UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

JAMES OBERGEFELL, et al.	**:**	**Civil Action No. 1:13-cv-501**
	:	
Plaintiffs,	**:**	**Judge Timothy S. Black**
	:	
v.	**:**	
	:	**PLAINTIFFS' MEMORANDUM IN**
THEODORE E. WYMYSLO, M.D., et.	**:**	**SUPPORT OF MOTION FOR**
al.,	**:**	**DECLARATORY JUDGMENT AND**
	:	**PERMANENT INJUNCTION**
Defendants.	**:**	

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR DECLARATORY JUDGMENT AND PERMANENT INJUNCTION

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I. INTRODUCTION

This case is about love surviving death. The last record of a person's life on earth should accurately state if the decedent is married and accurately name the surviving spouse. Ohio refuses that simple dignity to the married plaintiffs in this case. This Court has issued two temporary restraining orders protecting plaintiffs through December, 2013 (Docs. 13, 14, and 23). The State and local defendants have agreed to this lengthy extension of the temporary orders and can show no harm to the public if death certificates established under the order are left undisturbed. Plaintiffs have now moved for a permanent injunction and declaratory relief.

Plaintiffs seek a declaratory judgment that, as applied to them, Ohio Revised Code Section 3101.01(C) and Article 15, Section 11 of the Ohio Constitution violate rights secured by the Fourteenth Amendment to the United States Constitution. Plaintiffs include same-sex couples married in jurisdictions where same-sex couples are permitted to marry and who have been denied recognition of their out-of-state marriages in Ohio. The marriages of opposite-sex couples who have been married in other jurisdictions are recognized in Ohio whether or not their marriage would have been permitted in Ohio in the first place (*e.g.*, due to consanguinity or age).

Plaintiffs have also moved for a permanent injunction prohibiting the defendants and their officers from enforcing those laws with respect to these plaintiffs. That is, Plaintiffs seek to have Defendants Dr. Camille Jones and Dr. Theodore E. Wymyslo and their agents permanently enjoined from accepting a death certificate for James Obergefell, David Michener or their deceased husbands, which does not record his status at the time of death as "married" or "widowed" and does not record the name of his "surviving spouse," if applicable. Plaintiff Grunn, a funeral director, requests that the injunction prohibit any prosecution of him for filling out death certificates for married same-sex couples that identify the surviving spouse and list the

decedent as married, and that the injunction direct Defendants Wymyslo and Jones to issue instructions to local registrars, funeral homes, coroners and others who assist with the completing of Ohio death certificates explaining their duties under the orders of this Court to treat married same-sex couples the same as married opposite-sex couples with respect to death certificates.

The marriages of couples like James Obergefell and John Arthur and of David Michener and William Herbert Ives deserve recognition equal to the marriages of opposite-sex couples, which are recognized in Ohio whether or not they could have been legally solemnized in Ohio. In *United States v. Windsor*, 133 S. Ct. 2675 (2013), the Supreme Court mandated that the federal government recognize same-sex marriages from states where it is legal. Now, these Plaintiff same-sex couples simply seek recognition of their marriages by the State of Ohio with respect to death certificates.

II. STATEMENT OF FACTS

A. Statutory and Constitutional Provisions That Prohibit Recognition of Same-Sex Marriages

Ohio Revised Code Section 3101 was amended in 2004 to prohibit same-sex marriages in the state and to prohibit recognition of same-sex marriages from other states. Sub-section (C) provides the following:

> (1) Any marriage between persons of the same sex is against the strong public policy of this state. Any marriage between persons of the same sex shall have no legal force or effect in this state and, if attempted to be entered into in this state, is void ab initio and shall not be recognized by this state.
>
> (2) Any marriage entered into by persons of the same sex in any other jurisdiction shall be considered and treated in all respects as having no legal force or effect in this state and shall not be recognized by this state.
>
> (3) The recognition or extension by the state of the specific statutory benefits of a legal marriage to nonmarital relationships between persons of the same

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

Ohio Rev. Code Ann. § 3101.01.

> Also adopted in 2004 was an amendment to the Ohio Constitution, which states:
>
> Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage.

Ohio Const. art. XV, § 11.

Plaintiffs claim that these provisions (collectively referred to herein as "Ohio's marriage recognition ban" or "Ohio's ban") are unconstitutional as applied to the recognition of out of state same-sex marriages on death certificates in Ohio.

B. Plaintiffs James Obergefell and John Arthur (now deceased)

James Obergefell, a 47-year old man from Sandusky, Ohio, met the love of his life, John Arthur, in 1992.[1] They lived in a loving committed relationship until John's death on October 22, 2013.[2] Both James and John attended the University of Cincinnati, and they have many close friends and family here in Cincinnati.[3] In 2011, John was diagnosed with amyotrophic lateral sclerosis (ALS), a condition for which there is no cure.[4] After the decision in *United States v.*

[1] Declaration of James Obergefell, Doc. 3-1, ¶ 2-3.
[2] *Id.*
[3] Declaration of James Obergefell, Doc. 3-1, ¶ 2, 5; Declaration of John Arthur, Doc. 3-2, ¶ 2.
[4] Declaration of James Obergefell, Doc. 3-1, ¶ 8.

Windsor, James and John decided to marry.[5] On July 11, 2013, the couple boarded a medically equipped plane to travel to Maryland, a state that authorizes marriage for same-sex couples.[6] Because of John's condition, they were married inside the plane on the tarmac.[7] They are legally married in Maryland, but under Ohio law, their marriage was not recognized for any purpose until the temporary relief was entered in this case requiring that upon John's death, his death certificate reflect that he was married and that James is his surviving spouse.[8] John died on October 22, 2013. Doc. 51. His death certificate was issued in compliance with this court's order. Doc. 52. Without a permanent injunction, that death certificate will be amended to remove from the death certificate the reference to their marriage and the name of James as the surviving spouse. Ohio Rev. Code Ann. § 3705.22 (West). James seeks to make permanent this recognition of their marriage on John's death certificate as well as his own because this is the last official record of their lives, and they want this document to reflect James and John's legacy as a married couple for the public and for their descendants who generations from now who may research their history.[9]

C. Plaintiff David Michener

Mr. Michener and his late spouse, William Herbert Ives, had been together as a loving couple for eighteen years and adopted three children together.[10] On July 22, 2013, Mr. Michener and Mr. Ives were married in Delaware, where marriages by same-sex couples are permitted.[11]

[5] Declaration of James Obergefell, Doc. 3-1, ¶ 11.
[6] Declaration of James Obergefell, Doc. 3-1, ¶ 12.
[7] *Id.*
[8] Declaration of James Obergefell, Doc. 3-1, ¶ 13, Temporary Restraining Order, Doc. 14.
[9] Declaration of James Obergefell, Doc. 3-1, ¶ 15-17.
[10] Doc. 21 at 1.
[11] *Id.*

On August 27, 2013, Mr. Ives died unexpectedly of natural causes at University Hospital in Cincinnati, Ohio.[12]

In order for the cremation of Mr. Ives to proceed, a death certificate was required to be issued.[13] Plaintiff Michener sought a death certificate that accurately reflected Mr. Ives's status as married and lists Mr. Michener as the surviving spouse in order to bring closure to the family in a manner that respects their marriage and Mr. Ives's wish to be cremated.[14] This Court entered a temporary restraining order granting such relief on September 3, 2013.[15]

D. Plaintiff Robert Grunn

Plaintiff Robert Grunn is a licensed funeral director operating his business in Cincinnati, Ohio.[16] Mr. Grunn is a gay man and he is known within the gay community as a funeral director who is gay friendly.[17] One of his responsibilities as a funeral director is to fill out death certificates, including the portion of the certificate indicating the deceased's marital status and the name of the surviving spouse.[18] He uses Ohio Department of Health software to do this, and for deaths that occur in Cincinnati, he delivers the death certificates to the office of Defendant Camille Jones.[19] In his experience, his clients often do not realize the importance of death certificates until he returns certified copies to them.[20] His clients use the death certificates for varied purposes.[21] Mr. Grunn has many married gay or lesbian clients, including Mr. Obergefell who utilized his services when John died. As he did upon John's death, Mr. Grunn is certain he will face the issue of how to fill out a death certificate for married same-sex couples repeatedly

[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] Temporary Restraining Order, Doc. 23.
[16] Robert Grunn Declaration, Doc. 34-1, ¶ 2, 12.
[17] Robert Grunn Declaration, Doc. 34-1, ¶ 11.
[18] Robert Grunn Declaration, Doc. 34-1, ¶ 3.
[19] Robert Grunn Declaration, Doc. 34-1, ¶ 3, 5.
[20] Robert Grunn Declaration, Doc. 34-1, ¶ 7.
[21] Robert Grunn Declaration, Doc. 34-1, ¶ 6.

in the future.[22] Mr. Grunn intends to record the marital status as "married" and list the surviving spouse of the next married decedent with a same-sex spouse that he serves. He fears that by doing so he may be prosecuted for purposely making a false statement on a death certificate.[23] He seeks protection from that prosecution and a declaration of his rights and duties when serving clients with same-sex spouses.

E. History of Marriage Recognition in Ohio

The general rule in the United States for interstate marriage recognition is the "place of celebration rule," or *lex loci contractus*, which provides that marriages valid where celebrated are valid everywhere.[24] Historically, Ohio has recognized marriages that would be invalid if performed in Ohio but are valid in the jurisdiction where celebrated. This is true even when such marriages clearly violate Ohio law and are entered into outside of Ohio with the purpose of evading Ohio law with respect to marriage.[25] Ohio departed from this tradition in 2004 to adopt its statutory and constitutional prohibition on the recognition of marriages between two individuals of the same sex.[26] Prior to 2004, the Ohio legislature had never passed a law denying recognition to a specific type of marriage solemnized outside of the state.[27] The campaign to secure passage of both the statute and the constitutional prohibition on same-sex marriage recognition demonstrate a clear desire to harm same-sex couples.

F. Legislative History for Revised Code Section 3101.01(C)

When the 2004 legislation prohibiting same-sex marriage was passed, then-Governor Taft stated that its purpose was "to reaffirm existing Ohio law with respect to our most basic,

[22] Robert Grunn Declaration, Doc. 34-1, ¶ 13-15.
[23] Robert Grunn Declaration, Doc. 34-1, ¶ 17.
[24] Grossman Declaration, Doc. 44-1, ¶ 7(k).
[25] Grossman Declaration, Doc. 44-1, ¶ 7(n).
[26] Grossman Declaration, Doc. 44-1, ¶ 7(q), 32, 60.
[27] Grossman Declaration, Doc. 44-1, ¶¶ 32(d), 51.

rooted, and time-honored institution: marriage between a man and a woman. Marriage is an essential building block of our society, an institution we must reaffirm. At a time when parents and families are under constant attack within our social culture, it is important to confirm and protect those environments that offer our children, and ultimately our society, the best opportunity to thrive."[28] His appeal to tradition and to claims that heterosexual marriage best serves children mirrored statements by Senator Jacobson, who stated during the 2004 floor debates over the law that "children deserve that best opportunity and we are going to help children in whatever situation they are raised in," but "that does not mean to say that because two people would like to order their lives in a certain way we have to change the institution of marriage just to make them feel better about their choices."[29] In fact, the scientific evidence shows that children will have the "best opportunity" at a secure and happy life if their parents' marriages are recognized by the state.[30]

Senator Jacobson also stated that the legislation would not interfere with "the way adults choose to order their lives" because "[a]dults can form household relationships" after the passage of the legislation even though those relationships "don't have all the bells and whistles," "[p]erhaps don't have all the opportunities," and do not appear "equal to everyone else's."[31]

G. Legislative History for Article 15, Section 11 of the Ohio Constitution

The primary sponsor for the 2004 Ohio constitutional amendment at issue in this case, Citizens for Community Values ("CCV") had as its core principle its goal to protect Ohio from the "'inherent dangers of the homosexual activists' agenda" [including]:

[28] Becker Declaration, Doc. 41-1, ¶ 72.
[29] *Id.*, Senate TR p. 139.
[30] *See generally* Fulcher Declaration, Doc. 43-1.
[31] Becker Declaration, Doc. 41-1, ¶ 59.Senate TR p. 137.

a. Violating the Judeo-Christian teaching that the marriage defined as “one woman and one man living together in a lifelong, monogamous, covenantal relationship,” a “teaching [that] is grounded in Scripture, and the truths of Scripture are absolute and are not subject to change;”

b. Departing from “God’s intention for human sexuality, including not only homosexual behavior, but also rape, incest, pedophilia, premarital sex, adultery, bestiality, pornography and any other sexual expression outside this Scriptural norm;”

c. Ignoring nature’s confirming of “the Scriptural sexual ethic,” i.e. that only “[o]ne man and one woman have the ability to express their love in a true, complete physical union,” resulting “in life-giving procreation;”

d. Recruiting “men, women and children into this destructive lifestyle;”

e. Causing “destructive outcomes associated with homosexual behavior” including “AIDS, a much higher incidence and risk of sexually transmitted diseases, approximately three times the risk of alcoholism and drug abuse, a significantly higher rate of domestic violence and promiscuity, and a shortened life span;”

f. Rejecting conversion therapy as a viable alternative when “thousands of people have overcome this desire, have withdrawn from homosexual behavior and have gone on to enjoy fulfilling heterosexual relationships;”

g. Establishing “gay and lesbian organizations in our schools,” with the purpose being “to train gay and lesbian students for activism and to encourage ‘straight’ students to experiment with homosexual behavior as defined above,” and often resulting in “homosexual role playing;” and

h. Seeking "special rights for homosexuals" in an effort "to attain complete social acceptance of homosexual behavior."[32]

CCV sent letters to school boards and superintendents in Ohio warning them, erroneously, that they would face criminal and "daunting" civil liability if they took measures to protect lesbian and gay students from violence and harassment.[33]

In one of CCV's campaign publications, they misled Ohio voters about the need for the amendment, stating that marriage equality advocates sought to eliminate age requirements for marriage, advocated polygamy, and sought elimination of kinship limitations so that incestuous marriages could occur.[34] Print advertisements and materials for the campaign included threats about the inevitability of legalizing polygamous marriage if same-sex marriages were recognized.[35]

CCV warned Ohio employers that "[s]exual relationships between members of the same sex expose gays, lesbians and bisexuals to extreme risks of sexually transmitted diseases, physical injuries, mental disorders and even a shortened life span."[36]

The television and media campaign in support of the amendment contained misleading statements, such as "[w]e won't have a future unless [heterosexual] moms and dads have children," and that [e]very major social science study tells us time and again: families are stronger with a wife and a husband; children do better with a mother and a father."[37]

H. Failure to Recognize the Marriages of Same-Sex Couples Imposes Harm Beyond Death Certificates

[32] Becker Declaration, Doc. 41-1, ¶ 82.
[33] Becker Declaration, Doc. 41-1, ¶ 84.
[34] Becker Declaration, Doc. 41-1, ¶ 85.
[35] Becker Declaration, Doc. 41-1, ¶ 90-91.
[36] Becker Declaration, Doc. 41-1, ¶ 86.
[37] Becker Declaration, Doc. 41-1, ¶ 88.

Ohio death certificates (which, outside of this litigation, do not reflect marriages of same-sex couples) are important not only for the dignity of the surviving spouse and his or her family, but also have evidentiary value for things such as title transfers after a person's death.[38] Ohio's refusal to recognize the marriages of same-sex couples also harms those couples in numerous other ways. When a married person domiciled in Ohio who had a valid same-sex marriage from another jurisdiction dies, if the marriage is between two men or two women, the estate administration unfolds as if the person had died unmarried. Many rights are afforded to surviving spouses under Ohio probate law that are denied to same-sex spouses. After *Windsor*, many federal tax laws that used to disfavor same-sex spouses over opposite-sex spouses no longer do so; however, Ohio's tax commission has refused to offer same-sex spouses equal rights under its regulations. [39] Married same-sex couples must consider many additional burdens in their estate planning that opposite-sex couples do not in order to try to protect their surviving spouse from financial vulnerability. [40]

Same-sex married couples are also disadvantaged in the context of family law. For instance, unlike opposite-sex married couples who can invoke step-parent adoption procedures or adopt children together, same-sex married couples cannot. Ohio courts allow an individual gay or lesbian person to adopt a child, but not a same-sex couple because they are considered unmarried even if they are married. [41]

Additional indignities that same-sex married couples face in Ohio include that they are: Denied local and state tax benefits available to heterosexual married couples; Denied access to entitlement programs (welfare benefits, food stamps, Medicaid, etc.) available to heterosexual

[38] McKay Declaration, Doc. 45-1,¶ 17.
[39] McKay Declaration, Doc. 45-1, ¶ 40-43; Memo from Ohio Department of Taxation Issued Oct. 11, 2013, http://www.tax.ohio.gov/Portals/0/ohio_individual/individual/information_releases/DOMAInformationRelease.pdf.
[40] McKay Declaration, Doc. 45-1, ¶ 50-65.
[41] Becker Declaration, Doc. 41-1, ¶ 17.

married couples and their families; Barred by hospital staff and/or relatives from their long-time partners' bedsides during serious and final illnesses due to lack of legally-recognized relationship status; Denied the remedy of loss of consortium when a spouse is seriously injured through the acts of another; Denied the remedy of a wrongful death claim when a spouse is fatally injured through the wrongful acts of another; and Evicted from their homes following a spouse's death because same-sex spouses are in Ohio considered complete strangers to each other in the eyes of the law.[42] The injuries raised by the plaintiffs in this case therefore are simply a few of the many injuries suffered by married same-sex couples in Ohio. But the need for relief from discrimination regarding death certificates is present now in the lives of these plaintiffs and must be addressed to ensure that at least in death their marriages will finally be recognized by the State.

III. SUMMARY OF ARGUMENT PURSUANT TO LOCAL RULE 7.2

A same-sex marriage performed in a state where same-sex couples are permitted to marry deserves recognition equal to the marriage of an opposite-sex couple, which is recognized in Ohio whether or not that particular marriage could have been legally solemnized in Ohio. The facts in this case demonstrate that the purpose of the Ohio marriage recognition ban was to harm lesbians and gay men. When Congress declined to recognize valid same-sex marriages in the 1996 Defense of Marriage Act (DOMA), the Supreme Court struck it down as a violation of equal protection. *Windsor*, 133 S. Ct. 2675. The same result should follow here. Government classifications based on sexual orientation are appropriate for review under heightened scrutiny. There is no compelling governmental interest that supports recognition of opposite sex marriages but not same-sex marriages. Nor can Ohio identify a sufficiently important state interest that is closely tailored to this classification. In fact, given the history of Ohio's marriage

[42] Becker Declaration, Doc. 41-1, ¶ 23.

recognition ban and of similar measures across the country, and given the equal protection precedent in this circuit and elsewhere, the ban fails under *any standard of review*. Like the federal marriage recognition ban struck down on equal protection principles in *Windsor*, Ohio's marriage recognition ban is a, "[d]iscrimination[] of an unusual character" *Id.* at 2692 (citations omitted). Once subjected to "careful consideration," the Court found that DOMA's "demonstrated purpose [was] to . . . demean [same-sex] couple[s], whose moral and sexual choices the Constitution protects. . . . [T]he principal purpose and the necessary effect of this law are to demean those persons who are in a lawful same-sex marriage . . . [,] to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity." *Id.* at 2693, 2694, 2695-96 (internal citations omitted). As set out in detail below, Ohio's marriage recognition ban must similarly fail under these same equal protection principles and also as a denial of due process which protects the fundamental right to marry.

IV. ARGUMENT

A. Standard of Review for As-Applied Challenges Seeking Injunctive and Declaratory Relief.

Plaintiffs in this case challenge the Ohio marriage restrictions as applied to them with respect to the issue of death certificates. An as-applied challenge to a law limits the relief to the particular circumstances of the plaintiff. A facial challenge generally seeks to declare or enjoin a law as unconstitutional in all respects. "[T]he distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge. The distinction is both instructive and necessary, for it goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint." *Citizens United v. Federal Elections Commission* 558

U.S. 310, 331 (2010). Plaintiffs have requested injunctive and declaratory relief in this case limited to the issue of marriage recognition on death certificates.

A permanent injunction is appropriate if a party "can establish that it suffered a constitutional violation and will suffer 'continuing irreparable injury' for which there is no adequate remedy at law." *Women's Med. Prof'l Corp. v. Baird*, 438 F.3d 595, 602 (6th Cir. 2006) (citing *Kallstrom v. City of Columbus,* 136 F.3d 1055, 1067 (6th Cir.1998)). It is within the sound discretion of the district court to grant or deny a motion for permanent injunction. *See Kallstrom*, 136 F.3d at 1067 (injunction appropriate to protect private information of police officers); *Wayne v. Vill. of Sebring*, 36 F.3d 517, 531 (6th Cir. 1994)(district court erred in failing to rule on permanent injunction request).

The existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate. Fed. R. Civ. P. 57. In the Sixth Circuit, "[t]he two principal criteria guiding the policy in favor of rendering declaratory judgments are (1) when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." *Savoie v. Martin*, 673 F.3d 488, 495-96 (6th Cir. 2012) (*quoting Grand Trunk W. R. Co. v. Consol. Rail Corp.*, 746 F.2d 323, 326 (6th Cir. 1984). The plaintiffs in this case are entitled to both permanent injunctive and declaratory relief.

B. Ohio Denies to Same-Sex Married Couples Recognition that it Extends to Opposite-Sex Married Couples.

As this Court correctly held, "[l]ongstanding Ohio law has been clear: a marriage solemnized outside of Ohio is valid in Ohio if it is valid where solemnized. This legal approach is firmly rooted in the longstanding legal principle of '*lex loci contractus*' -- *i.e.*, the law of the

place of contracting controls. Ohio has adopted this legal approach from its inception as a State." (Order Granting Plaintiffs' Motion for a Temporary Restraining Order, Doc. 13, p. 9.)

In *Mazzolini v. Mazzolini*, 168 Ohio St. 357, 358, 155 N.E.2d 206 (1958), the Ohio Supreme Court refused to annul a marriage between first cousins because it was legal for first cousins to marry in Massachusetts where their marriage was celebrated. *See also Hardin v. Davis*, (Ohio Ct. C.P. Hamilton Cnty. 1945) ("But, although first cousins cannot marry in Ohio, it has been held that if they go to another state where such marriages are allowed, marry, and return to Ohio, the marriage is legal in Ohio"); *Slovenian Mut. Ben. Ass'n v. Knafelj* (Ohio Ct. App. 1930) (same). Likewise, Ohio recognizes out-of-state marriages of minors even though Ohio does not authorize such marriages. In *Peefer v. State*, 42 Ohio App. 276, 182 N.E. 117 (1931), an Ohio appellate court held that where a fourteen-year-old girl married in a state in which her marriage was authorized, the marriage cannot be set aside based on Ohio's law against marriage of under-aged people.

Ohio even recognizes valid out-of-state marriages that would have otherwise been illegal in Ohio, even if those marriages were entered into specifically in an effort to evade Ohio law. (Grossman Report, Doc. 44-1, ¶ 7(n).) S*ee Courtright v. Courtright*, 1891 WL 1022 (Ohio Com. Pl. 1891) aff'd without opinion, 53 Ohio 685 (Ohio 1895) (marriage between persons considered underage in Ohio married in a state where their marriage is legal "can not be set aside, either because it was not contracted in accordance with the law of this state, or because the parties went out of the state for the purpose of evading the laws of this state"); *Peefer*, 182 N.E. 117 (same); *Hardin*, 16 Ohio Supp. 19 (same)); *Slovenian Mut. Ben. Ass'n* (Ohio Ct. App. 1930) (same).

Ohio's statute and amendment prohibiting recognition of same-sex marriages are a departure from this long tradition of marriage recognition. As explained below, the record is

clear that Ohio's failure to recognize same-sex marriage is subject to the same defect as the failure of the federal government to recognize same-sex marriage. That is, the failure of Ohio to recognize same-sex marriages is a "discrimination of an unusual character" which "especially suggest[s] careful consideration to determine whether [it is] obnoxious to the [C]onstitution[] . . . ." *Windsor*, 133 S. Ct. at 2692; and such "careful consideration" will show that the Ohio laws' "demonstrated purpose is to . . . demean those persons who are in a lawful same-sex marriage. . . . to disparage and to injure those whom [other states], by [their] marriage laws, sought to protect in personhood and dignity." *Id.* at 2695-2696. As this Court correctly found, "[i]n derogation of law, the Ohio scheme has unjustifiably created two tiers of couples: (1) opposite-sex married couples legally married in other states; and (2) same-sex married couples legally married in other states. This lack of equal protection of law is fatal." (Order Granting Plaintiffs' Motion for a Temporary Restraining Order, Doc. 13, p. 8.)

C. Ohio's Ban on Recognizing Valid Out-of-State Marriages Between Same-Sex Couples Violates the Due Process and Equal Protection Clauses of the United States Constitution.

Section one of the Fourteenth Amendment to the United States Constitution provides in part that 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. As set out below, under any standard of review, the government interests that may be cited to support Ohio's ban on recognition of marriages between same-sex couples are not sufficient to survive constitutional scrutiny.

1. Ohio's Marriage Recognition Ban is Subject to Heightened Scrutiny Because It Discriminates Based on Sexual Orientation.

Since *Windsor*, the Sixth Circuit has not conducted a thorough review of its controlling law regarding the appropriate level of scrutiny for classifications based on sexual orientation.

The most recent Sixth Circuit case to consider the issue is *Davis v. Prison Health Servs.*, 679 F.3d 433, 438 (6th Cir. 2012) (inmate had viable equal protection claim under rational basis analysis where he alleged prison officials purposefully discriminated against him based on his sexual orientation when he was removed from prison job). In two sentences, the court rejected heightened scrutiny by relying on *Scarbrough v. Morgan Cnty. Bd. of Educ.*, 470 F.3d 250, 261 (6th Cir. 2006) for the proposition that sexual orientation has never been recognized as a suspect class in this circuit. *Scarbrough*, in turn, relied on *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 293 (6th Cir. 1997).

However, *Equality Foundation* is now questionable authority for the proposition that restrictions on gay and lesbian individuals are subject to rational basis analysis. As the Eastern District of Michigan recently pointed out, there are "ample reasons to revisit the question of whether sexual orientation is a suspect classification," including the fact that Sixth Circuit precedent on this issue, including *Equality Foundation* is based on *Bowers v. Hardwick*, 478, U.S. 186 (1986), which was overruled by *Lawrence v. Texas* in 2003. *Bassett v. Snyder*, --- F. Supp. 2d ----, 2013 WL 3285111 (E.D. Mich. June 28, 2013) (same-sex couples demonstrated a likelihood of success on the merits of their equal protection claim regarding a Michigan law prohibiting same-sex partners from receiving public employer benefits). The Supreme Court, in overruling *Bowers*, emphatically declared that it "was not correct when it was decided and is not correct today." *Lawrence v. Texas*, 539 U.S. 558, 578, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003). In repudiating the *Bowers* decision, the Court stated that "[i]ts continuance as precedent demeans the lives of homosexual persons" and represents "an invitation to subject homosexual persons to discrimination both in the public and in the private spheres." *Id.*

By overruling *Bowers*, the Supreme Court in *Lawrence* necessarily abrogated *Scarbrough*, *Equality Foundation*, and other decisions that relied on *Bowers* to foreclose the possibility of heightened scrutiny for sexual orientation classifications. *See Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 312 (D. Conn. 2012) ("The Supreme Court's holding in *Lawrence* 'remov[ed] the precedential underpinnings of the federal case law supporting the defendants' claim that gay persons are not a [suspect or] quasi-suspect class."') (citations omitted); *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 984 (N.D. Cal. 2012). ("[T]he reasoning in [prior circuit court decisions], that laws discriminating against gay men and lesbians are not entitled to heightened scrutiny because homosexual conduct may be legitimately criminalized, cannot stand post-*Lawrence*.")

Now that *Lawrence* has overruled *Bowers*, lower courts without controlling post-*Lawrence* precedent on the issue must apply the criteria mandated by the Supreme Court to determine whether sexual orientation classifications should receive heightened scrutiny. The Supreme Court uses certain factors to decide whether a new classification qualifies as a [suspect or] quasi-suspect class. They include: A) whether the class has been historically "subjected to discrimination,"; B) whether the class has a defining characteristic that "frequently bears [a] relation to ability to perform or contribute to society,"; C) whether the class exhibits "obvious, immutable, or distinguishing characteristics that define them as a discrete group;" and D) whether the class is "a minority or politically powerless." *Windsor v. United States*, 699 F.3d 169, 181 (2d Cir. 2012) (quoting *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987), and *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440-41 (1985)) (citations omitted). Of these considerations, the first two are the most important. *See id.* ("Immutability and lack of

political power are not strictly necessary factors to identify a suspect class."); *accord Golinski*, 824 F. Supp. 2d at 987.

As several federal and state courts have recently recognized, any faithful application of those factors leads to the inescapable conclusion that sexual orientation classifications must be recognized as suspect or quasi-suspect and subjected to heightened scrutiny. *See, e.g.*, *Windsor*, 699 F.3d at 181-85; *Golinski*, 824 F. Supp. 2d at 985-90; *Pedersen v. Office of Personnel Management*, 881 F. Supp. 2d 294, 310-33 (D. Conn. 2012); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010) *aff'd sub nom. Perry v. Bro*wn, 671 F.3d 1052 (9th Cir. 2012*) vacated and remanded sub nom. Hollingsworth v. Pe*rry, 133 S. Ct. 2652, 186 L. Ed. 2d 768 (U.S. 2013); *In re Balas*, 449 B.R. 567, 573-75 (Bankr. C.D. Cal. 2011) (decision of 20 bankruptcy judges); *Varnum v. Brien*, 763 N.W.2d 862, 885-96 (Iowa 2009); *In re Marriage Cases*, 183 P.3d 384, 441-44 (Cal. 2008); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 425-31 (Conn. 2008).

a. Lesbians and Gay Men Have Historically Suffered from Severe Discrimination.

The history of discrimination against gay and lesbian individuals has been both severe and pervasive.[43] In 1952, Congress prohibited gay men and women from entering the country.[44] In 1953, President Eisenhower issued an executive order requiring the discharge of homosexuals from all federal employment and mandating that all defense contractors and other private corporations with federal contracts ferret out and fire all homosexual employees, a policy which remained in place until 1975.[45] Even then, federal agencies were free to discriminate based on sexual orientation until President Clinton issued the first executive order forbidding such hiring

[43] *See generally* Chauncey Declaration, Doc. 42-1.
[44] Chauncey Declaration, Doc. 42-1, ¶ 48.
[45] Chauncey Declaration, Doc. 42-1, ¶ 46-47, 78.

discrimination in 1998.[46] The U.S. State Department discharged more homosexuals than communists at the height of the McCarthy era.[47]

Until the Supreme Court's *Lawrence* decision in 2003, discussed in Part III(D), supra, consensual homosexual conduct was criminalized in many states. In the mid-twentieth century, bars in New York and Los Angeles posted signs telling potential gay customers: "If You Are Gay, Please Stay Away" or, more directly, "We Do Not Serve Homosexuals."[48] Raids on gay bars in Chicago in this period were "a fact of life, a danger every patron risked by walking through the door."[49]

Until 2011, homosexuals could not openly serve in the military,[50] and the military still criminalizes sodomy today.[51] After World War II, known homosexual service members were denied GI Bill benefits, and later, when other people with undesirable discharges had their benefits restored, the Veterans Administration refused to restore them to homosexuals.[52]

In 1993, Cincinnati voters passed Issue 3, which amended the city charter to prohibit the city from extending civil rights protections based on sexual orientation.[53] After five years of litigation, the courts let the amendment stand, and it was not until 2004 that the Cincinnati voters repealed the amendment.[54] The pervasive negative attitudes and stereotypes toward gay and lesbian individuals are reflected in our nation's politicians as well. The governor of Pennsylvania recently compared same-sex marriage to incest.[55] The Republican Party in its 2012 Platform

[46] Chauncey Declaration, Doc. 42-1, ¶ 78.
[47] Chauncey Declaration, Doc. 42-1, ¶ 46.
[48] Chauncey Declaration, Doc. 42-1, ¶ 56.
[49] *Id.*
[50] Chauncey Declaration, Doc. 42-1, ¶ 80.
[51] Chauncey Declaration, Doc. 42-1, ¶ 40.
[52] Chauncey Declaration, Doc. 42-1, ¶ 42.
[53] Chauncey Declaration, Doc. 42-1, ¶ 74.
[54] *Id.*
[55] Catalina Camia, *Pa. Governor Compares Gay Marriage to Incest*, USATODAY.COM (Oct. 4, 2013, 2:01 PM), http://www.usatoday.com/story/onpolitics/2013/10/04/corbett-gay-marriage-incest-pennsylvania/2921793/.

reaffirmed its support for a Constitutional amendment prohibiting same-sex marriage, and baselessly alleged that supporters of same-sex marriage rights were engaged in "hate campaigns, threats of violence, and vandalism . . . against advocates of traditional marriage."[56] These are but a few of the most egregious examples of discrimination at the hands of both federal and state governments, their officials, and one of the two primary political parties in our country.

There can be no doubt therefore that lesbians and gay men historically have been, and continue to be, the target of purposeful and often grievously harmful discrimination because of their sexual orientation. For many years the prevailing attitude toward gay persons has been "one of strong disapproval, frequent ostracism, social and legal discrimination, and at times ferocious punishment." Richard A. Posner, Sex and Reason 291 (1992); *see also Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009, 1015 (1985) (Brennan, J., dissenting from denial of cert.) (gay people "have historically been the object of pernicious and sustained hostility."). As the Second Circuit concluded, "It is easy to conclude that homosexuals have suffered a history of discrimination. *Windsor* and several amici labor to establish and document this history, but we think it is not much in debate." *Windsor*, 699 F.3d at 182; *see Pedersen*, 881 F. Supp. 2d at 318 ("The long history of anti-gay discrimination which evolved from conduct-based proscriptions to status or identity-based proscriptions perpetrated by federal, state and local governments as well as private parties amply demonstrates that homosexuals have suffered a long history of invidious discrimination.").

b. A Person's Sexual Orientation Does Not Inhibit His/Her Ability to Contribute to Society

The other essential factor in the Court's heightened scrutiny analysis is whether the group in question is distinctively different from other groups in a way that "frequently bears [a] relation

[56] GOP, 2012 REPUBLICAN PLATFORM: WE BELIEVE IN AMERICA 10, 12, *available at* http://www.gop.com/wp-content/uploads/2012/08/2012GOPPlatform.pdf.

to ability to perform or contribute to society." *City of Cleburne, Tex.*, 473 U.S., 440-41 (citation omitted); *see also Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality) ("[W]hat differentiates sex from such nonsuspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society.").

Expert opinions submitted as part of this record confirm this point. "It is well-established that homosexuality is a normal expression of human sexuality. It is not a mental illness, and being gay or lesbian has no inherent association with a person's ability to lead a happy, healthy, and productive life or to contribute to society."[57] Courts discussing this prong have agreed with near unanimity that homosexuality is irrelevant to one's ability to perform or contribute to society. "There are some distinguishing characteristics, such as age or mental handicap, that may arguably inhibit an individual's ability to contribute to society, at least in some respect. But homosexuality is not one of them." *Windsor*, 699 F.3d at 682; *accord Golinski*, 824 F. Supp. 2d at 986 ("[T]here is no dispute in the record or the law that sexual orientation has no relevance to a person's ability to contribute to society."); *Pedersen*, 881 F. Supp. 2d at 320 ("Sexual orientation is not a distinguishing characteristic like mental retardation or age which undeniably impacts an individual's capacity and ability to contribute to society. Instead like sex, race, or illegitimacy, homosexuals have been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities."). *See also* Am. Psychiatric Ass'n, Position Statement On Homosexuality and Civil Rights, 131 Am. J. Psychiatry 436, 497 (1974). In this respect, sexual orientation is akin to race, gender, alienage, and national origin, all of which "are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such

[57] Peplau Declaration, Doc. 46-1, ¶ 11.

considerations are deemed to reflect prejudice and antipathy." *City of Cleburne, Tex.*, 473 U.S. at 440.

More generally, a group of constitutional law scholars writing as *amici curiae* in *Windsor* recently noted:

> [N]umerous courts, scholars, the American Psychiatric Association—and even the Proponents of Proposition 8—have recognized [that] homosexual orientation "'implies no impairment in judgment, stability, reliability or general social or vocational capabilities.'" . . . Indeed, gay men and lesbians can and do perform perfectly well as contributing members of society as lawyers, doctors, plumbers, soldiers, athletes, professors, judges, and parents—when they are permitted to do so. Thus, [the Supreme] Court's observation that race, gender, alienage, and national origin "are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy," is equally applicable to gay men and women. *City of Cleburne, Tex.*, 473 U.S. at 440.

Brief of Constitutional Law Scholars Bruce Ackerman, et al., as Amici Curiae, 14-15, *Windsor*, 133 S. Ct. 2675. *See Perry*, 704 F. Supp. 2d at 967("Attorney General admits that sexual orientation bears no relation to a person's ability to perform in or contribute to society," etc.).

c. Due to this History of Prejudice, Gay Men and Lesbians Lack Political Power

Lack of political power is not essential for recognition as a suspect or quasi-suspect class, *see Windsor*, 699 F.3d at 181, but the limited ability of gay people as a group to protect themselves in the political process also weighs in favor of heightened scrutiny of laws that discriminate based on sexual orientation. In analyzing this factor, "[t]he question is not whether homosexuals have achieved political successes over the years; they clearly have. The question is whether they have the strength to politically protect themselves from wrongful discrimination." *Id.* at 184.

Due to the history of prejudice that gay men and lesbians have faced, they lack the political power to expand their civil rights. See Dec. of Dr. Gary Segura, Doc. 47-1, ¶ 27 ("[i]n light of the political disadvantages still faced by a small, targeted, and disliked group . . . gay

men and lesbians are powerless to secure basic rights within the normal political processes"). Dr. Segura identified traditional indicia of political powerlessness, and found that gays and lesbians fit within the description of traditionally powerless groups.[58] One measure of gay and lesbian political powerlessness is the absence of statutory protections for them or *de jure* statutory inequality.[59] For example, Congress has failed to pass any federal legislation prohibiting discrimination against gay men and lesbians in employment, education, access to public accommodations, or housing.[60] Although a number of states now have extended basic anti-discrimination protections to gay men and lesbians, the majority of states, including Ohio, have no statutory prohibition on firing, refusing to hire, or demoting a person in private sector employment solely on the basis of their identity as a gay man or lesbian.[61] Similarly, the majority of states, including Ohio, do not provide statutory protections for discrimination in housing or public accommodations for gay and lesbian people.[62]

A second measure of gay and lesbian political powerlessness is the repeal or pre-emption of legislative protections through ballot initiatives including anti-discrimination policies, anti-marriage initiatives, and adoption bans.[63] A third measure is their underrepresentation in political office.[64] In Ohio, for instance, only two of 132 members, or 1.5%, of the state legislature identify as gay or lesbian.[65]

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[58] Segura Declaration, Doc. 47-1, ¶ 28 et seq.
[59] Segura Declaration, Doc. 47-1, p. 11-15.
[60] Segura Declaration, Doc. 47-1, ¶ 30.
[61] Chauncey Declaration, Doc. 42-1, ¶ 77.
[62] *Id.*
[63] Segura Declaration, Doc. 47-1, p. 15-20.
[64] Segura Declaration, Doc. 47-1, p. 20-22.
[65] Segura Declaration, Doc. 47-1, ¶ 51; Similarly, while there has been some improvement in recent years, lesbians and gay men remain "vastly under-represented in this Nation's decisionmaking councils." No openly gay person has ever served in the United States Cabinet. In 2008, of the more than half a million people who then held political office at the local, state, and national levels in this country, only about 400 were openly gay. *See Kerrigan*, 957 A.2d at 446; *see also Windsor*, 699 F.3d at 184-85 (underrepresentation of lesbians and gay men in positions of power "is attributable either to a hostility that excludes them or to a hostility that keeps their sexual preference private – which, for our purposes [assessing their political power], amounts to much the same thing").

These indicia of political powerlessness are caused by a number of factors including small population size and dispersion, the effect of HIV/AIDS on the community, violence against gay and lesbian people, relative invisibility because many gay and lesbian people are not open about their sexual orientation, censorship, public hostility and prejudice, political and social hostility, unreliable allies in the political process, moral and political condemnation, and a powerful, numerous, well-funded opposition.[66] For example, violence against gay and lesbian people engenders intimidation which can "undermine the mobilization of gays and lesbians and their allies to limit their free exercise of economic and social liberties."[67] In Ohio, the number of hate crimes against gay and lesbian people increased from 15.8% of total hate crimes reported in 2009 to 25% in 2012.[68] The total number of reported hate incidents decreased, but the number of incidents motivated by sexual orientation increased.[69] The recent successes for equal rights in some jurisdictions do not change the fact that, in the majority of the United States, gay and lesbian individuals are treated as second-class citizens.

The political influence of lesbians and gay men today stands in sharp contrast to the political power of women in 1973, when a plurality of the Court concluded in *Frontiero,* 411 U.S. at 688, that sex-based classifications required heightened scrutiny. After all, Congress had already passed Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963, both of which protect women from discrimination in the workplace. *See id.* at 687-88. In contrast, there are still no such bans in the federal government or the majority of the states. *See Golinski*, 824 F. Supp. 2d at 988-989; *Pedersen*, 881 F. Supp. 2d at 326-27. As political power has been defined by the Court for purposes of heightened scrutiny analysis, lesbians and gay men do not have it.

[66] Segura Declaration, Doc. 47-1, p. 22-35.
[67] Segura Declaration, Doc. 47-1, ¶ 58.
[68] Segura Declaration, Doc. 47-1, ¶ 60.
[69] *Id.*

Moreover, while there have been recent successes in securing antidiscrimination legislation (and even marriage equality) in some parts of the nation, those limited successes do not alter the conclusion that lesbians and gay men "are not in a position to adequately protect themselves from the discriminatory wishes of the majoritarian public." *Windsor*, 699 F.3d at 185. Thus, in the last two decades, more than two-thirds of ballot initiatives that proposed to enact (or prevent the repeal of) basic antidiscrimination protections for gay and lesbian individuals have failed.[70] Gay people "have seen their civil rights put to a popular vote more often than any other group." Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 Am. J. Pol. Sci. 245, 257 (1997).; *see also* Donald P. Haider-Markel et al., *Lose, Win, or Draw?: A Reexamination of Direct Democracy and Minority Rights*, 60 Pol. Res. Q. 304 (2007).

Indeed, the notion that gay people are too politically powerful to warrant applying heightened scrutiny is particularly misplaced because, by enshrining Ohio's marriage recognition ban in the state constitution, Ohio has effectively locked gay people out of the normal political process. *See infra* Argument, Part IV.C.4 (discussing why this "fencing out" violates equal protection). Having disabled gay people from remedying discrimination through the normal legislative process, Ohio can hardly argue that this discrimination is likely "to be soon rectified by legislative means." *City of Cleburne, Tex.*, 473 U.S. at 440.

d. Sexual Orientation is An Immutable or a "Defining" Characteristic

The heightened scrutiny inquiry sometimes also considers whether laws discriminate on the basis of "'immutable . . . or distinguishing characteristics that define [persons] as a discrete group.'" *Bowen*, 483 U.S., 602 (citation omitted). This consideration derives from the "basic concept of our system that legal burdens should bear some relationship to individual

[70] Segura Declaration, Doc. 47-1, ¶40.

responsibility." *Frontiero*, 411 U.S. at 686; *see also Plyler v. Doe*, 457 U.S. 202, 220 (1982) (noting that illegal alien children "have little control" over that status). But there is no requirement that a characteristic be immutable in order to trigger heightened scrutiny. Heightened scrutiny applies to classifications based on alienage and legitimacy, even though "[a]lienage and illegitimacy are actually subject to change." *Windsor*, 699 F.3d at 183 n.4; *see Nyquist v. Mauclet*, 432 U.S. 1, 9 n.11 (1977) (rejecting the argument that alienage did not deserve strict scrutiny because it was mutable).

To the extent that "immutability" is relevant to the inquiry of whether to apply heightened scrutiny, the question is not whether a characteristic is strictly unchangeable—it is whether the characteristic is a core trait or condition that one cannot or should not be required to abandon. *See Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084, 1093 (9th Cir. 2000) *overruled on other grounds by Thomas v. Gonzal*es, 409 F.3d 1177 (9th Cir. 200*5)* ("[S]exual orientation and sexual identity are immutable; they are so fundamental to one's identity that a person should not be required to abandon them.")*Watkins v. U.S. Army*, 875 F.2d 699, 726 (9th Cir. 1989) *Watkins v. United States Army*, 875 F.2d 699, 726 (9th Cir. 1989) (Norris, J., concurring in judgment) ("It is clear that by 'immutability' the [Supreme] Court has never meant strict immutability in the sense that members of the class must be physically unable to change or mask the trait defining their class. . . . the Supreme Court is willing to treat a trait as effectively immutable if changing it would involve great difficulty, such as requiring a major physical change or a traumatic change of identity.").

Under any definition of immutability, sexual orientation clearly qualifies. There is now broad medical and scientific consensus that sexual orientation is immutable. As Plaintiffs' expert Dr. Letitia Anne Peplau explains, "Sexual orientation refers to an enduring pattern of emotional,

romantic, and/or sexual attractions to men, women, or both sexes. Most adults are attracted to and form relationships with members of only one sex. Efforts to change a person's sexual orientation through religious or psychotherapy interventions have not been shown to be effective."[71] Indeed, there is significant evidence to show that interventions to change sexual orientation can be harmful to patients, and no major mental health professional organization has approved their use.[72] Further, when asked whether they have any choice in their sexual orientation, the vast majority of gay men and lesbians state that they have very little or no choice in the matter.[73] *See also Perry*, 704 F. Supp. 2d at 966 ("No credible evidence supports a finding that an individual may, through conscious decision, therapeutic intervention or any other method, change his or her sexual orientation."); *accord Golinski*, 824 F. Supp. 2d at 986; *Pedersen*, 881 F. Supp. 2d at 320-24.

Even more importantly, as the Supreme Court has acknowledged, sexual orientation is so fundamental to a person's identity that one ought not be forced to choose between one's sexual orientation and one's rights as an individual—even if such a choice could be made. *See Lawrence*, 539 U.S. at 576-77 (recognizing that individual decisions by consenting adults concerning the intimacies of their physical relationships are "an integral part of human freedom"); *see also In re Marriage Cases*, 183 P.3d, 442 ("Because a person's sexual orientation is so integral an aspect of one's identity, it is not appropriate to require a person to repudiate or change his or her sexual orientation in order to avoid discriminatory treatment."); *Kerrigan*, 957 A.2d at 438 ("In view of the central role that sexual orientation plays in a person's fundamental right to self-determination, we fully agree with the plaintiffs that their sexual orientation represents the kind of distinguishing characteristic that defines them as a discrete group for

[71] Peplau Declaration, Doc. 46-1, ¶ 10.
[72] Peplau Declaration, Doc. 46-1, ¶ 26-27.
[73] Peplau Declaration, Doc. 46-1, ¶ 25.

purposes of determining whether that group should be afforded heightened protection under the equal protection provisions of the state constitution."); *accord Golinski*, 824 F. Supp. 2d at 987; *Pedersen*, 881 F. Supp. 2d at 325.[74]

Sexual orientation discrimination accordingly meets not only the two essential criteria for receipt of heightened scrutiny, but *all* considerations the Supreme Court has identified, and thus defendants must sustain their burden to justify Ohio's failure to recognize same-sex marriages in accordance with heightened scrutiny analysis.

2. Ohio's Ban on Recognition of Valid Marriages of Same-Sex Couples Performed in Other Jurisdictions is also Subject to Heightened Scrutiny Because it Contains Explicit Sex-Based Classifications and Because It Perpetuates Improper Stereotyped Notions of the Spousal and Parental Roles of Men and Women.

Ohio's ban on marriage recognition must be subjected to heightened scrutiny for two additional reasons: it classifies explicitly based on gender, and it reflects stereotyped notions of the proper role of men and women in the marital and family contexts. There is nothing inconsistent about subjecting the Ohio marriage restrictions both to the scrutiny due classifications based on sex and to the scrutiny due classifications based on sexual orientation. The confluence of discrimination based on both sex and sexual orientation here is not mere happenstance; sexual orientation is defined by one's sex relative to the sex of those to whom one

[74] In the past, some courts have asserted that sexual orientation is not immutable by arguing that sexual orientation refers merely to the conduct of engaging in sexual activity. *See, e.g.*, *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 573-74 (9th Cir. 1990) (arguing that homosexuality "is behavioral and hence is fundamentally different from traits such as race, gender, or alienage, which define already existing suspect and quasi-suspect classes."). But the Supreme Court has now rejected that artificial distinction between the conduct of engaging in same-sex activity and the status of being gay, explaining that "[o]ur decisions have declined to distinguish between status and conduct in this context." *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2990 (2010); *see Pedersen*, 881 F. Supp. 2d at 325 ("Supreme Court precedent has since rejected the artificial distinction between status and conduct in the context of sexual orientation. Consequently, the precedential underpinnings of those cases declining to recognize homosexuality as an immutable characteristic have been significantly eroded." (citations omitted)).

is attracted and the opprobrium visited on lesbians and gay men by society is in large part because of their contravention of gender norms and stereotypes.[75]

There can be no doubt that Ohio's marriage recognition ban contains explicit gender classifications. It only recognizes a person as married if the person's sex is different from that of the person's spouse. Such a distinction requires heightened scrutiny. *United States v. Virginia*, 518 U.S. 515, 555 (1996) ('all gender-based classifications today' warrant 'heightened scrutiny.'") (quoting *J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127, 136 (1994)); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 728 (2003) ('Statutory classifications that distinguish between males and females are subject to heightened scrutiny."). "'[O]ur Nation has had a long and unfortunate history of sex discrimination,' . . . a history which warrants the heightened scrutiny we afford all gender-based classifications today." *J.E.B.*, 511 U.S. at 136 (quoting *Frontiero*, 411 U.S. at 684).[76]

Ohio's marriage recognition ban should be subject to heightened scrutiny for the additional reason that it reflects and seeks to enforce the perpetuation of sex stereotypes in life roles, which the Supreme Court has held to be constitutionally impermissible. *See, e.g., United*

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[75] *See Perry*, 704 F. Supp. 2d at 996; *see also Prowel v. Wise Bus. Forms, Inc*., 579 F.3d 285, 291 (3d Cir. 2008) (reversing summary judgment for the employer on the gay male employee's claim of discrimination based on failure to conform to gender stereotypes; "the line between sexual orientation discrimination and discrimination 'because of sex' can be difficult to draw."); *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002) ("Sexual orientation harassment is often, if not always, motivated by a desire to enforce heterosexually defined gender norms. In fact, stereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women."); Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69. N.Y.U. L. Rev. 197, 202-03 (1994) ("In the same way that the prohibition of miscegenation preserved the polarities of race on which white supremacy rested, the prohibition of homosexuality preserves the polarities of gender on which rests the subordination of women. . . . [S]tigmatization of gays in contemporary American society functions as part of a larger system of social control based on gender.").

[76] Ohio's restriction on marriage is no less invidious because it equally denies recognition to men and women of marriages performed in jurisdictions that recognize marriage between same-sex couples. *Loving* discarded "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; *see also McLaughlin v. Florida*, 379 U.S. 184, 191 (1964) (holding that equal protection analysis "does not end with a showing of equal application among the members of the class defined by the legislation") . Nor was the context of race central to *Loving*'s holding, which expressly found that, even if race discrimination had not been at play and the Court presumed "an even-handed state purpose to protect the integrity of all races," Virginia's anti-miscegenation statute still was "repugnant to the Fourteenth Amendment." *Id.* at 12 n.11.

States v. Virginia, 518 U.S. at 533 (justifications for gender classifications "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females"); *Califano v. Webster*, 430 U.S. 313, 317 (1977) (under heightened scrutiny, a court looks at whether a gender classification is the "result of 'archaic and overbroad generalizations' about women or of 'the role-typing society has long imposed' upon women").

Indeed, one of justifications offered for Ohio's non-recognition of same-sex marriages in Ohio was the well-being of children[77] As discussed, that premise flies in the face of the overwhelming scientific consensus that has developed through decades of rigorous studies. *See infra*, Argument, Part IV.C.5.b. As the Supreme Court of Iowa explained: "The research appears to strongly support the conclusion that same-sex couples foster the same wholesome environment as opposite-sex couples and suggests that the traditional notion that children need a mother and a father to be raised into healthy, well-adjusted adults is based more on stereotype than anything else." *Varnum*, 763 N.W.2d at 899 n.26. A law enforcing that stereotype must be subjected to heightened scrutiny.

The Supreme Court has made emphatically clear that gender classifications cannot be based on or validated by "fixed notions concerning the roles and abilities of males and females." *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724-25 (1982). And in the context of parenting responsibilities, the Supreme Court has rejected the notion of "any universal difference between maternal and paternal relations at every phase of a child's development." *Caban v. Mohammed*, 441 U.S. 380, 388-89 (1979); *see also Stanley v. Illinois*, 405 U.S. 645 (1972) (finding that a state law presumption that unmarried fathers were unfit violated Due Process and Equal Protection Clauses). The Court also has recognized that stereotypes about distinct parenting roles for men and women foster discrimination in the workplace and elsewhere. *Hibbs*, 538 U.S.

[77] *See* Becker Declaration, e.g., ¶¶ 41, 58, 59, 71, 88.

at 736 ("Stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. . . . These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers' stereotypical views about women's commitment to work and their value as employees."). Thus, "generalizations about typical gender roles in the raising and nurturing of children" are constitutionally insufficient bases for differential treatment of the sexes. *Knussman v. Maryland*, 272 F.3d 625, 636 (4th Cir. 2001) (upholding liability of state agency under the Equal Protection Clause for refusing to grant father paid leave as primary caregiver for newborn).[78]

As a result of these decisions and attendant legislative reforms, laws relating to marriage have become wholly gender-neutral, apart from their frequent exclusion of same-sex couples. Men and women entering into marriage today have the liberty to determine for themselves the responsibilities each will shoulder as parents, wage earners, and family decision-makers, regardless of whether these responsibilities conform to or depart from traditional arrangements. Laws based on the assumption that, for every family, the spousal and parental roles have to be performed by a man and a woman must be tested under heightened scrutiny.

3. Ohio's Marriage Ban is Also Subject to Heightened Scrutiny Because it Infringes Plaintiffs' Fundamental Rights and Liberty Interests.

a. *Loving v. Virginia*, 388 U.S. 1, 12 (1967) the Right to Marry Is a Fundamental Right that Belongs to the Individual.

[78] *See also Califano v. Westcott*, 443 U.S. 76, 89 (1979) (finding unconstitutional a federal statute providing for support in event of father's unemployment, but not mother's unemployment; describing measure as based on stereotypes that father is principal provider "while the mother is the 'center of home and family life"'); *Orr v. Orr*, 440 U.S. 268, 283 (1979) (invalidating a measure imposing alimony obligations on husbands, but not on wives, because it "carries with it the baggage of sexual stereotypes"); *Stanton v. Stanton*, 421 U.S. 7, 14-15 (1975) (finding unconstitutional a statute assigning different age of majority to girls than to boys and stating, "[n]o longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas").

"The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Loving*, 388 U.S. at 12 (citation omitted); *accord Zablocki v. Redhail*, 434 U.S. 374, 383 (1978).[79] Although states have a legitimate interest in regulating and promoting marriage, the fundamental right to marry belongs to the individual. "[T]he regulation of constitutionally protected decisions, such as where a person shall reside or whom he or she shall marry, must be predicated on legitimate state concerns other than disagreement with the choice the individual has made." *Hodgson v. Minnesota*., 497 U.S. 417, 435 (1990); *see also Loving*, 388 U.S. at 12 ("Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State."); *Roberts v. United States Jaycees*, 468 U.S. 609, 620 (1984) (""[T]he Constitution undoubtedly imposes constraints on the State's power to control the selection of one's spouse . . . .").

b. The Scope of a Fundamental Right or Liberty Interest Under the Due Process Clause Does Not Depend on Who Is Exercising that Right.

The Supreme Court has consistently refused to narrow the scope of the fundamental right to marry by reframing a plaintiff's asserted right to marry as a more limited right that is about the characteristics of the couple seeking marriage. Supreme Court cases addressing "the fundamental right to marry" do not recast it as merely "the right to interracial marriage," "the right to inmate marriage," or "the right of people owing child support to marry." *See Golinski*, 824 F. Supp. 2d at 982 n.5 (citing *Loving*, 388 U.S. at 12; *Turner v. Safley*, 482 U.S. 78, 94-96

[79] Many other cases describe the right to marry as fundamental. *Turner v. Safley*, 482 U.S. 78, 95 (1987) ("The decision to marry is a fundamental right"); *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) ("[T]he Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition"); *Griswold v. Connecticut*, 381 U.S. 479, 485-486 (1965) (intrusions into the "sacred precincts of marital bedrooms" offend rights "older than the Bill of Rights"); *id*., at 495-496 (Goldberg, J., concurring) (the law in question "disrupt[ed] the traditional relation of the family--a relation as old and as fundamental as our entire civilization"); *see generally Washington v. Glucksberg*, 521 U.S. 702, 727 n.19 (1997) (citing cases).

(1987); *Zablocki*, 434 U.S. at 383-86; *accord In re Marriage Cases*, 183 P.3d at 421 n.33 (*Turner* "did not characterize the constitutional right at issue as 'the right to inmate marriage.'").

Lawrence explained that the *Bowers* decision was flawed from the very outset in trying to distinguish the Court's liberty interest jurisprudence by characterizing the inquiry as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy." *Lawrence*, 539 U.S. at 566-67 (quoting *Bowers*, 478 U.S. at 190). In doing so, *Bowers* "fail[ed] to appreciate the extent of the liberty at stake," *Lawrence*, 539 U.S. at 567.

Lawrence held that the right of consenting adults (including same-sex couples) to engage in private, sexual intimacy is protected by the Fourteenth Amendment's protection of liberty, notwithstanding the historical existence of sodomy laws and their use against gay people. For the same reasons, the fundamental right to marry is "deeply rooted in this Nation's history and tradition" for purposes of constitutional protection even though same-sex couples have not historically been allowed to exercise that right.

"[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry." *Lawrence*, 539 U.S. at 572 (citation omitted). While courts use history and tradition to identify the interests that due process protects, they do not carry forward historical limitations, either traditional or arising by operation of prior law, on which Americans may exercise a right once that right is recognized as one that due process protects. This critical distinction—that history guides the *what* of due process rights, but not the *who* of which individuals have them—is central to due process jurisprudence. "'Fundamental rights, once recognized, cannot be denied to particular groups on the ground that these groups have historically been denied those rights.'" *In re Marriage Cases*, 183 P.3d at 430 (quoting *Hernandez*, 855 N.E.2d at 23 (Kaye, C.J., dissenting) (brackets omitted)).

For example, when the Court held that anti-miscegenation laws violated the fundamental right to marry in *Loving*, it did so despite a long tradition of excluding interracial couples from marriage. *Planned Parenthood 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* . . . ."); *Lawrence*, 539 U.S. at 577-78 ("[N]either history nor tradition could save a law prohibiting miscegenation from constitutional attack.") (citation omitted).

Cases subsequent to *Loving* have similarly confirmed that the fundamental right to marry is available to even those who have not traditionally been eligible to exercise that right. *See Boddie v. Connecticut*, 401 U.S. 371, 376 (1971) (states may not require indigent individuals to pay court fees in order to obtain a divorce, since doing so unduly burdened their fundamental right to marry again); *see also Zablocki*, 434 U.S. at 388-90 (state may not condition ability to marry on fulfillment of existing child support obligations). Similarly, the right to marry as traditionally understood in this country did not extend to people in prison. *See* Virginia L. Hardwick, Virgiria L. Hardwick, *Punishing the Innocent: Unconstitutional Restrictions on Prison Marriage and Visitation*, 60 N.Y.U. L. Rev. 275, 277-79 (1985). Nevertheless, in *Turner*, 482 U.S., 95-97, the Supreme Court held that a state cannot restrict a prisoner's ability to marry without sufficient justification.[80]

[80] When analyzing other fundamental rights and liberty interests in other contexts, the Supreme Court has consistently adhered to the principle that a fundamental right, once recognized, properly belongs to everyone. For example, in *Youngberg v. Romeo*, 457 U.S. 307, 315-16 (1982), the Supreme Court held that an individual involuntarily committed to a custodial facility because of a disability retained liberty interests including a right to freedom from bodily restraint, thus departing from a longstanding historical tradition in which people with serious disabilities were not viewed as enjoying such substantive due process rights and were routinely subjected to bodily restraints in institutions. Similarly, in *Eisenstadt*, 405 U.S. at 438, the Supreme Court struck down a ban on distributing contraceptives to unmarried persons, building on its prior holding in *Griswold*, 381 U.S. at 486, that

In sum, because the fundamental right to marry is firmly rooted in our nation's history, that right cannot be denied to interracial couples, divorced peoplecouples, prisoners, or same-sex couples simply because they have historically been prevented from exercising that right.

c. Ohio's Marriage Ban Discriminates Against Same-Sex Couples With Regard to the Exercise of Fundamental Rights and Liberty Interests.

Ohio's marriage ban discriminates against Plaintiffs in their exercise of their fundamental rights and liberty interests, and therefore implicates *both* the Due Process Clause and the Equal Protection Clause. *See Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (it is "essential" that courts employ strict scrutiny when a state law denies "groups or types of individuals" rights such as "[m]arriage and procreation [that] are fundamental"). Specifically with respect to classifications restricting who can enter into marriage, the Court has held that "the right to marry is of fundamental importance, and since the classification at issue here significantly interferes with the exercise of that right, we believe that 'critical examination' of the state interests advanced in support of the classification is required." *Zablocki*, 434 U.S. at 383 (citation omitted).

Even though the married Plaintiffs have validly married one another in jurisdictions that do not exclude same-sex couples from the freedom to marry, the married Plaintiffs continue to suffer the practical and dignitary harms of being denied recognition of their marriage by their home state of Ohio. In striking down the statutory provision that had denied gay and lesbian couples recognition of their otherwise valid marriages in *Windsor*, the Court observed:

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states could not prohibit the use of contraceptives by married persons. Importantly, the *Eisenstadt* Court did not suggest that this country had a specific history of protecting the sexual privacy of unmarried people. Rather, the Court held that, "[i]f the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Eisenstadt*, 405 U.S. at 453. And in *Lawrence*, the Court followed *Eisenstadt* and other due process cases in holding that lesbian and gay Americans could not be excluded from the existing fundamental right to sexual intimacy, even though historically they had often been prohibited from full enjoyment of that right. *Lawrence*, 539 U.S. at 566-67.

> [The discriminatory statute] tells those couples, and all the world, that their otherwise valid marriages are unworthy of . . . recognition. This places same-sex couples in an unstable position of being in a second-tier marriage. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects . . . . And it humiliates tens of thousands of children now being raised by same-sex couples. The law in question 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.

133 S. Ct. at 2694. Ohio's refusal to honor the marriages of Plaintiffs who have married in other jurisdictions similarly demeans them, humiliates their children, and complicates the children's understanding of their own families' integrity, and in all of these ways infringes Plaintiffs' liberty and equality interests as protected by the Due Process and Equal Protection Clauses.

4. Ohio's Constitutional Amendment Barring Recognition of Marriages of Same-Sex Couples is Also Subject to Heightened Scrutiny Because it Locks Same-Sex Couples Out of the Normal Political Process and Makes it Uniquely More Difficult to Secure Legislation on Their Behalf.

The Ohio same-sex marriage recognition ban warrants heightened scrutiny for an additional reason: it discriminatorily fences out of the normal political process any citizen of the State seeking to change the law to recognize marriages of same-sex couples performed in other jurisdictions by enshrining Ohio's exclusion of same-sex couples from marriage—and none of Ohio's other marriage regulations—in the Ohio Constitution. Unlike a citizen seeking to effect a different change in the State's marriage eligibility rules, such as someone wishing to change the age at which persons may marry without parental consent (currently age 18 for males and age 16 for females under Ohio Rev. Code Ann. § 3101.01(A)), Plaintiffs cannot simply lobby the General Assembly to change the Ohio Revised Code. Instead, they are uniquely burdened with having to amend the Ohio Constitution.

It is well established that such a selective disparity in the ability to advocate for a change in the law, disadvantaging a single class of people, is constitutionally suspect. *See Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982); *Hunter v. Erickson*, 393 U.S. 385 (1969); *Coal. to*

Defend Affirmative Action v. Regents of the Univ. of Mich., 701 F.3d 466, 477 (6th Cir. 2012) (en banc), *cert. granted sub nom. Schuette v. Coal. to Defend Affirmative Action* (No. 12-682); *Evans v. Romer*, 882 P.2d 1335 (Colo. 1994), *aff'd on other grounds* 517 U.S. 620, 633 (1996). Thus, as Justice Harlan put it in *Hunter*, there is a clear distinction between general rules of governance, such as the procedure for passing a law or amending a state constitution, that are presumptively valid even if they sometimes make it more difficult for a particular group to further its aims, and a law structured to prevent one single group from achieving its goals. 393 U.S. at 393 (Harlan, J., concurring). The latter type of provision has "the clear purpose of making it more difficult for . . . minorities to further their political aims" and thus is discriminatory on its face. *Id.*; *see also Seattle Sch. Dist. No. 1*, 458 U.S. at 470 (adopting Justice Harlan's concurrence); *Evans v. Romer*, 882 P.2d 1335, 1339 (Colo. 1994) *aff'd on other grounds*, 517 U.S. 620 (1996) ("[T]he Equal Protection Clause of the United States Constitution protects the fundamental right to participate equally in the political process, and . . . any legislation or state constitutional amendment which infringes on this right by 'fencing out' an independently identifiable class of persons must be subject to strict judicial scrutiny." (internal quotation marks and citation omitted)).

5. Ohio's Ban on Marriage Recognition Fails Under Any Standard of Review

Although heightened scrutiny is warranted for the reasons discussed above, the marriage bans cannot satisfy even rational basis review. "Even in the ordinary equal protection case calling for the most deferential of standards, [the Court] insist[s] on knowing the relation between the classification adopted and the object to be attained." *Romer v. Evans*, 517 U.S. 620, 632, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996). "[S]ome objectives . . . are not legitimate state interests" and, even when a law is justified by an ostensibly legitimate purpose, "[t]he State may

not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne, Tex.*, 473 U.S. at 446-47.

At the most basic level, by requiring that classifications be justified by an independent and legitimate purpose, the Equal Protection Clause prohibits classifications from being drawn for "the purpose of disadvantaging the group burdened by the law." *Romer*, 517 U.S. at 633; *see also Windsor*, 133 S. Ct. at 2693; *City of Cleburne, Tex.*, 473 U.S. at 450; *U.S. Dep't of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973). The Supreme Court invoked this principle most recently in *Windsor* when it held that the principal provision of the federal Defense of Marriage Act ("DOMA") violated equal protection principles because the "purpose and practical effect of the law . . . [was] to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages." *Windsor*, 133 S. Ct. at 2693. The Court explained that the statute was not sufficiently connected to a legitimate governmental purpose because its "interference with the equal dignity of same-sex marriages . . . was more than an incidental effect of the federal statute. It was its essence." *Id.* The Supreme Court has sometimes described this impermissible purpose as "animus" or a "bare … desire to harm a politically unpopular group." *Windsor*, 133 S. Ct. at 2693; *Romer*, 517 U.S. at 633; *City of Cleburne, Tex.*, 473 U.S. at 447; *Moreno*, 413 U.S. at 534. But an impermissible motive does not always reflect "malicious ill will." *Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring). It can also take the form of "negative attitudes," *City of Cleburne, Tex.*, 473 U.S. at 448, "fear," *Id.* "irrational prejudice," *Id.* at 450, or "some instinctive mechanism to guard against people who appear to be different in some respects from ourselves," *Garrett*, 531 U.S. at 374 (Kennedy, J., concurring).[81] The Sixth Circuit has held that, "the desire to effectuate one's

[81] In determining whether a law is based on such an impermissible purpose, the Court has looked to a variety of direct and circumstantial evidence, including the text of a statute and its obvious practical effects, *see, e.g.*, *Windsor*,

animus against homosexuals can never be a legitimate governmental purpose, [and] a state action based on that animus alone violates the Equal Protection Clause." *Davis v. Prison Health Services,* 679 F.433 438, *(quoting Stemler v. City of Florence,* 126 F.3d 856, 873–74 (6th Cir.1997) (inmate had viable equal protection claim where he alleged prison officials purposefully discriminated against him based on his sexual orientation when he was removed from prison job).

In addition, even when the government offers an ostensibly legitimate purpose, the court must also examine the statute's connection to that purpose to assess whether it is too "attenuated" to rationally advance the asserted governmental interest. *City of Cleburne, Tex.*, 473 U.S. at 446; *see, e.g.*, *Moreno,* 413 U.S. at 535-36 (invalidating law on rational-basis review because "even if we were to accept as rational the Government's wholly unsubstantiated assumptions concerning [hippies] . . . we still could not agree with the Government's conclusion that the denial of essential federal food assistance . . . constitutes a rational effort to deal with these concerns"); *Eisenstadt v. Baird*, 405 U.S. 438, 448-49 (1972) (invalidating law on rational-basis review because, even if deterring premarital sex is a legitimate governmental interest, "the effect of the ban on distribution of contraceptives to unmarried persons has at best a marginal relation to the proffered objective").

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133 S. Ct. at 2693; *Romer*, 517 U.S at 633; *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 266-68 (1977), statements by legislators during floor debates or committee reports, *see, e.g.*, *Windsor*, 133 S. Ct. at 2693; *Moreno*, 413 U.S. at 534-35, the historical background of the challenged statute, *see, e.g., Windsor*, 133 S. Ct. at 2693; *Arlington Heights*, 429 U.S. at 266-68, and a history of discrimination by the relevant governmental entity, *see, e.g. Arlington Heights*, 429 U.S. at 266-68. Finally, even without direct evidence of discriminatory intent, the absence of any logical connection to a legitimate purpose can lead to an inference of an impermissible intent to discriminate. *See Romer*, 517 U.S. at 632 (reasoning that the law's "sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects"); *City of Cleburne, Tex.*, 473 U.S. at 448-50 (reasoning that because a home for developmentally disabled adults did posed no threat to city's interests other than those also posed by permitted uses, requiring a special zoning permit in this case "appears to us to rest on an irrational prejudice").

This search for a meaningful connection between a classification and the asserted governmental interest also provides a safeguard against intentional discrimination. As the Supreme Court has explained, "[b]y requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Romer*, 517 U.S. at 633.[82]

In *Bassett v. Snyder*, --- F. Supp. 2d ----, 2013 WL 3285111 (E.D. Mich. June 28, 2013), the court held that same-sex couples demonstrated a likelihood of success on the merits of their equal protection claim regarding a Michigan law prohibiting same-sex partners from receiving public employee benefits where "[t]he historical background and legislative history of the Act demonstrate that it was motivated by animus against gay men and lesbians." *24-26. A review of the historical background and legislative history of the laws at issue here lead to a similar conclusion, and when the evidentiary record is examined, it is undeniable that the requested relief should be granted to the Plaintiffs. The evidence shows that there is no legitimate, let alone compelling, state interest that justifies denying same-sex married couples recognition of their marriages. Ohio's ban on recognition of valid same-sex marriages shares all the hallmarks of irrational discrimination that have been present in prior Supreme Court cases that struck down laws violating even the lowest level of equal protection scrutiny. Even if the Court does not

[82] The Supreme Court has been particularly likely to find a classification too attenuated to serve an asserted government interest when the law imposes a sweeping disadvantage on a group that is grossly out of proportion to accomplishing that purpose. For example, in *Romer*, the Court invalidated a Colorado constitutional amendment excluding gay people from eligibility for nondiscrimination protections because, the law "identifie[d] persons by a single trait and then denie[d] them protection across the board." 517 U.S. at 633. Similarly, in *Windsor* the Supreme Court invalidated the challenged section of DOMA as not sufficiently related to any legitimate governmental purpose in part because it was "a system-wide enactment with no identified connection" to any particular government program. *Windsor*, 133 S. Ct. at 2694. In such situations, the law's breadth may "outrun and belie any legitimate justifications that may be claimed for it." *Romer*, 517 U.S. at 635; *see also id*. ("The breadth of the amendment is so far removed from these particular justifications that we find it impossible to credit them."). Ohio's sweeping marriage bans likewise exclude same-sex couples and their children system-wide from the protections and benefits afforded married couples and their families under Ohio and federal law.

apply heightened scrutiny (although it should), none of the rationales likely to be proffered for Ohio's recognition ban can withstand constitutional review.

a. Ohio's Recognition Ban Cannot Be Justified by an Asserted Interest in Maintaining a Traditional Definition of Marriage.

In order to survive constitutional scrutiny, Ohio's recognition ban must be justified by some legitimate state interest other than simply maintaining a "traditional" definition of marriage. "Ancient lineage of a legal concept does not give it immunity from attack for lacking a rational basis." *Heller v. Doe by Doe*, 509 U.S. 312, 326-27 (1993). Indeed, the fact that a form of discrimination has been "traditional" is a reason to be *more* skeptical of its rationality. "The Court must be especially vigilant in evaluating the rationality of any classification involving a group that has been subjected to a tradition of disfavor for a traditional classification is more likely to be used without pausing to consider its justification than is a newly created classification." *City of Cleburne, Tex.*, 473 U.S. at 454 n.6 (Stevens, J., concurring) (alterations incorporated; internal quotation marks omitted); *see also Marsh v. Chambers*, 463 U.S. 783, 791-92 (1983) (even longstanding practice should not be "taken thoughtlessly, by force of long tradition and without regard to the problems posed by a pluralistic society"); *In re Marriage Cases*, 183 P.3d at 853-54 ("[E]ven the most familiar and generally accepted of social practices and traditions often mask an unfairness and inequality that frequently is not recognized or appreciated by those not directly harmed by those practices or traditions."). As the Supreme Court has explained, "times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress." *Lawrence*, 539 U.S. at 579.

Regarding laws that exclude 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*, 957 A.2d at 478 (citation omitted); *accord Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 961 n.23 (Mass. 2003) ("[I]t is circular reasoning, not analysis, to maintain that marriage must remain a heterosexual institution because that is what it historically has been."); *Varnum*, 763 N.W.2d at 898 (asking "whether restricting marriage to opposite-sex couples accomplishes the governmental objective of maintaining opposite-sex marriage" results in "empty analysis"); *see also Golinski*, 824 F. Supp. 2d at 993 ("Tradition alone . . . cannot form an adequate justification for a law. . . . Instead, the government must have an interest separate and apart from the fact of tradition itself.") (citations omitted).

Ultimately, "'preserving the traditional institution of marriage' is just a kinder way of describing the [s]tate's *moral disapproval* of same-sex couples." *Lawrence*, 539 U.S. at 601 (Scalia, J., dissenting) (emphasis in original). That intent to discriminate is not a rational basis for perpetuating discrimination. *See Windsor*, 133 S. Ct. at 2692; *Romer*, 517 U.S. at 633; *City of Cleburne, Tex.*, 473 U.S. at 450; *Moreno*, 413 U.S. at 534.

b. Ohio's Marriage Recognition Ban Cannot Be Justified by an Asserted Interest Related to Children.

Supporters of the Ohio DOMA statute and the Constitutional Amendment have asserted that children are best off when raised by a mother and father.[83] But even if it were rational for legislators to speculate that children raised by heterosexual couples are better adjusted than children raised by gay ones—and it is not, *see infra*, Fulcher discussion—there is simply no rational connection between the Ohio marriage recognition ban and the asserted goal.

Ohio's marriage recognition ban does not prevent gay couples from having children. *See Golinski*, 824 F. Supp. 2d at 997 ("Even if the Court were to accept as true, which it does not, that opposite-sex parenting is somehow superior to same-sex parenting, DOMA is not rationally

[83] Becker Declaration, Doc. 41-1, ¶ 41, House TR, p. 29; Becker Declaration, Doc. 41-1, ¶ 88.

related to this alleged governmental interest."); *accord Windsor*, 699 F.3d at 188; *Pedersen*, 881 F. Supp. 2d at 340-41; *Varnum*, 763 N.W.2d at 901.

The only effect that Ohio's marriage recognition ban has on children's well-being is that it *harms* the children of same-sex couples who are denied the protection and stability of having parents who are married. The *Windsor* Court aptly described how families with same-sex parents are treated by laws such as Ohio's marriage recognition ban:

> The differentiation demeans the couple, whose moral and sexual choices the Constitution protects . . . . And it humiliates . . . children now being raised by same-sex couples. The law in question 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 (internal citations omitted).

Like the DOMA statute invalidated in *Windsor*, Ohio's marriage recognition ban serves only to "humiliate" the "children now being raised by same-sex couples" and "make[] 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. "Excluding same-sex couples from civil marriage will not make children of opposite-sex marriages more secure, but it does prevent children of same-sex couples from enjoying the immeasurable advantages that flow from the assurance of a stable family structure in which children will be reared, educated, and socialized." *Goodridge*, 798 N.E.2d at 964 (internal quotation marks and citation omitted)). To the extent that Ohio's marriage recognition ban visits these harms on children as a way to attempt (albeit irrationally) to deter other same-sex couples from having children, the Supreme Court has invalidated similar attempts to incentivize parents by punishing children as "'illogical and unjust.'" *Plyler*, 457 U.S. at 220 (quoting *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972)). "'Obviously, no child is responsible for his

birth and penalizing the . . . child is an ineffectual—as well as unjust—way of deterring the parent.'" *Id.* (quoting *Weber*, 406 U.S. at 175).[84]

The lack of rational connection between the marriage ban and the asserted goals of encouraging children to be raised by heterosexual couples is sufficient to render the marriage ban unconstitutional, even without considering whether the government has a legitimate basis for preferring different-sex over same-sex parents. But 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. See Fulcher Declaration, Doc. 43-1, ¶¶ 18-19 ("[i]n . . . widely variable studies, the same findings continue to emerge: children reared by lesbian and gay parents are doing as well as children raised by heterosexual parents."). The American Psychological Association, the American Academy of Pediatrics, the American Medical Association, the American Academy of Child and Adolescent Psychiatry, and the American Academy of Family Physicians (among others) each have released statements in support of gay and lesbian parents and their ability and rights to rear children. *Id.* at ¶ 16.

This consensus has also been recognized by numerous courts. *See Perry*, 704 F. Supp. 2d at 980 (finding that the research supporting the conclusion 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" is "accepted beyond serious debate in the field of developmental psychology"); *In re Adoption of Doe*, 2008 WL 5006172, at *20 (Fla. Cir. Ct. Nov. 25, 2008) ("[B]ased on the robust nature of the evidence available in the field, this Court is satisfied that

[84]Moreover, any law adopted with the purpose of burdening gay people's ability to procreate would also demand strict scrutiny for implicating the fundamental right to decide "'whether to bear or beget a child.'" *Planned Parenthood of SE Penn. v. Casey*, 505 U.S. 833, 851 (1992) (quoting *Eisenstadt*, 405 U.S. at 453); *see Pedersen*, 881 F. Supp. 2d at 341.

the issue is so far beyond dispute that it would be irrational to hold otherwise; the best interests of children are not preserved by prohibiting homosexual adoption."), *aff'd sub nom. Fla. Dep't of Children & Families v. Adoption of X.X.G.*, 45 So.3d 79 (Fla. Dist. Ct. App. 2010); *Howard v. Child Welfare Agency Rev. Bd.*, Nos. 1999-9881, 2004 WL 3154530, at *9 and 2004 WL 3200916, at *3-4 (Ark. Cir. Ct. Dec. 29, 2004) (holding based on factual findings regarding the well-being of children of gay parents that "there was no rational relationship between the [exclusion of gay people as foster parents] and the health, safety, and welfare of the foster children."), *aff'd sub nom. Dep't of Human Servs. v. Howard*, 238 S.W.3d 1 (Ark. 2006); *Varnum*, 763 N.W.2d at 899 and n.26 (concluding, after reviewing "an abundance of evidence and research," that "opinions that dual-gender parenting is the optimal environment for children . . . is based more on stereotype than anything else"); *Golinski*, 824 F. Supp. 2d at 991 ("More than thirty years of scholarship resulting in over fifty peer-reviewed empirical reports have overwhelmingly demonstrated that children raised by same-sex parents are as likely to be emotionally healthy, and educationally and socially successful as those raised by opposite-sex parents.").

In any event, as discussed above, even without considering the scientific consensus regarding parenting by same-sex couples, the marriage recognition ban still fails constitutional review as a matter of law because there is no rational connection between the state's refusal to recognize the marriages of same-sex couples performed in jurisdictions where they are lawful and optimal parenting. Finally, children being raised by different-sex couples are simply unaffected by whether same-sex couples can marry. *See Windsor*, 699 F.3d at 188; *Golinski*, 824 F. Supp. 2d at 998; *Pedersen*, 881 F. Supp. 2d at 340-41; *Varnum*, 763 N.W.2d at 901.

c. No Legitimate Interest Overcomes the Primary Purpose and Practical Effect of Ohio's Marriage Bans to Disparage and Demean Same-Sex Couples and Their Families.

Because there is no rational connection between Ohio's marriage recognition ban and any of the asserted state interests, this Court can conclude that the marriage ban violates equal protection even without considering whether it is motivated by an impermissible purpose. *See Vill. of Willowbrook v. Olech*, 528 U.S. 562, 565 (2000) (allegations of irrational discrimination "quite apart from the Village's subjective motivation, are sufficient to state a claim for relief under traditional equal protection analysis"). In this case, however, the lack of any connection between Ohio's marriage recognition ban and any legitimate state interest also confirms the inescapable conclusion that it was passed because of, not in spite of, the harm it would inflict on same-sex couples. And, even if it were possible to hypothesize a rational connection between Ohio's marriage recognition ban and some legitimate governmental interest—and there is none—Ohio's marriage recognition ban would still violate equal protection because no hypothetical justification can overcome the unmistakable primary purpose and practical effect of the marriage ban to disparage and demean the dignity of same-sex couples in the eyes of the State and the wider community.

The Supreme Court in *Windsor* recently reaffirmed that when the primary purpose and effect of a law is to harm an identifiable group, the fact that the law may also incidentally serve some other neutral governmental interest cannot save it from unconstitutionality. In defending the constitutionality of DOMA, the Bipartisan Legal Advisory Group ("BLAG") argued that the statute helped serve a variety of federal interests in promoting efficiency and uniformity, as well as the same purported state interests that the State Defendant has asserted and is likely to assert in support of the marriage recognition ban. *See* Merits Brief of Bipartisan Legal Advisory Group

in *United States v. Windsor*, 2013 WL 267026, at *21 (2013). But the Supreme Court held that none of BLAG's rationalizations could save the law. The Court explained that "[t]he principal purpose [of DOMA] [was] to impose inequality, not for other reasons like governmental efficiency," and "no legitimate purpose overcomes the purpose and effect to disparage and injure" same-sex couples and their families. *Windsor*, 133 S. Ct at 2694, 2696; *see also Vance v. Bradley*, 440 U.S. 93, 97 (1979) (rational-basis review is deferential "absent some reason to infer antipathy"); *Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring) ("When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.").

It is indisputable that Ohio's marriage recognition ban was enacted because of, not in spite of, its adverse effect on same-sex couples. The historical background of the marriage recognition ban reflects a targeted attempt to exclude same-sex couples, not a mere side-effect of some broader public policy. *Cf. Windsor*, 133 S. Ct. at 2693 (examining historical context of DOMA); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-67 (1977) (explaining "historical background of the decision" is relevant when determining legislative intent). The marriage recognition ban was not enacted long ago at a time when "many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage." *Windsor*, 133 S. Ct. at 2689. The statutory and constitutional provisions were enacted as specific responses to developments in other jurisdictions where same-sex couples sought the freedom to marry. The marriage recognition ban did not simply represent a failure to include same-sex couples within the broader public policies advanced by marriage; it was a specific, targeted effort to exclude same-sex couples.

The legislative debates similarly reflect an intent to disparage same-sex relationships.[85] In addition to all the other contemporaneous evidence of an impermissible purpose, the inescapable "practical effect" of Ohio's marriage recognition ban is "to impose a disadvantage, a separate status, and so a stigma upon" same-sex couples in the eyes of the state and the broader community. *Windsor*, 133 S. Ct. at 2693; *see also Heckler v. Mathews*, 465 U.S. 728, 739-40 (1984) ("[A]s we have repeatedly emphasized, discrimination itself, by perpetuating 'archaic and stereotypic notions' or by stigmatizing members of the disfavored group as 'innately inferior' and therefore as less worthy participants in the political community . . . can cause serious noneconomic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group.") (footnote and citations omitted). The marriage recognition ban serves to "diminish[] the stability and predictability of basic personal relations" of gay people and "demeans the couple, whose moral and sexual choices the Constitution protects." *Windsor*, 133 S. Ct. at 2694 (citing *Lawrence*, 539 U.S. 558 (2003)). The marriage recognition ban thus constitutes an "official statement that the family relationship of same-sex couples is not of comparable stature or equal dignity to the family relationship of opposite-sex couples" and that "that it is permissible, under the law, for society to treat gay individuals and same-sex couples differently from, and less favorably than, heterosexual individuals and opposite-sex couples." *In re Marriage Cases*, 183 P.3d 384 at 452. That official statement of inequality is "in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres." *Lawrence*, 539 U.S. at 575.

The unmistakable intent of the marriage recognition ban is to impose inequality on gay people and their intimate relationships. As noted above, Ohio's marriage recognition ban is not rationally related to any legitimate purpose. But even if there were a rational connection between

[85] *See* Becker Declaration, pp. 10-32.

the marriage recognition ban and some legitimate purpose, that incidental connection could not "overcome[] the purpose and effect to disparage and to injure" same-sex couples and their families. *Windsor*, 133 S. Ct. at 2696. Ohio's ban on recognition of valid marriages between same-sex couples performed in other jurisdictions cannot survive any level of scrutiny, and therefore violates the Due Process and Equal Protection guarantees of the U.S. Constitution.

6. Same-Sex Married Couples are Entitled to Accurate Death Certificates that Reflect the Existence of the Marriage Just as are Opposite-Sex Married Couples

This Court should enjoin the Defendants from discriminating against same-sex married couples when it comes to filing death certificates that accurately reflect the existence of their marriages. This is a logical, small extension of the holdings in *Windsor* and the protections afforded to lesbians and gay men in recent years through the development of equal protection and due process precedent. The widowed Plaintiffs seek to make permanent the recognition of their marriages on their deceased husbands' death certificates because this is the last official record of their spouses' lives, and they want this document to reflect their legacy as married for the public and for their descendants generations from now who may research their history.[86] Death certificates are important not just for the emotional weight this official document carries for surviving family, but also for more concrete reasons such as their "evidentiary value in both the private and public sector. Financial institutions universally advise surviving spouses to obtain multiple certified copies of death certificates upon the death of their loved ones . . . In the public sector, a death certificate is required for a surviving spouse to claim an interest worth up to $40,000 in one or two of the decedent's separately titled vehicles."[87]

Plaintiff Robert Grunn who, as a funeral director tasked with filling out death certificates, faces the risk of prosecution for purposely making a false statement on a death certificate, is

[86] Declaration of James Obergefell, Doc. 3-1, ¶ 15-17.
[87] McKay Declaration, Doc. 45-1, ¶ 17.

entitled to protection from prosecution and a declaration of his rights and duties when serving same-sex married clients. [88]

V. CONCLUSION

This Court should issue a declaratory judgment that Ohio Revised Code Section 3101.01(C) and Article 15, Section 11 of the Ohio Constitution violate rights secured by the Fourteenth Amendment to the United States Constitution in that same-sex couples married in jurisdictions where same-sex marriage is valid who seek to have their out-of-state marriage accepted as legal in Ohio are treated differently than opposite-sex couples who have been married in states where their circumstances allow marriage in that state but not in Ohio. Further, Plaintiffs move for a permanent injunction prohibiting the defendants and their officers from enforcing those laws upon the Plaintiffs. This includes such officials completing death certificates as the need arises for the plaintiffs in a manner consistent with its order.

Respectfully submitted,

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[88] Robert Grunn Declaration, Doc. 34-1, ¶ 17.

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CERTIFICATE OF SERVICE

I hereby certify that on October 29, 2013, a copy of the foregoing pleading was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I further certify that a copy of the foregoing pleading and the Notice of Electronic Filing has been served by ordinary U.S. mail upon all parties for whom counsel has not yet entered an appearance electronically.

/s/Alphonse A Gerhardstein