Case No. 14-3057

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES OBERGEFELL *ET AL*.
Plaintiffs – Appellees

v.

LANCE D. HIMES, In his official capacity as the Interim Director of the Ohio Department of Health
Defendant – Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF OHIO (WESTERN DIVISION CINCINNATI)
CIVIL CASE NO. 1:13-CV-00501

BRIEF OF PLAINTIFFS-APPELLEES

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to Sixth Circuit Rule 26.1, Plaintiffs-Appellees offer the following disclosures:

Plaintiffs-Appellees James Obergefell, John Arthur, David Brian Michener, nor Robert Grunn are a subsidiary or affiliate of a publicly owned corporation.

No publicly traded corporation has a financial interest in the outcome of this appeal.

/s/ Alphonse A. Gerhardstein
Attorney for Plaintiffs-Appellees
Date: April 24, 2014

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STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs-Appellees respectfully ask the Court to hear oral argument. This case concerns issues of substantial importance. The District Court properly struck down Ohio's statutory and Constitutional bans on recognizing marriages between same-sex couples performed in other jurisdictions ("marriage recognition bans") as applied to death certificates. The constitutional issues raised in this case are not only critically important to the Plaintiff widowers and funeral director, but have implications for the resolution of outstanding questions about the scope of due process and equal protection for married same-sex couples. These important issues deserve oral argument, and argument will aid the Court's consideration of the case.

INTRODUCTION

This case is about love surviving death. The love at issue is that shared between two spouses for years and then in the moments leading up to and following one of their deaths. James Obergefell and David Michener, two widowers, seek nothing more than to have their marriages recognized on the death certificates of their now-deceased spouses. Solely because David and James were married to men, rather than women, Ohio refuses to document that their deceased spouses were married and also refuses to name these Plaintiffs as "surviving spouses" on their spouses' death certificates. While this case implicates the most profound and important of relationships, as the District Court rightly noted, "[it] is not a complicated case." Temp. Restraining Order, RE13, Page ID#91.

In a decision that "flows from the [*United States v.*] *Windsor* decision of the United States Supreme Court," the District Court appropriately declared that Ohio's refusal to respect the Plaintiffs' marriages in the context of death certificates violates the federal Constitution. Final Order, RE65, Page ID#1045. Just as the Defense of Marriage Act ("DOMA") violated the Constitution because it required the federal government to disrespect the marriages of same-sex couples that were celebrated under the laws of a state, *United States v. Windsor*, 133 S. Ct. 2675 (2013), Ohio's marriage recognition bans are also unconstitutional.

The District Court's decision is just one of ten federal court decisions finding all or part of a state's marriage ban unconstitutional in the past year.[1] But this case presents a narrower issue than others, and one that most closely mirrors the precise questions before the Court in *Windsor*: Does Ohio's ban on recognition of the out-of-state marriages of same-sex couples violate the Constitution as applied to Ohio death certificates?

Like Section 3 of DOMA, Ohio's marriage recognition bans unjustifiably infringe upon Plaintiffs' constitutionally protected liberty interest in their existing marriages and therefore constitute "a deprivation of the liberty of the person" protected by due process. *Id*. at 2695. And if the fundamental right to marry is to retain its meaning in this time of great mobility, it must also include the right to remain married when crossing state lines.

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[1] *Henry v. Himes*, No. 14-129, 2014 WL 1418395 (S.D. Ohio April 14, 2014); *DeBoer v. Snyder*, No. 12-10285, 2014 WL 1100794 (E.D. Mich. Mar. 21, 2014), *appeal docketed*, No. 14-1341 (6th Cir. Mar. 21, 2014); *Tanco v. Haslam*, No. 13-1159, 2014 WL 997525 (M.D. Tenn. Mar 14, 2014) (preliminary injunction), *appeal docketed*, No. 14-5297 (6th Cir. Mar. 19, 2014); *De Leon v. Perry*, No. 13-982, 2014 WL 715741 (W.D. Tex. Feb. 26, 2014) (preliminary injunction); *Lee v. Orr*, No. 13-1879, 2014 WL 683680 (N.D. Ill. Feb. 21, 2014); *Bostic v. Rainey*, No. 13-395, 2014 WL 561978, at *23 (E.D. Va. Feb. 13, 2014), *appeal docketed*, Nos. 14-1167(L), 14-1169, 14-1173 (4th Cir. Feb. 25, 2014); *Bourke v. Beshear*, No. 13-750, 2014 WL 556729 (W.D. Ky. Feb 12, 2014), *appeal docketed*, No. 14-5291 (6th Cir. Mar. 19, 2014); *Bishop v. U.S. ex rel. Holder*, 962 F. Supp. 2d 1252 (N.D. Okla. 2014), *appeal docketed*, Nos. 14-5003, 14-5006 (10th Cir. Jan. 17, 2014); *Kitchen v. Herbert*, 961 F. Supp. 2d 1181 (D. Utah 2013), *appeal docketed*, 13-4178 (10th Cir. Dec. 20, 2013).

The Constitution also ensures the equal treatment of all people, including lesbians and gay men, and courts should be suspicious when the government draws distinctions among citizens based on a factor like sexual orientation, which does not reflect a person's ability to contribute to society and burdens a class of people who have suffered a history of invidious discrimination. Though "times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress,…persons in every generation can invoke [the Constitution's] principles in their own search for greater freedom." *Lawrence v. Texas*, 539 U.S. 558, 579 (2003). By affirming the District Court's order, this Court will be extending to the Plaintiffs the respect and dignity owed their marriages.

STATEMENT OF JURISDICTION

The District Court possessed jurisdiction under 28 U.S.C. § 1331 because Plaintiffs' claims arose under the Constitution and laws of the United States. This Court has appellate jurisdiction under 28 U.S.C. § 1291 because the District Court judgment granting Plaintiffs' motion for a declaratory judgment and permanent injunction is a final order. Defendant filed a timely notice of appeal.

STATEMENT OF THE ISSUES FOR REVIEW

1. Do Ohio's marriage recognition bans as applied to the recognition of out-of-state marriages when recording marital status on Ohio death certificates

violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution?

2. Does a licensed funeral director who has a legal duty to prepare death certificates have standing to challenge Ohio's marriage recognition bans as applied to the recognition of out-of-state marriages of same-sex couples when recording their marital status on Ohio death certificates?

STATEMENT OF THE CASE

Ohio's Marriage Recognition Bans

Ohio's legislative and constitutional bans on marriage for same-sex couples and on the recognition in Ohio of the marriages of same-sex couples performed in other jurisdictions were passed in 2004 amidst a wave of similar legislative and constitutional activity. Those measures—in Ohio and across the country—were responses, in part, to the 2003 ruling by the Massachusetts Supreme Judicial Court that Massachusetts could not exclude same-sex couples from marriage. *See Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003). Ohio went further than many states by also banning civil unions and domestic partnerships—thus stripping from same-sex couples the possibility of any legal recognition of their relationships in Ohio.

In 2004, the Ohio legislature amended Revised Code Section 3101 to prohibit marriages between same-sex couples under Ohio law and to prohibit the recognition of such marriages performed in other jurisdictions. Final Order, RE65, Page ID#1046; Ohio Rev. Code Ann. § 3101.01(C). Through this law, legislators wanted to ensure that relationships between same-sex couples would not have "all the bells and whistles" of marriage or appear as "equal to everyone else's" relationships. Final Order, RE65, Page ID#1048.

Also in 2004, a group called Citizens for Community Values (CCV) secured a spot on the November ballot for Issue 1, which sought to amend the Ohio Constitution to exclude same-sex couples from marriage. Like the legislative action that year, Issue 1 not only barred same-sex couples from marriage but also prohibited the formation or recognition of other relationship protections for same-sex couples. Ohio Const. art. XV, § 11.

CCV's campaign in support of Issue 1 relied on negative and inaccurate representations of gay and lesbian people. The Amendment's promotional materials proclaimed that "homosexual identity" is "based exclusively on sexual behavior, referring to oral and/or anal sodomy." Becker Report, RE41-6, Page ID#301. Supporters of the Amendment falsely claimed that "marriage equality advocates sought to eliminate age requirements for marriage, advocated polygamy, and sought elimination of kinship limitations so that incestuous marriages could

occur." Final Order, RE65, Page ID#1048. CCV also warned Ohio employers that "[s]exual relationships between members of the same sex expose gays, lesbians and bisexuals to extreme risks of sexually transmitted diseases, physical injuries, mental disorders and even a shortened life span." *Id*. Amidst this campaign of fear and misrepresentation, the Amendment passed by 62% of Ohio voters. Appellant Br. 2.

The Plaintiffs and the Preliminary Rulings

James Obergefell and John Arthur, both born and raised in Ohio, met in 1992 and lived in a loving and committed relationship for 22 years until John's death on October 22, 2013. Final Order, RE65, Page ID#1049. In 2011, John was diagnosed with amyotrophic lateral sclerosis (ALS), a condition for which there is no cure. Obergefell Decl., RE3-1, Page ID#29.

After the United States Supreme Court struck down the federal Defense of Marriage Act (DOMA) in *Windsor*, James and John decided to marry because the decision "partially opened the door to equality." *Id*. At the time, John was confined to his bed and the couple knew that they did not have much time left. John's physical condition made it difficult to travel to a state where they would have the freedom to marry. *Id*. #29-30. With the support of family and friends, on July 11, 2013, the couple boarded a medically equipped plane and traveled to

Maryland, a state that permits same-sex couples to marry. Final Order, RE65, Page ID#1049. Because of John's fragile health, they could not leave the plane and were married inside the plane on the tarmac. Obergefell Decl., RE3-1, Page ID#30. The entire Cincinnati Community shared in their joy. The Mayor of Cincinnati proclaimed July 11, 2013 "John Arthur and Jim Obergefell Day." Proclamation, RE10-1, Page ID#68.

Though their marriage was lawful in Maryland, when they returned to Ohio, they learned that their marriage would not be recognized for any purpose under Ohio law. Obergefell Decl., RE3-1, Page ID#30. Before he died, John spoke of the importance of his death certificate:

> I am married to James Obergefell. I love him and want our last days together to be a celebration of our love. How can we celebrate when Ohio law requires that my death certificate say I am not married and that I have no surviving spouse?

Arthur Decl., RE3-2, Page ID#33.

Knowing that John would soon die, and having just learned that the surviving spouse is routinely listed on Ohio death certificates, James and John filed a complaint against the Director of the Ohio Department of Health and the Cincinnati Vital Records Registrar, asserting that Ohio's refusal to respect their marriage in the context of death certificates violates the federal constitution. At the TRO hearing and throughout this litigation the City of Cincinnati declined to

defend the Ohio marriage recognition bans. Transcript of TRO Hrg., RE78-1, Page ID#1416-17.

On July 22, 2013, the District Court entered a temporary restraining order enjoining the enforcement of the State's marriage recognition bans as applied to the eventual issuance of John's death certificate. In accordance with that Order, after John died in October, his death certificate reflected that he was married and that James is his surviving spouse. Notice of Death, RE51, Page ID#752; Notice of Compliance, RE52, Page ID#754.

Should this court overturn the permanent injunction entered below, the State will amend the death certificate in the future to remove the reference to the couple's marriage and the name of James as John's surviving spouse. Appellant Br. 54; O.R.C. § 3705.22 (West). James seeks to make permanent this recognition on John's death certificate for the economic benefits and for the dignity it bestows on their marriage. As James explained before John's death,

> [T]his is about more than money or benefits. John will die soon. I love him deeply; more than any other person on earth. I want the world to know that we share the highest commitment two people can make to each other in our society. I recently reviewed a blank death certificate. When John dies he should be listed as married on that document and I should be listed as his surviving spouse. This is the last official record of his life. It breaks my heart to think that this record would omit the most important fact of his life – our marriage.

Obergefell Decl., RE3-1, Page ID#30.

Plaintiff David Michener and his late spouse, William Herbert Ives, both of Cincinnati, were in a loving and committed relationship for eighteen years. Final Order, RE65, Page ID#1050. They were the parents of three children who they were raising together in Ohio. *Id.* On July 22, 2013, David and William were married in Delaware, where same-sex couples have the freedom to marry. *Id.* Shortly after their marriage, on August 27, 2013, William died unexpectedly of natural causes. *Id.* David sought a death certificate that accurately reflected his marriage to William in order to move forward with the family's grieving and cremation. *Id.* The District Court entered a temporary restraining order granting such relief on September 3, 2013. *Id.*

Plaintiff Robert Grunn has been a licensed funeral director in the state of Ohio for over 22 years. Grunn Decl., RE34-1, Page ID #221. As a gay man, Mr. Grunn, is well-known within the gay and lesbian community and caters his funeral services to gay and lesbian individuals and families. Final Order, RE65, Page ID#1050.

One of Mr. Grunn's key responsibilities as a funeral director is to fill out death certificates, including the portion of the certificate indicating the deceased's marital status and the name of any surviving spouse. *Id.* These death certificates are then required for burial, cremation, insurance and other purposes following death. Grunn Decl., RE34-1, Page ID#222. Mr. Grunn has many married gay and

lesbian clients, including James and John, who utilized his services when John died. Final Order, RE65, Page ID#1050-51. Mr. Grunn is certain he will continue to face the issue of how to fill out death certificates for married same-sex couples in the future. *Id*. Because of the District Court's Order, Mr. Grunn was able to list John as married and list James as his surviving spouse on John's death certificate. He intends to properly record the marriages of married lesbian and gay decedents in the future but fears that by doing so he may be prosecuted for purposely making a "false statement" on a death certificate. *Id*.

The Declaratory Judgment and Permanent Injunction

After the temporary restraining orders were entered in July and September of 2013, the State agreed to abide by their terms until a hearing on Plaintiffs' motion for a permanent injunction could be heard. RE13, Page ID#106; RE23, Page ID#135. After full briefing and argument in December 2013, the District Court issued a declaratory judgment and permanently enjoined the enforcement of Ohio's marriage recognition bans in the context of the death certificates for Ohioans with lawful marriages to a spouse of the same sex. The District Court held that "the right to remain married … is a fundamental liberty interest appropriately protected by the Due Process Clause of the United States Constitution … [and] Ohio's marriage recognition bans violate this fundamental right without rational

justification." Final Order, RE65, Page ID#1054. The Court rejected the State's "vague, speculative, and unsubstantiated" justifications and held that such alleged interests "do not rise anywhere near the level necessary to counterbalance the specific, quantifiable, and particularized injuries" suffered by the Plaintiffs. *Id*. #1059.

The District Court also held that Ohio's marriage recognition bans discriminate on the basis of sexual orientation and therefore warrant heightened equal protection scrutiny. However, the District Court concluded that it need not analyze whether the State could meet that heightened burden because the laws failed even rational-basis review under the Equal Protection Clause.

The Court ruled that the State's proffered interests in preserving "tradition" and proceeding with "caution" were not legitimate. *Id*. #1082-84. The Court also rejected the justifications raised by CCV as *amicus* about the welfare of children, concluding:

> Even if it were rational for legislators to speculate that children raised by heterosexual couples are better off than children raised by gay or lesbian couples, which it is not, there is simply no rational connection between the Ohio marriage recognition bans and the asserted goal… The only effect the bans have on children's well-being is harming the children of same-sex couples who are denied the protection and stability of having parents who are legally married.

Id. #1083-84.

The Director of the Ohio Department of Health filed a timely notice of appeal of the final judgment. The Cincinnati Registrar did not appeal.

SUMMARY OF THE ARGUMENT

Ohio's marriage recognition bans subject the Plaintiffs to significant hardship. By departing from its long-standing tradition of recognizing marriages lawfully performed in other jurisdictions, whether or not such marriages could be performed in Ohio, the State treats the Plaintiffs and their deceased spouses as strangers, rather than families, demeans their deepest relationships, and stigmatizes their children by labeling their families as second class. *See Windsor*, 133 S. Ct. at 2694. The Court need not look any further than *Windsor* to conclude that Ohio's marriage recognition bans, as applied to death certificates, violate the most basic principles of due process and equal protection. *Id*. at 2693-94.

While Ohio's bans fail under *all* levels of constitutional review, heightened scrutiny is warranted here for several reasons. Like Section 3 of DOMA, the bans constitute discrimination of an "unusual character" requiring "careful consideration" by the Court. *Id.* at 2692. Under both the Due Process and Equal Protection Clauses, the bans trigger heightened scrutiny because they infringe upon the protected liberty interests in Plaintiffs' existing marital relationships and burden the widowers' fundamental right to marry, which encompasses the right to remain married.

The marriage recognition bans also trigger heightened scrutiny under the Equal Protection Clause because they discriminate based on sexual orientation. The District Court properly held that sexual-orientation classifications are subject to heightened scrutiny. This Court's previous decisions applying rational-basis review to such classifications either were *dicta* or directly relied on *Bowers v. Hardwick*, 478 U.S. 186 (1986), which was repudiated in *Lawrence*, 539 U.S. 558. Now that *Bowers* has been overruled, this Court's decisions in *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati* ("*Equality Foundation II*"), 128 F.3d 289, 292-93 (6th Cir. 1997) and its progeny are irreconcilable with controlling Supreme Court precedent and the Court must analyze the traditional factors examined by the Supreme Court to determine whether sexual-orientation classifications warrant heightened scrutiny. Under faithful application of those factors, government discrimination based on sexual orientation should not be presumed constitutional. Finally, heightened scrutiny is warranted because the marriage recognition bans discriminate based on sex.

Although heightened scrutiny is required, Ohio's marriage recognition bans are unconstitutional under any standard of review. The same justifications offered for Ohio's marriage recognition bans here – tradition, deference to the democratic process, uniformity – were offered in support of DOMA in *Windsor* and were necessarily rejected by the Supreme Court. Tradition, standing alone, is not an

independent and legitimate purpose that can justify disparate treatment. Caution with respect to social change cannot justify discrimination against minority groups and has been routinely rejected by courts as a rational basis for unequal treatment. The State's alleged interest in creating uniform rules is belied by the fact that Ohio has abandoned its previously uniform rule of respecting out-of-state marriages just in the context of marriages of same-sex couples.

Finally, none of the arguments raised solely by the *amici* justify the marriage recognition bans. The bans cannot be justified by an interest in channeling potentially procreative "man-woman" couples into more stable relationships as Ohio refuses to recognize the marriages of same-sex couples even when they procreate and recognizes marriages between different-sex couples regardless of whether they are able or willing to procreate. Additionally, recognizing the marriages of same-sex couples will not alter the incentives for different-sex couples to marry before they have children. The marriage recognition bans also cannot be justified by an asserted interest in optimal parenting because, even if the Court were to accept the scientifically unsupportable view that same-sex couples are less "optimal" parents than heterosexual ones, the marriage recognition bans do not prevent same-sex couples from having children. Instead, they needlessly stigmatize those children and deprive them of the protections of having two married parents.

The lack of any rational connection between Ohio's marriage recognition bans and a legitimate state interest is fatal to the State's defense of the bans and reinforces the inevitable conclusion that the primary purpose and practical effect of the bans is to impose "a disadvantage, a separate status, and so a stigma upon" same-sex couples in the eyes of the State and the broader community. *Windsor*, 133 S. Ct. at 2693.

ARGUMENT

I. OHIO'S MARRIAGE RECOGNITION BANS ARE UNCONSTITUTIONAL UNDER *WINDSOR*.

This case is on "all fours" with *Windsor*. After Edith Windsor's spouse Thea Spyer died, the federal government was required by DOMA not to respect her marriage for federal estate tax purposes. Windsor paid the tax but challenged DOMA's constitutionality. The Supreme Court held that the federal government's refusal to recognize the legal marriages of same-sex couples violated due process and equal protection because it burdened "many aspects of married and family life, from the mundane to the profound," 133 S. Ct. at 2694, and because its "avowed purpose and practical effect" were to treat those couples unequally, rather than to further a legitimate purpose. *Id*. at 2693. Ohio's marriage recognition bans similarly tell Plaintiffs that their marriages are "less worthy than the marriages of others." *Id*. at 2696. By "displac[ing] th[e] protection [of marriage] and treating those persons as living in marriages less respected than others," Ohio's marriage

recognition bans similarly violate basic principles of due process and equal protection. *Id*.

A. The Marriage Recognition Bans Constitute "Discrimination[] of an Unusual Character" Requiring "Careful Consideration" by the Court.

In *Windsor*, the Supreme Court reaffirmed that "[d]iscriminations of an unusual character" require "careful consideration to determine whether they are obnoxious to the constitutional provision" at issue. *Windsor*, 133 S. Ct. at 2692 (internal quotation marks omitted). The unusual discrimination that triggered "careful consideration" in *Windsor* was DOMA's "depart[ure] from [Congress's] history and tradition of reliance on state law to define marriage." *Id*. at 2692. But "careful consideration" is not limited to cases involving federalism concerns. For example, in *Romer v. Evans*, 517 U.S. 620, 633 (1996), the Supreme Court held that Colorado's ban on nondiscrimination protections for gay people required "careful consideration" because such a "disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence."

As the District Court held, Ohio's marriage recognition bans dramatically depart from Ohio's longstanding practice of recognizing legal marriages from other jurisdictions even when those marriages would not have been legal under Ohio law. Temp. Restraining Order, RE13, Page ID#99. Ohio recognizes out-of-

state marriages between first cousins and minors even though it is illegal for first cousins to marry in Ohio. *Mazzolini v. Mazzolini*, 155 N.E.2d 206 (1958) (first cousins); *Peefer v. State*, 182 N.E. 117 (Ohio Ct. App. 1931) (minors). The fact that a marriage was entered into specifically in an effort to evade Ohio law has not affected the general rule of recognizing marriages that were valid where celebrated even if such marriages could not be lawfully contracted in Ohio. Grossman Rep., RE44-1, Page ID#338. *See also Peefer*, 182 N.E. 117; *Hardin v. Davis*, 16 Ohio Supp. 19 (Ohio Ct. C.P. Hamilton Cnty. 1945). Ohio's marriage recognition bans carve out an exception from that longstanding practice by denying recognition of lawful marriages from other jurisdictions if those marriages involve two persons of the same sex.[2]

Ohio's departure from its longstanding practice of recognizing marriages from other jurisdictions warrants "careful consideration" for the same reason that DOMA's departure from Congress's longstanding practice of following states' definition of marriages warranted "careful consideration" in *Windsor*. In both cases, the refusal to recognize the legal marriages of same-sex couples while recognizing all other legal marriages from other jurisdictions "singles out a class of

[2] The State unconvincingly argues that *In re Stiles Estate*, 59 Ohio St.2d 73 (Ohio 1979) undercuts this argument. But in that case the court voided an in-state marriage and had no occasion to consider the application of marriage recognition rules.

persons deemed by a State entitled to recognition and protection to enhance their own liberty" and "seek[s] to displace this protection" and relegate those persons to a second tier status. *Windsor*, 133 S. Ct. at 2695-96. As in *Windsor*, that dramatic departure is a "discrimination[] of an unusual character" that requires "careful consideration" before it can be upheld as constitutional.[3]

B. The Primary Purpose and Practical Effect of Ohio's Marriage Recognition Bans is to Disparage and Demean Same-Sex Couples and Their Families.

The record surrounding the passage of Ohio's marriage recognition bans, as well as the lack of any rational basis for the bans (see Point V, below) leads to the inescapable conclusion that, just as was true for DOMA, the marriage recognition bans were passed because of, not in spite of, the harm they would inflict on same-sex couples. *Windsor*, 133 S. Ct. at 2694 ("The principal purpose [of DOMA] is to impose inequality …"). This Court has also held that "the desire to effectuate … animus against homosexuals can never be a legitimate governmental purpose, [and] a state action based on that animus alone violates the Equal Protection Clause." *Stemler v. City of Florence*, 126 F.3d 856, 873-74 (6th Cir.1997).

[3] As discussed *infra*, the Ninth Circuit in *SmithKline Beecham Corp. v. Abbott Labs*, 740 F.3d 471 (9th Cir. 2014), interpreted *Windsor* to require careful consideration as part of heightened scrutiny for all sexual-orientation classifications. Regardless of whether *Windsor* applied careful consideration because DOMA was unusual or because it classified based on sexual orientation, Ohio's marriage recognition bans require careful consideration in this case under either interpretation of *Windsor*.

The historical background of the marriage recognition bans reflects a targeted attempt to exclude same-sex couples, not a mere side-effect of some broader public policy. *Cf. Windsor*, 133 S. Ct. at 2693 (examining historical context of DOMA). The marriage recognition bans were not enacted long ago at a time when "many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage." *Windsor*, 133 S. Ct. at 2689. They were enacted as specific responses to developments in other jurisdictions where same-sex couples sought the freedom to marry. "Actions neutral at their inception may, of course, be perpetuated or maintained for discriminatory purposes, and that perpetuation or maintenance itself may be found a constitutional violation." *Taylor v. Ouachita Parish Sch. Bd.*, 648 F.2d 959, 966 (5th Cir. 1981). The Equal Protection Clause is violated when government has "selected *or reaffirmed* a particular course of action" because of its negative effects on an identifiable group. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (emphasis added)).

Moreover, the "sheer breadth" of Ohio's marriage recognition bans "is so discontinuous with the reasons offered for it that" the exclusion of same-sex couples is "inexplicable by anything but animus toward the class it affects." *Romer*, 517 U.S. at 632. Ohio's marriage recognition bans did much more than simply preserve the traditional definition of marriage. They included sweeping

new disabilities that prohibited same-sex couples from entering into any other legal relationship similar to marriage. Ohio Rev. Code § 3101.01; Ohio Con. Art. XV, § 11. Though at the time Ohio law clearly limited marriage to opposite-sex couples, the legislature and electorate acted anyway to pass the bans.

Finally, the inescapable "practical effect" of Ohio's marriage recognition bans is "to impose a disadvantage, a separate status, and so a stigma upon" same-sex couples. *Windsor*, 133 S. Ct at 2693. The marriage recognition bans collectively "diminish[] the stability and predictability of basic personal relations" of gay people and "demean[] the couple, whose moral and sexual choices the Constitution protects." *Id*. at 2694. That official statement of inequality "in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres." *Lawrence*, 539 U.S. at 575. But "[a] State cannot so deem a class of persons a stranger to its laws." *Romer*, 517 U.S. at 635.

Even if it were possible to hypothesize a rational connection between Ohio's marriage recognition bans and some legitimate governmental interest—and there is none, see Point V, below—no hypothetical justification can overcome the unmistakable primary purpose and practical effect of the marriage recognition bans to disparage and demean the dignity of same-sex couples in the eyes of the State and the wider community.

C. The State Regulation of Marriage is Subject to Constitutional Limits and the Central Holding of *Windsor* Applies Here.

The State's attempts to minimize *Windsor*'s impact are unavailing. While States do have considerable freedom to define marriage, the *Windsor* Court repeatedly noted that those laws are subject to constitutional limits and "must respect the constitutional rights of persons." *Windsor*, 133 S. Ct. at 2691 (*citing Loving v. Virginia*, 388 U.S. 1 (1967)). Indeed, as Justice Scalia noted in dissent, the *Windsor* majority "formally disclaimed reliance upon principles of federalism." *Id.* at 2705 (Scalia, J., dissenting). Respect for federalism does not come at the cost of sacrificing the constitutional rights of individuals. *Cf. Loving*, 388 U.S. at 12 ("Under our Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State."). Ohio's broad authority over domestic relations law does not include the power to infringe upon Plaintiffs' federal constitutional rights.

Windsor's central holding means that the marriages of same-sex couples share "equal dignity" with other couples' marriages. 133 S.Ct. at 2393. And like Section 3 of DOMA, Ohio's marriage recognition bans "interfere with the equal dignity" of Plaintiffs' marriages, and "place[] same-sex couples in an unstable position of being in a second-tier marriage," "demean[ing] the couple[s]," and "humiliat[ing] … children now being raised by same-sex couples." *Id.* at 2693-94. By erasing the protections of marriage for the Plaintiff widowers and their children and demeaning their marital relationships, Ohio does precisely what the

federal government did with Section 3 of DOMA and what the *Windsor* Court found unconstitutional. As Justice Scalia presciently predicted, the "state law shoe [has] dropped," and Ohio's marriage recognition bans simply cannot survive constitutional review after *Windsor*. *Id.* at 2705, 2709 (Scalia, J., dissenting).

II. OHIO'S MARRIAGE RECOGNITION BANS ARE SUBJECT TO HEIGHTENED SCRUTINY UNDER BOTH THE DUE PROCESS AND EQUAL PROTECTION CLAUSES BECAUSE THEY INFRINGE UPON THE PROTECTED LIBERTY INTERESTS AND FUNDAMENTAL RIGHTS OF MARRIED SAME-SEX COUPLES.

Ohio's marriage recognition bans deprive the widowed Plaintiffs and other married same-sex couples of due process and equal protection in at least two ways. First, when the Plaintiff widowers lawfully married in another state, they acquired protected liberty and property rights in that marriage, which Ohio cannot take away without meeting heightened scrutiny. Second, by voiding, for purposes of Ohio law, the Plaintiffs' otherwise valid marriages, the recognition bans infringe upon their fundamental right to marry, which also triggers heightened scrutiny.

A. Married Same-Sex Couples Have a Protected Liberty Interest in Their Existing Marriages.

The District Court properly held that "[*t]he right to remain married* is … a fundamental liberty interest appropriately protected by the Due Process Clause of the United States Constitution" and that the Ohio marriage recognition bans "violate this fundamental right without rational justification." Final Order, RE65, Page ID#1044 (emphasis in original). Like DOMA, Ohio's marriage recognition

bans constitute "a deprivation of the liberty of the person" protected by due process. *Windsor*, 133 S. Ct. at 2695.

Laws that significantly burden constitutionally protected liberties, such as *existing* marital and family relationships, are subject to heightened scrutiny. *See, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479, 503-04 (1965) (striking down law barring use of contraceptives by married couples); *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (holding unconstitutional housing ordinance restricting grandmother from residing with grandson). Plaintiffs have the same protected liberty interest in their marital and family relationships as did the plaintiffs in *Moore*, *Griswold*, and other cases involving attempts by the government to burden protected family relationships.

When a law imposes a "direct and substantial" burden on an existing marital relationship, the law cannot be upheld "unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." *Montgomery v. Carr*, 101 F.3d 1117, 1124 (6th Cir. 1996) (internal quotation marks and citation omitted). By operation of law, the marriage recognition bans erase the marriages of the Plaintiff widowers under state law. Final Order, RE65, Page ID#1055. It is difficult to conceive a more "direct and substantial" burden on the marriage. As discussed below, in Point V, "no legitimate purpose," let alone

an important state interest, "overcomes the purpose and effect to disparage and to injure" married same-sex couples living in Ohio. *Windsor*, 133 S. Ct. at 2696.

B. Ohio's Marriage Recognition Bans Infringe Upon Plaintiffs' Fundamental Right to Marry

The Court can decide this case without addressing the right to marry itself – it can strike down the marriage recognition bans under *Windsor* as set out in Point I, under the liberty interest that protects a person's existing marriage as set out under Point II.A, or under equal protection as explained in Points III, IV and V. But Ohio's marriage recognition bans also unconstitutionally infringe on the Plaintiffs' fundamental right to marry.

"While states do have a legitimate interest in regulating and promoting marriage, the fundamental right to marry belongs to the individual." Final Order, RE65, Page ID#1061 n.10. As the Court held in *Loving*, 388 U.S. at 12, "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." By erasing the marriages of the Plaintiff widowers under Ohio law, the recognition bans also infringe Plaintiffs' fundamental right to marry and are therefore subject to heightened scrutiny.

i. This Case is Not About the Right to "Same-Sex Marriage"

The marriage recognition bans implicate the fundamental right to marry—and not, as the State attempts to reframe the issue, a "right to same sex marriage."

Appellant Br. 25-30. Same-sex couples in Ohio and elsewhere do not seek a new right to "same-sex marriage" or to the recognition of their "same-sex marriages." Instead, they seek recognition of their existing marriages as part of the same freedom to marry that courts have recognized for decades.

Reframing the right at stake in this case as the right to "same-sex marriage" would repeat the error committed in *Bowers*, where the right at issue was characterized as the "fundamental right [for] homosexuals to engage in sodomy." 478 U.S. at 190. The *Lawrence* Court, in overruling *Bowers*, specifically criticized the framing of the issue by the *Bowers* Court as "fail[ing] to appreciate the extent of the liberty at stake." *Lawrence*, 539 U.S. at 567. As Justice Kennedy explained, "our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education" and "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do." *Id.* at 574.

To be sure, same-sex couples have until recently been denied the freedom to marry, and as a corollary the right to recognition of lawfully entered marriages, but the State cannot deny fundamental rights to certain groups simply because it has done so in the past. "Our Nation's history, legal traditions, and practices" help courts identify *what* fundamental rights the Constitution protects but not *who* may exercise those rights. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

"[F]undamental rights, once recognized, cannot be denied to particular groups on the ground that these groups have historically been denied those rights." *In re Marriage Cases*, 183 P.3d 384, 430 (Cal. 2008)(quotation marks omitted; bracket in original).

Thus, the fundamental right to marry remains the same regardless of who exercises it. No one disputes the fact that it extends to couples of different races, *Loving*, 388 U.S. at 12, even though "interracial marriage was illegal in most States in the 19th century." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847-48 (1992). Similarly, this case is no more about a "new" right to "same-sex marriage" than *Loving* was about a "new" right to "interracial marriage."[4]

ii. The Right to Recognition of a Lawful Marriage is Part of the Fundamental Right to Marry

The fundamental right to marry protects more than the solemnization of marriage. In *Loving*, Mildred Jeter and Richard Loving were married in Washington D.C. before returning to Virginia where they were prosecuted for violating the state's ban on interracial marriage. *Loving*, 388 U.S. at 2-3. The Court held that "[t]he freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State." *Id*. at 12. The

[4] The State's interpretation of the Full Faith and Credit Clause, Appellant's Br. 30-33, which would have given Virginia the freedom to exclude inter-racial couples from marriage, cannot be squared with *Loving*.

fact that the Lovings were already married in another jurisdiction did not change the fact that the state's bans infringed upon their fundamental right to marry.

Where a "statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests." *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978); *cf. Boddie v. Connecticut*, 401 U.S. 371, 380–81 (1971)(holding that filing fees for divorce actions violate the due process rights of indigent petitions by burdening their right to marry another person). The Ohio marriage recognition bans create a chaotic matrix of rules whereby a person is considered married in the state where the marriage was solemnized, in the other states that recognize marriages between same-sex couples and by the federal government, but not by the state where he or she resides. As with DOMA, the "principal purpose" behind the enactment of Ohio's marriage recognition ban was "to impose inequality" on same-sex couples should they be able to marry elsewhere. *Windsor*, 133 S. Ct. at 269. Just as the Lovings' fundamental right to marry included the right to return home to Virginia and have their Washington D.C. marriage recognized and not criminalized, so too does the Plaintiff widowers' right to marry include recognition of their out-of-state marriages in their home State of Ohio.

III. OHIO'S MARRIAGE RECOGNITION BANS ARE SUBJECT TO HEIGHTENED SCRUTINY BECAUSE THEY DENY EQUAL PROTECTION BASED ON SEXUAL ORIENTATION.

This Court should affirm the District Court and join the Second and Ninth Circuits in holding that sexual-orientation classifications are not presumed to be constitutional and must be subjected to heightened scrutiny under the Equal Protection clause. *Windsor v. United States*, 699 F.3d 169, 181-85 (2012); *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 484 (9th Cir. 2014). When the government classifies people based on their sexual orientation, it should bear the burden of proving the statute's constitutionality, and it should be required to do so by showing, at a minimum, that the sexual-orientation classification is closely related to an important governmental interest. *Cf. United States v. Virginia*, 518 U.S. 515, 532-33 (1996)(sex discrimination).

A. The Level of Scrutiny for Sexual-Orientation Classifications is an Open Question in this Circuit.

The proper level of scrutiny for sexual-orientation classifications is an open question in this Circuit. Relying directly or indirectly on *Bowers*, and/or asserting *dicta*, this Court has applied rational-basis review to sexual orientation discrimination claims prior to *Windsor*. *See Equality Foundation II*, 128 F.3d at 292-93; *Scarbrough v. Morgan Cnty. Bd. of Educ.*, 470 F.3d 250, 261 (6th Cir. 2006) (relying on *Equality Foundation II*). But like every other Circuit to address the issue before *Lawrence*, in *Equality Foundation II*, this Court reasoned that,

because the government could constitutionally criminalize private, consensual sex between gay people under *Bowers*, sexual orientation could not be considered a suspect or quasi-suspect classification for equal protection.

In 2003, the Supreme Court overruled *Bowers* and emphatically declared that it "was not correct when it was decided, and it is not correct today." *Lawrence*, 539 U.S. at 578. The District Court properly held that by overruling *Bowers*, the Supreme Court necessarily abrogated *Equality Foundation II* and other decisions that relied on *Bowers* to foreclose heightened scrutiny for sexual-orientation classifications. Final Order, RE65, Page ID#1068-70; *see also Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 312 (D. Conn. 2012); *Golinski v. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 984 (N.D.Cal. 2012).

In *Equality Foundation II*, this Court affirmed that "under *Bowers v. Hardwick* … and its progeny, homosexuals did not constitute either a 'suspect class' or a 'quasi-suspect class' because the conduct which defined them as homosexuals was constitutionally proscribable." 128 F.3d at 292-93. Applying rational-basis, this Court went on to uphold Cincinnati's Issue 3, which amended the City charter to prohibit local protections for people based on sexual orientation. *Id*.

The State incorrectly argues that *Equality Foundation II* applied rational-basis in reliance on *Romer* and therefore *Romer* is the foundation for Sixth Circuit

law holding that sexual-orientation classifications do not warrant heightened scrutiny. Appellant Br. 38. Though the *Equality Foundation II* Court noted that *Romer* did not apply a heightened level of scrutiny to sexual-orientation classifications, 128 F.3d at 294, the *Romer* Court never had to reach the question of the level of scrutiny because "[a]mendment 2 fail[ed], indeed defie[d], even this conventional [rational-basis] inquiry." *Romer*, 517 U.S. at 632. That left this Court free to apply rational-basis consistent with its prior holding that relied on *Bowers*. *Equality Foundation II*, 128 F.3d at 294. Therefore, on the question of the level of scrutiny to apply to classifications based on sexual orientation, this Court relied on *Bowers*. The Supreme Court's decision in *Lawrence* undermines this central jurisprudential foundation to the Court's holding in *Equality Foundation II* that rational-basis applies to sexual-orientation classifications.

Since *Lawrence*, this Court has only twice confronted sexual orientation equal protection claims and, in *dicta*, citing back to *Equality Foundation*, has noted that sexual orientation receives rational-basis review in this Circuit. *Davis v. Prison Health Servs.*, 679 F.3d 433, 438 (2012); *Scarbrough*, 470 F.3d at 261.[5]

[5] In both *Davis* and *Scarbrough*, this Court held that the Plaintiff prevailed under rational basis review, meaning that the level of scrutiny did not determine the outcome in either case. Under the law of this Circuit, where an assertion in a case is not outcome-determinative, such assertion is properly considered *dicta*. *See, e.g.*, *United States v. McMurray*, 653 F.3d 367, 375-76 (6th Cir. 2011) (holding that because statement in prior case "'was not necessary to the outcome' in that case…it is *dicta* that is not binding")(internal quotation marks and citations

Because the only post-*Lawrence* cases to consider the level of scrutiny for classifications based on sexual orientation have done so in *dicta* and have followed *Equality Foundation II*, which cannot be reconciled with *Lawrence*, the Court must – and may – re-assess the appropriate level of review for sexual-orientation classifications.

The Supreme Court's holding in *Windsor* provides another intervening jurisprudential reason for this Court not to follow *Equality Foundation II* and its progeny. The Ninth Circuit has held that "*Windsor* requires that heightened scrutiny be applied to equal protection claims involving sexual orientation" *SmithKline*, 740 F.3d at 481. *SmithKline* held that under *Windsor*, the Court "must examine [the classification's] actual purposes and carefully consider the resulting inequality to ensure that our most fundamental institutions neither send nor reinforce messages of stigma or second-class status." *Id.* at 483.

When Sixth Circuit precedent is "inconsistent" with later Supreme Court precedent, the older Sixth Circuit precedent no longer should be followed. *See, e.g.*, *Rutherford v. Columbia Gas*, 575 F.3d 616, 619 (6th Cir. 2009)(prior panel decision "remains controlling authority unless an *inconsistent decision* of the United States Supreme Court requires modification of the decision or this Court

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omitted); *Davis*, 679 F.3d at 442 n.3) (same). "One panel of the Sixth Circuit is not bound by *dicta* in a previously published panel opinion." *BDT Prods., Inc. v. Lexmark Int'l, Inc.*, 602 F.3d 742, 750 (6th Cir.2010) (alterations omitted).

sitting en banc overrules the prior decision.")(emphasis added)(internal quotation marks and citations omitted); *Sierra Club v. Korleski*, 681 F.3d 342, 352 (6th Cir. 2012)(same). Given the Supreme Court's inconsistent holdings in *Lawrence* and *Windsor*, *Equality Foundation II* is no longer the law of the Circuit and the level of scrutiny for sexual orientation is an open question.

B. Sexual-Orientation Classifications Require Heightened Scrutiny Under the Traditional Criteria Examined By the Supreme Court.

The Supreme Court uses the following factors to determine whether a classification triggers heightened scrutiny:

> A) whether the class has been historically "subjected to discrimination,"[ ] B) whether the class has a defining characteristic that "frequently bears [a] relation to ability to perform or contribute to society,"[ ] C) whether the class exhibits "obvious, immutable, or distinguishing characteristics that define them as a discrete group;"[ ] and D) whether the class is "a minority or politically powerless."

Windsor, 699 F.3d at 181 (internal quotation marks and citations omitted). Of these considerations, the first two are the most important. *See id.* ("Immutability and lack of political power are not strictly necessary factors to identify a suspect class."). Citing to the robust uncontested factual record below including expert reports addressing each criterion, the District Court held that any faithful application of those factors leads to the inescapable conclusion that sexual-

orientation classifications must be recognized as suspect or quasi-suspect and subjected to heightened scrutiny.[6] Final Order, RE65, Page ID #1070-71.

The State does not address the suspect classification factors, apparently conceding all but the fourth. Appellant Br. 44. But sexual orientation easily fits all four factors. *See, e.g.*, *Pedersen*, 881 F. Supp. 2d at 310-33; *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 425-31 (Conn. 2008).

First, "[t]he history of discrimination against gay and lesbian individuals has been both severe and pervasive." Final Order, RE65, Page ID#1071 (Citing expert reports of Chauncey and Becker). *See also Windsor*, 699 F.3d at 182 ("It is easy to conclude that homosexuals have suffered a history of discrimination. Windsor and several *amici* labor to establish and document this history, but we think it is not much in debate.").

Second, sexual orientation bears no relation to ability to perform or contribute to society. Final Order, RE65, Page ID#1073 ("sexual orientation is akin to race, gender, alienage, and national origin, all of which 'are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy.'") (citing expert report of Peplau and *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440

[6] Decisions from other circuits applying rational basis review either predate *Lawrence*, adhered to or adopted pre-*Lawrence* precedent without analysis, or simply failed to discuss the heightened-scrutiny factors at all.

(1985)). Though some have argued that sexual orientation is relevant to the ability to contribute to society because the two people in a same-sex couple cannot accidentally procreate, that argument misunderstands the proper inquiry. *See Windsor*, 699 F.3d at 182-83 (rejecting a similar argument). The relevant question for heightened scrutiny is whether, as a general matter, a classification usually bears on a person's ability to contribute to society – not whether a classification is *always* irrelevant in all contexts. *Cleburne*, 473 U.S. at 446 (the Court "should look to the likelihood that governmental action premised on a particular classification is valid as a general matter, not merely to the specifics of the case before us"; the proper question is whether a characteristic is one that "the government may legitimately take into account in a wide range of decisions.").

Third, sexual orientation is an "obvious, immutable, or distinguishing" aspect of personal identity that a person cannot – and should not – be required to change in order to escape discrimination. Final Order, RE65, Page ID#1076-78. The District Court, relying on the report of expert Anne Peplau, properly held that, "[u]nder any definition of immutability, sexual orientation clearly qualifies." Final Order, RE65, Page ID#1077; *see Windsor*, 699 F.3d at 183.

Fourth, "[a]s political power has been defined by the Supreme Court for purposes of heightened scrutiny analysis, gay people do not have it." Final Order, RE65, Page ID#1076. While gay people have secured some limited advances

recently, they pale in comparison to the political progress of women at the time sex was recognized as a quasi-suspect classification. Final Order, RE65, Page ID#1076. There is still no express federal ban on sexual orientation discrimination in employment, housing, or public accommodations, and twenty-nine states, including Ohio, have no such protections either. *Id*. #1075 (citing Becker Report); *see also Pedersen*, 881 F. Supp. 2d at 326-27. Notably, gay people have also been particularly vulnerable to discriminatory ballot initiatives, like Ohio's marriage amendment, that seek to roll back protections they have secured in the legislature or prevent such protections from ever being extended. *Griego v. Oliver*, 316 P.3d 865, 883 (N.M. 2013).

In short, sexual-orientation classifications demand heightened scrutiny under not just the two critical factors, but under all four factors that the Supreme Court has used to identify classifications warranting heightened scrutiny review.

IV. OHIO'S MARRIAGE RECOGNITION BANS ARE SUBJECT TO HEIGHTENED SCRUTINY BECAUSE THEY DENY EQUAL PROTECTION BASED ON SEX.

"'[A]ll gender-based classifications today' warrant 'heightened scrutiny.'" *Virginia*, 518 U.S. at 518 (quoting *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136 (1994))(denying women access to Virginia Military Institute violates equal protection). There can be no doubt that Ohio's marriage recognition bans contain explicit gender classifications: a person's marriage will be recognized only if her

sex and her spouse's sex are different. Like any other sex classification, the marriage recognition bans must be tested through the framework of heightened scrutiny. *Cf. Califano v. Webster*, 430 U.S. 313 (1977) (per curiam) (upholding sex-based classification in social security benefit formula, but only after subjecting it to heightened scrutiny).

The State does not contest that the marriage recognition bans discriminate on the basis of sex. In other cases, supporters of marriage bans have argued that the sex-based classifications in the marriage bans do not trigger heightened scrutiny because they are not designed to denigrate members of either sex or deny opportunity to men or women. But heightened scrutiny applies to *all* explicit sex-based classifications regardless of whether those classifications have a purpose to denigrate or deny opportunity. *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973) ("classifications based upon sex … are inherently suspect, and must therefore be subjected to strict judicial scrutiny").

Similarly, Ohio's marriage recognition bans are no less invidious because they equally deny men and women the right to remain married, under Ohio law, to a person of the same sex. In *Loving*, 388 U.S. at 8, the Supreme Court rejected "the notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations." "Applying the

same logic" used in *Loving*, "the fact of equal application to both men and women does not immunize [Ohio's marriage recognition bans] from the heightened burden of justification that the Fourteenth Amendment requires of state laws drawn according to sex." *Kitchen*, 961 F. Supp. 2d. at 1206.[7]

Ohio's marriage recognition bans are also based on sex stereotypes about the proper parenting roles for men and women. *Amici* argue that the bans advance the State's interest in ensuring "gender differentiated parenting" in which men and women each make "distinct" parenting contributions. CCV Amicus Brief at 21-22. But the Supreme Court has long rejected the notion of "any universal difference between maternal and paternal relations at every phase of a child's development." *Caban v. Mohammed*, 441 U.S. 380, 389 (1979); *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003)(rejecting "[s]tereotypes about women's domestic roles" and "parallel stereotypes presuming a lack of domestic responsibilities for men").

Because Ohio's marriage recognition bans explicitly classify based on sex, they must – like all other laws containing explicit sex classifications – be tested within the heightened scrutiny framework.

[7] The anti-miscegenation law in *Loving* also applied unequally to protect the racial "integrity" of white people but not other racial groups. But the Court made clear that the racial classifications were unconstitutional "even assuming an even-handed state purpose to protect the 'integrity' of all races." *Loving*, 388 U.S. at 11 n.11.

V. OHIO'S MARRIAGE RECOGNITION BANS ARE UNCONSTITUTIONAL UNDER ANY STANDARD OF REVIEW.

If the requisite heightened scrutiny is applied, the State cannot carry its burden to demonstrate how excluding same-sex couples from marriage is at least closely related to an important governmental interest. Nor can the State explain, under the "careful consideration" required by *Windsor*, how any legitimate interest overcomes the primary purpose and practical effect of the marriage recognition bans to demean Plaintiffs and other married same-sex couples.[8] The State does not suggest that the marriage recognition bans can survive heightened judicial review, arguing only that the bans survive rational-basis. Appellant Br. at 45-52. But even under the most deferential standard of review, the marriage recognition bans violate the Equal Protection Clause. Indeed, the State's arguments in defense of Ohio's marriage recognition bans have "failed rational basis review in every court to consider them post-*Windsor*." *Bourke*, 2014 WL 556729, at *8.[9]

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[8] Though here it is clear that the primary purpose and practice effect of the marriage recognition bans is to demean same-sex couples, see, Point I.B., *supra*, the Court need not find animus to strike down the bans under rational-basis review. S*ee Vill. of Willowbrook v. Olech*, 528 U.S. 562, 565 (2000) (allegations of irrational discrimination "quite apart from the Village's subjective motivation, are sufficient to state a claim for relief under traditional equal protection analysis"); *Davis*, 679 F.3d at 438) ("demonstrating that the challenged government action was motivated by animus or ill-will" is one, but not the exclusive, way of showing that government lacks a rational basis for its action.).

[9] Though the *Equality Foundation II* Count held that the repeal of sexual orientation-based protections from employment and housing discrimination was

A. Under Rational-Basis Review, Excluding Same-Sex Couples from Marriage Must Have a Rational Relationship to a Legitimate Governmental Purpose.

"[E]ven in the ordinary equal protection case calling for the most deferential of standards, [the Court] insist[s] on knowing the relation between the classification adopted and the object to be attained." *Romer*, 517 U.S. at 632. It is this "search for the link between classification and objective" that "gives substance to the Equal Protection Clause." *Id.* "[R]equiring that the classification bear a rational relationship to an independent and legitimate legislative end … ensure[s] that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Id.* at 633; *accord Cleburne*, 473 U.S. at 450; *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

The Supreme Court has sometimes described this impermissible purpose as "animus" or a "bare … desire to harm a politically unpopular group." *Windsor*, 133 S. Ct. at 2693; *Romer*, 517 U.S. at 634; *Cleburne*, 473 U.S. at 447; *Moreno*, 413 U.S. at 534. But an impermissible motive does not always reflect "malicious ill will." *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 375

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rationally related to a legitimate interest in cost savings, 126 F.3d at 299, no such rationale could survive here after *Windsor*. In defense of DOMA, The Bipartisan Legal Advisory Group (BLAG) asserted the same alleged interest in conserving resources, Merits Brief of Bipartisan Legal Advisory Group of the U.S. House of Representatives, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307), 2013 WL 267026, at *37, but the Supreme Court held that "no legitimate purpose" could justify the inequality and stigma that DOMA imposed on same-sex couples and their families. 133 S. Ct. at 2696.

(2001) (Kennedy, J., concurring). It can also take the form of "moral disapproval," *Lawrence*, 539 U.S. at 582 (O'Connor, J., concurring), "negative attitudes," *Cleburne*, 473 U.S. at 448, "fear," *id.*, "irrational prejudice," *id.* at 450, "simple want of careful, rational reflection," *Garrett*, 531 U.S. at 374 (Kennedy, J., concurring), or "some instinctive mechanism to guard against people who appear to be different in some respects from ourselves." *Id.*

In addition, even when the government offers an ostensibly legitimate purpose, the court must also examine the law's connection to that purpose to assess whether it is too "attenuated" to rationally advance the asserted governmental interest. *Cleburne*, 473 U.S. at 446; *see, e.g.*, *Moreno*, 413 U.S. at 535-36 (invalidating law on rational-basis review because "even if we were to accept as rational the Government's wholly unsubstantiated assumptions concerning [hippies] … we still could not agree with the Government's conclusion that the denial of essential federal food assistance … constitutes a rational effort to deal with these concerns"); *Eisenstadt v. Baird*, 405 U.S. 438, 448 (1972) (invalidating law on rational-basis review because, even if deterring premarital sex is a legitimate governmental interest, "the effect of the ban on distribution of contraceptives to unmarried persons has at best a marginal relation to the proffered objective"). This search for a meaningful connection between a classification and

the asserted governmental interest also provides an additional safeguard against intentional discrimination.

The State's rationales for the marriage recognition bans boil down to four arguments: 1) the bans are rationally related to a state interest in proceeding with caution and preserving the will of Ohio legislators and voters; 2) the bans are rationally related to an interest in uniformity; 3) the bans are rationally related to a state interest in preserving tradition and 4) Section 2 of DOMA provides a rational basis for the bans. Regardless of the level of scrutiny applied, none of the proffered rationales for Ohio's marriage recognition bans can withstand constitutional review.

B. Ohio's Marriage Recognition Bans Cannot be Justified by an Asserted Interested in Proceeding Cautiously.

Proceeding "cautiously" by continuing to deny equal treatment to an unpopular group is not a legitimate state interest. *See Pedersen*, 881 F. Supp. 2d at 345–46 ("Categorizing a group of individuals as a 'vast untested social experiment' … to justify their exclusion, … until long-term evidence is available to establish that such a group will not have a harmful effect upon society is a rationale, which, … would eviscerate the doctrine of equal protection by permitting discrimination until equal treatment is proven, by some unknown metric, to be warranted."); *see also Golinski*, 824 F. Supp. 2d at 1001. If "caution" and "deliberation" alone could justify discrimination, the development of civil

rights for unpopular groups would be perpetually thwarted, and rational-basis review would mean no judicial review at all.

Even if proceeding cautiously were a legitimate interest, the State's marriage recognition bans do not rationally advance that interest. Ohio's constitutional amendment adopted an absolute ban, unlimited in time, that erected a fundamental barrier to adoption of a different policy. By enshrining the marriage recognition ban in the State Constitution, the voters did not pause and enact a time-specific moratorium to allow more study, but rather ensured a blunt, definitive prohibition that could not be changed without "enlisting the citizenry of [Ohio] to amend the State Constitution," yet again. *Romer*, 517 U.S. at 631. Given the terms of the amendment itself, it is not credible that the State was seeking solely to be "cautious." *Romer*, 517 U.S. at 635.

The related rationale of protecting Ohio voters and lawmakers from judicial intrusion is inconsistent with the entire constitutional system. "The doctrine of judicial review, a bedrock principle of our system of government, unequivocally empowers and obligates the federal judiciary to scrutinize the constitutionality of legislative action." *Pedersen*, 881 F. Supp. 2d at 344 (*citing Marbury v. Madison*, 5 U.S. 137 (1803)). "The irreplaceable value of the power articulated by Mr. Chief Justice Marshall [in *Marbury*,]," the *Pedersen* Court noted, "lies in the protection it has afforded the constitutional rights and liberties of individual citizens and

minority groups against oppressive or discriminatory government action." *Id*. (*citing United States v. Richardson*, 418 U.S. 166, 192 (1974)).

The need for judicial review is equally, if not more pressing, in the context of voter initiatives. *Cf. Romer*, 517 U.S. 620 (striking down voter-initiated constitutional "Amendment 2" in Colorado banning any legislative, executive or judicial action protecting individuals based on sexual orientation); *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 471 (1982)(striking down voter-initiated school re-districting law). "'It is government's duty under our constitutional design…to 'safeguard against the tyranny of [majoritarian] passions' … [and] the need for judicial independence is the greatest when constitutional impairments are 'instigated by the major voice of the community.'" *Jones v. Bates*, 127 F.3d 839 (9th Cir. 1997)(citing Federalist Papers), *rev'd on other grounds*sub nom. *Bates v. Jones*, 131 F.3d 843 (9th Cir. 1997); *accord DeBoer*, 2014 WL 1100794 at *16.

C. Ohio's Marriage Recognition Bans Cannot Be Justified By An Asserted Interest In Uniformity.

The State's asserted interest in maintaining marriage uniformity within Ohio is not a rational basis for the marriage recognition bans. Like DOMA, the marriage recognition bans are a departure from a previously uniform rule. *Cf. Windsor*, 699 F.3d at 186 ("DOMA's sweep arguably creates more discord and anomaly than uniformity…"). "Longstanding Ohio law has been clear: a marriage solemnized outside of Ohio is valid in Ohio if it is valid where solemnized. This

legal approach is firmly rooted in the longstanding legal principle of '*lex loci contractus*' -- i.e., the law of the place of contracting controls." Temp. Restraining Order, RE13, Page #99. Until the passage of the marriage recognition bans, Ohio had used this uniform rule since its inception as a State and those bans actually disrupt long-standing uniformity principles.

The State also asserts that its marriage recognition bans ensure fairness. They argue that Ohio same-sex couples who do not have the means to travel out of state to get married should not be treated differently from those who do and that a contrary rule would not be "fair." But an interest in "fairness" does not explain the marriage recognition bans. Ohio already respects the marriages that heterosexual couples contract in other states, even where those couples could not marry under Ohio law. See Point I.A., *supra*. And this is true even if not all straight couples in Ohio can afford to travel to take advantage of other states' more lenient marriage laws. The marriage recognition bans do not advance a state interest in "fairness" because they treat married same-sex couples one way and married different-sex couples another way.

This rationale elevates like treatment of parties who are not similarly situated (married and unmarried same-sex couples living in Ohio) over like treatment of couples who are (married same-sex and married different-sex couples), and is therefore antithetical to the basic premises of equal protection law.

See Harlen Associates v. Incorporated Vill. of Mineola, 273 F.3d 494, 499 (2d Cir. 2001) ("[t]he Equal Protection Clause requires that the government treat all similarly situated people alike") (citing *Cleburne*, 473 U.S. at 439). And even if there were some interest in treating same-sex couples "consistently" irrespective of marital status, that would still not justify treating them as inferior to different-sex couples, as the marriage recognition bans do here. *Windsor*, 133 S. Ct. at 2691-92 ("State laws … regulating marriage, of course, must respect the constitutional rights of persons," and our constitutional tradition includes "the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State.").

D. **Ohio's Marriage Recognition Bans Cannot Be Justified By an Asserted Interest in Preserving Traditional Discrimination**.

"Tradition," by itself, does not constitute "an independent and legitimate legislative end" for purposes of rational-basis review. *Romer*, 517 U.S. at 633. "[T]he government must have an interest separate and apart from the fact of tradition itself." *Golinski*, 824 F. Supp. 2d at 993.

"Ancient lineage of a legal concept does not give it immunity from attack for lacking a rational basis." *Heller v. Doe by Doe*, 509 U.S. 312, 326 (1993). The Supreme Court has on many occasions struck down discriminatory practices that had existed for years without raising any constitutional concerns. "Many of 'our people's traditions,' such as *de jure* segregation and the total exclusion of women

from juries, are now unconstitutional even though they once coexisted with the Equal Protection Clause." *J.E.B.*, 511 U.S. at 142 n.15 (citation omitted); *see also id* ("We do not dispute that this Court long has tolerated the discriminatory use of peremptory challenges, but this is not a reason to continue to do so."); *Virgina*, 518 U.S. at 557 ("A prime part of the history of our Constitution … is the story of the extension of constitutional rights and protections to people once ignored or excluded."); *Windsor*, 133 S. Ct. at 2689 (As we have gained "new perspective, a new insight" about same-sex couples and their families, we can now see "[t]he limitation of lawful marriage to heterosexual couples, which for centuries had been deemed both necessary and fundamental… as an unjust exclusion."). Acknowledging that changed understanding does not mean that people in past generations were irrational or bigoted. It simply acknowledges that "times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress." *Lawrence*, 539 U.S. at 579.

Ultimately, "'preserving the traditional institution of marriage' is just a kinder way of describing the [s]tate's *moral disapproval* of same-sex couples." *Lawrence*, 539 U.S. at 601 (Scalia, J., dissenting) (emphasis in original). That intent to discriminate is not a rational basis for perpetuating discrimination. *See, e.g.*, *Romer*, 517 U.S. at 633; *Moreno*, 413 U.S. at 534.

E. DOMA Section 2 Does Not Provide a Rational Basis for the Marriage Recognition Bans.

Section 2 of the federal DOMA does not "authorize" Ohio's denial of recognition to married same-sex couples, as the State asserts. Appellant Br. at 50. Regardless of what Section 2 provides, this Court must decide whether Ohio's marriage recognition bans satisfy the Fourteenth Amendment's commands of due process and equal protection of the laws. No act of Congress can exempt Ohio from those fundamental requirements. *See, e.g.*, *Saenz v. Roe*, 526 U.S. 489, 508 (1999).

Moreover, even if it were relevant, Section 2 of DOMA is invalid for the same reasons *Windsor* held Section 3 to be invalid. Like Section 3, Section 2 targets legally married same-sex couples in an unprecedented manner. Never before has Congress passed a statute purporting to authorize states to ignore a whole class of marriages. The Supreme Court also noted that the title of the statute itself—Defense of Marriage Act—evinced an improper discriminatory purpose, which applies equally to Section 2. *Windsor*, 133 S. Ct. at 2693. In light of *Windsor*'s analysis, it is apparent that Section 2 of DOMA is equally infected with the improper purpose and discriminatory effect that were fatal to Section 3. An unconstitutional act of Congress certainly cannot insulate a state law from constitutional review by the federal courts.[10]

[10] The State argues that the Full Faith and Credit Clause undercuts Plaintiffs' argument because the Clause grants Congress the ability to prescribe the

F. Ohio's Marriage Recognition Bans Cannot Be Justified by the Asserted Interests in Procreation and Childrearing Raised Only By *Amici*.

i. The Marriage Recognition Bans Cannot Be Justified by An Asserted Interest in Channeling the Procreative Potential of Heterosexual Couples Into Marriage.

The argument that the marriage recognition bans can be justified by the State's interest in "channel[ing] potentially procreative conduct into stable, enduring relationships" (hereafter "responsible procreation") is without merit. *Amicus* Br. of CCV at 15. The "responsible procreation" interest advanced here has already been rejected by the Supreme Court. BLAG, defending DOMA in *Windsor*, asserted the same purported governmental interest in responsible procreation, Merits Brief of Bipartisan Legal Advisory Group of the U.S. House of Representatives, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307), 2013 WL 267026, at *21, and the Supreme Court necessarily rejected that argument when it held that "no legitimate purpose" could justify the inequality and stigma that DOMA imposed on same-sex couples and their families. 133 S. Ct. at 2696.

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effect of one State's "public Acts" and "Records" in other States. Appellant Br. 31. This argument is unavailing. "Whatever powers Congress may have under the Full Faith and Credit Clause, 'Congress does not have the power to authorize the individual States to violate the Equal Protection Clause.'" *De Leon*, 2014 WL 715741, at *22 (citing *Graham v. Richardson*, 403 U.S. 365, 382 (1971)).

The Equal Protection Clause prohibits "irrational line drawing." *BellSouth Telecommunications, Inc. v. Farris,*
542 F.3d 499, 505 (6th Cir. 2008). When the government draws a line between two groups, it must "come forward with a legitimate reason justifying the line it has drawn." *Smith Setzer & Sons*, 20 F.3d 1311, 1321 (4th Cir. 1994); *see Hooper v. Bernalillo Cnty. Assessor*, 472 U.S. 612, 618 (1985). The argument that the marriage recognition bans are justified by the State's interest in channeling potentially procreative "man-woman" couples into marriage explains neither why Ohio refuses to recognize the marriages of same-sex couples who procreate nor why it does recognize the marriages of different-sex couples who cannot procreate. If the government's interest is ensuring that children be raised by two married parents, that interest applies equally to the children of same-sex couples. And, even if it made sense to describe the state interest underlying marriage laws as addressing only the problem of unplanned pregnancies, this argument does not explain why Ohio recognizes the marriages of all adult couples, including obviously infertile different-sex couples, but not same-sex couples. Nor does it explain how banning the recognition of marriages between same-sex couples induces "man-woman" couples to procreate responsibly.

Amici argue that under *Johnson v. Robison*, 415 U.S. 361, 378 (1974), "a classification will be upheld if 'characteristics peculiar to only one group rationally

explain the statute's different treatment of the two groups'" but fail to meet the very standard that they invoke. CCV Br. at 24-25. *Amici* have failed to identify a "characteristic peculiar" to the favored group that "rationally explains the [law's] different treatment of the two groups." *Id.* If the goal is to persuade couples to marry before or after they conceive a child, the reason has to be that children do better when raised in a family with two parents. But that interest is just as applicable to the children of same-sex couples. Here, same-sex couples and their children will benefit as much from having their marriages recognized in Ohio as different-sex couples and their children do. Thus, the "addition" of married same-sex couples advances the interest in ensuring that children are raised by two parents. *Johnson*, 415 U.S. at 38.

Finally, Ohio's decision not to recognize the out-of-state marriages of gay and lesbian couples does not logically induce straight couples to marry, to have children, or to have children within marriage. Where there is no logical connection between the classification and the asserted purpose, the law violates equal protection. *Hooper*, 472 U.S. at 618; see also, *Bishop*, 962 F. Supp. 2d at 1291 ("Marriage is incentivized for naturally procreative couples to precisely the same extent regardless of whether same-sex couples (or other non-procreative couples) are included.")

ii. **Ohio's Marriage Recognition Bans Cannot Be Justified by an Asserted Interest in "Optimal" Childrearing**.

Ohio's marriage recognition bans do not advance an interest in "optimal parenting." Rather than promoting an "optimal" environment for children, the "only effect the [marriage recognition bans have] on children's well-being is harming the children of same-sex couples who are denied the protection and stability of having parents who are legally married." Final Order, RE65, Page ID#1084. Refusing to recognize the marriages of same-sex couples has no rational connection – or any connection – to the asserted goal of fostering a purportedly "optimal" parenting environment for the children of heterosexual couples. "Indeed, Justice Kennedy explained [in *Windsor*] that it was the government's failure to recognize same-sex marriages that harmed children, not having married parents who happened to be of the same sex." *Bourke*, 2014 WL 556729, at *8.[11]

In addition to failing rational-basis review as a matter of logic, the underlying premise that same-sex couples are less "optimal" parents than different-

[11] To the extent that Ohio's marriage recognition bans visit these harms on children as a way to attempt (albeit irrationally) to deter other same-sex couples from having children, the Supreme Court has invalidated similar attempts to incentivize parents by punishing children as "'illogical and unjust.'" *Plyler v. Doe*, 457 U.S. 202, 220 (1982) (quoting *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972)). "'Obviously, no child is responsible for his birth and penalizing the … child is an ineffectual—as well as unjust—way of deterring the parent.'" *Id.* (quoting *Weber*, 406 U.S. at 175).

sex couples has been rejected by every major professional organization dedicated to children's health and welfare. The District Court is just one of many to conclude that "[t]he overwhelming scientific consensus, based on decades of peer-reviewed scientific research, shows unequivocally that children raised by same-sex couples are just as well adjusted as those raised by heterosexual couples." Final Order, RE65, Page ID #1084 n.20; *Bostic*, 2014 WL 561978, at *18 ("Gay and lesbian couples are as capable as other couples of raising well-adjusted children…In the field of developmental psychology, 'the research supporting this conclusion is accepted beyond serious debate.'"); *DeBoer*, 2014 WL 1100794, at *10 (reaching same conclusion after bench trial and concluding that authors of leading studies suggesting otherwise "clearly represent a fringe viewpoint that is rejected by the vast majority of their colleagues").

VI. ***BAKER V. NELSON*** **IS NOT CONTROLLING**.

Contrary to the State's arguments, the Supreme Court's summary dismissal, more than forty years ago, of the appeal in *Baker v. Nelson*, 409 U.S. 810 (1972), for want of a substantial federal question, does not control this case. Every court, including the District Court below, to have considered such bans after *Windsor* has not only determined that it could reach the merits notwithstanding *Baker*, but has concluded that the marriage recognition bans at issue violate the federal

Constitution. *See, e.g.*, *Bostic*, 2014 WL 561978, at *10; *Bourke*, 2014 WL 556729, at *1; *Kitchen*, 961 F. Supp. 2d at 1194-95.

The State argues that lower courts must follow *Baker* until the Supreme Court explicitly overrules it. Appellant Br. 19-20. But that rule does not apply to summary dismissals like *Baker*, which "have considerably less precedential value than an opinion on the merits." *Ill. State Bd. of Elec. v. Socialist Workers Party*, 440 U.S. 173, 180-81 (1979). Instead, the Supreme Court has cautioned that, "when doctrinal developments indicate otherwise," courts should not "adhere to the view that if the Court has branded a question as unsubstantial, it remains so[.]" *Hicks v. Miranda*, 422 U.S. 332, 344 (1975)(internal citations omitted). That admonition should be heeded in this case. Doctrinal developments by the Supreme Court in application of the Equal Protection and Due Process Clauses require that *Baker* no longer have precedential effect.

"In the forty years after *Baker*, there have been manifold changes in the Supreme Court's equal protection jurisprudence." *Windsor*, 699 F.3d at 178-79. When *Baker* was decided, the Supreme Court had not yet recognized an intermediate level of heightened equal protection scrutiny or applied such scrutiny to laws that discriminate based on gender or so-called "illegitimacy." *See Craig v. Boren*, 429 U.S. 190, 197 (1976) (striking down gender-based classification under intermediate scrutiny); *Mathews v. Lucas*, 427 U.S. 495, 510 (1976) (striking down

law that discriminated against children born outside of marriage under intermediate scrutiny). It had not yet struck down laws that target gay and lesbian people, *see Romer*, 517 U.S. at 635, or invalidated a law enacted in order to treat same-sex couples unequally, *see Windsor*, 133 S. Ct. at 2693. Certainly the Court had not yet considered a case involving same-sex couples who are legally married, or held that laws must treat those couples and their children with "equal dignity." *Id*.

In light of these developments, this court should follow every other court post-*Windsor* in concluding that *Baker* does not control challenges to state laws barring a state from recognizing the lawful marriages of same-sex couples and address the significant constitutional questions presented here.

VII. PLAINTIFF ROBERT GRUNN HAS STANDING

The District Court properly held that Robert Grunn has standing to challenge the marriage recognition bans. Order, RE54, Page ID #834.

A. Robert Grunn Has Met the Case or Controversy Requirement of Article III.

To satisfy the standing requirements of Article III, Mr. Grunn must establish that (i) he has suffered a "concrete and particularized" injury that is "actual or imminent" rather than "conjectural" or "hypothetical"; (ii) there is a causal connection between his injury and the challenged action, such that the injury is "fairly traceable" to the defendant's alleged violation; and (iii) his injury would "likely" be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504

U.S. 555, 560–61 (1992). "At bottom, 'the gist of the question of standing' is whether petitioners have 'such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination.'" *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). Mr. Grunn satisfies each of the three elements and has a deeply personal stake in the outcome of the case.

The District Court correctly held that Mr. Grunn has satisfied the injury-in-fact requirement by establishing that because of the marriage recognition bans he fears criminal prosecution. Fear of criminal prosecution is sufficient to establish standing for "one does not have to await the consummation of threatened injury to obtain preventive relief." *Babbit v. United Farm Workers Nat'l. Union*, 442 U.S. 289, 298 (1979) (internal citation omitted). "It is not necessary that the plaintiff first expose himself to actual arrest or prosecution to be entitled to challenge the [laws] that he claims deters the exercise of his constitutional rights." *Id*. (internal citation omitted). Rather, where a plaintiff can show that the fear is "not imaginary or wholly speculative" and that "the State ha[d] not disavowed any intention of invoking the criminal penalty provision," he meets the Article III requirements for standing. *Id*. at 302. This is true even where the "criminal penalty provision has not yet been applied and may never be." *Id*. Mr. Grunn's

injury is based on a fear of prosecution under a law that is yet to be enforced against him, but which the Defendant has the authority to use to prosecute him, has not disavowed an intention to prosecute him under, and Mr. Grunn fears such prosecution.

This injury is fairly traceable to the Defendant and would be redressed by a favorable decision. There is no dispute that Defendant is responsible for the enforcement of the marriage recognition bans in the context of death certificates and were the bans to be struck down Mr. Grunn's fear of prosecution would be eliminated.

B. **Robert Grunn Has Third-Party Standing**.

"Ordinarily, one may not claim standing ... to vindicate the constitutional rights of some third party." *Singleton v. Wulff*, 428 U.S. 106, 114 (1976). However, this disfavor can be overcome where a plaintiff (1) "shows that he himself is injured by its operation," *Barrows v. Jackson*, 346 U.S. 249, 255 (1953), (2) "has a 'close relationship' with the person who possesses the right," and (3) where "there is a 'hindrance' to the possessor's ability to protect his own interests." *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004). The operation of the marriage recognition bans injures Mr. Grunn, as discussed above, and he has a close relationship with married same-sex couples who face clear obstacles to protecting their own interests with respect to the bans.

As a vendor of funeral services with a particular personal and market focus on the gay community, Mr. Grunn's relationship with legally married same-sex couples who need and desire to have their death certificates reflect their marriages is sufficiently close for third-party standing. *Cf. Craig*, 429 U.S. 190 (permitting vendor of beer to raise third-party claim on behalf of prospective patrons in challenge to sex-based restriction on the sale of beer). Courts require a close relationship to ensure that the challenger has the "appropriate incentive to challenge (or not challenge) governmental action and to do so with the necessary zeal and appropriate presentation." *Kowalski*, 543 U.S. at 129. As a gay man, with a business interest in continuing to adequately serve the gay community, Mr. Grunn is well-suited to prosecute this case vigorously.

Mr. Grunn's clients must rely on him to originate and register death certificates. They do not have access to the State's Electronic Death Registration System, nor do they have the statutory authority to register deaths with the local registrar of vital statistics. Grunn Decl., RE34-1, Page ID#221-22.

Mr. Grunn's clients also face serious obstacles to "litigating their rights themselves." *Smith v. Jefferson Cnty. Bd. of Sch. Comm'rs*, 641 F.3d 197, 209 (6th Cir. 2011). Where a "genuine obstacle" to a party's own standing exists, "the third party's absence from court loses its tendency to suggest that his right is not truly at stake, or truly important to him, and the party who is in court becomes by default

the right's best available proponent." *Singleton*, 428 U.S. at 116. Unlike in *Kowalski*, there is no State forum where married same-sex couples can go to vindicate their rights and only a limited window of time to go to court following the death of a spouse to assert their claims. *Kowalski*, 543 U.S. at 131-32.

Mr. Grunn's clients face serious obstacles to asserting their constitutional rights within the narrow window between their spouse's death and the final disposition of the body. As the District Court noted, "[t]he need to file a lawsuit to ensure that a loved one's death certificate accurately reflects their marriage is an incredible burden to place on grieving spouses." Order Denying MTD, RE54, Page ID #834. For the many people for whom the death of a spouse is an unexpected tragedy, the only window of time available to vindicate their rights is immediately following the death of the spouse and prior to burial or cremation. To expect a grieving family to rush to Court to prevent the state from issuing a death certificate that erases a person's marriage from the last official document recording his life and death constitutes a "genuine obstacle," making Mr. Grunn "the right's best available proponent." *Singleton*, 428 U.S. at 116.

VIII. ALL OF THE INJUNCTION FACTORS SUPPORT THE PERMANENT INJUNCTION

John Arthur and William Ives have died. Their surviving spouses, Jim Obergefell and David Michener, hold their death certificates recognizing their marriages closely. They feel affirmed and respected. David and William's three

minor children will see for the rest of their lives that their dads were married at the time of William's death. But that will change if Ohio succeeds in overturning the District Court order, amending William's death certificate and thus erasing their marriage from the public record. Not only does marriage recognition bring economic benefits to Plaintiffs, it also brings to these families the dignity owed their marriages. This dignity was stressed no less than eleven times throughout the *Windsor* decision.

Denial of these important rights also imposes severe and irreparable harm on the Plaintiffs. The public interest is served by directing Ohio to follow the bedrock principles of equal protection and due process. Extending dignity through marriage recognition to Plaintiffs on an equal basis to that extended to different-sex married couples surely poses no harm to Ohio. But denying that dignity and erasing "married" from the death certificates of John Arthur and William Ives would surely tell their widowers and families, "you are second class." The "avowed purpose and practical effect" of such acts would be "to impose a disadvantage, a separate status, and so a stigma upon" Plaintiffs. *Windsor*, 133 S. Ct. at 2693. But such indignity is not permitted under the Constitution. John Arthur and William Ives must be permitted to rest in peace and their death certificates reflecting their marriages left undisturbed.

CONCLUSION

The District Court decision should be affirmed and Ohio's marriage recognition bans should be permanently enjoined as unconstitutional as applied to death certificates.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B):

1. Exclusive of the portions of the brief exempted by 6th Cir. R. 32(b)(1), the brief contains approximately 13,925 words.

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3. If the court so requests, I will provide an electronic version of the brief and/or a copy of the word or line printout.

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/s/ Alphonse A. Gerhardstein
Attorney for Plaintiffs-Appellees
Date: April 24, 2014

CERTIFICATE OF SERVICE

I certify that a copy of this brief has been served through the Court's electronic filing system on this 24th day of April, 2014. Electronic service was therefore made upon all counsel of record on the same day.

/s/ Alphonse A. Gerhardstein
Attorney for Plaintiffs-Appellees
Date: April 24, 2014

DESIGNATION OF DISTRICT COURT RECORD

Plaintiffs-Appellees designate the following district court documents:

Document No.	Description of Document	Page ID#
1	Complaint	1
3	Motion for Temp. Restraining Order and Preliminary Injunction	12
9	Hrg. Mem. of Plaintiffs in Support of Motion for TRO	46
10	Defendant City of Cincinnati Registrar Response to Motion for Temp. Restraining Order and Preliminary Injunction	62
11	Response to Motion for Temp. Restraining Order and Preliminary Injunction	69
13	Decision Granting Temp. Restraining Order	91
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21	Motion for a TRO by David Michener	127
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33	Second Amended Complaint	206
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ADDENDUM

Ohio Rev. Code Ann. § 3101.01Sub-section (C) provides:

> (1) Any marriage between persons of the same sex is against the strong public policy of this state. Any marriage between persons of the same sex shall have no legal force or effect in this state and, if attempted to be entered into in this state, is void ab initio and shall not be recognized by this state.
>
> (2) Any marriage entered into by persons of the same sex in any other jurisdiction shall be considered and treated in all respects as having no legal force or effect in this state and shall not be recognized by this state.
>
> (3) The recognition or extension by the state of the specific statutory benefits of a legal marriage to nonmarital relationships between persons of the same sex or different sexes is against the strong public policy of this state. Any public act, record, or judicial proceeding of this state, as defined in section 9.82 of the Revised Code, that extends the specific statutory benefits of legal marriage to nonmarital relationships between persons of the same sex or different sexes is void ab initio...
>
> (4) Any public act, record, or judicial proceeding of any other state, country, or other jurisdiction outside this state that extends the specific benefits of legal marriage to nonmarital relationships between persons of the same sex or different sexes shall be considered and treated in all respects as having no legal force or effect in this state and shall not be recognized by this state.

.

Ohio Const. art. XV, § 11 states:

> Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage.