No. 14-3057

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES OBERGEFELL, et al.,	:	On Appeal from the United States
	:	District Court for the Southern District
Plaintiffs-Appellees,	:	of Ohio, Western Division
	:	
v.	:	District Court Case No. 13-cv-0501
	:	
LANCE D. HIMES,	:	
	:	
Defendant-Appellant.	:	

BRIEF OF APPELLANT LANCE D. HIMES, INTERIM DIRECTOR OF THE OHIO DEPARTMENT OF HEALTH

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STATEMENT REGARDING ORAL ARGUMENT

Defendant-Appellant Himes ("State" or "Ohio") asks the Court to hear oral argument. This case concerns an issue of substantial importance, as the district court not only invalidated application of a popularly enacted state law as purportedly violating the federal constitution, but it did so regarding a legal tradition that was unquestioned for most of the Nation's (and the world's) history. Such an issue deserves oral argument, and argument will aid the Court's consideration of the case.

JURSIDICTIONAL STATEMENT

The district court had federal-question jurisdiction over Plaintiffs' challenges under 28 U.S.C. § 1331. The district court entered a final judgment for Plaintiffs on December 23, 2013. On January 16, 2014, then-Defendant Theodore Wymyslo, now succeeded as Ohio's Director of Health by substituted defendant Lance D. Himes, timely appealed the district court's final judgment. Doc.68, Notice of Appeal. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Does Ohio's continued use of the traditional definition of marriage survive a substantive-due-process claim under the Fourteenth Amendment of the United States Constitution, in the context of declining to recognize an out-of-state same-sex marriage when recording marital status on an Ohio death certificate?

2. Does Ohio's continued use of the traditional definition of marriage survive an equal-protection claim under the Fourteenth Amendment of the United States Constitution, in the context of declining to recognize an out-of-state same-sex marriage when recording marital status on an Ohio death certificate?

3. Do standing requirements prevent a third-party standing claim by a funeral director who fills out death-certificate information for his clients, and thus wishes to advance their interests in how their marital status is recorded?

INTRODUCTION

This case is about democracy—and the limited role of courts in overriding democratic choices regarding social policy. Yes, the case is also about marriage—one very narrow application of the broader issue of same-sex marriage—but the question before this Court is whether it will cut off the ongoing democratic debate. Until about a decade ago, every State considered marriage to involve a man and a woman, and many States, like Ohio, went to the polls to confirm that belief. Over three million Ohioans voted to keep the traditional definition of marriage, by a 62-38 percent margin. A decade before that, the federal government also acted to confirm the traditional view, allowing States to refuse to recognize marriages performed elsewhere that went against their strong public policy, so that no one State could impose its view on the Nation. And that democratic consensus reflected centuries of practice in America and millennia of practice throughout civilization. Now, of course, that consensus is changing, with different sides expressing views on the matter. Some States have expanded the definition of marriage to include same-sex couples. Many others, like Ohio, are defending their traditional laws in courts, meeting their legal and ethical obligations while the societal debate continues. This Court must decide whether to cut off that debate and, moreover, abruptly nullify the judgment expressed just ten years ago by 62% of the State's voters.

This case also involves a broad decision about what should be a very narrow issue. It does not involve same-sex couples claiming a right to marry; instead, it involves a claim for recognition of marriage performed in another State, by Ohioans who traveled there for that reason. And it does not involve a claim for recognition across the board, for all legal purposes. Instead, it involves the narrow claim that when Ohio records death certificates, it must list a decedent as "married" if he was married in another State, and must list his partner as a surviving spouse. That dignitary interest is of course important to Plaintiffs, but amidst the broader marriage debate, it is a narrowly defined issue.

Yet the district court's decision goes much further. Even a "limited" ruling under its framework would have been inherently broad in implication by opining that Ohioans had no rational basis for declining to recognize what would have been, in 2004, a novel view among the States. But the decision added that Plaintiffs had a substantive-due-process right to same-sex-marriage recognition—something no other court has held. The court also held that Ohio's law was subject to heightened scrutiny, despite this Court's on-point precedent otherwise. And it held that a funeral director could be an extra Plaintiff on third-party standing grounds, even though many other cases show that litigants have been able to directly assert their claims. All of this demonstrates judicial overreaching, and this Court should reverse.

The court below, in overriding Ohio's democratic choice, also overstepped its role as a lower court, as the decision goes against precedent in several ways. *First*, the Supreme Court has concluded that due-process and equal-protection challenges to traditional marriage laws fail to present a "substantial federal question." *Baker v. Nelson*, 409 U.S. 810 (1972). That remains good law, and only the Supreme Court can change it.

Second, this Court's precedent establishes that sexual orientation is not a suspect class entitled to heightened scrutiny. *Equality Foundation of Greater Cincinnati v. City of Cincinnati*, 128 F.3d 289, 293, 294 (6th Cir. 1997). The U.S. Supreme Court's most recent decision did not hold otherwise. *See United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) (premising holding on the existence of impermissible animus under rational-basis review).

Third, the *Windsor* decision expressly *reaffirmed* the States' authority over marriage, so the district court ignored both that precedent and the underlying commitment to federalism that our Constitution contains. "By history and tradition the definition and regulation of marriage . . . has been treated as being within the authority and realm of the separate States." *Id*. at 2689-90. Marriage has received this treatment for good reason: it "is central to state domestic relations law" because it provides "the foundation of the State's broader authority to regulate . . . the protection of offspring, property interests, and the enforcement of marital

responsibilities." *Id.* at 2691 (internal quotations and citations omitted). Reading *Windsor* otherwise—as *requiring* courts to override traditional state sovereignty—is to say that the Court's federalist reasoning and holding were for naught.

Fourth, Ohioans have constitutionally permissible and sufficient reasons to retain the traditional definition of marriage. They have a right to ensure that their decisions are made by Ohio, not Maryland. The State adopted its constitutional amendment precisely in the face of other States' changes, and, indeed, this very case proves Ohioans' concerns. Ohioans also have a rational basis in maintaining uniformity in their laws, to ensure that all same-sex couples are treated alike unless change happens for all, rather than privileging those who travel. And they have a rational interest in cautiously weighing any such major change, to observe other States' experience as laboratories of democracy, and to ensure that any potential change is accompanied by consideration of issues including religious liberty and by careful planning to cover the scope of affected laws.

This is, no doubt, an important issue in a society that is at times divided, uncertain, and fluid—and that is all the more reason to allow debate to continue. The debate over marriage is new, and dynamic, and the federal courts should not take over—and effectively end—the States' recognized, traditional role in defining and developing their own laws regarding marriage.

This Court should reverse the decision below.

STATEMENT OF THE CASE AND FACTS

A. Ohio's lawmakers and citizens confirmed in Ohio's statutory and constitutional law that marriage is between one man and one woman.

Like every State in the Union, Ohio has long followed the traditional legal and societal definition of marriage as between a man and a woman. In 2004, as the debate over that definition grew, in both the democratic sphere and in the courts, Ohioans decided to confirm the traditional definition in two ways.

First, Ohio's lawmakers confirmed Ohio's definition of marriage by passing Ohio's Defense of Marriage Act. The Act provides:

> (C)(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 . . . 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. . . .

Ohio Rev. Code § 3101.01(C). The Act disavows any intent to prohibit extending non-marital benefits to same-sex relationships or any intent to affect private agreements. Ohio Rev. Code § 3101.01(C)(3)(a)-(b).

On February 6, 2004, after the Act passed both the Ohio House of Representatives and Senate, Governor Robert Taft signed it into law. In doing so, the governor emphasized that the law's purpose was not to discriminate against any Ohio citizens, but "to reaffirm existing Ohio law with respect to our most basic, rooted, and time-honored institution: marriage between a man and a woman." *See* Doc.41-8, Becker Ex. G, at Page ID #428.

Second, at that time, some States' marriage statutes were being challenged in courts. *See, e.g.*, *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003) (invalidating, under state constitution, statutory marriage definition). Ohio's citizens decided to define marriage a second time, this time in Ohio's Constitution.

Specifically, Ohio's citizens amended the Ohio Constitution to define marriage as between one man and one woman, and to confirm that Ohio would not recognize out-of-state same-sex marriages. The amendment passed with over three million votes, by a margin of 61.7% in favor and 38.3% against. "State Issue 1: November 2, 2004," Ohio Secretary of State, *available at* http://www.sos.state.oh.us/sos/elections/Research/electResultsMain/2004ElectionsResults/04-1102Issue1.aspx (last visited April 9, 2014). Article XV § 11 of the Ohio Constitution now 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.

Ohio Const. Art. XV § 11.

B. Because Ohio does not offer same-sex marriage, Plaintiff James Obergefell and John Arthur traveled to Maryland to be married according to the laws of that State.

Because Ohio's Constitution does not recognize same-sex marriage, James Obergefell and John Arthur, both Cincinnati residents, flew to Maryland to get married there. Doc.33, Second Am. Compl., at Page ID #2094. They wed inside the jet while it sat on the tarmac. *Id*. They returned to Cincinnati the same day. *Id*.

C. Obergefell and Arthur sued to challenge Ohio's law as applied to Arthur's then-expected death certificate, and Michener joined later.

Eight days after marrying, Obergefell and Arthur sued in federal district court, challenging Ohio's anticipated refusal to recognize their marriage on Arthur's death certificate. *See generally* Doc.1, Compl. At the time, Arthur suffered from amyotrophic lateral sclerosis ("ALS") and was in hospice care. *Id.* at Page ID #4. Arthur believed he would soon need a death certificate, but that Ohio's marriage amendment would prevent officials from listing him as married to Obergefell on the death certificate and from listing Obergefell as his surviving spouse. *Id*. at Page ID #6; Doc.3-2, Decl. of John Arthur, at Page ID #33. Obergefell and Arthur sought a temporary restraining order and a preliminary injunction to prevent Ohio from enforcing its marriage amendment and to require

Ohio to list Obergefell and Arthur as married on Arthur's death certificate. Doc.3, Motion for Prelim. Injunc., Page ID #12. The district court granted the plaintiffs' motion. Doc.13, Order. Arthur passed away, and Ohio issued his death certificate according to the court's temporary restraining order, listing Obergefell and Arthur as married to reflect their Maryland marriage. Doc.52-3.

Plaintiff David Brian Michener joined this action after his spouse under Delaware law, William Ives, passed away unexpectedly. Doc.24, Am. Compl., at Page ID #141-42. Relying on arguments previously made, Michener requested a temporary restraining order requiring that Ives's death certificate reflect his and Michener's Delaware marriage. Doc.22, Stipulation, at Page ID #132. The court granted the motion, and Ohio has since issued Ives's death certificate in compliance with the court's temporary order. Doc.23, TRO, at Page ID #136-37; Doc.52-4, Notice of Compliance, at Page ID #821.

D. Funeral director Robert Grunn joined the case, seeking relief as to death certificates for all his future clients.

Robert Grunn, an Ohio funeral director, joined this case seeking a declaration permitting him to report on Ohio death certificates the same-sex marriages of future unidentified clients. Doc.33, Second Am. Compl. at Page ID #217. Grunn submitted an affidavit stating that he generates death certificates by collecting and entering his clients' information into software provided by the Department of Health. Doc.34-1, Grunn Aff. at Page ID #221-22. He signs the

death certificates, files them with the local registrar of vital statistics, and provides certified copies to his clients. *Id*. at #222. In doing so, Grunn follows the instructions of the Department of Health and understands that purposely making a false statement on a death certificate will subject him to criminal penalties. *Id*.

Grunn has previously worked with a same-sex couple who had been married outside of Ohio, and he expects to have increasing numbers of similar clients in the future. *Id*. at #223. He intends to list such clients as "married" on their death certificates, but fears that if he does so, the State will prosecute him for having purposely made a false statement on a death certificate. *Id*. Grunn requested "clear direction" from the court as to how he should complete the "marital status" and "surviving spouse" information on the death certificates for his anticipated same-sex clients who were married in other states. *Id*.

E. The district court granted a permanent injunction to all Plaintiffs.

The district court granted a permanent injunction to Plaintiffs because it found that Ohio's ban on recognizing out-of-state, same-sex marriages violated their constitutional rights. Doc.65, Final Order, at Page ID #1086-89. Specifically, it "permanently enjoined" state officials "from enforcing Ohio's marriage recognition bans on Plaintiffs," in the death-certificate context, allowing Grunn to acknowledge any out-of-state, same-sex marriage on Ohio death

certificates. *Id.* #1090. The court grounded this holding in the Fourteenth Amendment's Due Process and Equal Protection Clauses. *Id.* #1052-85.

1. The court began with due process. It conceded that "most courts have not found that a right to same-sex marriage is implicated in the fundamental right to marry." *Id.* #1052 (emphasis in original). Citing a law-review article, however, it distinguished those cases from this one by suggesting that this case implicated the "right not to be deprived of one's *already-existing legal marriage* and its attendant benefits and protections," including the right not to be deprived of an out-of-state, same-sex marriage. *Id.* #1053 (emphasis added). As for the level of scrutiny for this newly created "right to remain married," the court noted that the Supreme Court applies an "intermediate standard" for laws addressing "the highly-protected status of existing marriage, family, and intimate relationships." *Id.* #1054.

Applying this scrutiny, the court began with the burden on Plaintiffs. It noted that "[c]ouples moving from state to state have an expectation that their marriage and, more concretely, the property interests involved with it . . . will follow them." *Id.* #1056. Ohio's "termination" of Plaintiffs' out-of-state, same-sex marriage also "intrude[d] into the realm of private marital, family, and intimate relations specifically protected by the Supreme Court." *Id.* (citing *Lawrence v. Texas*, 539 U.S. 558 (2003)). The court found that like Section 3 of the federal

DOMA struck down in *Windsor*, Ohio's refusal to recognize these marriages had a "destabilizing and stigmatizing impact." *Id.* #1056. The court also listed the "benefits" that Plaintiffs lost from the failure to recognize their out-of-state marriage—ranging from the rights "afforded to surviving spouses under Ohio probate law" to the "local and state tax benefits available to heterosexual married couples." *Id.* #1057-58.

Turning to Ohio's interests—including, for example, the interest in keeping the decision to permit same-sex marriage within the democratic processes and the need to approach broad social change with care—it found them "vague, speculative, and unsubstantiated." *Id.* #1059. And while Section 2 of the federal DOMA expressly permitted Ohio to refuse to recognize out-of-state, same-sex marriages, the court found that this provision did "not provide a legitimate basis for otherwise constitutionally invalid state laws," thereby invalidating the federal law in a footnote. *Id.* #1060 n.9.

2. The court next held that Ohio's refusal to recognize out-of-state, same-sex marriages violated equal-protection because Ohio recognized some out-of-state, opposite-sex marriages that would otherwise be impermissible under Ohio law (such as marriages between first cousins or minors). *Id.* #1062-64. It initially analogized this case to *Windsor*, which struck down the federal government's refusal to recognize same-sex marriages under federal law. *Id.* #1064-66 (citing

133 S. Ct. at 2675). Like the law there, the court found that Ohio unjustifiably created two tiers of individuals: opposite-sex couples married in other States and same-sex couples married in other States. It thus interpreted Ohio law as recognizing *all* out-of-state, opposite-sex marriages. *Id.* #1066-67 (citing, among others, *Mazzolini v. Mazzolini*, 155 N.E.2d 206, 208 (Ohio 1958)).

The court then turned to the level of scrutiny for this distinction. It conceded that the Sixth Circuit has continued to apply rational-basis review to sexual-orientation classifications even after *Lawrence* and *Romer v. Evans*, 517 U.S. 620 (1996). *Id.* #1068-70 (citing *Davis v. Prison Health Servs.*, 679 F.3d 433, 438 (6th Cir. 2012); *Scarbrough v. Morgan Cnty. Bd. of Educ.*, 470 F.3d 250, 261 (6th Cir. 2006)). But it noted that these decisions relied on pre-*Lawrence* cases, opting to determine anew this level-of-scrutiny question. *Id.* #1070-78. To determine whether a new class qualifies for heightened scrutiny, the court stated, courts look to (1) whether the class has been historically discriminated against; (2) whether the class has a characteristic that relates to its ability to contribute to society; (3) whether the class has immutable characteristics; and (4) whether the class is politically powerless. *Id.* #1070 (citing *Windsor v. United States*, 699 F.3d 169, 181 (2d Cir. 2012)). Under these factors, the court held that sexual-orientation classifications should be subject to heightened scrutiny. *Id.* #1070-78.

Alternatively, the court held that Ohio lacked a rational basis for refusing to recognize out-of-state, same-sex marriages. *Id.* #1079-85. The court noted that rational-basis review required a classification to be reasonably related to a legitimate interest, and that laws flunk this test if they merely seek to "'disadvantag[e] the group burdened by the law.'" *Id.* #1079 (quoting *Romer*, 517 U.S. at 633). *Windsor* itself "invoked this principle" of rational-basis review, the court continued, when it held that Section 3 of the federal DOMA violated equal-protection. *Id.* Applying this rule, it found the fact that traditional marriage was "traditional" counted as a strike against it—because an old classification is more likely to arise merely from unthinking continuation of the past. *Id.* #1083.

3. The district court also granted relief to funeral director Grunn, representing the third-party interests of his future potential clients. In an earlier ruling, the court had denied Ohio's motion to dismiss Grunn. Doc.54, Order Denying Motion to Dismiss, at Page ID #822-37. The court agreed with Ohio that Grunn had no first-party standing to bring claims of his own. *Id.* #825-26. But it found that he had third-party standing to bring claims for his future clients. *Id.* #826-34. It held that he was injured in fact because he feared prosecution for filling out death-certificate information improperly. *Id.* #827-28. And it found that Grunn had a "close relationship" to his future clients, *id.* #830-32, and that they faced a "hindrance" to protecting their own interests, *id.* #832-34. The court also

found that Grunn's claims were ripe and appropriate for declaratory relief. *Id.* #834-37.

In its Final Order, the district court granted relief specifically for Grunn, ordering that he may complete death-certificate information for any clients married in other States, listing them as "married" and listing a "surviving spouse." Doc.65, Final Order, at Page ID #1090.

SUMMARY OF ARGUMENT

The district court erred at virtually every step, and all of its holdings should be reversed.

First, the Supreme Court has already answered the question here, so the district court need not have addressed it, nor does this Court need to. *See Baker v. Nelson*, 409 U.S. 810 (1972). *Baker* said that claims to same-sex marriage simply do not implicate a federal issue. Only the Supreme Court can change *Baker*, and it did not do so in *United States v. Windsor*, 133 S. Ct. 2675 (2013). Indeed, *Windsor* expressly confirmed that States, not the federal government, have authority over marriage.

Second, the district court erred in finding a substantive-due-process right here. No fundamental right to same-sex marriage, or to have such a marriage recognized, is established by our Nation's history. And substantive due process does not apply when a more specific constitutional provision applies. Here, the

court described the right as not a right to marry, but a right to have another State's marriage recognized—but that is what the Full Faith and Credit Clause does (and it simply does not apply here to obviate Ohio's law). Indeed, Section 2 of the federal DOMA preserves a State's power to choose non-recognition, and in so holding the district court wrongly invalidated that federal law.

Third, Ohio's preservation of the traditional definition of marriage does not violate equal-protection. The court was wrong to apply heightened scrutiny for this claim, as this Court's binding precedent rejects it. *Equality Found. of Greater Cincinnati v. City of Cincinnati*, 128 F.3d 289, 293, 294 (1997). Rational-basis review applies, and Ohio has several rational bases here, both at the time of adopting its amendment and today. Among those: the desire to have Ohioans decide Ohio's marriage policy democratically, and not to have other States or courts decide for them. Maintaining uniformity, so that all same-sex couples are treated the same under Ohio law, as opposed to privileging out-of-state travelers. It is rational for a state to be cautious in weighing such a major social change, looking to other States' experiences with such changes, and considering whether other legal adjustments are needed, such as balanced protections for religious liberty or other adjustments to the many laws affected by redefining marriage. And again, *Windsor* confirms that marriage is an issue for the States.

Fourth, the district court erred in holding that funeral director Grunn had standing. He faces no injury himself, and he does not qualify for third-party standing. He does not have the requisite "close relationship" with his unidentified clients, and other plaintiffs face no hindrance to pursuing their own rights, as this case shows.

ARGUMENT

The district court held that Plaintiffs had both a substantive-due-process and equal-protection right to have Ohio laws recognize their Maryland and Delaware same-sex marriages. It also held that Grunn could raise claims on behalf of future clients. The court was mistaken on all counts.

I. THE DISTRICT COURT'S DUE-PROCESS AND EQUAL-PROTECTION HOLDINGS CONFLICT WITH BINDING SUPREME COURT PRECEDENT

As a threshold matter, *Baker v. Nelson*, 409 U.S. 810 (1972), precludes Plaintiffs' due-process and equal-protection claims. The district court erred by relying on post-*Baker* cases that have not overruled that decision.

A. The Supreme Court has already summarily rejected Plaintiffs' due-process and equal-protection challenges to Ohio's traditional definition of marriage

For all of the debate surrounding marriage, this case is simple—at least for this intermediate Court—because binding Supreme Court precedent requires this Court to reject Plaintiffs' claims. In *Baker*, a same-sex couple brought a constitutional challenge to Minnesota's prohibition on same-sex marriage, arguing

they were "deprived of liberty and property without due process and [were] denied the equal protection of the laws" when a county clerk declined to issue them a marriage license. *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971). The Minnesota Supreme Court rejected both arguments, noting that "[t]he due process clause of the Fourteenth Amendment is not a charter for restructuring [marriage] by judicial legislation," and that adhering to the traditional definition of marriage did not involve any "irrational or invidious discrimination" for purposes of the Equal Protection Clause. *Id.* at 186-87.

The same-sex couple appealed to the U.S. Supreme Court, which summarily dismissed the case "for want of a substantial federal question." *Baker*, 409 U.S. at 810. The appeal placed before the Supreme Court two questions: (1) whether Minnesota's "refusal to sanctify appellants' [same-sex] marriage deprive[d] appellants of their liberty to marry and of their property without due process of law under the Fourteenth Amendment"; and (2) whether Minnesota's "refusal, pursuant to Minnesota marriage statutes, to sanctify appellants' marriage because both are of the male sex violate[d] their rights under the equal protection clause of the Fourteenth Amendment." *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065, 1085 (D. Haw. 2012) (quoting *Baker v. Nelson*, Jurisdictional Stmt., No. 71-1027, at 3 (Feb. 11, 1971)). In dismissing the appeal, the Supreme Court considered both claims and found no federal issue.

Baker's summary dismissal governs this case today. The dismissal was itself "an adjudication on the merits that is binding on lower federal courts." *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1303 (M.D. Fla. 2005) (citing *Hicks v. Miranda*, 422 U.S. 332, 344 (1975)); *see also Ohio ex rel. Eaton v Price*, 360 U.S. 246, 247 (1959) ("Votes to affirm summarily, and to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case . . . ."). And that binding authority did not simply govern the remainder of the litigation in *Baker*; rather, "[t]he precedential value of a dismissal for want of a substantial federal question extends beyond the facts of the particular case *to all similar cases." Jackson*, 884 F. Supp. 2d at 1087 (citations and internal quotations omitted). Plaintiffs have raised here the same issues that the same-sex couple in *Baker* brought before the U.S. Supreme Court: whether the due process and equal-protection clauses require a state to recognize their same-sex marriage. After *Baker*, the answer is clear: They do not.

This interpretation of *Baker* is not novel, as many lower courts have relied on it when considering state laws that do not recognize same-sex marriage. In *Wilson*, for example, the court held that *Baker* required it to dismiss due-process and equal-protection challenges to Florida's refusal to recognize out-of-state, same-sex marriages. 354 F. Supp. 2d at 1304-05. According to the court, *Baker* "addressed the same issues presented in this action and this Court is bound to

follow the Supreme Court's decision." *Id.*; *see also Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 870 (8th Cir. 2006) (recognizing that *Baker* rejected constitutional challenges to traditional marriage definition); *Jackson*, 884 F. Supp. 2d at 1088 (holding that "*Baker* is the last word from the Supreme Court regarding the constitutionality of a state law limiting marriage to opposite-sex couples and thus remains binding on this Court"); *Sevcik v. Sandoval*, 911 F. Supp. 2d 996, 1003 (D. Nev. 2012) ("find[ing] that the present challenge is in the main a garden-variety equal protection challenge precluded by *Baker*"); *Andersen v. King Cnty.*, 138 P.3d 963, 999 n.19 (Wash. 2006) (en banc) (Johnson, J., concurring) ("Courts have specifically held that *Baker* is binding precedent . . . .").

Baker forecloses the Plaintiffs' claims here, as it did in these other cases. Like the same-sex couple in *Baker*, Plaintiffs challenge a state law prohibiting same-sex marriage as violating the Equal Protection and Due Process Clauses. Doc.33, Second Am. Compl. ¶ 50, Page ID #216. Because *Baker* makes clear that those claims fail to state a substantial federal question, the Court should reverse the decision below and remand for the court to dismiss this case.

B. Neither this Court nor the district court is at liberty to conclude that post-*Baker* decisions have overruled it.

The district court's fifty-page opinion did not even *cite Baker*, let alone attempt to *distinguish* it. Instead, the decision ignored *Baker*, repeatedly relying on analogies to the Supreme Court's more recent (yet further afield) decisions in

Windsor, *Lawrence*, and *Romer*—none of which involved the States' authority over marriage. Doc.65, Final Order, at Page ID #1064-65, 1069. If the district court (implicitly) believed that it need not follow *Baker* in light of these cases, it failed to articulate why and disregarded clear limits on lower courts' authority.

The Supreme Court has repeatedly told lower courts that they should not reject one of its cases based on a belief that its later decisions have undermined it. "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989); *see State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (noting that the "Court of Appeals was correct in applying" a decision even though later decisions had undermined it, because "it is this Court's prerogative alone to overrule one of its precedents"); *see also Agostini v. Felton*, 521 U.S. 203, 237 (1997). This Court, too, has repeatedly found that it does "not have the authority" to hold that the Supreme Court has implicitly overruled one of its prior decisions. *United States v. Thompson*, 515 F.3d 556, 565 (6th Cir. 2008); *see United States v. Hill*, 440 F.3d 292, 299 n.3 (6th Cir. 2006); *Steele v. Indus. Dev. Bd. of Metro. Govt. Nashville*, 301 F.3d 401, 409 (6th Cir. 2002).

The district court disregarded this rule. It relied on alleged inferences from *distinguishable* Supreme Court decisions to ignore a *binding* decision. Take its reliance on *Windsor*. *Windsor* considered Section 3 of DOMA, which imposed a federal definition of "marriage" for purposes of all federal laws, one that required courts to ignore same-sex marriages recognized by a State. The Court struck down this provision because it represented an "unusual deviation from the [federal government's] usual tradition of recognizing and accepting state definitions of marriage." 133 S. Ct. at 2693. Until DOMA, "the Federal Government, through our history, [would] defer[] to state-law policy decisions with respect to domestic relations." *Id*. at 2691. Indeed, the Court stressed that, "regulation of domestic relations is an area that has long been regarded as a virtually exclusive province of the States." *Id*. at 2691 (citation omitted). *Windsor* is thus firmly rooted in our country's federalist system and the "unquestioned authority of the States" to regulate marriage. *Id.* at 2693.

Tellingly, unlike the district court, the circuit courts that struck down Section 3 of DOMA before *Windsor* gave *Baker* the respect it is due. The Second Circuit, for example, recognized that *Baker* "held that the use of the traditional definition of marriage for a state's own regulation of marriage status did not violate equal protection." *Windsor v. United States*, 699 F.3d 169, 176 (2d Cir. 2012). But it *distinguished* Section 3 of DOMA—as Ohio does here—on the ground that

"[t]he question whether the federal government may constitutionally define marriage as it does . . . is sufficiently distinct from the question . . . whether same-sex marriage may be constitutionally restricted by the *states*." *Id.* at 178. Similarly, Judge Boudin also recognized that *Baker* was "precedent binding on us unless repudiated by subsequent Supreme Court precedent." *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 8 (1st Cir. 2012).

The district court's reliance on *Lawrence* and *Romer* was even more mistaken. *Lawrence* involved a criminal prohibition on specified sexual conduct and did not implicate the definition of marriage, as evidenced by the Court's express disclaimer that the case did "not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." 539 U.S. at 578; *see id.* at 585 (O'Connor, J.) (noting that the case did not involve the State's legitimate interest in "preserving the traditional institution of marriage"). Similarly, *Romer* involved a state constitutional amendment restricting the ability of localities to prohibit discrimination based on sexual orientation in, among other things, employment. 517 U.S. at 624. As other courts have recognized, these decisions do not alter the "dispositive effect of *Baker*." *Wilson*, 354 F. Supp. 2d at 1305. Neither decision "explicitly or implicitly overturn[s] [the Supreme Court's] holding in *Baker* or provide[s] the lower courts, including this

Court, with any reason to believe that the holding is invalid today." *Id.*; *see Jackson*, 884 F. Supp. 2d at 1085-86 (same).

To be sure, other district courts have, since *Windsor*, also set aside *Baker*'s controlling nature in reaching conclusions opposite to *Baker*. *See Bourke v. Beshear*, No. 3:13-CV-750-H, 2014 WL 556729, at *13, n.1 (W.D. Ky.); *McGee v. Cole*, No.3:13-24068, 2014 WL 321122, at *8-10 (S.D. W. Va.); *Bostic v. Rainey*, No.2:13CV395, 2014 WL 561978, at *9-10 (E.D. Va.); *De Leon v. Perry*, No. SA-13-CA-00982-OLG, 2014 WL 715741, at *8-10 (W.D. Tex.); *Bishop v. U.S. ex rel. Holder*, 962 F. Supp. 2d 1252, 1274-77 (N.D. Okla. 2014); *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1194-95 (D. Utah 2013). But those courts were incorrect, for the reasons stated. *Windsor* did not undermine *Baker*'s holding as to *state* authority over marriage and therefore confers no license to ignore *Baker*'s binding effect.

The Supreme Court has not overruled *Baker*. This Court has no authority to do so. And neither did the district court.

II. SUBSTANTIVE DUE PROCESS DOES NOT TAKE AWAY OHIO'S AUTHORITY TO RECOGNIZE ONLY TRADITIONAL OUT-OF-STATE MARRIAGES

As shown by over a century's worth of history and the Constitution's underlying structure, the Due Process Clause's "substantive" component provides Plaintiffs no "fundamental right" to same-sex marriage or same-sex-marriage

recognition. The district court erred in relying on a law-review article rather than our country's history and traditions.

A. Plaintiffs have no "fundamental right" to same-sex-marriage recognition under substantive due process

The substantive component of the Due Process Clause provides neither a fundamental right to same-sex marriage nor a fundamental right to have a State recognize a same-sex marriage entered into in another State under that State's laws. To qualify as a "fundamental right" under substantive due process, an alleged right "must be 'objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.'" *U.S. Citizens Ass'n v. Sebelius*, 705 F.3d 588, 601 (6th Cir. 2013) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997)). And any analysis for determining whether an alleged right meets these standards must be undertaken "with a careful description of the asserted right, for '[t]he doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.'" *Reno v. Flores*, 507 U.S. 292, 302 (1993) (quoting *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992)).

Unsurprisingly given these demanding standards, "the list of liberty interests and fundamental rights is short, and the Supreme Court has expressed very little interest in expanding it." *EJS Props. v. Toledo*, 698 F.3d 845, 860 (6th Cir. 2012)

(internal quotations omitted). Rather, "identifying a new fundamental right subject to the protections of substantive due process is often an uphill battle . . . ." *Grinter v. Knight*, 532 F.3d 567, 573 (6th Cir. 2008).

Here, "a careful description of the asserted right," *Reno*, 507 U.S. at 302, shows that Plaintiffs claim a fundamental right to require Ohio to recognize their out-of-state, same-sex marriages. They are mistaken. No such right is "deeply rooted in" our Nation's history and traditions. *Glucksberg*, 521 U.S. at 720-21 (internal quotation omitted). Nor does any such right arise from the Full Faith and Credit Clause, the constitutional provision that actually governs Plaintiffs' theory.

1. The Nation's history and traditions prove that Plaintiffs have no fundamental right for Ohio to recognize their out-of-state same-sex marriages

When conducting this "substantive due process" analysis, the Court should "begin, as [the Supreme Court does] in all due process cases, by examining our Nation's history, legal traditions, and practices." *Id*. at 710. Those factors "provide the crucial 'guideposts for responsible decision making,' . . . that direct and restrain [the] exposition of the Due Process Clause." *Id.* (internal citation omitted). This history and tradition is all but dispositive here.

First, the concept of same-sex marriage is not rooted in our Nation's history. No State recognized same-sex marriage until 2004 when Massachusetts began issuing same-sex marriage licenses as a result of a state-court decision. Doc.44-1,

Grossman Decl. ¶ 46, Page ID #546. Currently, in addition to Ohio, a substantial majority of States continue to adhere to the traditional definition of marriage.[1]

For this reason, the majority of courts to consider the question have refused to recognize a fundamental right to same-sex marriage. *See, e.g.*, *Conaway v. Deane*, 932 A.2d 571, 628 (Md. 2007) ("[V]irtually every court to have considered the issue has held that same-sex marriage is not constitutionally protected as fundamental in either their state or the Nation as a whole."); *Andersen*, 138 P.3d at 979 ("Plaintiffs have not established that at this time the fundamental right to marry includes the right to marry a person of the same sex."); *Hernandez v. Robles*, 855 N.E.2d 1, 10 (N.Y. 2006) ("by defining marriage as it has, the New York Legislature has not restricted the exercise of a fundamental right"); *Lewis v.*

[1] *See* Ala. Const. art. I, § 36.03; Alaska Const. art. 1, § 25; Ariz. Const. art. 30, § 1; Ark. Const. amend. 83, § 1; Colo. Const. art. 2, § 31; Fla. Const. art. 1, § 27; Ga. Const. art. 1, § 4 ¶ I; Idaho Const. art. III, § 28; Ind. Code § 31-11-1-1; Kan. Const. art. 15, § 16; Ky. Const. § 233A; La. Const. art. XII, § 15; Mich. Const. art. I, § 25 (held unconstitutional in *DeBoer v. Snyder*, 2014 WL 1100794 (E.D. Mich.) but stayed pending appeal); Miss. Const. art. 14, § 263A; Mo. Const. art. I, § 33; Mont. Const. art. XIII, § 7; Neb. Const. art. I, § 29; Nev. Const. art. I, § 21; N.C. Const. art. XIV, § 6; N.D. Const. art. XI, § 28; Okla. Const. art. 2, § 35 (held unconstitutional in *Bishop v. U.S. ex rel. Holder*, 962 F. Supp. 2d 1252 (N.D. Okla. 2014) but stayed pending appeal); Or. Const. art. XV, § 5a; 23 Pa. Cons. Stat. Ann. § 1704; S.C. Const. art. XVII, § 15; S.D. Const. art. XXI, § 9; Tenn. Const. art. XI, § 18; Tex. Const. art. 1, § 32 (preliminarily enjoined by *De Leon v. Perry*, 2014 WL 715741 (W.D. Tex.) but injunction stayed pending Texas's appeal); Utah Const. art. 1, § 29 (held unconstitutional in *Kitchen v. Herbert*, 961 F. Supp. 2d 1181 (D. Utah 2013) but stayed pending appeal); Va. Const. art. I, § 15-A (held unconstitutional in *Bostic v. Rainey*, 2014 WL 561978 (E.D. Va.) but stayed pending appeal); W. Va. Code § 48-2-603; Wis. Const. art. XIII, § 13; Wyo. Stat. Ann. § 20-1-101.

Harris, 908 A.2d 196, 211 (N.J. 2006) ("[W]e cannot find that a right to same-sex marriage is so deeply rooted in the traditions, history, and conscience of the people of this State that it ranks as a fundamental right."). Rather, "[i]t seems fair to conclude that, until recent years, 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.

Second, given that same-sex marriage itself has been recognized nowhere until recently, there could be no longstanding right for one State to recognize an out-of-state, same-sex marriage. Indeed, there was no longstanding rule requiring States to recognize any out-of-state marriages. While most States traditionally recognized lawful out-of-state marriages under a conflict-of-law rule holding that the validity of a marriage depends on its validity in the State in which it was celebrated, *see* Restatement (Second) Conflicts of Laws § 283 (1971), that rule contained an equally traditional *exception* for marriages violating the public policy of the state in which recognition was sought.

Long before same-sex marriage was contemplated, for example, Ohio courts indicated that they would refuse to recognize a marriage that is "unalterably opposed to a well-defined public policy." *Mazzolini v. Mazzolini*, 155 N.E.2d 206, 208 (Ohio 1958), *see, e.g., Smith v. Smith*, 50 N.E.2d 889, 894 (Ohio Ct. App.

1943) (suggesting that "[h]ad Connecticut recognized the marriage as valid, it would be questionable whether the public policy of Ohio would approve"). Thus, for example, Plaintiffs were wrong when they suggested below that Ohio law would never treat out-of-state marriage as void "due to consanguinity or age," Doc.53, Pl. Memo. Supporting Motion, at Page ID # 766. Plaintiffs' consanguinity argument, for example, is undercut by Ohio's case law. *See, e.g., In re Stiles Estate*, 59 Ohio St. 2d 73, 75 (Ohio 1979) (refusing to recognize common-law marriage between uncle and niece as against public policy); *see also*, Doc.65, Final Order, Page ID #1066-67 (misstating Ohio's law as *always* recognizing marriages from other jurisdictions if valid where solemnized).

This "public policy" exception—the one under which Ohio refuses to recognize out-of-state, same-sex marriages—thus comports with the "Nation's history, legal traditions, and practices." The exception dates back to before the Fourteenth Amendment's adoption. *See* J. Story, *Commentaries on the Conflict of Laws* § 113a, at 168 (Little Brown, & Co. 6th ed. 1865) (noting that exceptions to out-of-state marriage recognition included "those positively prohibited by the public law of a country from motives of policy"). And this public-policy exception continues to this day. Restatement (Second) Conflicts of Laws § 283; *see, e.g.*, *Cook v. Cook*, 104 P.3d 857, 860 (Ariz. Ct. App. 2005); *Hesington v. Hesington's*

Estate, 640 S.W.2d 824, 826 (Mo. Ct. App. 1982); *Laikola v. Engineered Concrete*, 277 N.W.2d 653, 656 (Minn. 1979).

In short, Plaintiffs cannot identify anything in our Nation's history and traditions suggesting they have a fundamental right to same-sex marriage or to a State's recognition of out-of-state marriages violating its public policy.

2. The Full Faith and Credit Clause confirms that Plaintiffs lack a fundamental right to same-sex-marriage recognition

The Full Faith and Credit Clause confirms that the Plaintiffs do not have a substantive due process right that would require Ohio to recognize their out-of-state, same-sex marriages. Where a particular provision of the Constitution "'provides an explicit textual source of constitutional protection,' a court must assess a plaintiff's claims under that explicit provision and 'not the more generalized notion of substantive due process.'" *Conn v. Gabbert*, 526 U.S. 286, 293 (1999) (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989)); *see, e.g.*, *id.* (holding that alleged unreasonable search of attorney fell "under the Fourth Amendment, and not the Fourteenth" Amendment's substantive-due-process component); *Brandenburg v. Hous. Auth.*, 253 F.3d 891, 900 (6th Cir. 2001) (holding that "[a]ny claim for a violation of [a] substantive due process right to free speech is duplicative of [a] First Amendment retaliation claim").

Here, the Full Faith and Credit Clause—which notes that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial

Proceedings of every other State," U.S. Const. art. IV, § 1—provides the relevant constitutional limit. And, for two separate reasons, that clause permits Ohio to refuse to recognize out-of-state, same-sex marriages.

First, the Full Faith and Credit Clause expressly grants Congress the ability "by general Laws" to "prescribe" the "Effect" that one State's "public Acts" and "Records" have in other States. U.S. Const. art. IV, § 1; *Sun Oil Co. v. Wortman*, 486 U.S. 717, 729 (1988) (suggesting that Congress could legislate on whether a statute of limitations of one State be given effect in another state); *Pac. Employers Ins. Co. v. Indus. Accident Comm'n of Cal.*, 306 U.S. 493, 502 (1939) (suggesting that Congress "may under the constitutional provision" give "extra-state effect" to a State's statute); *Los Altos El Granada Investors v. City of Capitola*, 583 F.3d 674, 686 (9th Cir. 2009) ("The Constitution also gives Congress the power to determine the contours of [full faith and credit] deference.").

Congress did precisely that with respect to state marriage laws. Section 2 of the federal DOMA provides: "No State . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . . ." 28 U.S.C. § 1738C. DOMA Section 2 was an appropriate exercise of Congress's power to regulate conflicts between the laws of different states. *See Wilson*, 354 F. Supp. 2d at 1303.

The Supreme Court's decision in *Windsor* left this provision untouched. *See* 133 S. Ct. at 2682-83. *Windsor* expressly acknowledged that the States' authority to define marriage means that "[m]arriage laws vary in some respects from State to State." *Id.* at 2691. To hold otherwise would improperly allow one State to impose its definition of "marriage" upon another, contravening the individual States' deeply rooted authority to regulate marriage. *Id.* ("The significance of state responsibilities for the definition and regulation of marriage dates to the Nation's beginning . . . ."); *see also id*. at 2697 (Roberts, C.J., dissenting) ("There is no departure [from the allocation of responsibilities between the State and Federal Governments] when one State adopts or keeps a definition of marriage that differs from that of its neighbor, for it is entirely expected that state definitions would 'vary, subject to constitutional guarantees, from one State to the next.'"). Indeed, Plaintiffs' own expert acknowledges the historical precedent for such variation. Doc.44-1, Grossman Decl. ¶¶ 21-25, Page ID #541-42. Implicit in this recognition is that each State has, and has always had, the right to define marriage within its borders.

Second, even if Congress had never enacted Section 2 of DOMA, the Full Faith and Credit Clause would still have protected Ohio's right to define marriage within its borders. The Supreme Court has long held that "the Full Faith and Credit Clause does not require a State to apply another State's law in violation of

its own legitimate public policy." *Nevada v. Hall*, 440 U.S. 410, 422 (1979); *see Pac. Employers*, 306 U.S. at 502. Thus, the States maintained public-policy exceptions to out-of-state marriages even before Congress enacted Section 2 of DOMA. *See* Part II.A.1. This "long established and still subsisting choice-of-law practice[]" of recognizing only those out-of-state marriages that do not violate the State's public policy are not unconstitutional under the Full Faith and Credit Clause, even if this policy has "come to be thought, by modern scholars, unwise." *Sun Oil*, 486 U.S. at 728-29.

In short, the Full Faith and Credit Clause is the constitutional provision most directly applicable to this case. It requires the States to respect one another's laws when they differ, and Congress has seen fit to make that protection clear in the context of state marriage laws through DOMA Section 2. The district court was wrong to evade the application of this clause under the guise of substantive-due-process analysis. *See Conn*, 526 U.S. at 293.

B. The district court's contrary analysis was mistaken

The district court refrained from finding a fundamental right to same-sex marriage. Doc.65, Final Order, at Page ID #1052-53. It held that the right at issue was "not the right to marry, but, instead, the right not to be deprived of one's already-existing legal marriage and its attendant benefits and protections." Doc.65, Final Order, at Page ID #1053. But its analysis was mistaken.

First, the district court cited several Supreme Court decisions, none of which justifies its result. *See* Doc.65, Final Order, at Page ID #1052-55 (citing *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Lawrence*, 549 U.S. at 578; *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984); *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977); *Zablocki v. Redhail*, 434 U.S. 374 (1978)). Both *Loving* and *Zablocki*, for example, involved a right to *traditional* marriage. *Loving*, 388 U.S. at 2; *Zablocki*, 434 U.S. at 379. Unlike same-sex marriage, traditional marriage *is* consistent with "our Nation's history, legal traditions, and practices." *Glucksberg*, 521 U.S. at 710; *see Hernandez*, 7 N.Y.3d at 362-63. These cases thus say nothing about *expanding* the right to marriage beyond the traditional and historical context of an opposite-sex relationship. *See Jackson*, 884 F. Supp. 2d at 1095 ("[T]he Supreme Court, in discussing the fundamental right to marry, has had no reason to consider anything other than the traditional and ordinary understanding of marriage as a union between a man and a woman."); *In re Kandu*, 315 B.R. 123, 140 (Bkrtcy. W.D. Wash 2004) (same).

The district court's reliance on *Roberts*, *Lawrence*, and *Moore* fares no better. As noted, *Lawrence* expressly disclaimed that it considered whether "the government must give formal recognition to any relationship that homosexual persons seek to enter." 539 U.S. at 578. *Roberts* involved freedom-of-association rights within the context of gender discrimination by *private organizations*. *See*

468 U.S. at 612. *Moore* involved restrictions on a grandmother's ability to live with her son and two grandsons. 431 U.S. at 496. If anything, that the district court stretched to rely on these inapposite cases illustrates the novelty of its holding that a "fundamental right" to same-sex-marriage recognition exists.

Second, turning to history, the court said "the concept that a marriage that has legal force where it was celebrated also has legal force throughout the country has been a longstanding general rule in every state." Doc.65, Final Order, at Page ID #1053-54. But this overlooks the equally historical *exception* on which Ohio relies here for those marriages against the "strong public policy" of the State. Ohio Rev. Code § 3101.01(C)(1); *see Mazzolini*, 155 N.E.2d at 208; *see also* J. Story, *Commentaries on the Conflict of Laws* § 113a, at 168 (Little Brown, & Co. 6th ed. 1865). By relying on the traditional *rule* that States will recognize out-of-state marriages, but ignoring the equally traditional *exception* for marriages against public policy, the district court made a classic substantive-due-process mistake. It failed to provide the "*careful* description of the asserted fundamental liberty interest" that the Supreme Court's cases require. *Glucksberg*, 521 U.S. at 721 (internal quotation marks omitted; emphasis added).

Third, the Court rejected the State's reliance on Section 2 of DOMA—which expressly authorizes Ohio to refuse to recognize same-sex marriage performed in other States—in a footnote. It noted that while "Section 2 of DOMA [was] not

specifically before this Court, the implications of today's ruling speak for themselves." Doc.65, Final Order, at Page ID #1060 n.9. But this Court cannot accord Plaintiffs the relief they seek without invalidating this controlling federal statute—something the Court should not do sua sponte.

Fourth, given these mistakes, the district court inappropriately applied heightened scrutiny. Doc.65, Final Order, at Page ID #1054-61. Classifications that do not intrude on a fundamental right receive, at most, rational-basis review. *See Glucksberg*, 521 U.S. at 728. And, for the reasons explained below, the State's decision to retain the traditional definition of marriage satisfies that review. *See* Part III.B.

III. OHIO'S DECISION TO RECOGNIZE ONLY TRADITIONAL MARRIAGE COMPORTS WITH EQUAL PROTECTION

At its heart, the Equal Protection Clause of the Fourteenth Amendment "protects against invidious discrimination among similarly-situated individuals or implicating fundamental rights." *Dixon v. Univ. of Toledo*, 702 F.3d 269, 278 (6th Cir. 2012) (internal quotations omitted). At the same time, "where no suspect class or fundamental right is implicated, [the court] appl[ies] the rational-basis test and sustain[s] the government action in question unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [the Court] can only conclude that the [government's]

actions were irrational." *Sadie v. City of Cleveland*, 718 F.3d 596, 601-02 (6th Cir. 2013) (internal quotations omitted).

A. Rational-basis review applies to Ohio's marriage laws

The district court applied heightened scrutiny to Plaintiffs' equal-protection claims premised on sexual orientation. In doing so, the district court contradicted not one, but three, published opinions of this Court. *Compare* Doc.65, Final Order, at Page ID #1078 (holding that "[d]efendants must justify" marriage law "in accordance with a heightened scrutiny analysis"), *with Davis v. Prison Health Servs.*, 679 F.3d 433, 438 (6th Cir. 2012); *Scarbrough v. Morgan Cnty. Bd. of Educ.*, 470 F.3d 250, 261 (6th Cir. 2007); *Equality Found.*, 128 F.3d at 294. Apart from these controlling precedents, moreover, the district court's reasoning for adopting heightened scrutiny is unsupported. Binding precedent requires this Court to apply rational-basis review when determining the constitutionality of Ohio's marriage laws. And, regardless, rational-basis review is appropriate here.

1. Binding precedent requires this Court to apply rational-basis review.

This Court's binding precedent dictates rational-basis review, and the district court's contrary conclusion simply disregarded those controlling cases.

a. This Court's controlling precedent applies rational-basis review to sexual-orientation classifications.

Three published cases in the Sixth Circuit establish that equal-protection claims based on sexual orientation receive rational-basis review. The first of those

is *Equality Foundation*, which concerned an amendment to Cincinnati's charter prohibiting the city from offering designated legal protection to gays and lesbians. *Equality Foundation* explained that the U.S. Supreme Court had "resolved" in *Romer* that "the deferential 'rational relationship test' . . . was the correct point of departure" for evaluating laws alleged to burden gays and lesbians. 128 F.3d at 294. Relying on *Romer*, this Court applied a rational-basis standard and concluded that Cincinnati's charter amendment served "the valid interests of the Cincinnati electorate in conserving public and private financial resources" and was not "an irrational measure fashioned only to harm an unpopular segment of the population." *Id*. at 301.

Since *Equality Foundation*, the Sixth Circuit has twice reaffirmed that equal-protection claims premised on sexual orientation receive rational-basis review. In *Scarbrough*, the Court relied on the fact that "homosexuality is not a suspect class in this circuit" to conclude that "persons who associate with homosexuals" are likewise not a suspect class and subject only to rational-basis review. 470 F.3d at 261. And just two years ago, the Court restated the rational-basis standard in *Davis v. Prison Health Services*: "Because this court has not recognized sexual orientation as a suspect classification, [the plaintiff's equal protection] claim is governed by rational basis review." 679 F.3d 433, 438 (2012).

Similarly, *Windsor* did not apply heightened scrutiny to equal-protection claims premised on sexual orientation; it ruled under the same rational-basis review. Indeed, *Windsor* expressly used the language of rational-basis review, holding that the "principal purpose" of the federal law was "to demean" same-sex couples, which itself could not be a "legitimate purpose," *Windsor*, 133 S. Ct. at 2695-96, as rational-basis review requires, *Armour v. City of Indianapolis*, 132 S. Ct. 2073, 2080 (2012) (rational-basis review requires "some legitimate government purpose"). *Windsor* cannot, and thus does not, require the Sixth Circuit to revisit its precedent establishing rational-basis review for sexual-orientation claims.

This Court's three published opinions, then, unaffected by *Windsor*, bind all panels in subsequent cases. *See* Sixth Circuit Rule 32.1(b). Without en banc rehearing, "[p]ublished panel opinions are binding on later panels." *Id*. In this circuit, rational-basis review applies to equal-protection claims premised on sexual orientation until the en banc court holds otherwise. The Court should apply rational-basis review.

b. The district court should not have disregarded these controlling cases.

Instead of following the binding precedent of this circuit, the district court took upon itself the authority of an en banc court and held that rational-basis review did not apply. In doing so, the court both relied on and extended the

opinion of *another district court*. Because the district court's rationale was mistaken, this court should reverse.

After recognizing that the Sixth Circuit "rejected heightened scrutiny" for claims based on sexual orientation in its "most recent . . . case to consider the issue," Doc.65, Final Order, Page ID #1068, the district court turned to *Bassett v. Snyder*, a case from the Eastern District of Michigan, 951 F. Supp. 2d 939 (E.D. Mich. 2013). Then, purporting to look to *Bassett*, the district court traced the following line of logic: (1) *Equality Foundation*, which established rational-basis review for sexual orientation claims in the Sixth Circuit, relied on *Bowers v. Hardwick,* 478 U.S. 186 (1986); (2) the U.S. Supreme Court overruled *Bowers* in *Lawrence v. Texas*, 539 U.S. 558 (2003); (3) therefore, any Sixth Circuit cases that apply rational-basis review to sexual-orientation claims are not controlling because "the Supreme Court eliminated a major jurisprudential foundation of . . . *Equality Foundation*." Doc.65, Final Order, at Page ID #1068-70. Every step of that analysis is flawed, and indeed, *Bassett* itself reflects that the test is rational-basis review.

First, in *Equality Foundation*, the Sixth Circuit primarily relied not on *Bowers*, but on the then-recent *Romer* decision, which concerned a ballot issue in Colorado that was claimed to be similar to Cincinnati's charter amendment. *Equality Found.*, 128 F.3d at 291-92. Indeed, the entire purpose of *Equality*

Foundation was to apply *Romer*, since the U.S. Supreme Court had held *Equality Foundation* for *Romer*, and sent the case back to the Sixth Circuit following its decision. *Id*. at 294; *see also Equality Found. of Greater Cincinnati v. City of Cincinnati*, 518 U.S. 1001 (1996). In deciding *Equality Foundation* on remand, the Sixth Circuit noted that *Romer* "resolved that the deferential 'rational relationship' test . . . was the correct point of departure for the evaluation of laws which uniquely burdened the interests of homosexuals." *Equality Found.*, 128 F.3d at 294. It also noted that *Romer* itself applied rational-basis review. *Id*.; *see Romer*, 517 U.S. at 631-32 (holding that Colorado's amendment "fails . . . [the] conventional inquiry" into whether a "legislative classification . . . bears a rational relation to some legitimate end."). Thus, the Sixth Circuit concluded that, based on *Romer*, rational-basis review applied to claims premised on sexual orientation. *Equality Found.*, 128 F.3d at 301 (concluding that "the valid interests of the Cincinnati electorate . . . justif[ied] the City's Charter Amendment under a rational basis analysis"). Indeed, the only time *Equality Foundation* mentioned *Bowers* was simply to recount the holding of its prior decision, which the U.S. Supreme Court vacated when it remanded the case in light of *Romer*. *Equality Foundation*, 128 F.3d at 292-93 (only citation to *Bowers*, describing prior vacated holding).

Second, even if the district court had been correct in concluding that the Sixth Circuit relied on *Bowers,* it would not matter to this case, since the Supreme

Court decided *Lawrence* (and overruled *Bowers*) entirely on grounds of substantive due process, without any equal-protection analysis. *Lawrence* begins by stating that the question in the case is whether "the petitioners were free as adults to engage in the private conduct . . . under the Due Process Clause of the Fourteenth Amendment." 539 U.S. at 564. Later, *Lawrence* explicitly disclaims that its holding relies on the "alternative" equal-protection argument because "[w]ere [the Court] to hold the statute invalid under the Equal Protection Clause" some might wonder if the law could simply be "drawn differently" and remain constitutional. *Id*. at 574-75. Even if that statement suggests that *Lawrence* would have come out the same way on equal-protection grounds, it says nothing about how the Court would have gotten there—by rational-basis reasoning or some form of heightened scrutiny. In sum, *Lawrence* does not speak to whether rational-basis review should apply to equal-protection claims premised on sexual orientation, and contrary to the district court's analysis, it cannot be thought to have overruled *Equality Foundation*'s conclusion that it does.

Third, even if *Equality Foundation* were not good law in light of *Lawrence,* the Sixth Circuit's application of rational-basis review in *Scarbrough* and *Davis* would not be unsound, as the district court presumed. This Court decided both *Scarbrough* and *Davis* after *Lawrence*. The Sixth Circuit had the opportunity to revisit its precedent in light of the Supreme Court's decision in *Lawrence*, and

continued to apply rational-basis review. The district court's claim that it was "without controlling post-*Lawrence* precedent on the issue" is patently incorrect. *Cf.* Doc.65, Final Order, at Page ID #1070 *with Davis*, 679 F.3d at 438 (decided after *Lawrence*) and *Scarbrough*, 470 F.3d at 261 (same). Sixth Circuit precedent required the district court to apply rational-basis review to Ohio's marriage law, and the district court erred when it decided to apply heightened scrutiny instead.

Any doubt about the clarity of the rational-basis rule in the Sixth Circuit can be resolved by looking to the very same district court opinion on which the lower court here purported to rely. In *Bassett*, the Eastern District of Michigan did, as the district court here said, raise questions about whether the Sixth Circuit should revisit its precedent holding that rational-basis review applies to equal-protection claims premised on sexual orientation. But it went on to conclude that it could *not*, as the lower court here did, decide that sexual orientation is a suspect classification because "[a]t present . . . *that is not the law of the circuit, and it cannot govern the decision here*." 951 F. Supp. 2d at 961 (emphasis added). Two other district courts have reached the same conclusion in the last two years. *See Bourke v. Beshear*, 2014 WL 556729 at *4-5 (W.D. Ky. 2014) (applying rational-basis review); *Lee v. Pauldine*, No.1:12-cv-07, 2013 WL 65111 at *6 (S.D. Ohio) (same). Only the en banc court can overrule a prior panel holding, and since that

has not happened, rational-basis review remains the standard for evaluating Ohio's marriage laws. *See* Sixth Circuit Rule 32.1(b).

2. Aside from binding precedent, heightened scrutiny is not appropriate in this case.

Even if this panel were to disregard circuit precedent and reexamine the issue, sexual orientation is not a suspect class entitled to heightened scrutiny. When considering "social . . . legislation" the "Equal Protection Clause allows the States wide latitude" because "the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985). That is why applying rational-basis review is the rule rather than the exception in deciding equal-protection claims. *See id*. Heightened scrutiny, by contrast, applies where the legal classification evidences prejudice and antipathy (as it does not here) and then only if democratic processes cannot be expected to change the law. *Id*. ("*because* such discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny") (emphasis added). But today advocates of same-sex marriage are experiencing significant success both at the ballot box and in state legislatures. *See* Jeffrey M. Jones, Same-Sex Marriage Support Solidifies Over 50% in US, Gallup Politics, May 3, 2013, available at http://www.gallup.com/poll/162398/sex-marriage-support-solidifies-above.aspx; Maine Rev. Stat. Ann. 19-A § 650-A (defining marriage as the "union of 2

people," without regard to gender; adopted by statewide referendum on Nov. 6, 2012); *see also*, *e.g.*, New Hampshire Rev. Stat. 457:1-a (legislative act recognizing same-sex marriage); 15 Vermont Stat. Ann. § 8 (same); McKinney's Consol. Laws of N.Y. Ann., Domestic Relations Law § 10-a (same). That success is simply inconsistent with the lack of political power that the U.S. Supreme Court has recognized as a trademark of a suspect class. *See Clebourne*, 473 U.S. at 440. Sexual orientation is not a suspect classification and is not entitled to heightened scrutiny.

B. Ohio's marriage laws survive rational-basis review

Ohio's marriage laws satisfy rational-basis review. When applying rational-basis review, courts do not sit in judgment about "the wisdom, fairness, or logic of legislative choices," *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993), but instead consider only if a rational relationship exists between the law's classification and "some legitimate government purpose," *Bd. of Trs. of Univ. of Alabama v. Garrett*, 531 U.S. 356, 367 (2001) (internal quotation omitted). Rational-basis review is not concerned with the reasoning "articulate[d] . . . at the moment a particular decision is made." *Id*. Rather, the challenging party can prevail only by discounting every "reasonably conceivable state of facts that could provide a rational basis for the classification" in the law. *Id*. (internal quotation omitted). Plaintiffs cannot meet that standard.

1. Ohio's marriage laws are rationally related to several legitimate justifications

Ohio voters had a rational interest in ensuring that Ohio's democratic process—not that of Maryland or Delaware—would continue to set marriage policy within the State. Requiring Ohio to recognize marriages from other States would make Ohio's democratic processes subservient to those of other States. It is precisely this "license for a single State to create national policy" that other courts have rejected and that it is rational for Ohio to want to avoid. *Wilson*, 354 F. Supp. 2d at 1303; *Sevcik,* 911 F. Supp. 2d at 1021.

Relatedly, avoiding judicial intrusion upon a historically legislative function (defining "marriage") is a legitimate justification for Ohio's marriage laws. Ohioans could have feared that, absent a strong public-policy statement like that set out in both the constitutional amendment and the statute, they would risk abdicating the State's marriage definition to judicial resolution, even resolution by out-of-state courts. *See* Doc.41-6, Becker Decl. Ex. E, Page ID #340, 351 (statement of Rep. Seitz, p. 5, lns. 1-3, "I'm not willing to leave it to courts to define what Ohio's public policy might be."); (statement of Rep. Grendell, p. 46, lns. 9-15, "There's no judge in Massachusetts who is accountable to one person who lives in this state, but we all are. And that's why it is important that we retain the policy, power in Ohio to decide on what is marriage."); (statement of Rep. Grendell, p. 47, lns. 18-20, "I'm going to vote that the people of Ohio deserve to

have their representatives decide the public policy of this state."). That courts could intrude upon this area, absent an express statement of public policy, is hardly unrealistic, since it has happened before. *See Mazzolini*, 155 N.E.2d at 208. Thus, Ohioans' desire to retain their democratic voice is a legitimate justification for Ohio's marriage laws. *See Sevcik,* 911 F. Supp. 2d at 1021 ("[T]he protection of Nevada's public policy is a valid reason for the State's refusal to credit the judgment of another state, lest other states be able to dictate the public policy of Nevada.")

The desire to maintain marriage uniformity within Ohio is another rational basis supporting Ohio's marriage laws. A simple search of any legal database will reveal hundreds of provisions of Ohio law that rely in some way on the terms "husband," "wife," or "spouse," sometimes with associated gender pronouns. Those provisions touch on all manner of topics, ranging from domestic relations to tort remedies and tax law. *See*, *e.g.*, Ohio Rev. Code § 3111.97 (parentage rules for embryo donation); Ohio R. Civ. Pro. 19.1 (compulsory joinder where husband or wife injured); Ohio Rev. Code § 5747.08(E) (joint tax returns). It is entirely rational for Ohioans to determine that if same-sex marriage is to be recognized in this State, such revision should not be undertaken in a piecemeal fashion. The surest way for Ohioans to effect a comprehensive policy change was by amending the state constitution to define marriage for all purposes within the State. That

strategy is the most insulated from judicial review, and most effectively ensures a uniform marriage policy throughout the state.

And that uniformity rationale can hardly be thought to proceed from illegitimate animus; in fact, the opposite would be true, as the interest in uniformity serves a fundamental goal of fairness. If Ohio had instead chosen to recognize only out-of-state same-sex marriage, as the Plaintiffs advocate here, it would essentially have approved same-sex marriage only for those couples who possess the resources necessary to navigate another State's marriage laws and the wherewithal required to travel to be married. Ohioans could have preferred that same-sex marriage be legal for all purposes in the State or for none, which provides yet another rational basis for the marriage laws Ohio has enacted.

Ohioans also have an interest in approaching social change with deliberation and care. Before the last decade, no State permitted same-sex marriage. Now, some States have chosen to expand marriage to include same-sex couples, while most others, including Ohio, have not. It is undisputed that allowing same-sex marriage would significantly alter Ohio's definition of marriage. Faced with these circumstances, Ohio lawmakers and voters could rationally choose to examine the impact that changing marriage laws has had or will have in other states and wait before considering whether to change Ohio's laws. "[T]he state may rationally decide to observe the effect of allowing same-sex marriage in other states before

changing its definition of marriage." *Jackson*, 884 F. Supp. 2d at 1118. Ohio's marriage laws are rationally connected to this purpose, as they leave to the democratic process any change that may occur. "[T]he state could rationally conclude that it is addressing a divisive social issue with caution." *Id.* at 1072.

Indeed, Ohio's desire to have its marriage policy decided democratically, by Ohioans—and to put up a barrier against a decision forced upon it by courts or other States—has ironically been proven prescient by this very case. Many Ohioans may have desired a permanent ban on same-sex marriage, of course. But others may have wanted more time to study the issue. A constitutional amendment was the only way to assure continued deliberation about it, before a court could step in and shut down the debate.

Given all of this, Justice Brandeis's metaphor of the States as the laboratories of democracy remains powerful—and rational—today. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). It is rational for Ohio's voters and lawmakers to wait to see how revision efforts in other States progress, to assess the results of such changes, and then to take them into account in setting future policy. *See Jackson*, 884 F. Supp. 2d at 1118 (noting the legitimate interest in addressing "a highly-debated social issue cautiously"); *see also, e.g., Lawrence*, 539 U.S. at 585 (O'Connor, J., concurring) (listing

"preserving the traditional institution of marriage" as an example of a "legitimate state interest").

Ohio's desire to protect its right to define marriage from another state or a court is not only rational, it is authorized by federal statute. Under rational-basis review, Section 2 of DOMA itself provides a legitimate justification for Ohio's action. In passing Ohio's marriage laws, lawmakers and voters exercised the authority that the federal government had preserved for the States. Congress, through Section 2 of DOMA, confirmed each State's right to decide for itself whether to recognize the same-sex marriages of the other States. 28 U.S.C. § 1738C. *Windsor* left this provision of DOMA untouched, and Plaintiffs do not challenge it here. Under these circumstances, Ohio's decision not to recognize out-of-state same-sex marriages is a rational policy decision based on State authority that federal law protects.

Ohio voters and lawmakers may have been motivated by yet another interest: the desire not to alter the definition of marriage without first taking steps to consider religious liberty issues and myriad state laws and regulatory systems. Such concerns have been the subject of significant ongoing debate and attention by people on all sides of the marriage policy issue. And a desire to ensure that any such issues are fully analyzed and appropriately addressed is a conceivable legitimate basis for legislators and voters to forestall any potential move away

from the traditional definition of marriage. That is especially true in the context in which the challenged statute and amendment were adopted, as courts in other jurisdictions contemplated rulings that otherwise might have been claimed to have extraterritorial effect.

2. The district court's contrary analysis ignored the legitimate justifications for Ohio's marriage laws

The district court did not adequately consider Ohio's rational bases. In fact, the district court really did not discuss many of the legitimate justifications Ohio put forward for its marriage laws at all. In a cursory section captioned "Potential State Interests," the court glossed over the State's argument that Ohio's voters had a rational interest in preserving "*uniformly* the traditional definition of marriage *without regard to contrary determinations by some other jurisdictions*," and in preserving the democratic process in this area. Doc.56, Respondents' Br. at Page ID #884 (emphasis added). And the court failed to justify its rejection of a narrow, tradition-alone rationale: While it is true, as the court quoted, that "[a]ncient lineage of a legal concept does not give it immunity from attack for lacking a rational basis," Doc.65, Final Order, at Page ID #1082 (quoting *Heller v. Doe by Doe*, 509 U.S. 312, 326-27 (1993)), it is also true, as the court failed to note, that traditional classifications can "suggest[ ] . . . a commonsense distinction" that the law rightfully recognizes, *id*. *See also Williams v. Illinois*, 399 U.S. 235 (1970)

(although the "antiquity of a practice" does not "insulate[ ] it from constitutional attack," it is a "factor[that] should be weighed in the balance").

Other than that, the court largely stated the bald conclusion that there was "no rational connection between Ohio's marriage-recognition bans and the asserted state interests," which the court had never discussed. Doc.65, Final Order, at Page ID #1084. And then the court proceeded in a circle: Because no rational basis could justify Ohio's marriage laws, those laws must have been passed to burden same-sex couples, *id*. at #1084-85, and because they were passed to burden~~ed~~ same-sex couples, no rational basis could ever justify them, *id*. at #1085. That circular reasoning cannot justify striking down Ohio's democratically enacted marriage laws.

IV. GRUNN HAS NO THIRD-PARTY STANDING TO PURSUE CLAIMS FOR FUTURE CLIENTS.

If the Court reverses, as it should, Grunn's claim cannot stand on its own. But even if the Court affirms the district court as to the relief granted to the other Plaintiffs, it should reverse the *expanded* relief that the district court gave to Grunn. He has no valid third-party standing to pursue his clients' rights.

A. Grunn's lack of standing is independently important

Two threshold points are critical regarding Grunn's standing. First, his standing is important, despite the presence of other parties with standing, because the relief he sought was unique. When several plaintiffs seek the same relief,

courts routinely end the inquiry after finding one party with standing, for the standing of tag-along plaintiffs does not change things. *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264, n.9 (1977); *see also 1064 Old River Road, Inc. v. City of Cleveland*, 137 Fed. Appx. 760, 765 (6th Cir. 2005).

But here, the district court granted broader relief for Grunn and his future clients, and that relief cannot piggyback upon the other named plaintiffs' claims regarding two death certificates. Standing is both plaintiff- and provision-specific. Where "the injury-in-fact" claimed by one group "is very different from that of" other plaintiffs, the court must separately "inquire about the standing of each category of plaintiffs." *National Rifle Ass'n of America v. Magaw*, 132 F.3d 272, 278 n.4 (6th Cir. 1997).

Second, although Grunn's lack of standing requires reversal of his expanded relief, that does not end the case for the other Plaintiffs. The district court erred in misreading Ohio's motion in that regard. In assessing Ohio's motion to dismiss Grunn, the court noted Arthur's death and asked "whether this lawsuit dies with him." Doc.54, Order Denying the Motion to Dismiss, at Page ID #822. The court improperly characterized Ohio as "argu[ing] that now that Messrs. Arthur and Ives have died, there exists no live controversy" but for Grunn's joining the case. *Id.* #825. But Ohio said no such thing. Ohio asked to dismiss Grunn's claims, but

took (and still takes) the position that because the remaining Plaintiffs' death certificates could be amended if the decision is reversed, their claims are not moot. Alternatively, any mootness is likely capable-of-repetition, yet-evading-review, because death certificates of course involve the problem of death occurring before appeals are over. Thus, Grunn should be dismissed.

B. Grunn lacks standing

Grunn faces no injury, and he does not have third-party standing.

1. Grunn faces no injury-in-fact

The district court found that Grunn could raise others' claims because he faced an Article III injury-in-fact, namely, his alleged fear of prosecution for filling out false information. That "injury" as claimed below is illusory.

When injury is claimed based upon a threatened prosecution, that threat must be real. "The mere existence of a statute, which may or may not ever be applied to plaintiffs' members, is not sufficient to create a case or controversy within the meaning of Article III." *Magaw*, 132 F.3d at 293 (internal quotation and citation omitted). The Supreme Court has "repeatedly reiterated that 'threatened injury must be *certainly impending* to constitute injury in fact,' and that '[a]llegations of *possible* future injury are not sufficient.'" *Clapper v. Amnesty Int'l*, 133 S. Ct. 1138, 1147 (2013) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)). And an injury cannot be deemed "certainly impending" where its

occurrence requires a "chain of events" that "is simply too attenuated." *Feiger v. Michigan Supreme Court*, 553 F.3d 955, 967 (6th Cir. 2009).

Grunn's "chain of events" is too speculative. It requires (1) an as-yet unidentified member of a same-sex couple married elsewhere to die in Ohio; (2) the surviving partner to hire Grunn and ask Grunn to list "married" on the death certificate; (3) the local registrar of certificates or the Ohio Department of Health to find the information "false," and determine that Grunn purposely made the false statement in violation of Ohio Rev. Code § 3705.29(A)(1); (4) the relevant agency to refer the matter to a county prosecutor; (5) the prosecutor to exercise discretion to prosecute. Grunn candidly admitted that Ohio's "'chain of events' leading to [his] prosecution may illustrate a prosecution that is not 'certainly impending,'" suggesting that it is "not imaginary or wholly speculative." Doc.49, Opp. to Motion to Dismiss, Page ID #725. But *Whitmore* requires much more than that.

2. Grunn lacks standing to sue on behalf of third parties

Even if Grunn faced concrete injury, he cannot rely on disfavored third-party standing. *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) (beyond certain examples, the Court has "not looked favorably upon third-party standing"). He cannot show either (1) "a close relationship with the person who possesses the right" at issue, or (2) "a hindrance to the possessor's ability to protect his own interests." *Boland v. Holder*, 682 F.3d 531, 537 (6th Cir. 2012).

a. Grunn does not have a "close relationship" with unknown future clients. *Kowalski* rejected lawyers' claims regarding unascertained clients "who will request, but be denied" counsel. 543 U.S. at 130-31. A lawyer's relationship with an "existing client" or "known claimants" might satisfy the "close relationship" factor. *Id.* But it was not enough where "[t]he attorneys before us do not have a 'close relationship' with their alleged 'clients'; indeed, they have no relationship at all." *Id.* at 131; *see Smith v. Jefferson Cnty. Bd of Sch. Comm'rs*, 641 F.3d 197, 226 (6th Cir. 2011) (Batchhelder, C.J., concurring in part and dissenting in part) ("Prospective or hypothetical relationships cannot sustain third-party standing.").

Grunn falls squarely under *Kowalski*, claiming hypothetical future clients. The district court's distinction of *Kowalksi* was mistaken. It said that Grunn was different because he is part of the gay community and routinely serves it. But surely his own identity should not matter, and the criminal-defense lawyers in *Kowalski* routinely served that market. The court also said that the "services of a funeral director, unlike those of an attorney, are services every one of us will inescapably require one day." Doc.54, Order Denying Motion to Dismiss, Page ID #831 (emphasis in original). But the relevant population in *Kowalski*, of future defendants, would all (or virtually all) need lawyers.

The district court was also wrong in relying on *Craig v. Boren,* 429 U.S. 190 (1976), which allowed a beer seller to represent the interests of male beer buyers who were age 18 to 21. Grunn is not in the same buyer-seller relationship as in *Craig*. In *Craig*, the challenged law *barred* sales from the present seller to the absent buyers, so the seller, on the other side of the barred transaction, "incur[ed] a direct economic injury through the constriction of her buyers' market." 429 U.S. at 194. Here, by contrast, nothing blocks Grunn's potential business relationships or otherwise injures him economically; the law affects only how he fills out a form. Moreover, *Craig* stressed that the seller's standing had never been challenged, and that mootness arose only after the case was in the Supreme Court. That combination justified keeping the case for decision for "prudential" reasons. *Id.* at 193-94. Here, by contrast, Ohio objected to Grunn from the beginning.

b. Grunn also cannot show that anything prevents the real parties from "litigating their right themselves." *Smith*, 641 F.3d at 209. Hindrance must be pleaded with specificity. *See Wuliger v. Mfrs. Life Ins. Co.*, 567 F.3d 787, 793 (6th Cir. 2009). This Court has explained that "hypothetical future defendants" faced no hindrance in raising their Sixth Amendment rights when other such defendants had raised challenges before. *Boland*, 682 F.3d at 536-37.

Here, other Plaintiffs *are* pursuing the relevant claims. The district court erred in reasoning that these Plaintiffs were rare in achieving a lawsuit in time, and

in saying that most or all other plaintiffs would not make it to court first because death catches them by surprise. Doc.54, Order Denying Motion to Dismiss, Page ID #833-34. But other plaintiffs are not needed here, as this case moves forward—the existing named Plaintiffs (other than Grunn) are enough. Moreover, others can sue—and have—regarding interstate marriage recognition generally, or in other specific contexts, and some of these cases could encompass the narrow death-certificate relief. Indeed, this Court's docket is full of cases that cover similar issues, so there is no "need" to expand the case to Grunn just to get an answer. Kentucky's case involves recognition of out-of-state marriages for all purposes, so that will include this death-certificate context. Tennessee also has a recognition case in this Court, and Michigan's case is even broader, involving the right to marry. In sum, no systemic hindrance to suit exists, so the Court need not expand third-party standing to meet a nonexistent "need" to address the issue.

CONCLUSION

The Court should reverse the district court's judgment, dissolve its permanent injunction, and direct it to enter a judgment in favor of Defendant-Appellant Himes.

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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 13,813 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.

4. I understand that a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in Fed. R. App. P. 32(a)(7) may result in the court's striking the brief and imposing sanctions against me.

/s/ *Bridget E. Coontz*
BRIDGET E. COONTZ

CERTIFICATE OF SERVICE

I certify that a copy of this brief has been served through the court's electronic filing system on this 10th day of April, 2014. Electronic service was therefore made upon all counsel of record on the same day.

/s/ *Bridget E. Coontz*
BRIDGET E. COONTZ

DESIGNATION OF DISTRICT COURT RECORD

Defendant-Appellant Lance D. Himes designates the following district court documents:

Document No.	Description of Document	Page ID#
1	Complaint	1
3	Motion for Temporary Restraining order and Preliminary Injunction	12
11	Response to Motion for Temporary Restraining Order and Preliminary Injunction	69
13	Decision Granting Temporary Restraining Order	91
14	Order Granting Temporary Restraining Order	106
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33	Second Amended Complaint	206
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