No. 14-3057

In the United States Court of Appeals for the Sixth Circuit

JAMES OBERGEFELL, *ET AL.*,
Plaintiffs-Appellees,

v.

LANCE D. HIMES, INTERIM DIRECTOR OF THE
OHIO DEPARTMENT OF HEALTH,
Defendant-Appellant

.

ON APPEAL FROM U.S. DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF OHIO, CIVIL ACTION
NO. 13-CV-0501, HON. TIMOTHY S. BLACK

BRIEF FOR *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF APPELLANT IN SUPPORT OF REVERSAL

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 14-3057 Case Name: Obergefell v. Himes

Name of counsel: Lawrence J. Joseph

Pursuant to 6th Cir. R. 26.1, Eagle Forum Education & Legal Defense Fund
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No

CERTIFICATE OF SERVICE

I certify that on April 17, 2014 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Lawrence J. Joseph
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This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

LEGISLATIVE HISTORY

RULES AND REGULATIONS

OTHER AUTHORITIES

IDENTITY, INTEREST AND AUTHORITY TO FILE

Amicus curiae Eagle Forum Education & Legal Defense Fund ("EFELDF"), a nonprofit Illinois corporation, submits this *amicus* brief with the accompanying motion for leave to file.[1] Since its founding, EFELDF has consistently defended traditional American values, including traditional marriage, defined as the union of husband and wife. For these reasons and those set forth in the accompanying motion, EFELDF has a direct and vital interest in the issues raised here.

STATEMENT OF THE CASE

Two surviving spouses from out-of-state, same-sex marriages and a funeral director (collectively, "Plaintiffs") seek to invalidate Ohio's definition of marriage as consisting only of the legal union between a man and a woman, OHIO CONST. art. XV, § 11; OHIO REV. CODE ANN. §3101.01 (collectively, "Ohio's Marriage Laws"), as applied to recording same-sex marriage on death certificates. The two same-sex Ohio couples traveled outside Ohio to states that allowed same-sex marriage with the express purpose of circumventing Ohio law; they did not move to those states, much less establish even minimal domicile there. They simply married, then returned to Ohio, seeking to import their same-sex marriages against Ohio's laws. The Director of the Ohio Department of Health (hereinafter, "Ohio")

[1] Pursuant to FED. R. APP. P. 29(c)(5), the undersigned counsel certifies that: counsel for *amicus* authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to this brief's preparation or submission.

defends Ohio law. This Court should make three findings, all of which are compelled by binding Circuit and Supreme Court decisions.

First, this Court should recognize that *Baker v. Nelson*, 409 U.S. 810 (1972), controls the due-process and equal-protection issues presented here. In *Baker*, the Supreme Court faced essentially the same questions presented here: whether the Constitution provides a right to same-sex marriage. The Court answered that question in the negative, dismissing "for want of a substantial federal question," *id.*, a mandatory appeal under former 28 U.S.C. §1257(2) (1988) from *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (Minn. 1971).

Second, this Court should recognize that nothing in *U.S. v. Windsor*, 133 S.Ct. 2675 (2013), changed that result. In *Windsor*, the Supreme Court held that the federal husband-wife definition of marriage, 1 U.S.C. §7, from the Defense of Marriage Act ("DOMA") violates the Constitution. *See* Section II.C, *infra*. In the four-decade interval between *Baker* and *Windsor*, federal appeals courts routinely cited *Baker* to dismiss same-sex-marriage claims. *See, e.g., Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 870-71 (8th Cir. 2006); *Adams v. Howerton*, 673 F.2d 1036, 1042 (9th Cir. 1982). Because *Windsor* recognized the states' near-exclusive state authority in the area of marriage law, nothing in *Windsor* changed the result in *Baker*.

Third, and finally, this Court should resoundingly reject the District Court's

attempt to treat these settled equal-protection and marriage-law issues as somehow new under substantive-due-process theories, Slip Op. at 18, thereby purporting to entitle Plaintiffs to nationwide recognition of relationships created only under novel and atypical state laws. Creating new substantive rights under the Due Process Clause is disfavored.[2] Instead, courts must use "the utmost care … lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the [federal judiciary]." *Glucksberg*, 521 U.S. at 720. In particular, courts must reject efforts to legislate from the bench via the "more generalized notion of substantive due process" when there already is "an explicit textual source of constitutional protection," *Handy-Clay v. City of Memphis*, 695 F.3d 531, 547 (6th Cir. 2012) (internal quotations omitted), which the District Court did here: rule under substantive due process on a Full Faith and Credit claim. This Court should treat the federalism aspect of this case under the Full Faith and Credit

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[2] Recognizing "[t]he tendency of a principle to expand itself to the limit of its logic," *Washington v. Glucksberg*, 521 U.S. 702, 733 n.23 (1997) (interior quotations omitted), the Supreme Court requires federal courts to tread cautiously in expounding substantive due-process rights outside the "fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition." *Id.* at 720-21. Accordingly, to qualify as "fundamental," a right must be both "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty" (*i.e.*, "neither liberty nor justice would exist if [the right] were sacrificed"). *Id.* at 720-21. Even those who fervently believe that same-sex marriage meets the second prong must admit that it cannot meet the first. Leaving aside what the states that ratified the Fourteenth Amendment believed *in the 1860s*, same-sex marriage (which *Baker* easily rejected in 1972) is not "deeply rooted" even *today*.

Clause, which requires dismissal for lack of jurisdiction. *See* Section I.A, *infra.*

In ignoring the Full Faith and Credit Clause in deference to inventing a substantive-due-process rights, the District Court followed the path of one of the most discredited decisions in our history, *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), *abrogated by* U.S. CONST. amend XIII, XIV ("*Dred Scott*"), in which the Supreme Court held that a property right created only by Missouri law was entitled to federal constitutional recognition and protection in every state, regardless of the other states' laws against that form of property.[3]

As Abraham Lincoln recognized, the pro-slavery arguments at the time focused on narrow complaints by the Slave States – very much analogous to the incremental steps here, recognition of a death certificate – but nonetheless sought at bottom to compel Free States to recognize slavery:

> I am also aware they have not, as yet, in terms, demanded the overthrow of our Free-State Constitutions…. [W]hen all these other sayings shall have been silenced, the overthrow of these Constitutions will be demanded, and nothing be left to resist the demand. It is nothing to the contrary, that they do not demand the whole of this just now. Demanding what they do, *and for the reason they do*, they can voluntarily stop nowhere short of this consummation. Holding, as they do, that slavery is morally right, and socially elevating, they cannot cease to

[3] The Second Circuit named *Dred Scott* and another substantive due-process case the two competitors for the title of "most discredited … Supreme Court decision[]."*Image Carrier Corp. v. Beame*, 567 F.2d 1197, 1199 (2d Cir. 1977).

> demand a full national recognition of it, as a legal right, and a social blessing.

Abraham Lincoln, Cooper Union Address (Feb. 27, 1860), *in* 1 ABRAHAM LINCOLN, COMPLETE WORKS, COMPRISING HIS SPEECHES, LETTERS, STATE PAPERS, AND MISCELLANEOUS WRITINGS at 612 (John G. Nicolay & John Hay eds. 1907) (emphasis added). Ironically, DOMA's opponents now rely on the very Civil War Amendments that overturned *Dred Scott* to seek to compel the United States and forty-one other states to recognize the same-sex marriage regimes of a few states.

In any event, Plaintiffs' federalism argument refutes itself. Individual states – here, Maryland and Delaware – cannot impose their experiment in same-sex marriage on all states nationwide. And yet that is precisely what would happen when same-sex couples married in those states move or return to a state that does not recognize their marriage. Under *Dred Scott*, a law that "deprives a citizen of the United States of his [rights] merely because he came himself … into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law." 60 U.S. (19 How.) at 450. If anything, the situation is worse here. Plaintiffs are not married residents of Maryland or Delaware who traveled into Ohio, but Ohioans trying to import another state's laws into their state against its public policy. The state sovereignty inherent in federalism does not allow one state to impose its views on either the Nation as a whole or the several states. This Court must

recognize that states retain their sovereignty when their sister states experiment with new legal arrangements like same-sex marriage.

STATEMENT OF FACTS

Amicus EFELDF adopts the facts as stated in Ohio's opening brief. Ohio Br. at 6-15. Additionally, the relevant facts include legislative facts that Ohioans plausibly may have believed to support rationales on which they plausibly may have acted to favor husband-wife marriage. *See* Section II.B, *infra*. Plaintiffs have not introduced evidence adequate to negative all theoretical connections between husband-wife marriage and responsible procreation and childrearing. *Id.*

SUMMARY OF ARGUMENT

The Full Faith and Credit Clause itself does not provide an enforceable private right or even "federal-question" jurisdiction (Section I.A). When properly viewed as claims under the Full Faith and Credit Clause, Plaintiffs' claims to compel Ohio to recognize their out-of-state same-sex marriages fall outside federal-question jurisdiction and do not qualify as a violation of federal law sufficient to invoke the *Ex parte Young* exception to Ohio's sovereign immunity (Section I.B).

The only federal rights *even arguably* at issue here are those that might arise under the Equal Protection Clause, but they too are illusory because same-sex couples are not similarly situated to opposite-sex couples in their ability to serve as

mother and father to their biological offspring (Section II.A). Ohio's preference for that family arrangement satisfies the rational-basis test because Plaintiffs have not met their burden of producing evidence (which cannot yet and may never exist) to negative any *theoretical* connection between biological mother-father families and parenting and childrearing outcomes (Section II.B). *Windsor* cannot help Plaintiffs because the majority decision held that Congress acted irrationally to impose an across-the-board federal definition over state-created relationships that Congress lacked a basis to reject (Section II.C). Instead, *Baker* controls in this area of traditional, and near-exclusive, state authority (Section II.D).

ARGUMENT

I. PLAINTIFFS LACK RIGHTS ENFORCEABLE AGAINST OHIO IN FEDERAL COURT

To the extent that they assert claims other than the equal-protection right to same-sex marriage generally, Plaintiffs' claims fall outside the jurisdiction of the lower federal courts to redress. Moreover, "while a district court has the discretion to remand a case removed from state court, it may not remand a case that was never removed from state court." *First Nat'l Bank of Pulaski v. Curry*, 301 F.3d 456, 467 (6th Cir. 2002). Accordingly, these claims must be dismissed.

A. Ohio Is Immune from Suit in Federal Court over Ohio's Alleged Violation of the Full Faith and Credit Clause

As Ohio explains, the District Court's novel substantive-due-process right to recognition of out-of-state, same-sex marriages is the Full Faith and Credit Clause

recast as substantive due process. *See* Ohio Br. at 30.[4]; *Handy-Clay*, 695 F.3d at 547. Under the circumstances, this Court should review these claims for what they are: claims that these out-of-state marriages are entitled to Full Faith and Credit. When viewed as such, these claims are jurisdictionally barred.

1. The Full Faith and Credit – If Any – Due to Out-of-State Marriages Does Not Create a Right Enforceable in Federal Court

Under the Full Faith and Credit Clause, Plaintiffs' demand that Ohio recognize their out-of-state marriages does not trigger federal-question jurisdiction or even a right enforceable in the lower federal courts. Instead, their only federal-court review will come if the U.S. Supreme Court reviews their case out of Ohio's

[4] Quite simply, same-sex marriage is not a fundamental right under the Due Process Clause. *Id.* Although husband-wife marriage unquestionably is a fundamental right, *Turner v. Safley*, 482 U.S. 78, 95 (1987) ("decision to marry is a fundamental right"); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) ("Marriage and procreation are fundamental"), the federal Constitution has never required an unrestricted right to marry *anyone*. Instead, the fundamental right recognized by the Supreme Court applies only to marriages between one man and one woman: "Marriage is one of the basic civil rights of man, fundamental to our very existence and survival." *Loving v. Virginia*, 388 U.S. 1, 12 (1967). Unlike opposite-sex marriage, same-sex relationships are not fundamental to the existence and survival of the human race. Indeed, the Supreme Court already has held that same-sex couples have *no right* to marry, much less a fundamental right do so. *Baker*, 409 U.S. at 810; Section II.D, *infra*. Since *Loving* was extant in 1972 when the Supreme Court decided *Baker*, *Loving* obviously does not relate to this litigation. In that respect, nothing has changed materially since 1972.

state courts. *See Adar v. Smith*, 639 F.3d 146, 152-58 (5th Cir. 2011) (*en banc*);[5] *Thompson v. Thompson*, 484 U.S. 174, 183-84, 185-87 (1988). "[T]he Full Faith and Credit Clause, in either its constitutional or statutory incarnations, does not give rise to an implied federal cause of action." *Thompson*, 484 U.S. at 182. In essence, "no federal question arises until a state court fails to give full faith and credit to the law of a sister state." *Adar*, 639 F.3d *Id.* at 154 (*citing Chicago & A.R. Co. v. Wiggins Ferry Co.*, 108 U.S. 18, 23-24 (1883)); *Minnesota v. N. Sec. Co.*, 194 U.S. 48, 72 (1904) ("to invoke the rule which [the Full Faith and Credit Clause] prescribes does not make a case arising under the Constitution or laws of the United States"); *cf. Taveras v. Taveraz*, 477 F.3d 767, 783 (6th Cir. 2007) (issues of comity do not establish federal-question jurisdiction).

In cases like this one, "jurisdictional dismissal for failing to assert a colorable constitutional claim is appropriate for cases brought under the full faith and credit clause 'because the Clause does not create substantive rights but rather provides a rule of decision (*i.e.*, a procedural rule) for state and federal courts.'" *Adar*, 639 F.3d *Id.* at 157 n.7 (*quoting* Lumen N. Mulligan, "A Unified Theory of 28 U.S.C. § 1331 Jurisdiction," 61 VAND. L. REV. 1667, 1706-07 (2008)). Simply put, the District Court's novel analysis of Ohio's failure to recognize out-of-state

[5] *Adar* dismissed a Louisiana same-sex couple's suit to compel Louisiana to amend a Louisiana birth certificate after they adopted the child in New York.

marriages is a controversy that the lower federal courts lack jurisdiction even to consider.

2. DOMA §2 Independently Eliminates Plaintiffs' Rights to Full Faith and Credit for Out-of-State Same-Sex Marriages

As Ohio explains, Congress has authorized states to decline to recognize same-sex marriages from other jurisdictions. 28 U.S.C. §1738C. The Full Faith and Credit Clause gives Congress plenary authority "by general Laws [to] prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and *the Effect thereof.*" U.S. CONST. art. IV, §1 (emphasis added). When Congress exercises plenary authority under constitutional provisions within its jurisdiction, "any action taken by a State within the scope of the congressional authorization is rendered invulnerable to … challenge" under that constitutional provision. *W. & S. Life Ins. Co. v. State Bd. of Equalization,* 451 U.S. 648, 652-53 (1981). Thus, "Congress has plenary authority in all cases in which it has substantive legislative jurisdiction, so long as the exercise of that authority does not offend some other constitutional restriction." *Buckley v. Valeo,* 424 U.S. 1, 132 (1976). Because they have not challenged §1738C, Plaintiffs should lose their arguments based on Full Faith and Credit, even if this Court had jurisdiction to hear those claims.[6]

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[6] As indicated, Congress must act within all relevant "constitutional restrictions," but Plaintiffs do not allege that Congress has failed to do so here. Moreover, *Windsor* did not even discuss whether §1738C violates equal-protection principles. In short, to invalidate §1738C, Plaintiffs would need to succeed on the

B. Sovereign Immunity Bars this Action

Unless a state waived its immunity or Congress abrogated immunity under the Fourteenth Amendment, sovereign immunity bars suits for both damages and injunctive relief. *Alden v. Maine,* 527 U.S. 706, 712-16 (1999). The test for waiver is "a stringent one," and "consent … must be unequivocally expressed." *Sossamon v. Texas*, 131 S.Ct. 1651, 1658 (2011) (interior quotations and citations omitted). Here, "Congress has not abrogated the Eleventh Amendment for state law claims, nor has Ohio waived sovereign immunity." *McCormick v. Miami Univ.*, 693 F.3d 654, 664 (6th Cir. 2012) (citations omitted). Further, the Ohio Attorney General lacks the authority to waive immunity, so Ohio can raise it for the first time on appeal, and this Court can raise it *sua sponte. Mixon v. Ohio,* 193 F.3d 389, 396-97 (6th Cir. 1999). The *Ex parte Young* doctrine requires "an ongoing violation of federal law," *Verizon Md., Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002), which is absent in executive-branch refusals to comply with claims under the Full Faith and Credit Clause not yet reduced to state-court judgments. *See* Section I.A.1, *supra.* Because Ohio's denial of recognition to out-of-state same-sex marriages does not implicate a federal "right" other than the equal-protection issues addressed in Section II, *infra*, this Court must reject claims based on the Full

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equal-protection theory addressed in Section II, *infra*, even if this Court excused Plaintiffs failure to challenge §1738C.

Faith and Credit Clause and federalism.

II. OHIO'S MARRIAGE LAWS SATISFY THE RATIONAL-BASIS TEST

Under the Equal Protection Clause, courts evaluate differential treatment based on sexual orientation under the rational-basis test. *Romer v. Evans*, 517 U.S. 620, 631-32 (1996); Ohio Br. at 37-44 (discussing Sixth Circuit precedent). As explained in this section, Ohio's Marriage Laws readily meet that test, as recognized in *Baker* and not changed by *Windsor*.

A. Plaintiffs Are Not Similarly Situated with Married Opposite-Sex Couples, and Ohio Has No Discriminatory Purpose

The Equal Protection Clause "embodies a general rule that States must treat like cases alike but may treat unlike cases accordingly." *Vacco v. Quill*, 521 U.S. 793, 799 (1997). For a class to raise an equal-protection claim vis-à-vis the government's treatment of a similarly situated class, the two classes must be "in all relevant respects alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). Further, "ordinary equal protection standards" require a plaintiff to "show both that the [challenged action] had a discriminatory effect and that it was motivated by a discriminatory purpose." *Wayte v. U.S.*, 470 U.S. 598, 608 (1985). The required "discriminatory purpose" means "more than intent as volition or intent as aware of consequences. It implies that the decisionmaker ... selected or reaffirmed a course of action at least in part *'because of,'* not merely *'in spite of'* its adverse effects

upon an identifiable group." *Pers. Adm'r v. Feeney*, 442 U.S. 256, 279 (1979) (emphasis added). Plaintiffs cannot either establish that they are similarly situated with opposite-sex married couples or show an impermissibly discriminatory purpose in Ohio's Marriage Laws.

First, same-sex couples and opposite-sex couples are not "similarly situated" with respect to procreation: "an individual's right to equal protection of the laws does not deny … the power to treat different classes of persons in different ways." *Johnson v. Robison*, 415 U.S. 361, 374-75 (1974) (interior quotations omitted, alteration in original). A classification is clearly "reasonable, not arbitrary" if it "rest[s] upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Reed v. Reed*, 404 U.S. 71, 75-76 (1971). Provided that Ohio rationally may prefer married biological parents' raising their children in a family, *see* Section II.B, *infra*, Plaintiffs are not similarly situated with opposite-sex married couples.

Second, any "foreseeable" or even "volitional" impact on the non-favored class does not qualify as a "[d]iscriminatory purpose" if the state lawfully may benefit the favored class. *Feeney*, 442 U.S. at 278-79. Put another way, "where a group possesses distinguishing characteristics relevant to interests the State has the authority to implement, a State's decision to act on the basis of those differences does not give rise to a constitutional violation." *Bd. of Trustees of Univ. of*

Alabama v. Garrett, 531 U.S. 356, 366-67 (2001) (interior quotations omitted). While it may not be Plaintiffs' fault that their union cannot engage in procreation as mother and father, it certainly is not Ohio's fault. Provided that Ohio rationally may prefer married biological parents' raising their children in a family, *see* Section II.B, *infra*, Ohio's Marriage Laws' impact on Plaintiffs or their families does not qualify as a "discriminatory purpose."

Moreover, insofar as Plaintiffs seek to privilege same-sex marriages via the Equal Protection Clause, they necessarily concede that marriage is a valuable benefit that Ohio bestows on couples eligible to marry:

> [W]hen the right invoked is that to equal treatment, the appropriate remedy is a *mandate* of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class

Heckler v. Mathews, 465 U.S. 728, 740 (1984) (emphasis in original, interior quotations omitted). Both as a matter of equal-protection law and of applied economics, making same-sex couples eligible for marriage's benefits lowers the benefits' value, relatively, for those who already enjoy it. Plaintiffs cannot argue that allowing same-sex marriage leaves opposite-sex marriage unaffected.

If Plaintiffs are not similarly situated with opposite-sex married couples and Ohio lacks an impermissible "discriminatory purpose," Plaintiffs cannot state an equal-protection claim on which relief can be granted. As indicated, the question

then becomes whether Ohio has a rational basis for preferring that biological mothers and fathers raise their children.

B. The Rational-Basis Test Is Flexible for Defendants, Demanding for Most Plaintiffs, and Impossible for these Plaintiffs to Satisfy

Assuming *arguendo* that Plaintiffs' complaint states a potential claim under the rational-basis test, Plaintiffs must offer far more evidence than they have – indeed, evidence that will not even exist for *at least* a generation – before they could ever dislodge Ohio's preference that married biological parents raise their children in a family. By contrast, "[Ohio] … has no obligation to produce evidence to sustain the rationality of a statutory classification." *Heller v. Doe,* 509 U.S. 312, 320 (1993). This is, then, a fight that Plaintiffs cannot win.

Specifically, rational-basis plaintiffs must "negative every conceivable basis which might support [the challenged statute]," including those bases on which the state plausibly *may have* acted. *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356, 364 (1973) (internal quotations omitted); *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 462-63 (1988).[7] Further, it is enough that a plausible policy

[7] Because rational-basis review considers any rationales on which the Ohio electorate *plausibly may have acted*, courts cannot reject the procreation-and-childrearing rationale. Similarly unavailing is the straw-man argument that Ohio allows marriage for infertile opposite-sex couples. First, unlike strict scrutiny, rational-basis review does not require narrowly tailoring marriage to legitimate purposes (*e.g.*, procreation or childrearing): "[r]ational basis review … is not a license for courts to judge the wisdom, fairness, or logic of legislative choices," and "[a] statute does not fail rational-basis review because it is not made with

may have guided the decisionmaker and that "the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational." *Nordlinger,* 505 U.S. at 11-12 (citations omitted, emphasis added). Under the rational-basis test, government action need only "further[] a legitimate state interest," which requires only "a plausible policy reason for the classification." *Id.* Moreover, courts give economic and social legislation a presumption of rationality, and "the Equal Protection Clause is offended only if the statute's classification rests on grounds wholly irrelevant to the achievement of the State's objective." *Kadrmas,* 487 U.S. at 462-63 (interior quotations omitted). Ohio's Marriage Laws easily meet this test.

With respect to husband-wife marriage, it is enough, for example, that Ohio "rationally may have … considered [it] to be true" that marriage has benefits for responsible procreation and childrearing. *Nordlinger,* 505 U.S. at 11-12; *Adar,* 639 F.3d at 162; *Lofton,* 358 F.3d at 818-20. Rather than rejecting the nuclear family as the core of a stable society, the District Court (Slip Op. at 41-42) deferred to

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mathematical nicety or because *in practice it results in some inequality.*" *Trihealth, Inc. v. Bd. of Comm'rs,* 430 F.3d 783, 790-91 (6th Cir. 2005) (interior quotations omitted, emphasis added); *Massachusetts Bd. of Retirement v. Murgia,* 427 U.S. 307, 316 (1976). Second, some couples marry with the intent not to have children or with the mistaken belief they are infertile, yet later do have children. Third, by reinforcing the optimal family unit, husband-wife marriage at least reinforces marriage's procreation and childrearing function even when particular marriages are childless.

studies in the very type of courtroom fact-finding that rational-basis test precludes: "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993). Accordingly, Plaintiffs cannot prevail by marshaling "impressive supporting evidence … [on] the probable consequences of the [statute]" vis-à-vis the legislative purpose, but must instead negate "the *theoretical* connection" between the two. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463-64 (1981) (emphasis in original). Although the typical rational-basis plaintiff has a difficult evidentiary burden, Plaintiffs here face an *impossible* burden.

Unfortunately for Plaintiffs, the data simply do not exist to *negative* the procreation and childrearing rationale for traditional husband-wife marriage. And yet those data are Plaintiffs' burden to produce. Nothing that Plaintiffs have produced or could produce undermines the rationality of believing that children raised in a marriage by their biological mother and father may have advantages over children raised under other arrangements:

> Although social theorists ... have proposed alternative child-rearing arrangements, none has proven as enduring as the marital family structure, nor has the accumulated wisdom of several millennia of human experience discovered a superior model.

Lofton v. Sec'y of Dept. of Children & Family Services, 358 F.3d 804, 820 (11th

Cir. 2004) (citations omitted); see also *Windsor*, 133 S.Ct. at 2716 ("no one – including social scientists, philosophers, and historians – can predict with any certainty what the long-term ramifications of widespread acceptance of same-sex marriage will be") (Alito, J., dissenting). Society is *at least* a generation away from the most minimal longitudinal data that could even purport to compare the relative contributions of same-sex versus opposite-sex marriages to the welfare of society. Quite simply, these living arrangements are new, and the few children that have grown up in them cannot present a sufficiently large sample size to provide any basis for meaningful study. Further, the children need to be studied from their own childhood into adulthood and parenthood.

Contrary to the District Court's facile acceptance of social-science studies, Slip Op. at 41-42, therefore, the Ohio electorate was entitled to take a more jaundiced view of academic cherry-picking over an incomplete period to establish anything about same-sex families:

> We must assume, for example, that the legislature might be aware of the critiques of the studies cited by appellants – critiques that have highlighted significant flaws in the studies' methodologies and conclusions, such as the use of small, self-selected samples; reliance on self-report instruments; politically driven hypotheses; and the use of unrepresentative study populations consisting of disproportionately affluent, educated parents.

Lofton, 358 F.3d at 325; accord Loren D. Marks, Same-Sex Parenting and

Children's Outcomes: A Closer Examination of the American Psychological Association's Brief on Lesbian and Gay Parenting, 41 SOC. SCI. RESEARCH 735, 748 (2012) (reviewing significant flaws in 59 studies on same-sex parenting and concluding that generalized claims of no difference were "not empirically warranted"). If Ohio wants more children raised in husband-wife families, Ohio's police power gives her the right to privilege that relationship over all others. Maynard v. Hill, 125 U.S. 190, 205 (1888). While EFELDF respectfully submits that Plaintiffs never will be able to negative the value of traditional husband-wife families for childrearing, Plaintiffs cannot prevail when the data required by their theory of the case do not (and cannot) yet exist.

C. *Windsor* Does Not Support Plaintiffs Here

Because *Windsor* neither follows nor overrules the rational-basis analysis described in Section II.B, *supra*, the impact of that decision here is unclear from the *face* of the majority decision. As explained in this section, *Windsor* can only be read as a holding that the federal government lacked any rational basis to prefer opposite-sex marriage over same-sex marriage, when doing so required the federal government to reject state-authorized same-sex marriages that it lacked any authority to change. Here, by contrast, Ohio has the police power to refuse to recognize out-of-state marriages against Ohio's Marriage Laws and public policy.

As Chief Justice Roberts signaled in his dissent, that deference to the states

as the entities with the authority to define marital relationships in *Windsor* translates to deference to the states when courts are presented with state legislation like Ohio's Marriage Laws. *See Windsor*, 133 S.Ct. at 2697 (Roberts, C.J., dissenting). As shown in this section, nothing in *Windsor* or the Equal Protection Clause requires sovereign states to recognize same-sex marriage.

1. *Windsor* Applied a Truncated Form of Rational-Basis Review to Conclude that DOMA §3's Principal Purpose Was to Demean Same-Sex Marriages

Windsor held that Congress lacked a "legitimate purpose" for DOMA §3's "principal purpose and … necessary effect" that the majority perceived (namely "to demean those persons who are in a lawful same-sex marriage"). *Windsor*, 133 S.Ct. at 2695-96. As the *Windsor* dissents explain, however, the opinion's surface does not reveal what rationale – exactly – led the *Windsor* majority to that holding:

> The sum of all the Court's nonspecific hand-waving is that this law is invalid (maybe on equal-protection grounds, maybe on substantive-due-process grounds, and perhaps with some amorphous federalism component playing a role) because it is motivated by a "'bare … desire to harm'" couples in same-sex marriages.

Id. at 2705 (Scalia, J., dissenting). Reading below the surface, three factors make clear that *Windsor* was decided under equal-protection principles via the rational-basis test, premised on the irrationality perceived by the *Windsor* majority of federal legislation imposing an across-the-board federal definition of "marriage," when states – not the federal government – have the authority to define lawful

marriages within their respective jurisdictions.[8]

First, *Windsor* does not rely on elevated scrutiny of any sort, holding only that DOMA §3 lacks any "legitimate purpose" whatsoever. *Windsor*, 133 S.Ct. at 2696. In equal-protection cases that present thorny merits issues – even issues that might implicate elevated scrutiny if proved – courts sometimes can sidestep the difficult merits questions by rejecting a law's underlying distinctions as wholly arbitrary. For example, as-applied, race-based challenges to *facially neutral* limits on voting or holding office could proceed *facially* against freeholder requirements on the theory that restricting those privileges to freeholders (*i.e.*, property owners) was arbitrary, even without proving that the as-applied, race-based impact constituted racial discrimination. *Turner v. Fouche*, 396 U.S. 346, 362 (1970); *Quinn v. Millsap*, 491 U.S. 95, 103 n.8 (1989). As in *Turner* and *Quinn*, the *Windsor* majority found DOMA §3 void under the rational-basis test, without needing to resort to elevated scrutiny under other theories pressed by the parties.[9]

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[8] Although *Windsor* discusses due process and equal protection, the Fifth Amendment's equal-protection component falls within the Due Process Clause's liberty interest. *Jimenez v. Weinberger*, 417 U.S. 628, 637 (1974). Thus, for federal defendants, equal-protection rights *are* due-process issues. Moreover, assuming *arguendo* that no fundamental rights apply, substantive due process collapses into the same rational-basis analysis used for equal-protection cases. *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1221 (6th Cir. 1992).

[9] Even if *Windsor* applied elevated scrutiny to federal intrusions into state marriage law, that would not compel the conclusion that courts should apply the same level of scrutiny to state laws: "family and family-property law must do

Second, DOMA §3's "discrimination of an unusual character" lacked any perceived legitimate purpose, evidencing the animus that established an equal-protection violation. *Windsor*, 133 S.Ct. at 2693. As such, the majority did not need even to consider the bases – such as responsible parenting and childrearing – proffered by the House interveners or the enacting Congress in defense of DOMA. *See* H.R. Rep. No. 104-664, at 12 (1996), *reprinted at* 1996 U.S.C.C.A.N. 2905, 2916. Typically, a rational basis excuses even discriminatory purposes; in *Windsor*, the majority found only the purpose "to injure the very class New York seeks to protect," based on the perceived "unusual deviation from the usual [federal] tradition of recognizing and accepting state definitions of marriage." *Windsor*, 133 S.Ct. at 2693. Under that unusual posture, *Windsor* did not even need to evaluate the rational bases on which Congress claimed to have acted.

Third, federalism is essential to the *Windsor* holding. Federalism not only defines "the very class … protect[ed]" (*i.e.*, state-approved same-sex marriages),

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major damage to clear and substantial federal interests before the Supremacy Clause will demand that state law will be overridden." *Hillman v. Maretta*, 133 S.Ct. 1943, 1950 (2013) (interior quotations omitted); *see also Windsor*, 133 S.Ct. at 2675 (*citing Hillman*). It is no more unusual for states to have a freer hand in family law (where their interests predominate) than for the federal government to have a freer hand in, say, immigration (where its interests predominate): "states on their own cannot treat aliens differently from citizens without a compelling justification," whereas "the federal government can treat aliens differently from citizens so long as the difference in treatment has a rational basis." *Soskin v. Reinertson*, 353 F.3d 1242, 1254 (10th Cir. 2004).

but also makes the *federal* action unusual. *Id.* Because Ohio's Marriage Laws are entirely "usual" and fall within the "virtually exclusive province of the States." *Id.* at 2691 (interior quotations omitted), *Windsor* has no bearing here.

These three interrelated factors establish that *Windsor* cannot help Plaintiffs here. All three are absent when states regulate marriage under their own sovereign authority.

2. Ohio's Marriage Laws Do Not Disparage or Demean Same-Sex Couples as DOMA §3 Did under *Windsor*

Although the *Windsor* majority found DOMA §3's primary purpose was to demean certain same-sex couples, *id.* at 2693, that holding does not translate to this litigation for the reasons identified in the prior section. Unlike DOMA §3 in *Windsor*, Ohio's Marriage Laws fit within Ohio's authority and is entirely "usual" as an exercise of that authority. Unlike Ohio's Marriage Laws – which govern the marriage-related facts on the ground in Ohio – DOMA §3 did not undo the fact of Ms. Windsor's New York marriage. Thus, unlike the "unusual" *Windsor* case, this "usual" case requires this Court to evaluate the rational bases for adopting Ohio's Marriage Laws, which *Windsor* did not even consider: "cases cannot be read as foreclosing an argument that they never dealt with." *Waters v. Churchill*, 511 U.S. 661, 678 (1994). Only if Ohio's Marriage Laws fail there, *see* Section II.B, *supra*,

can Plaintiffs prevail.[10]

3. Ohio's Concern for *All* Ohio Children in the Aggregate Is Rational and Suffices to Answer the *Windsor* Majority's Concern for Children Raised in Same-Sex Marriages

The *Windsor* majority also considered it relevant that DOMA §3 "humiliates tens of thousands of children now being raised" nationally in state-authorized, same-sex marriages. *Windsor,* 133 S.Ct. at 2694. The question of same-sex marriage affects not only the present (and future) children in same-sex marriages, but also *all future children.* If Ohio and other states with similar marriage laws have permissibly concluded that reserving marriage for opposite-sex couples ensures future children's highest *aggregate* likelihood of optimal upbringings, the *Windsor* concern for thousands of children raised in same-sex marriages cannot trump Ohio's and those states' concern for the best interests of the millions of children for whom the states seek optimized parenting and childrearing outcomes.[11]

Assuming *arguendo* that the *Windsor* opinion's concern for children living

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[10] As Ohio explains, Plaintiffs are simply wrong that Ohio and the states always have accepted out-of-state marriages from other states that violated in-state definitions of marriage and public policy. *See* Ohio Br. at 35, 47.

[11] While any negative impact on children of non-favored relationships is something that a state legislative process may consider in making a legislative judgment, that impact – like the impact on adults in non-favored relationships – is not a judicial concern, *provided that the state law permissibly favors marriage. See* Section II.B, *supra.* Simply put, any "foreseeable" or even "volitional" impact on the non-favored class does not qualify as a "[d]iscriminatory purpose" under the Equal Protection Clause. *Feeney,* 442 U.S. at 278-79.

in homes headed by same-sex couples could qualify as a holding on a childless couple's estate taxation, that holding would go to the arbitrariness of the federal government's rejecting an aspect of state family law that the federal government had no authority to define, reject, or redefine for federal purposes. *See Windsor*, 133 S.Ct. at 2693-94. The same cannot be said of Ohio because legislation – by an entity with near-exclusive authority to legislate in this arena – necessarily involves choosing: "the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one." *Murgia*, 427 U.S. at 314. Assuming that it does not involve either fundamental rights or suspect classes, "[s]uch a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller*, 509 U.S. at 320. Here, Ohio permissibly may have based its classification on optimizing aggregate parenting and childrearing outcomes.[12]

Classifications do not violate Equal Protection simply because they are "not made with mathematical nicety or because in practice it results in some inequality." *Dandridge v. Williams*, 397 U.S. 471, 485 (1970). "Even if the classification involved here is to some extent both underinclusive and overinclusive, and hence the line drawn by [the legislature] imperfect, it is

[12] *Amicus* EFELDF offers this parenting-and-childrearing rationale for opposite-sex marriage to supplement the rationales provided in Ohio's brief. *Amicus* EFELDF concurs with Ohio's analysis of its additional rationales.

nevertheless the rule that in a case like this perfection is by no means required." *Vance v. Bradley*, 440 U.S. 93, 108 (1979) (interior quotations omitted); *Murgia*, 427 U.S. at 315-317 (rational-basis test does not require narrow tailoring). As the entity vested with authority over family relationships, Ohio can make choices to ensure the best aggregate outcomes, without violating the Equal Protection Clause.

D. *Baker* Remains Controlling

As Ohio explains, *Baker* is controlling on whether the federal Constitution includes a right to same-sex marriage. Ohio Br. at 17-24. The *Baker* plaintiffs sought the same rights and benefits that Minnesota conveyed to husband-wife marriage, and the Supreme Court dismissed the case for want of a substantial federal question. *Baker*, 409 U.S. at 810. Although merely a summary decision, "lower courts are bound by summary decisions by [the Supreme] Court until such time as the Court informs them that they are not.'" *Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975) (interior quotations and alterations omitted); *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). *Baker* requires this Court to rule for Ohio here.

Windsor presented an obvious opportunity for the Supreme Court to overrule *Baker*, if the Court believed that *Windsor* applied to state marriage laws. The Court's failure to reject *Baker* speaks volumes and forecloses the conclusion that

Baker is no longer controlling.[13] The District Court makes two mistakes in rejecting *Baker* out of hand. First, with respect to substantive due process, the District Court does not cite *any* doctrinal developments since 1972. *See* note 4, *supra* (marriage already was a fundamental right in 1972 when the Supreme Court summary rejected same-sex marriage as *any* type of federal right). Second, with respect to equal protection, the District Court misreads the impact of *Lawrence v. Texas*, 539 U.S. 558 (2003), *Romer*, and *Windsor* on *Baker*.

With respect to *Lawrence*, criminalizing consensual, private adult behavior in *Lawrence* obviously differs from requiring public and societal recognition in *Baker*. In any event, *Lawrence* expressly disavowed undermining *Baker:*

> The present case … does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.

Lawrence, 539 U.S. at 578. As such, the suggestion that *Lawrence* undermines *Baker* cannot be squared with *Lawrence* itself, much less *Mandel* and *Hicks*.

Similarly, *Romer* held Colorado's Amendment 2 to be unconstitutional for broadly limiting the *political* rights to seek or obtain various forms of government redress that homosexuals theretofore had shared with all citizens under the federal

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[13] The *Baker* jurisdictional statement plainly presented the question whether denying same-sex marriage violated equal-protection and due-process rights that Plaintiffs here assert. *Baker v. Nelson*, No. 71-1027, Jurisdictional Statement at 3 (Oct. Term 1972). Under *Mandel* and *Hicks*, *Baker* necessarily decided that the Constitution does not support those rights.

and state constitutions. *Romer*, 517 U.S. at 632-33. Guaranteeing universal political rights under *Romer* does not undermine allowing husband-wife definitions of marriage under *Baker*. Unlike the targeted and common definition of "marriage" at issue here, the *Romer* law was held to be sufficiently overbroad and unusual to allow the *Romer* majority to infer animus. *Romer*, 517 U.S. at 633. Ohio's Marriage Laws do not present that situation.

Finally, in *Windsor*, the Supreme Court rejected what the majority perceived as an overbroad federal intrusion into an area of state dominance, with the resulting "discrimination" so unusual as to provide evidence of animus as the law's principal purpose. 133 S.Ct. at 2693-95. By contrast, here Ohio acts within that primary area of dominance to enact a law that is hardly unusual. Indeed, as the Chief Justice explained, that state "power will come into play on the other side of the board in future cases about the constitutionality of state marriage definitions." *Id.* at 2697 (Roberts, C.J., dissenting). Because none of the features relevant to the *Windsor* majority apply here, *see* Section II.C, *supra*, *Windsor* does not undermine *Baker*.[14]

In summary, *Lawrence*, *Romer*, and *Windsor* did not undermine *Baker*. As

[14] Justice Scalia's *Windsor* dissent on the ease of transferring the *Windsor* reasoning on DOMA to states' same-sex marriage laws did not (and, as a dissent, could not) invite lower courts to do that, contrary to otherwise-controlling precedent and *Windsor* itself. Justice Scalia was clearly speaking to the *Supreme Court's* "sense of what it can get away with," not what lower courts can get away with. *Windsor*, 133 S.Ct. at 2709 (Scalia, J., dissenting). Lower courts lack the required legal flexibility.

such, *Baker* remains binding precedent that the District Court and this Court have an obligation to follow.

CONCLUSION

For judgment for Plaintiffs must be reversed.

Dated: April 17, 2014

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CERTIFICATE OF COMPLIANCE

1. The foregoing complies with FED. R. APP. P. 32(a)(7)(B)'s type-volume limitation because the brief contains 6,999 words excluding the parts of the brief that FED. R. APP. P. 32(a)(7)(B)(iii) exempts.

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CERTIFICATE OF SERVICE

I hereby certify that on April 17, 2014, I electronically submitted the foregoing brief (together with the accompanying motion for leave to file the brief) to the Clerk for filing and transmittal of a Notice of Electronic Filing to the participants in this appeal who are registered CM/ECF users.

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