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' REPLY IN RESPONSE**
THEODORE E. WYMYSLO, M.D., et. al.,	:	**TO DEFENDANT WYMYSLO'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR**
	:	**DECLARATORY JUDGMENT AND**
Defendants.	:	**PERMANENT INJUNCTION**

PLAINTIFFS' REPLY IN RESPONSE TO DEFENDANT WYMYSLO'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR DECLARATORY JUDGMENT AND PERMANENT INJUNCTION

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I. INTRODUCTION

Defendant Wymyslo sees only two issues – the "ongoing debate about the proper definition of marriage" and whether "the people through their democratic decision-making processes, define marriage." (Doc. 56, p. 42). Defendant is wrong. This case is about the recognition of out of state same-sex marriages in a very narrow context – issuance of death certificates.

Defendant would have this Court stand down and abandon its duty to address the constitutional issue presented when Ohio refuses to issue death certificates that reflect the valid out of state marriages of the married Plaintiffs in this case. The Supreme Court did not stand down when in *United States v. Windsor*, 133 S. Ct. 2675 (2013), it held unconstitutional a federal law that denied recognition to marriages between same-sex couples while extending recognition to marriages between opposite-sex couples. Relying on Justice Ginsburg's recent remarks about the Court's decision in *Roe v. Wade* at the University of Chicago, Defendant Wymyslo appeals to "judicial restraint." Justice Ginsburg did not say that the Supreme Court should have refused to enforce the constitution when it was faced with the *Roe* case. Rather, she said it should have "struck down only the Texas law that brought the matter before the Court. That law allowed abortions only to save a mother's life."[1] Plaintiffs are not asking for a sweeping decision invalidating the Ohio ban on same-sex marriage celebration and recognition in all respects. Rather, this case seeks measured, limited relief.

John Arthur is dead. He was married to James Obergefell. Defendant Wymyslo cannot identify any interest that supports Ohio's refusal to recognize his marriage and record John's marriage on his death certificate. The same argument applies to William Ives. That is the real

[1] http://bigstory.ap.org/article/ginsburg-says-roe-gave-abortion-opponents-target (last visited November 30, 2013) (cited by Defendant at Doc. 56, p.45).

issue facing the Court. A ruling for the Plaintiffs in this case properly applies the principle of equal protection to the plight of plaintiffs who have been denied recognition of their marriages under the legislative and popularly enacted measures in Ohio. After granting limited relief regarding death certificates there remains every opportunity as Justice Ginsburg recommended (and the Defendant has requested), to allow "change to develop in the political process." *Id*.

II. ARGUMENT

A. *Baker v. Nelson*, 409 U.S. 810 (1972) Does not Control this Case.

Defendant wrongly suggests that *Baker v. Nelson*, 409 U.S. 810 (1972) requires this Court to reject the claims of Plaintiffs. This one line decision rendered forty-one years ago no longer has any significant weight in light of the intervening case law. The United States District Court for the Middle District of Pennsylvania recently held that *Baker* is not controlling in a Pennsylvania marriage equality case because the Supreme Court's doctrine has substantially changed since 1972. *Whitewood v. Wolf*, 1:13-cv-1861, "Memorandum and Order," Nov. 15, 2013 (Exhibit A, attached). That court correctly held that "significant doctrinal developments in the areas of due process and equal protection . . . eviscerate any utility or controlling effect that Defendants posit *Baker v. Nelson* may have . . . ." *Id.* at 6, *citing Hicks v. Miranda*, 422 U.S. 332, 344 (1975) ("[I]f the Court has branded a question as unsubstantial, it remains so except when doctrinal developments indicate otherwise [.]").

In *Baker*, the plaintiffs appealed a decision of the Minnesota Supreme Court declining to recognize marriage between same-sex couples. There have been significant developments affecting marriage equality since 1972 when *Baker's* one-line decision was issued finding "[t]he appeal is dismissed for want of a substantial federal question." 409 U.S. 810. For example, in *Windsor*, the Second Circuit held that one of the reasons *Baker* did not control was that "[i]n the

forty years after *Baker*, there have been manifold changes to the Supreme Court's equal protection jurisprudence." *Windsor v. United States*, 699 F.3d 169, 178-79 (2d Cir. 2012), *aff'd*, 133 S. Ct. 2675 (2013); *id.* at 179 ("These doctrinal changes constitute another reason why *Baker* does not foreclose our disposition of this case."). As the Second Circuit explained:

> When Baker was decided in 1971, "intermediate scrutiny" was not yet in the Court's vernacular. Classifications based on illegitimacy and sex were not yet deemed quasi-suspect. The Court had not yet ruled that "a classification of [homosexuals] undertaken for its own sake" actually lacked a rational basis. And, in 1971, the government could lawfully "demean [homosexuals'] existence or control their destiny by making their private sexual conduct a crime."

Id. (citations omitted).

Similarly, *Baker* could not and did not address how Plaintiffs' substantive due process claims should be evaluated in light of the Court's intervening decisions in *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Turner v. Safley*, 482 U.S. 78 (1987); *Lawrence v. Texas*, 539 U.S. 558 (2003); and *Windsor*, 133 S. Ct. 2675 (2013).

Baker also is not controlling here because it involved different issues than those presented in this case. Summary dispositions "prevent lower courts from coming to opposite conclusions on the *precise issues presented and necessarily decided* by those actions." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (emphasis added). *Baker* addressed the constitutionality of a Minnesota marriage law passed at a time before there was any public discussion about marriage for same-sex couples. It did not consider the constitutionality of a law that specifically was enacted by a state in order to preclude marriage for same-sex couples and whether such an enactment had the "purpose and effect to disparage and to injure" same-sex couples. *Windsor*, 133 S. Ct. at 2696. Of central importance for this case is the fact that *Baker* did not consider the constitutionality of a law barring *recognition* of valid marriages of same-sex couples entered into

in other jurisdictions. By contrast, in *United States v. Windsor*, decided just last term, the Supreme Court struck down a law prohibiting the federal government from recognizing valid marriages of same-sex couples, marking a critically significant doctrinal development in the context of marriage recognition bans. Thus, *Baker* poses no bar to the relief requested by Plaintiffs in this case.

B. The Reach of *Windsor* is Not Limited by Its Discussion of the Traditional Role of States in Marriage Regulation

The Court's opinion in *Windsor* discussed issues of federalism only to establish that DOMA "reject[ed] the long established precept" that "the Federal Government [defers] to state-law policy decisions with respect to domestic relations" and "departs from th[e] history and tradition of reliance on state law to define marriage." *Windsor*, 133 S. Ct. at 2692. This departure, coupled with the obvious anti-gay animus expressed by Congress in passing DOMA, *Id.* at 2693, helped make DOMA a "[d]iscrimination[] of an unusual character" which merited "careful consideration to determine whether [it was] obnoxious to the [C]onstitution[] . . . ." *Id.* at 2692 (citing *Romer v. Evans*, 517 U.S. 620, 633 (1996) (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37-38 (1928))). Once subjected to such "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). In short, the purpose of DOMA was "to impose inequality, not [to further] other reasons like governmental efficiency." *Id.* at 2694 (2013). The Court held that "no legitimate purpose overc[ame]" this illegitimate purpose, *Id.* at 2696, and thus DOMA was "unconstitutional as a deprivation of the liberty of the person

protected by the Fifth Amendment of the Constitution." *Id.* at 2695. The Court further noted that "[t]he liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws." *Id.*

Justice Scalia in his dissent expressly stated that notions of federalism would not set any boundary on the impact of the majority opinion. *Windsor*, 133 S. Ct. at 2705. Any exercise of governmental power, federal or state, must comport with the protections of the Fourteenth Amendment, including the Equal Protection Clause. *Windsor* made this point explicit:

> [t]he States' interest in defining and regulating the marital relation, *subject to constitutional guarantees*, stems from the understanding that marriage is more than a routine classification for purposes of certain statutory benefits. Private, consensual sexual intimacy between two adult persons of the same sex may not be punished by the State, and it can form 'but one element in a personal bond that is more enduring. . . . The power the Constitution grants it also restrains.

Id. at 2692, 2695 (emphasis added). *See also Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (Eleventh Amendment sovereign immunity limited by the Fourteenth Amendment); *Ex parte Commonwealth of Virginia*, 100 U.S. 339, 346 (1879) ("The prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power. . . . [I]n exercising her rights, a State cannot disregard the limitations which the Federal Constitution has applied to her power. Her rights do not reach to that extent."); *Loving v. Virginia*, 388 U.S. 1, 7 (1967) (while marriage is a social relation subject to the state's police power, its power to regulate marriage is not unlimited under the Fourteenth Amendment).

Like the federal government's departure from the longstanding principle of letting states decide the definition of marriage, Ohio has departed from its long history of recognizing marriages from out-of-state that it would not allow in its borders. This makes the discrimination at issue here one of "unusual character" just like in *Windsor*. Thus, that decision provides an

important platform upon which this Court may act to protect the Plaintiffs rather than a barrier to such action.

C. Section 2 Of DOMA Does not Trump the Constitution or Prevent any Holding That Ohio's Application of its Marriage Laws Violates the Constitution.

Plaintiffs are not challenging Section 2 of DOMA in this lawsuit even though it is questionable whether it is a valid exercise of Congress's power. There is simply no need to reach that issue. Section 3 of DOMA, which defined marriage for all federal purposes as "only a legal union between one man and one woman" and spouse as "only . . . a person of the opposite sex who is a husband or a wife," was declared unconstitutional in *Windsor*.

Section 2 of DOMA, however, was not at issue in *Windsor*. It reads as follows:

> No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

28 U.S.C. § 1738C.

The Defendant wrongly suggests that Section 2 provides protection from the constitutional challenge in this case. Doc. 56, p. 9. The Supreme Court has stated that the "requirement of full faith and credit is to be read and interpreted in the light of well-established principles of justice, protected by other constitutional provisions which it was never intended to modify or override." *Bigelow v. Old Dominion Copper Mining & Smelting Co.*, 225 U.S. 111, 134 (1911). *See also Botz v. Helvering*, 134 F.2d 538, 545 (8th Cir. 1943) (same); *Wetmore v. Karrick*, 205 U.S. 141 (1907) (full faith and credit clause necessarily to be interpreted in connection with other provisions of the Constitution). Further, the Plaintiffs have based their claims on equal protection and due process and not the Full Faith and Credit Clause.

DOMA Section 2 therefore does not give Ohio license to violate portions of the Constitution, including the Fourteenth Amendment's guarantees of equal protection and due process.

D. Ohio Denies Marriage Recognition to Married Same-Sex Couples But Extends Marriage Recognition to Similarly Situated Married Opposite-Sex Couples.

Whether this Court applies heightened scrutiny or rational basis as it decides the issue of equal protection, as a threshold matter it must determine if Ohio treats opposite-sex couples married in other jurisdictions differently than same-sex couples married in other jurisdictions. The one case cited by Defendants to challenge this premise is not about marriage recognition at all. *In re Stiles Estate*, 59 Ohio St.2d 73, 391 N.E.2d 1026 (1979) (Doc. 56 at 14). In *Stiles*, the Supreme Court of Ohio, in a case involving a probate estate, declined to recognize a common law marriage between an uncle and niece allegedly entered into *in Ohio*. *Id.* There is no valid comparison between *Stiles* and the instant case. The married Plaintiffs in this case did not attempt to marry in Ohio. Furthermore, there was no argument that the incestuous marriage between uncle and niece in *Stiles* was valid in any state outside Ohio, unlike the two states where Plaintiffs were married and sixteen others plus the District of Columbia which allow marriage between same-sex couples.

Plaintiffs' prior arguments and this Court's analysis in its temporary restraining order decision (Doc. 13) remain unchallenged. Where opposite-sex couples marry outside Ohio and seek to have their marriages recognized in Ohio, even if such marriage could not legally be solemnized in Ohio, those marriages are granted recognition. However, same-sex couples who are married in other jurisdictions are treated differently under Ohio law—their marriages are denied recognition. Defendant Wymyslo seeks to justify this different treatment by noting that there is an express law prohibiting same-sex marriage recognition. Of course, this reasoning is

circular because laws challenged on the basis that they are unconstitutional cannot be found constitutional because the challenged measure is expressly written into state law. Further, the possibility that there may be some marriages between opposite-sex couples performed in other jurisdictions that Ohio might not recognize does not change the fact that the marriage ban creates a classification based on sexual orientation that causes same-sex married couples to be treated differently than similarly situated opposite-sex married couples.

E. Heightened Scrutiny Should be Applied Because this Case Involves Both a Suspect Class and a Fundamental Right. Ohio's Marriage Recognition Ban Fails Under Heightened Scrutiny

1. *Equality Foundation* must be reexamined in light of subsequent Supreme Court precedent, and is not controlling here.

Defendant Wymyslo argues that the 1997 *Equality Foundation* case and its progeny prevent this Court from using anything but rational basis scrutiny. *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 301 (6th Cir. 1997); *Davis v. Prison Health Servs.*, 679 F.3d 433, 438 (6th Cir. 2012); *Scarbrough v. Morgan Cnty. Bd. of Educ.*, 470 F.3d 250, 261 (6th Cir. 2006). However, in *Equality Foundation* the court rejected heightened scrutiny based on the decision *Bowers v. Hardwick*, 478 U.S. 186 (1986)(rejecting challenge to criminal sodomy statute). The Sixth Circuit explained that, "homosexuals did not constitute either a 'suspect class' or a 'quasi-suspect class' *because the conduct which defined them as homosexuals was constitutionally proscribable*." *Equality Foundation*, 128 F.3d at 293 (emphasis added). Of course since that 1997 decision the courts and the public have all learned that gay people are not "defined" by conduct. Moreover, the Supreme Court reversed *Bowers* and eliminated any precedential value the case may have retained when in *Lawrence v. Texas*, 539 U.S. 588 (2003), the Court struck down a Texas sodomy statue as unconstitutional. The Court stated that the statute

> seek[s] to control a personal relationship that . . . is within the liberty of persons to choose without being punished as criminals. This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects. It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.

Id. at 567. In *Scarbrough*, the Sixth Circuit relied on *Equality Foundation* without conducting an independent analysis. *Scarbrough,* 470 F.3d at 261. Then in *Davis*, the court cites to *Scarbrough* for the proposition that sexual orientation is not a suspect classification in the Sixth Circuit further entrenching the reliance on pre-*Lawrence* case law. *Davis*, 679 F.3d at 438.

The Supreme Court expressed disfavor with the rationale used in *Bowers* to uphold Georgia's sodomy law—that the majority of the electorate found homosexual sodomy immoral:

> First, the fact that a State's governing majority has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice. Second, individual decisions concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of "liberty" protected by the Due Process Clause of the Fourteenth Amendment.

Lawrence v. Texas, 539 U.S. 558, 578 (2003) (*quoting* Justice Steven's dissent in *Bowers).* The Supreme Court went on to explain that this analysis "should have been controlling in *Bowers* and should control here. *Bowers* was not correct when it was decided, and it is not correct today." *Id.*

Thus, to the extent the Defendant suggests that targeting same sex relationships for harm is itself an appropriate state purpose, the Defendant is wrong and after *Lawrence*, *Equality Foundation* cannot be used to support that notion in any respect. Defendant further notes *Equality Foundation*'s mention of the importance of respecting measures that are passed by the electorate. Nothing in that decision, however, suggests that popularly enacted measures need not comply with the constitution.

Defendant Wymyslo fails to offer any justifications for how the state's refusal to recognize Plaintiffs' marriages and record those marriages on the state issued death certificates advances any legitimate purpose. As explained in detail in the opening brief and below, the Ohio marriage ban as applied to death certificates fails to comply with the constitution whether heightened scrutiny or rational basis is applied.

2. Facts matter. This Court should consider the overwhelming facts that support Plaintiffs' claim of heightened scrutiny and discriminatory purpose

Defendant Wymyslo dismisses the entire factual presentation of the plaintiffs in one sentence, "Relatedly, the Court need not consider Plaintiff's declarations relating to whether sexual orientation is a suspect class." Doc. 56, p. 20. Defendant then cites to the *Equality Foundation* decision after remand from the Supreme Court as authority for that proposition. *Id.* (*citing* 128 F.3d 289). That decision does not support such a sweeping dismissal of the factual record. Moreover, that decision did not discuss at all the weight to be given the facts. An earlier decision vacated by the Supreme Court discussed the factual record. *Equality Foundation of Greater Cincinnati v. City of Cincinnati*, 54 F.3d 261 (6th Cir. 1995) *cert granted, judgment vacated*, 518 U.S. 1001 (1996). Even that decision fails to support the notion that a court "need not consider" the facts. Rather, it simply said that certain facts which have particular constitutional significance can be reviewed *de novo* by the Court of Appeals. In short, nothing in any of the *Equality Foundation* opinions suggests that facts do not matter.

Indeed, since the trial court decision in *Equality Foundation* twenty years ago, other courts have reviewed the important issues of the nature of sexual orientation, the history of discrimination, the political power of gays and other issues that bear on heightened scrutiny and have agreed with the findings made by Judge Spiegel. *See Equal. Found. of Greater Cincinnati,*

Inc. v. City of Cincinnati, 860 F. Supp. 417, 426-427 (S.D. Ohio 1994); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 998-1003(N.D. Cal. 2010) *aff'd sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012) *vacated and remanded sub nom. Hollingsworth v. Perry*, 133 S. Ct. 2652 (U.S. 2013); *Windsor v. United States*, 699 F.3d 169, 181-85 (2d Cir. 2012) *cert. granted*, 133 S. Ct. 786 (2012) and *aff'd,* 133 S. Ct. 2675 (2013); *Varnum v. Brien*, 763 N.W.2d 862, 889-96 (Iowa 2009); *Kerrigan v. Comm'r of Pub. Health*, 289 Conn. 135, 174-226, 957 A.2d 407, 431-61 (2008).

3. Sexual orientation is a suspect classification entitled to heightened scrutiny.

This Court is not limited by the Sixth Circuit's previous statements that gays and lesbians are not a suspect class, *see e.g., Scarbrough v. Morgan Cnty. Bd. of Educ.,* 470 F .3d 250, 261 (6th Cir. 2006), because those decisions rely on case law following *Bowers v. Hardwick,* 478 U.S. 186 (1986) before it was overruled by *Lawrence v. Texas,* 539 U.S. 558 (2003).[2] See Section II. E. 1, supra. In the wake of *Lawrence,* other courts have recognized that gays and lesbians are entitled to heightened scrutiny as a class. *See, e.g., Kerrigan v. Comm 'r of Pub. Health,* 957 A.2d 407, 432-62 (Conn. 2008); *Varnum v. Brien,* 763 N. W.2d 862, 889-97 (Iowa 2009); *Windsor v. United States*, 699 F.3d 169, 181- 185 (2d Cir. 2012) (applying intermediate scrutiny) *aff'd on other grounds,* 133 S. Ct. 2675 (2013).[3]. The U.S. Department of Justice, after carefully examining the factors discussed below, concluded that heightened scrutiny should

[2] Plaintiffs contend that *Equality Federation* and its progeny do not resolve the question of whether sexual orientation constitutes a suspect classification. Should the Court find those cases controlling, Plaintiffs ask the Court to analyze the heightened scrutiny factors so that the Court of Appeals may properly revisit the question and conclude that sexual orientation classifications are entitled to heightened scrutiny.

[3] The Supreme Court's affirmance on other grounds of the Second Circuit decision in *Windsor* does not undercut its precedential value. *See* e.g., *In re Schafer,* 689 F.3d 601, 604, 606 (6th Cir. 2012) (describing as one of its "precedents" "*Hood v. Tennessee Student Assistance Corp*., 319 F.3d 755 (6th Cir.2003), *aff'd on other grounds,* 541 U.S. 440 (2004); *Balintulo v. Daimler AG*, 727 F.3d 174, 191 (2d Cir. 2013) ("The law of this Circuit already provides answers to some of those questions, including the principle that corporations are not proper defendants under the ATS in light of prevailing customary international law, *see Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 149 (2d Cir.2010), aff'd on other grounds, 133 S.Ct. at 1669″).

apply to sexual orientation classifications. Brief for the Petitioner United States (Merits), Department of Justice, U.S. v. Windsor, 133 S.Ct. 2675 (2013) (No. 12-307), 16-36.

As fully explained in the opening brief, there are several factors that clearly support a finding that heightened scrutiny should apply. First, there can be no dispute that gays and lesbians have historically experienced discrimination, both nationwide and in Ohio. Defendant incorrectly argues that because gays and lesbians have secured some rights in some states that they are therefore not subjects of historical discrimination. No struggle for equal rights is completely linear. And no current gain eliminates a history of discrimination. Second, gays and lesbians lack "sufficient political strength to bring a prompt end to the prejudice and discrimination [that they suffer] through traditional political means," *Kerrigan,* 957 A.2d at 444. *See Lyng v. Castillo*, 477 U.S. 635, 638 (1986). As traced in the opening brief, this is true both at a national level and within Ohio.

Third, gays and lesbians have "obvious, immutable, or distinguishing characteristics that define them as a discrete group." *Lyng*, 477 U.S. at 638. Sexual orientation is a distinguishing characteristic that defines gays and lesbians as a discrete, socially visible group. *See Lawrence,* 539 U.S. at 568 (tracing emergence of sexual orientation as a discrete identity category in the late 19th century). Evidence also shows that sexual orientation is an immutable characteristic. *See Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 986 (N.D. Cal. 2012) ("[T]he consensus in the scientific community is that sexual orientation is an immutable characteristic"). Fourth, sexual orientation "bears no relation to [anyone's] ability to perform or contribute to society." *Frontiero,* 411 U.S. at 686. "[S]exual orientation bears no relation to a person's ability to participate in or contribute to society, a fact that many courts have acknowledged." *Kerrigan,* 957 A.2d at 434; *Golinski,* 824 F. Supp. 2d at 983; *Perry*, 704 F. Supp. 2d at 1002; *Equality*

Foundation of Greater Cincinnati, Inc. v. Cincinnati, 860 F.Supp. 417, 437 (S.D.Ohio 1994) ("[S]exual orientation ... bears no relation whatsoever to an individual's ability to perform, or to participate in, or contribute to, society.... If homosexuals were afflicted with some sort of impediment to their ability to perform and to contribute to society, the entire phenomenon of 'staying in the [c]loset' and of 'coming out' would not exist; their impediment would betray their status."), *rev'd on other grounds,* 54 F.3d 261 (6th Cir.1995), *vacated and remanded*, 518 U.S. 1001, 116 S.Ct. 2519, 135 L.Ed.2d 1044 (1996). *See generally* Doc 53-1, pp. 18–28.

When heightened scrutiny is applied, the Defendant must establish that the Ohio marriage recognition ban as applied to Plaintiffs' request for and provision of death certificates to same-sex couples married in jurisdictions permitting such marriages is "substantially related to an important governmental objective." *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (six year statute of limitations for paternity action failed heightened scrutiny). Moreover, under heightened scrutiny a statute must be defended based upon the "actual [governmental] purposes" supporting the measure and not simply based on post-hoc "rationalizations." *United States v. Virginia*, 518 U.S. 515, 535-536 (1996) (Virginia violated equal protection when it maintained military school for men and not for women.) Defendant Wymyslo simply argues that heightened scrutiny does not apply and has failed to identify any actual governmental purpose that is substantially related to the marriage recognition ban. There simply is none and the measure must fail under this test.

4. Heightened scrutiny is appropriate because the marriage recognition ban violates a fundamental right

Marriage is a fundamental right under Supreme Court precedent. "Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival." *Loving*, 388 U.S. at 12 (1967). Defendant Wymyslo's attempt to recast the right as one of "same-sex marriage" is disingenuous. Just as the freedom of religion applies to people of all religions or non-religions,

so too does the marriage right apply to all people. Christians do not have to secure a separate "freedom of Christian religion." They are entitled simply to the free exercise of religion. Likewise, marriage applies to all people regardless of their race, creed, or sexual orientation. There is nothing about gay and lesbian people that makes them less entitled to this fundamental right.

The Supreme Court has also recognized that the Due Process Clause provides a substantive right of intimate association, which means that "personal decisions relating to . . . family relationships" are constitutionally protected from state interference. *Lawrence,* 539 U.S. at 573; *Moore v. City of E. Cleveland*, 431 U.S. 494, 499 (1977) ("[W]hen the government intrudes on choices concerning family living arrangements, [courts] must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged resolution."). To survive the heightened scrutiny applicable to such impingements, a court must find that important governmental interests are at stake, the law will significantly further those interests, and the law is necessary to further those interests. *Witt v. Dep 't of Air Force*, 527 F.3d 806, 817 (9th Cir. 2008) (applying the heightened scrutiny required by *Lawrence); Cook v. Gates*, 528 F.3d 42,61 (1st Cir. 2008) (same).

The marriage laws at issue here directly and substantially interfere with the married Plaintiffs' family relationships by preventing them from receiving the myriad benefits provided by the state to married couples, including the benefit of being recognized on one's spouse's death certificate. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) ("[E]ven though a person has no 'right' to a valuable government benefit . . . [the government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests."). Moreover, the Marriage recognition ban enshrined in the state constitution fences out the plaintiffs. Gay men and

lesbians cannot simply lobby their legislature to secure the right to marry. They must mount a campaign to amend the entire constitution in order to secure their rights. As it violates a fundamental right the marriage recognition ban is a denial of substantive due process and must be held unconstitutional as applied in this case to the issue of death certificates.

F. The Marriage Recognition Ban As Applied to Death Certificates Fails Under Rational Basis Review

As thoroughly discussed above, and in Plaintiffs' Memorandum in Support of its Motion for Declaratory Judgment and Permanent Injunction, the reasons for applying heightened scrutiny to this case are well established and convincing. Doc. 53-1 at 15-37. But even if the Court applies rational basis review to this case, the Ohio marriage recognition ban fails judicial review under that standard as well.

Defendant argues that rational basis review should be more deferential when the challenged enactment is established by referendum. But of course Colorado Amendment 2 was just such an enactment. The Supreme Court stated in that case that, "even in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained." *Romer v. Evans*, 517 U.S. 620, 632 (1996). In *Romer*, the Court invalidated a Colorado constitutional amendment that prohibited all legislative, executive, or judicial action designed to protect gay and lesbian persons from discrimination. *Id.* at 635-36. The Court held that

> [T]he amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and, as we shall explain, invalid form of legislation[, and that] its 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; it lacks a rational relationship to legitimate state interests.

Id. at 632. Applying rational basis review, the Sixth Circuit has examined the "relation between the classification adopted and the object to be obtained" and invalidated several laws under this

deferential standard. For example, in in *People's Rights Organization, Inc. v. City of Columbus*, 152 F.3d 522 (6th Cir. 1996), the court stated that "[r]ational basis review, while deferential, is not toothless," and proceeded to invalidate a "grandfather" clause exception from an ordinance banning the sale, transfer, acquisition, or possession of assault weapons. *Id.* at 532. The court found no valid nexus between the City's proposed justification for the exception and the means through which it was carried out. *Id.* at 531-32. In *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002), the Sixth Circuit invalidated a Tennessee statute that allowed only licensed funeral directors to sell caskets, urns, and other funeral merchandise. *Id.* at 222-23. While noting that only a handful of statutes have been invalidated using rational basis review, the Sixth Circuit nevertheless found that the law did not promote public health or safety, and that the law's only purpose was to "privilege certain businessmen over others at the expense of consumers." *Id.* at 229. The court held the law lacked a legitimate purpose and therefore failed rational basis review. *Id.*

Similarly, in *Maxwell's Pic-Pac v. Dehner*, 887 F. Supp. 2d 733 (W.D. Ky. 2012), the Western District of Kentucky held that a Kentucky law which prohibited grocery stores and gas stations from selling wine and liquor, but potentially allowed all other retailers to do so, created a classification that lacked a rational relationship to a legitimate state interest. In doing so, it found in the record no actual correlation between the state's proffered purposes for the law and the classification the law created. *Id.* at 748-51. The court also twice noted that "deference is not an abdication of judicial review." *Id.* at 744, 751.

Of course in *Windsor* the federal statute prohibiting the federal recognition of marriages between same-sex couples also failed under a rational basis test. In that case, the Court found the federal DOMA unconstitutional because the classification failed to serve any legitimate

governmental purpose. Ohio's marriage recognition ban, like the measure in *Windsor*, fails rational basis 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.

Further, even in the case cited by Defendant supporting rational basis review for classifications based upon sexual orientation, the Sixth Circuit identified gay and lesbian individuals as an "identifiable group for equal protection purposes," stating that "the desire to effectuate one's 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 Servs.*, 679 F.3d 433, 438, 441. *See also*, *Stemler v. City of Florence*, 126 F.3d 856, 873 (6th Cir. 1997) (recognizing equal protection claim stated by lesbian mistreated by police); *Bassett v. Snyder*, --- F. Supp. 2d ----, 2013 WL 3285111 (June 28, 2013) at *24-26 (holding that "*[t]he historical background and legislative history of the Act* [prohibiting same-sex partners from receiving public employee benefits] demonstrate that it was motivated by animus against gay men and lesbians," and the plaintiffs thus demonstrated a likelihood of success on the merits of their equal protection claim) (emphasis added). Thus, the Supreme Court and Sixth Circuit have both recognized that the lowest level of review for an equal protection challenge, rational basis, nonetheless has teeth. Defendant has identified no rational relationship between the stated goals and the marriage recognition ban. Indeed the Ohio law, like the federal law in *Windsor* is based on a bare desire to harm gay and lesbian people.

1. Respect for democratic process

The Defendant asserts an interest in defining marriage through the democratic process and avoiding what it sees as judicial intrusion upon a historically legislative function. The

Defendant claims that this avoidance of judicial intrusion allows the state to approach "social change with deliberation and care." Doc. 56, p. 33-35. The majoritarian process is not always the best means for establishing the rights of minority groups. This balancing among the three branches of government was anticipated and viewed as critical by the founders. The Federalist No. 78. Sometimes judicial intervention is necessary to preserve the rule of law. *See, e.g.*, *Watson v. City of Memphis*, 373 U.S. 526, 528 (1963) (rejecting appeal by city to permit delay in desegregation based on alleged "need and wisdom of proceeding slowly and gradually.") Moreover there is no sunset provision or study period set out in the Ohio marriage recognition ban so there is no deliberation promoted simply by deferring to the constitutional amendment as it presently stands. As the Ninth Circuit correctly found, acting with "deliberation and care" is not a reason that supports a purpose of harming gay people. *Perry v. Brown*, 671 F.3d 1052, 1090 (9th Cir. 2012) *cert. granted*, 133 S. Ct. 786, 184 L. Ed. 2d 526 (U.S. 2012) and *vacated and remanded sub nom. Hollingsworth v. Perry*, 133 S. Ct. 2652, 186 L. Ed. 2d 768 (U.S. 2013) (vacated on other grounds).

2. Preserving traditional definition of marriage

Defendant Wymyslo also asserts a policy interest in preserving the "traditional definition of marriage." Doc. 56, 36. Defendant Wymyslo claims a "desire to ensure that any such issues are fully analyzed and appropriately accommodated on any considered course of action." *Id*. However, much like the previous argument, the marriage recognition ban does not set aside a time period or mechanism for discussing the potential implications of recognizing the marriages of couples performed in other jurisdictions. Instead, it permanently deprives married same-sex couples like the married Plaintiffs the right to ever have their marriages recognized in this state.

The appeal to tradition standing alone is also problematic. The Supreme Court has firmly held that "tradition" alone cannot justify the government's discrimination against a class of individuals. *Williams* v. *Illinois*, 399 U.S. 235, 239 (1970) (noting in an equal protection challenge that "neither the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack"); *Heller v. Doe by Doe*, 509 U.S. 312, 326-27 (1993) ("Ancient lineage of a legal concept does not give it immunity from attack for lacking a rational basis."); *See VMI*, 518 U.S. at 535-536 (invalidating longstanding tradition of single-sex education at Virginia Military Institute); *see also Lawrence*, 539 U.S. at 577-578 ("[N]either history nor tradition could save a law prohibiting miscegenation from constitutional attack.") (quoting *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting)). Indeed, similar statements about the need to preserve the "institution" of heterosexual marriage were the very justifications found insufficient by the Supreme Court in *Windsor*. 133 S. Ct. at 2693.[4]

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. v. Cleburne Living Ctr.*, 473 U.S. 432, 454, n.6 (1985) (Stevens, J., concurring) (alterations incorporated; internal quotation marks omitted); *see also Marsh v. Chambers*, 463 U.S. 783, 791-92 (1983) (even longstanding practice

[4] In *Perry v. Schwarzenegger*, 704 F. Supp. 2d at 998, the trial court found none of the following purported state interests viable to maintain a prohibition on same-sex marriage: (1) reserving marriage as a union between a man and a woman and excluding any other relationship from marriage; (2) proceeding with caution when implementing social changes; (3) promoting opposite-sex parenting over same-sex parenting; (4) protecting the freedom of those who oppose marriage for same-sex couples; (5) treating same-sex couples differently from opposite-sex couples; and (6) any other conceivable interest.

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 384, 853-54 (Cal. 2008) ("[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, hearing in banc denied, 680 F.3d 1104 (9th Cir. 2012) and appeal dismissed, 724 F.3d 1048 (9th Cir. 2013) ("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).

3. Religious liberty

Defendant Wymyslo argues that the traditional definition of marriage should not be altered "without evaluating steps to safeguard the religious rights and beliefs of others." Doc. 56, 36. He cites to a 2011 letter to the New York Legislature from several law professors. *Id.*

Defendant does not claim a governmental purpose, grounded in religion, as support for the marriage recognition ban. Defendant's argument regarding religion addresses future issues with respect to how one would accommodate persons religiously opposed to the marriages between same-sex couples in a state where such marriages are legal. Plaintiffs of course are not asking this Court to edit or otherwise draft any new legislation for Ohio regarding same-sex marriage. If and when Ohio legislators address that issue they will have ample time to consider all sides of the debate. Other states have navigated these waters before. *See, e.g.*, Conn. Gen. Stat. Ann. § 46b-22b, § 46b-35a, and § 46b-35b. There are no religious concerns relevant to the death certificates at issue in this case.

4. State Interest Related to Children

As fully explained in Plaintiffs' opening brief, (Doc. 53-1, pp. 42-45), there is no rational connection between the Ohio marriage recognition ban and the asserted goal of providing family settings where children are well-adjusted. The Ohio marriage recognition ban does not prevent same-sex couples from having children. In fact, the ban harms the children of same-sex couples who are denied the protection and stability of having parents who are married. *Windsor*, 133 U.S. at 2694. Moreover, the very notion that the state can deter same-sex parents from having children by punishing their children is itself "illogical and unjust." *See* Doc. 53-1, 44-45 and cases cited. Children raised by opposite-sex couples are simply unaffected by whether same-sex couples can marry further exposing the lack of any rational connection between the goal and the marriage recognition ban. *Id.*

The Defendant – appropriately – has not sought to defend the marriage recognition ban based on any claim that married opposite-sex couples make better parents than married same-sex couples. Nor has the Defendant challenged the expert testimony offered by Plaintiffs that

children raised by same-sex couples fare just as well as children raised by married heterosexual couples. Only an amicus brief filed by Citizens for Community Values (CCV) argues to the contrary. (Doc. 61).

CCV incorrectly claims that children need to be raised in families with opposite-sex parents in order to develop healthily. Psychologists have identified factors that predict healthy development and adjustment, among which are the quality of a child's relationship with their parent or parent figure, the quality of the relationship between the parents and other significant adults, and the availability of adequate economic and social resources. Fulcher Expert Report, Doc. 43-1, ¶ 10. These factors are determinative regardless of whether children are raised by two parents of the same sex or two parents of opposite sexes. *Id.* Whether a child is raised by same-sex or opposite-sex parents has no bearing whatsoever on the child's psychological adjustment. *Id.* at ¶ 9.

CCV's amicus brief asserts that children of heterosexual two-parent families fare better than those of gay and lesbian couples because men and women offer unique contributions to the care and development of children. CCV Amicus Brief, Doc. 61, p. 3. In support of this assertion, CCV cites a number of social science studies discussing differences in parenting style that are common among heterosexual couples raising children. CCV Amicus Brief, pp. 4-8. The studies cited do not support the conclusion that the presence of both a male and a female parent in the home enhances the adjustment of children and adolescents. Fulcher Expert Report, Doc. 43-1, ¶ 13(c). Rather, the observed differences in parenting style are largely attributable to the type of responsibility that the parent has within the home. *Id.* Both men and women are equally capable of being good parents, *Id*, and research shows that there is a range of suitable parenting styles and parents need not adopt a particular parenting style for their children to be well-adjusted. *See*

Paul R. Amato & Frieda Fowler, *Parenting Practices, Child Adjustment, and Family Diversity, 64 Journal of Marriage & Family* 703, 714 (2002). As the district court in *Perry* correctly concluded, "[c]hildren do not need to be raised by a male parent and a female parent to be well adjusted, and having both a male and a female parent does not increase the likelihood that a child will be well-adjusted." 704 F. Supp. 2d 921, 981 (N.D. Cal. 2010). *See also* Brief of Amici Curiae American Sociological Association, 2013 WL 840004 at *28, filed in *Hollingsworth v. Perry*, 133 S.Ct. 2652 (2013); *U.S. v. Windsor*, 133 S.Ct. 2675 (2013) (Nos. 12-144, 12-307).[5]

CCV also cites several studies[6] regarding the impact of divorce and one parent family life for the proposition that the optimal situation for development is for the child to grow up with two biological parents in the household. CCV amicus, Doc. 61, p. 3. But these studies offered no conclusions about the significance of biological parenthood. Moreover, they do not purport to examine same-sex parents or their children, and thus do not shed light on the wellbeing of children raised by same-sex parents. Brief of Amici Curiae American Sociological Association, 2013 WL 840004 at **26-27. The authors of one of the principal studies relied on by CCV, the Child Trends study, have publicly disavowed attempts to distort the meaning of their research. *See* Moore, *Marriage from a Child's Perspective,* introductory note advising that "no conclusions can be drawn from the research about the well-being of children raised by same-sex parents or adoptive parents."); see also Brief of Amici Curiae American Sociological

[5] CCV incorrectly asserts that Dr. Michael Lamb, a leading expert in developmental psychology and an expert witness in *Perry*, has supported its view. CCV amicus brief, Doc. 61, pp. 3-4. But CCV flagrantly mischaracterizes Dr. Lamb's testimony in that case. *See* relevant excerpts of trial transcript from Perry, Exhibit B, attached (p. 1064-1070).

[6] Sara McLanahan & Gary Sandefur, *Growing Up With a Single Parent: What Hurts, What Helps* 1 (1994); Wendy D. Manning & Kathleen A. Lamb, *Adolescent Well-Being in Cohabiting, Married, & Single-Parent Families*, 65 J. Marriage & Fam. 876, 890 (2003); Kristen Anderson Moore, et al., *Marriage from a Child's Perspective,* Child Trends Research Brief at 1-2 (2002).

Association, 2013 WL 840004 at **26-27 (debunking similar attempts to mischaracterize this body of research). [7]

Finally, CCV claims that a study by Mark Regnerus supports its position that heterosexual couples make optimal parents. Mark D. Regnerus, *How Different Are the Adult Children of Parents Who Have Same-Sex Relationships? Findings from the New Family Structures Study*, 41 Social Science Research 752 (2012). But this study allows for no such conclusion because it did not actually examine outcomes for children raised by same-sex parents. Rather, Regnerus examined children who had a parent who had at any time had a same-sex romantic relationship, the majority of whom were the offspring of failed opposite sex unions whose parent subsequently had a same-sex relationship. His heterosexual comparison group was restricted to only those families that remained intact throughout the child's childhood. This study merely reflects the well-documented fact that children tend to do better in stable, intact families than they do after experiencing their parents' divorce. Regnerus himself recognized that "[c]hild outcomes in stable, 'planned' [gay, lesbian or bisexual] families and those that are the product of previous heterosexual unions are quite likely distinctive, as previous studies' conclusions would suggest." *Id.*, at 765. *See also* Brief of Amici Curiae American Sociological Association, 2013 WL 840004 at *16-22, filed in *Hollingsworth v. Perry*, 133 S.Ct. 2652 (2013); *U.S. v. Windsor*, 133 S.Ct. 2675 (2013) (Nos. 12-144, 12-307)[8]

[7] CCV also attempts to discredit respected studies that have concluded that children of same-sex couples fare just as well as children of opposite-sex couples by suggesting that these studies cannot be trusted because of methodological flaws. CCV Amicus Brief, Doc. 61, pp. 8-9. But there is no basis for this characterization of the research, which was published in respected, rigorously peer-reviewed journals and meet the standards for research in the field. Fulcher Expert Report, Doc. 43-1, ¶ 17.

[8] Moreover, Regnerus' study has been discredited by an internal audit conducted by the journal that published it. *See* Darren E. Sherkat, *The Editorial Process and Politicized Scholarship: Monday Morning Editorial Quarterbacking and a Call for Scientific Vigilance*, Social Science Research 41 (2012) 1346–1349. The auditor concluded that the paper has "serious flaws and distortions" and should not have been published. *Id.* at 1347, 1349.

In sum, the CCV amicus brief provides no support for the proposition that children are better off with opposite-sex parents than same-sex parents. The Defendant was wise to abandon this argument. The unsupported and misleading arguments of CCV do not provide any basis for this Court to find that the refusal to recognize same-sex marriages on death certificates rationally relates to any state interest in the wellbeing of children.

G. This Court is Presented With a Narrow Question and Only Limited Relief is Requested

In the end, Defendant Wymyslo asks this Court to ignore the equal protection and due process violations that are injuring the plaintiffs because to act would allegedly thwart the will of the voters in a manner inconsistent with an alleged duty to act with restraint. Defendant is wrong. The electorate cannot order a violation of the Equal Protection Clause by referendum or otherwise, just as the state may not avoid its application by deferring to the wishes or objections of a body politic. *City of Cleburne, Tex.*, 473 U.S. at 448.

Should the Court have concerns about the potential implications of its ruling, it may limit its decision to the question squarely before it. See, e.g., *Cleburne*, 473 U.S. at 477; Cf., *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328 (2006). ("[W]hen confronting a constitutional flaw in a statute, we try to limit the solution to the problem.") It is not unusual for a case to be decided on narrow grounds rather than striking a statute down on its face. *See City of Cleburne*, 473 U.S. at 447; *Ayotte*, 546 U.S. at 329.

In *City of Cleburne*, the Supreme Court considered whether an ordinance requiring a permit for "[h]ospitals for the insane or feeble-minded, or alcoholic [sic] or drug addicts, or penal or correctional institutions" violated equal protection as applied to a group home for mentally challenged persons. 473 U.S. at 447. The Court concluded that the law violated Equal Protection as applied to the plaintiff because the group home in question posed no different or

special hazard to the community that justified the requirement for a permit. *Id.* at 448. The Court purposefully refrained from determining whether the law could be applied constitutionally in other circumstances beyond those raised by the plaintiff. *Id.* at 447. This allowed the Court to avoid making an unnecessarily broad constitutional judgment. *Id. See also Ohio Citizen Action v. City of Englewood*, 671 F.3d 564, 570-71(6th Cir. 2012) (Addressing an as applied challenge first without reaching plaintiffs' facial challenge to avoid making an unnecessary constitutional ruling).

In this case, the only matter before the Court is the application of the marriage recognition ban in the context of death certificates. The case at bar is not a facial attack on the Ohio constitutional amendment or the Ohio statute banning celebration and recognition of marriages of same-sex couples in Ohio. This case does not include any request to recognize all marriages between same-sex couples from other jurisdictions for all purposes. Nor do Plaintiffs request permission for same-sex couples to marry in Ohio. Plaintiffs seeking that relief in future cases may well state valid claims and courts facing those issues may well need to issue new injunctions. But those issues are not presently before the Court. Those issues can be separately aired perhaps after additional developments that may occur through the political process. Plaintiffs in this case seek only the limited relief they need – recognition of valid marriages performed in jurisdictions where such marriages are legal on Ohio death certificates. The Defendant has identified no state interest that overcomes the equal protection and due process violations caused by Defendant.

III. CONCLUSION

Plaintiffs' Motion for Declaratory Judgment and Permanent Injunction should be granted.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on December 9, 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