No. 14-574

IN THE

Supreme Court of the United States

GREGORY BOURKE, *et al.*,
& TIMOTHY LOVE, *et al.*,

Petitioners,

v.

STEVE BESHEAR, IN HIS OFFICIAL CAPACITY
AS GOVERNOR OF KENTUCKY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex?

2. Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state?

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INTRODUCTION

States' "historic and essential authority to define the marital relation" of their citizens is without dispute. *United States v. Windsor*, 133 S.Ct. 2675, 2692 (2013). Further, "until recent years," the concept of defining "marriage between a man and woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization." *Id.* at 2689. As recognized in *Windsor*, our nation has been involved in a state-by-state democratic debate about whether to redefine the age-old definition of marriage. *Id.* ("That belief [in the traditional man-woman marriage definition], for many who long held it, became even more urgent, more cherished when challenged. For others, however, came the beginnings of a new perspective, a new insight. Accordingly, some states concluded that same-sex marriage ought to be given recognition and validity in the law for these same-sex couples who wish to define themselves by their commitment to each other."). The Petitioners seek to end the democratic debate. They ask this Court wholly to remove the states' role – the citizens' role – in defining marriage through the democratic process and to have the Court declare that the Fourteenth Amendment, ratified in 1868, compels states to define marriage as a genderless institution.

In holding that the decision of whether to define marriage to include same-sex couples belongs to the states, not to the judiciary, the Sixth Circuit Court of Appeals recognized that "this is a case about change – and how best to handle it under the United States Constitution." Pet. App. 4a. The Court recognized that

in deciding this question of paramount importance to this nation, "[p]rocess and structure matter greatly in American government" and "[o]f all the ways to resolve this question, one option is not available: a [judicial] poll… about whether gay marriage is a good idea." *Id.* Pet. App. 5a.

The Petitioners' reliance upon *Windsor* as the basis to federalize the definition of marriage is unfounded. *Windsor* compels the opposite conclusion. *Windsor* recognizes that "there is no federal law of domestic relations" and that, subject to respecting the constitutional rights of persons, "regulation of domestic relations is an area that has long been regarded as a virtually exclusive province of the States." *Windsor*, 133 S.Ct. at 2691. As set forth below, Kentucky's marriage laws do not violate the Fourteenth Amendment.

STATEMENT OF THE CASE

The Kentucky case presents both questions certified by the Court: licensing (Question 1) and recognition (Question 2).

A. Kentucky's Marriage Recognition History

Kentucky has never defined marriage to include same-sex couples, and the Kentucky courts have long established that such unions do not constitute a marriage. *See* An Act for Regulating the Solemnization of Marriages, § 1, 1798 Ky. Acts. 49, 49-50, and *S.J.L.S. v. T.L.S.*, 265 S.W.3d 804, 822 (Ky. Ct. App. 2008). The Kentucky Supreme Court rejected a same-sex couple's federal constitutional challenge to Kentucky's marriage laws more than thirty

years ago. *Jones v. Hallahan*, 501 S.W.2d 588, 589 (Ky. 1973).

Kentucky, like 33 other states, has exercised its broad authority to regulate domestic relations by adopting a traditional man-woman definition of marriage. The Kentucky legislature has passed a number of statutes recognizing that same-sex marriages are against Kentucky public policy, including Ky. Rev. Stat. Ann. §§ 402.005, 402.020(1)(d), 402.040(2), and 402.045.[1] Approximately ten years ago, the Kentucky General Assembly and 74% of participating voters (1,222,125 citizens) passed and ratified the following amendment to Kentucky's constitution, re-affirming Kentucky's existing policy:

> Only a marriage between one man and one woman shall be valid or recognized as a marriage in Kentucky. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized.

Ky. Const. § 233A.[2] Read together, these laws declare Kentucky's public policy in favor of traditional marriage, define marriage as between one man and one woman, prohibit the creation of same-sex marriages in Kentucky, and prohibit Kentucky's recognition of same-sex marriages from other jurisdictions.

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1. The statutes are set forth at Pet. App. 158a-161a.

2. Pet. App. 158a.

B. The Petitioners

One group of petitioners, the *Love* Petitioners, challenges the Commonwealth's marriage-licensing law. The other group, the *Bourke* Petitioners, challenges the ban on recognizing out-of-state same-sex marriages. Pet. App. 8a-9a. Both groups contend that Kentucky's marriage laws deny them benefits they would otherwise receive, including preferential treatment for inheritance taxes, compelled spousal financial support, spousal privilege in trial proceedings, intestacy inheritance rights, loss of consortium benefits, health care coverage, standing to bring workers' compensation claims for deceased spouses, and certain federal benefits such as social security benefits and FMLA[3] leave to care for a spouse. The Petitioners also argue that children being raised by same-sex couples are humiliated because same-sex couples are not permitted to marry and that such children are further harmed by the reduction of "family resources and by denying their family social and legal recognition and respect." J.A. 581. According to the Petitioners, non-recognition of their status as spouses also limits their rights with regard to adoption and status as parents. J.A. 591, 594-95, 614.

C. Procedural History

As stated above, Kentucky presents both of the certified questions in this case: licensing (Question 1) and recognition (Question 2).

1. The recognition laws of Kentucky were first challenged by the Petitioners, Gregory Bourke and

3. Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6.

Michael DeLeon and their minor children, on July 26, 2013 in the United States District Court for the Western District of Kentucky. J.A. 541. The Complaint was subsequently amended to name additional plaintiffs Randall Johnson, Paul Campion, and their minor children; Kimberly Franklin; Tamera Boyd; Jimmy Lee Meade; and Luther Barlowe, alongside Bourke and De Leon, to challenge Kentucky's marriage recognition laws. J.A. 566-584. An Answer to the Second Amended Complaint was filed on behalf of the Respondent Governor Steve Beshear and Kentucky Attorney General Jack Conway. J.A. 544.

On February 12, 2014, the district court granted the *Bourke* Petitioners' motion for summary judgment based solely on the pleadings. The court held that Kentucky's laws and constitutional provision regarding the non-recognition of same-sex marriages performed in other states violated the Equal Protection Clause of the United States Constitution. Pet. App. 125a. While Plaintiffs raised several constitutional challenges, the lower court addressed only the Equal Protection claims. Pet. App. 134a. The court recognized that neither the Supreme Court nor the Sixth Circuit Court of Appeals had ruled that same-sex marriage was a fundamental right, and therefore applied rational basis review. Pet. App. 138a-139a. Despite no clear showing of animus, the district court ruled that Kentucky's marriage recognition laws could not withstand rational basis review. Pet. App. 145a, 148a. Respondent Beshear filed a notice of appeal to the Sixth Circuit Court of Appeals on March 18, 2014. On March 19, 2014, the district court entered a stay until further order of the Sixth Circuit Court of Appeals. J.A. 550.

2. The *Love* Petitioners (Timothy Love, Lawrence Ysunza, Maurice Blanchard, and Dominique James), who are challenging the marriage license laws of Kentucky, were allowed to intervene in the *Bourke* action after the district court granted summary judgment to the *Bourke* Petitioners. J.A. 547. Kentucky Attorney General Jack Conway was dismissed from the *Love* case and from the *Bourke* matter on March 24, 2014 after indicating to the district court that he would no longer defend Kentucky's marriage laws in this matter. J.A. 550-551. The *Love* Petitioners filed their motion for summary judgment on April 18, 2014. J.A. 551. A timely response and a reply to that response were filed. J.A. 551. The district court granted summary judgment to the *Love* Petitioners on July 1, 2014, but stayed enforcement of his ruling until further order of the Sixth Circuit. Pet. App. 96a-123a. The *Love* decision did not determine whether or not Kentucky's marriage laws interfered with a fundamental right. The district court interpreted *Windsor* to mean that this Court would not recognize same-sex marriage as a fundamental right. Pet. App. 98a. The opinion was decided solely on an Equal Protection Clause analysis. Pet. App. 98a. Despite recognizing that this Court has never explicitly identified homosexuals as a suspect class and despite existing Sixth Circuit precedent to the contrary, the district court found that homosexuals should be considered a "quasi-suspect class" for the purposes of Equal Protection analysis and that the proper level of scrutiny is intermediate. Pet. App. 115a. The court did not apply intermediate scrutiny, however, but instead ruled that Kentucky's marriage licensure laws could not withstand rational basis review. Pet. App. 120a. Respondent Beshear filed his notice of appeal with the Sixth Circuit on July 8, 2014.

3. Respondent Beshear filed his appellant brief in the Sixth Circuit in the *Bourke* case on May 7, 2014. J.A. 555. The *Bourke* Petitioners filed their response on June 9, 2014. J.A. 555. A reply was filed June 26, 2014. J.A. 556. After the *Love* motion for summary judgment was granted on July 1, 2014 and notice of appeal was filed by Respondent Beshear, the *Bourke* and *Love* cases were consolidated on July 16, 2014. J.A. 556, 561. The Kentucky cases, along with cases from Michigan, Ohio, and Tennessee that involve either the licensure and/or recognition questions, were consolidated for oral argument and argued before a panel of the Sixth Circuit on August 6, 2014. J.A. 558. The Sixth Circuit opinion reversing the federal district courts, including the Western District of Kentucky, and upholding the rights of states to regulate the licensure and recognition of marriage within their borders, authored by Judge Sutton and joined by Judge Cook with Judge Daughtery dissenting, was entered on November 6, 2014. Pet. App. 1a-95a. The *Bourke* and *Love* Petitioners jointly petitioned this Court for a writ of certiorari on November 20, 2014. J.A. 558, 564. The Court granted the petition for certiorari on January 16, 2015. J.A. 558-59, 565.

SUMMARY OF ARGUMENT

Through the democratic process, Kentucky citizens have elected not to license or recognize same-sex marriage licenses issued by other states. The statutes and constitutional amendment that are the subject of this litigation did not change the law in Kentucky. Rather, they codified what has always been the consensus of Kentuckians. That other communities and citizens in other states have chosen to permit same-sex marriages does not mandate that Kentucky follow.

This Court in *United States v. Windsor*, 133 S.Ct. 2675 (2013), affirmed a state's independent sovereign authority to offer same-sex marriage licenses based upon the "formation of consensus" of the citizens of that state, and the federal government's inability under the Fourteenth Amendment to interfere with that consensus if motivated by a discriminatory animus. The corollary of that holding is that a state, likewise, based upon the "formation of consensus" of its citizens, *may also* in the exercise of its sovereign authority elect *not* to offer or recognize same-sex marriage licenses. Kentucky has exercised its sovereign immunity just as New York did in *Windsor*.

Unlike the passage of DOMA[4] at issue in *Windsor,* the anti-sodomy laws in *Lawrence v. Texas*, 539 U.S. 558 (2003), and the repeal of protective legislation in *Romer v. Evans*, 517 U.S. 620 (1996), Kentucky's marriage statutes and constitutional amendment did not change the law in Kentucky. The laws reflect what has always been the law in the Commonwealth of Kentucky and the consensus of Kentucky communities – only traditional man-woman marriages will be licensed or recognized.

The Petitioners have not demonstrated a basis for applying heightened scrutiny to their Equal Protection challenge to Kentucky's marriage laws. Same-sex marriage is not a fundamental right because same-sex marriage is not "objectively 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if

4. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419.

they were sacrificed.'" *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)(citations omitted). Heightened scrutiny is also not available because homosexuals do not meet the criteria of a suspect class. Primarily, gays and lesbians cannot demonstrate they are a discrete and insular class who are unable to attract the attention of lawmakers.

Kentucky's marriage laws that limit the issuance of marriage licenses and recognition of out-of-state marriage licenses to man-woman couples are rationally related to the state's interest in furthering procreation. Same-sex couples do not further that interest and, therefore, restricting the benefits and burdens of marriage do not violate the Fourteenth Amendment. The Petitioners' contention that procreation would not be harmed if the state granted them a marriage license or recognized their out-of-state marriage license applies the wrong test. This Court has determined that "when…the inclusion of one group promotes a legitimate government purpose, and the addition of other groups would not, we cannot say that the statute's classification of beneficiaries and non-beneficiaries is invidiously discriminatory." *Johnson v. Robison*, 415 U.S. 361, 383 (1974). Further, Kentucky is not required to draw perfect lines in its classifications in order to comply with the Equal Protection Clause, and the fact that the laws may be over-inclusive or under-inclusive does not mandate their invalidation.

The answer to Question 1 and Question 2 certified by this Court is that Kentucky may, in the exercise of its sovereign authority, elect not to authorize or recognize same-sex marriage licenses without violating the Fourteenth Amendment.

ARGUMENT

I. The Fourteenth Amendment does not require a state to license a marriage between two people of the same sex.

A. *Windsor* reaffirms, not undermines, each state's province to define marriage in accordance with the consensus of its citizens.

The Petitioners are asking this Court to federalize same-sex marriage and to compel Kentucky citizens to adhere to the "formation of consensus" of communities in other states regarding same-sex marriage. *See United States v. Windsor,* 133 S.Ct. 2675, 2692-2693 (2013)("The dynamics of state government in the federal system are to allow the formation of consensus respecting the way members of a discrete community treat each other in their daily contact and constant interaction with each other."). The Petitioners assert that Kentucky's adherence to the only form of marriage ever recognized by the state "relegates lesbians and gays to second-class status" and constitutes discrimination based upon sexual orientation and on the basis of sex. Pet. Br. 26-38. The Petitioners' argument mischaracterizes the history of Kentucky's marriage laws and overstates the holdings of recent Supreme Court cases involving homosexual persons.

This Court's determination in *Windsor* that § 3 of DOMA deprived the petitioners "of the benefits and responsibilities that come with the federal recognition of their marriage" did not remove from political debate or the democratic process the sovereign right of Kentucky to decide the important social issue of whether a same-sex

marriage would constitute a valid marriage in Kentucky. The Petitioners have erroneously applied *Windsor* to support their position that same-sex marriage is a federally mandated right, that states no longer maintain independent sovereignty to decide this issue, and that a state's decision to adhere to traditional marriage rather than adopt a new definition relegates homosexuals and their children to second-class citizens.

Windsor instructs that *if* a state exercises its independent sovereign authority to offer same-sex marriages, then Congress lacks authority to strip the benefit from the citizens who had been conferred that benefit. *Windsor* does not compel ***all states***, however, to provide that benefit or to recognize same-sex marriages authorized in other states. Instead, *Windsor* confirms that these decisions should be made on the local level, and – once made – the federal government lacks authority to interfere with that decision when based upon a discriminatory animus. Congress' interference with what has traditionally been the province of the states – defining marriage – evidenced a discriminatory motive.

Likewise, that this Court invalidated the unlawful state legislative acts in *Romer v. Evans*, 517 U.S. 620 (1996), and *Lawrence v. Texas,* 539 U.S. 558 (2003), does not compel invalidation of Kentucky's marriage laws. The challenged Kentucky laws codified the only definition of marriage that Kentucky has ever known and that a majority of Kentuckians voted to maintain. Unlike the challenge in *Romer* to Colorado's constitutional amendment, which prohibited all "legislative, executive or judicial action at any level of state or local government designed to protect" homosexual persons, the Kentucky marriage statutes do

not remove any rights previously afforded by Kentucky to homosexual couples or same-sex couples. Similarly, unlike the criminal sodomy laws invalidated by *Lawrence,* the Kentucky marriage statutes do not infringe upon the Petitioners' privacy rights to engage in consensual activity without interference from the government. The *Lawrence* Court specifically acknowledged that its striking state sodomy laws as unconstitutional "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." 539 U.S. at 578.

This Court has long recognized the strict rules limiting the judiciary's interference with the states' authority over these types of domestic matters:

> [T]he power to make rules to establish, protect, and strengthen family life as well as to regulate the disposition of property left in [the States by its citizens] is committed by the Constitution of the United States and the people of the [State] to the legislature of that State. Absent a specific constitutional guarantee, it is for that legislature, not the life-tenured judges of this Court, to select from among possible laws.

Labine v. Vincent, 401 U.S. 532, 538-39 (1971). This Court has further instructed that "[w]hen social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude, and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic process." *City of Cleburne, Texas v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985) (citations omitted).

If, as *Windsor* declared, states like New York may act to accept and sanction same-sex marriage, and those "actions were without doubt a proper exercise of [New York's] sovereign authority within our federal system, all in the way that the Framers of the Constitution intended," *Windsor*, 133 S.Ct. at 2692, then the corollary of that proposition must stand. That is, the Framers of the Constitution intended the same "sovereign authority" to provide states the ability to define marriage so as to reject and refuse same-sex marriage in favor of traditional marriage. When this Court held that "[t]he dynamics of state government in the federal system are to allow the formation of consensus respecting the way the members of a discrete community treat each other in their daily contact and constant interaction with each other," *id.*, the Court recognized Kentucky's ability to maintain the traditional definition of marriage in accordance with the consensus of its citizens, which it has done – and which the challenged laws do. *Id.* The consensus of the Kentucky legislature and the citizens of the Commonwealth to maintain the traditional, man-woman marriage is no less a proper exercise of Kentucky's sovereign authority within the federal system than New York's exercise of its sovereign authority to change the definition.

This conclusion is supported by this Court's determination in *Schuette v. Coalition to Defend Affirmative Action*, 134 S.Ct. 1623, 1638 (2014), that "[s]ave and unless the state, county or municipal government runs afoul of a federally protected right, it has vast leeway in the management of its internal affairs." *Id.* (quoting *Sailors v. Board of Ed. of Kent County,* 387 U.S. 105 (1967)). What occurred in Kentucky with regard to adoption of the constitutional amendment and enactment

of marriage statutes is not comparable to Congress' passage of § 3 of DOMA, which invaded the states' rights. Kentucky's enactment of its marriage statutes and adoption of Section 233A of its Constitution codified what has always been the law in the Commonwealth of Kentucky – prohibition of same-sex marriages. *See S.J.L.S.,* 265 S.W.3d at 822 ("Such marriages have been prohibited by statute since 1998, [KY. REV. STAT. ANN.] § 402.020(1)(d), **and by common law since the formation of the Commonwealth."**)(emphasis added); *see also Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973)(recognizing that Kentucky has never permitted the issuance of marriage licenses to same-sex couples).

"Same-sex marriage presents a highly emotional and important question of public policy—but not a difficult question of constitutional law" when it comes to the states' right to enact laws preserving or altering the traditional definition of marriage. *Windsor*, 133 S.Ct. at 2714 (Alito, J., dissenting). When this Court in *Schuette* determined that the Michigan voters' decision to amend the Michigan constitution to prohibit race-based preferences as part of the admissions process for state universities was within their authority, the Court confirmed that even sensitive issues involving federally protected rights can be decided through the political process:

> This case is not about how the debate about racial preferences should be resolved. It is about who may resolve it. There is no authority in the Constitution of the United States or in this Court's precedents for the Judiciary to set aside Michigan laws that commit this policy determination to the voters. *See Sailors Board*

> *of Ed. of Kent County*, 387 U.S. 105 (1967) ("Save and unless the state, county or municipal government runs afoul of a federally protected right, it has vast leeway in the management of its internal affairs"). Deliberative debate on sensitive issues such as racial preferences all too often may shade into rancor. But that does not justify removing certain court-determined issues from the voters' reach. Democracy does not presume that some subjects are either too divisive or too profound for public debate.

Schuette, 134 S.Ct. at 1638.

In sum, *Windsor* does not stand for the proposition that the federal constitution compels states to allow same-sex marriages. As this Court held in *Labine,* "absent a specific constitutional guarantee, it is for the legislature, not the life-tenured judges of this Court, to select from among possible laws." *Labine*, 401 U.S. at 538-39. "If the States are the laboratories of democracy, requiring every state to recognize same-gender unions—contrary to the views of its electorate and representatives—turns the notion of a limited national government on its head." *Kitchen v. Herbert*, 755 F.3d 1193, 1231 (10th Cir. 2014) (Kelly, J., dissenting)(citing *Bond v. United States,* 131 S.Ct. 2355, 2364 (2011)(explaining that federalism allows for state responses instead of relying upon the eventuality of a federal policy)).

B. The constitutionality of Kentucky's marriage statutes should not be assessed under the Equal Protection Clause by applying heightened scrutiny.

The Sixth Circuit correctly applied rational basis review, not heightened or intermediate scrutiny, to the Petitioners' Equal Protection challenge to the states' same-sex marriage laws. Pet. App. 22a. This Court has "long held that 'a classification neither involving fundamental rights nor proceeding along suspect lines . . . cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.'" *Armour v. City of Indianapolis, Ind.*, 132 S.Ct. 2073, 2080 (2012)(quoting *Heller v. Doe*, 509 U.S. 312, 319-320 (1993)). There is no fundamental right to same-sex marriage, and homosexual orientation is not a suspect class.

The Petitioners' Brief appears to vacillate between a modified rational basis standard (Pet. Br. 25)("States should not be able to impose such an exclusion without showing that it is at least reasonably adapted to further some substantial goal") and "heightened scrutiny" (Pet. Br. 32) for a "quasi-suspect" class based upon sexual orientation. As set forth below, heightened scrutiny is not the appropriate standard by which to analyze Kentucky's marriage statutes.

1. Same-sex marriage is not deeply rooted in this Nation's history.

In order to establish a fundamental right to same-sex marriage, the Petitioners must establish that same-sex

marriage is "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'" *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)(internal quotations and citations omitted). The Petitioners cannot meet this burden, however. This Court recognized in *Windsor* that "[i]t seems fair to conclude that, until recent years, many citizens had not even considered the possibility that two persons of the same sex might" marry. 133 S.Ct. at 2689; *accord* 133 S.Ct. at 2715 (Alito, J. dissenting)("It is beyond dispute that the right to same-sex marriage is not deeply rooted in this Nation's history and tradition.") and *Hernandez v. Robles*, 855 N.E.2d 1, 8 (N.Y. 2006)("Until a few decades ago, it was an accepted truth for almost everyone that ever lived, in any society in which marriage existed, that there could be marriages only between two participants of different sex.")

The Petitioners' argument that there is a general fundamental right to marry the person of one's choice and to a genderless marriage misapplies prior holdings from this Court regarding the fundamental right of marriage. *Glucksberg* cautions that there must be a "careful description" of the asserted fundamental right. 521 U.S. at 721. Judicial declarations regarding the fundamental "right to marriage" have intrinsically tied marriage to procreation, which is a biological impossibility for same-sex couples. For example, in *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942), this Court held that "[m]arriage and procreation are fundamental to the very existence and survival of the race" when reviewing the constitutionality of a state statute that provided for the sterilization of habitual criminals. The link between

marriage and procreation was made long before *Skinner.* In *Maynard v. Hill,* 125 U.S. 190, 211 (1888), the Court referred to traditional marriage as "the foundation of the family and of society, without which there would be neither civilization nor progress."

And, more recently, in *Turner v. Safley*, 482 U.S. 78 (1987), this Court held that a state prison regulation that prohibited inmates from marrying except for a compelling reason violated the prisoner's fundamental right to marriage. The marriage right was tied to the fact that "most inmates eventually will be released by parole or commutation, and therefore most inmate marriages are formed in the expectation that they will be fully consummated." *Id.* at 96. The *Turner* Court was careful to distinguish its holding that there was a "constitutionally protected marital relationship in the prison context" from the Court's earlier holding in *Butler v. Wilson,* 415 U.S. 953 (1974), that the restriction on marriage did not violate those prisoners' right to marriage because those prisoners were sentenced to life imprisonment and hence there was no expectation of consummation of the marriage. Thus, the Court's prior recognition of the importance of marriage in our society has been in the context of the traditional man-woman version of the institution and not an individual fundamental right to marry the person of one's choice or to a genderless marriage.

Finally, while *Loving v. Virginia*, 388 U.S. 1 (1967), recognized the right to marriage as one of the "basic civil rights of man," the Court described the right as "fundamental to our very existence and survival." *Id.* at 12. Unlike a person's race, which has nothing to do with procreation, a person's sex has everything to do

with procreation. Thus, the fundamental principle upon which *Loving* was based simply does not transfer to same-sex marriage. Certainly, if *Loving* had established a fundamental right to marry any person, particularly a person of the same-sex, then this Court would not have rejected, just five years later in *Baker v. Nelson*, 409 U.S. 810 (1972)(dismissing appeal for "want of a substantial federal question"), the identical challenges presented by the Petitioners in this case.

2. Gays and lesbians do not constitute a suspect class or a quasi-suspect class.

The Sixth Circuit correctly rejected the Petitioners' contention that homosexual orientation is a suspect class warranting a heightened level of scrutiny and recognized that this Court "has never held that legislative classifications based on sexual orientation receive heightened review and indeed has not recognized a new suspect class in more than four decades." Pet. App. 42a. This Court had the opportunity to apply heightened scrutiny in *Romer v. Evans*, 517 U.S. 620 (1996), and *Lawrence v. Texas*, 539 U.S. 558 (2003), and most recently in *Windsor,* but did not do so.

Only state classifications based upon race, alienage, and national origin have been classified as suspect classes, while sex and illegitimacy have been classified as quasi-suspect. *Loving*, 388 U.S. at 11 (race); *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971)(alienage); *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (national origin); *Craig v. Boren*, 429 U.S. 190, 197 (1976) (sex); *Mathews v. Lucas*, 427 U.S. 495 (1976)(illegitimacy). The Court has clearly rejected other minority groups'

efforts to obtain protected status, such as the elderly and mentally disabled, even though such groups could have benefited from such protection. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976)(age), and *Cleburne*, 473 U.S. at 445-446 (mental disability).

Four criteria have been relied upon by this Court when identifying the limited number of suspect classifications: (1) inability to attract the attention of lawmakers; (2) a history of unequal treatment; (3) an obvious, immutable or distinguishing trait; and (4) bearing no relation to their ability to perform or contribute to society. *Id.* at 441, 445; *Lyng v. Castillo*, 477 U.S. 635, 638 (1986); *San Antonio Sch. Dist. v. Rodriquez*, 411 U.S. 1, 28 (1973); *Frontiero v. Richardson*, 411 U.S. 677 (1973)(plurality). The balance of those factors do not weigh in favor of classifying homosexual orientation as a suspect class.

a. Gays and lesbians as a class clearly have the ability to attract the attention of lawmakers.

The Petitioners' contention that they have been unable to "attract the attention of lawmakers" or that they cannot rely upon "the operation of those political processes ordinarily to be relied upon to protect minorities" in which to achieve success in the same-sex marriage debate at the ballot box strains credulity. *See Cleburne,* 473 U.S. at 445-446 (rejecting suspect class status for the mentally disabled based upon their ability to attract the attention of lawmakers), and *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152, n. 4 (1938). The Petitioners cannot legitimately contend that homosexual persons – as a class – have been "relegated to such a position of political powerlessness as to command extraordinary protection

from the majoritarian political process." *Plyler v. Doe*, 457 U.S. 202, 217, n. 14 (1982)(quoting *Rodriquez*, 411 U.S. at 28).

To the contrary, same-sex marriage advocates have succeeded at the ballot boxes or through legislation in twelve states (inclusive of the District of Columbia). Additionally, a number of states and local governments have adopted civil rights legislation creating a protected class for gays and lesbians on the same par as protections afforded to classifications based upon race, sex, and national origin.[5] *See Andersen v. King County,* 138 P.3d 963, 974-75 (Wash. 2006)(en banc)("The enactment of provisions providing increased protections to gay and lesbian individuals in Washington shows that as a class gay and lesbian persons are not powerless but, instead exercise increasing political power."); *Conaway v. Deane*, 932 A.2d 571, 611 (Md. 2007)("We are not persuaded that gay, lesbian, and bisexual persons are so politically powerless that they are entitled to extraordinary protection from the majoritarian political process. To the contrary, it appears that, at least in Maryland, advocacy to eliminate discrimination against gay, lesbian, and bisexual persons based upon their sexual orientation has been met with growing successes in the legislative and executive branches of government.")(internal quotation marks omitted).

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5. State civil rights legislation protecting homosexual orientation includes: Conn. Gen.Stat. §§ 46b–20 to 46b–20a; Del.Code Ann. tit. 13, § 101; D.C.Code § 46–401; Haw.Rev.Stat. § 572–1; 750 Ill. Comp. Stat. 5/201; Me.Rev.Stat. tit. 19–A, § 650–A; Md.Code Ann., Fam. Law §§ 2–201 to 2–202; Minn.Stat. Ann. §§ 517.01 to 517.03; N.H.Rev.Stat. Ann. §§ 457:1-a to 457:2; N.Y. Dom. Rel. Law § 10–a; R.I. Gen. Laws § 15–1–1 *et seq.;* Vt. Stat. Ann. tit. 15, § 8; Wash. Rev.Code §§ 26.04.010 to 26.04.020.

The amicus briefs (by volume and supporters) filed in this case supporting the Petitioners is a testament to the ability of this class to garner political support and of their political might: 167 Members of the U.S. House of Representatives and 44 U.S. Senators; 226 Mayors; AFL-CIO; American Bar Association; United States Department of Justice; Hawaii; Kenneth B. Mehlman and others;[6] Minnesota; Massachusetts, California, Connecticut, Delaware, District of Columbia, Illinois, Iowa, Maine, Maryland, New Hampshire, New Mexico, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and Virginia. These amici briefs are similar in number and supporters to those filed in *Windsor* and *Hollingsworth v. Perry*, 133 S.Ct. 2652 (2013). "Any minority can be said to be powerless to assert direct control over the legislature, but if that were a criterion for higher level scrutiny by the courts, much economic and social legislation would not be suspect." *Cleburne*, 473 U.S. at 445. The Petitioners' success at the local level to obtain protection as a group, along with the extraordinary support of government and political officials, *see supra* note 4, weigh against creating a federally-recognized suspect class status for this group.

6. The amici filers of this Brief describe themselves as: "social and political conservatives, moderates, and libertarians from diverse backgrounds. Many have served as elected or appointed officeholders in various Presidential administrations, as governors, mayors, and other officeholders in States and cities across the Nation, as members of Congress, as ambassadors, as military officers, as officials in political campaigns and political parties, and as advocates and activists for various political and social causes."

b. Kentucky's codification of its traditional man-woman marriage definition has no bearing on any history of social discrimination against gays and lesbians.

Just as it is disingenuous for the Petitioners to assert that they are politically powerless or lack the ability to attract the attention of lawmakers, it also would be disingenuous for the Respondent to assert that gays and lesbians have not been subjected to a history of unequal treatment by society. Unequal treatment by society, however, is not the type of unequal treatment necessary for recognition as a suspect class. For example, the mentally disabled in *Cleburne* experienced unequal treatment by society, but they were not afforded status as a protected class. The social discrimination experienced by homosexual persons is distinguishable from the systematic governmental discrimination experienced by recognized protected classes, which have been limited to race, alienage, national origin, sex, and illegitimacy.

Further, any history of social discrimination against homosexual persons is wholly unrelated to Kentucky's long-standing history of limiting marriages to the traditional man-woman model. Kentucky's earliest marriage statutes, adopted six years after Kentucky was granted statehood, reference marriage as a union between "man and wife." An Act for Regulating the Solemnization of Marriage § 1, 1798, Ky. Acts 49, 49-50 (approved Feb. 3, 1798); s*ee, also, S.J.L.S.*, 265 S.W.3d at 822 ("Such marriages have been prohibited by statute since 1998, Ky. Rev. Stat. Ann. § 402.020(1)(d), and by common law since the formation of the Commonwealth."), and *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973)(recognizing that

Kentucky has never permitted the issuance of marriage licenses to same-sex couples).

Thus, while homosexuals as a class may have a history of social rejection and discrimination, it is distinguishable from the systematic government discrimination sufficient to elevate that class to having protected status for Equal Protection analysis.

c. The Petitioners have not established that gays and lesbians have obvious, immutable, or distinguishing traits.

The Petitioners attempt to discount this factor claiming that they are not required to establish that a trait is "immutable in a literal sense" to qualify for heightened scrutiny and that they are still entitled to strict scrutiny even if they could choose their sexual orientation because they should not have to do so. Pet. Br. 35, n. 6. The Petitioners' reliance upon a footnote in *Nyguist v. Mauclet*, 432 U.S. 1, 9 n.11 (1977), for their proposition that immutability is not required is misplaced.

It is fair to conclude that there is at least legitimate debate regarding sexual orientation being an immutable characteristic on the same level as race, color, sex or national origin. Nonetheless, even if gays and lesbians as a group have immutable characteristics and lack political power, these disadvantages are not sufficient to elevate them to suspect class. Other classes with immutable characteristics have been denied protective status:

> If the large and amorphous class of the mentally retarded were deemed quasi-suspect for the

> reasons given by the Court of Appeals, it would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large. One need mention in this respect only the aging, the disabled, the mentally ill, and the infirm. We are reluctant to set out on that course, and we decline to do so.

Cleburne, 473 U.S. at 446.

Thus, even if sexual orientation is immutable and even if gays and lesbians as a group have been unable to achieve the desired legislative responses, just as the Court refused to recognize other such groups as suspect class, so should the Court remain reluctant to do so here.

Not elevating gays and lesbians to protected class status does not mean that homosexual persons are not without protection, however. That is clear from *Lawrence*, *Romer*, and *Windsor*. Further, the rational basis test is not without teeth, nor is it a license to rubber stamp discrimination. *Romer*, 517 U.S. at 632 ("[E]ven in the ordinary equal protection case calling for the most deferential standards, we insist on knowing the relation between the classification adopted and the object to be obtained."). That is, state legislation limiting marriage to traditional man-woman couples, which necessarily restricts same-sex couples who are presumptively homosexual, must be rationally related to a legitimate government purpose. *See Cleburne*, 473 U.S. at 446.

3. Kentucky's marriage laws do not discriminate on the basis of sexual orientation.

The Petitioners state that since Kentucky's marriage laws do not allow for the licensing and/or recognition of same-sex marriage, those laws are "necessarily" discriminating against same-sex couples on the basis of their sexual orientation and that because of that alleged discrimination, they belong to a classification requiring the application of heightened scrutiny. Pet. Br. 32. The Petitioners fail to address the fact that Kentucky's marriage laws are not facially discriminatory to gays and lesbians based upon their sexual orientation. Kentucky's marriage laws treat homosexuals and heterosexuals the same and are facially neutral. Men and women, whether heterosexual or homosexual, are free to marry persons of the opposite sex under Kentucky law, and men and women, whether heterosexual or homosexual, cannot marry persons of the same sex under Kentucky law. *See Dean v. D.C.*, 653 A.2d 307, 363 n. 1 (D.C. 1995)(Steadman, J., concurring)(citing *Baehr v. Lewin,* 852 P.2d 44, 51 n. 11 (Haw. 1993), *reconsideration granted in part,* 875 P.2d 225 (1993)("[N]ot all opposite-sex marriages are between heterosexuals, not all same-sex marriages would necessarily be between homosexuals.").

4. Kentucky's marriage laws do not discriminate on the basis of sex.

The Petitioners argue that the marriage laws of Kentucky discriminate facially on the basis of sex. Pet. Br. 38. This argument ignores the reality that Kentucky's marriage laws apply equally to members of both genders

and do not discriminate on that basis. The fact that, under Kentucky law, only men can marry women and vice versa demonstrates that the Commonwealth's marriage laws are sex neutral and not discriminatory. *See Baker v. State*, 744 A.2d 864, 880 n. 13 (Vt. 1999)("[T]here is no discrete class subject to differential treatment solely on the basis of sex; each sex is equally prohibited from precisely the same conduct."); *Conaway v. Deane*, 932 A.2d 571 (2007) (deciding that a Maryland statute prohibiting same sex-marriages did not draw an impermissible sex-based distinction because the statute did not separate men and women into discrete classes for the purpose of granting to one class benefits at the expense of the other); *Wolf v. Walker*, 986 F. Supp. 2d 982, 1008 (W.D. Wis. 2014), *aff'd sub nom. Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 316 (2014)("[A] sex discrimination theory is not viable, even if the government is making a sex-based classification with respect to an individual, because the intent of the laws banning same-sex marriage is not to suppress females or males as a class.").

Most courts to have considered this issue have rejected the Petitioners' sex discrimination theory. *Wolf,* 986 F. Supp.2d at 1008 (citing *Geiger v. Kitzhaber*, 994 F.Supp. 2d 1128, 1140 (D. Or. 2014); *Latta v. Otter*, 19 F.Supp.3d 1054, 1074 (D. Idaho 2014); *Bishop v. U.S. ex rel. Holder*, 962 F.Supp. 2d 1252, 1286 (N.D. Okla. 2014); *Sevcik v. Sandoval*, 911 F.Supp.2d 996, 1005 (D. Nev. 2012), *rev'd on other grounds*, 771 F.3d 456 (9th Cir. 2014); *Jackson v. Abercrombie*, 884 F. Supp. 2d 1065, 1098 (D. Haw. 2012), *vacated and remanded as moot*, 585 F. Appx. 413 (9th Cir. 2014); *Griego v. Oliver*, 316 P.3d 865, 880 (N.M. 2013); *In re Marriage Cases*, 183 P.3d 384, 438 (Cal. 2008), superseded by constitutional amendment as stated by *Hollingsworth*

v. Perry, 133 S. Ct. 2652, 2656, 768 (2013); *Hernandez v. Robles*, 855 N.E.2d 1, 10 (N.Y. 2006); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 509 (Conn. 2008)(Borden, J., dissenting); and *Conaway v. Deane,* 932 A.2d 571, 601-602 (Md. 2007)), *cf. Baehr v. Lewin*, 852 P.2d 44, 59-63 (Haw. 1993)(plurality); *Latta v. Otter*, 771 F.3d 456, 482 (9th Cir. 2014)(Berzon, J., concurring). Kentucky's marriage laws simply do not discriminate based upon sex.

C. Kentucky's marriage laws are rationally related to a legitimate state interest.

The Sixth Circuit correctly found that the states could not be convicted of "irrationality" by creating "an incentive for two people who procreate together to stay together for the purposes of rearing their offspring." Pet. App. 25a-26a. The existence of a rational basis requires that Kentucky's marriage laws be sustained.

The Supreme Court has articulated the considerable deference to be given to the state under a rational-basis review:

> [The] rational-basis review in equal protection analysis "is not a license for courts to judge the wisdom, fairness or logic of legislative choices." Nor does it authorize "the judiciary [to] sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." For these reasons, a classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption

> of validity. Such classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose. Further, a legislature that creates these categories need not "actually articulate at any time the purpose or rationale supporting its classification." Instead, a classification "must be upheld against equal protection challenge **if there is any reasonably conceivable state of facts that could provide a rational basis for the classification**."

Heller, 509 U.S. at 319-20(emphasis added)(internal citations omitted). In performing a rational basis analysis, courts are obligated to look to any "conceivable basis" for the challenged law, and their analysis is not limited to those articulated, established, recorded, or those that may have even occurred to the defendant. *See FCC v. Beach Communications, Inc.,* 508 U.S. 307, 313 (1993); *Railroad Retirement Board v. Fritz,* 449 U.S. 166 (1980). Further, "those attacking the rationality of the legislative classification have the burden to 'negative every conceivable basis which might support it.'" *Beach Communications*, 508 U.S. at 315 (internal citations omitted).

1. Promotion of birth rates is a legitimate interest.

The Petitioners have not met their burden to establish that marriage between opposite-sex couples fails to further Kentucky's interests in procreation and promotion of a stable birth rate. Encouraging, promoting, and

supporting the formation of relationships that have the natural ability to procreate furthers the Commonwealth's fundamental interest in ensuring humanity's continued existence.

It is entirely rational for Kentucky to limit the granting of tax and other benefits to the broad class of opposite-sex couples in furtherance of population growth even though not all opposite-sex couples may choose to, or can, have biological children. State legislatures, by necessity "paint with a broad brush" and, constitutionally, are granted wide latitude in enacting legislation to further economic goals. The issue is not whether excluding same-sex couples from marriages results in greater natural procreation, but whether there is any rational basis for granting tax and other marriage benefits to only heterosexual couples.

2. Asking whether there is harm to the state's interest by allowing same-sex marriage asks the wrong question.

The Petitioners argued below that Kentucky's stated interest was not rationally related to traditional marriage laws because Kentucky had not explained how allowing same-sex couples to marry would harm or diminish the Commonwealth's interest in procreation. Pet. App. 120a. This "no-harm" premise is not grounded in any legal authority and misses the mark altogether. It is well established that Kentucky's legislation is required to be "presumed constitutional [with] "[t]he burden…on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record." *Heller,* 509 U.S. at 320 (citation and internal quotations omitted). Adoption

of this no-harm standard would make short work of Equal Protection and Due Process claims. The Commonwealth has "no obligation to produce evidence to sustain the rationality of a statutory classification. '[A] legislative choice is not subject to courtroom fact finding and may be based upon rational speculation unsupported by evidence or empirical data.'" *Id.*

The same no-harm theory could be argued by many plaintiffs who make Equal Protection or Due Process challenges when denied a government benefit. This Court has clearly expressed that "when . . . the inclusion of one group promotes a legitimate government purpose, and the addition of other groups would not, we cannot say that the statute's classification of beneficiaries and non-beneficiaries is invidiously discriminatory." *Johnson v. Robison*, 415 U.S. 361, 383 (1974). Same-sex couples cannot naturally promote Kentucky's legitimate purpose of procreation. The exclusion of same-sex couples from receipt of marriage benefits (*i.e.*, tax and other benefits) when they do not promote Kentucky's legitimate purpose is not invidiously discriminatory.

Johnson demonstrates that even though same-sex couples may benefit from the benefits associated with marriage and even though same-sex couples may share characteristics with opposite-sex couples, those factors are not enough to require the state to make the benefits available to them. In *Johnson*, the Supreme Court considered whether the government violated former Selective Service registrants' Equal Protection rights where veterans' educational benefits were offered to draftees who served on active duty in the Armed Forces but not to Selective Service registrants who were

conscientious objectors and served in alternative civilian service. Both groups were out of the job force during the time of their service, both had their lives disrupted as a result of their mandatory service and both would have benefited from receipt of the government benefits.

This Court, however, found no Equal Protection violation by Congress' decision to limit educational benefits to those who served on active duty. The Court held that the statutory classification was rationally related to the objectives of the statute which were to help induce registrants to volunteer for the draft or seek a lower Selective Service classification, to make military service more palatable to a draftee, and thus to reduce the draftee's unwillingness to be a soldier. 415 U.S. at 382. The Court found that the two groups were not similarly situated because military service with educational benefits was more attractive to an active service draftee than military service without benefits. Educational benefits made no difference to the attractiveness of the military for a conscientious objector whose refusal to actively serve was based upon deeply-held religious beliefs. This Court also rejected the notion that even though both groups had been displaced from their routines during the time of their service and even though both would have benefited from the educational benefit, "a common characteristic shared by beneficiaries and non-beneficiaries alike, is not sufficient to invalidate a statute when other characteristics peculiar to only one group rationally explain the statute's different treatment of the two groups." *Id.* at 378. Thus, the Court held that offering educational benefits to the conscientious objectors would not have promoted the government's interest in making the Armed Service more attractive and there was no violation of the Equal Protection clause based upon the classifications.

Similarly, even though same-sex couples and opposite-sex couples may share some similarities and even if recognizing marriage between same-sex couples would not reduce procreation, as the Petitioners allege, offering same-sex couples the state benefit of marriage recognition does not promote Kentucky's legitimate interest in fostering population growth. Offering the benefit to opposite-sex couples does, however. Thus, there is no "invidious discrimination" by excluding same-sex couples from the state benefit.

3. Kentucky is not required to draw exact lines for its classification.

This Court has repeatedly stated that the state is not required to draw perfect lines in its classifications. "[C]ourts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between the means and ends. A classification does not fail rational basis review because it 'is not made with mathematical nicety or because in practice it results in some inequality.'" *Heller*, 509 U.S. at 321 (internal citations omitted). Thus, that man-woman couples who may not choose, or may not be able, to have children are allowed to marry does not nullify the rational basis for a man-woman marriage classification. *See Dandridge v. Williams*, 397 U.S. 471, 486-87 (1970)("[T]he Equal Protection Clause does not require that a state must choose between attacking every aspect of a problem or not attacking the problem at all. It is enough that the state's action be rationally based and free from invidious discrimination.")(internal citations omitted).

Notably, the Minnesota Supreme Court in *Baker* rejected the same "line drawing" argument asserted by the Petitioners:

> Petitioners note that the state does not impose upon heterosexual married couples a condition that they have a proved capacity or declared willingness to procreate, posing a rhetorical demand that this court must read such condition into the statute if same-sex marriages are to be prohibited. Even assuming that such a condition would be neither unrealistic nor offensive under the *Griswold* rationale, the classification is no more than theoretically imperfect. We are reminded, however, that 'abstract symmetry' is not demanded by the Fourteenth Amendment.

Baker v. Nelson, 191 N.W.2d 185, 187 (Minn. 1971).

4. Kentucky's marriage laws also meet a heightened standard of review.

Because the Sixth Circuit found neither a fundamental right to same-sex marriage nor that homosexual persons are entitled to protected class status, the Sixth Circuit did not analyze whether Kentucky's prohibition against same-sex marriage satisfies a standard more stringent than rational basis. Regardless of the standard of review, however, Kentucky's laws do not violate the Equal Protection Clause.

Given the longstanding judicial link between marriage and procreation, Kentucky's laws restricting marriage benefits only to couples who can naturally procreate plainly

furthers Kentucky's state interest and would clearly meet a heightened threshold for a quasi-suspect class or a suspect class. *See Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982)(holding that to uphold a classification based upon gender, a quasi-suspect class, there must be a showing "at least that the classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives'") and *Plyler v. Doe*, 457 U.S. 202, 217 (1982)(holding that when a classification disadvantages a suspect class, the classification must be "precisely tailored to serve a compelling governmental interest.").

Accordingly, Kentucky's marriage statutes are sufficiently narrowly tailored to overcome the Petitioners' Equal Protection challenge. Thus, even if a heightened standard is applied, Kentucky's marriages laws do not violate the Equal Protection Clause.

II. The Fourteenth Amendment does not require a state to recognize marriage of two people of the same sex when their marriage was lawfully licensed and performed out of state.

A. *Windsor* does not compel Kentucky to adopt a marriage definition in accordance with the consensus of other communities that recognize same-sex marriage.

The *Bourke* (recognition-seeking) Petitioners contend that *Windsor* compels the conclusion that Kentucky must recognize same-sex marriages licensed in other states. The Petitioners argue that the Kentucky legislation, like

§ 3 of DOMA, "single[d] out marriages of lesbians and gays for unequal treatment," thereby demeaning gays and lesbians and treating their marriages as second-class marriages." Pet. Br. 57. The Petitioners ignore that § 3 of DOMA was declared unlawful because Congress overstepped its authority when its "goal was 'to put a thumb on the scales and influence a state's decision as to how to shape its own marriage laws.'" *Windsor*, 133 S.Ct. at 2693 (citations omitted). Congress' overstepping into this state-regulated area evidenced a discriminatory motive.

The 1998 legislation and 2004 constitutional amendment in Kentucky did not take away a right or privilege that existed for same-sex couples in Kentucky or that has ever been authorized by Kentucky. Kentucky was not trying to influence the decision of any other state as to how to shape their marriage laws. Kentucky was acting – like New York did as recognized by *Windsor* – to define marriage in accordance with the consensus of its communities. Kentucky communities have never reached a consensus to define marriage in a manner in which gender is irrelevant. Since its inception, Kentucky has adhered to the traditional model of one man and one woman, and Kentucky has never recognized genderless marriages licensed by other states. Unlike Congress' passage of § 3 of DOMA, Kentucky did not take away or remove any benefit that has ever been available in Kentucky.

B. The loss of rights attendant to being married experienced by same-sex couples with marriage licenses issued by other states does not compel Kentucky to adhere to the consensus of other communities regarding the definition of marriage.

The *Bourke* Petitioners devote considerable space in their Brief to explaining the impact to them and their families of their decision to move to Kentucky where the consensus of communities is not to allow or recognize same-sex marriage. The alleged impact includes: being required to execute power of attorney and healthcare surrogate forms not required of married couples; fear that they may be forced to reside at separate health care facilities one day and therefore possibly being prevented from caring for each other in their old age; having to seek out real estate professionals experienced with working with same-sex couples to ensure their joint property rights are protected when purchasing Kentucky real estate; the possibility that the lack of a permanent parent/child relationship with children they are raising would threaten the stability of their family if the legal adoptive parent died; the inability to consent to medical treatment for the adoptive children of their spouse; having to keep adoption papers with them to "fend off questions concerning their legal status; the inability to receive health insurance through the other's employer; and the additional costs associated with state inheritance taxes." Pet. Br. 8-11.

While the *Bourke* Petitioners' decisions to move to Kentucky may have resulted in these additional burdens and costs, these additional burdens are no different than for heterosexual couples whose otherwise lawful out-of-

state marriages would not be recognized by Kentucky. For example, in California, where *Bourke* Petitioners Johnson and Campion were married, first-cousin marriage is lawful. Kentucky, however, prohibits marriages between first cousins and considers such marriages to be void. Ky. Rev. Stat. Ann. § 402.010. Any couple whose marriage violates Kentucky's public policy experiences the same concerns and challenges. *Windsor* does not stand for the proposition that Kentucky (and states like it whose citizens' consensus is to maintain the traditional man-woman definition of marriage) is required to conform to the consensus of the citizens of California, Connecticut, New York or Hawaii when their citizens move to Kentucky.

The Full Faith and Credit Clause "does not require a State to apply another State's law in violation of its own legitimate public policy." *Nevada v. Hall*, 440 U.S. 410, 422 (1979). The Petitioners' reliance upon the Fourteenth Amendment to challenge Kentucky's marriage laws should not lead to a different result. Judge Sutton below correctly stated if a state is constitutionally permitted to limit the issuance of marriage licenses to man-woman couples, then "a State does not behave irrationally by insisting upon its own definition of marriage rather than deferring to the definition adopted by another State." Pet. App. 55a. The Court recognized that preservation of a state's authority to recognize, or to opt not to recognize, an out-of-state marriage preserves a state's sovereign interest in deciding for itself how to define the marital relationship." Pet. App. 55a.

Kentucky's refusal to recognize the out-of-state marriages of the *Bourke* Petitioners did not result from the "unprecedented exercises of power [that] call for

judicial skepticism," as in *Windsor* and *Romer*. Pet. App. 56a. Kentucky's non-recognition of same-sex marriages is consistent with its refusal to recognize other marriages that violate its public policy.

C. Kentucky's "place of celebration" rule does not single out same-sex marriages for non-recognition.

The Petitioners argue that because Kentucky courts have recognized heterosexual marriages performed in other states that would not have been valid if performed in Kentucky, then Kentucky's statutory and constitutional provisions against the recognition of same-sex marriages performed outside of Kentucky are unconstitutional. The Petitioners erroneously assert that Kentucky has "singled out the marriages of lesbians and gay men for unequal treatment." Pet. Br. 57. The Petitioners rely upon what they term the "place of celebration" rule, which they define as states generally recognizing marriages validly performed in other states, even if the marriage would not have been licensed in the domiciliary state. Pet. Br. 54. The Petitioners' reliance upon this general rule misstates Kentucky law as applicable to this case and ignores the pivotal distinction made by the Kentucky courts in recognizing marriages performed in other states that would not have been validly performed in Kentucky: whether or not the marriage considered was void, or merely voidable.

The "place of celebration" rule does not obligate Kentucky, or any other state, to recognize every marriage from other jurisdictions if valid in the foreign jurisdiction. There have always been exceptions to the general rule.

Gilbert v. Gilbert, 122 S.W.2d 137, 139 (Ky. 1938)("But a marriage, valid where it takes place, is valid everywhere, except in those instances, not necessary to mention here, where the marriage is against the public policy of the state.")(internal citation omitted). When marriages, validly performed in other jurisdictions, are found to be against the public policy of Kentucky, those marriages are void and not recognized by the Commonwealth. Compare *Beddow v. Beddow*, 257 S.W.2d 45, 47- 48 (Ky. 1952) (marriage of incompetent person void), with *Mangrum v. Mangrum,* 220 S.W.2d 406, 407 (Ky. 1949)(marriage of underage person voidable).

When determining whether or not a marriage is considered void and not merely voidable, the Kentucky courts consider whether or not the legislature has explicitly expressed its intent in the statutory language. *Stevenson v. Gray*, 56 Ky. 193, 222 (1856)("[I]t was not absolutely void, because it was not so declared by the statute…."); *Mangrum,* 220 S.W.2d at 408 ("If the Legislature had intended to declare such a marriage against the public policy of the state, it would have made it absolutely void regardless of the place where the marriage ceremony was performed."); *Robinson v. Commonwealth,* 212 S.W.3d 100, 105 (Ky. 2006)("If the legislature had intended to declare an underage marriage against the public policy of the state, it would have made it absolutely void—as it has done with incestuous marriages and same-sex marriages—and it would not have enacted Ky. Rev. Stat. Ann. § 402.030.").

In every case cited by the Petitioners as examples of the application of the "place of celebration" rule, each marriage was merely voidable as the legislature had not

made such unions absolutely void. *Id.* Even if, as in the case in *Robinson*, the Court preferred to render the marriage void because it felt nullifying the marriage to be in the best interest of the public, the courts show restraint because it is the prerogative of the legislature to determine what is against public policy. *Robinson*, 212 S.W.3d at 106 ("It is beyond the power of a court to vitiate an act of the legislature on the grounds that public policy promulgated therein is contrary to what the court considers to be in the public interest. It is the prerogative of the legislature to declare that acts constitute a violation of public policy.") (internal citation omitted).

The "place of celebration" rule does not require the recognition by the Commonwealth of Kentucky of same-sex marriages validly performed in other states when such marriages are against the stated public policy of Kentucky as decided by the legislature and its citizenry when, as has been shown herein, the statutory and constitutional provisions barring recognition are rationally related to a legitimate purpose.

CONCLUSION

Kentucky's marriage laws which prohibit the issuance of marriage licenses to same-sex couples and the recognition of same-sex marriages entered into out-of-state do not violate the Equal Protection Clause. The decision of the Sixth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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