United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

September 25, 2014

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 14-31037
Jonathan Robicheaux, et al v. James Caldwell, et al
USDC No. 2:13-CV-5090
USDC No. 2:14-CV-327
USDC No. 2:14-CV-97

Enclosed is an order entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk

Shea E. Pertuit

By: _____
Shea E. Pertuit, Deputy Clerk
504-310-7666

P.S. to Counsel: The briefing notice will issue under separate cover. Additionally, you will receive separate notification of the tentative date of the oral argument and further information regarding same.

Mr. James Dalton Courson
Mr. Stuart Kyle Duncan
Mrs. Angelique Duhon Freel
Ms. Lesli Danielle Harris
Mr. James Michael Johnson
Mr. Richard Gerard Perque
Mr. Scott Jerome Spivey

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 14-31037

JONATHAN P. ROBICHEAUX; DEREK PENTON;
NADINE BLANCHARD; COURTNEY BLANCHARD,

Plaintiffs–Appellants,

versus

JAMES D. CALDWELL, in His Official Capacity
as the Louisiana Attorney General, Also Known as Buddy Caldwell,

Defendant–Appellee.

JONATHAN P. ROBICHEAUX; DEREK PENTON; NADINE BLANCHARD;
COURTNEY BLANCHARD; ROBERT WELLS; GARTH BEAUREGARD,

Plaintiffs–Appellants,

versus

DEVIN GEORGE, in His Official Capacity as the State Registrar
and Center Director at Louisiana Department of Health and Hospitals;
TIM BARFIELD, in His Official Capacity as
the Louisiana Secretary of Revenue;
KATHY KLIEBERT, in Her Official Capacity as
the Louisiana Secretary of Health and Hospitals,

Defendants–Appellees.

FORUM FOR EQUALITY LOUISIANA, INCORPORATED;
JACQUELINE M. BRETTNER; M. LAUREN BRETTNER;
NICHOLAS J. VAN SICKELS; ANDREW S. BOND; HENRY LAMBERT;
R. CAREY BOND; L. HAVARD SCOTT, III; SERGIO MARCH PRIETO,

Plaintiffs–Appellants,

versus

TIM BARFIELD, in His Official Capacity as
Secretary of the Louisiana Department of Revenue;
DEVIN GEORGE, in His Official Capacity as Louisiana State Registrar,

Defendants–Appellees.

Appeals from the United States District Court
for the Eastern District of Louisiana

O R D E R :

IT IS ORDERED that the appellees' unopposed motion to expedite the appeal is GRANTED.

IT IS FURTHER ORDERED that the appellees' unopposed motion to establish a briefing notice is GRANTED.

IT IS FURTHER ORDERED that the appellees' unopposed motion for assignment to the same merits panel as No. 14-50196 is GRANTED.

/s/ Jerry E. Smith
JERRY E. SMITH
United States Circuit Judge

No. 14-31037

In the United States Court of Appeals for the Fifth Circuit

JONATHAN P. ROBICHEAUX; DEREK PENTON; NADINE BLANCHARD; and COURTNEY BLANCHARD, *Plaintiffs – Appellants*

v.

JAMES D. CALDWELL, in his official capacity as the Louisiana Attorney General, also known as Buddy Caldwell, *Defendant – Appellee*

JONATHAN P. ROBICHEAUX; DEREK PENTON; NADINE BLANCHARD; COURTNEY BLANCHARD; ROBERT WELLES; and GARTH BEAUREGARD, *Plaintiffs – Appellants*

v.

DEVIN GEORGE, in his official capacity as the State Registrar and Center Director at Louisiana Department of Health and Hospitals; TIM BARFIELD, in his official capacity as the Louisiana Secretary of Revenue; KATHY KLIEBERT, in her official capacity as the Louisiana Secretary of Health and Hospitals, *Defendants – Appellees*

FORUM FOR EQUALITY LOUISIANA, INCORPORATED; JACQUELINE M. BRETTNER; M. LAUREN BRETTNER; NICHOLAS J. VAN SICKELS; ANDREW S. BOND; HENRY LAMBERT; R. CAREY BOND; L. HAVARD SCOTT, III; and SERGIO MARCH PRIETO, *Plaintiffs – Appellants*

v.

TIM BARFIELD, in his official capacity as Secretary of the Louisiana Department of Revenue; DEVIN GEORGE, in his official capacity as Louisiana State Registrar, *Defendants – Appellees*

On Appeal from the United States District Court for the Eastern District of Louisiana, Case Nos. 2:13-cv-5090, 2:14-cv-97, 2:14-cv-327
The Honorable Martin Leach-Cross Feldman, District Judge

BRIEF OF APPELLANTS

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STATEMENT OF INTERESTED PERSONS

In the United States Court of Appeals
For the Fifth Circuit

Jonathan Robicheaux, *et al.*, Plaintiffs – Appellants,	)	
v.	)	No. 14-31037
James Caldwell, *et al.*, Defendants – Appellees.	)	

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Individual Plaintiffs/Appellants:

Garth Beauregard; Courtney Blanchard; Nadine Blanchard; Andrew S. Bond; R. Carey Bond; Jacqueline M. Brettner; M. Lauren Brettner; Henry Lambert; Derek Penton; Sergio March Prieto; Jonathan P. Robicheaux; Nicholas J. Van Sickels; L. Havard Scott, III; and Robert Welles.

Entity Plaintiff/Appellant:

Forum For Equality Louisiana, Inc. is a Louisiana nonprofit corporation with its primary office in New Orleans, Louisiana. The Forum is a social welfare organization within the meaning of Section 501(c)(4) of the Internal Revenue Code. The Forum has no parent corporation(s). As a 501(c)(4) organization, The Forum does not have shareholders or issue stock and, thus, is not a nongovernmental corporate entity in which a publicly held corporation owns 10% or more of its stock.

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Defendants/Appellees

Tim Barfield, in his official capacity as the Louisiana Secretary of Revenue;

James D. Caldwell, in his official capacity as the Louisiana Attorney General, also known as Buddy Caldwell (*Defendant Caldwell was dismissed below*

and the propriety of his dismissal is not raised on appeal);

Devin George, in his official capacity as the State Registrar and Center Director at Louisiana Department of Health and Hospitals;

Kathy Kliebert, in her official capacity as the Louisiana Secretary of Health and Hospitals.

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LOUISIANA DEPARTMENT OF JUSTICE

Individual Amici (below):

Helen M. Alvare; Douglas W. Allen; Ryan T. Anderson; Jason S. Carroll; David J. Eggebeen; Robert P. George; Sherif Girgis; Allen J. Hawkins, Jr.; Byron R. Johnson; Alan J. Hawkins; Catherine R. Pakaluk; Joseph Price; Mark D. Regnerus; Katherine Shaw Spaht; and John Randall Trahan.

Entity Amici[1] below:

American Civil Liberties Union Foundation of Louisiana; American Military Partner Association; City of New Orleans; Donaldson Adoption Institute, Evan B. Donaldson Adoption Institute; Lambda Legal Defense and Education Fund, Inc.; Marriage Law Foundation;

[1] Counsel lacks information about the structures of the entity amici, including parent entities, related entities, or shareholders.

National Center for Lesbian Rights; OutServe–SLDN Inc.

Counsel for Amici below:

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Kenneth D. Upton, Jr.
Counsel for Appellants

STATEMENT REGARDING ORAL ARGUMENT

This case meets the standards in Federal Rule of Appellate Procedure 34(a)(2) for oral argument, in that (a) this appeal is not frivolous, (b) the dispositive issues raised in this appeal concerning the deprivation of same-sex couples' marriage rights protected under the Due Process and Equal Protection Clauses of the Fourteenth Amendment have not been recently and authoritatively decided in this Circuit, and (c) as described in the accompanying memorandum, the decisional process would be significantly aided by oral argument.

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JURISDICTIONAL STATEMENT

(A) Each of the three consolidated district court cases below sought relief against state officials under 42 U.S.C. § 1983 for deprivation of same-sex couples' marriage rights protected under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. Thus, the district court had federal question jurisdiction under 28 U.S.C. §§ 1331 and 1343 because the case raises claims under the Constitution of the United States.

(B) This is an appeal from a final judgment entered below after the district court's ruling resolved cross-motions for summary judgment and disposed of all claims between all parties. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

(C) The district court issued its decision on the merits and entered final judgment on September 3, 2014,

ROA.1953-84. The Plaintiffs-Appellants timely filed their Notices of Appeal on September 4, 2014, ROA.1986-87, September 5, 2014, ROA.1988-93, and September 8, 2014, ROA.2248-49, pursuant to Federal Rule of Appellate Procedure 4(a)(1)(A).

(D) This appeal is from a final judgment that disposes of all parties' claims.

ISSUES PRESENTED FOR REVIEW

1. Do Louisiana's laws prohibiting same-sex couples from marrying and denying recognition to same-sex couples' out-of-state marriages violate the Due Process Clause of the Fourteenth Amendment?

2. Do Louisiana's laws prohibiting same-sex couples from marrying and denying recognition to same-sex couples' out-of-state marriages violate the Equal Protection Clause of the Fourteenth Amendment?

INTRODUCTION

Following *United States v. Windsor*, 133 S. Ct. 2675 (2013), a nearly unbroken wave of federal circuit and district courts around the country have struck down as unconstitutional popularly enacted bans on marriage for same-sex couples. In *upholding* Louisiana's discriminatory ban on the merits, the lower court stands alone in the nation. To reach this aberrant result, the court ignored Supreme Court precedent, relied on *dissenting* opinions at odds with prevailing jurisprudence, and abdicated the federal judiciary's essential role as guardian of the constitutional rights of minorities. But, as the Supreme Court has repeatedly reaffirmed, "a citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be." *Lucas v. Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713, 736-37 (1964). Indeed, the Supreme Court's recent denial of petitions seeking reversal

of decisions in three circuits, allowing marriages of same-sex couples to commence in states in those circuits, highlights how far the lower court strayed from governing constitutional principles. Worse yet, the decision licenses Louisiana to perpetuate far-reaching harms inflicted on same-sex couples, and most especially their children, by the State's discrimination against their families.

Plaintiffs-Appellants are seven loving, committed Louisiana same-sex couples, several of whom are raising children together, and an organization whose membership includes Louisiana same-sex couples and their families. The Plaintiff couples seek to exercise their fundamental right to marry within Louisiana or to have marriages they entered elsewhere recognized in their home state. But Louisiana, first by statute and then by constitutional amendment, has excluded same-sex couples and their families from all rights to marry and to recognition of their marriages entered

elsewhere. *See* LA. CIV. CODE art. 86 (1988); LA. CIV. CODE art. 3520(B) (1999); LA. CIV. CODE art. 89 (1999); LA. CONST. art. XII, § 15 (2004) (collectively, the "Marriage Ban").

These couples suffer concrete harms and weather stigma every day because Louisiana excludes their families from the civil institution of marriage, in violation of the fundamental right to marry and guarantee of equal protection. Plaintiffs bring this suit against Defendant-Appellee State officials, who, acting under color of state law, execute or enforce Louisiana's Marriage Ban. Denied their federal rights to liberty and equality by their state government, Plaintiffs now turn, as many other minority members have before them, to the federal courts to enforce cherished rights guaranteed under the United States Constitution.

STATEMENT OF THE CASE

Having been denied the right to marry and have their marriages recognized, Plaintiffs Jon Robicheaux and Derek Penton, Courtney and Nadine Blanchard, Garth Beauregard and Robert Welles, Jackie and Lauren Brettner, Nick Van Sickels and Andrew Bond, Henry Lambert and Carey Bond, Havard Scott and Sergio March Prieto, and Forum for Equality, on behalf of its members, filed suit against several Louisiana state officials who have enforced the Marriage Ban or refused to recognize Plaintiffs' valid out-of-state marriages (collectively, "Defendants" or "State Officials"). In three separate actions the Plaintiffs asked the district court to declare unconstitutional article XII, § 15 of the Louisiana Constitution, article 3520(B) of the Louisiana Civil Code, and any other Louisiana law that prohibits same-sex couples

from marrying and having their marriages recognized,[2] and to enjoin their enforcement. These actions were consolidated before the district court: *Robicheaux v. Caldwell*, No. 13-cv-05090; *Robicheaux v. George*, No. 14-cv-00097; and *Forum for Equality Louisiana, Inc. v. Barfield*, No. 14-cv-000327.

On September 3, 2014, following cross-motions for summary judgment and a June 25, 2014 hearing, ROA.1597, the district court granted Defendants' motion for summary judgment and denied Plaintiffs' motion, ROA.1953-84, holding that Louisiana "has a legitimate interest under a rational basis standard of review for addressing the meaning of marriage through the democratic process." ROA.1953. It also found that Louisiana's Marriage Ban is "directly related to achieving marriage's historically preeminent purpose of linking children to their biological parents." ROA.1968.

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[2] Plaintiffs clarified in briefing to the district court that these laws include articles 86 and 89 of the Louisiana Civil Code. ROA.1954-55, n.3.

Acknowledging its status as the lone federal court post-*Windsor* to have upheld a state marriage ban against constitutional challenge, the court primarily relied on *dissents* to *Furman v. Georgia*, 408 U.S. 238 (1972), *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014), *Bishop v. Smith*, 760 F.3d 1070 (10th Cir. 2014), and *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014). Plaintiffs now appeal the district court's decision.

1. Louisiana's Marriage Ban

The Constitution of the State of Louisiana, as amended in 2004, bans same-sex couples from marrying in Louisiana and prohibits state recognition of their valid out-of-state marriages. LA. CONST. art. XII, § 15. Similarly, articles 86, 89, and 3520(B) of the Louisiana Civil Code preclude same-sex couples from marrying in Louisiana or from seeking recognition of their marriages entered into under the laws of another jurisdiction.

2. The Impact of Louisiana's Marriage Ban on Same-Sex Couples

Plaintiffs wish to marry or have their marriages recognized for reasons shared by different-sex couples permitted to marry in Louisiana: to celebrate and publicly declare their love and commitment before their families, friends, and communities through marriage, which provides unparalleled intimacy, companionship, emotional support, and security. Their stories illustrate the far-reaching effects the Marriage Ban has had on their families.

Nick and Andrew have been in a loving, committed relationship for eleven years. ROA.971-72. They married in the District of Columbia in December 2012. ROA.972. Both men longed to be parents but because Louisiana neither allows unmarried couples to jointly adopt nor same-sex couples to marry or have their marriages recognized, Nick, by himself, adopted their daughter. ROA.973. As a result, every year Nick must execute a provisional custody by

mandate in order to provide Andrew with a limited set of rights to care for their child. ROA.974. *See also* LA. REV. STAT. § 9:951.

Jackie and Lauren, who have been together for four years and married in 2012, have a young daughter. ROA.979-80, 989. Lauren gave birth to their child in 2013. ROA.980, 989. However, even though Louisiana applies a presumption of parentage for children born into a marriage, LA. CHILD. CODE art. 185, their daughter's birth certificate identifies only Lauren as her parent, ROA.980, 990, depriving Jackie and her daughter of legal protections for their parent-child relationship. ROA.980-82, 991-92.

Plaintiffs, like other same-sex couples in Louisiana, are unable to add their spouses to their health insurance, and must incur additional costs executing wills, medical directives, or provisional custody documents. *See, e.g.*, ROA.967, 1002. In addition, because the State refuses to

allow same-sex couples to marry and does not recognize their lawful out-of-state marriages, hundreds of statutes in Louisiana treat these families differently, to their disadvantage.

Unlike different-sex couples, same-sex couples are denied the right to file joint state tax returns, LA. REV. STAT. § 47:293, La. Revenue Info. Bulletin No. 13-024 (Sept. 13, 2013). As a result, Plaintiffs and other same-sex couples suffer stigma and additional tax burdens, as occurred when Defendant Barfield demanded payment of $15,928.01 from Plaintiffs Henry and Carey. ROA.999-1001. Same-sex couples also are denied the protection of the marital privilege, LA. CODE EVID. arts. 504, 505; spousal support obligations, LA. CIV. CODE art. 98; and the opportunity to create a community property regime upon the celebration of their marriage, LA. CIV. CODE art. 2334. They are denied the opportunity to make health care decisions for an

incapacitated spouse, LA. REV. STAT. § 40:1299.53; obtain state retirement fund spousal survivor benefits, LA. REV. STAT. § 11:471; and priority for appointment as curator for an incapacitated (interdicted) spouse, LA. CODE CIV. PROC. art. 4561. They are deprived of the ability to provide security for each other in times of overwhelming grief through spousal protections upon death, including rights to inheritance when a spouse dies intestate, LA. CIV. CODE arts. 889, 890, 894, or to benefit from the homestead exemption, LA. REV. STAT. § 20:1.

In addition, unmarried same-sex couples, including Plaintiffs Garth and Robert, are denied more than 1,000 federal benefits made available to married same-sex couples after the Supreme Court's decision in *Windsor*, 133 S. Ct. at 2683. And married same-sex couples are deprived of federal benefits that inure only to couples whose marriages are recognized by their domicile, such as veteran's spousal

benefits and social security survivor's benefits. *See, e.g.*, 38 U.S.C. § 103(c) (veterans spousal benefits determined "according to the law of the place where the parties resided"); 20 C.F.R. § 404.345 (social security spousal benefits determined by reference to "the laws of the State where the insured had a permanent home").

Compounding the tangible harms caused by the Marriage Ban, Plaintiffs and their children also suffer stigma and humiliation as a result of state-sanctioned discrimination. The Ban denies them the symbolic *imprimatur* and dignity that the label "marriage" uniquely confers. It is the only term in our society that, without further explanation, conveys that a relationship is deep and abiding, and commands instant respect for the relationship.

SUMMARY OF ARGUMENT

In *Windsor*, which struck down Section 3 of the federal Defense of Marriage Act ("DOMA"), the Supreme Court ruled that when the government denies same-sex couples equal marriage rights, it "demeans the couple," 133 S. Ct. at 2692, "humiliates ... children now being raised by same-sex couples," deprives their families of extensive tangible protections, *id.* at 2694, and denies them "a dignity and status of immense import," *id.* at 2692. In so doing, the government violates "basic due process and equal protection principles," *id.* at 2682.

In the aftermath of *Windsor*, an avalanche of lower court rulings around the country have struck down marriage bans virtually identical to Louisiana's—the Fourth, Seventh, Ninth, and Tenth Circuits among them.[3] These courts have

[3] *Latta v. Otter*, No. 14–35420, 14-35421, 12-17668, 2014 U.S. App. LEXIS 19152 (9th Cir. Oct. 7, 2014); *Baskin v. Bogan*, No. 14-2386,

continued —

held, as did the Supreme Court in *Windsor*, that popularly enacted laws discriminating against same-sex couples in their marriage rights violate guarantees of due process and equal protection. Significantly, on October 6, 2014, the Supreme Court declined petitions to accept *certiorari* in the Fourth, Seventh, and Tenth Circuit cases, rendering those decisions final and requiring Virginia, Indiana, Wisconsin, Oklahoma, and Utah immediately to permit and recognize marriages of same-sex couples.[4]

Louisiana's Marriage Ban deserves the same fate. As many other courts have held—including the Fourth and

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— *continuation*
2014 U.S. App. LEXIS 17294 (7th Cir. Sept. 4, 2014); *Bostic*, 760 F.3d 352; *Bishop*, 760 F.3d 1070; *Kitchen*, 755 F.3d1193.

[4] *See Rainey v. Bostic*, No. 14-153, 2014 U.S. LEXIS 6053 (Oct. 6, 2014); *Schaefer v. Bostic*, No. 14-225, 2014 U.S. LEXIS 6405 (Oct. 6, 2014); *McQuigg v. Bostic*, No. 14-251, 2014 U.S. LEXIS 6316 (Oct. 6, 2014); *Bogan v. Baskin*, No. 14-277, 2014 U.S. LEXIS 5797 (Oct. 6, 2014); *Walker v. Wolf*, No. 14-278, 2014 U.S. LEXIS 6655 (Oct. 6, 2014); *Smith v. Bishop*, No. 14-136, 2014 U.S. LEXIS 6054 (Oct. 6, 2014); *Herbert v. Kitchen*, No. 14-124, 2014 U.S. LEXIS 6637 (Oct. 6, 2014)

Tenth Circuits—such restrictions violate the fundamental right to marry, which accords lesbian and gay individuals the freedom enjoyed by all others to marry the one person of their choice, and to have their marriages respected by the State. And as many courts also have held—including the Seventh and Ninth Circuits—the Marriage Ban likewise violates the equal protection guarantee. It deprives same-sex couples of equal dignity and autonomy in the most intimate spheres of their lives and brands them as inferior to other Louisiana couples, denying them state and federal protections and inviting ongoing discrimination from third parties. Though the Marriage Ban warrants strict scrutiny because it infringes fundamental rights, or at least heightened scrutiny because it discriminates on the basis of sexual orientation and gender, it fails under even rational basis review. No conceivable legitimate governmental interest is served by barring same-sex couples from

marrying and from receiving recognition for their existing marriages.

Defying the unmistakable import of *Windsor* and the wave of cases striking down state marriage bans around the country, the decision below found no constitutional flaw in Louisiana's Marriage Ban. Relying on *dissents* from Supreme Court and circuit court opinions, the court below got it wrong. Indeed, the lower court decision and Louisiana's defense of its discriminatory Marriage Ban flip *Windsor*'s core conclusions on their heads.

While the Supreme Court interceded in *Windsor* to protect lesbian and gay couples from the results of a democratic process that "demeans the couple," 133 S. Ct. at 2694, the court below held that vindication of the couples' rights would "demean the democratic process," ROA.1965. But, as the Supreme Court confirmed in another recent decision, judicial deference to the democratic process must

give way under "the well-established principle that when hurt or injury is inflicted on . . . minorities by the encouragement or command of laws or other state action, the Constitution requires redress by the courts." *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1637 (2014).

And while *Windsor* emphasized the harms inflicted on children of same-sex couples without even a "legitimate" countervailing government purpose, 133 S. Ct. at 2695, 2696, the court below gave credence to the State's unsupported claim that restricting marriage to different-sex couples is somehow justified by "linking children" with "their two biological parents," ROA.1968. This justification has been rejected out of hand by courts far and wide. In the words of the Seventh Circuit, such a justification "is so full of holes that it cannot be taken seriously." *Baskin*, 2014 U.S. App. LEXIS 17294, *25.

Plaintiffs want only to protect one another and their children through marriage and to live in dignity in their home State. Our democracy functions and prevails because we promise liberty and equality for all. Our judiciary exists to enforce that promise. Plaintiffs turn to this Court to vindicate these rights.

ARGUMENT

Standard of Review (Applicable to All Issues Raised Below)

This Court reviews a "district court's grant of summary judgment *de novo*, applying the same standards as the district court." *Green v. Life Ins. Co.*, 754 F.3d 324, 329 (5th Cir. 2014) (internal citations and quotations omitted). Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "When parties file cross-motions for summary

judgment, we review each party's motion independently, viewing the evidence and inferences in the light most favorable to the nonmoving party." *Duval v. N. Assur. Co. of Am.*, 722 F.3d 300, 303 (5th Cir. 2013) (internal citations and quotations omitted).

I. LOUISIANA'S AUTHORITY TO REGULATE MARRIAGE IS CONSTRAINED BY THE CONSTITUTION.

Plaintiffs challenge Louisiana's Marriage Ban because it fails to "respect the constitutional rights of persons" by depriving them of their guarantees of liberty and equality under the Fourteenth Amendment. *Windsor*, 133 S. Ct. at 2691 ("State laws defining and regulating marriage, of course, must respect the constitutional rights of persons, *see, e.g., Loving v. Virginia*, 388 U.S. 1 (1967)."). Louisiana attempts to sidestep this inquiry by suggesting that federalism principles and the rights of Louisiana citizens to engage in the "democratic process" inherently insulate the

Marriage Ban from constitutional review. The district court similarly framed the matter as a "clash between convictions regarding the value of state decisions reached by way of the democratic process as contrasted with personal, genuine, and sincere lifestyle choices recognition." ROA.1957. But the issues before this Court are not mere policy preferences; they are whether the Marriage Ban violates the *federal constitutional rights* of a Louisiana minority—same-sex couples and their families.

No one disputes Louisiana's authority, as a general matter, "to regulate certain aspects of the marriage relationship." *Poe v. Gerstein*, 517 F.2d 787, 795 (5th Cir. 1975). The issue here is narrower, however: do Louisiana's laws excluding same-sex couples from marriage infringe the "constitutional guarantees" recognized in *Windsor*? 133 S. Ct. at 2692 ("The States' interest in defining and regulating the marital relation, *subject to constitutional guarantees*,

stems from the understanding that marriage is more than a routine classification for purposes of certain statutory benefits" (emphasis added)).

Louisiana would have this Court abdicate its role as adjudicator of constitutional challenges and grant states unfettered discretion to determine who does and does not deserve constitutional rights. Relying heavily on Justice Powell's *dissent* in *Furman*, 408 U.S. 238, the district court erroneously accepted the argument that the democratic process shields Louisiana's Marriage Ban from constitutional scrutiny. ROA.1965, 1970. But, as Justice Powell and others on the *Furman* Court confirmed, when states deny rights afforded by the Constitution, the federal courts have a duty to intervene. "The Due Process Clause of the Fourteenth Amendment imposes on the judiciary a[n] . . . obligation to scrutinize state legislation." *Furman*, 408 U.S. at 433 (Powell, J., dissenting); *see also id.* at 268-69 ("[W]e

must not, in the guise of 'judicial restraint,' abdicate our fundamental responsibility to enforce the *Bill of Rights*.") (Brennan, J., concurring); *id.* at 313-14 ("Judicial review, by definition, often involves a conflict between judicial and legislative judgment as to what the Constitution means or requires. . . . It seems conceded by all that the [Eighth] Amendment imposes some obligations on the judiciary to judge the constitutionality of punishment and that there are punishments that the Amendment would bar whether legislatively approved or not.") (White, J., concurring).

Our constitutional democracy entrusts courts with the responsibility to check the majority when it acts to strip constitutional protections from a disfavored group. "Minorities trampled on by the democratic process have recourse to the courts; the recourse is called constitutional law." *Baskin*, 2014 U.S. App. LEXIS 17294, at *68. *See also Latta*, 2014 U.S. App. LEXIS 19152, at *44 ("[A] primary

purpose of the Constitution is to protect minorities from oppression by majorities."). "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943); *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1997) (when government "undertakes such an intrusive regulation of the family, . . . the usual judicial deference to the legislature is inappropriate") (Powell, J., writing for the majority).

The district court's assertion that *Windsor* protects Louisiana's refusal to recognize marriages of same-sex couples because the State was "acting squarely within the scope of its traditional authority," ROA.1962, misapprehends *Windsor* and contradicts every other court to interpret that decision, including a Louisiana state court,

Constanza v. Caldwell, No. 2013-0052-D2 (La. 15th Jud. Dist. Ct. Sept. 22, 2014).[5] "*Windsor* does not teach us that federalism principles can justify depriving individuals of their constitutional rights; it reiterates *Loving*'s admonition that the states must exercise their authority without trampling constitutional guarantees." *Bostic*, 760 F.3d, at 379. Indeed, the Court expressly declined to base *Windsor* on federalism principles, stating that it was "unnecessary to decide whether [DOMA's] federal intrusion on state power is a violation of the Constitution, because it disrupts the federal balance." *Windsor*, 133 S. Ct. at 2692. Instead, the Court held that DOMA's "avowed purpose" and "practical effect of . . . impos[ing] a disadvantage, a separate status, and so a stigma" on same-sex relationships violates due

[5] The redacted and unsealed version of the decision was publicly disseminated by the court and is available at Lyle Denniston, *Rulings Differ on Same Sex Marriage in Louisiana*, SCOTUSBLOG (Sept. 23, 2014, 7:24 PM), http://www.scotusblog.com/2014/09/rulings-differ-on-same-sex-marriage-in-louisiana/.

process and equal protection guarantees. *Id.* at 2693; *see also id.* at 2709 (Scalia, J., dissenting) ("[T]he real rationale of today's opinion . . . is that DOMA is motivated by 'bare . . . desire to harm' couples in same-sex marriages. How easy it is, indeed how inevitable, to reach the same conclusion with regard to state laws denying same-sex couples marital status.").

This is not the first time Louisiana has sought to deter this Court from examining the constitutionality of its marriage laws by arguing that constitutional analysis "is inappropriate . . . with respect to rights and obligations that are peculiarly matters of state interest and concern." *Kirchberg v. Feenstra*, 609 F.2d 727, 735 n.18 (5th Cir. 1979), *aff'd*, 450 U.S. 455 (1981). *Kirchberg* challenged Louisiana marital laws automatically deeming the husband head of the couple's community estate. In invalidating those laws as unconstitutional, this Court recognized that,

notwithstanding the State's extensive regulation of domestic relations, the obligation remains to "remov[e] any constitutionally infirm provisions." *Id.* The Court concluded that "if it is ultimately a question of whether the state legislation or the Constitution will prevail, the state legislation must fall." *Id.* Just as in *Kirchberg*, Louisiana's discriminatory marriage laws are subject to constitutional constraints. "[N]either [Louisiana's] federalism-based interest in defining marriage nor our respect for the democratic process that codified that definition can excuse" Louisiana's infringement of Plaintiffs' constitutional rights. *Bostic*, 760 F.3d, at 380.[6]

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[6] This Court' review of this case is also not foreclosed by the Supreme Court's summary dismissal in *Baker v. Nelson*, 409 U.S. 810 (1972). Summary dismissals like *Baker* are only binding to the extent they have not been undermined by subsequent doctrinal developments. *See Hicks v. Miranda*, 422 U.S. 332, 344 (1975). Recognizing that *Baker* was decided "42 years ago and the dark ages so far as litigation over discrimination against homosexuals is concerned," *Baskin* 2014 U.S. App. LEXIS 17294, at *35, courts addressing post-*Windsor* challenges to state marriage bans have held that "[s]ubsequent decisions . . . make clear that *Baker* is no longer authoritative." *Id.* at

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II. LOUISIANA'S MARRIAGE BAN INFRINGES PLAINTIFFS' FUNDAMENTAL RIGHT TO MARRY.

Louisiana's Marriage Ban deprives Plaintiffs of their fundamental right to marry and to have their valid out-of-state marriages recognized. These deprivations each violate the due process guarantee. The Due Process Clause of the Fourteenth Amendment provides that no "State [shall] deprive any person of life, liberty, or property, without due process of law," U.S. CONST. amend. XIV, § 1, and protects individuals from arbitrary governmental intrusion into fundamental rights. *See, e.g., Washington v. Glucksberg*, 521 U.S. 702, 719-20 (1997). When laws burden the exercise of a

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*35; *see also Bostic*, 760 F.3d, at 375. The district court declined to consider the viability of *Baker*, noting that "defendants here do not contend that *Baker* forecloses this Court's review or mandates the disposition of this case." ROA.1973. Particularly in light of the Supreme Court's substantive engagement with state marriage bans in *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) and its denials of review in *Baskin*, *Bostic*, *Kitchen*, *Bishop*, and *Wolf*, this Court should not consider *Baker* an impediment to constitutional review of the Marriage Ban.

fundamental right, the government must show that the intrusion is narrowly tailored to serve a compelling government interest. *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978). The State can identify no legitimate government interest—let alone a compelling one—in defense of the Marriage Ban. Nor can it show that the Ban is rationally related—let alone narrowly tailored—to the interests it purportedly advances. Thus, as explained in Section VI, *infra*, the Marriage Ban must fall.

A. The Marriage Ban Infringes Same-Sex Couples' Fundamental Right to Marry.

The right to marry is unquestionably a fundamental right protected by the due process guarantee, *Loving,* 388 U.S. at 12, because deciding whether and whom to marry is exactly the kind of personal matter about which government should have little say. Thus, in recognizing marriage as a fundamental right, courts have placed special emphasis on

one's free choice of spouse. *See, e.g.*, *Hodgson v. Minnesota*, 497 U.S. 417, 435 (1990) ("the regulation of constitutionally protected decisions, such as . . . whom [to] marry, must be predicated on legitimate state concerns other than disagreement with the choice the individual has made"); *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 564-65 (1989) ("*[F]reedom of personal choice* in matters of marriage and family life is one of the liberties protected by the Due Process of the Fourteenth Amendment.") (emphasis added); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 620 (1984) (our federal Constitution "undoubtedly imposes constraints on the state's power to control the selection of one's spouse"); *Zablocki*, 434 U.S. at 387 (finding unconstitutional burden on right to marry where law affected individuals' "*freedom of choice* in an area in which we have held such freedom to be fundamental") (emphasis added); *see Moore*, 431 U.S. at 499; *see also Bostic*, 760 F.3d, at 376-77; *Kitchen*, 755 F.3d at

1212-13; *In re Marriage Cases*, 183 P.3d 384, 420 (Cal. 2008); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 958 (Mass. 2003).

As the Supreme Court recently recognized in *Windsor* (and lower courts have since repeatedly reaffirmed), the fundamental right to marry is *not* limited to different-sex couples. In ruling that the federal government must provide marital benefits to married same-sex couples, and that married lesbians and gay men and their children deserve equal dignity and equal treatment from the federal government, the Court acknowledged that marriage is not inherently defined by the gender or sexual orientation of the individuals who constitute the couples. To the contrary, marriage enables same-sex couples "to define themselves by their commitment to each other" and to "live with pride in themselves and their union and in a status of equality with all other married persons." *Windsor*, 133 S. Ct. at 2689.

It is thus unconstitutional to "deprive some couples . . . but not other couples, of [the] rights and responsibilities [of marriage]." *Windsor*, 133 S. Ct. at 2694. "*Lawrence* and *Windsor* indicate that the choices that individuals make in the context of same-sex relationships enjoy the same constitutional protection as the choices accompanying opposite-sex relationships." *Bostic*, 760 F.3d, at 377. As the choice of whom to marry is among those choices, court after court has struck down state laws barring same-sex couples from marrying—reaffirming that all people are guaranteed the fundamental right to choose whom to marry regardless of sexual orientation or gender. *See, e.g., id.*; *Kitchen*, 755 F.3d at 1240; *Baskin*, 2014 U.S. Dist. LEXIS 86114, at *45; *Wolf v. Walker*, 986 F. Supp. 2d 982, 1028 (W.D. Wis. 2014); *Whitewood v. Wolf*, 992 F. Supp. 2d 410, 423-24 (M.D. Pa. 2014), *De Leon v. Perry*, 975 F. Supp. 2d 632, 659 (W.D. Tex. 2014); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 991 (N.D. Cal. 2010). This Court should concur.

B. The Marriage Ban Violates the Fundamental Right of Married Plaintiffs to Remain Married in Louisiana.

Just as the right to marry the spouse of one's choice has a deeply-rooted constitutional foundation, there is nothing novel about the principle that a couple has a fundamental right to have their out-of-state marriage accorded legal recognition by the state in which they live. *Kitchen*, 755 F.3d at 1213. *See also Latta v. Otter*, No. 1:13-cv-00482, 2014 U.S. Dist. LEXIS 66417 (D. Idaho May 13, 2014); *Henry v. Himes*, No. 1:14-cv-129, 2014 U.S. Dist. LEXIS 51211, at *22 (S.D. Ohio Apr. 14, 2014); *De Leon*, 975 F. Supp. 2d at 661-62; *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 978 (S.D. Ohio 2013). Indeed, in *Loving*, the Supreme Court struck down not only Virginia's law prohibiting interracial marriages within the state, but also the statutes that denied recognition to and criminally punished such marriages entered outside the state. *Id.* at 4.

The Lovings themselves had married in Washington, D.C., a jurisdiction that permitted interracial marriages, and had been prosecuted upon their return home. The Court held that Virginia's statutory scheme—including penalizing out-of-state marriages and voiding marriages obtained elsewhere—"deprive[d] the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment." *Id.* at 12; *see also Zablocki*, 434 U.S. at 397 n.1 ("[T]here is a sphere of privacy or autonomy surrounding *an existing marital relationship* into which the State may not lightly intrude . . . .") (Powell, J., concurring) (emphasis added).[7]

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[7] The expectation that a marriage, once entered, will be respected throughout the land is deeply rooted in "[o]ur Nation's history, legal traditions, and practices." *Glucksberg*, 521 U.S. at 721. The "policy of the civilized world [] is to sustain marriages, not to upset them." *Madewell v. United States*, 84 F. Supp. 329, 332 (E.D. Tenn. 1949). Historically, certainty that a marital status once obtained will be universally recognized has been understood to be of fundamental importance both to the individual and to society more broadly. *See* 1 Joel Prentiss Bishop, *New Commentaries on Marriage, Divorce, and Separation* § 856, at 369 (1891). Accordingly, interstate recognition of

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"When a state effectively terminates the marriage of a same-sex couple married in another jurisdiction, it intrudes into the realm of private marital, family, and intimate relations specifically protected by the Supreme Court." *Obergefell*, 962 F. Supp. 2d at 979; *see also Windsor*, 133 S. Ct. at 2694. Indeed, the constitutionally guaranteed right to marry would be meaningless if the State were free to refuse recognition and effectively annul a marriage as if it had never occurred.[8] The status of being married "is a far-

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marriage has been a defining and essential feature of American law. *See, e.g.*, Joseph Story, *Commentaries on the Conflict of Laws* § 113, at 187 (8th ed. 1883) ("[t]he general principle certainly is...that...marriage is decided by the law of the place where it is celebrated").

[8] Louisiana's own history and laws are consistent with the fundamental importance of the marriage recognition principle in U.S. legal history and tradition. *See Ghassemi v. Ghassemi,* 998 So. 2d 731, 738 (La. App. 1st Cir. Oct. 15, 2008) ("it is the public policy of Louisiana that every effort be made to uphold the validity of marriages.") (citing *Wilkinson v. Wilkinson*, 323 So. 2d 120, 124 (La. 1975)). Louisiana has honored marriages valid in other jurisdictions but not meeting Louisiana's own marriage requirements. *See, e.g., id.* at 750 ("[A] marriage between first cousins, if valid in the state or country where it was contracted, will be recognized as valid."); *Brinson*
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reaching legal acknowledgment of the intimate relationship between two people," *Windsor*, 133 S. Ct. at 2692, a commitment of enormous import that spouses carry wherever they go throughout their married lives. Louisiana may not strip married Plaintiffs of "one of the vital personal rights essential to the orderly pursuit of happiness," *Loving*, 388 U.S. at 12, when they come home. Like Richard and Mildred Loving, same-sex couples have a constitutional due process right "not to be deprived of one's already-existing

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v. Brinson, 96 So. 2d 653, 656 (La. 1957) (recognizing common-law marriage, even though such marriage may not be created in Louisiana); *Fritsche v. Vermilion Parish Hosp. Serv. Dist. No. 2*, 893 So. 2d 935, 937-38 (La. App. 3d Cir. Feb. 2, 2005) (same); *United States ex rel. Modianos v. Tuttle*, 12 F.2d 927, 929 (E.D. La. 1925) (recognizing foreign marriage contracted by proxy, even though the marriage would be null if contracted in Louisiana). In a Reconstruction-era decision, the Louisiana Supreme Court recognized a Spanish marriage between a white man and a free woman of color, even though the marriage violated Louisiana's anti-miscegenation laws. *Succession of Caballero v. Executor*, 24 La. Ann. 573, 575 (La. 1872). Louisiana's Marriage Ban is a marked departure from this long-standing rule and is constitutionally impermissible. The rule of inter-state marriage recognition, while often cast as comity rather than a constitutional principle, is an essential element of the constellation of constitutional protections accorded the institution of marriage.

legal marriage and its attendant benefits and protections" upon returning home. *Obergefell*, 962 F. Supp. 2d at 978; *cf. De Leon*, 975 F. Supp.2d at 662.

C. This Case Involves the Well-Established Fundamental Right to Marry, Not a New and Different Right to Marry Someone of the Same Sex.

The State below tried to reframe this case as invoking a "new" right to same-sex marriage, too recently coined to be fundamental. ROA.874-76. This reframing, which the district court echoed, ROA.1973-74, erroneously narrows the liberty interests at stake by defining them in relation to a particular group. *See Bostic*, 760 F.3d, at 376-77 (Supreme Court decisions on the right to marry "speak of a broad right to marry that is not circumscribed based on the characteristics of the individuals seeking to exercise that right"); *Kitchen,* 755 F.3d at 1209-18.

Like any fundamental right, the freedom to marry is

defined by the attributes of the right itself, rather than the identity of the people seeking to exercise it. In *Loving*, for example, the Supreme Court did not describe the right asserted as a "new" right to "interracial marriage." 388 U.S. 1. Nor did the Court identify a right to "prisoner marriage" in *Turner v. Safley*, 482 U.S. 78 (1987), or a right of people owing child support to "impoverished parent marriage" in *Zablocki*, 434 U.S. 374. Plaintiffs simply seek the right to marry the person they love, honor, and cherish, one of our most deeply rooted and cherished liberties. *See Windsor*, 133 S. Ct. at 2689 (same-sex couples seek to "occupy the same status and dignity as that of a man and woman in lawful marriage"); *Bostic*, 760 F.3d, at 376.

The suggestion that Plaintiffs seek a "new" right rather than the same right exercised by others replicates the flawed reasoning of *Bowers v. Hardwick,* 478 U.S. 186 (1986), overruled by *Lawrence v. Texas*, 539 U.S. 558 (2003). In

Bowers, the Court recast the right at stake as a claimed "fundamental right" of "homosexuals to engage in sodomy," rather than a right, shared by all adults, to consensual intimacy with the person of one's choice. *Lawrence*, 539 U.S. at 566-67 (quoting *Bowers*, 478 U.S. at 190). *Lawrence* held that the constricted framing of the issue in *Bowers* "fail[ed] to appreciate the extent of the liberty at stake." *Lawrence*, 539 U.S. at 567. Here, Plaintiffs do not seek a new right, but rather seek to exercise a *pre-existing*, settled fundamental right: marriage.

D. The State Misapprehends the Role of History When Considering the Scope of Fundamental Rights.

The State and the district court contend that the historical limitation of marriage to different-sex couples demonstrates that the fundamental right to marry simply cannot apply to same-sex couples. But Louisiana's claim that Plaintiffs' right to marry "cannot be 'deeply rooted' in our

traditions," ROA.876, ignores that "liberty's full extent and meaning may remain yet to be discovered and affirmed." *Schuette*, 134 S. Ct. at 1636. In numerous cases, the Supreme Court has struck down invidious restrictions on who may be permitted to exercise a fundamental right, even though those like the plaintiffs had historically been denied such rights. *See, e.g.*, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847-48 (1992) ("[I]nterracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause in *Loving* . . . ."); *Turner*, 482 U.S. 78 (striking down restriction on incarcerated prisoner's ability to marry);[9] *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971) (states may not burden

[9] *See also* Virginia L. Hardwick, *Punishing the Innocent: Unconstitutional Restrictions on Prison Marriage and Visitation*, 60 N.Y.U. L. Rev. 275, 277-79 (1985).

divorced person's right to marry again, though no historical right of divorcees to remarry).

Our Nation's history and traditions demonstrate 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. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom." *Lawrence*, 539 U.S. at 579. Accordingly, although courts consider history and tradition to identify the interests that due process protects, *Glucksberg*, 521 U.S. at 710-18, once a right has been deemed fundamental, historical limitations on the classes of persons permitted to exercise that right are not immune to challenge.

Louisiana's argument also ignores that marriage laws, through court decisions and legislation, have undergone profound changes over time and are virtually unrecognizable

from the way they operated in past centuries. *See generally* Nancy F. Cott, *A History of Marriage and the Nation* (Harvard Univ. Press 2000).[10] Yet the essence of marriage endures. Couples continue to come together—to join their lives and to form new families—and marriage continues to support and stabilize them. "Over the decades, the Supreme Court has demonstrated that the right to marry is an expansive liberty interest that may stretch to accommodate changing societal norms." *Bostic*, 760 F.3d, at 376.

Thus, the fact that same-sex couples historically were

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[10] For example, Louisiana's longstanding restrictions on interracial marriage were struck down as unconstitutional. *See Loving*, 388 U.S. at 6 n.5 (citing Louisiana's then-existing anti-miscegenation law, LA. REV. STAT. § 14:79 (1950)). The Louisiana Supreme Court had previously upheld these anti-miscegenation laws, noting that "marriage is a status controlled by the states," and citing the state's "interest in maintaining the purity of the races and in preventing the propagation of half-breed children. Such children have difficulty in being accepted by society, and there is no doubt that children in such a situation are burdened, as has been said in another connection, with 'a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone'." *State v. Brown*, 108 So. 2d 233, 234 (La. 1959) (quoting *Brown v. Bd. of Education* without attribution).

not allowed to marry is hardly the end of the analysis. *See Lawrence*, 539 U.S. at 572 ("[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry." (internal quotation marks omitted)). History merely guides the *what* of due process rights, not the *who* of which individuals may exercise them. This distinction is central to due process jurisprudence and explains why the State and the district court are incorrect to argue that the right to marry is reserved solely for those who wish to marry someone of a different sex. Once a right is recognized as *fundamental*, it "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 at 430 (internal quotation marks omitted).[11]

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[11] The court below expressed concerns, just as proponents of interracial marriage bans did in generations past, that recognition of Plaintiffs' fundamental right to marry would send this nation down a slippery slope to legalization of other historically unauthorized relationships, including polygamy. ROA.1980-81; *cf. Perez v. Sharp*, *continued —*

III. LOUISIANA'S MARRIAGE BAN IMPERMISSIBLY IMPAIRS LIBERTY INTERESTS IN ASSOCIATION, INTEGRITY, AUTONOMY, AND SELF-DEFINITION.

By denying Plaintiffs access to the civil institution of marriage, Louisiana's Marriage Ban also infringes upon a host of other related fundamental liberty interests. The right to marry is related to other protected rights such as privacy and association. *See Griswold v. Connecticut*, 381 U.S. 479,

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198 P.2d 17 at 41 (Cal. 1948) (comparing ban on interracial marriage to bans on incest, bigamy, and polygamy) (Shenk, J., dissenting). However, this Court, in reversing the court below, would change nothing about how marriage laws in Louisiana operate except elimination of the gendered entry barrier. By contrast, in a polygamy ban challenge, the government would have interests to assert very different from those asserted here, such as which spouses need to consent to marry and how spousal presumptions should operate in a marriage with more than two people. *See, e.g., Potter v. Murray City*, 760 F.2d 1065, 1070 (10th Cir. 1985) (government justified in prohibiting polygamy in part because it "has established a vast and convoluted network of other laws clearly establishing its compelling state interest in and commitment to a system of domestic relations based exclusively upon the practice of monogamy as opposed to plural marriage"); *see also Latta*, 2014 U.S. App. LEXIS 19152 at *16, fn 2 (rejecting notion that recognizing fundamental right to marry the person of one's choice will lead to invalidation of bans on incest, polygamy, and child marriage because "fundamental rights may sometimes permissibly be abridged: when the laws at issue further compelling state interests, to which they are narrowly tailored.").

486 (1965) (referring to the "privacy surrounding the marriage relationship"); *M.L.B. v. S.L.J.*, 519 U.S. 102,116 (1996) ("Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as 'of basic importance in our society' . . . sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect.") (internal citations omitted).

Louisiana's Marriage Ban burdens Plaintiffs' protected interest in autonomy over "personal decisions relating to . . . family relationships," *Lawrence*, 539 U.S. at 574, and additionally impairs Plaintiffs' ability to identify themselves and to participate fully in society as married couples, thus burdening fundamental liberty interests in intimate association and self-definition. *See Griswold*, 381 U.S. at 482-83; *Windsor*, 133 S. Ct. at 2689. The Marriage Ban also interferes with constitutionally protected interests in family

integrity and association by precluding Plaintiffs Nick and Andrew, Jackie and Lauren, and Courtney and Nadine from securing legal recognition of parent-child relationships through mechanisms available to different-sex couples (*e.g.*, stepparent adoption, joint adoption, and other marital parentage protections), thus infringing on their fundamental liberty interest in "direct[ing] the upbringing and education" of their children. *See Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925). Such infringements on bonds between children and their parents violate core substantive guarantees of the Due Process Clause. *See Moore*, 431 U.S. at 503. For these reasons as well, the Marriage Ban is subject to strict scrutiny – a test it cannot survive.

IV. LOUISIANA'S MARRIAGE BAN VIOLATES THE EQUAL PROTECTION CLAUSE AND MUST BE SUBJECTED TO HEIGHTENED SCRUTINY.

The Equal Protection Clause provides that "[n]o State . . . [shall] deny to any person within its jurisdiction the

equal protection of the laws." U.S. Const. amend. XIV, § 1. The right to equal protection ensures that similarly situated persons are not treated differently simply because of their membership in a class. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985).[12]

Louisiana's Marriage Ban is antithetical to basic principles of equal protection. It creates a permanent "underclass" of people singled out and denied the fundamental right to marry based on their sex and sexual orientation. This stigmatized, second-class status cannot be squared with the guarantee of equal protection.

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[12] Gay and lesbian couples are similarly situated to heterosexual couples in every respect relevant to the purposes of marriage. *See Griswold*, 381 U.S. at 486 ("Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects."); *Turner*, 482 U.S. at 95-96 (even where prisoner had no right to conjugal visits and therefore no possibility of consummating marriage or having children, "[m]any important attributes of marriage remain"). Here, Plaintiffs "are in committed and loving relationships . . . just like heterosexual couples." *Varnum v. Brien*, 763 N.W.2d 862, 883-84 (Iowa 2009).

A. The Marriage Ban Discriminates on the Basis of Sexual Orientation and Must Be Subjected to Heightened Scrutiny.

Louisiana's Marriage Ban classifies and prescribes "distinct treatment on the basis of sexual orientation." *See In re Marriage Cases*, 183 P.3d at 440-41. Accordingly, heightened scrutiny should apply.

Although this Court observed ten years ago that, at that time, "[n]either the Supreme Court nor this court ha[d] recognized sexual orientation as a suspect classification," *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004), that does not foreclose recognizing sexual orientation as a suspect or quasi-suspect classification now. This Court has never engaged in analysis of the considerations relevant to whether heightened scrutiny should apply to sexual orientation classifications. In any event, *Windsor* has called into question any precedent applying only rational basis review for sexual orientation classifications. *See SmithKline*

Beecham Corp. v. Abbott Labs, 740 F.3d 471, 481 (9th Cir. 2014) ("*Windsor* requires that we reexamine our prior precedents").[13] Post-*Windsor*, numerous courts across the country, including the Seventh and Ninth Circuits, have held that sexual orientation classifications warrant heightened scrutiny. *See Baskin*, 2014 U.S. App. LEXIS 17294, at *19-20 ("[M]ore than a reasonable basis is required because this is a case in which the challenged discrimination is . . . 'along suspect lines.'"); *SmithKline*, 740 F.3d at 483-84; *Love v. Beshear*, 989 F. Supp. 2d 536, 545 (W.D. Ky. 2014); *Wolf*, 986 F. Supp. 2d at 1014; *Whitewood*, 992 F. Supp. 2d at 430; *Latta*, 2014 U.S. Dist. LEXIS 66417, at *52.[14] This

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[13] Courts have recognized *Windsor*'s application of heightened scrutiny given that the Supreme Court (1) did not consider "conceivable" justifications for the law not asserted by the defenders of the law; (2) required the government to "justify" the discrimination; (3) considered the harm that the law caused the disadvantaged group; and (4) did not afford the law a presumption of validity. *SmithKline,* 740 F.3d at 481-483; *see also Wolf*, 986 F. Supp. 2d at 1010; *Latta*, 2014 U.S. Dist. LEXIS 66417, at *52-53.

[14] Additionally, Second Circuit precedent requires heightened
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Court should similarly find that Louisiana's Marriage Ban triggers heightened scrutiny.

The traditional hallmarks of a classification warranting heightened scrutiny are whether the class (1) historically has been "subjected to discrimination" and (2) has a defining characteristic that "frequently bears [a] relation to ability to perform or contribute to society." *Windsor*, 699 F.3d at 181 (quoting and citing *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987), and *Cleburne*, 473 U.S. at 440-41). Courts may also consider whether the class exhibits "obvious, immutable, or distinguishing characteristics that define them as a discrete group" and is "a minority or politically powerless." *Windsor*, 699 F.3d at 181. The first two considerations are most important. *See id.*

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scrutiny for classifications based on sexual orientation. *See Windsor v. United States*, 699 F.3d 169, 185 (2d Cir. 2012), *aff'd*, 133 S. Ct. 2675 (2013).

("Immutability and lack of political power are not strictly necessary factors to identify a suspect class.").

Sexual orientation satisfies every factor of this test. First, lesbians and gay men have experienced a history of discrimination. *See Baskin*, 2014 U.S. App. LEXIS 17294, at *30 ("Because homosexuality is not a voluntary condition and homosexuals are among the most stigmatized, misunderstood, and discriminated-against minorities in the history of the world, the disparagement of their sexual orientation, implicit in the denial of marriage rights to same-sex couples, is a source of continuing pain to the homosexual community."); *see also Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 11 (1st Cir. 2012). Second, "it is axiomatic that sexual orientation has no relevance to a person's capabilities as a citizen." *Whitewood*, 992 F. Supp. 2d at 428. *Accord Windsor,* 699 F.3d at 181-85; *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 986 (N.D.

Cal. 2012). Based on these factors alone, heightened scrutiny is warranted.

Further, sexual orientation also is a "sufficiently distinguishing" characteristic. *See Windsor*, 699 F.3d at 184. *Accord Baskin*, 2014 U.S. App. LEXIS 17294, at *27 ("[T]here is little doubt that sexual orientation . . . is an immutable (and probably an innate, in the sense of in-born) characteristic rather than a choice.").

Lastly, the long history of *de jure* discrimination against lesbians and gay men (including through laws such as the Marriage Ban) as well as the current lack of non-discrimination protections demonstrates that they are "not in a position to adequately protect themselves from the discriminatory wishes of the majoritarian public." *Windsor*, 699 F.3d at 185. Notably, there is no federal statute or state-wide Louisiana code provision expressly protecting lesbians and gay men from discrimination in employment, housing,

education, or public accommodations.

Because this Court has never analyzed these factors to determine whether heightened scrutiny should apply to sexual orientation classifications, and *Johnson* predates *Windsor*, this Court should address the question and hold that classifications based on sexual orientation are subject to heightened scrutiny.

B. The Marriage Ban Also Warrants Heightened Scrutiny Because It Discriminates on the Basis of Gender.

Louisiana's Marriage Ban also warrants heightened scrutiny because it classifies based on gender and impermissibly enforces conformity with gender-based stereotypes about the proper roles of men and women. *See Orr v. Orr*, 440 U.S. 268, 283 (1979) ("[l]egislative classifications . . . on the basis of gender carry the inherent risk of reinforcing stereotypes about the 'proper place' of women" and men). Laws that classify based on gender are

invalid absent an "exceedingly persuasive justification" showing they substantially further important governmental interests. *United States v. Virginia*, 518 U.S. 515, 534 (1996); *see also Hogan v. Miss. Univ. for Women*, 646 F.2d 1116, 1118 (5th Cir. Unit A June 1981), *aff'd*, 458 U.S. 718 (1982); *Kirchberg*, 609 F.2d at 734. The relevant inquiry under the Equal Protection Clause is whether the law treats an individual differently because of his or her gender. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 146 (1994).

Louisiana's Marriage Ban discriminates facially based on gender. *See, e.g.*, LA. CIV. CODE art. 86 ("Marriage is a legal relationship between a man and a woman that is created by civil contract."); LA. CONST. art. XII, § 15 ("Marriage in the state of Louisiana shall consist only of the union of one man and one woman."). As a result, Robert is precluded from marrying the person he wishes—Garth—solely because Robert is a man rather than a woman. *See*

Latta, 2014 U.S. App. LEXIS 19152, at *50 (Berzon, J., concurring) (Idaho and Nevada marriage bans facially discriminate based on sex); *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1206 (D. Utah, 2013); *see also Baehr v. Lewin*, 852 P.2d 44, 58 (Haw. 1993); *Goodridge*, 798 N.E.2d at 971 (Greaney, J., concurring); *Baker v. Vermont*, 744 A.2d 864, 905 (Vt. 1999) (Johnson, J., concurring and dissenting). *Cf. Perry*, 704 F. Supp. 2d at 996.

Louisiana's Marriage Ban is no less invidious because it denies men as well as women the right to marry a same-sex spouse. Just as *Loving* 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," 388 U.S. at 8 [15]; *see also Powers v.*

[15] The district court dismissed outright any applicability of *Loving* to a claim based on gender discrimination, observing "the Constitution specifically bans differentiation based on race." ROA.1966. But Justice
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Ohio, 499 U.S. 400, 410 (1991); *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964), the Marriage Ban cannot escape heightened scrutiny by "equal application" of its gender-based classifications. *See J.E.B.*, 511 U.S. 127 (government may not strike jurors based on sex, even though such a practice, as a whole, does not favor one sex over the other); *In re Levenson*, 537 F.3d 925, 929 (9th Cir. 2009) (denial of spousal benefits "due solely to his [same-sex] spouse's sex . . . was sex-based" and constitutes sex discrimination); *Hall v. BNSF Ry. Co.*, No. C13-2160 RSM, 2014 U.S. Dist. LEXIS 132878, at *9 (W.D. Wa. Sept. 22, 2014) (plaintiffs' complaint sufficiently alleged "disparate treatment based on his sex, . . . he (as a male who married a male) was treated

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Kennedy made short shrift of that position when he wrote, "[h]ad those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight." *Lawrence*, 539 U.S. at 578-79.

differently in comparison to his female coworkers who also married males.").

Louisiana's Marriage Ban additionally discriminates based on gender, warranting heightened scrutiny, by impermissibly enforcing conformity with gender stereotypes—namely that a man should marry a woman, and a woman marry a man, to satisfy proper gender roles for marriage. *See, e.g.*, *J.E.B.*, 511 U.S. at 131, 142 n.14 (rejecting sex-based restrictions on jury selection because they enforced "stereotypes about [men and women's] competence or predispositions," especially where a sex-based distinction serves "to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women"). Such gender stereotyping is constitutionally impermissible. *See, e.g.*, *Virginia*, 518 U.S. at 533 (justifications "must not rely on overbroad generalizations about the different talents, capacities, or

preferences of males and females"); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724-25 (1982); *Califano v. Webster*, 430 U.S. 313, 317 (1977).

C. The Marriage Ban Triggers Strict Scrutiny Because It Prohibits a Class of Citizens from Exercising the Fundamental Right to Marry and Remain Married.

Lastly, strict scrutiny is required because, regardless of whether the Marriage Ban's classification is suspect, it discriminates with respect to the exercise of a fundamental right. *See* Sections II and III, *supra; Bostic*, 760 F.3d, at 377; *Kitchen*, 755 F.3d at 1218; *Bishop*, 760 F.3d, at 1080. When a legislative classification interferes with the exercise of a fundamental right, it triggers strict scrutiny and must be narrowly tailored to advance a compelling governmental interest. *See Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); Erwin Chemerinsky, *Constitutional Law: Principles and Policies*, § 10.1.

V. DUE PROCESS AND EQUAL PROTECTION REQUIRE THAT LAWS SINGLING OUT LESBIANS AND GAY MEN FOR DISFAVORED TREATMENT BE SUBJECTED TO CAREFUL CONSIDERATION.

Windsor reaffirmed that when the primary purpose and effect of a law is to harm an identifiable group, the law is unconstitutional regardless of whether it incidentally serves a neutral governmental interest. *Windsor*, 133 S. Ct. at 2693-96. Thus, laws of "unusual character" that single out a certain class of citizens, such as lesbians and gay men, for disfavored legal status or hardship require careful consideration by a reviewing court. *Id.* at 2692 (citing *Romer v. Evans*, 517 U.S. 620 (1996)). *See also Massachusetts*, 682 F.3d at 10-11 ("In a set of equal protection decisions [involving groups that were historically disadvantaged or unpopular], the Supreme Court has now several times struck down state or local enactments without invoking any suspect classification. . . . The Court has in these cases undertaken a

more careful assessment of the justifications than the light scrutiny offered by conventional rational basis review.").

In *Windsor*, the Supreme Court closely examined DOMA, which Louisiana's Marriage Ban mirrors in design, purpose, and effect, and its harmful impact on same-sex couples and their children. The Court concluded that "[t]he history of DOMA's enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages" was the "essence" of the statute. *Id.* at 2693. Regarding DOMA's effects, the Court observed that "[u]nder DOMA, same-sex married couples have their lives burdened, by reason of government decree, in visible and public ways, . . . from the mundane to the profound." *Id.* at 2694. Such differential treatment "demeans the couple, whose moral and sexual choices the Constitution protects," and "humiliates tens of thousands of children now being raised by same-sex couples." *Id.* Because "no legitimate purpose"

overcame these improper purposes, DOMA violated due process and equal protection. *Id.* at 2696.

Windsor mandates that when considering laws that single out same-sex couples for disfavored treatment—as the Marriage Ban plainly does—courts may not simply defer to hypothetical justifications states proffer, but must carefully consider the actual purpose underlying enactment and the harms inflicted. If the record demonstrates that the "principal purpose" and "necessary effect" of a challenged law is to "impose inequality," courts must strike down the law. *Id.* at 2694-95. After *Windsor*, "courts reviewing marriage regulations by either the state or federal government, must be wary of whether 'defending' traditional marriage is a guise for impermissible discrimination against same-sex couples." *Bishop v. United States ex rel. Holder*, 962 F. Supp. 2d 1252, 1279 (N.D. Ok. 2014) (emphasis in original).

Louisiana's purpose in passing the current version of the Marriage Ban was to target same-sex couples and exclude them from the State's legal frameworks for marriage formation and recognition. It was the culmination of several decades of legislation with that primary aim.

In 1975, the Louisiana legislature excluded same-sex couples from marriage for the first time. *See* 1975 La. Acts 36, § 1 (amending LA. CIV. CODE art. 88 to provide that only marriages contracted between a man and a woman would be recognized). In 1987, the Legislature amended and recodified Louisiana's marriage laws, repeating and strengthening this exclusion. *See* 1987 La. Acts 886, § 1. This bill amended LA. CIV. CODE art. 86 to declare "Marriage is a legal relationship between a man and a woman that is created by civil contract," when it had previously defined marriage in genderless terms. *See* LA. CIV. CODE art. 86 (1870) ("The law considers marriage in no other view than as a civil

contract."). It also recodified the 1975 language as the first sentence of LA. CIV. CODE art. 89. *See* 1987 La. Acts 886, § 1.

In response to the Hawaii Supreme Court's decision that excluding same-sex couples from marriage constituted discrimination, *Baehr*, 852 P.2d 44, Louisiana's legislature in 1999 added paragraph (B) to Article 3520 of the Civil Code—carving out an exception to the State's policy favoring marital recognition for marriages of same-sex couples. *See* LA. CIVIL CODE art. 3520(B); ROA.942; Jane Schacter, *Courts and the Politics of Backlash: Marriage Equality Litigation, Then and Now*, 82 S. CAL. L. REV. 1153, 1185-86 (2009). In 2004, following the Massachusetts *Goodridge* ruling, 798 N.E.2d 941, striking down that state's marriage ban, Louisiana made its exclusion of same-sex couples from marriage a state constitutional prohibition, and further barred the legislature from adopting any "legal status identical or substantially similar to that of marriage." LA.

CONST. art. XII, § 15. *See also* ROA.942; Schacter, *supra*, at 1186.

The Marriage Ban's addition to State law parallels the context that led to the passage of DOMA. *Windsor*, 133 S. Ct. at 2682-83. Because the purpose underlying the Marriage Ban is similar, if not virtually identical, to Congress's purpose in enacting DOMA, the justifications advanced for Louisiana's Marriage Ban require careful consideration and cannot survive the scrutiny required by *Windsor*.

VI. THE MARRIAGE BAN CANNOT SURVIVE ANY LEVEL OF SCRUTINY.

Louisiana's Marriage Ban is unconstitutional under any level of scrutiny. Importantly, even rational basis review is not toothless, *see Greater Houston Small Taxicab Co. Owners Ass'n v. City of Houston*, 660 F.3d 235, 239 (5th Cir. 2011) (quoting *Schweiker v. Wilson,* 450 U.S. 221, 234 (1981)); *Harris Cnty. v. Carmax Auto Superstores Inc.*, 177 F.3d 306,

324 (5th Cir. 1999) (cautioning district court to carefully examine considerations raised by plaintiffs, even under rational basis review). "[E]ven in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained." *Romer*, 517 U.S. at 632. *See also Baskin*, 2014 U.S. App. LEXIS 17294, at *19 ("We hasten to add that even when the group discriminated against is not a 'suspect class,' courts examine, and sometimes reject, the rationale offered by government for the challenged discrimination."). While the district court erred in holding that only rational basis review applied, the district court also erred by not examining the rationality of the State's proffered reasons for the Marriage Ban. *See, e.g.*, ROA.1968 (concluding without explanation that the Marriage Ban is "directly related to achieving . . . purpose of linking children to their biological parents").

With the sole exception of this case, courts applying rational basis review uniformly have held that marriage bans fail even under that standard. *See, e.g.*, *Baskin*, 2014 U.S. App. LEXIS 17294, at *19 (holding heightened scrutiny applicable but nonetheless deciding that statute failed even rational basis review); *Love*, 989 F. Supp. 2d at 547 (same); *Wolf*, 986 F. Supp. 2d at 1016 (same); *Henry*, 2014 U.S. Dist. LEXIS 51211, at *51-53 (same); *Obergefell*, 962 F. Supp. 2d at 987-95 (same); *Geiger v. Kitzhaber*, 994 F. Supp. 2d 1128, 1147 (D. Or. 2014) (marriage laws fail rational basis review); *Bourke v. Beshear*, 996 F. Supp. 2d 542, 557 (W.D. Ky. 2014) (same); *Tanco v. Haslam*, 2014 U.S. Dist. LEXIS 33463, at *25 (M.D. Tenn. Mar. 14, 2014) (concluding plaintiffs likely to prevail under rational basis review); *DeBoer v. Snyder*, 973 F. Supp. 2d 757, 769-70, 775 (E.D. Mich. 2014) (declining to resolve whether heightened scrutiny is applicable and holding that ban fails rational basis review);

De Leon, 975 F. Supp. 2d at 652 (same); *Bostic v. Rainey*, 970 F. Supp. 2d 456, 482 (E.D. Va. 2014) (same); *Bishop*, 962 F. Supp. 2d at 1287 (same). Neither Louisiana's asserted justifications for its Marriage Ban, nor any other conceivable justification, satisfy even this basic standard.

A. "Linking Children to Their Biological Parents" Is Not a State Interest That Can Justify the Marriage Ban.

Without any analysis or explanation, the district court proclaimed that "Louisiana's laws are directly related to achieving marriage's historically preeminent purpose of linking children to their biological parents." ROA.1968. But as court after court has held, there is simply no rational connection between barring same-sex couples from marriage and any asserted governmental interest in procreation or child-rearing.[16]

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[16] *See, e.g., Baskin,* 2014 U.S. App. LEXIS 17294, at 36-39, 50; *Geiger*, 994 F. Supp. 2d, at 1134; *Latta*, 2014 U.S. Dist. LEXIS 66417, at *22; *DeBoer*, 973 F. Supp. 2d at 770-72; *De Leon*, 975 F. Supp. 2d at

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First, the suggestion that marriage is inherently tied to procreation is simply inaccurate. That the right to marry is not conditioned on procreation was recognized expressly in *Turner*, 482 U.S. at 95-96 (marriage is a fundamental right for prisoners even though some may never have the opportunity to "consummate" marriage; "important attributes" of marriage include "expression . . . of emotional support and public commitment," and, for some, "exercise of religious faith as well as personal dedication" and "precondition to the receipt of government benefits . . . [including] less tangible benefits," such as "legitimization of children born out of wedlock"). *Cf. Lawrence*, 539 U.S. at 578 ("[D]ecisions by married persons, concerning the intimacies

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653-55; *Bostic*, 970 F. Supp. 2d at 480; *Bourke*, 996 F. Supp. 2d, at 553; *Bishop*, 962 F. Supp. 2d at 1293-94; *Kitchen*, 961 F. Supp. 2d at 1211-13; *Griego v. Oliver*, 316 P.3d 865, 886-87 (N.M. 2013); *Obergefell*, 962 F. Supp. 2d at 994-95; *Perry*, 704 F. Supp. 2d at 999-1000; *Golinski*, 824 F. Supp. 2d at 997; *Windsor*, 699 F.3d at 188; *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 340-41 (D. Conn. 2012); *Varnum*, 763 N.W.2d at 901.

of their physical relationship, even when not intended to produce offspring, are a form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment."). As *Windsor* acknowledged, an individual's choice of whom to marry often fulfills dreams and vindicates a person's dignity and desire for self-definition in ways that have nothing to do with a desire to have children; marriage permits couples "to define themselves by their commitment to each other," and "to affirm their commitment to one another before their children, their family, their friends, and their community." *Windsor*, 133 S. Ct. at 2689.

Louisiana law does not condition anyone's right to marry—let alone recognition of anyone's marriage—on the parties' abilities or intentions for having or rearing children, but permits those who are incapable or simply uninterested

in childbearing to marry.[17] *See Bostic,* 760 F.3d at 58; *Bishop*, 962 F. Supp. 2d at 1293 (noting that "the infertile, the elderly, and those who simply do not wish to ever procreate" are permitted to marry in Oklahoma); *De Leon*, 975 F. Supp. 2d at 654. Thus an interest in procreation cannot sustain the Marriage Ban.

Nor can the Ban be justified as a means to encourage different-sex couples to procreate responsibly within marriage. *See Baskin*, 2014 U.S. App. LEXIS 17294, at *25;

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[17] Infertility is not listed as grounds for annulment or divorce in Louisiana's Civil Code. *See, e.g.*, LA. CIVIL CODE art. 94 (listing grounds for finding marriage to be absolutely null); LA. CIV. CODE art. 95 (identifying basis for finding marriage to be "relatively" null); LA. CIV. CODE art. 103 (listing grounds for divorce). Different-sex couples in Louisiana incapable of procreating have always had the right to choose to get married, and state law recognizes such marriages as valid. Indeed, as a sampling of cases around the country illustrates, a spouse's infertility has never been a ground for divorce or annulment in any state. *See, e.g., Griego*, 316 P.3d at 877-78 (infertility never a ground for divorce); *Turner v. Avery*, 113 A. 710 (N.J. Ch. 1921) (that wife could not bear children was not grounds for annulment); *Korn v. Korn*, 242 N.Y.S. 589, 591 (N.Y. App. Div. 1930) ("The law appears to be well settled that sterility is not a ground for annulment."); *cf. Goodridge*, 798 N.E.2d at 961 ("Fertility is not a condition of marriage, nor is it grounds for divorce").

Kitchen, 755 F.3d at 1223 ("[I]t is wholly illogical to believe that state recognition of the love and commitment between same-sex couples will alter the most intimate and personal decisions of opposite-sex couples.").[18]

Even assuming the State's interests in linking children to their biological parents or in "responsible procreation" were legitimate, these justifications cannot explain Louisiana's decision to include within marriage the millions of different-sex couples throughout the country who cannot procreate accidentally due to infertility. This is not a matter of underinclusiveness and overinclusiveness at the margins.[19] The mismatch here is so extreme that the alleged

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[18] The Bipartisan Legal Advisory Group of the U.S. House of Representatives ("BLAG"), which defended DOMA in *Windsor*, asserted the responsible procreation justification. BLAG Merits Brief, 2013 WL 267026, at *21. The Court necessarily rejected it by holding 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.

[19] Louisiana's Marriage Ban is "overinclusive in ignoring the effect of the ban on the children adopted by same-sex couples, [and] *continued* —

procreation-related purpose of marriage simply is not a rational explanation for the line drawn by the Marriage Ban. *See Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 366 n.4 (2001) (noting lack of rational basis for challenged ordinance in *Cleburne* because "purported justifications . . . made no sense in light of how the city treated other groups similarly situated in relevant respects"); *Romer*, 517 U.S. at 635 (protecting freedom of association and conserving resources could not explain why gay people alone were excluded from antidiscrimination protections); *Eisenstadt v. Baird*, 405 U.S. 438, 449 (1972) (no rational basis where law was "riddled with exceptions" for similarly situated groups).

For Louisiana to provide different-sex couples who are unable or unwilling to have and raise children the benefits of

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underinclusive in extending marriage rights to other non-procreative couples." *Baskin*, 2014 U.S. App. LEXIS 17294, at *24. *See also Bostic*, 760 F.3d, at 382 ("In light of the Virginia Marriage Laws' extreme underinclusivity, we are forced to draw the . . . conclusion in this case" that the laws must have rested on irrational prejudice.).

marriage, while excluding all same-sex couples—including those who are already raising children—is irrational. Justice Scalia highlighted this fatal lack of rationality in his *Lawrence* dissent, remarking that, given the majority's decision, "what justification could there possibly be for denying the benefits of marriage to homosexual couples . . . [s]urely not the encouragement of procreation, since the sterile and elderly are allowed to marry." *Lawrence*, 539 U.S. at 605. Thus the State's post-hoc effort to seize upon the sole ground of difference between same-sex couples and some different-sex couples—the ability to procreate without the assistance of reproductive technology or a donor—to justify treating these two groups differently ignores the reality that procreation and marriage are wholly separate matters under the law.

Moreover, the district court's choice to privilege biological parent-child relationships over adoptive

relationships also ignores Louisiana law, which does not privilege biological parenting. On the contrary, Louisiana law facilitates adoption by unrelated individuals and by married couples, LA. CHILD. CODE art. 1198, 1221, and equalizes the legal status of biological and adopted children. *See, e.g., Kirby v. Albert T.J.*, 517 So. 2d 974, 981 (La. App. 3d Cir. 1987) (adopted child "is considered for all purposes as the legitimate child" of the adoptive parent). In requiring couples to be married in order to adopt, the State recognizes that marriage's primary purpose is not related to linking children to their *biological* parents. The State's proffered rationale, if applied even-handedly, would seem to imply that different-sex couples who are adoptive parents are less optimal than biological parents. But "[i]f the fact that a child's parents are married enhances the child's prospects for a happy and successful life, . . . this should be true whether the child's parents are natural or adoptive." *Baskin*, 2014

U.S. App. LEXIS 17294, at *44.

Similarly, countless other aspects of Louisiana law are inconsistent with this asserted rationale and make clear its arbitrariness. For example, Louisiana has not restricted the ability of unmarried different-sex couples to procreate; restricted the ability of biological parents to place their children up for adoption; restricted the ability of married couples with children to dissolve their marriages or legally separate; or, treated adopted children differently from children reared by their genetic parents (no matter how the children were conceived). Given these public policies, linking children to their biological parents or promoting "responsible procreation" cannot possibly serve as conceivable purposes for Louisiana's Marriage Ban.

B. Instead of Promoting the Welfare of Children, the Marriage Ban Harms Children.

Far from promoting the welfare of children,

Louisiana's Marriage Ban serves only to "humiliate" the "children now being raised by same-sex couples" and "makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Windsor*, 133 S. Ct. at 2694; *accord Baskin*, 2014 U.S. App. LEXIS 17294, at *32-33, 67. In crediting the State's interest in "linking children to an intact family," the district court implicitly acknowledged that marriage protects the couple's children, but then denied those same protections to children reared by same-sex couples, who are barred from marriage. Louisiana may not prefer one class of children over another simply because of the circumstances of their conception and birth, the status or conduct of their parents, or whether their parent-child relationships are biological or adoptive. *See Levy v. Louisiana*, 391 U.S. 68, 72 (1968) (denying non-marital children equal right to recover for

mother's wrongful death held to be unconstitutional "invidious discrimination").

"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*, 996 F. Supp. 2d at 553.

C. The Marriage Ban Cannot Be Justified by an Illegitimate Interest in Fostering a Social Consensus.

Finally, Louisiana attempts to justify its Marriage Ban by stating that it seeks to ensure that its marriage laws reflect a "wide social consensus." ROA.870-71. But as explained in Section I, *supra*, neither federalism nor the democratic process can circumvent the constitutional constraints on Louisiana's authority to regulate marriage. Likewise, the attainment of a wide social or democratic consensus cannot serve to justify the deprivation of

Plaintiffs' constitutional rights. The constitutional rights to marriage and equal protection would be meaningless if they could be abridged the moment a majority feels these rights should not apply to a minority.

"The United States is a *constitutional* democracy." *Smith v. Allwright*, 321 U.S. 649, 664 (1944) (emphasis added). "[T]he Supreme Court has made clear on many occasions that matters guaranteed by the Bill of Rights . . . are not to depend on majority vote." *Siff v. State Democratic Exec.Comm.*, 500 F.2d 1307, 1308 (5th Cir. 1974). Indeed, the State "must recognize and appreciate that the Framers of the Constitution adopted the Bill of Rights . . . to protect the individual against the majority. Thus, contrary to what many Americans mistakenly feel, the majority does not rule the Bill of Rights." *Fernandes v. Limmer*, 465 F. Supp. 493, 505-506 (N.D. Tex.1979), *aff'd in part and rev'd in part by*, 663 F.2d 619 (Former 5th Cir. 1981) (reversing vagueness

challenge, affirming other first amendment claims). *Cf. ACLU v. Miss. State Gen. Serv. Admin.*, 652 F. Supp. 380, 383 (S.D. Miss.1987) ("The public interest must fall on the side of Constitutional rights of individuals over the will of the majority. That is the underlying fundamental of the Bill of Rights of our Constitution."). Simply put, "[o]ne's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 782 n.12 (1986) (quoting *Barnette*, 319 U.S. at 638).

The Marriage Ban thus cannot be justified by having been "cultivated through democratic consensus," where it is precisely that consensus that tramples the constitutional rights guaranteed to same-sex couples in Louisiana.

D. The Marriage Ban Does Not Rationally Further Any Other Potential, Unarticulated Interest.

Other potential justifications for the Marriage Ban, wisely not raised by the State, have been rejected by other courts and fare no better here.[20]

1. *There is no rational relationship between the Marriage Ban and any asserted interest in childrearing or optimal parenting.*

The Ban has no rational connection to an asserted interested in promoting an "optimal" parenting environment for children—a justification often connected to the State's asserted preference that children be raised by their biological parents. *See De Leon*, 975 F. Supp. 2d at 653-54; *Bostic*, 970 F. Supp. 2d at 478; *Perry*, 704 F. Supp. 2d at 980.

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[20] Given that the State did not rely on these arguments in the district court, they should be deemed waived. *See, e,g., Stewart Glass & Mirror, Inc. v. U.S. Auto Glass Disc. Ctrs., Inc.*, 200 F.3d 307, 316-17 (5th Cir. 2000) ("It is a bedrock principle of appellate review that claims raised for the first time on appeal will not be considered."). Nonetheless, they are addressed in an abundance of caution.

"Prohibiting gays and lesbians from marrying does not stop them from forming families and raising children. Nor does prohibiting same-sex marriage increase the number of heterosexual marriages or the number of children raised by heterosexual parents." *DeBoer*, 973 F. Supp. 2d at 771-72. Thus, "[e]ven 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 [exclusion of same-sex couples from marriage] and the asserted goal." *Obergefell*, 962 F. Supp. 2d at 994 (emphasis in original).

The premise that same-sex couples are less "optimal" parents than different-sex couples has been rejected by every major professional organization dedicated to children's

health and welfare.[21] "The 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." *Id.* at 994 n.20; *see also Bostic*, 760 F.3d, at 383. *Accord DeBoer*, 973 F. Supp. 2d at 770-72 (noting "approximately 150 sociological and psychological studies of children raised by same-sex couples have repeatedly confirmed . . . that there is simply no scientific basis to conclude that children raised in same-sex households fare worse than those raised in heterosexual

[21] This consensus is reflected in formal policy statements and organizational publications by every major professional organization dedicated to children's health and welfare, including the American Academy of Pediatrics, American Academy of Child and Adolescent Psychiatry, American Psychiatric Association, American Psychological Association, American Psychoanalytic Association, and Child Welfare League of America. *See* Brief of the American Psychological Association *et al.* as *Amici Curiae* on the Merits in Support of Affirmance, *Windsor*, 133 S. Ct. 2675 (No. 12-307), 2013 U.S. S. Ct. Briefs LEXIS 1339, at *30-48 (discussing this scientific consensus); Brief of the American Sociological Ass'n in Support of Respondent Kristin M. Perry and Respondent Edith Schlain Windsor, *Perry*, 133 S. Ct. 2652 (No. 12-144), 2013 U.S. S. Ct. Briefs LEXIS 1380, at *13-23.

households"). It is beyond any serious debate that "[c]hildren raised by gay or lesbian parents are as likely as children raised by heterosexual parents to be healthy, successful and well-adjusted." *Perry*, 704 F. Supp. 2d at 980.

Further, excluding same-sex couples from marriage has no bearing on how different-sex couples rear the children they may bear. *See Baskin,* 2014 U.S. App. LEXIS 17294, at *40, 44-45; *Latta,* 2014 U.S. Dist. LEXIS 66417, at *63-64. Children raised by different-sex couples are unaffected by whether same-sex couples can marry. *See Baskin*, 2014 U.S. App. LEXIS 17294, at *40, 44-45; *Golinski*, 824 F. Supp. 2d at 997; *accord Windsor*, 699 F.3d at 188; *Pedersen*, 881 F. Supp. 2d at 340-41; *Varnum*, 763 N.W.2d at 901. "Optimal child-rearing" thus cannot justify the Marriage Ban.

2. *Preservation of tradition cannot justify the Marriage Ban.*

Maintaining a "traditional" definition of marriage also cannot justify the Marriage Ban. "Tradition per se . . .

cannot be a lawful ground for discrimination—regardless of the age of the tradition." *Baskin*, 2014 U.S. App. LEXIS 17294, at*54. *See also Heller v. Doe*, 509 U.S. 312, 326-27 (1993) ("Ancient lineage of a legal concept does not give it immunity from attack for lacking a rational basis"); *Williams v. Illinois*, 399 U.S. 235, 239 (1970) ("[N]either the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack.").

"[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack." *Lawrence*, 539 U.S. at 577-78 (quoting *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting)).

With respect to laws prohibiting same-sex couples from

marriage, "the justification of 'tradition' does not explain the classification; it merely repeats it. Simply put, a history or tradition of discrimination—no matter how entrenched—does not make the discrimination constitutional." *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 478 (Conn. 2008); *accord Goodridge*, 798 N.E.2d at 961 n.23; *Varnum*, 763 N.W.2d at 898. 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), which is not a rational basis for perpetuating discrimination. *See Windsor*, 133 S. Ct. at 2692; *Romer*, 517 U.S. at 633; *Cleburne*, 473 U.S. at 450; *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

3. *The Marriage Ban cannot be justified by an interest in proceeding with caution.*

Lastly, an interest in proceeding with caution in the

face of "fundamental social change" ROA.1967, does not satisfy rational basis, as proceeding cautiously by continuing to deny equal treatment to an unpopular group is not a legitimate state interest. "Proceeding with caution" is a means, not an end, and such means are permissible only if they are in pursuit of legitimate goals.[22] 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. Every court to consider the proceeding-with-caution argument after *Windsor* has rejected it. *See, e.g.*, *Kitchen*, 961 F. Supp. 2d at 1194-95; *Bourke*, 996 F.Supp.2d at 553; *DeBoer*, 973 F. Supp. 2d at 770-71; *Wolf*, 986 F. Supp. 2d at 1025. As the district court in

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[22] *See, e.g., Massachusetts v. EPA*, 549 U.S. 497, 524 (2007) (incremental pursuit of proper end of reducing emissions of greenhouse gases permissible); *Califano v. Jobst*, 434 U.S. 47, 57-58 (1977) (Congress may work incrementally toward "the goal of eliminating the hardship caused by the general marriage rule").

Kitchen noted, "[t]he State can plead an interest in proceeding with caution in almost any setting. If the court were to accept the State's argument here, it would turn the rational basis analysis into a toothless and perfunctory review." 961 F. Supp. 2d at 1213.

CONCLUSION

The concrete harms and stigmatic injuries to Plaintiffs and their children of being denied the right to marry are considerable. By denying Plaintiffs the choice of whether and whom to marry, the State "prohibits them from participating fully in our society, which is precisely the type of segregation that the Fourteenth Amendment cannot countenance." *Bostic*, 760 F.3d, at 384. Plaintiffs, like other same-sex couples across Louisiana, yearn for recognition of their shared humanity and a family life accorded equal dignity by the State. The Constitution's guarantees of due process and equal protection require nothing less.

The judgment of the district court should be ***reversed*** and the case remanded with instructions to enter Judgment for Plaintiffs-Appellants.

Dated: October 17, 2014.

Respectfully submitted,

LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.

By: */s/ Kenneth D. Upton, Jr.*
KENNETH D. UPTON, JR.

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I hereby certify that, on October 17, 2014, I electronically transmitted the above and foregoing document to the Clerk of the Court using the ECF System for filing.

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s/*Kenneth D. Upton, Jr.*
Kenneth D. Upton, Jr.

ADDENDUM

No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1

Marriage in the state of Louisiana shall consist only of the union of one man and one woman. No official or court of the state of Louisiana shall construe this constitution or any state law to require that marriage or the legal incidents thereof be conferred upon any member of any union other than the union of one man and one woman. A legal status identical to or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized. No official or court of the state of Louisiana shall recognize any marriage contracted in any other jurisdiction which is not the union of one man and one woman.

LA. CONST. art. XII, § 15

Marriage is a legal relationship between a man and a woman that is created by civil contract. The relationship and the contract are subject to special rules prescribed by law.

LA. CIV. CODE art. 86

Persons of the same sex may not contract marriage with each other. A purported marriage between persons of the same sex contracted in another state shall be governed by the provisions of Title II of Book IV of the Civil Code. [See art. 3520(B)]

LA. CIV. CODE art. 89

A purported marriage between persons of the same sex violates a strong public policy of the state of Louisiana and such a marriage contracted in another state shall not be recognized in this state for any purpose, including the assertion of any right or claim as a result of the purported marriage.

LA. CIV. CODE art. 3520(B)

In compliance with the Louisiana Constitution, the Louisiana Department of Revenue shall not recognize same-sex marriages when determining filing status. If a taxpayer's federal filing status of married filing jointly, married filing separately or qualifying widow is pursuant to IRS Revenue Ruling 2013-17 [ruling that same-sex couples legally married in states that recognize such marriages will be treated as married for federal tax purposes], the taxpayer must file a separate Louisiana return as single, head of household or qualifying widow, as applicable. The taxpayer(s) who filed a federal return pursuant to IRS Revenue Ruling 2013-17 may not file a Louisiana state income tax return as married filing jointly, married filing separately or qualifying widow. The taxpayer must provide the same federal income tax information on the Louisiana State Return that would have been provided prior to the issuance of Internal Revenue Service Ruling 2013-17.

Excerpt from La. Revenue Info.
Bulletin No. 13-024 (Sept. 13, 2013)