is "fairly traceable to the challenged action of the defendant;" and, (3) it is likely that the injury "will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (citations and internal quotation marks omitted). Plaintiffs who sue public officials can satisfy the causation and redressability requirements—parts (2) and (3) of this standard—by demonstrating "a meaningful nexus" between the defendant and the asserted injury. *Bronson v. Swensen*, 500 F.3d 1099, 1111-12 (10th Cir. 2007).

Plaintiffs' facts, ones defendants do not challenge, assert that Kansas' laws banning same-sex marriage prevented the two court clerks from issuing marriage licenses to them. These undisputed facts satisfy all three parts of *Lujan*'s test.

As it pertains to Clerks Lumbreras and Hamilton, these facts, first, establish that plaintiffs suffered an actual ("in fact") injury when the Clerks, acting on account of state law, refused to issue marriage licenses to plaintiffs. Second, this injury is "fairly traceable" to Kansas' laws. Chief Judge Fairchild's Administrative Order 14-13 explains why the license did not issue to plaintiffs Marie and Brown. Likewise, the prepared statement read by the Sedgwick County deputy clerk reveals that Kansas' ban was the only reason the clerk refused to issue a license to plaintiffs Wilks and DiTrani. And last, common logic establishes that the relief sought by plaintiffs, if granted, would redress plaintiffs' injuries. The Clerks refused to issue licenses because of Kansas' same-sex marriage ban. It stands to reason that enjoining enforcement of this ban would redress plaintiffs' injuries by removing the barrier to issuance of licenses.

The standing analysis of the claim against Secretary Moser is more muted. The Complaint asserts that Secretary Moser, in his official duties, ensures compliance with Kansas marriage laws, including the ban against same-sex marriage, and issues forms that district court clerks and other governmental officials use to record lawful, valid marriages. Plaintiffs also allege that Secretary Moser controls the forms that governmental workers distribute to marriage license applicants. This includes, plaintiffs assert, a form requiring license applicants to identify one applicant as the "bride" and the other as the "groom." Secretary Moser's response to plaintiffs' motion papers never disputes these facts and the Court concludes they satisfy *Lujan*'s three-part standing test. That is, they establish a prima facie case that Secretary Moser has

caused at least some aspect of plaintiffs' injury, that at least part of their injury is traceable to the Secretary, and the relief requested would redress some aspect of plaintiffs' injury.[6]

Defendants argue that no standing can exist because they lack the wherewithal to force other state officials to recognize plaintiffs' same-sex marriages, even if licenses are issued. This argument misses the point. *Lujan*'s formulation does not require a plaintiff to show that granting the requested relief will redress every aspect of his or her injury. In equal protection cases, a plaintiff must show only that a favorable ruling would remove a barrier imposing unequal treatment. *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 666 (1993) ("The 'injury in fact' in an equal protection case . . . is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.") (citing *Turner v. Fouche*, 396 U.S. 346, 362 (1970)). Plaintiffs here have made a prima facie showing that the relief they seek would redress aspects of their licensing claims. This is sufficient to satisfy Article III's standing requirement.

Secretary Moser raises a similar redressability issue, arguing that executive branch officials are not proper defendants because employees of the Kansas judiciary issue and administer marriage licenses. Doc. 14 at 13. Secretary Moser contends that he merely is a records' custodian and has neither supervisory authority over judicial officials who issue marriage licenses nor any other involvement administering marriage laws. Defendants rely on the Tenth Circuit's first decision in *Bishop*, where the court concluded that the general duty of

[6] The standing requirement is judged by the claims asserted in the Complaint. While they are not germane to plaintiffs' motion for preliminary relief, the Complaint also asserts "recognition" claims, *i.e.*, claims seeking to require defendants to recognize plaintiffs' marriages once licenses have issued and plaintiffs have married. Kansas law shows that Secretary Moser is significantly involved with recognition of marriage in Kansas. *See* K.S.A. § 23-2512 (requiring him to issue, on request, marriage certificates that constitute prima facie evidence of two persons' status as a married couple).

the Governor and Attorney General to enforce Oklahoma's laws lacked sufficient causal connection to satisfy the standing requirement. *Bishop v. Okla.*, 333 F. App'x 361, 365 (10th Cir. 2009). But the present case against Secretary Moser is materially different.

Among other things, Kansas' statutes make Secretary Moser responsible for the following marriage-related activities: supervising the registration of all marriages (K.S.A. § 23-2507); supplying marriage certificate forms to district courts (K.S.A. § 23-2509); and maintaining an index of marriage records and providing certified copies of those records on request (K.S.A. § 23-2512). Secretary Moser's records play an important role in the recognition aspect of plaintiffs' claims. When Secretary Moser distributes certified copies of marriage licenses kept under his supervision, those copies constitute prima facie evidence of the marriages in "all courts and for all purposes." *See* K.S.A. § 23-2512. In short, when Secretary Moser issues a marriage certificate he creates a rebuttable presumption that persons listed in that certificate are married.[7]

Finally, where a plaintiff seeks "'injunctive, as opposed to monetary relief"' against high-level state officials, "'no "direct and personal" involvement is required'" to "'subject them to the equitable jurisdiction of the court.'" *Hauenstein ex rel. Switzer v. Okla. ex rel. Okla. Dep't of Human Servs.*, No. CIV-10-940-M, 2011 WL 1900398, at *4 (W.D. Okla. May 19, 2011) (quoting *Ogden v. United States*, 758 F.2d 1168, 1177 (7th Cir. 1985)). In other words, plaintiffs

[7] The parties dispute the significance of Secretary Moser's role in promulgating marriage license forms that require applicants to specify a "bride" and a "groom." Docs. 14 at 2, 20 at 5-6. At least two cases have held that the state official responsible for marriage license forms that exclude same-sex couples is a proper defendant in a case challenging a state's same-sex marriage laws. *Bostic v. Schaefer*, 760 F.3d 352, 372 (4th Cir. 2014) (subsequent history omitted) (Virginia's Registrar of Vital Records was a proper defendant because she promulgated marriage license application forms); *Wolf v. Walker*, No. 14-CV-64-BBC, 2014 WL 1729098, at *4 (W.D. Wis. Apr. 30, 2014) (Wisconsin state Registrar was a proper defendant because of his official duty to "prescribe forms for blank applications, statement, consent of parents, affidavits, documents and other forms" related to acquiring a marriage license).

need not establish that Secretary Moser personally denied their marriage license applications so long as he would play a role in providing their requested relief. *See Wolf*, 2014 WL 1729098, at *4. Given Secretary Moser's responsibility for marriage-related enabling and registration functions, he has a sufficiently prominent connection to the relief sought by the Complaint to justify including him as a defendant.

But the standing analysis differs for plaintiffs' claim seeking to recognize same-sex couples married outside Kansas. For this claim, plaintiffs have failed to establish Article III standing. Neither of the plaintiff couples assert that they entered a valid marriage in another state that Kansas refuses to recognize. Nor do they even allege that they sought to marry in another state and have that marriage recognized in Kansas. Rather, both couples seek to marry in Kansas and under the laws of Kansas. Doc. 1 at ¶ 15. In sum, plaintiffs have not alleged an injury in fact attributable to the non-recognition aspect of Kansas' same-sex marriage ban. This case differs from *Kitchen* and *Bishop* because both of those cases involved at least one same-sex couple who had married under the laws of another state. *Bishop v. Smith*, 760 F.3d 1070, 1075 (10th Cir. 2014) *cert. denied*, No. 14-136, 2014 WL 3854318 (U.S. Oct. 6, 2014); *Kitchen*, 755 F.3d at 1199.

In their Amicus Brief, Phillip and Sandra Unruh assert that the Court may not decide the constitutionality of Kansas' same-sex marriage ban as applied to male, same-sex couples because the only plaintiffs are two female, same-sex couples. Doc. 22 at 7-8. This argument is a clever use of the facts but, ultimately, it fails to persuade the Court.[8] The Court construes plaintiffs' Complaint to allege that Kansas' laws banning same-sex marriage are ones that are

[8] In their Amicus Brief, the Unruhs assert a number of other arguments about the wisdom and constitutionality of Kansas' same-sex marriage ban. The Court does not address those arguments individually because the Tenth Circuit's decisions in *Kitchen* and *Bishop* have decided the issues they raise in their brief.

unconstitutional on their face (as opposed to a claim challenging the way that Kansas has applied those laws to them). A claim is a facial challenge when "it is not limited to plaintiffs' particular case, but challenges application of the law more broadly." *John Doe No. 1 v. Reed*, 561 U.S. 186, 194 (2010). If plaintiffs succeed in establishing no circumstances exist under which Kansas could apply its same-sex marriage ban permissibly, the Court may invalidate the laws in their entirety, including their application to male, same-sex couples. *Doe v. City of Albuquerque*, 667 F.3d 1111, 1127 (10th Cir. 2012) ("[A] successful facial attack means the statute is wholly invalid and cannot be applied to anyone.") (quoting *Ezell v. City of Chicago*, 651 F.3d 684, 698-99 (7th Cir. 2011))

In sum, plaintiffs' Complaint asserts sufficient facts and claims to satisfy all three components of *Lujan*'s standard. Consequently, the Court concludes that an actual case or controversy exists between all four plaintiffs and all three defendants.

B. Sovereign Immunity

Defendants next assert that the Eleventh Amendment and 42 U.S.C. § 1983 prohibit a federal court from issuing injunctive relief against a state judicial officer. Docs. 14 at 10-14, 15 at 5-7. Defendants advance three principal arguments as support for this proposition.

First, the two Clerk defendants argue that 42 U.S.C. § 1983 expressly prohibits injunctive relief against judicial officers. Supporting their argument, defendants cite the plain text of § 1983, which provides:

> Every person who, under color of any statute . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights . . . shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, *except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable*.

(emphasis added). Defendants correctly point out that the Clerks are "judicial officers" for purposes of the judicial immunity provision of § 1983. *Lundahl v. Zimmer*, 296 F.3d 936, 939 (10th Cir. 2002). However, § 1983 contains a significant caveat—the "acts or omissions" at issue must be ones taken in the "officer's judicial capacity." *Id.*; *Mireles v. Waco*, 502 U.S. 9, 11 (1991); 42 U.S.C. § 1983. Thus, to determine whether judicial immunity applies to the Clerks, the Court must determine whether issuing marriage licenses constitutes a judicial act.

"In determining whether an act by a judge [or here, a clerk of the judicial system] is 'judicial,' thereby warranting absolute immunity, [courts] are to take a functional approach, for such 'immunity is justified and defined by the *functions* it protects and serves, not by the person to whom it attaches.'" *Bliven v. Hunt*, 579 F.3d 204, 209-10 (2d Cir. 2009) (quoting *Forrester v. White*, 484 U.S. 219, 227 (1988)) (emphasis in original). "[T]he factors determining whether an act by a judge is a 'judicial' one relate to the nature of the act itself, *i.e.*, whether it is a function normally performed by a judge, and to the expectations of the parties, *i.e.*, whether they dealt with the judge in his judicial capacity." *Stump v. Sparkman*, 435 U.S. 349, 362 (1978). Kansas law distinguishes between a clerk's "judicial" and "ministerial" functions by asking whether "a statute imposes a duty upon the clerk to act in a certain way leaving the clerk no discretion." *Cook v. City of Topeka*, 654 P.2d 953, 957 (Kan. 1982).

Judged by these criteria, the issuance of marriage licenses under Kansas law is a ministerial act, not a judicial act. When K.S.A. § 23-2505 describes the Clerk's duty to issue marriage licenses, the statute uses mandatory language and does not allow for any discretion by the Clerks. *Id.* § 23-2505(a) ("The clerks of the district courts or judges thereof, when applied to for a marriage license by any person who is one of the parties to the proposed marriage and who is legally entitled to a marriage license, *shall* issue a marriage license . . . .") (emphasis added).

Thus, if applicants for a marriage license meet the statutory qualifications for marriage, the clerk has no discretion to deny them a marriage license.

Moreover, Chief Judge Fairchild's Administrative Order in Douglas County leaves no doubt that Kansas judges regard issuing marriage licenses as a ministerial and not a judicial function. When his Administrative Order explained why Clerk Hamilton was not issuing a marriage license to plaintiffs Marie and Brown, he wrote, "[t]he court performs an administrative function when it issues a marriage license . . . . The Court's role in administrative matters is to apply and follow the existing laws of the State of Kansas." Seventh Judicial District Administrative Order 14-13 (Doc. 23-7 at 3). Indeed, as Chief Judge Fairchild explained, no same-sex marriage licenses could issue despite the Tenth Circuit's decisions in *Kitchen* and *Bishop* because issuing marriage licenses is not a judicial act. *Id.* ("This court may not make a determination as to the validity of this constitutional provision without a justiciable case before it concerning the court's issuance of or failure to issue a marriage license.").

The Tenth Circuit reached the same conclusion during the first *Bishop* appeal. 333 F. App'x at 365. It recognized, under laws similar to Kansas', that Oklahoma district court clerks perform a ministerial function when they issue marriage licenses. *Id.* By the time the case returned to the Tenth Circuit following remand, plaintiffs had added district court clerks as defendants. *Bishop*, 760 F.3d at 1075. The Tenth Circuit confirmed that the clerks' function administering marriage licenses was a ministerial one. *Id.* at 1092 ("[Clerks] are responsible for faithfully applying Oklahoma law, and Oklahoma law clearly instructs both of them to withhold marital status from same-sex couples."). Judicial immunity under 42 U.S.C. § 1983, therefore, does not apply.

Defendants' second immunity argument contends that plaintiffs' seek "retroactive" relief, which, they assert, the Eleventh Amendment does not allow against state officials acting in their official capacities. Generally, the Eleventh Amendment bars suits brought by individuals against state officials acting in their official capacities. *Harris v. Owens*, 264 F.3d 1282, 1289 (10th Cir. 2001). However, under *Ex parte Young*, 209 U.S. 123 (1908), "a plaintiff may bring suit against individual state officers acting in their official capacities if the complaint alleges an ongoing violation of federal law and the plaintiff seeks prospective relief." *Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159, 1167 (10th Cir. 2012) (citations omitted). If both aspects of this test are met, *Ex parte Young* allows a court to enjoin a state official from enforcing an unconstitutional statute. *Cressman v. Thompson*, 719 F.3d 1139, 1146 n.8 (10th Cir. 2013).

Defendant Moser asserts that plaintiffs have failed to bring a proper *Ex parte Young* suit because plaintiffs only seek to remedy a past refusal to issue marriage licenses instead of seeking prospective relief for an ongoing deprivation of their constitutional rights. The Court disagrees. Plaintiffs are not seeking to correct or collect damages for the Clerks' inability to issue marriage licenses in the past. Instead, plaintiffs seek a preliminary and permanent injunction prohibiting the Clerks from enforcing the Kansas same-sex marriage ban in the future. As a result, the concern protected by the Eleventh Amendments' ban against retroactive relief—federal courts awarding monetary damages that states must pay from their general revenues—is not implicated. *See Edelman v. Jordan*, 415 U.S. 651, 664-65 (1974). The Court concludes that plaintiffs seek prospective relief for an ongoing deprivation of their constitutional rights. As such, their requested relief falls within the *Ex parte Young* exception to sovereign immunity.

Last, defendants contend that the Anti-Injunction Act, 28 U.S.C. § 2283, prohibits the Court from enjoining them. Defendants' argument reasons that an injunction prohibiting them

from enforcing Kansas' ban against same-sex marriages would interfere with a stay order entered by the Kansas Supreme Court in *State of Kansas ex rel. Schmidt v. Moriarity*, No. 112,590 (Kan. Oct. 10, 2014) (contained in record as Doc. 14-1). This argument ignores an important exception to the Anti-Injunction Act. The Anti-Injunction Act provides, "A court of the United States may not grant an injunction to stay proceedings in a State court *except as expressly authorized by Act of Congress*, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283 (emphasis added). The Supreme Court has held that a suit seeking to enjoin deprivation of constitutional rights under 42 U.S.C. § 1983 falls within the "expressly authorized" exception to the act's general rule. *See Mitchum v. Foster*, 407 U.S. 225, 242-43 (1972). Likewise, plaintiffs' suit here falls squarely within this exception, negating defendants' argument under this act.

Defendants persist, however. They argue that even if the Anti-Injunction Act does not apply directly, the requested injunction nonetheless implicates the policies the act protects. This argument also relies on the stay order entered by the Kansas Supreme Court in *Moriarity*, (Doc. 14-1). While defendants' argument is a colorable one, it is miscast as one under the Anti-Injunction Act. The federal courts have addressed this concern under the rubric of the *Younger* abstention doctrine, as applied to § 1983 cases, and not as a concern predicated on the Anti-Injunction Act. *See* Erwin Chemerinsky, *Federal Jurisdiction* 770 (6th ed. 2012). Consistent with this approach, the Court addresses the substance of defendants' argument as part of its discussion of abstention doctrines, below at pages 18-26.

C. Domestic Relations Exception

Defendant Moser asserts that the Court should decline jurisdiction because states have exclusive control over domestic relations. Secretary Moser cites *United States v. Windsor*,

__U.S.__, 133 S. Ct. 2675 (2013) for two propositions in support of this assertion: that states have exclusive control over domestic relations; and no federal law may contradict a state's definition of marriage.

Secretary Moser's argument misapprehends *Windsor*. *Windsor* held that the federal government may not give unequal treatment to participants in same-sex marriages recognized by states that permit same-sex marriage as a matter of state law. 133 S. Ct. at 2795-96. Moreover, *Windsor* made clear that although "regulation of domestic relations is an area that has long been regarded as a virtually exclusive province of the states," state marriage laws "of course, must respect the constitutional rights of persons." *Id.* at 2691 (citing *Loving v. Virginia*, 388 U.S. 1 (1967) (internal quotations and further citations omitted)).

The domestic relations exception Secretary Moser invokes is a narrow exception to federal court diversity jurisdiction and it "encompasses only cases involving the issuance of a divorce, alimony, or child custody decree." *Ankenbrandt v. Richards*, 504 U.S. 689, 692, 704 (1992). This exception does not apply to cases like this one, where a federal court has jurisdiction over a case because that case presents a "federal question." *Atwood v. Fort Peck Tribal Court Assiniboine*, 513 F.3d 943, 946-47 (9th Cir. 2008). Nor does it apply to constitutional challenges to an underlying statutory scheme. *Johnson v. Rodrigues (Orozco)*, 226 F.3d 1103, 1111 (10th Cir. 2000).

D. Abstention

While "the Constitution and Congress equip federal courts with authority to void state laws that transgress federal civil rights, . . . comity toward state sovereignty counsels the power be sparingly used." *Moe v. Dinkins*, 635 F.2d 1045, 1046 (2d Cir. 1980). In this case especially, plaintiffs ask the Court to enter a particularly sensitive issue of state social policy. *Smelt v. Cnty.*

of Orange, 447 F.3d 673, 681 (9th Cir. 2006). Recognizing the delicate balance of sovereignty implicated by plaintiffs' request, the doctrine of abstention authorizes a federal court to decline to exercise jurisdiction if federal court adjudication would "cause undue interference with state proceedings." *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans ("NOPSI")*, 491 U.S. 350, 359 (1989).

But likewise, "federal courts are obliged to decide cases within the scope of federal jurisdiction." *Sprint Commc'ns, Inc. v. Jacobs*, __ U.S. __, 134 S. Ct. 584, 588 (2013). Even in cases where permissible, abstention under any doctrine is "the exception, not the rule." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976). Abstention "is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it." *Id.* (citations omitted). The following four subsections address the propriety of abstention under three doctrines raised on the Court's own motion (the first three), and one raised by defendants.

1. *Pullman* Abstention

Under the abstention doctrine of *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941), "federal courts should abstain from decision when difficult and unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided." *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 236 (1984). "*Pullman* abstention is limited to uncertain questions of state law." *Id.* (citing *Colorado River*, 424 U.S. at 813). If the meaning or method of enforcing a law is unsettled, federal courts should abstain so that a state court has an opportunity to interpret the law. *Id.* If the state court might construe the law in a way that obviates the need to decide a federal question, abstention prevents "both unnecessary adjudication . . . and 'needless friction with state policies.'" *Id.* (quoting *Pullman*, 312 U.S. at

500). Conversely, "Where there is no ambiguity in the state statute, the federal court should not abstain but should proceed to decide the federal constitutional claim. We would negate the history of the enlargement of the jurisdiction of the federal district courts, if we held the federal court should stay its hand and not decide the question before the state courts decided it." *Wis. v. Constantineau*, 400 U.S. 433, 439 (1971) (citations omitted); *see also Zwickler v. Koota*, 389 U.S. 241, 251 (1967) (a federal court should not abstain under *Pullman* simply to give a state court the first opportunity to decide a federal constitutional claim).

The Court does not detect, nor have defendants pointed to any ambiguity or uncertainty in the Kansas laws plaintiffs challenge. The challenged laws unequivocally prohibit plaintiffs and other same-sex couples from procuring a marriage license and marrying a person of the same sex in Kansas. Kan. Const. art. 15, §16; K.S.A. §§ 23-2501 and 23-2508. State officials have applied these laws to plaintiffs consistent with their plain meaning. *See* Docs. 4-1 at ¶ 5, 4-3 at ¶ 5, 4-4 at ¶ 5. Thus, the challenged laws are not subject to an interpretation that might avoid or modify the federal constitutional questions raised by plaintiffs. As a result, the critical concern underlying *Pullman* abstention—avoidance of unnecessary state-federal friction where deference to a state court decision may negate the federal question involved—is missing.

2. *Younger* Abstention

On the same day plaintiffs filed this action, Kansas' Attorney General Eric Schmidt filed a mandamus action with the Kansas Supreme Court. *Moriarty*, Case No. 112,590 (Kan. Oct. 10, 2014) (Doc. 14-1). This mandamus action stemmed from an Administrative Order order entered by a Kansas state court trial judge in Johnson County, Kansas, who, in the wake of the Supreme Court's decision not to grant certiorari in *Kitchen* or *Bishop*, directed the clerk of his court to begin issuing Kansas marriage licenses to same-sex couples. General Schmidt asked the Kansas

Supreme Court to vacate the Johnson County, Kansas Administrative Order, or at least to stay its effect. Though the Kansas Supreme Court recognized that the Tenth Circuit's decisions in *Kitchen* and *Bishop* may present a valid defense to the Attorney General's mandamus action, it granted a "temporary stay" of the trial judge's order directing the Johnson County clerk to issue marriage licenses to same-sex couples. Doc. 14-1 at 2. The Kansas Supreme Court set a briefing deadline for October 28, 2014, and will hold oral arguments on November 6, 2014. *Id.* at 3.

The Kansas Supreme Court's stay order also specifies the issues pending before it: (1) whether the Johnson County District Court possessed authority to issue marriage licenses to same-sex couples; (2) whether the Tenth Circuit's interpretation and application of the United States Constitution in *Kitchen* and *Bishop* are supreme and therefore modify Kansas' ban against same-sex marriage; and (3) even if the Tenth Circuit rulings are supreme, whether Kansas' same-sex marriage laws are otherwise permissible under the United States Constitution. *Id.* Because the issues specified in *Moriarty* might resolve the constitutional questions presented here, and because an injunction could interfere with those state proceedings, the Court considers whether it should abstain from adjudicating this action under the principles of *Younger v. Harris*, 401 U.S. 37 (1971).

The *Younger* doctrine reflects "longstanding public policy against federal court interference with state court proceedings." *Id.* at 43. The doctrine holds that, for reasons of state sovereignty and comity in state-federal relations, federal courts should not enjoin state judicial proceedings. *Younger* abstention is required when: (1) there is an ongoing state judicial proceeding involving the federal plaintiff; (2) that implicates important state interests; and (3) the proceeding provides an adequate opportunity for the federal plaintiff to assert his or her federal claims. *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982).

Originally, *Younger* abstention applied only to concurrent state court criminal proceedings. *Younger*, 401 U.S. at 53. But the doctrine's scope has expanded gradually, and in its current form it also prevents federal courts from interfering with state civil and administrative proceedings. *See Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987) (federal courts may not enjoin pending state court civil proceedings between private parties); *Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc.*, 477 U.S. 619, 629 (1986) (federal courts may not enjoin pending state administrative proceedings involving important state interests). Moreover, the Supreme Court also has expanded *Younger*'s restrictions against federal court injunctions to include requests for declaratory relief because "ordinarily a declaratory judgment will result in precisely the same interference with and disruption of state proceedings that [*Younger* abstention] was designed to prevent." *Samuels v. Mackell*, 401 U.S. 66, 72 (1971).

But even though *Moriarty* might resolve the issues presented here, the Court concludes that *Younger* abstention is not appropriate. Two independent reasons lead the Court to this conclusion. First, and most, plaintiffs are not a party in *Moriarty* and therefore cannot assert their constitutional claims in that proceeding. As a result, a critical element of the *Younger* formulation is absent. "[A]bstention is mandated under *Younger* only when the federal plaintiff is actually a party to the state proceeding; the [*Younger*] doctrine does not bar non-parties from raising constitutional claims in federal court, even if the same claims are being addressed in a concurrent state proceeding involving similarly situated parties." *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 928-29 (1975) (cited in *Blackwelder v. Safnauer*, 689 F. Supp. 106, 119 (N.D.N.Y. 1988)).

Second, even if plaintiffs had asserted their claims in *Moriarty*, the Supreme Court has narrowed *Younger*'s application in civil proceedings to three "exceptional circumstances."

Sprint Comm'ns, Inc. v. Jacobs, __ U.S. __, 134 S. Ct. 584, 586 (2013). None of the three is present here. *Younger* precludes federal interference with ongoing state criminal prosecutions, certain ongoing civil enforcement proceedings akin to criminal prosecutions, and pending civil proceedings involving certain orders that uniquely further the state courts' ability to perform their judicial functions. In *Jacobs*, the Supreme Court explicitly confirmed *Younger* does not apply "outside these three 'exceptional' categories," and that the three categories define the entirety of *Younger*'s scope. *Id.* at 586-87 (citing *NOPSI*, 491 U.S. 350, 368 (1989)).

Tacitly recognizing that *Younger* is limited to three exceptional circumstances, defendants strive to fit this case (and derivatively, *Moriarity*) within the third exception—pending state court civil proceedings involving certain orders that uniquely further the Kansas state courts' ability to perform their judicial functions. They argue that a federal court injunction would interfere with the state courts' efforts to ensure uniform treatment of same-sex marriage licenses across all of Kansas' 105 counties. This argument is not without any appeal, for the Court recognizes that a decision from a Kansas state court would not raise the comity concerns inherent in a federal court injunction. But after reviewing the cases where *NOPSI* approved of abstention under this branch of the *Younger* analysis, the Court concludes that abstention is not appropriate.

In *Juidice v. Vail*, 430 U.S. 327, 335 (1977), the Supreme Court held that a federal court should abstain from interfering with a state's contempt process because it is integral to "the regular operation of [the state's] judicial system." Likewise, in *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 13-14, (1987), the Court extended *Juidice* to a challenge to Texas' law requiring an appellant to post a bond pending appeal. As the Court explained, both "involve[d] challenges to the processes by which the State compels compliance with the judgments of its courts." *Id.* at

13-14. Both *Juidice* and *Pennzoil* involved processes the state courts used to decide cases and enforce judgments, *i.e.*, functions that are uniquely judicial functions. In contrast, as the Court already has determined, when Kansas clerks issue marriage licenses they perform a ministerial function. *See supra* at pp. 14-15. Accordingly, the stay order in *Moriarty* does not qualify as one uniquely furthering Kansas' courts ability to perform their judicial functions in the sense that the post-*Younger* cases use that phrase.

Because neither plaintiffs nor defendants are parties in *Moriarty* and because the case does not fall within one of the three exceptional categories of civil cases that trigger *Younger* abstention, the Court declines to abstain on this basis.

3. *Colorado River* Abstention

The United States Supreme Court has recognized that, in certain circumstances, it may be appropriate for a federal court to refrain from exercising its jurisdiction to avoid duplicative litigation when there is a concurrent foreign or state court action. *Colorado River Water Conservation Dist. v. United States.*, 424 U.S. 800 (1976). Although it is generally classified as an abstention doctrine, *Colorado River* is not truly an abstention doctrine because it "springs from the desire for judicial economy, rather than from constitutional concerns about federal-state comity." *Rienhardt v. Kelly*, 164 F.3d 1296, 1303 (10th Cir. 1999); *see also Colorado River*, 424 U.S. at 817 ("there are principles unrelated to considerations of proper constitutional adjudication and regard for federal-state relations which govern in situations involving the contemporaneous exercise of concurrent jurisdictions, either by federal courts or by state and federal courts"). However, "the circumstances permitting the dismissal of a federal suit due to the presence of a concurrent state proceeding for reasons of wise judicial administration are

considerably more limited than the circumstances appropriate for abstention." *Colorado River*, 424 U.S. at 818.

Colorado River identified four factors that federal courts should consider when deciding whether to abstain under its aegis: the problems that occur when a state and federal court assume jurisdiction over the same res; the inconvenience of the federal forum; the desirability of avoiding piecemeal litigation; and the order that the concurrent forums obtained jurisdiction. *Id.* "No one factor is necessarily determinative," but "[o]nly the clearest of justifications will warrant dismissals." *Id.* at 818-19.

The Court finds no clear justification for dismissing this case. This Court and the Kansas Supreme Court have not assumed concurrent jurisdiction over the same res, so there is no exceptional need for unified proceedings. Moreover, concerns about interfering with state proceedings are resolved under a *Younger* analysis, which—as the Court has explained—does not apply here. *See supra* at pp. 20-24. Finally, this case and *Moriarty* are not parallel proceedings for purposes of *Colorado River* because the cases involve different parties and different claims. *Moriarty* is a dispute between two government officials—the Kansas Attorney General and the Chief Judge of the Johnson County, Kansas District Court. Plaintiffs are not involved in *Moriarty*, and although *Moriarty* may have state-wide consequences, it does not directly address issuance of marriage licenses in Douglas or Sedgwick Counties, where plaintiffs live and seek to vindicate their constitutional rights. *See Wolf v. Walker*, 9 F. Supp. 3d 889, 895 (W.D. Wis. 2014) ("Plaintiffs have the right under 42 U.S.C. § 1983 to bring a lawsuit to vindicate their own constitutional rights."); *see also Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 26 (1983) ("[T]he presence of federal-law issues must always be a major consideration weighing against surrender" of jurisdiction under *Colorado River*."). In

sum, this case does not present exceptional circumstances warranting departure from the Court's general obligation to decide cases pending properly before it.

4. *Burford* Abstention

Defendants also urge the Court to abstain under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). In *Burford*, the federal court confronted a complex question of Texas oil and gas law governed by a complex state administrative scheme. *Id.* at 318-20. Holding that the federal district court should have dismissed the case, the Supreme Court emphasized the existence of complex state administrative procedures and the need for centralized decision-making when allocating drilling rights. *Id.* at 334. Defendants argue that this case resembles *Burford* because granting plaintiffs' relief would interfere with Kansas' system for uniform administration of marriage licenses and records.

The Court is sympathetic to the burden an injunction places on state officials but does not find Kansas' system for administering the marriage laws to be so complex that state officials will struggle to sort out an injunction banning enforcement of the state's same-sex marriage ban. Nor does this case present the type of issue best left to localized administrative procedures. Rather, this case presents federal constitutional questions, ones squarely within the province and competence of a federal court. *See Johnson v. Rodrigues (Orozco)*, 226 F.3d 1103, 1112 (10th Cir. 2000). Accordingly, the Court declines to abstain under *Burford*.

E. The *Rooker-Feldman* Doctrine

In supplemental briefing filed with the Court the morning of the preliminary injunction hearing, defendants asserted that the *Rooker-Feldman* doctrine bars plaintiffs' federal court claims. *See* Doc. 24. The *Rooker-Feldman* doctrine provides that federal courts, except for the Supreme Court, cannot directly review state court decisions. In *Exxon Mobil Corp. v. Saudi*

Basic Indus. Corp., 544 U.S. 280 (2005), the Supreme Court confined the doctrine's application to the factual setting presented in the two cases that gave the doctrine its name: when the losing parties in a state court case bring a federal suit alleging that the state court ruling was unconstitutional. *Rooker v. Fid. Trust Co.*, 263 U.S. 413 (1923); *D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983). Plaintiffs ask this Court to conduct, defendants assert, what amounts to a "review" of the Kansas' Supreme Court's stay order in *Moriarty*.

Defendants' *Rooker-Feldman* argument is not persuasive. First, plaintiffs were not "losing parties" in the *Moriarty* action. In *Moriarty*, the Kansas Attorney General "prevailed"—at least for the length of the court's stay—over Chief Judge Moriarty of the Johnson County, Kansas District Court by obtaining a temporary stay of Judge Moriarty's Administrative Order. Plaintiffs are not parties to *Moriarty* and "[t]he *Rooker-Feldman* doctrine does not bar actions by nonparties to the earlier state court judgment." *Lance v. Dennis*, 546 U.S. 459, 466 (2006).

Nor do plaintiffs in this case seek review of the *Moriarty* stay order—an order that applies only to applicants in Johnson County. Plaintiffs seek marriage licenses in Sedgwick and Douglas Counties. Instead, plaintiffs here challenge the constitutional validity of a legislative act and a state constitutional amendment. Such challenges are permissible under *Rooker-Feldman* because the doctrine does not bar a federal court from deciding the "validity of a rule promulgated in a non-judicial proceeding." *Feldman*, 460 U.S. at 486. Although this Court's ruling may affect some aspects of *Moriarty*, concurrent state and federal court litigation over similar issues does not trigger dismissal under *Rooker-Feldman*. *See Exxon Mobil*, 544 U.S. at 292 ("neither *Rooker* nor *Feldman* supports the notion that properly invoked concurrent jurisdiction vanishes if a state court reaches judgment on the same or a related question").

During the injunction hearing, defendants invoked *Atl. Coast Line R.R. Co. v. Bhd. of Locomotive Eng'rs*, 398 U.S. 281 (1970). Defendants' reliance on this case is also unpersuasive. In that case, a union asked a federal court to enjoin enforcement of a state court injunction against picketing because the state court's injunction violated federal law. *Id.* at 284. The Supreme Court concluded that the union's suit amounted to a request for the federal district court to review the state court's injunction, which *Rooker-Feldman* prohibits. *Id.* at 296. In contrast to the current case, the plaintiff in *Atl. Coast Line* was a party to the state court proceeding and sought review of a judgment—not a legislative act. Consequently, nothing in *Atl. Coast Line* suggests this Court should depart from the well-established rule that the *Rooker-Feldman* doctrine does not bar a federal court challenge to the constitutionality of a state statute by someone who is not a party to the similar state court proceeding.

II. Merits of Plaintiffs' Motion

A. Standard for a Preliminary Injunction

Having determined that it can, and should, adjudicate plaintiffs' motion on its merits, the Court now turns to plaintiffs' request for a preliminary injunction. Under Fed. R. Civ. P. 65(a), plaintiffs seek a preliminary injunction that: (1) enjoins the defendants from enforcing Article 15, § 16 of the Kansas Constitution, K.S.A. §§ 23-2501 and 23-2508, and any other law that excludes same-sex couples from marriage, and (2) directs defendants to issue marriage licenses to otherwise-qualified same-sex couples.

A preliminary injunction is an order prohibiting a defendant from taking certain specified actions. In some cases, such an order can mandate the defendant to take (or continue taking) certain actions. The injunction is "preliminary" in the sense that it is entered before the case is ready for a final decision on the merits. The issuance of a preliminary injunction is committed to

the "sound discretion of the trial court . . ." *Tri-State Generation & Transmission Ass'n, Inc. v. Shoshone River Power, Inc.*, 805 F.2d 351, 354 (10th Cir. 1986). A preliminary injunction is considered an "extraordinary and drastic" remedy, one that a court should not grant "unless the movant, by a clear showing, carries the burden of persuasion." *West v. Derby Unified Sch. Dist. No. 260*, 23 F. Supp. 2d 1220, 1221-22 (D. Kan. 1998) (internal quotation omitted).

To obtain a preliminary injunction, a plaintiff must establish four elements: (1) the plaintiff is substantially likely to succeed on the merits; (2) the plaintiff will suffer irreparable injury if the injunction is denied; (3) the plaintiff's threatened injury outweighs the injury the defendant will suffer if the injunction issues; and (4) the injunction would not be adverse to the public interest. *Tri-State Generation*, 805 F.2d at 355 (citing *Lundgrin v. Claytor*, 619 F.2d 61, 63 (10th Cir. 1980)). The Court considers each of these elements, in order, below.

1. Likelihood of Success on the Merits

a. Tenth Circuit Precedent

"The Tenth Circuit has adopted [a] liberal definition of the 'probability of success' requirement." *Otero Sav. & Loan Ass'n v. Fed. Reserve Bank of Kansas City, Mo.*, 665 F.2d 275, 278 (10th Cir. 1981). As long as the other three factors favor a preliminary injunction, "it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation." *Id.* (citing *Cont'l Oil Co. v. Frontier Ref. Co.*, 338 F.2d 780, 782 (10th Cir. 1964) (further citations omitted)). But this general standard is elevated when a plaintiff requests one of the three types of "disfavored" preliminary relief—"those altering the status quo,

'mandatory' preliminary injunctions,[9] and those granting the moving party all the relief it could achieve at trial." *Flood v. ClearOne Commc'ns, Inc.*, 618 F.3d 1110, 1117 n.1 (10th Cir. 2010). When a plaintiff seeks one of the disfavored forms of injunction, he or she must make an elevated showing that establishes the likelihood of success on the merits and the balance of harms favors issuing an injunction. *Id.* (citing *Westar Energy, Inc. v. Lake*, 552 F.3d 1215, 1224 (10th Cir. 2009)). Here, plaintiffs' motion requests a preliminary injunction that qualifies under each category of disfavored injunction: it would alter the status quo; it would require that defendants undertake some affirmative conduct; and it would grant plaintiffs almost the entire scope of relief they would request at a trial on the merits. *See* Docs. 1 at ¶ 1, 3 at ¶ VI.A. Accordingly, the Court will require plaintiffs to show a strong likelihood of success on the merits.

Two Tenth Circuit opinions, *Kitchen* and *Bishop*, control this part of the preliminary injunction analysis. In *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014), same-sex couples challenged Utah's state statute and state constitutional amendment prohibiting same-sex marriage. They argued that the laws violated their due process and equal protection rights under the Fourteenth Amendment. Utah's state-constitutional provision prohibiting same-sex marriage provided:

> (1) Marriage consists only of the legal union between a man and a woman.
>
> (2) No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect.

Utah Const. art. I, § 29. Utah's statutory same-sex marriage ban provided that:

---

[9] An injunction is "mandatory" if it requires the nonmoving party to perform some affirmative act to comply with it. *See RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1208 (10th Cir. 2009).

> (1)(a) It is the policy of this state to recognize as marriage only the legal union of a man and a woman as provided in this chapter.
>
> (b) Except for the relationship of marriage between a man and a woman recognized pursuant to this chapter, this state will not recognize, enforce, or give legal effect to any law creating any legal status, rights, benefits, or duties that are substantially equivalent to those provided under Utah law to a man and a woman because they are married.

U.C.A. § 30-1-4.1.

After finding that the plaintiffs had sued the proper parties for standing purposes, the Tenth Circuit held that the fundamental right to marry includes the right to marry a person of the same sex. *Kitchen*, 755 F.3d at 1201-02, 1218. The Tenth Circuit then examined the challenged laws under the strict scrutiny standard that applies to fundamental rights. *Id.* at 1218. This standard requires that any law infringing on a fundamental right be "narrowly tailored" to promote a "compelling government interest." *Id.* After discussing the government interests Utah said the same-sex marriage ban served, the Tenth Circuit concluded that the laws failed the strict scrutiny standard. *Id.* at 1218-28 (rejecting the following rationales under strict scrutiny: promoting biological reproduction within marriages, promoting optimal childrearing, promoting gendered parenting styles, and accommodating religious freedom and reducing the potential for civic strife). The Tenth Circuit concluded: "[U]nder the Due Process and Equal Protection Clauses of the United States Constitution, those who wish to marry a person of the same sex are entitled to exercise the same fundamental right as is recognized for persons who wish to marry a person of the opposite sex." *Id.* at 1229-30.

In *Bishop v.* Smith, 760 F.3d 1070 (10th Cir. 2014), same-sex couples brought a similar equal protection and due process challenge to Oklahoma's constitutional amendment prohibiting same-sex marriage. Oklahoma's constitutional same-sex marriage ban provided:

> A. Marriage in this state shall consist only of the union of one man and one woman. Neither this Constitution nor any other provision of law shall be

> construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.
>
> B. A marriage between persons of the same gender performed in another state shall not be recognized as valid and binding in this state as of the date of the marriage.
>
> C. Any person knowingly issuing a marriage license in violation of this section shall be guilty of a misdemeanor.

Okla. Const. art. 2, § 35. After determining that plaintiffs had standing to sue, the Tenth Circuit held that *Kitchen* controlled the merits of the appeal. *Bishop*, 760 F.3d at 1076-79. The Tenth Circuit considered arguments not addressed in *Kitchen*, but ultimately concluded that they did not "persuade [the court] to veer from our core holding that states may not, consistent with the United States Constitution, prohibit same-sex marriages." *Id.* at 1080-82 (reaffirming *Kitchen* but also rejecting under strict-scrutiny analysis children's interest in having their biological parents raise them as a compelling government interest justifying a same-sex marriage ban).

Even under the more exacting standard for disfavored injunctions, plaintiffs have shown a strong likelihood they will succeed on the merits of their claims. *Kitchen* and *Bishop* establish a fundamental right to same-sex marriage, and state laws prohibiting same-sex marriage infringe upon that right impermissibly. *Kitchen*, 755 F.3d at 1229-30; *Bishop*, 760 F.3d at 1082. Kansas' same-sex marriage ban does not differ in any meaningful respect from the Utah and Oklahoma laws the Tenth Circuit found unconstitutional.

At the preliminary injunction hearing, defendants' counsel tried to differentiate Kansas—and its same-sex marriage ban—from the Utah and Oklahoma provisions nullified in *Kitchen* and *Bishop*. He argued that Kansas, by statute, recognizes common law marriage and plaintiffs could achieve married status under the common law variant of marriage. This argument, even if accurate, proves too much. On its best day, this argument contends that Kansas' common law marriage alternative provides same-sex couples access to a separate but equal classification of

marriage. That is, opposite-sex citizens can marry by either statutory or common law marriage while same-sex couples must confine their marriages to the common law alternative. Thus, defendants' alternative way of looking at the same-sex ban still denies plaintiffs equal protection of Kansas' marriage laws.

Because Tenth Circuit precedent is binding on this Court, *Kitchen* and *Bishop* dictate the result here. *See United States v. Spedalieri*, 910 F.2d 707, 709 n.2 (10th Cir. 1990) ("A district court must follow the precedent of this circuit . . ."); *Phillips v. Moore*, 164 F. Supp. 2d 1245, 1258 (D. Kan. 2001) ("The [district] court, of course, is bound by circuit precedent"). The Court concludes, therefore, that plaintiffs have shown a strong likelihood that they will succeed in establishing that Article 15, § 16 of the Kansas Constitution and K.S.A. § 23-2501 violate their rights guaranteed by the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

b. Role of Kansas State Court Precedent

Defendants contend that the Kansas Court of Appeals decision *In re Estate of Gardiner*, 22 P.3d 1086 (Kan. Ct. App. 2001), *aff'd in part, rev'd in part*, 42 P.3d 120 (Kan. 2002) controls the constitutional questions raised by plaintiffs' motion. In *Gardiner*, the Kansas Court of Appeals rejected plaintiff's claim that Kansas' prohibition against recognizing same-sex marriages violated the Fourteenth Amendment of the United State Constitution. *Id.* at 125-26. Defendants assert that this Court now must follow *Gardiner* for two reasons: (1) 28 U.S.C. § 1738 obligates federal courts to honor the decisions of state courts; and (2) the United States Supreme Court's denial of certiorari in *Gardiner* elevated the precedential effect of that decision to one that is binding on all federal courts. The Court disagrees with both propositions.

Title 28 U.S.C. § 1738 is the full faith and credit statute that applies in federal court. This statute requires federal courts to give the same preclusive effect to a state court *judgment* that another court of the same state would give to it. In other words, under 28 U.S.C. § 1738, a federal court must look to law of the judgment-rendering state to determine the preclusive effect of a state court judgment. *Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 375 (1985). But defendants' argument confuses judgment and precedent. A "judgment" represents a court's final determination of the parties' rights after their case has been litigated to its conclusion. In contrast, "precedent" consists of the body of decisional rules established in previous cases that courts must apply later when deciding like cases. Section 1738 obligates federal courts to honor state court judgments, not follow their precedent. Moreover, for § 1738 purposes, a state court judgment precludes subsequent federal litigation only if it involved the same parties, the same claim, and resulted in a final decision on the merits. *Rivet v. Regions Bank of La.*, 522 U.S. 470, 476 (1998). Neither plaintiffs nor defendants were parties in *Gardiner*. Thus, 28 U.S.C. § 1738 does not obligate this Court to honor the judgment rendered in *Gardiner* or follow its precedent.

Nor does the Supreme Court's decision declining to issue a writ of certiorari confer precedential effect on *Gardiner* in a way that binds the federal courts. It is well-settled that a denial of certiorari creates no precedential value. *Teague v. Lane*, 489 U.S. 288, 296 (1989) ("As we have often stated, the 'denial of a writ of certiorari imports no expression of opinion upon the merits of the case.'") (quoting *United States v. Carver*, 260 U.S. 482, 490 (1923)); *United States v. Mitchell*, 783 F.2d 971, 977 (10th Cir. 1986) ("[n]o precedential conclusion can be drawn from the denial of certiorari"). This is especially true here, because the *Gardiner* plaintiff abandoned his constitutional attack on Kansas' same-sex marriage laws before he took his appeal to the

Kansas Supreme Court. *See* 42 P.3d 120. Thus, the only consideration of Kansas' same-sex marriage laws came in the Kansas Court of Appeals' opinion—one the United States Supreme Court was never asked to review.

In sum, defendants have failed to persuade the Court to depart from two well-settled decisional principles: first, that federal courts are not bound by state court interpretations of federal constitutional issues, *see Tighe v. B.C. Christopher Sec. Co*., No. 91-4219-SAC, 1994 WL 191876, at *5 n.7 (D. Kan. Apr. 22, 1994) (citing *Mullaney v. Wilbur*, 421 U.S. 684, 690-91 (1975)); and second, that a federal district court must follow the precedent of its Circuit. *Spedalieri*, 910 F.2d at 709.

2. Irreparable Injury

Plaintiffs have shown they likely will suffer irreparable injury if the Court does not issue a preliminary injunction. "When an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." *Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001) (quotation omitted); *see also Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Awad v. Ziriax*, 670 F.3d 1111, 1131 (10th Cir. 2012); *Quinly v. City of Prairie Village*, 446 F. Supp. 2d 1233, 1237-38 (D. Kan. 2006). Moreover, the Court would be "unable to grant an effective monetary remedy after a full trial because such damages would be inadequate or difficult to ascertain," further favoring a finding of irreparable injury. *Awad*, 670 F.3d at 1131. Thus, the Court concludes that plaintiffs have satisfied the irreparable injury requirement by showing a likely violation of their constitutional rights.

3. Balance of Harm

Next, plaintiffs have shown that their threatened injury outweighs any injury defendants would experience from the injunction. "[W]hen a law is likely unconstitutional, the interests of

those [whom] the government represents, such as voters[,] do not outweigh a plaintiff's interest in having [her] constitutional rights protected." *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1145 (10th Cir. 2013) (en banc) (plurality) (quoting *Awad*, 670 F.3d at 1131) (internal alterations omitted), *aff'd*, __ U.S. __ ,134 S. Ct. 2751 (2014). On these facts, Tenth Circuit precedent requires the Court to conclude that the balance of harm analysis favors injunctive relief.

4. Public Interest

Last, the Court must determine whether granting an injunction would be adverse to the public interest. Here, competing considerations collide head-on. On one hand, "it is always in the public interest to prevent the violation of a party's constitutional rights." *Hobby Lobby*, 723 F.3d at 1145 (quoting *Awad*, 670 F.3d at 1131-32). On the other hand, the public interest values enforcement of democratically enacted laws. This latter value must yield though, when binding precedent shows that the laws are unconstitutional. In this setting, the public's interest in enforcement must give way to the "more profound and long-term interest in upholding an individual's constitutional rights." *Awad*, 670 F.3d at 1132 (quotation omitted). Consistent with this precedent, the Court concludes that the public interest favors protecting plaintiffs' constitutional rights by enjoining Kansas' plainly unconstitutional provisions.

III. Effective Date of Preliminary Injunction

Finally, defendants have asked the Court to stay any injunction it might enter temporarily, while they appeal to the Tenth Circuit. Under Fed. R. Civ. P. 62(c), a court may suspend or modify an injunction during the pendency of an appeal to secure the opposing party's rights. *See also Rhines v. Weber*, 544 U.S. 269, 276 (2005) (holding district courts "ordinarily have authority to issue stays . . . where such a stay would be a proper exercise of discretion").

The purpose of a stay is to preserve the status quo while the opposing party pursues its appeal. *McClendon v. City of Albuquerque*, 79 F.3d 1014, 1020 (10th Cir. 1996).

In the same-sex marriage decisions that followed *Kitchen* and *Bishop*, several federal district courts have stayed the effect of their decisions to permit defendant to exhaust its appeal rights. *See, e.g.*, *Guzzo v. Mead*, No. 14-CV-200-SWS, 2014 WL 5317797, at *7 (D. Wyo. Oct. 17, 2014) (granting request for stay pending appeal); *Evans v. Utah*, No. 2:14CV55DAK, 2014 WL 2048343, at *18 (D. Utah May 19, 2014) (granting request for stay pending appeal despite factors weighing against it). Judge Skavdahl explained why in *Guzzo*:

> The Court is sympathetic to the mounting irreparable harms faced by Plaintiffs. However, the many changes that result from this ruling are very serious and deserve as much finality as the Court can guarantee. Given the fundamental issues apparent in this case, it is in the litigants' and the public's interest to ensure the correct decision is rendered. It would only cause a great deal of harm and heartache if this Court allowed same-sex marriage to proceed immediately, only to have a reviewing court later nullify this decision (and with it, the same-sex marriages occurring in the interim).

2014 WL 5317797, at *7.

Defendants' stay request presents a relatively close call. As *Guzzo* explained, the Tenth Circuit has settled the substance of the constitutional challenge plaintiffs' motion presents. *Id.* at *5. And under the Circuit's decisions, Kansas law is encroaching on plaintiffs constitutional rights. But defendants' arguments have required the Court to make several jurisdictional and justiciability determinations, and human fallibility is what it is; the Circuit may come to a different conclusion about one of these threshold determinations. On balance, the Court concludes that a short-term stay is the safer and wiser course.

Consequently, the Court grants the preliminary injunction described below but stays the effective date of that injunction until 5:00 p.m. (CST) on Tuesday, November 11, 2014 (unless defendants sooner inform the Court that they will not seek review from the Circuit). This will

permit adequate time for defendants to appeal from this Order and try to convince the Tenth Circuit that it should stay the Court's preliminary injunction for a longer period. This stay will provide the added benefit of giving the defendant Clerks and Secretary Moser adequate time to prepare to honor the injunction—assuming the Court of Appeals does not stay or vacate the Court's injunction. But unless defendants convince the Tenth Circuit to order an additional stay, the injunction imposed by the Order will go into effect at 5:00 p.m. (CST) on Tuesday, November 11, 2014.

Conclusion

IT IS THEREFORE ORDERED BY THE COURT THAT plaintiffs' Motion for a Preliminary Injunction is granted (Doc. 3). Defendants are hereby enjoined from enforcing or applying Article 15, § 16 of the Kansas Constitution and K.S.A. § 23-2501 and any other Kansas statute, law, policy or practice that prohibits issuance of marriage licenses to same-sex couples in Kansas. Defendants may not refuse to issue marriage licenses on the basis that applicants are members of the same sex. The Court also orders that defendants' request for a temporary stay of the preliminary injunction is granted. The preliminary injunction is stayed and will not take effect until 5:00 p.m. (CST) on Tuesday, November 11, 2014, unless defendants sooner inform the Court they will not seek review before the Court of Appeals.

Finally, plaintiffs' motion for a temporary restraining order is denied as moot.

IT IS SO ORDERED.

Dated this 4th day of November, 2014, at Kansas City, Kansas.

Daniel D. Crabtree

Daniel D. Crabtree
United States District Judge

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 112,590

STATE OF KANSAS *ex rel.* DEREK SCHMIDT, ATTORNEY GENERAL,
Petitioner,

v.

KEVIN P. MORIARTY, CHIEF JUDGE, TENTH JUDICIAL DISTRICT,
AND SANDRA MCCURDY, CLERK OF THE DISTRICT COURT,
TENTH JUDICIAL DISTRICT,
Respondents.

ORDER TO SHOW CAUSE

On October 10, 2014, the State of Kansas on relation of Attorney General Derek Schmidt filed this original action in mandamus against Kevin P. Moriarty, Chief Judge of the Kansas Tenth Judicial District, and Sandra McCurdy, Clerk of the District Court for the Tenth Judicial District. Attorney General Schmidt alleged Chief Judge Moriarty exceeded his authority in issuing Amended Administrative Order 14-11 on October 8, which directs McCurdy to "issue marriage licenses to all individuals, including same-sex individuals, provided they are otherwise qualified to marry." Schmidt asked this court to strike down Moriarty's order and direct Moriarty and McCurdy not to issue marriage licenses to same-sex couples.

Later that day, this court ordered a temporary stay of Moriarty's order insofar as it authorized McCurdy to issue marriage licenses to same sex-couples. The stay was ordered to remain in force pending further order by this court. We also directed Moriarty and McCurdy to file a response to Schmidt's mandamus petition and set a deadline for any additional briefing the parties wished to submit. Oral argument on the petition was scheduled for Thursday, November 6 at 10:00 a.m.

Also on October 10, two same-sex couples who were denied marriage licenses by the Clerks of District Court in the Seventh and Eighteenth Judicial Districts filed suit in the United States District Court for the District of Kansas challenging Kansas' laws prohibiting same-sex marriage on grounds of equal protection and due process. *Marie v. Moser, et al.*, No. 14-cv-02518 (D. Kan. Oct. 10, 2014). Those plaintiffs also sought injunctive relief to temporarily block the enforcement of Kansas' constitutional and statutory ban on same-sex marriage. The federal district court held a hearing on this motion on Friday, October 31.

On Tuesday, November 4, the federal district court in *Marie* entered a preliminary injunction. It enjoined the defendants from "enforcing or applying Article 15, § 16 of the Kansas Constitution and K.S.A. § 23-2501, and any other Kansas statute, law, policy or practice that prohibits issuance of marriage licenses on the basis that applicants are members of the same sex." *Marie*, slip op. at 38. The federal court also granted the defendants' motion for temporary stay, which effectively prevents the preliminary injunction from taking effect until 5:00 p.m. (CST) on Tuesday, November 11, 2014. The temporary stay was granted to "permit adequate time for defendants to appeal from this Order and try to convince the Tenth Circuit that it should stay the Court's preliminary injunction for a longer period." *Marie*, slip op. at 38.

In the federal district court's rulings, it exercised jurisdiction over the constitutionality of Kansas' same-sex marriage ban. If Schmidt's mandamus action in our court were to proceed, we would also likely reach the same constitutional questions reviewed in *Marie*. And if we were to reach the opposite conclusion from the federal court—uphold the ban, not block it—the courts' conflicting judgments would inject additional uncertainty into the debate of the validity of Kansas's same-sex marriage ban. See *Schaefer v. Milner,* 156 Kan. 768, 775, 137 P.2d 156 (1943) (necessity of avoiding conflict in the execution of judgments by independent courts).

Accordingly, the parties are hereby ordered to show cause by 5:00 p.m. on November 14, 2014, why:

1. our October 10 order temporarily staying Moriarty's order insofar as it allows the issuance of marriage licenses to same-sex couples should, or should not, remain in full force and effect pending final resolution of the federal matter;

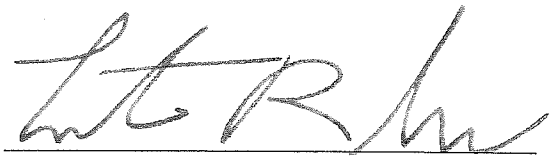
2. our consideration of this mandamus action otherwise should, or should not, be stayed pending final resolution of the federal matter. See *Henry, Administrator v. Stewart*, 203 Kan. 289, 292, 454 P.2d 7 (1969) (quoting *Landis v. North American Co.*, 299 U.S. 248, 254, 57 S. Ct. 163, 81 L. Ed. 153 [1936]) ("[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.").

The parties' responses may include, but are not limited to, reference to the doctrine of judicial comity, "a principle by which the courts of one state or jurisdiction give effect to the laws and judicial decisions of another, not as a matter of obligation, but out of deference and respect." *In re Miller*, 228 Kan. 606, Syl. ¶ 3, 620 P.2d 800 (1980); see *Perrenoud v. Perrenoud*, 206 Kan. 559, 573, 480 P.2d 749 (1971) (comity can apply between federal courts and state courts). See also *Schaefer v. Milner*, 156 Kan. at 775 (principle enforced to prevent unseemly, expensive, and dangerous conflicts of jurisdiction and process). See, *e.g.*, *State ex rel. Wilson v. Condon*, No. 2014-002121, 2014 WL 5038396 (S.C. Oct. 9, 2014).

Oral argument scheduled for 10:00 a.m. on Thursday, November 6, 2014, is hereby postponed pending further order by this court.

The stay issued in our order of October 10, 2014, shall remain in force pending further order by this court.

IT IS SO ORDERED THIS 5th day of November 2014.



Lawton R. Nuss
Chief Justice

FILED
United States Court of Appeals
Tenth Circuit

November 7, 2014

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

KAIL MARIE; MICHELLE L. BROWN; KERRY WILKS, Ph.D.; DONNA DITRANI,

Plaintiffs - Appellees,

v.

ROBERT MOSER, M.D., in his official capacity as Secretary of the Kansas Department of Health and Environment; DOUGLAS A. HAMILTON, in his official capacity as Clerk of the District Court for the 7th Judicial District (Douglas County); BERNIE LUMBRERAS, in her official capacity as Clerk of the District Court for the 18th Judicial District (Sedgwick County),

Defendants - Appellants.

No. 14-3246
(D.C. No. 2:14-CV-02518-DDC-TJJ)
(D. Kan.)

ORDER

Before **LUCERO** and **BACHARACH**, Circuit Judges.

The district court granted preliminary injunctive relief to plaintiffs on November 4, enjoining defendants from enforcing or applying Kansas constitutional and statutory provisions that prohibit issuance of marriage licenses to same-sex couples. The district court then stayed its injunctive order until 5:00 p.m. on November 11. Defendants immediately appealed the preliminary injunction ruling

and also filed an emergency motion pursuant to 10th Cir. R. 8.1, asking this court to stay the district court's injunctive order pending their appeal of the ruling.

We conclude that defendants have failed to make the showings necessary to obtain a stay, and we deny the emergency motion for a stay pending appeal. We note that the district court's temporary stay of its own preliminary injunction order remains in effect until 5:00 p.m. CST on November 11, 2014.

Entered for the Court

ELISABETH A. SHUMAKER, Clerk

2014 WL 5748990
Only the Westlaw citation is currently available.
United States Court of Appeals,
Sixth Circuit.

April **DeBoer**, et al., Plaintiffs–Appellees,
v.
Richard SNYDER, Governor, State of Michigan, in his official capacity, et al., Defendants–Appellants.
James Obergefell, et al., Plaintiffs–Appellees,
v.
Richard Hodges, Director of the Ohio Department of Health, in his official capacity, Defendant–Appellant.
Brittani Henry, et al., Plaintiffs–Appellees,
v.
Richard Hodges, Director of the Ohio Department of Health, in his official capacity, Defendant–Appellant.
Gregory Bourke, et al., Plaintiffs–Appellees,
v.
Steve Beshear, Governor, Commonwealth of Kentucky, in his official capacity, Defendant–Appellant.
Valeria Tanco, et al., Plaintiffs–Appellees,
v.
William Edward "Bill" Haslam, Governor, State of Tennessee, in his official capacity, et al., Defendants–Appellants.
Timothy Love, et al., Plaintiffs/Intervenors–Appellees,
v.
Steve Beshear, Governor, Commonwealth of Kentucky, in his official capacity, Defendant–Appellant.

Nos. 14–1341, 3057, 3464, 5291, 5297, 5818. | Argued: Aug. 6, 2014. | Decided and Filed: Nov. 6, 2014.

Appeal from the United States District Court for the Eastern District of Michigan at Detroit; No. 2:12–cv–10285—Bernard A. Friedman, District Judge.
Appeals from the United States District Court for the Southern District of Ohio at Cincinnati; Nos. 1:13–cv–00501 & 1:14–cv–00129—Timothy S. Black, District Judge.
Appeals from the United States District Court for the Western District of Kentucky at Louisville; No. 3:13–cv–00750—John G. Heyburn II, District Judge.
Appeal from the United States District Court for the Middle District of Tennessee at Nashville; No. 3:13–cv–01159—Aleta Arthur Trauger, District Judge.

Attorneys and Law Firms

ARGUED: Aaron D. Lindstrom, Office of the Michigan Attorney General, Lansing, Michigan, for Appellant in 14–1341. Carole M. Stanyar, Ann Arbor, Michigan, for Appellees in 14–1341. Eric E. Murphy, Office of the Ohio Attorney General, Columbus, Ohio, for Appellant in 14–3057 and 14–3464. Alphonse A. Gerhardstein, Gerhardstein & Branch Co. LPA, Cincinnati, Ohio, for Appellees in 14–3057 and 14–3464. Leigh Gross Latherow, VanAntwerp, Monge, Jones, Edwards & McCann, LLP, Ashland, Kentucky, for Appellant in 14–5291 and 14–5818. Laura E. Landenwich, Clay Daniel Walton & Adams, PLC, Louisville, Kentucky, for Appellees in 14–5291 and 14–5818. Joseph F. Whalen, Office of the Tennessee Attorney General, Nashville, Tennessee, for Appellants in 14–5297. William L. Harbison, Sherrard & Roe, PLC, Nashville, Tennessee, for Appellees in 14–5297. **ON BRIEF:** 14–1341: Aaron D. Lindstrom, Kristin M. Heyse, Office of the Michigan Attorney General, Lansing, Michigan, for Appellant. Carole M. Stanyar, Ann Arbor, Michigan, Dana M. Nessel, Detroit, Michigan, Robert A. Sedler, Wayne State University Law School, Detroit, Michigan, Kenneth M. Mogill, Mogill, Posner & Cohen, Lake Orion, Michigan, for Appellees. Kyle J. Bristow, Bristow Law, PLLC, Clarkston, Michigan, Alphonse A. Gerhardstein, Gerhardstein & Branch Co. LPA, Cincinnati, Ohio, David A. Robinson, North Haven, Connecticut, Deborah J. Dewart, Swansboro, North Carolina, Paul Benjamin Linton, Northbrook, Illinois, James R. Wierenga, David & Wierenga, P.C., Grand Rapids, Michigan, Eric Rassbach, The Becket Fund for Religious Liberty, Washington, D.C., James J. Walsh, Thomas J. Rheaume, Jr., Bodman PLC, Detroit, Michigan, William J. Olson, William J. Olson, P.C., Vienna, Virginia, Lawrence J. Joseph, Washington, D.C., Thomas M. Fisher, Office of the Attorney General of Indiana, Indianapolis, Indiana, Mary E. McAlister, Liberty Counsel, Lynchburg, Virginia, Mathew D. Staver, Anita L. Staver, Liberty Counsel, Orlando, Florida, Anthony R. Picarello, Jr., Jeffrey Hunter Moon, Michael F. Moses, U.S. Conference of Catholic Bishops, Washington, D.C., Alexander Dushku, R. Shawn Gunnarson, Kirton McConkie, Salt Lake City, Utah, Erin Elizabeth Mersino, Thomas More Law Center, Ann Arbor, Michigan, David Boyle, Long Beach, California, Benjamin G. Shatz, Manatt, Phelps & Phillips, LLP, Los Angeles, California, Elizabeth B. Wydra, Constitutional Accountability Center, Washington, D.C., Paul M. Smith, Jenner & Block LLP, Washington, D.C., Catherine E. Stetson, Hogan Lovells U.S. LLP, Washington, D.C., Jason Walta, National Education

Association, Washington, D.C., Diana Raimi, Jaffe Raitt Heuer & Weiss, P.C., Ann Arbor, Michigan, Rocky C. Tsai, Ropes & Gray LLP, San Francisco, California, Alan M. Gershel, Thomas M. Cooley Law School, Auburn Hills, Michigan, Jerome C. Roth, Nicole S. Phillis, Munger, Tolles & Olson LLP, San Francisco, California, Andrew J. Davis, Folger Levin LLP, San Francisco, California, Nicholas M. O'Donnell, Sullivan & Worcester LLP, Boston, Massachusetts, Sean R. Gallagher, Polsinelli PC, Denver, Colorado, Mark C. Fleming, Felicia H. Ellsworth, Wilmer Cutler Pickering Hale and Dorr LLP, Boston, Massachusetts, Paul R.Q. Wolfson, Dina B. Mishra, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, D.C., Alan Schoenfeld, Wilmer Cutler Pickering Hale and Dorr LLP, New York, New York, Diane M. Soubly, Stevenson Keppelman Associates, Ann Arbor, Michigan, Ria Tabacco Mar, NAACP Legal Defense & Educational Fund, Inc., New York, New York, Christy L. Anderson, Bryan Cave LLP, Denver, Colorado, Carmine D. Boccuzzi, Jr., Cleary Gottlieb Steen & Hamilton LLP, New York, New York, Jonathan B. Miller, Office of the Massachusetts Attorney General, Boston, Massachusetts, Jyotin Hamid, Joseph Rome, Debevoise & Plimpton LLP, New York, New York, Jeffrey S. Trachtman, Kramer Levin Naftalis & Frankel LLP, New York, New York, Christopher D. Man, Chadbourne & Parke LLP, Washington, D.C., Chase B. Strangio, American Civil Liberties Union Foundation, New York, New York, Suzanne B. Goldberg, Columbia Law School, New York, New York, Marcia D. Greenberger, Emily J. Martin, National Women's Law Center, Washington, D.C., G. David Carter, Joseph P. Bowser, Hunter Carter, Arent Fox LLP, Washington, D.C., Sara Bartel, Morrison & Foerster LLP, San Francisco, California, Daniel McNeel Lane, Jr., Matthew E. Pepping, Akin Gump Strauss Hauer & Feld LLP, San Antonio, Texas, Jessica M. Weisel, Akin Gump Strauss Hauer & Feld LLP, Los Angeles, California, Michael L. Whitlock, Bingham McCutchen LLP, Washington, D.C., for Amici Curiae. 14–3057: Bridget E. Coontz, Zachery P. Keller, Office of the Ohio Attorney General, Columbus, Ohio, for Appellant. Alphonse A. Gerhardstein, Jennifer L. Branch, Jacklyn Gonzales Martin, Gerhardstein & Branch Co. LPA, Cincinnati, Ohio, Lisa T. Meeks, Newman & Meeks Co., LPA, Cincinnati, Ohio, Chase B. Strangio, James D. Esseks, American Civil Liberties Union Foundation, New York, New York, Drew Dennis, ACLU of Ohio, Inc., Cleveland, Ohio, for Appellees. Byron J. Babione, Alliance Defending Freedom, Scottsdale, Arizona, Lawrence J. Joseph, Washington, D.C., Benjamin G. Shatz, Manatt, Phelps & Phillips, LLP, Los Angeles, California, Carmine D. Boccuzzi, Jr., Cleary Gottlieb Steen & Hamilton LLP, New York, New York, Gregory R. Nevins, Lambda Legal Defense and Education Fund, Inc., Atlanta, Georgia, Susan L. Sommer, Lambda Legal Defense and Education Fund, Inc., New York, New York, Camilla B. Taylor, Lambda Legal Defense and Education Fund, Inc., Chicago, Illinois, Mark C. Fleming, Felicia H. Ellsworth, Wilmer Cutler Pickering Hale and Dorr LLP, Boston, Massachusetts, Paul R.Q. Wolfson, Dina B. Mishra, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, D.C., Alan Schoenfeld, Wilmer Cutler Pickering Hale and Dorr LLP, New York, New York, Paul M. Smith, Jenner & Block LLP, Washington, D.C., Roberta A. Kaplan, Jaren Janghorbani, Joshua D. Kaye, Jacob H. Hupart, Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York, New York, Thomas D. Warren, Baker & Hostetler LLP, Cleveland, Ohio, Jeffrey S. Trachtman, Kramer Levin Naftalis & Frankel Llp, New York, New York, Marcia D. Greenberger, Emily J. Martin, National Women's Law Center, Washington, D.C., Shannon P. Minter, Christopher F. Stoll, National Center for Lesbian Rights, Washington, D.C., for Amici Curiae. 14–3464: Eric E. Murphy, Bridget E. Coontz, Office of the Ohio Attorney General, Columbus, Ohio, for Appellant. Alphonse A. Gerhardstein, Jennifer L. Branch, Jacklyn Gonzales Martin, Gerhardstein & Branch Co. LPA, Cincinnati, Ohio, Lisa T. Meeks, Newman & Meeks Co., LPA, Cincinnati, Ohio, Susan L. Sommer, M. Currey Cook, Keith Hammeran, Lambda Legal Defense & Education Fund, Inc., New York, New York, Paul D. Castillo, Lambda Legal Defense & Education Fund, Inc., Dallas, Texas, for Appellees. Catherine E. Stetson, Hogan Lovells U.S. LLP, Washington, D.C., Andrew J. Davis, Folger Levin LLP, San Francisco, California, Sean R. Gallagher, Polsinelli PC., Denver, Colorado, Nicholas M. O'Donnell, Sullivan & Worcester LLP, Boston, Massachusetts, Carmine D. Boccuzzi, Jr., Cleary Gottlieb Steen & Hamilton LLP, New York, New York, Ria Tabacco Mar, NAACP Legal Defense & Educational Fund, Inc., New York, New York, Jyotin Hamid, Joseph Rome, Debevoise & Plimpton LLP, New York, New York, Suzanne B. Goldberg, Columbia Law School, New York, New York, Daniel McNeel Lane, Jr., Matthew E. Pepping, Akin Gump Strauss Hauer & Feld LLP, San Antonio, Texas, Jessica M. Weisel, Akin Gump Strauss Hauer & Feld LLP, Los Angeles, California, Paul D. Ritter, Jr., Christopher J. Weber, Robert G. Schuler, Kegler, Brown, Hill & Ritter Co., L.P.A., Columbus, Ohio, Lawrence J. Joseph, Washington, D.C., Harlan D. Karp, Tina R. Haddad, Cleveland, Ohio, Benjamin G. Shatz, Manatt, Phelps & Phillips, LLP, Los Angeles, California, Christopher D. Man, Chadbourne & Parke LLP, Washington, D.C., Mark C. Fleming, Felicia H. Ellsworth, Wilmer Cutler Pickering Hale and Dorr LLP, Boston, Massachusetts, Paul R.Q. Wolfson, Dina B. Mishra, Wilmer Cutler Pickering Hale and Dorr LLP,

Washington, D.C., Alan Schoenfeld, Wilmer Cutler Pickering Hale and Dorr LLP, New York, New York, Rocky C. Tsai, Ropes & Gray LLP, San Francisco, California, Joseph R. Guerra, Sidley Austin LLP, Washington, D.C., Emma L. Dill, Bryan Cave LLP, San Francisco, California, Jeffrey S. Trachtman, Kramer Levin Naftalis & Frankel LLP, New York, New York, Marcia D. Greenberger, Emily J. Martin, National Women's Law Center, Washington, D.C., Sara Bartel, Morrison & Foerster LLP, San Francisco, California, G. David Carter, Joseph P. Bowser, Hunter T. Carter, Arent Fox LLP, Washington, D.C., Marjory A. Gentry, Arnold & Porter LLP, San Francisco, California, Diane M. Soubly, Stevenson Keppelman Associates, Ann Arbor, Michigan, Harlan D. Karp, Cleveland, Ohio, for Amici Curiae. 14–5291: Leigh Gross Latherow, William H. Jones, Jr., Gregory L. Monge, VanAntwerp, Monge, Jones, Edwards & McCann, LLP, Ashland, Kentucky, for Appellant. Laura E. Landenwich, Daniel J. Canon, L. Joe Dunman, Clay Daniel Walton & Adams, PLC, Louisville, Kentucky, Shannon R. Fauver, Dawn R. Elliott, Fauver Law Office, PLLC, Louisville, Kentucky, for Appellees. David A. Robinson, North Haven, Connecticut, Deborah J. Dewart, Swansboro, North Carolina, Stanton L. Cave, Law Office of Stan Cave, Lexington, Kentucky, Eric Rassbach, The Becket Fund for Religious Liberty, Washington, D.C., David Boyle, Long Beach, California, Benjamin G. Shatz, Manatt, Phelps & Phillips, LLP, Los Angeles, California, Paul M. Smith, Jenner & Block LLP, Washington, D.C., Catherine E. Stetson, Hogan Lovells U.S. LLP, Washington, D.C., Andrew J. Davis, Folger, Levin LLP, San Francisco, California, Rocky C. Tsai, Ropes & Gray LLP, San Francisco, California, Jerome C. Roth, Nicole S. Phillis, Munger, Tolles & Olson LLP, San Francisco, California, Nicholas M. O'Donnell, Sullivan & Worcester LLP, Boston, Massachusetts, Carmine D. Boccuzzi, Jr., Cleary Gottlieb Steen & Hamilton LLP, New York, New York, Mark C. Fleming, Felicia H. Ellsworth, Wilmer Cutler Pickering Hale and Dorr LLP, Boston, Massachusetts, Paul R.Q. Wolfson, Dina B. Mishra, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, D.C., Alan Schoenfeld, Wilmer Cutler Pickering Hale and Dorr LLP, New York, New York, Sean R. Gallagher, Polsinelli PC, Denver, Colorado, Jyotin Hamid, Joseph Rome, Debevoise & Plimpton LLP, New York, New York, Christy L. Anderson, Bryan Cave LLP, Denver, Colorado, Ria Tabacco Mar, NAACP Legal Defense & Educational Fund, Inc., New York, New York, Suzanne B. Goldberg, Columbia Law School, New York, New York, Joshua A. Block, Chase Strangio, American Civil Liberties Union Foundation, New York, New York, Elizabeth B. Wydra, Constitutional Accountability Center, Washington, D.C., Marcia D. Greenberger, Emily J. Martin, National Women's Law Center, Washington, D.C., Jeffrey S. Trachtman, Kramer Levin Naftalis & Frankel LLP, New York, New York, Christopher D. Man, Chadbourne & Parke LLP, Washington, D.C., Sara Bartel, Morrison & Foerster LLP, San Francisco, California, Daniel McNeel Lane, Jr., Matthew E. Pepping, Akin Gump Strauss Hauer & Feld LLP, San Antonio, Texas, Jessica M. Weisel, Akin Gump Strauss Hauer & Feld LLP, Los Angeles, California, Diane M. Soubly, Stevenson Keppelman Associates, Ann Arbor, Michigan, Marjory A. Gentry, Arnold & Porter LLP, San Francisco, California, Michael L. Whitlock, Bingham McCutchen LLP, Washington, D.C., G. David Carter, Joseph P. Bowser, Hunter Carter, Arent Fox LLP, Washington, D.C., for Amici Curiae. 14–5297: Joseph F. Whalen, Martha A. Campbell, Kevin G. Steiling, Office of the Tennessee Attorney General, Nashville, Tennessee, for Appellants. William L. Harbison, Phillip F. Cramer, J. Scott Hickman, John L. Farringer, Sherrard & Roe, PLC, Nashville, Tennessee, Abby R. Rubenfeld, Rubenfeld Law Office, PC, Nashville, Tennessee, Maureen T. Holland, Holland and Associates, PLLC, Memphis, Tennessee, Regina M. Lambert, Knoxville, Tennessee, Shannon P. Minter, Christopher F. Stoll, Amy Whelan, Asaf Orr, National Center for Lesbian Rights, San Francisco, California, for Appellees. Deborah J. Dewart, Swansboro, North Carolina, Eric Rassbach, The Becket Fund for Religious Liberty, Washington, D.C., Byron J. Babione, Alliance Defending Freedom, Scottsdale, Arizona, Paul M. Smith, Jenner & Block LLP, Washington, D.C., Catherine E. Stetson, Hogan Lovells U.S. LLP, Washington, D.C., Benjamin G. Shatz, Manatt, Phelps & Phillips, LLP, Los Angeles, California, Elizabeth B. Wydra, Constitutional Accountability Center, Washington, D.C., Andrew J. Davis, Folger Levin LLP, San Francisco, California, Rocky C. Tsai, Ropes & Gray LLP, San Francisco, California, Jerome C. Roth, Nicole S. Phillis, Munger, Tolles & Olson LLP, San Francisco, California, Nicholas M. O'Donnell, Sullivan & Worcester LLP, Boston, Massachusetts, Sean R. Gallagher, Polsinelli PC, Denver, Colorado, Carmine D. Boccuzzi, Jr., Cleary Gottlieb Steen & Hamilton LLP, New York, New York, Mark C. Fleming, Felicia H. Ellsworth, Wilmer Cutler Pickering Hale and Dorr LLP, Boston, Massachusetts, Paul R.Q. Wolfson, Dina B. Mishra, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, D.C., Alan Schoenfeld, Wilmer Cutler Pickering Hale and Dorr LLP, New York, New York, Barbara J. Chisholm, P. Casey Pitts, Altshuler Berzon LLP, San Francisco, California, Christy L. Anderson, Bryan Cave LLP, Denver, Colorado, Jyotin Hamid, Joseph Rome, Debevoise & Plimpton LLP, New York, New York, Ria Tabacco Mar, NAACP Legal Defense & Educational Fund, Inc., New York, New York, Joshua A. Block, Chase B. Strangio, American Civil Liberties Union

Foundation, New York, New York, Christopher D. Man, Chadbourne & Parke LLP, Washington, D.C., Marcia D. Greenberger, Emily J. Martin, National Women's Law Center, Washington, D.C., Jeffrey S. Trachtman, Kramer Levin Naftalis & Frankel LLP, New York, New York, G. David Carter, Joseph P. Bowser, Hunter Carter, Arent Fox LLP, Washington, D.C., Sara Bartel, Morrison & Foerster LLP, San Francisco, California, Daniel McNeel Lane, Jr., Matthew E. Pepping, Akin Gump Strauss Hauer & Feld LLP, San Antonio, Texas, Jessica M. Weisel, Akin Gump Strauss Hauer & Feld LLP, Los Angeles, California, Marjory A. Gentry, Arnold & Porter LLP, San Francisco, California, Diane M. Soubly, Stevenson Keppelman Associates, Ann Arbor, Michigan, Michael L. Whitlock, Bingham McCutchen LLP, Washington, D.C., Suzanne B. Goldberg, Columbia Law School, New York, New York, for Amici Curiae. 14–5818: Leigh Gross Latherow, William H. Jones, Jr., Gregory L. Monge, VanAntwerp, Monge, Jones, Edwards & McCann, LLP, Ashland, Kentucky, for Appellant. Laura E. Landenwich, Daniel J. Canon, L. Joe Dunman, Clay Daniel Walton & Adams, PLC, Louisville, Kentucky, for Appellees. Diane M. Soubly, Stevenson Keppelman Associates, Ann Arbor, Michigan, for Amicus Curiae.

OPINION

Before DAUGHTREY, SUTTON and COOK, Circuit Judges.

SUTTON, J., delivered the opinion of the court, in which COOK, J., joined. DAUGHTREY, J. (pp. 43–64), delivered a separate dissenting opinion.

SUTTON, Circuit Judge.

***1** This is a case about change—and how best to handle it under the United States Constitution. From the vantage point of 2014, it would now seem, the question is not whether American law will allow gay couples to marry; it is when and how that will happen. That would not have seemed likely as recently as a dozen years ago. For better, for worse, or for more of the same, marriage has long been a social institution defined by relationships between men and women. So long defined, the tradition is measured in millennia, not centuries or decades. So widely shared, the tradition until recently had been adopted by all governments and major religions of the world.

But things change, sometimes quickly. Since 2003, nineteen States and the District of Columbia have expanded the definition of marriage to include gay couples, some through state legislation, some through initiatives of the people, some through state court decisions, and some through the actions of state governors and attorneys general who opted not to appeal adverse court decisions. Nor does this momentum show any signs of slowing. Twelve of the nineteen States that now recognize gay marriage did so in the last couple of years. On top of that, four federal courts of appeals have compelled several other States to permit same-sex marriages under the Fourteenth Amendment.

What remains is a debate about whether to allow the democratic processes begun in the States to continue in the four States of the Sixth Circuit or to end them now by requiring all States in the Circuit to extend the definition of marriage to encompass gay couples. Process and structure matter greatly in American government. Indeed, they may be the most reliable, liberty-assuring guarantees of our system of government, requiring us to take seriously the route the United States Constitution contemplates for making such a fundamental change to such a fundamental social institution.

Of all the ways to resolve this question, one option is not available: a poll of the three judges on this panel, or for that matter all federal judges, about whether gay marriage is a good idea. Our judicial commissions did not come with such a sweeping grant of authority, one that would allow just three of us—just two of us in truth—to make such a vital policy call for the thirty-two million citizens who live within the four States of the Sixth Circuit: Kentucky, Michigan, Ohio, and Tennessee. What we have authority to decide instead is a legal question: Does the Fourteenth Amendment to the United States Constitution prohibit a State from defining marriage as a relationship between one man and one woman?

Through a mixture of common law decisions, statutes, and constitutional provisions, each State in the Sixth Circuit has long adhered to the traditional definition of marriage. Sixteen gay and lesbian couples claim that this definition violates their rights under the Fourteenth Amendment. The circumstances that gave rise to the challenges vary. Some involve a birth, others a death. Some involve concerns about property, taxes, and insurance, others death certificates and rights to visit a partner or partner's child in the hospital. Some involve a couple's effort to obtain a marriage license within their State, others an effort to achieve recognition of a marriage solemnized in another State. All seek dignity and respect,

the same dignity and respect given to marriages between opposite-sex couples. And all come down to the same question: Who decides? Is this a matter that the National Constitution commits to resolution by the federal courts or leaves to the less expedient, but usually reliable, work of the state democratic processes?

I.

***2** *Michigan*. One case comes from Michigan, where state law has defined marriage as a relationship between a man and a woman since its territorial days. *See* An Act Regulating Marriages § 1 (1820), *in* 1 *Laws of the Territory of Michigan* 646, 646 (1871). The State reaffirmed this view in 1996 when it enacted a law that declared marriage "inherently a unique relationship between a man and a woman." Mich. Comp. Laws § 551.1. In 2004, after the Massachusetts Supreme Judicial Court invalidated the Commonwealth's prohibition on same-sex marriage, *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass.2003), nearly fifty-nine percent of Michigan voters opted to constitutionalize the State's definition of marriage. "To secure and preserve the benefits of marriage for our society and for future generations of children," the amendment says, "the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose." Mich. Const. art. I, § 25.

April **DeBoer** and Jayne Rowse, a lesbian couple living in Michigan, challenge the constitutionality of this definition. Marriage was not their first objective. **DeBoer** and Rowse each had adopted children as single parents, and both wanted to serve as adoptive parents for the other partner's children. Their initial complaint alleged that Michigan's adoption laws violated the Equal Protection Clause of the Fourteenth Amendment. The State moved to dismiss the lawsuit for lack of standing, and the district court tentatively agreed. Rather than dismissing the action, the court "invit[ed the] plaintiffs to seek leave to amend their complaint to ... challenge" Michigan's laws denying them a marriage license. ***DeBoer*** R. 151 at 3. **DeBoer** and Rowse accepted the invitation and filed a new complaint alleging that Michigan's marriage laws violated the due process and equal protection guarantees of the Fourteenth Amendment.

Both sets of parties moved for summary judgment. The district court concluded that the dispute raised "a triable issue of fact" over whether the "rationales" for the Michigan laws furthered "a legitimate state interest," and it held a nine-day trial on the issue. ***DeBoer*** R. 89 at 4, 8. The plaintiffs' experts testified that same-sex couples raise children as well as opposite-sex couples, and that denying marriage to same-sex couples creates instabilities for their children and families. The defendants' experts testified that the evidence regarding the comparative success of children raised in same-sex households is inconclusive. The district court sided with the plaintiffs. It rejected all of the State's bases for its marriage laws and concluded that the laws failed to satisfy rational basis review.

Kentucky. Two cases challenge two aspects of Kentucky's marriage laws. Early on, Kentucky defined marriage as "the union of a man and a woman." *Jones v. Hallahan*, 501 S.W.2d 588, 589 (Ky.1973); *see* An Act for Regulating the Solemnization of Marriages § 1, 1798 Ky. Acts 49, 49–50. In 1998, the Kentucky legislature codified the common law definition. The statute says that " 'marriage' refers only to the civil status, condition, or relation of one (1) man and one (1) woman united in law for life, for the discharge to each other and the community of the duties legally incumbent upon those whose association is founded on the distinction of sex." Ky.Rev.Stat. § 402.005. In 2004, the Kentucky legislature proposed a constitutional amendment providing that "[o]nly a marriage between one man and one woman shall be valid or recognized as a marriage in Kentucky." Ky. Const. § 233A. Seventy-four percent of the voters approved the amendment.

***3** Two groups of plaintiffs challenge these Kentucky laws. One group, the fortuitously named *Love* plaintiffs, challenges the Commonwealth's marriage-licensing law. Two couples filed that lawsuit: Timothy Love and Lawrence Ysunza, along with Maurice Blanchard and Dominique James. Both couples claim that the Fourteenth Amendment prohibits Kentucky from denying them marriage licenses.

The other group, the *Bourke* plaintiffs, challenges the ban on recognizing out-of-state same-sex marriages. Four same-sex couples filed the lawsuit: Gregory Bourke and Michael DeLeon; Jimmy Meade and Luther Barlowe; Randell Johnson and Paul Campion; and Kimberly Franklin and Tamera Boyd. All four couples were married outside Kentucky, and they contend that the State's recognition ban violates their due process and equal protection rights. Citing the hardships imposed on them by the recognition ban—loss of tax breaks, exclusion from intestacy laws, loss of dignity—they seek to enjoin its enforcement.

The district court ruled for the plaintiffs in both cases. In *Love*, the court held that the Commonwealth could not

justify its definition of marriage on rational basis grounds. It also thought that classifications based on sexual orientation should be subjected to intermediate scrutiny, which the Commonwealth also failed to satisfy. In *Bourke*, the court invalidated the recognition ban on rational basis grounds.

Ohio. Two cases challenge Ohio's refusal to recognize out-of-state same-sex marriages. Ohio also has long adhered to the traditional definition of marriage. *See* An Act Regulating Marriages § 1, 1803 Ohio Laws 31, 31; *Carmichael v. State*, 12 Ohio St. 553, 560 (1861). It reaffirmed this definition in 2004, when the legislature passed a Defense of Marriage Act, which says that marriage "may only be entered into by one man and one woman." Ohio Rev.Code § 3101.01(A). "Any marriage entered into by persons of the same sex in any other jurisdiction," it adds, "shall be considered and treated in all respects as having no legal force or effect." *Id.* § 3101.01(C)(2). Later that same year, sixty-two percent of Ohio voters approved an amendment to the Ohio Constitution along the same lines. As amended, the Ohio Constitution says that Ohio recognizes only "a union between one man and one woman" as a valid marriage. Ohio Const. art. XV, § 11.

Two groups of plaintiffs challenge these Ohio laws. The first group, the *Obergefell* plaintiffs, focuses on one application of the law. They argue that Ohio's refusal to recognize their out-of-state marriages on Ohio-issued death certificates violates due process and equal protection. Two same-sex couples in long-term, committed relationships filed the lawsuit: James Obergefell and John Arthur; and David Michener and William Herbert Ives. All four of them are from Ohio and were married in other States. When Arthur and Ives died, the State would not list Obergefell and Michener as spouses on their death certificates. Obergefell and Michener sought an injunction to require the State to list them as spouses on the certificates. Robert Grunn, a funeral director, joined the lawsuit, asking the court to protect his right to recognize same-sex marriages on other death certificates.

***4** The second group, the *Henry* plaintiffs, raises a broader challenge. They argue that Ohio's refusal to recognize out-of-state marriages between same-sex couples violates the Fourteenth Amendment no matter what marital benefit is affected. The *Henry* case involves four same-sex couples, all married in other States, who want Ohio to recognize their marriages on their children's birth certificates. Three of the couples (Brittani Henry and Brittni Rogers; Nicole and Pam Yorksmith; Kelly Noe and Kelly McCracken) gave birth to children in Ohio and wish to have both of their names listed on each child's birth certificate rather than just the child's biological mother. The fourth couple (Joseph Vitale and Robert Talmas) lives in New York and adopted a child born in Ohio. They seek to amend their son's Ohio birth certificate so that it lists both of them as parents.

The district court granted the plaintiffs relief in both cases. In *Obergefell*, the court concluded that the Fourteenth Amendment protects a fundamental right to keep existing marital relationships intact, and that the State failed to justify its law under heightened scrutiny. The court likewise concluded that classifications based on sexual orientation deserve heightened scrutiny under equal protection, and that Ohio failed to justify its refusal to recognize the couples' existing marriages. Even under rational basis review, the court added, the State came up short. In *Henry*, the district court reached many of the same conclusions and expanded its recognition remedy to encompass all married same-sex couples and all legal incidents of marriage under Ohio law.

Tennessee. The Tennessee case is of a piece with the two Ohio cases and one of the Kentucky cases, as it too challenges the State's same-sex-marriage recognition ban. Tennessee has always defined marriage in traditional terms. *See* An Act Concerning Marriages § 3 (1741), *in Public Acts of the General Assembly of North–Carolina and Tennessee* 46, 46 (1815). In 1996, the Tennessee legislature reaffirmed "that the historical institution and legal contract solemnizing the relationship of one (1) man and one (1) woman shall be the only legally recognized marital contract in this state in order to provide the unique and exclusive rights and privileges to marriage." Tenn.Code Ann. § 36–3–113(a). In 2006, the State amended its constitution to incorporate the existing definition of marriage. *See* Tenn. Const. art. XI, § 18. Eighty percent of the voters supported the amendment.

Three same-sex couples, all in committed relationships, challenge the recognition ban: Valeria Tanco and Sophy Jesty; Ijpe DeKoe and Thomas Kostura; and Johno Espejo and Matthew Mansell. All three couples were legally married in other States. The district court preliminarily enjoined the law. Relying on district court decisions within the circuit and elsewhere, the court concluded that the couples likely would show that Tennessee's ban failed to satisfy rational basis review. The remaining preliminary injunction factors, the court held, also weighed in the plaintiffs' favor.

***5** All four States appealed the decisions against them.

II.

Does the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment require States to expand the definition of marriage to include same-sex couples? The Michigan appeal (***DeBoer***) presents this threshold question, and so does one of the Kentucky appeals (*Love*). Case law offers many ways to think about the issue.

A.

Perspective of an intermediate court. Start with a recognition of our place in the hierarchy of the federal courts. As an "inferior" court (the Constitution's preferred term, not ours), a federal court of appeals begins by asking what the Supreme Court's precedents require on the topic at hand. Just such a precedent confronts us.

In the early 1970s, a Methodist minister married Richard Baker and James McConnell in Minnesota. Afterwards, they sought a marriage license from the State. When the clerk of the state court denied the request, the couple filed a lawsuit claiming that the denial of their request violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *Baker v. Nelson,* 191 N.W.2d 185, 186 (Minn.1971). The Minnesota Supreme Court rejected both claims. As for the due process claim, the state court reasoned: "The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis.... This historic institution manifestly is more deeply founded than the asserted contemporary concept of marriage and societal interests for which petitioners contend. The due process clause ... is not a charter for restructuring it by judicial legislation." *Id.* As for the equal protection claim, the court reasoned: "[T]he state's classification of persons authorized to marry" does not create an "irrational or invidious discrimination.... [T]hat the state does not impose upon heterosexual married couples a condition that they have a proved capacity or declared willingness to procreate ... [creates only a] theoretically imperfect [classification] ... [and] 'abstract symmetry' is not demanded by the Fourteenth Amendment." *Id.* at 187. The Supreme Court's decision four years earlier in *Loving v. Virginia,* 388 U.S. 1 (1967), which invalidated Virginia's ban on interracial marriages, did not change this conclusion. "[I]n commonsense and in a constitutional sense," the state court explained, "there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex." *Baker,* 191 N.W.2d at 187.

Baker and McConnell appealed to the United States Supreme Court. The Court rejected their challenge, issuing a one-line order stating that the appeal did not raise "a substantial federal question." *Baker v. Nelson,* 409 U.S. 810, 810 (1972). This type of summary decision, it is true, does not bind the Supreme Court in later cases. But it does confine lower federal courts in later cases. It matters not whether we think the decision was right in its time, remains right today, or will be followed by the Court in the future. Only the Supreme Court may overrule its own precedents, and we remain bound even by its summary decisions "until such time as the Court informs [us] that [we] are not." *Hicks v. Miranda,* 422 U.S. 332, 345 (1975) (internal quotation marks omitted). The Court has yet to inform us that we are not, and we have no license to engage in a guessing game about whether the Court will change its mind or, more aggressively, to assume authority to overrule *Baker* ourselves.

***6** But that was then; this is now. And now, claimants insist, must account for *United States v. Windsor,* 133 S.Ct. 2675 (2013), which invalidated the Defense of Marriage Act of 1996, a law that refused for purposes of federal statutory benefits to respect gay marriages authorized by state law. Yet *Windsor* does not answer today's question. The decision never mentions *Baker*, much less overrules it. And the outcomes of the cases do not clash. *Windsor* invalidated a federal law that refused to respect state laws permitting gay marriage, while *Baker* upheld the right of the people of a State to define marriage as they see it. To respect one decision does not slight the other. Nor does *Windsor's* reasoning clash with *Baker*. *Windsor* hinges on the Defense of Marriage Act's unprecedented intrusion into the States' authority over domestic relations. *Id.* at 2691–92. Before the Act's passage in 1996, the federal government had traditionally relied on state definitions of marriage instead of purporting to define marriage itself. *Id.* at 2691. That premise does not work—it runs the other way—in a case involving a challenge in federal court to state laws defining marriage. The point of *Windsor* was to prevent the Federal Government from "divest[ing]" gay couples of "a dignity and status of immense import" that New York's extension of the definition of marriage gave them, an extension that "without doubt" any State could provide. *Id.* at 2692, 2695. *Windsor* made explicit that it does not answer today's question, telling us that the "opinion and its holding are confined to ... lawful marriages" already protected by some of the States. *Id.* at 2696. Bringing the matter to a close, the Court held minutes after releasing *Windsor* that procedural obstacles in *Hollingsworth v.. Perry,* 133 S.Ct. 2652 (2013),

prevented it from considering the validity of state marriage laws. Saying that the Court declined in *Hollingsworth* to overrule *Baker* openly but decided in *Windsor* to overrule it by stealth makes an unflattering and unfair estimate of the Justices' candor.

Even if *Windsor* did not overrule *Baker* by name, the claimants point out, lower courts still may rely on "doctrinal developments" in the aftermath of a summary disposition as a ground for not following the decision. *Hicks*, 422 U.S. at 344. And *Windsor*, they say, together with *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Romer v. Evans*, 517 U.S. 620 (1996), permit us to cast *Baker* aside. But this reading of "doctrinal developments" would be a groundbreaking development of its own. From the perspective of a lower court, summary dispositions remain "controlling precedent, unless and until re-examined by [the Supreme] Court." *Tully v. Griffin, Inc.*, 429 U.S. 68, 74 (1976); *see Hicks*, 422 U.S. at 343–45. And the Court has told us to treat the two types of decisions, whether summary dispositions or full-merits decisions, the same, "prevent[ing] lower courts" in both settings "from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). Lest doubt remain, the Court has also told us not to ignore its decisions even when they are in tension with a new line of cases. "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989); *see Agostini v. Felton*, 521 U.S. 203, 237 (1997).

***7** Just two scenarios, then, permit us to ignore a Supreme Court decision, whatever its form: when the Court has overruled the decision by name (if, say, *Windsor* had directly overruled *Baker*) or when the Court has overruled the decision by outcome (if, say, *Hollingsworth* had invalidated the California law without mentioning *Baker*). Any other approach returns us to a world in which the lower courts may anticipatorily overrule all manner of Supreme Court decisions based on counting-to-five predictions, perceived trajectories in the caselaw, or, worst of all, new appointments to the Court. In the end, neither of the two preconditions for ignoring Supreme Court precedent applies here. *Windsor* as shown does not mention *Baker*, and it clarifies that its "opinion and holding" do not govern the States' authority to define marriage. *Hollingsworth* was dismissed. And neither *Lawrence* nor *Romer* mentions *Baker*, and neither is inconsistent with its outcome. The one invalidates a State's criminal antisodomy law and explains that the case "does not involve ... formal recognition" of same-sex relationships. *Lawrence*, 539 U.S. at 578. The other invalidates a "[s]weeping" and "unprecedented" state law that prohibited local communities from passing laws that protect citizens from discrimination based on sexual orientation. *Romer*, 517 U.S. at 627, 633, 635–36.

That brings us to another one-line order. On October 6, 2014, the Supreme Court "denied" the "petitions for writs of certiorari" in 1,575 cases, seven of which arose from challenges to decisions of the Fourth, Seventh, and Tenth Circuits that recognized a constitutional right to same-sex marriage. But this kind of action (or inaction) "imports no expression of opinion upon the merits of the case, as the bar has been told many times." *United States v. Carver*, 260 U.S. 482, 490 (1923). "The 'variety of considerations [that] underlie denials of the writ' counsels against according denials of certiorari any precedential value." *Teague v. Lane*, 489 U.S. 288, 296 (1989) (internal citation omitted). Just as the Court's three decisions to stay those same court of appeals decisions over the past year, all without a registered dissent, did not end the debate on this issue, so too the Court's decision to deny certiorari in all of these appeals, all without a registered dissent, does not end the debate either. A decision not to decide is a decision not to decide.

But don't *these* denials of certiorari signal that, from the Court's perspective, the right to same-sex marriage is inevitable? Maybe; maybe not. Even if we grant the premise and assume that same-sex marriage will be recognized one day in all fifty States, that does not tell us how—whether through the courts or through democracy. And, if through the courts, that does not tell us why—whether through one theory of constitutional invalidity or another. Four courts of appeals thus far have recognized a constitutional right to same-sex marriage. They agree on one thing: the result. But they reach that outcome in many ways, often more than one way in the same decision. *See Bostic v. Schaefer*, 760 F .3d 352 (4th Cir.2014) (fundamental rights); *Baskin v. Bogan*, 766 F.3d 648 (7th Cir.2014) (rational basis, animus); *Latta v. Otter*, No. 14–35420, 2014 WL 4977682 (9th Cir. Oct. 7, 2014) (animus, fundamental rights, suspect classification); *Bishop v. Smith*, 760 F.3d 1070 (10th Cir.2014) (fundamental rights); *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir.2014) (same). The Court's certiorari denials tell us nothing about the democracy-versus-litigation path to same-sex marriage, and they tell us nothing about the validity of any of these theories. If a federal court denies the people suffrage over an issue long thought to be within their power, they deserve an explanation. We, for our part, cannot find one,

as several other judges have concluded as well. *See Bostic*, 760 F.3d at 385–98 (Niemeyer, J., dissenting); *Kitchen*, 755 F.3d at 1230–40 (Kelly, J., concurring in part and dissenting in part); *Conde–Vidal v. Garcia–Padilla*, No. 14–1253–PG, 2014 WL 5361987 (D.P.R. Oct. 21, 2014); *Robicheaux v. Caldwell*, 2 F.Supp.3d 910 (E.D.La.2014).

***8** There are many ways, as these lower court decisions confirm, to look at this question: originalism; rational basis review; animus; fundamental rights; suspect classifications; evolving meaning. The parties in one way or another have invoked them all. Not one of the plaintiffs' theories, however, makes the case for constitutionalizing the definition of marriage and for removing the issue from the place it has been since the founding: in the hands of state voters.

B.

Original meaning. All Justices, past and present, start their assessment of a case about the meaning of a constitutional provision by looking at how the provision was understood by the people who ratified it. If we think of the Constitution as a covenant between the governed and the governors, between the people and their political leaders, it is easy to appreciate the force of this basic norm of constitutional interpretation—that the originally understood meaning of the charter generally will be the lasting meaning of the charter. When two individuals sign a contract to sell a house, no one thinks that, years down the road, one party to the contract may change the terms of the deal. That is why the parties put the agreement in writing and signed it publicly—to prevent changed perceptions and needs from changing the guarantees in the agreement. So it normally goes with the Constitution: The written charter cements the limitations on government into an unbending bulwark, not a vane alterable whenever alterations occur—unless and until the people, like contracting parties, choose to change the contract through the agreed-upon mechanisms for doing so. *See* U.S. Const. art. V. If American lawyers in all manner of settings still invoke the original meaning of Magna Carta, a Charter for England in 1215, surely it is not too much to ask that they (and we) take seriously the original meaning of the United States Constitution, a Charter for this country in 1789. Any other approach, too lightly followed, converts federal judges from interpreters of the document into newly commissioned authors of it.

Many precedents gauging individual rights and national power, leading to all manner of outcomes, confirm the import of original meaning in legal debates. *See, e.g., Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173–80 (1803); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401–25 (1819); *Legal Tender Cases*, 79 U.S. 457, 536–38 (1870); *Myers v. United States*, 272 U.S. 52, 110–39 (1926); *INS v. Chadha*, 462 U.S. 919, 944–59 (1983); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218–25 (1995); *Washington v. Glucksburg*, 521 U.S. 702, 710–19 (1997); *Crawford v. Washington*, 541 U.S. 36, 42–50 (2004); *Boumediene v. Bush*, 553 U.S. 723, 739–46 (2008); *Giles v. California*, 554 U.S. 353, 358–61 (2008); *District of Columbia v. Heller*, 554 U.S. 570, 576–600 (2008).

In trying to figure out the original meaning of a provision, it is fair to say, the line between interpretation and evolution blurs from time to time. That is an occupational hazard for judges when it comes to old or generally worded provisions. Yet that knotty problem does not confront us. Yes, the Fourteenth Amendment is old; the people ratified it in 1868. And yes, it is generally worded; it says: "[N]or 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." Nobody in this case, however, argues that the people who adopted the Fourteenth Amendment understood it to require the States to change the definition of marriage.

***9** Tradition reinforces the point. Only months ago, the Supreme Court confirmed the significance of long-accepted usage in constitutional interpretation. In one case, the Court held that the customary practice of opening legislative meetings with prayer alone proves the constitutional permissibility of legislative prayer, quite apart from how that practice might fare under the most up-to-date Establishment Clause test. *Town of Greece v. Galloway*, 134 S.Ct. 1811, 1818–20 (2014). In another case, the Court interpreted the Recess Appointments Clause based in part on long-accepted usage. *NLRB v. Noel Canning*, 134 S.Ct. 2550, 2559–60 (2014). Applied here, this approach permits today's marriage laws to stand until the democratic processes say they should stand no more. From the founding of the Republic to 2003, every State defined marriage as a relationship between a man and a woman, meaning that the Fourteenth Amendment permits, though it does not require, States to define marriage in that way.

C.

Rational basis review. Doctrine leads to the same place as

history. A first requirement of any law, whether under the Due Process or Equal Protection Clause, is that it rationally advance a legitimate government policy. *Vance v. Bradley*, 440 U.S. 93, 97 (1979). Two words ("judicial restraint," *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314 (1993)) and one principle (trust in the people that "even improvident decisions will eventually be rectified by the democratic process," *Vance*, 440 U.S. at 97) tell us all we need to know about the light touch judges should use in reviewing laws under this standard. So long as judges can conceive of some "plausible" reason for the law—*any* plausible reason, even one that did not motivate the legislators who enacted it—the law must stand, no matter how unfair, unjust, or unwise the judges may consider it as citizens. *Heller v. Doe*, 509 U.S. 312, 330 (1993); *Nordlinger v. Hahn*, 505 U.S. 1, 11, 17–18 (1992).

A dose of humility makes us hesitant to condemn as unconstitutionally irrational a view of marriage shared not long ago by every society in the world, shared by most, if not all, of our ancestors, and shared still today by a significant number of the States. Hesitant, yes; but still a rational basis, some rational basis, must exist for the definition. What is it? Two at a minimum suffice to meet this low bar. One starts from the premise that governments got into the business of defining marriage, and remain in the business of defining marriage, not to regulate love but to regulate sex, most especially the intended and unintended effects of male-female intercourse. Imagine a society without marriage. It does not take long to envision problems that might result from an absence of rules about how to handle the natural effects of male-female intercourse: children. May men and women follow their procreative urges wherever they take them? Who is responsible for the children that result? How many mates may an individual have? How does one decide which set of mates is responsible for which set of children? That we rarely think about these questions nowadays shows only how far we have come and how relatively stable our society is, not that States have no explanation for creating such rules in the first place.

***10** Once one accepts a need to establish such ground rules, and most especially a need to create stable family units for the planned and unplanned creation of children, one can well appreciate why the citizenry would think that a reasonable first concern of any society is the need to regulate male-female relationships and the unique procreative possibilities of them. One way to pursue this objective is to encourage couples to enter lasting relationships through subsidies and other benefits and to discourage them from ending such relationships through these and other means. People may not need the government's encouragement to have sex. And they may not need the government's encouragement to propagate the species. But they may well need the government's encouragement to create and maintain stable relationships within which children may flourish. It is not society's laws or for that matter any one religion's laws, but nature's laws (that men and women complement each other biologically), that created the policy imperative. And governments typically are not second-guessed under the Constitution for prioritizing how they tackle such issues. *Dandridge v. Williams*, 397 U.S. 471, 486–87 (1970).

No doubt, that is not the only way people view marriage today. Over time, marriage has come to serve another value—to solemnize relationships characterized by love, affection, and commitment. Gay couples, no less than straight couples, are capable of sharing such relationships. And gay couples, no less than straight couples, are capable of raising children and providing stable families for them. The quality of such relationships, and the capacity to raise children within them, turns not on sexual orientation but on individual choices and individual commitment. All of this supports the policy argument made by many that marriage laws should be extended to gay couples, just as nineteen States have done through their own sovereign powers. Yet it does not show that the States, circa 2014, suddenly must look at this policy issue in just one way on pain of violating the Constitution.

The signature feature of rational basis review is that governments will not be placed in the dock for doing too much or for doing too little in addressing a policy question. *Id.* In a modern sense, crystallized at some point in the last ten years, many people now critique state marriage laws for doing too little—for being underinclusive by failing to extend the definition of marriage to gay couples. Fair enough. But rational basis review does not permit courts to invalidate laws every time a new and allegedly better way of addressing a policy emerges, even a better way supported by evidence and, in the Michigan case, by judicial factfinding. If legislative choices may rest on "rational speculation unsupported by evidence or empirical data," *Beach Commc'ns*, 508 U.S. at 315, it is hard to see the point of premising a ruling of unconstitutionality on factual findings made by one unelected federal judge that favor a different policy. Rational basis review does not empower federal courts to "subject" legislative line-drawing to "courtroom" factfinding designed to show that legislatures have done too much or too little. *Id.*

***11** What we are left with is this: By 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. That does not convict the States of irrationality, only of awareness of the biological reality that couples of the same sex do not have children in the same way as couples of opposite sexes and that couples of the same sex do not run the risk of unintended offspring. That explanation, still relevant today, suffices to allow the States to retain authority over an issue they have regulated from the beginning.

To take another rational explanation for the decision of many States not to expand the definition of marriage, a State might wish to wait and see before changing a norm that our society (like all others) has accepted for centuries. That is not preserving tradition for its own sake. No one here claims that the States' original definition of marriage was unconstitutional when enacted. The plaintiffs' claim is that the States have acted irrationally in standing by the traditional definition in the face of changing social mores. Yet one of the key insights of federalism is that it permits laboratories of experimentation—accent on the plural—allowing one State to innovate one way, another State another, and a third State to assess the trial and error over time. As a matter of state law, the possibility of gay marriage became real in 2003 with the Massachusetts Supreme Judicial Court's decision in *Goodridge*. Eleven years later, the clock has not run on assessing the benefits and burdens of expanding the definition of marriage. Eleven years indeed is not even the right timeline. The fair question is whether in 2004, *one* year after *Goodridge*, Michigan voters could stand by the traditional definition of marriage. How can we say that the voters acted irrationally for sticking with the seen benefits of thousands of years of adherence to the traditional definition of marriage in the face of one year of experience with a new definition of marriage? A State still assessing how this has worked, whether in 2004 or 2014, is not showing irrationality, just a sense of stability and an interest in seeing how the new definition has worked elsewhere. Even today, the only thing anyone knows *for sure* about the long-term impact of redefining marriage is that they do not know. A Burkean sense of caution does not violate the Fourteenth Amendment, least of all when measured by a timeline less than a dozen years long and when assessed by a system of government designed to foster step-by-step, not sudden winner-take-all, innovations to policy problems.

In accepting these justifications for the four States' marriage laws, we do not deny the foolish, sometimes offensive, inconsistencies that have haunted marital legislation from time to time. States will hand some people a marriage license no matter how often they have divorced or remarried, apparently on the theory that practice makes perfect. States will not even prevent an individual from remarrying the same person three or four times, where practice no longer seems to be the issue. With love and commitment nowhere to be seen, States will grant a marriage license to two friends who wish to share in the tax and other material benefits of marriage, at least until the State's no-fault divorce laws allow them to exit the partnership freely. And States allow couples to continue procreating no matter how little stability, safety, and love they provide the children they already have. Nor has unjustified sanctimony stayed off the stage when it comes to marital legislation—with monogamists who "do not monog" criticizing alleged polygamists who "do not polyg." *See* Paul B. Beers, *Pennsylvania Politics Today and Yesterday* 51 (1980).

***12** How, the claimants ask, could *anyone* possibly be unworthy of this civil institution? Aren't gay and straight couples both capable of honoring this civil institution in some cases and of messing it up in others? All of this, however, proves much too much. History is replete with examples of love, sex, and marriage tainted by hypocrisy. Without it, half of the world's literature, and three-quarters of its woe, would disappear. Throughout, we have never leveraged these inconsistencies about deeply personal, sometimes existential, views of marriage into a ground for constitutionalizing the field. Instead, we have allowed state democratic forces to fix the problems as they emerge and as evolving community mores show they should be fixed. Even if we think about today's issue and today's alleged inconsistencies solely from the perspective of the claimants in this case, it is difficult to call that formula, already coming to terms with a new view of marriage, a failure.

Any other approach would create line-drawing problems of its own. Consider how plaintiffs' love-and-commitment definition of marriage would fare under their own rational basis test. Their definition does too much because it fails to account for the reality that no State in the country requires couples, whether gay or straight, to be in love. Their definition does too little because it fails to account for plural marriages, where there is no reason to think that three or four adults, whether gay, bisexual, or straight, lack the capacity to share love, affection, and commitment, or for that matter lack the capacity to be capable (and more plentiful) parents to boot. If it is constitutionally irrational to stand by the man-woman definition of marriage, it must be constitutionally irrational to stand by the monogamous definition of marriage. Plaintiffs have no answer to the point. What they might say they cannot: They might say that tradition or community mores provide a rational basis

for States to stand by the monogamy definition of marriage, but they cannot say that because that is exactly what they claim is illegitimate about the States' male-female definition of marriage. The predicament does not end there. No State is free of marriage policies that go too far in some directions and not far enough in others, making all of them vulnerable—if the claimants' theory of rational basis review prevails.

Several cases illustrate just how seriously the federal courts must take the line-drawing deference owed the democratic process under rational basis review. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976), holds that a State may require law enforcement officers to retire without exception at age fifty, in order to assure the physical fitness of its police force. If a rough correlation between age and strength suffices to uphold exception-free retirement ages (even though some fifty-year-olds swim/bike/run triathlons), why doesn't a correlation between male-female intercourse and procreation suffice to uphold traditional marriage laws (even though some straight couples don't have kids and many gay couples do)? *Armour v. City of Indianapolis*, 132 S.Ct. 2073 (2012), says that if a city cancels a tax, the bureaucratic hassle of issuing refunds entitles it to keep money already collected from citizens who paid early. If administrative convenience amounts to an adequate public purpose, why not a rough sense of social stability? More deferential still, *Kotch v. Board of River Port Pilot Commissioners*, 330 U.S. 552 (1947), concludes that a State's interest in maintaining close ties among those who steer ships in its ports justifies denying pilotage licenses to anyone who isn't a friend or relative of an incumbent pilot. Can we honestly say that traditional marriage laws involve more irrationality than *nepotism* ?

***13** The debate over marriage of course has another side, and we cannot deny the costs to the plaintiffs of allowing the States to work through this profound policy debate. The traditional definition of marriage denies gay couples the opportunity to publicly solemnize, to say nothing of subsidize, their relationships under state law. In addition to depriving them of this status, it deprives them of benefits that range from the profound (the right to visit someone in a hospital as a spouse or parent) to the mundane (the right to file joint tax returns). These harms affect not only gay couples but also their children. Do the benefits of standing by the traditional definition of marriage make up for these costs? The question demands an answer—but from elected legislators, not life-tenured judges. Our task under the Supreme Court's precedents is to decide whether the law has some conceivable basis, not to gauge how that rationale stacks up against the arguments on the other side. Respect for democratic control over this traditional area of state expertise ensures that "a statewide deliberative process that enable[s] its citizens to discuss and weigh arguments for and against same-sex marriage" can have free and reasonable rein. *Windsor*, 133 S.Ct. at 2689.

D.

Animus. Given the broad deference owed the States under the democracy-reinforcing norms of rational basis review, the cases in which the Supreme Court has struck down a state law on that basis are few. When the Court has taken this step, it usually has been due to the novelty of the law and the targeting of a single group for disfavored treatment under it. In one case, a city enacted a new zoning code with the none-too-subtle purpose of closing down a home for the intellectually disabled in a neighborhood that apparently wanted nothing to do with them. The reality that the code applied only to homes for the intellectually disabled—and not to other dwellings such as fraternity houses—led the Court to invalidate the regulation on the ground that the city had based it upon "an irrational prejudice against the mentally retarded." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985). In another case, a statewide initiative denied gays, and gays alone, access to the protection of the State's existing antidiscrimination laws. The novelty of the law, coupled with the distance between the reach of the law and any legitimate interest it might serve, showed that the law was "born of animosity toward" gays and suggested a design to make gays "unequal to everyone else." *Romer*, 517 U.S. at 634–35.

None of the statewide initiatives at issue here fits this pattern. The four initiatives, enacted between 2004 and 2006, codified a long-existing, widely held social norm already reflected in state law. "[M]arriage between a man and a woman," as the Court reminded us just last year, "had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization." *Windsor*, 133 S.Ct. at 2689.

***14** Neither was the decision to place the definition of marriage in a State's constitution unusual, nor did it otherwise convey the kind of malice or unthinking prejudice the Constitution prohibits. Nineteen States did the same thing during that period. Human Rights Campaign Found., *Equality from State to State 2006*, at 13–14 (2006), *available at* htt p://s3.amazonaws.com/hrc-asse

ts//files/assets/resources/StateToState2007. pdf. And if there was one concern animating the initiatives, it was the fear that the courts would seize control over an issue that people of good faith care deeply about. If that is animus, the term has no useful meaning.

Who in retrospect can blame the voters for having this fear? By then, several state courts had altered their States' traditional definitions of marriage under the States' constitutions. Since then, more have done the same. Just as state judges have the authority to construe a state constitution as they see fit, so do the people have the right to overrule such decisions or preempt them as they see fit. Nor is there anything static about this process. In some States, the people have since re-amended their constitutions to broaden the category of those eligible to marry. In other States, the people seemed primed to do the same but for now have opted to take a wait-and-see approach of their own as federal litigation proceeds. *See, e.g.*, Wesley Lowery, *Same–Sex Marriage Is Gaining Momentum, but Some Advocates Don't Want It on the Ballot in Ohio*, Wash. Post (June 14, 2014), http://www.washingtonpost.com/politics/same-sex-marriage-iis-gaining -momentum-but-ohio-advocates–dont–want–it–on–the–ballot/2014/06/14/a090452ae77e–11e3–afc6–a1dd9407abcf_story.html (explaining that Ohio same-sex marriage advocates opted not to place the question on the 2014 state ballot despite collecting nearly twice the number of required signatures). What the Court recently said about another statewide initiative that people care passionately about applies with equal vigor here: "Deliberative debate on sensitive issues such as racial preferences all too often may shade into rancor. But that does not justify removing certain court-determined issues from the voters' reach. Democracy does not presume that some subjects are either too divisive or too profound for public debate." *Schuette v. Coal. to Defend Affirmative Action*, 134 S.Ct. 1623, 1638 (2014). "It is demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds." *Id.* at 1637.

What of the possibility that other motivations affected the amendment process in the four States? If assessing the motives of multimember legislatures is difficult, assessing the motives of *all* voters in a statewide initiative strains judicial competence. The number of people who supported each initiative—Michigan (2.7 million), Kentucky (1.2 million), Ohio (3.3 million), and Tennessee (1.4 million)—was large and surely diverse. In addition to the proper role of the courts in a democracy, many other factors presumably influenced the voters who supported *and* opposed these amendments: that some politicians favored the amendment and others opposed it; that some faith groups favored the amendment and others opposed it; that some thought the amendment would strengthen families and others thought it would weaken them or were not sure; that some thought the amendment would be good for children and others thought it would not be or were not sure; and that some thought the amendment would preserve a long-established definition of marriage and others thought it was time to accommodate gay couples. Even a rough sense of morality likely affected voters, with some thinking it immoral to exclude gay couples and others thinking the opposite. For most people, whether for or against the amendment, the truth of why they did what they did is assuredly complicated, making it impossible to pin down any one consideration, as opposed to a rough aggregation of factors, as motivating them. How in this setting can we indict the 2.7 million Michigan voters who supported the amendment in 2004, less than *one year* after the *first* state supreme court recognized a constitutional right to gay marriage, for favoring the amendment for prejudicial reasons and for prejudicial reasons alone? Any such conclusion cannot be squared with the benefit of the doubt customarily given voters and legislatures under rational basis review. Even the gay-rights community, remember, was not of one mind about taking on the benefits and burdens of marriage until the early 1990s. *See* George Chauncey, *Why Marriage? The History Shaping Today's Debate over Gay Equality* 58, 88 (2004); Michael J. Klarman, *From the Closet to the Altar: Courts, Backlash, and the Struggle for Same–Sex Marriage* 48–52 (2013). A decade later, a State's voters should not be taken to task for failing to be of one mind about the issue themselves.

***15** Some equanimity is in order in assessing the motives of voters who invoked a constitutionally respected vehicle for change and for resistance to change: direct democracy. *See Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 151 (1912). Just as gay individuals are no longer abstractions, neither should we treat States as abstractions. Behind these initiatives were real people who teach our children, create our jobs, and defend our shores. Some of these people supported the initiative in 2004; some did not. It is no less unfair to paint the proponents of the measures as a monolithic group of hate-mongers than it is to paint the opponents as a monolithic group trying to undo American families. "Tolerance," like respect and dignity, is best traveled on a "two-way street." *Ward v. Polite*, 667 F.3d 727, 735 (6th Cir.2012). If there is a dominant theme to the Court's cases in this area, it is to end otherness, not to create new others.

All of this explains why the Court's decisions in *City of Cleburne* and *Romer* do not turn on reading the minds of

city voters in one case or of statewide initiative supporters in the other. They turn on asking whether anything but prejudice to the affected class could explain the law. *See City of Cleburne*, 473 U.S. at 450; *Romer*, 517 U.S. at 635. No such explanations existed in those cases. Plenty exist here, as shown above and as recognized by many others. *See Lawrence*, 539 U.S. at 585 (O'Connor, J., concurring in the judgment) ("Unlike the moral disapproval of same-sex relations[,] ... other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group."); *Bishop*, 760 F.3d at 1104–09 (Holmes, J., concurring) (same); *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 868 (8th Cir.2006) (enactment not " 'inexplicable by anything but animus' towards same-sex couples"); *Conaway v. Deane*, 932 A.2d 571, 635 (Md.2007) (no reason to "infer antipathy"); *Hernandez v. Robles*, 855 N.E.2d 1, 8 (N.Y.2006) (those who favor the traditional definition are not "irrational, ignorant or bigoted"); *Andersen v. King Cnty.*, 138 P.3d 963, 981 (Wash.2006) (en banc) ("the only reason" for the law was not "anti-gay sentiment").

One other point. Even if we agreed with the claimants that the nature of these state constitutional amendments, and the debates surrounding them, required their invalidation on animus grounds, that would not give them what they request in their complaints: the right to same-sex marriage. All that the invalidation of the amendments would do is return state law to where it had always been, a status quo that in all four States included state statutory and common law definitions of marriage applicable to one man and one woman—definitions that no one claims were motivated by ill will. The elimination of the state constitutional provisions, it is true, would allow individuals to challenge the four States' other marital laws on state constitutional grounds. No one filed such a challenge here, however.

E.

***16** *Fundamental right to marry.* Under the Due Process Clause, courts apply more muscular review—"strict," "rigorous," usually unforgiving, scrutiny—to laws that impair "fundamental" rights. In considering the claimants' arguments that they have a fundamental right to marry each other, we must keep in mind that something can be fundamentally important without being a fundamental right under the Constitution. Otherwise, state regulations of many deeply important subjects—from education to healthcare to living conditions to decisions about when to die—would be subject to unforgiving review. They are not. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) (public education); *Maher v.. Roe*, 432 U.S. 464, 469 (1977) (healthcare); *Lindsey v. Normet*, 405 U.S. 56, 73–74 (1972) (housing); *Glucksberg*, 521 U .S. at 728 (right to die). Instead, the question is whether our nation has treated the right as fundamental and therefore worthy of protection under substantive due process. More precisely, the test is whether the right is "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed." *Glucksberg*, 521 U.S. at 721 (internal citations omitted). That requirement often is met by placing the right in the Constitution, most obviously in (most of) the guarantees in the Bill of Rights. *See id.* at 720. But the right to marry in general, and the right to gay marriage in particular, nowhere appear in the Constitution. That route for recognizing a fundamental right to same-sex marriage does not exist.

That leaves the other option—that, even though a proposed right to same-sex marriage does not appear in the Constitution, it turns on bedrock assumptions about liberty. This too does not work. The first state high court to redefine marriage to include gay couples did not do so until 2003 in *Goodridge*.

Matters do not change because *Loving v. Virginia*, 388 U.S. 1 (1967), held that "marriage" amounts to a fundamental right. When the Court decided *Loving*, "marriage between a man and a woman no doubt [was] thought of ... as essential to the very definition of that term." *Windsor*, 133 S.Ct. at 2689. In referring to "marriage" rather than "opposite-sex marriage," *Loving* confirmed only that "opposite-sex marriage" would have been considered redundant, not that marriage included same-sex couples. *Loving* did not change the definition. That is why the Court said marriage is "fundamental to our very existence and survival," 388 U.S. at 12, a reference to the procreative definition of marriage. Had a gay African–American male and a gay Caucasian male been denied a marriage license in Virginia in 1968, would the Supreme Court have held that Virginia had violated the Fourteenth Amendment? No one to our knowledge thinks so, and no Justice to our knowledge has ever said so. The denial of the license would have turned not on the races of the applicants but on a request to change the definition of marriage. Had *Loving* meant something more when it pronounced marriage a fundamental right, how could the Court hold in *Baker* five years later that gay marriage does not even raise a substantial federal question? *Loving* addressed, and rightly corrected, an unconstitutional eligibility requirement for marriage; it did not create a new definition of marriage.

***17** A similar problem confronts the claimants' reliance on other decisions treating marriage as a fundamental right, whether in the context of a statute denying marriage licenses to fathers who could not pay child support, *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978), or a regulation restricting prisoners' ability to obtain marriage licenses, *Turner v. Safley*, 482 U.S. 78, 94–95 (1987). It strains credulity to believe that a year after each decision a gay indigent father could have required the State to grant him a marriage license for his partnership or that a gay prisoner could have required the State to permit him to marry a gay partner. When *Loving* and its progeny used the word marriage, they did not redefine the term but accepted its traditional meaning.

No doubt, many people, many States, even some dictionaries, now define marriage in a way that is untethered to biology. But that does not transform the fundamental-rights decision of *Loving* under the old definition into a constitutional right under the new definition. The question is whether the old reasoning applies to the new setting, not whether we can shoehorn new meanings into old words. Else, evolving-norm lexicographers would have a greater say over the meaning of the Constitution than judges.

The upshot of fundamental-rights status, keep in mind, is strict-scrutiny status, subjecting all state eligibility rules for marriage to rigorous, usually unforgiving, review. That makes little sense with respect to the trials and errors societies historically have undertaken (and presumably will continue to undertake) in determining who may enter and leave a marriage. Start with the *duration* of a marriage. For some, marriage is a commitment for life and beyond. For others, it is a commitment for life. For still others, it is neither. In 1969, California enacted the first pure no-fault divorce statute. *See* Family Law Act of 1969, 1969 Cal. Stat. 3312. A dramatic expansion of similar laws followed. *See* Lynn D. Wardle, *No–Fault Divorce and the Divorce Conundrum*, 1991 BYU L.Rev. 79, 90. The Court has never subjected these policy fits and starts about who may *leave* a marriage to strict scrutiny.

Consider also the *number* of people eligible to marry. As late as the eighteenth century, "[t]he predominance of monogamy was by no means a foregone conclusion," and "[m]ost of the peoples and cultures around the globe" had adopted a different system. Nancy F. Cott, *Public Vows: A History of Marriage and the Nation* 9 (2000). Over time, American officials wove monogamy into marriage's fabric. Beginning in the nineteenth century, the federal government "encouraged or forced" Native Americans to adopt the policy, and in 1878 the Supreme Court upheld a federal antibigamy law. *Id.* at 26; *see Reynolds v. United States*, 98 U.S. 145 (1878). The Court has never taken this topic under its wing. And if it did, how would the constitutional, as opposed to policy, arguments in favor of same-sex marriage not apply to plural marriages?

***18** Consider finally the *nature* of the individuals eligible to marry. The age of consent has not remained constant, for example. Under Roman law, men could marry at fourteen, women at twelve. The American colonies imported that rule from England and kept it until the mid–1800s, when the people began advocating for a higher minimum age. Today, all but two States set the number at eighteen. *See* Vivian E. Hamilton, *The Age of Marital Capacity: Reconsidering Civil Recognition of Adolescent Marriage*, 92 B.U. L.Rev. 1817, 1824–32 (2012). The same goes for the social acceptability of marriage between cousins, a union deemed "desirable in many parts of the world"; indeed, around "10 percent of marriages worldwide are between people who are second cousins or closer." Sarah Kershaw, *Living Together: Shaking Off the Shame*, N.Y. Times (Nov. 25, 2009), http://www.nytimes.com/2009/11/26/garden/26cousins.html. Even in the United States, cousin marriage was not prohibited until the mid-nineteenth century, when Kansas—followed by seven other States—enacted the first ban. *See* Diane B. Paul & Hamish G. Spencer, *"It's Ok, We're Not Cousins by Blood": The Cousin Marriage Controversy in Historical Perspective*, 6 PLoS Biology 2627, 2627 (2008). The States, however, remain split: half of them still permit the practice. *Ghassemi v. Ghassemi*, 998 So.2d 731, 749 (La.Ct.App.2008). Strict scrutiny? Neither *Loving* nor any other Supreme Court decision says so.

F.

Discrete and insular class without political power. A separate line of cases, this one under the Equal Protection Clause, calls for heightened review of laws that target groups whom legislators have singled out for unequal treatment in the past. This argument faces an initial impediment. Our precedents say that rational basis review applies to sexual-orientation classifications. *See Davis v. Prison Health Servs.*, 679 F.3d 433, 438 (6th Cir.2012); *Scarbrough v. Morgan Cnty. Bd. of Educ.*, 470 F.3d 250, 260–61 (6th Cir.2006); *Stemler v. City of Florence*, 126 F.3d 856, 873–74 (6th Cir.1997).

There is another impediment. The Supreme Court has never held that legislative classifications based on sexual orientation receive heightened review and indeed has not

recognized a new suspect class in more than four decades. There are ample reasons for staying the course. Courts consider four rough factors in deciding whether to treat a legislative classification as suspect and presumptively unconstitutional: whether the group has been historically victimized by governmental discrimination; whether it has a defining characteristic that legitimately bears on the classification; whether it exhibits unchanging characteristics that define it as a discrete group; and whether it is politically powerless. *See Rodriguez,* 411 U.S. at 28.

We cannot deny the lamentable reality that gay individuals have experienced prejudice in this country, sometimes at the hands of public officials, sometimes at the hands of fellow citizens. Stonewall, Anita Bryant's uninvited answer to the question "Who are we to judge?", unequal enforcement of antisodomy laws between gay and straight partners, Matthew Shepard, and the language of insult directed at gays and others make it hard for anyone to deny the point. But we also cannot deny that the institution of marriage arose independently of this record of discrimination. The traditional definition of marriage goes back thousands of years and spans almost every society in history. By contrast, "American laws targeting same-sex couples did not develop until the last third of the 20th century." *Lawrence,* 539 U.S. at 570. This order of events prevents us from inferring from history that prejudice against gays led to the traditional definition of marriage in the same way that we can infer from history that prejudice against African Americans led to laws against miscegenation. The usual leap from history of discrimination to intensification of judicial review does not work.

***19** *Windsor* says nothing to the contrary. In arguing otherwise, plaintiffs mistake *Windsor's* avoidance of one federalism question for avoidance of federalism altogether. Here is the key passage:

> Despite these considerations, it is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance. The State's power in defining the marital relation is of central relevance in this case quite apart from principles of federalism. Here the State's decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import. When the State used its historic and essential authority to define the marital relation in this way, its role and its power in making the decision enhanced the recognition, dignity, and protection of the class in their own community. DOMA, because of its reach and extent, departs from this history and tradition of reliance on state law to define marriage. " '[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,* 517 U.S. at 633). Plaintiffs read these words (and others that follow) as an endorsement of heightened review in today's case, pointing to the first two sentences as proof that individual dignity, not federalism, animates *Windsor's* holding.

Yet federalism permeates both parts of this passage and both parts of the opinion. *Windsor* begins by expressing doubts about whether Congress has the delegated power to enact a statute like DOMA at all. But instead of resolving the case on the far-reaching enumerated-power ground, it resolves the case on the narrower *Romer* ground—that anomalous exercises of power targeting a single group raise suspicion that bigotry rather than legitimate policy is afoot. Why was DOMA anomalous? Only federalism can supply the answer. The national statute trespassed upon New York's time-respected authority to define the marital relation, including by "enhanc[ing] the recognition, dignity, and protection" of gay and lesbian couples. *Id.* Today's case involves no such "divest[ing]"/"depriv[ing]"/"undermin[ing]" of a marriage status granted through a State's authority over domestic relations within its borders and thus provides no basis for inferring that the purpose of the state law was to "impose a disadvantage"/"a separate status"/"a stigma" on gay couples. *Id.* at 2692–95. When the Framers "split the atom of sovereignty," *U.S. Term Limits, Inc. v. Thornton,* 514 U.S. 779, 838 (Kennedy, J., concurring), they did so to *enhance* liberty, not to allow the National Government to *divest* liberty protections granted by the States in the exercise of their historic and in this instance nearly exclusive power. What we have here is something entirely different. It is the States doing exactly what every State has been doing for hundreds of years: defining marriage as they see it. The only thing that has changed is the *willingness* of many States over the last eleven years to expand the definition of marriage to encompass gay couples.

***20** Any other reading of *Windsor* would require us to subtract key passages from the opinion and add an inverted holding. The Court noted that New York "without doubt" had the power under its traditional authority over marriage to extend the definition of marriage to include gay couples and that Congress had no power to enact "unusual" legislation that interfered with the States' long-held authority to define marriage. *Windsor,* 133 S.Ct. at 2692–93. A decision premised on heightened scrutiny under the Fourteenth Amendment that redefined marriage nationally to include same-sex couples not only would divest the States of their traditional

authority over this issue, but it also would authorize Congress to do something no one would have thought possible a few years ago—to use its Section 5 enforcement powers to add new definitions and extensions of marriage rights in the years ahead. That would leave the States with little authority to resolve ever-changing debates about how to define marriage (and the benefits and burdens that come with it) outside the beck and call of Congress and the Court. How odd that one branch of the National Government (Congress) would be reprimanded for entering the fray in 2013 and two branches of the same Government (the Court and Congress) would take control of the issue a short time later.

Nor, as the most modest powers of observation attest, is this a setting in which "political powerlessness" requires "extraordinary protection from the majoritarian political process." *Rodriguez,* 411 U.S. at 28. This is not a setting in which dysfunction mars the political process. *See Reynolds v. Sims,* 377 U.S. 533 (1964); *Baker v. Carr,* 369 U.S. 186 (1962). It is not a setting in which the recalcitrance of Jim Crow demands judicial, rather than we-can't-wait-forever legislative, answers. *See Brown v. Bd. of Educ.,* 347 U.S. 483 (1954). It is not a setting in which time shows that even a potentially powerful group cannot make headway on issues of equality. *See Frontiero v. Richardson,* 411 U.S. 677 (1973). It is not a setting where a national crisis—the Depression—seemingly demanded constitutional innovation. *See W. Coast Hotel Co. v. Parrish,* 300 U.S. 379 (1937). And it is not a setting, most pertinently, in which the local, state, and federal governments historically disenfranchised the suspect class, as they did with African Americans and women. *See United States v. Carolene Prods. Co.,* 304 U.S. 144, 152 n.4 (1938).

Instead, from the claimants' perspective, we have an eleven-year record marked by nearly as many successes as defeats and a widely held assumption that the future holds more promise than the past—if the federal courts will allow that future to take hold. Throughout that time, other advances for the claimants' cause are manifest. Nationally, "Don't Ask, Don't Tell" is gone. Locally, the Cincinnati charter amendment that prevented gay individuals from obtaining certain preferences from the city, upheld by our court in 1997, *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati,* 128 F.3d 289 (6th Cir.1997), is no more. The Fourteenth Amendment does not insulate influential, indeed eminently successful, interest groups from a defining attribute of all democratic initiatives—some succeed, some fail—particularly when succeeding more and failing less are in the offing.

***21** Why, it is worth asking, the sudden change in public opinion? If there is one thing that seems to challenge hearts and minds, even souls, on this issue, it is the transition from the abstract to the concrete. If twenty-five percent of the population knew someone who was openly gay in 1985, and seventy-five percent knew the same in 2000, Klarman, *supra,* at 197, it is fair to wonder how few individuals still have not been forced to think about the matter through the lens of a gay friend or family member. *That* would be a discrete and insular minority.

The States' undoubted power over marriage provides an independent basis for reviewing the laws before us with deference rather than with skepticism. An analogy shows why. When a *state* law targets noncitizens—a group marked by its lack of political power and its history of enduring discrimination—it must in general meet the most demanding of constitutional tests in order to survive a skirmish with a court. But when a *federal* law targets noncitizens, a mere rational basis will save it from invalidation. This disparity arises because of the Nation's authority (and the States' corresponding lack of authority) over international affairs. *Mathews v. Diaz,* 426 U.S. 67, 84–85 (1976). If federal preeminence in foreign relations requires lenient review of federal immigration classifications, why doesn't state preeminence in domestic relations call for equally lenient review of state marriage definitions?

G.

Evolving meaning. If all else fails, the plaintiffs invite us to consider that "[a] core strength of the American legal system ... is its capacity to evolve" in response to new ways of thinking about old policies. *DeBoer* Appellees' Br. at 57–58. But even if we accept this invitation and put aside the past—original meaning, tradition, time-respected doctrine—that does not take the plaintiffs where they wish to go. We could, to be sure, look at this case alongside evolving moral and policy considerations. The Supreme Court has done so before. *Lawrence,* 539 U.S. at 573. It may do so again. "A prime part of the history of our Constitution ... is the story of the extension of constitutional rights ... to people once ignored or excluded." *United States v. Virginia,* 518 U.S. 515, 557 (1996). Why not do so here?

Even on this theory, the marriage laws do not violate the Constitution. A principled jurisprudence of constitutional evolution turns on evolution in *society's* values, not evolution in *judges'* values. Freed of federal-court

intervention, thirty-one States would continue to define marriage the old-fashioned way. *Lawrence*, by contrast, dealt with a situation in which just thirteen States continued to prohibit sodomy, and even then most of those laws had fallen into desuetude, rarely being enforced at all. On this record, what right do we have to say that societal values, as opposed to judicial values, have evolved toward agreement in favor of same-sex marriage?

***22** The theory of the living constitution rests on the premise that every generation has the right to govern itself. If that premise prevents judges from insisting on principles that society has moved past, so too should it prevent judges from anticipating principles that society has yet to embrace. It follows that States must enjoy some latitude in matters of timing, for reasonable people can disagree about just when public norms have evolved enough to require a democratic response. Today's case captures the point. Not long ago American society took for granted the rough correlation between marriage and creation of new life, a vision under which limiting marriage to opposite-sex couples seemed natural. Not long from now, if current trends continue, American society may define marriage in terms of affirming mutual love, a vision under which the failure to add loving gay couples seems unfair. Today's society has begun to move past the first picture of marriage, but it has not yet developed a consensus on the second.

If, *before* a new consensus has emerged on a social issue, federal judges may decide when the time is ripe to recognize a new constitutional right, surely the people should receive some deference in deciding when the time is ripe to move from one picture of marriage to another. So far, not a single United States Supreme Court Justice in American history has written an opinion maintaining that the traditional definition of marriage violates the Fourteenth Amendment. No one would accuse the Supreme Court of acting irrationally in failing to recognize a right to same-sex marriage in 2013. Likewise, we should hesitate to accuse the States of acting irrationally in failing to recognize the right in 2004 or 2006 or for that matter today. Federal judges engaged in the inherent pacing that comes with living constitutionalism should appreciate the inherent pacing that comes with democratic majorities deciding within reasonable bounds when and whether to embrace an evolving, as opposed to settled, societal norm. The one form of pacing is akin to the other, making it anomalous for the Court to hold that the States act unconstitutionally when making reasonable pacing decisions of their own.

From time to time, the Supreme Court has looked beyond our borders in deciding when to expand the meaning of constitutional guarantees. *Lawrence*, 539 U.S. at 576. Yet foreign practice only reinforces the impropriety of tinkering with the democratic process in this setting. The great majority of countries across the world—including such progressive democracies as Australia and Finland—still adhere to the traditional definition of marriage. Even more telling, the European Court of Human Rights ruled only a few years ago that European human rights laws do not guarantee a right to same-sex marriage. *Schalk & Kopf v. Austria*, 2010–IV Eur. Ct. H.R. 409. "The area in question," it explained in words that work just as well on this side of the Atlantic, remains "one of evolving rights with no established consensus," which means that States must "enjoy [discretion] in the timing of the introduction of legislative changes." *Id.* at 438. It reiterated this conclusion as recently as this July, declaring that "the margin of appreciation to be afforded" to States "must still be a wide one." *Hämäläinen v. Finland*, No. 37359/09, HUDOC, at *19 (Eur.Ct.H.R. July 16, 2014). Our Supreme Court relied on the European Court's gay-rights decisions in *Lawrence*. 539 U.S. at 576. What neutral principle of constitutional interpretation allows us to ignore the European Court's same-sex marriage decisions when deciding this case? If the point is relevant in the one setting, it is relevant in the other, especially in a case designed to treat like matters alike.

***23** Other practical considerations also do not favor the creation of a new constitutional right here. While these cases present a denial of access to many benefits, what is "[o]f greater importance" to the claimants, as they see it, "is the loss of ... dignity and respect" occasioned by these laws. *Love* Appellees' Br. at 5. No doubt there is much to be said for "dignity and respect" in the eyes of the Constitution and its interpreters. But any loss of dignity and respect on this issue did not come from the Constitution. It came from the neighborhoods and communities in which gay and lesbian couples live, and in which it is worth trying to correct the problem in the first instance—and in that way "to allow the formation of consensus respecting the way the members" of a State "treat each other in their daily contact and constant interaction with each other." *Windsor*, 133 S.Ct. at 2692.

For all of the power that comes with the authority to interpret the United States Constitution, the federal courts have no long-lasting capacity to change what people think and believe about new social questions. If the plaintiffs are convinced that litigation is the best way to resolve today's debate and to change heads and hearts in the process, who are we to say? Perhaps that is not the only point, however. Yes, we cannot deny thinking the

plaintiffs deserve better—earned victories through initiatives and legislation and the greater acceptance that comes with them. But maybe the American people too deserve better—not just in the sense of having a say through representatives in the legislature rather than through representatives in the courts, but also in the sense of having to come face to face with the issue. Rights need not be countermajoritarian to count. *See, e.g.*, Civil Rights Act of 1964, Pub.L. No. 88352, 78 Stat. 241. Isn't the goal to create a culture in which a majority of citizens dignify and respect the rights of minority groups through majoritarian laws rather than through decisions issued by a majority of Supreme Court Justices? It is dangerous and demeaning to the citizenry to assume that *we*, and only *we*, can fairly understand the arguments for and against gay marriage.

Last, but not least, federal courts never expand constitutional guarantees in a vacuum. What one group wants on one issue from the courts today, another group will want on another issue tomorrow. The more the Court innovates under the Constitution, the more plausible it is for the Court to do still more—and the more plausible it is for other advocates on behalf of other issues to ask the Court to innovate still more. And while the expansion of liberal and conservative constitutional rights will solve, or at least sidestep, the amendment-difficulty problem that confronts many individuals and interest groups, it will exacerbate the judge-confirmation problem. Faith in democracy with respect to issues that the Constitution has not committed to the courts reinforces a different, more sustainable norm.

III.

***24** Does the Constitution prohibit a State from denying recognition to same-sex marriages conducted in other States? That is the question presented in the two Ohio cases (*Obergefell* and *Henry*), one of the Kentucky cases (*Bourke*), and the Tennessee case (*Tanco*). Our answer to the first question goes a long way toward answering this one. If it is constitutional for a State to define marriage as a relationship between a man and a woman, it is also constitutional for the State to stand by that definition with respect to couples married in other States or countries.

The Constitution in general does not delineate when a State must apply its own laws and when it must apply the laws of another State. Neither any federal statute nor federal common law fills the gap. Throughout our history, each State has decided for itself how to resolve clashes between its laws and laws of other sovereigns—giving rise to the field of conflict of laws. The States enjoy wide latitude in fashioning choice-of-law rules. *Sun Oil Co. v. Wortman*, 486 U.S. 717, 727–29 (1988); *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 307–08 (1981).

The plaintiffs in these cases do not claim that refusal to recognize out-of-state gay and lesbian marriages violates the Full Faith and Credit Clause, the principal constitutional limit on state choice-of-law rules. Wisely so. The Clause "does not require a State to apply another State's law in violation of its own legitimate public policy." *Nevada v. Hall*, 440 U.S. 410, 422 (1979). If defining marriage as an opposite-sex relationship amounts to a legitimate public policy—and we have just explained that it does—the Full Faith and Credit Clause does not prevent a State from applying that policy to couples who move from one State to another.

The plaintiffs instead argue that failure to recognize gay marriages celebrated in other States violates the Due Process and Equal Protection Clauses. But we do not think that the invocation of these different clauses justifies a different result. As shown, compliance with the Due Process and Equal Protection Clauses in this setting requires only a rational relationship between the legislation and a legitimate public purpose. And a State does not behave irrationally by insisting upon its own definition of marriage rather than deferring to the definition adopted by another State. Preservation of a State's authority to recognize, or to opt not to recognize, an out-of-state marriage preserves a State's sovereign interest in deciding for itself how to define the marital relationship. It also discourages evasion of the State's marriage laws by allowing individuals to go to another State, marry there, then return home. Were it irrational for a State to adhere to its own policy, what would be the point of the Supreme Court's repeated holdings that the Full Faith and Credit Clause "does not require a State to apply another State's law in violation of its own public policy"? *Id.*

***25** Far from undermining these points, *Windsor* reinforces them. The case observes that "[t]he definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the protection of offspring, property interests, and the enforcement of marital responsibilities." 133 S.Ct. at 2691 (internal quotation marks omitted). How could it be irrational for a State to decide that the foundation of its domestic-relations law will be *its* definition of marriage, not somebody else's? *Windsor* adds that "[e]ach state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders." *Id.*

How could it be irrational for a State to apply its definition of marriage to a couple in whose marital status the State as a sovereign has a rightful and legitimate concern?

Nor does the policy of nonrecognition trigger *Windsor's* (or *Rower's*) principle that unprecedented exercises of power call for judicial skepticism. States have always decided for themselves when to yield to laws of other States. Exercising this power, States often have refused to enforce all sorts of out-of-state rules on the grounds that they contradict important local policies. *See* Restatement (First) of Conflict of Laws § 612; Restatement (Second) of Conflict of Laws § 90. Even more telling, States in many instances have 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. *See* Restatement (First) of Conflict of Laws § 134; Restatement (Second) of Conflict of Laws § 283. The laws challenged here involve routine rather than anomalous uses of state power.

What of the reality that Ohio recognizes some heterosexual marriages solemnized in other States even if those marriages could not be performed in Ohio? *See, e.g., Mazzolini v. Mazzolini,* 155 N.E.2d 206, 208 (Ohio 1958). The only reason Ohio could have for banning recognition of same-sex marriages performed elsewhere and not prohibiting heterosexual marriages performed elsewhere, the Ohio plaintiffs claim, is animus or "discrimination[ ] of an unusual character." *Obergefell* Appellees' Br. at 18 (quoting *Windsor,* 133 S.Ct. at 2692).

But, in making this argument, the plaintiffs misapprehend Ohio law, wrongly assuming that Ohio would recognize as valid *any* heterosexual marriage that was valid in the State that sanctioned it. That is not the case. Ohio law recognizes some out-of-state marriages that could not be performed in Ohio, but not all such marriages. *See, e.g., Mazzolini,* 155 N.E.2d at 208 (marriage of first cousins); *Hardin v. Davis,* 16 Ohio Supp. 19, 20 (OhioCt.Com.Pl.1945) (marriage by proxy). In *Mazzolini,* the most relevant precedent, the Ohio Supreme Court stated that a number of heterosexual marriages—ones that were "incestuous, polygamous, shocking to good morals, unalterably opposed to a well defined public policy, or prohibited"—would not be recognized in the State, even if they were valid in the jurisdiction that performed them. 155 N.E.2d at 208–09 (noting that first-cousin marriages fell outside this rule because they were "not made void by explicit provision" and "not incestuous"). Ohio law declares same-sex marriage contrary to the State's public policy, placing those marriages within the longstanding exception to Ohio's recognition rule. *See* Ohio Rev.Code § 3101.01(C).

IV.

***26** That leaves one more claim, premised on the constitutional right to travel. In the Tennessee case (*Tanco*) and one of the Ohio cases (*Henry*), the claimants maintain that a State's refusal to recognize out-of-state same-sex marriages illegitimately burdens the right to travel—in the one case by penalizing couples who move into the State by refusing to recognize their marriages, in the other by preventing their child from obtaining a passport because the State refused to provide a birth certificate that included the names of both parents.

The United States Constitution does not mention a right to travel by name. "Yet the constitutional right to travel from one State to another is firmly embedded in our jurisprudence." *Saenz v. Roe,* 526 U.S. 489, 498 (1999) (internal quotation marks omitted). It provides three guarantees: (1) "the right of a citizen of one State to enter and to leave another State"; (2) "the right to be treated as a welcome visitor rather than an unfriendly alien" when visiting a second State; and (3) the right of new permanent residents "to be treated like other citizens of that State." *Id.* at 500.

Tennessee's nonrecognition law does not violate these prohibitions. It does not ban, or for that matter regulate, movement into or out of the State other than in the respect all regulations create incentives or disincentives to live in one place or another. Most critically, the law does not punish out-of-state new residents in relation to its own born and bred. Nonresidents are "treated" just "like other citizens of that State," *id.,* because the State has not expanded the definition of marriage to include gay couples in all settings, whether the individuals just arrived in Tennessee or descend from Andrew Jackson.

The same is true for the Ohio law. No regulation of movement or differential treatment between the newly resident and the longstanding resident occurs. All Ohioans must follow the State's definition of marriage. With respect to the need to obtain an Ohio birth certificate before obtaining a passport, they can get one. The certificate just will not include both names of the couple. The "just" of course goes to the heart of the matter. In that respect, however, it is due process and equal protection, not the right to travel, that govern the issue.

* * *

This case ultimately presents *two* ways to think about change. One is whether the Supreme Court will constitutionalize a new definition of marriage to meet new policy views about the issue. The other is whether the Court will begin to undertake a different form of change—change in the way we as a country optimize the handling of efforts to address requests for new civil liberties.

If the Court takes the first approach, it may resolve the issue for good and give the plaintiffs and many others relief. But we will never know what might have been. If the Court takes the second approach, is it not possible that the traditional arbiters of change—the people—will meet today's challenge admirably and settle the issue in a productive way? In just eleven years, nineteen States and a conspicuous District, accounting for nearly forty-five percent of the population, have exercised their sovereign powers to expand a definition of marriage that until recently was universally followed going back to the earliest days of human history. That is a difficult timeline to criticize as unworthy of further debate and voting. When the courts do not let the people resolve new social issues like this one, they perpetuate the idea that the heroes in these change events are judges and lawyers. Better in this instance, we think, to allow change through the customary political processes, in which the people, gay and straight alike, become the heroes of their own stories by meeting each other not as adversaries in a court system but as fellow citizens seeking to resolve a new social issue in a fair-minded way.

***27** For these reasons, we reverse.

DISSENT

MARTHA CRAIG DAUGHTREY, Circuit Judge, dissenting.

"The great tides and currents which engulf the rest of men do not turn aside in their course to pass the judges by."

***27** Benjamin Cardozo, *The Nature of the Judicial Process* (1921)

The author of the majority opinion has drafted what would make an engrossing TED Talk or, possibly, an introductory lecture in Political Philosophy. But as an appellate court decision, it wholly fails to grapple with the relevant constitutional question in this appeal: whether a state's constitutional prohibition of same-sex marriage violates equal protection under the Fourteenth Amendment. Instead, the majority sets up a false premise—that the question before us is "who should decide?"—and leads us through a largely irrelevant discourse on democracy and federalism. In point of fact, the real issue before us concerns what is at stake in these six cases for the individual plaintiffs and their children, and what should be done about it. Because I reject the majority's resolution of these questions based on its invocation of *vox populi* and its reverence for "proceeding with caution" (otherwise known as the "wait and see" approach), I dissent.

In the main, the majority treats both the issues and the litigants here as mere abstractions. Instead of recognizing the plaintiffs as persons, suffering actual harm as a result of being denied the right to marry where they reside or the right to have their valid marriages recognized there, my colleagues view the plaintiffs as social activists who have somehow stumbled into federal court, inadvisably, when they should be out campaigning to win "the hearts and minds" of Michigan, Ohio, Kentucky, and Tennessee voters to their cause. But these plaintiffs are not political zealots trying to push reform on their fellow citizens; they are committed same-sex couples, many of them heading up *de facto* families, who want to achieve equal status—*de jure* status, if you will—with their married neighbors, friends, and coworkers, to be accepted as contributing members of their social and religious communities, and to be welcomed as fully legitimate parents at their children's schools. They seek to do this by virtue of exercising a civil right that most of us take for granted—the right to marry.[1]

Readers who are familiar with the Supreme Court's recent opinion in *United States v. Windsor*, 133 S.Ct. 2675 (2013), and its progeny in the circuit courts, particularly the Seventh Circuit's opinion in *Baskin v. Bogan*, 766 F.3d 648, 654 (7th Cir.2014) ("Formally these cases are about discrimination against the small homosexual minority in the United States. But at a deeper level, ... they are about the welfare of American children."), must have said to themselves at various points in the majority opinion, "But what about the children?" I did, and I could not find the answer in the opinion. For although my colleagues in the majority pay lip service to marriage as an institution conceived for the purpose of providing a stable family unit "within which children may flourish," they ignore the destabilizing effect of its absence in the

homes of tens of thousands of same-sex parents throughout the four states of the Sixth Circuit.

***28** Indeed, with the exception of Ohio, the defendants in each of these cases—the proponents of their respective "defense of marriage" amendments—spent virtually their entire oral arguments professing what has come to be known as the "irresponsible procreation" theory: that limiting marriage and its benefits to opposite-sex couples is rational, even necessary, to provide for "unintended offspring" by channeling their biological procreators into the bonds of matrimony. When we asked counsel why that goal required the simultaneous exclusion of same-sex couples from marrying, we were told that permitting same-sex marriage might denigrate the institution of marriage in the eyes of opposite-sex couples who conceive out of wedlock, causing subsequent abandonment of the unintended offspring by one or both biological parents. We also were informed that because same-sex couples cannot themselves produce wanted or unwanted offspring, and because they must therefore look to non-biological means of parenting that require planning and expense, stability in a family unit headed by same-sex parents is assured without the benefit of formal matrimony. But, as the court in *Baskin* pointed out, many "abandoned children [born out of wedlock to biological parents] are adopted by homosexual couples, and those children would be better off both emotionally and economically if their adoptive parents were married." *Id.* How ironic that irresponsible, unmarried, opposite-sex couples in the Sixth Circuit who produce unwanted offspring must be "channeled" into marriage and thus rewarded with its many psychological and financial benefits, while same-sex couples who become model parents are punished for their responsible behavior by being denied the right to marry. As an obviously exasperated Judge Posner responded after puzzling over this same paradox in *Baskin*, "Go figure." *Id.* at 662.

In addressing the "irresponsible procreation" argument that has been referenced by virtually every state defendant in litigation similar to this case, the *Baskin* court noted that estimates put the number of American children being raised by same-sex parents at over 200,000. *Id.* at 663. "Unintentional offspring are the children most likely to be put up for adoption," *id.* at 662, and because statistics show that same-sex couples are many times more likely to adopt than opposite-sex couples, "same-sex marriage improves the prospects of unintended children by increasing the number and resources of prospective adopters." *Id.* at 663. Moreover, "[i]f marriage is better for children who are being brought up by their biological parents, it must be better for children who are being brought up by their adoptive parents." *Id.* at 664.

The concern for the welfare of children that echoes throughout the *Baskin* opinion can be traced in part to the earlier opinion in *Windsor*, in which the Supreme Court struck down, as unconstitutional on equal-protection grounds, section 3 of the federal Defense of Marriage Act (DOMA), which defined the term "marriage" for federal purposes as "mean[ing] only a legal union between one man and one woman as husband and wife," and the term "spouse" as "refer [ring] only to a person of the opposite sex who is a husband or a wife." *Id.* at 2683 (citing 1 U.S.C. § 7). Although DOMA did not affect the prerogative of the states to regulate marriage within their respective jurisdictions, it did deprive same-sex couples whose marriages were considered valid under state law of myriad federal benefits. As Justice Kennedy, writing for the majority, pointed out:

> ***29** DOMA's principal effect is to identify a subset of state-sanctioned marriages and make them unequal. The principal purpose is to impose inequality, not for other reasons like governmental efficiency.... The differentiation demeans the [same-sex] couple, whose moral and sexual choices the Constitution protects, see *Lawrence [v. Texas]*, 539 U.S. 558 [(2003)], and whose relationship the State has sought to dignify. 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.

Id. at 2694.

Looking more closely at the situation of just one of the same-sex couples from the six cases before us brings Justice Kennedy's words on paper to life. Two of the Michigan plaintiffs, April **DeBoer** and Jayne Rowse, are unmarried, same-sex partners who have lived as a couple for eight years in a home they own together. They are both trained and employed as nurses, **DeBoer** in a hospital neonatal department and Rowse in an emergency department at another hospital. Together they are rearing three children but, due to existing provisions in Michigan's adoption laws, **DeBoer** and Rowse are

prohibited from adopting the children as joint parents because they are unmarried. Instead, Rowse alone adopted two children, who are identified in the record as N and J. **DeBoer** adopted the third child, who is identified as R.

All three children had difficult starts in life, and two of them are now characterized as "special needs" children. N was born on January 25, 2009, to a biological mother who was homeless, had psychological impairments, was unable to care for N, and subsequently surrendered her legal rights to N. The plaintiffs volunteered to care for the boy and brought him into their home following his birth. In November 2009, Rowse completed the necessary steps to adopt N legally.

Rowse also legally adopted J after the boy's foster care agency asked Rowse and **DeBoer** initially to serve as foster parents and legal guardians for him, despite the uphill climb the baby faced. According to the plaintiffs' amended complaint:

> J was born on November 9, 2009, at Hutzel Hospital, premature at 25 weeks, to a drug addicted prostitute. Upon birth, he weighed 1 pound, 9 ounces and tested positive for marijuana, cocaine, opiates and methadone. His birth mother abandoned him immediately after delivery. J remained in the hospital in the NICU for four months with myriad different health complications, and was not expected to live. If he survived, he was not expected to be able to walk, speak or function on a normal level in any capacity.... With Rowse and **DeBoer's** constant care and medical attention, many of J's physical conditions have resolved.

The third adopted child, R, was born on February 1, 2010, to a 19–year–old girl who received no prenatal care and who gave birth at her mother's home before bringing the infant to the hospital where plaintiff **DeBoer** worked. R continues to experience issues related to her lack of prenatal care, including delayed gross motor skills. She is in a physical-therapy program to address these problems.

***30** Both **DeBoer** and Rowse share in the responsibilities of raising the two four-year-olds and the five-year-old. The plaintiffs even have gone so far as to "coordinate their work schedules so that at least one parent is generally home with the children" to attend to their medical needs and perform other parental duties. Given the close-knit, loving environment shared by the plaintiffs and the children, **DeBoer** wishes to adopt N and J legally as a second parent, and Rowse wishes to adopt R legally as her second parent.

Although Michigan statutes allow married couples and single persons to adopt, those laws preclude unmarried couples from adopting each other's children. As a result, **DeBoer** and Rowse filed suit in federal district court challenging the Michigan adoption statute, Michigan Compiled Laws § 710.24, on federal equal-protection grounds. They later amended their complaint to include a challenge to the so-called Michigan Marriage Amendment, *see* Mich. Const. art. I, § 25, added to the Michigan state constitution in 2004, after the district court suggested that the plaintiffs' "injury was not traceable to the defendants' enforcement of section [710.24]" but, rather, flowed from the fact that the plaintiffs "were not married, and any legal form of same-sex union is prohibited" in Michigan. The case went to trial on the narrow legal issue of whether the amendment could survive rational basis review, *i.e.*, whether it proscribes conduct in a manner that is rationally related to any conceivable legitimate governmental purpose.

The bench trial lasted for eight days and consisted of testimony from sociologists, economists, law professors, a psychologist, a historian, a demographer, and a county clerk. Included in the plaintiffs' presentation of evidence were statistics regarding the number of children in foster care or awaiting adoption, as well as testimony regarding the difficulties facing same-sex partners attempting to retain parental influence over children adopted in Michigan. Gary Gates, a demographer, and Vivek Sankaran, the director of both the Child Advocacy Law Clinic and the Child Welfare Appellate Clinic at the University of Michigan Law School, together offered testimony painting a grim picture of the plight of foster children and orphans in the state of Michigan. For example, Sankaran noted that just under 14,000 foster children reside in Michigan, with approximately 3,500 of those being legal orphans. Nevertheless, same-sex couples in the state are not permitted to adopt such children as a couple. Even though one person can legally adopt a child, should anything happen to that adoptive parent, there is no provision in Michigan's legal framework that would "ensure that the children would necessarily remain with the surviving non-legal parent," even if that parent went through the arduous, time-consuming, expensive adoption-approval process. Thus, although the State of Michigan would save money by moving children from

foster care or state care into adoptive families, and although same-sex couples in Michigan are almost three times more likely than opposite-sex couples to be raising an adopted child and twice as likely to be fostering a child, there remains a legal disincentive for same-sex couples to adopt children there.

***31** David Brodzinsky, a developmental and clinical psychologist, for many years on the faculty at Rutgers University, reiterated the testimony that Michigan's ban on adoptions by same-sex couples increases the potential risks to children awaiting adoptions. The remainder of his testimony was devoted to a systematic, statistic-based debunking of studies intimating that children raised in gay or lesbian families, *ipso facto,* are less well-adjusted than children raised by heterosexual couples. Brodzinsky conceded that marriage brings societal legitimatization and stability to children but noted that he found no statistically significant differences in general characteristics or in development between children raised in same-sex households and children raised in opposite-sex households, and that the psychological well-being, educational development, and peer relationships were the same in children raised in gay, lesbian, or heterosexual homes.

Such findings led Brodzinsky to conclude that the gender of a parent is far less important than the quality of the parenting offered and that family processes and resources are far better predictors of child adjustment than the family structure. He testified that those studies presuming to show that children raised in gay and lesbian families exhibited more adjustment problems and decreased educational achievement were seriously flawed, simply because they relied on statistics concerning children who had come from families experiencing a prior traumatic breakup of a failed heterosexual relationship. In fact, when focusing upon children of lesbian families created through donor insemination, Brodzinsky found no differences in comparison with children from donor insemination in heterosexual families or in comparison with children conceived naturally in heterosexual families. According to Brodzinsky, such a finding was not surprising given the fact that all such children experienced no family disruption in their past. For the same reason, few differences were noted in studies of children adopted at a very early age by same-sex couples and children naturally born into heterosexual families.

Nancy Cott, a professor of history at Harvard University, the director of graduate studies there, and the author of *Public Vows: A History of Marriage and the Nation,* also testified on behalf of the plaintiffs. She explained how the concept of marriage and the roles of the marriage partners have changed over time. As summarized by Cott, the wife's identity is no longer subsumed into that of her husband, interracial marriages are legal now that the antiquated, racist concept of preserving the purity of the white race has fallen into its rightful place of dishonor, and traditional gender-assigned roles are no longer standard. Cott also testified that solemnizing marriages between same-sex partners would create tangible benefits for Michigan citizens because spouses would then be allowed to inherit without taxation and would be able to receive retirement, Social Security, and veteran's benefits upon the death of an eligible spouse. Moreover, statistics make clear that heterosexual marriages have not suffered or decreased in number as a result of states permitting same-sex marriages. In fact, to the contrary, Cott noted that there exists some evidence that many young people now refuse to enter into heterosexual marriages until their gay or lesbian friends can also enjoy the legitimacy of state-backed marriages.

***32** Michael Rosenfeld, a Stanford University sociologist, testified about studies he had undertaken that confirmed the hypothesis that legitimation of same-sex relationships promotes their stability. Specifically, Rosenfeld's research established that although same-sex couples living in states without recognition of their commitments to each other did have a higher break-up rate than heterosexual married couples, the break-up rates of opposite-sex married couples and same-sex couples in recognized civil unions were virtually identical. Similarly, the break-up rates of same-sex couples not living in a state-recognized relationship approximated the break-up rate of heterosexual couples cohabiting without marriage.

Rosenfeld also criticized the methodology of studies advanced by the defendants that disagreed with his conclusions. According to Rosenfeld, those critical studies failed to take into account the stability or lack of stability of the various groups examined. For example, he testified that one such study compared children who had experienced no adverse family transitions with children who had lived through many such traumatic family changes. Not surprisingly, children from broken homes with lower-income-earning parents who had less education and lived in urban areas performed more poorly in school than other children. According to Rosenfeld, arguments to the contrary that failed to control for such differences, taken to their extreme, would lead to the conclusion that only high-income individuals of Asian descent who earned advanced degrees and lived in suburban areas should be allowed to marry.

To counteract the testimony offered by the plaintiffs' witnesses, the defendants presented as witnesses the

authors or co-authors of three studies that disagreed with the conclusions reached by the plaintiffs' experts. All three studies, however, were given little credence by the district court because of inherent flaws in the methods used or the intent of the authors. For example, the New Family Structures Study reported by Mark Regnerus, a sociologist at the University of Texas at Austin, admittedly relied upon interviews of children from gay or lesbian families who were products of broken heterosexual unions in order to support a conclusion that living with such gay or lesbian families adversely affected the development of the children. Regnerus conceded, moreover, that his own department took the highly unusual step of issuing the following statement on the university website in response to the release of the study:

> [Dr. Regnerus's opinions] do not reflect the views of the sociology department of the University of Texas at Austin. Nor do they reflect the views of the American Sociological Association which takes the position that the conclusions he draws from his study of gay parenting are fundamentally flawed on conceptual and methodological grounds and that the findings from Dr. Regnerus'[s] work have been cited inappropriately in efforts to diminish the civil rights and legitimacy of LBGTQ partners and their families.

***33** In fact, the record before the district court reflected clearly that Regnerus's study had been funded by the Witherspoon Institute, a conservative "think tank" opposed to same-sex marriage, in order to vindicate "the traditional understanding of marriage."

Douglas Allen, the co-author of another study with Catherine Pakaluk and Joe Price, testified that children raised by same-sex couples graduated from high school at a significantly lower rate than did children raised by heterosexual married couples. On cross-examination, however, Allen conceded that "many of those children who ... were living in same-sex households had previously lived in an opposite sex household where their parents had divorced, broken up, some kind of separation or transition." Furthermore, Allen provided evidence of the bias inherent in his study by admitting that he believed that engaging in homosexual acts "means eternal separation from God, in other words[,] going to hell ."

The final study advanced by the defendants was conducted by Loren Marks, a professor in human ecology at Louisiana State University, in what was admittedly an effort to counteract the "groupthink" portrayed by perceived "liberal psychologists." But although Marks criticized what he perceived to be "a pronounced liberal lean on social issues" by many psychologists, he revealed his own bias by acknowledging that he was a lay clergyman in the Church of Jesus Christ of Latter Day Saints (LDS) and that the LDS directive "for a couple to be married by God's authority in God's house, the holy temple, and then to have children per the teaching that God's commandment for his children to multiply and replenish the earth remains in force."

Presented with the admitted biases and methodological shortcomings prevalent in the studies performed by the defendant's experts, the district court found those witnesses "largely unbelievable" and not credible. **DeBoer***v. Snyder*, 973 F.Supp.2d 757, 768 (E.D.Mich.2014). Proceeding to a legal analysis of the core issue in the litigation, the district court then concluded that the proscriptions of the marriage amendment are not rationally related to any legitimate state interest. Addressing the defendants' three asserted rational bases for the amendment,[2] the district court found each such proffered justification without merit.

Principally, the court determined that the amendment is in no way related to the asserted state interest in ensuring an optimal environment for child-rearing. The testimony adduced at trial clearly refuted the proposition that, all things being equal, same-sex couples are less able to provide for the welfare and development of children. Indeed, marriage, whether between same-sex or opposite-sex partners, increases stability within the family unit. By permitting same-sex couples to marry, that stability would not be threatened by the death of one of the parents. Even more damning to the defendants' position, however, is the fact that the State of Michigan allows heterosexual couples to marry even if the couple does not wish to have children, even if the couple does not have sufficient resources or education to care for children, even if the parents are pedophiles or child abusers, and even if the parents are drug addicts.

***34** Furthermore, the district court found no reason to believe that the amendment furthers the asserted state interests in "proceeding with caution" before "altering the traditional definition of marriage" or in "upholding tradition and morality." As recognized by the district court, there is no legitimate justification for delay when constitutional rights are at issue, and even adherence to religious views or tradition cannot serve to strip citizens

of their right to the guarantee of equal protection under the law.

Finally, and relatedly, the district court acknowledged that the regulation of marriage traditionally has been seen as part of a state's police power but concluded that this fact cannot serve as an excuse to ignore the constitutional rights of individual citizens. Were it otherwise, the court observed, the prohibition in Virginia and in many other states against miscegenation still would be in effect today. Because the district court found that "regardless of whoever finds favor in the eyes of the most recent majority, the guarantee of equal protection must prevail," the court held the amendment and its implementing statutes "unconstitutional because they violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution." *Id.* at 775.

If I were in the majority here, I would have no difficulty in affirming the district court's opinion in **DeBoer**. The record is rich with evidence that, as a pragmatic matter, completely refutes the state's effort to defend the ban against same-sex marriage that is inherent in the marriage amendment. Moreover, the district court did a masterful job of supporting its legal conclusions. Upholding the decision would also control the resolution of the other five cases that were consolidated for purposes of this appeal.

Is a thorough explication of the legal basis for such a result appropriate? It is, of course. Is it necessary? In my judgment, it is not, given the excellent—even eloquent—opinion in **DeBoer** and in the opinions that have come from four other circuits in the last few months that have addressed the same issues involved here: *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir.2014) (holding Utah statutes and state constitutional amendment banning same-sex marriage unconstitutional under the Fourteenth Amendment); *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir.2014) (same, Virginia); *Baskin v. Bogan*, 766 F.3d 648 (7th Cir.2014) (same, Indiana statute and Wisconsin state constitutional amendment); and *Latta v.. Otter*, Nos. 14–35420, 14–35421, 12–17668, 2014 WL 4977682 (9th Cir. Oct. 7, 2014) (same, Idaho and Nevada statutes and state constitutional amendments).[3]

Kitchen was decided primarily on the basis of substantive due process, based on the Tenth Circuit's determination that under Supreme Court precedents, the right to marry includes the right to marry the person of one's choice. The court located the source of that right in Supreme Court opinions such as *Maynard v. Hill*, 125 U.S. 190, 205 (1888) (recognizing marriage as "the most important relation in life"); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (holding that the liberty protected by the Fourteenth Amendment includes the freedom "to marry, establish a home and bring up children"); *Loving*, 388 U.S. at 12 ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."); *Zablocki*, 434 U.S. at 384 (recognizing that "the right to marry is of fundamental importance for all individuals"); and *Turner v. Safley*, 482 U.S. 78, 95–96 (1987) (in the context of a prison inmate's right to marry, "[such] marriages are expressions of emotional support and public commitment [,] ... elements [that] are important and significant aspects of the marital relationship" even in situations in which procreation is not possible). *Kitchen*, 755 F.3d at 1209–11. The Tenth Circuit also found that the Utah laws violated equal protection, applying strict scrutiny because the classification in question impinged on a fundamental right. In doing so, the court rejected the state's reliance on various justifications offered to establish a compelling state interest in denying marriage to same-sex couples, finding "an insufficient causal connection" between the prohibition on same-sex marriage and the state's "articulated goals," which included a purported interest in fostering biological reproduction, encouraging optimal childrearing, and maintaining gendered parenting styles. *Id.* at 1222. The court also rejected the state's prediction that legalizing same-sex marriage would result in social discord, citing *Watson v. City of Memphis*, 373 U.S. 526, 535 (1963) (rejecting "community confusion and turmoil" as a reason to delay desegregation of public parks). *Id.* at 1227.

***35** The Fourth Circuit in *Bostic* also applied strict scrutiny to strike down Virginia's same-sex-marriage prohibitions as infringing on a fundamental right, citing *Loving* and observing that "[o]ver the decades, the Supreme Court has demonstrated that the right to marry is an expansive liberty interest that may stretch to accommodate changing societal norms." 760 F.3d at 376. In a thoughtful opinion, the court analyzed each of the state's proffered interests: maintaining control of the "definition of marriage," adhering to the "tradition of opposite-sex marriage," "protecting the institution of marriage," "encouraging responsible procreation," and "promoting the optimal childrearing environment." *Id.* at 378. In each instance, the court found that there was no link between the state's purported "compelling interest" and the exclusion of same-sex couples "from participating fully in our society, which is precisely the type of segregation that the Fourteenth Amendment cannot countenance." *Id* . at 384. As to the state's interest in federalism, the court pointed to the long-recognized principle that "[s]tate laws defining and regulating marriage, of course, must respect the constitutional rights

of persons," *id.* at 379 (quoting *Windsor*, 133 S.Ct. at 2691), and highlighted *Windsor's* reiteration of "*Loving's* admonition that the states must exercise their authority without trampling constitutional guarantees ." *Id.* Addressing the state's contention that marriage under state law should be confined to opposite-sex couples because unintended pregnancies cannot result from same-sex unions, the court noted that "[b]ecause same-sex couples and infertile opposite-sex couples are similarly situated, the Equal Protection Clause counsels against treating these groups differently." *Id.* at 381–82 (citing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985)).

The Seventh Circuit's *Baskin* opinion is firmly grounded in equal-protection analysis. The court proceeded from the premise that "[d]iscrimination by a state or the federal government against a minority, when based on an immutable characteristic of the members of that minority (most familiarly skin color and gender), and occurring against an historical background of discrimination against the persons who have that characteristic, makes the discriminatory law or policy constitutionally suspect." 766 F.3d at 654. But the court also found that "discrimination against same-sex couples is irrational, and therefore unconstitutional even if the discrimination is not subjected to heightened scrutiny." *Id.* at 656. This conclusion was based on the court's rejection of "the only rationale that the states put forth with any conviction—that same-sex couples and their children don't *need* marriage because same-sex couples can't *produce* children, intended or unintended," an argument "so full of holes that it cannot be taken seriously." *Id.* (emphasis in original). The court therefore found it unnecessary to engage in "the more complex analysis found in more closely balanced equal-protection cases" or under the due process clause of the Fourteenth Amendment." *Id.* at 656–57.

***36** The Ninth Circuit's opinion in *Latta* also focuses on equal-protection principles in finding that Idaho's and Nevada's statutes and constitutional amendments prohibiting same-sex marriage violate the Fourteenth Amendment. Because the Ninth Circuit had recently held in *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F .3d 471, 481 (9th Cir.2014), that classifications based on sexual orientation are subject to heightened scrutiny, a conclusion the court drew from its reading of *Windsor* to require assessment more rigorous than rational-basis review, the path to finding an equal-protection violation was less than arduous. As did the Tenth Circuit in *Kitchen*, the court in *Latta* found it "wholly illogical" to think that same-sex marriage would affect opposite-sex couples' choices with regard to procreation. *Latta*, 2014 WL 4977682, *5 (citing *Kitchen*, 755 F.3d at 1223).

These four cases from our sister circuits provide a rich mine of responses to every rationale raised by the defendants in the Sixth Circuit cases as a basis for excluding same-sex couples from contracting valid marriages. Indeed, it would seem unnecessary for this court to do more than cite those cases in affirming the district courts' decisions in the six cases now before us. Because the correct result is so obvious, one is tempted to speculate that the majority has purposefully taken the contrary position to create the circuit split regarding the legality of same-sex marriage that could prompt a grant of *certiorari* by the Supreme Court and an end to the uncertainty of status and the interstate chaos that the current discrepancy in state laws threatens. Perhaps that is the case, but it does not relieve the dissenting member of the panel from the obligation of a rejoinder.

If ever there was a legal "dead letter" emanating from the Supreme Court, *Baker v. Nelson*, 409 U.S. 810 (1972), is a prime candidate. It lacks only a stake through its heart. Nevertheless, the majority posits that we are bound by the Court's aging one-line order denying review of an appeal from the Minnesota Supreme Court "for want of a substantial federal question." As the majority notes, the question concerned the state's refusal to issue a marriage license to a same-sex couple, but the decision came at a point in time when sodomy was legal in only one state in the country, Illinois, which had repealed its anti-sodomy statute in 1962. The Minnesota statute criminalizing same-sex intimate relations was not struck down until 2001, almost 30 years after *Baker* was announced.[4] The Minnesota Supreme Court's denial of relief to a same-sex couple in 1971 and the United States Supreme Court's conclusion that there was no *substantial* federal question involved in the appeal thus is unsurprising. As the majority notes—not facetiously, one hopes—"that was then; this is now."

At the same time, the majority argues that we are bound by the eleven words in the order, despite the Supreme Court silence on the matter in the 42 years since it was issued. There was no recognition of *Baker* in *Romer v. Evans*, 517 U.S. 620 (1996), nor in *Lawrence v. Texas*, 539 U.S. 558 (2003), and not in *Windsor*, despite the fact that the dissenting judge in the Second Circuit's opinion in *Windsor* made the same argument that the majority makes in this case. *See Windsor v. United States*, 699 F.3d 169, 189, 192–95 (2d Cir.2012) (Straub, J., dissenting in part and concurring in part). And although the argument was vigorously pressed by the DOMA proponents in their Supreme Court brief in *Windsor*,[5] neither Justice Kennedy in his opinion for the court nor any of the four dissenting

judges in their three separate opinions mentioned *Baker*. In addition, the order was not cited in the three orders of October 6, 2014, denying *certiorari* in *Kitchen, Bostic,* and *Baskin.* If this string of cases—*Romer, Lawrence, Windsor, Kitchen, Bostic,* and *Baskin*—does not represent the Court's overruling of *Baker sub silentio,* it certainly creates the "doctrinal development" that frees the lower courts from the strictures of a summary disposition by the Supreme Court. *See Hicks v. Miranda,* 422 U.S. 332, 344 (1975) (internal quotation marks and citation omitted).

Definition of Marriage

***37** The majority's "original meaning" analysis strings together a number of case citations but can tell us little about the Fourteenth Amendment, except to assure us that "the people who adopted the Fourteenth Amendment [never] understood it to require the States to change the definition of marriage." The quick answer is that they undoubtedly did not understand that it would also require school desegregation in 1955 or the end of miscegenation laws across the country, beginning in California in 1948 and culminating in the *Loving* decision in 1967. Despite a civil war, the end of slavery, and ratification of the Fourteenth Amendment in 1868, extensive litigation has been necessary to achieve even a modicum of constitutional protection from discrimination based on race, and it has occurred primarily by judicial decree, not by the democratic election process to which the majority suggests we should defer regarding discrimination based on sexual orientation.

Moreover, the majority's view of marriage as "a social institution defined by relationships between men and women" is wisely described in the plural. There is not now and never has been a universally accepted definition of marriage. In early Judeo–Christian law and throughout the West in the Middle Ages, marriage was a religious obligation, not a civil status. Historically, it has been pursued primarily as a political or economic arrangement. Even today, polygynous marriages outnumber monogamous ones—the practice is widespread in Africa, Asia, and the Middle East, especially in countries following Islamic law, which also recognizes temporary marriages in some parts of the world. In Asia and the Middle East, many marriages are still arranged and some are even coerced.

Although some of the older statutes regarding marriage cited by the majority do speak of the union of "a man and a woman," the picture hardly ends there. When Justice Alito noted in *Windsor* that the opponents of DOMA were "implicitly ask[ing] us to endorse [a more expansive definition of marriage and] to reject the traditional view," *Windsor,* 133 S.Ct. at 2718 (Alito, J., dissenting), he may have been unfamiliar with all that the "traditional view" entailed, especially for women who were subjected to coverture as a result of Anglo–American common law. Fourteenth Amendment cases decided by the Supreme Court in the years since 1971 that "invalidat[ed] various laws and policies that categorized by sex have been part of a transformation that has altered the very institution at the heart of this case, marriage." *Latta,* 2014 WL 4977682, at *20 (Berzon, J., concurring).

> Historically, marriage was a profoundly unequal institution, one that imposed distinctly different rights and obligations on men and women. The law of coverture, for example, deemed the "the husband and wife ... one person," such that "the very being or legal existence of the woman [was] suspended ... or at least [was] incorporated and consolidated into that of the husband" during the marriage. 1 William Blackstone, Commentaries on the Laws of England 441 (3d rev. ed. 1884). Under the principles of coverture, "a married woman [was] incapable, without her husband's consent, of making contracts ... binding on her or him." *Bradwell v. Illinois,* 83 U.S. 130, 141 (1872) (Bradley, J., concurring). She could not sue or be sued without her husband's consent. *See, e.g.,* Nancy F. Cott, *Public Vows: A History of Marriage and the Nation* 11–12 (2000). Married women also could not serve as the legal guardians of their children. *Frontiero v. Richardson,* 411 U.S. 677, 685 (1973) (plurality op.).
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> ***38** Marriage laws further dictated economically disparate roles for husband and wife. In many respects, the marital contract was primarily understood as an economic arrangement between spouses, whether or not the couple had or would have children. "Coverture expressed the legal essence of marriage as reciprocal: a husband was bound to support his wife, and in exchange she gave over her property and labor." Cott, *Public Vows,* at 54. That is why "married women traditionally were denied the legal capacity to hold or convey property...." *Frontiero,* 411 U.S. at 685. Notably, husbands owed their wives support even if there were no children of the marriage. *See, e.g.,* Hendrik Hartog, *Man and Wife in America: A History* 156 (2000).
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> There was also a significant disparity between the rights of husbands and wives with regard to physical intimacy. At common law, "a woman was the sexual property of her husband; that is, she had a duty to have intercourse with him." John D'Emilio & Estelle B. Freedman, *Intimate Matters: A History of Sexuality in America* 79 (3d ed.2012). Quite literally, a wife was

legally "the possession of her husband, ... [her] husband's property." Hartog, *Man and Wife in America*, at 137. Accordingly, a husband could sue his wife's lover in tort for "entic[ing]" her or "alienat[ing]" her affections and thereby interfering with his property rights in her body and her labor. *Id.* A husband's possessory interest in his wife was undoubtedly also driven by the fact that, historically, marriage was the only legal site for licit sex; sex outside of marriage was almost universally criminalized. *See, e.g.*, Ariela R. Dubler, *Immoral Purposes: Marriage and the Genus of Illicit Sex*, 115 Yale L.J. 756, 763–64 (2006).

Notably, although sex was strongly presumed to be an essential part of marriage, the ability to procreate was generally not. *See, e.g.*, Chester Vernier, American Family Laws: A Comparative Study of the Family Law of the Forty–Eight American States, Alaska, the District of Columbia, and Hawaii (to Jan. 1, 1931) (1931) I § 50, 239–46 (at time of survey, grounds for annulment typically included impotency, as well as incapacity due to minority or "non-age"; lack of understanding and insanity; force or duress; fraud; disease; and incest; but not inability to conceive); II § 68, at 38–39 (1932) (at time of survey, grounds for divorce included "impotence"; vast majority of states "generally held that impotence ... does not mean sterility but must be of such a nature as to render complete sexual intercourse practically impossible"; and only Pennsylvania "ma[d]e sterility a cause" for divorce).

The common law also dictated that it was legally impossible for a man to rape his wife. Men could not be prosecuted for spousal rape. A husband's "incapacity" to rape his wife was justified by the theory that " 'the marriage constitute[d] a blanket consent to sexual intimacy which the woman [could] revoke only by dissolving the marital relationship." ' *See, e.g.*, Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 Calif. L. Rev 1373, 1376 n.9 (2000) (quoting Model Penal Code and Commentaries, § 213.1 cmt. 8(c), at 342 (Official Draft and Revised Comments 1980)).

***39** Concomitantly, dissolving the marital partnership via divorce was exceedingly difficult. Through the mid-twentieth century, divorce could be obtained only on a limited set of grounds, if at all. At the beginning of our nation's history, several states did not permit full divorce except under the narrowest of circumstances; separation alone was the remedy, even if a woman could show "cruelty endangering life or limb." Peter W. Bardaglio, *Reconstructing the Household: Families, Sex, and the Law in the Nineteenth–Century South* 33 (1995); *see also id.* 32–33. In part, this policy dovetailed with the grim fact that, at English common law, and in several states through the beginning of the nineteenth century, "a husband's prerogative to chastise his wife"—that is, to beat her short of permanent injury—was recognized as his marital right. Reva B. Siegel, *''The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 Yale L.J. 2117, 2125 (1996).

Id. at *20–21.

Women were not the only class deprived of equal status in "traditional marriage." Until the end of the Civil War in 1865, slaves were prohibited from contracting legal marriages and often resorted to "jumping the broomstick" to mark a monogamous conjugal relationship. Informal "slave marriage" was the rule until the end of the war, when Freedmen's Bureaus began issuing marriage licenses to former slaves who could establish the existence of long-standing family relationships, despite the fact that family members were sometimes at great distances from one another. The ritual of jumping the broomstick, thought of in this country in terms of slave marriages, actually originated in England, where civil marriages were not available until enactment of the Marriage Act of 1837. Prior to that, the performance of valid marriages was the sole prerogative of the Church of England, unless the participants were Quakers or Jews. The majority's admiration for "traditional marriage" thus seems misplaced, if not naïve. The legal status has been through so many reforms that the marriage of same-sex couples constitutes merely the latest wave in a vast sea of change.

Rational–Basis Review.

The principal thrust of the majority's rational-basis analysis is basically a reiteration of the same tired argument that the proponents of same-sex-marriage bans have raised in litigation across the country: marriage is about the regulation of "procreative urges" of men and women who therefore do not need the "government's encouragement to have sex" but, instead, need encouragement to "create and maintain stable relationships within which children may flourish." The majority contends that exclusion of same-sex couples from marriage must be considered rational based on "the biological reality that couples of the same sex do not have children in the same way as couples of opposite sexes and that couples of the same sex do not run the risk of unintended children." As previously noted, however, this argument is one that an eminent jurist has described as

being "so full of holes that it cannot be taken seriously." *Baskin,* 766 F.3d at 656 (Posner, J.).

***40** At least my colleagues are perceptive enough to acknowledge that "[g]ay couples, no less than straight couples, are capable of sharing such relationships ... [and] are capable of raising stable families." The majority is even persuaded that the "quality of [same-sex] relationships, and the capacity to raise children within them, turns not on sexual orientation but on individual choices and individual commitment." All of which, the majority surmises, "supports the policy argument made by many that marriage laws should be extended to gay couples." But this conclusion begs the question: why reverse the judgments of four federal district courts, in four different states, and in six different cases that would do just that?

There are apparently two answers; first, "let the people decide" and, second, "give it time." The majority posits that "just as [same-sex marriage has been adopted in] nineteen states and the District of Columbia," the change-agents in the Sixth Circuit should be "elected legislators, not life-tenured judges." Of course, this argument fails to acknowledge the impracticalities involved in amending, re-amending, or un-amending a state constitution.[6] More to the point, under our constitutional system, the courts are assigned the responsibility of determining individual rights under the Fourteenth Amendment, regardless of popular opinion or even a plebiscite. As the Supreme Court has noted, "It is plain that the electorate as a whole, whether by referendum or otherwise, could not order [government] action violative of the Equal Protection Clause, and the [government] may not avoid the strictures of that Clause by deferring to the wishes or objections of some fraction of the body politic." *City of Cleburne,* 473 U.S. at 448 (internal citation omitted).

Moreover, as it turns out, legalization of same-sex marriage in the "nineteen states and the District of Columbia" mentioned by the majority was not uniformly the result of popular vote or legislative enactment. Nine states now permit same-sex marriage because of *judicial* decisions, both state and federal: Massachusetts, Connecticut, Iowa, New Mexico, and Colorado (state supreme court decisions); New Jersey (state superior court decision not appealed by defendant); California (federal district court decision allowed to stand in ruling by United States Supreme Court); and Oregon and Pennsylvania (federal district court decisions not appealed by defendants). Despite the majority's insistence that, as life-tenured judges, we should step aside and let the voters determine the future of the state constitutional provisions at issue here, those nine federal and state courts have seen no acceptable reason to do so. In addition, another 16 states have been or soon will be added to the list, by virtue of the Supreme Court's denial of *certiorari* review in *Kitchen*, *Bostick*, and *Baskin*, and the Court's order dissolving the stay in *Latta.* The result has been the issuance of hundreds—perhaps thousands—of marriage licenses in the wake of those orders. Moreover, the 35 states that are now positioned to recognize same-sex marriage are comparable to the 34 states that permitted interracial marriage when the Supreme Court decided *Loving.* If the majority in this case is waiting for a tipping point, it seems to have arrived.

***41** The second contention is that we should "wait and see" what the fallout is in the states where same-sex marriage is now legal. The majority points primarily to Massachusetts, where same-sex couples have had the benefit of marriage for "only" ten years—not enough time, the majority insists, to know what the effect on society will be. But in the absence of hard evidence that the sky has actually fallen in, the "states as laboratories of democracy" metaphor and its pitch for restraint has little or no resonance in the fast-changing scene with regard to same-sex marriage. Yet, whenever the expansion of a constitutional right is proposed, "proceed with caution" seems to be the universal mantra of the opponents. The same argument was made by the State of Virginia in *Loving.* And, in *Frontiero v. Richardson,* 411 U.S. 677 (1973), the government asked the Court to postpone applying heightened scrutiny to allegations of gender discrimination in a statute denying equal benefits to women until the Equal Rights Amendment could be ratified. If the Court had listened to the argument, we would, of course, still be waiting. One is reminded of the admonition in Martin Luther King, Jr.'s "Letter from Birmingham Jail" (1963): "For years now I have heard the word "Wait"! ... [But h]uman progress never rolls in on wheels of inevitability ... [and] time itself becomes an ally of the forces of social stagnation."

Animus

Finally, there is a need to address briefly the subject of unconstitutional animus, which the majority opinion equates only with actual malice and hostility on the part of members of the electorate. But in many instances involving rational-basis review, the Supreme Court has taken a more objective approach to the classification at issue, rather than a subjective one. Under such an analysis, it is not necessary for a court to divine individual malicious intent in order to find unconstitutional animus. Instead, the Supreme Court has instructed that an

exclusionary law violates the Equal Protection Clause when it is based not upon relevant facts, but instead upon only a general, ephemeral distrust of, or discomfort with, a particular group, for example, when legislation is justified by the bare desire to exclude an unpopular group from a social institution or arrangement. In *City of Cleburne*, for example, the Court struck down a zoning regulation that was justified simply by the "negative attitude" of property owners in the community toward individuals with intellectual disabilities, not necessarily by actual malice toward an unpopular minority. In doing so, the Court held that "the City may not avoid the strictures of the [Equal Protection] Clause by deferring to the wishes or objections of some fraction of the body politic," 473 U.S. at 448, and cited *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984), for the proposition that "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." In any event, as the majority here concedes, we as a country have such a long history of prejudice based on sexual orientation that it seems hypocritical to deny the existence of unconstitutional animus in the rational-basis analysis of the cases before us.

***42** To my mind, the soundest description of this analysis is found in Justice Stevens's separate opinion in *City of Cleburne:*

> In every equal protection case, we have to ask certain basic questions. What class is harmed by the legislation, and has it been subjected to a "tradition of disfavor" by our laws? What is the public purpose that is being served by the law? What is the characteristic of the disadvantaged class that justifies the disparate treatment? In most cases the answer to these questions will tell us whether the statute has a "rational basis."

Id. at 453 (Stevens, J., concurring) (footnotes omitted). I would apply just this analysis to the constitutional amendments and statutes at issue in these cases, confident that the result of the inquiry would be to affirm the district courts' decisions in all six cases. I therefore dissent from the majority's decision to overturn those judgments.

Today, my colleagues seem to have fallen prey to the misguided notion that the intent of the framers of the United States Constitution can be effectuated only by cleaving to the legislative will and ignoring and demonizing an independent judiciary. Of course, the framers presciently recognized that two of the three co-equal branches of government were representative in nature and necessarily would be guided by self-interest and the pull of popular opinion. To restrain those natural, human impulses, the framers crafted Article III to ensure that rights, liberties, and duties need not be held hostage by popular whims.

More than 20 years ago, when I took my oath of office to serve as a judge on the United States Court of Appeals for the Sixth Circuit, I solemnly swore to "administer justice without respect to persons," to "do equal right to the poor and to the rich," and to "faithfully and impartially discharge and perform all the duties incumbent upon me ... under the Constitution and laws of the United States." *See* 28 U.S.C. § 453. If we in the judiciary do not have the authority, and indeed the responsibility, to right fundamental wrongs left excused by a majority of the electorate, our whole intricate, constitutional system of checks and balances, as well as the oaths to which we swore, prove to be nothing but shams.

Footnotes

1 *See, e.g., Loving v. Virginia*, 388 U.S. 1, 12 (1967) ("Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival.") (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)). The Supreme Court has described the right to marry as "of fundamental importance for all individuals" and as "part of the fundamental 'right of privacy' implicit in the Fourteenth Amendment's Due Process Clause." *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978).

2 In the district court, the state did not advance an "unintended pregnancy" argument, nor was that claim included in the state's brief on appeal, although counsel did mention it during oral argument. In terms of "optimal environment," the state emphasized the need for children to have "both a mom and a dad," because "men and women are different," and to have a "biological connection to their parents."

3 On October 6, the Supreme Court denied *certiorari* and lifted stays in *Kitchen*, *Bostic*, and *Baskin*, putting into effect the district court injunctions entered in each of those three cases. A stay of the mandate in the Idaho case in *Latta* also has been vacated, and the appeal in the Nevada case is not being pursued. As a result, marriage licenses are currently being issued to same-sex couples

throughout most—if not all—of the Fourth, Seventh, Ninth, and Tenth Circuits.

4 *See Doe v. Ventura*, No. 01–489, 2001 WL 543734 (D. Ct. of Hennepin Cnty. May 15, 2001) (unreported).

5 *See United States v. Windsor*, Brief on the Merits for Respondent the Bipartisan Legal Advisory Group of the U.S. House of Representatives, No. 12–307, 2013 WL 267026 at 16–19, 25–26 (Jan. 22, 2013).

6 In Tennessee, for example, a proposed amendment must first be approved by a simple majority of both houses. In the succeeding legislative session, which can occur as long as a year or more later, the same proposed amendment must then be approved "by two-thirds of all the members elected to each house." Tenn. Const. art. XI, § 3. The proposed amendment is then presented "to the people at the next general election in which a Governor is to be chosen," *id.*, which can occur as long as three years or more later. If a majority of all citizens voting in the gubernatorial election also approve of the proposed amendment, it is considered ratified. The procedure for amending the constitution by convention can take equally long and is, if anything, more complicated. In Michigan, a constitutional convention, one of three methods of amendment, can be called no more often than every 16 years. *See* Mich. Const. art. XII, § 3.