Nos. 14-2386, 14-2387 & 14-2388

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MARILYN RAE BASKIN, *et al.*,
Plaintiffs-Appellees,

v.

PENNY BOGAN, *et al.*,
Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of Indiana, No. 1:14-cv-00355 (Hon. Richard L. Young)

MIDORI FUJII, *et al.*,
Plaintiffs-Appellees,

v.

COMMISSIONER OF THE INDIANA STATE DEPARTMENT OF REVENUE, in his official capacity, *et al.*,
Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of Indiana, No. 1:14-cv-00404 (Hon. Richard L. Young)

PAMELA LEE, *et al.*,
Plaintiffs-Appellees,

v.

BRIAN ABBOTT, *et al.*,
Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of Indiana, No. 1:14-cv-00406 (Hon. Richard L. Young)

BRIEF FOR AMICUS CURIAE GAY & LESBIAN ADVOCATES & DEFENDERS IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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Appellate Court Nos: 14-2386, 14-2387 &14-2388

Short Captions: *Baskin v. Bogan*; *Fujii v. Commissioner of the Indiana State Department of Revenue; Lee v. Abbott*

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Attorney's Signature: /s/ Paul R.Q. Wolfson Date: August 5, 2014
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INTEREST OF AMICUS CURIAE[1]

Founded in 1978, Gay & Lesbian Advocates & Defenders (GLAD) is a public interest legal organization dedicated to ending discrimination based on sexual orientation, HIV status, and gender identity and expression. GLAD has litigated widely in both State and federal courts in all areas of law in order to protect civil rights. Of particular relevance, GLAD recently litigated successful challenges to Section 3 of the Defense of Marriage Act (DOMA). *Massachusetts v. HHS*, 682 F.3d 1 (1st Cir. 2012), *cert. denied*, 133 S. Ct. 2887 (2013); *Pedersen v. OPM*, 881 F. Supp. 2d 294 (D. Conn. 2012), *cert. denied*, 133 S. Ct. 2888 (2013).

SUMMARY OF ARGUMENT

Since the Supreme Court decided *United States v. Windsor*, 133 S. Ct. 2675 (2013), every federal court to consider whether a State's laws banning the solemnization or recognition of marriages of same-sex couples violate the Equal Protection Clause has held that they do. One question put to those courts—and put to this Court in these cases—is whether a State's refusal to solemnize or recognize marriages of same-sex couples is rationally related to a legitimate government

[1] No counsel for a party authored this brief in whole or in part, and no one other than amicus, its members, or its counsel made any monetary contribution toward the brief's preparation or submission. All parties to these appeals have consented to this brief's filing. *See* Joint Notice of Consent to the Filing of Amicus Curiae Briefs, *Baskin v. Bogan*, No. 14-2386 (July 14, 2014).

purpose. The answer is no. Such a targeted denigration of same-sex couples violates the Equal Protection Clause under rational-basis review. That conclusion warrants affirmance with respect to Indiana's and Wisconsin's laws here.[2]

As the Supreme Court recognized in striking down DOMA in *Windsor*, excluding gay and lesbian couples from the rights and responsibilities that flow from civil marriage serves no legitimate government purpose. Instead, it "impose[s] a disadvantage, a separate status, and so a stigma" upon same-sex couples. *Windsor*, 133 S. Ct. at 2693. *Windsor* was entirely consistent with the Supreme Court's prior rational-basis cases. Those cases instruct that courts must ensure that legislation meaningfully furthers a legitimate State interest, and that such inquiry should be more searching when the legislation targets a historically disadvantaged group, affects important personal interests, or deviates from historic State practices in a particular field. Moreover, those cases teach that a State's justifications for the challenged legislation must be viewed skeptically when its enactment history suggests animus toward the affected group or that the proffered justifications do not match the classification drawn.

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[2] Although GLAD believes heightened scrutiny is the appropriate standard of review for classifications based on sexual orientation, that question need not be conclusively resolved here because, as the district courts found, these bans fail even rational-basis review. *Baskin v. Bogan*, 2014 WL 2884868, at *11-14 (S.D. Ind. June 25, 2014); *Wolf v. Walker*, 986 F. Supp. 2d 982, 1016-1026 (W.D. Wis. 2014).

Just as each of these considerations was applicable to DOMA in *Windsor*, each applies here and requires invalidation of the States' marriage bans.

ARGUMENT

I. RATIONAL-BASIS REVIEW IS A MEANINGFUL CHECK ON STATE AUTHORITY

The Equal Protection Clause requires that any classifications in the law be made "'without respect to persons.'" *Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591, 602 (2008). Its fundamental command is that people "'under like circumstances and conditions'" should be "'treated alike.'" *Id.* This is the Clause's direction in every case, regardless of the level of scrutiny ultimately employed. *LaBella Winnetka, Inc. v. Village of Winnetka*, 628 F.3d 937, 941 (7th Cir. 2010).

"[W]hile rational basis review is indulgent and respectful, it is not meant to be 'toothless.'" *Windsor v. United States*, 699 F.3d 169, 180 (2d Cir. 2012), *aff'd*, 133 S. Ct. 2675 (2013); *see Sklar v. Byrne*, 727 F.2d 633, 640 (7th Cir. 1984). To the contrary, it requires that (1) legislation be enacted for a legitimate purpose, and not out of prejudice, fear, animus, or moral disapproval of a particular group, and (2) the means chosen be sufficiently and plausibly related to the legitimate purpose, as well as proportional to the burdens imposed.

Most laws will pass muster under this standard, but "deference in matters of policy cannot … become abdication in matters of law." *National Fed'n of Indep.*

Bus. v. Sebelius, 132 S. Ct. 2566, 2579 (2012). Indiana's and Wisconsin's marriage bans fall into the category of cases where the Supreme Court requires closer review. Upon such review, the purported justifications lack any rational connection to a legitimate legislative goal. Accordingly, these States' decisions to specifically disqualify same-sex couples from the institution of civil marriage are invalid.

A. Rational-Basis Review Varies Depending On Context

The application of rational-basis review is neither wooden nor mechanical. The nature and scope of the inquiry depend on the context of the classification, and circumstances may warrant more "careful consideration" of the legislature's purpose and the claimed fit between that purpose and the classification. *See Windsor*, 133 S. Ct. 2693. These circumstances include whether the group targeted by the classification has traditionally been subject to discrimination, whether important personal interests are at stake, and whether the classification reflects a departure from past practices. Where present, these circumstances may undermine the usual expectation that classifications are being drawn in good faith, for genuine purposes, and not arbitrarily or to penalize a disfavored group. *See id.*; *Massachusetts v. HHS*, 682 F.3d 1, 11 (1st Cir. 2012); *cf. Vance v. Bradley*, 440 U.S. 93, 97 (1979) (rational-basis review is deferential "absent some reason to infer antipathy").

When a classification targets a historically disadvantaged group, the Supreme Court has applied "a more searching form of rational basis review." *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring in judgment); *see City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 453 n.6 (1985) (Stevens, J., concurring) (courts must exercise special "vigilan[ce] in evaluating the rationality of any classification involving a group that has been subjected to a 'tradition of disfavor'"). It was pivotal to the Supreme Court's rational-basis review that gay people in *Romer v. Evans*, 517 U.S. 620, 634-635 (1996), "'hippies'" in *USDA v. Moreno*, 413 U.S. 528, 534 (1973), and persons with mental disabilities in *Cleburne*, 473 U.S. at 448, had been the subject of prejudice or disdain. The Supreme Court recognized that the challenged measures might well have been motivated by disapproval of or negative stereotypes about those groups, and it therefore closely assessed the potential explanations for each measure.

The Supreme Court's rational-basis cases also consider the nature of the interests affected by the classification. Even where fundamental rights are not implicated, laws that burden personal and family choices command closer attention. *Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring in judgment). In *Eisenstadt v. Baird*, 405 U.S. 438 (1972), for example, the Supreme Court's analysis was informed by the fact that the challenged law regulated intimate

affairs—in that case, access to contraception. Accordingly, *Eisenstadt* carefully considered how the law operated in practice as well its preferential treatment of married couples, and concluded that the law's real purpose was not the one proffered by the State. *Id*. at 447-453. In *Windsor*, the Court's reasoning turned on the fact that the challenged law affected family arrangements implicating "personhood and dignity." 133 S. Ct. at 2696. The Court could identify no interest that could rebut its conclusion that the "principal purpose and the necessary effect" of DOMA was to "demean" married same-sex couples. *Id*. at 2695.

Finally, the scope of review is also informed by whether the legislative act represents a departure from prior acts in the same policymaking domain. For example, *Romer*'s rational-basis analysis was mindful of the fact that the Colorado constitutional amendment at issue was "unprecedented" and of "'an unusual character.'" 517 U.S. at 633; *see also Windsor*, 133 S. Ct. at 2693. Among other things, State classifications that "singl[e] out a certain class of citizens for disfavored legal status or general hardships" are highly unusual in our society and warrant careful examination. *Romer*, 517 U.S. at 633.

These factors all require a more searching review of these States' bans on same-sex couples marrying and on recognition of same-sex couples' marriages.

First, it is beyond cavil that gay people have historically been mistreated and disadvantaged. *See Lawrence*, 539 U.S. at 571 ("[F]or centuries there have been

powerful voices to condemn homosexual conduct as immoral."); *see also SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 485-486 (9th Cir. 2014).

Second, marriage has been "recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Loving v. Virginia*, 388 U.S. 1, 12 (1967). It implicates a profound and "intimate relationship between two people," *Windsor*, 133 S. Ct. at 2692, reflecting a "personal bond that is more enduring," *Lawrence*, 539 U.S. at 567.

Third, the States' marriage bans are anomalous in the context of their general marriage policies. *See Baskin v. Bogan*, 2014 WL 2884868, at *14 (S.D. Ind. June 25, 2014) (Indiana's challenged law "is an unusual law for Indiana to pass"); *Wolf v. Walker*, 986 F. Supp. 2d 982, 1017-1018 (W.D. Wis. 2014) (Wisconsin's marriage amendment is "unusual" and "rare, if not unprecedented"). Both States impose sweeping and targeted disadvantages on a particular group of persons that are different from the ways in which these States effectuate their other public policies about marriage. For example, unlike their laws that simply prohibit those who are already married or consanguineous from marrying, Wis. Stat. § 765.03(1); Ind. Code §§ 31-11-1-2, 31-11-1-3, Wisconsin and Indiana prohibit not only the solemnization of marriages within the State, but also the recognition of marriages lawfully solemnized elsewhere, solely for same-sex couples, Wis. Const. art. XIII, § 13; Wis. Stat. §§ 765.001(2), 765.01; Ind. Code § 31-11-1-1. Thus,

rather than retaining these States' "traditional" form of marriage regulation (*e.g.*, Wis. Br. 4, 15, 46-48, 50-52; Ind. Br. 12, 22-26, 34, 39-40, 43), the bans manifest a class-based hostility born of animosity. The breadth of the "disfavored legal status" and "general hardships" imposed by these States' bans requires careful judicial examination. *Romer*, 517 U.S. at 633.

The marriage recognition bans depart from these States' historic law that generally respects marriages lawfully solemnized in another State. Indiana's longstanding general rule is that "Indiana will accept as legitimate a marriage validly contracted in the place where it is celebrated." *Mason v. Mason*, 775 N.E.2d 706, 709 (Ind. Ct. App. 2002) (citing *Bolkovac v. State*, 98 N.E.2d 250, 254 (Ind. 1951)). Wisconsin employs a similar general rule. *Appling v. Doyle*, 826 N.W.2d 666, 673 (Wis. Ct. App. 2012) ("[W]e follow the general rule that '[m]arriages valid where celebrated are valid everywhere.'"); *Xiong ex rel. Edmondson v. Xiong*, 648 N.W.2d 900, 903 (Wis. Ct. App. 2012) ("Generally, whether a marriage is valid is controlled by the law of the place where the marriage was contracted.").

Accordingly, Indiana has recognized out-of-State marriages even when they could not be solemnized within Indiana itself, such as a marriage between certain first cousins that "could not be validly contracted between residents of Indiana."

Mason, 775 N.E.2d at 709.[3] It is only marriages of same-sex couples that Indiana statutorily refuses to recognize "'even if the marriage is lawful in the place where it is solemnized.'" *Id.* at 709 n.3 (quoting Ind. Code § 31-11-1-1(b)); *see also McPeek v. McCardle*, 888 N.E.2d 171, 174 & n.2 (Ind. 2008) (citing Ind. Code § 31-11-1-1(b) as the only example of an Indiana "public policy" exception to the "general rule of law … that a marriage valid where it is performed is valid everywhere"). Likewise, Wisconsin excludes same-sex couples from its general practice of recognizing even those out-of-State marriages that could not have been solemnized within Wisconsin. *See, e.g.*, *In re Ferguson's Estate*, 130 N.W.2d 300 302 (Wis. 1964) (recognizing the Michigan marriage of a man with child-support

[3] Indiana argues (Br. 46-47) that *Mason* is not good law because an Indiana Supreme Court decision issued eighty years prior, *Sclamberg v. Sclamberg*, 41 N.E.2d 801 (Ind. 1942), held an out-of-State marriage between an uncle and his niece to be void. In fact, *Sclamberg* did not so hold; it simply noted the parties did not contest the issue. 41 N.E.2d at 802-803.

Similarly, Indiana (Br. 45) overreads *Roche v. Washington*, 19 Ind. 53 (1862), which concerned a marriage of members of an Indian tribe. Consistent with prevailing law, the court relied on international, not domestic, law when addressing the rights of the Indian couple. *Roche*, 19 Ind. at 59 (addressing application of "*jus gentium*"—the law of nations). To the extent the court addressed domestic law at all, *Roche* decided that Indiana law governed that marriage's validity—not because, as Indiana contends (Br. 45), "the *lex loci* principle applies only where Indiana and the *lex loci* State generally agree as to what constitutes a valid marriage," but instead because the *lex loci* State *was* Indiana since "[t]he marriage … was contracted in Indiana" and "all territorial jurisdiction of the tribe had ceased in the State." *Roche*, 19 Ind. at 59-60.

obligations to a minor child from a prior marriage, despite a Wisconsin statute that prohibited issuing a marriage license to such an individual).

The States' response that marriages of same-sex couples violate their "public policy" (Ind. Br. 44, 46; Wis. Br. 55) is insufficient. Even "public policy" must satisfy the Equal Protection Clause. The States fail to justify the particular classification their laws impose, which distinguishes gay and lesbian couples from others—such as consanguineous heterosexual couples in Indiana, or couples in which one individual has preexisting child-support obligations to a child of another marriage in Wisconsin—to whom these States have not applied their out-of-State marriage recognition bans. These States' decisions to jettison their longstanding practice in order to treat out-of-State marriages between same-sex couples differently is, to say the least, of "'an unusual character.'" *Romer*, 517 U.S. at 633.

Moreover, Indiana enacted its marriage-recognition ban, and Wisconsin enacted its constitutional marriage ban, following the passage of DOMA, which the Supreme Court characterized as a Congressional attempt to "put a thumb on the scales and influence a state's decision" to prohibit same-sex marriage. 133 S. Ct. at 2693 (citations and internal quotation marks omitted). In *Windsor*, the Court found that DOMA's "principal purpose and necessary effect" was to "demean" same-sex couples, "burden[] their lives," and "humiliate[] their children." *Id.* at 2694. These unprecedentedly broad state bans on same-sex marriage enacted in

the wake of DOMA likewise "especially suggest careful consideration to determine whether they are obnoxious to" the Equal Protection Clause. *Id.* at 2693.

These contextual factors, applied in this case, inform the core equal protection inquiry: whether a government has singled out a class of citizens in order to disadvantage them. *Romer*, 517 U.S. at 633. Where the above-described factors are present, as here, they suggest that the "purpose and practical effect" of a law are impermissibly "to impose a disadvantage, a separate status, and so a stigma" upon the citizens of a particular class. *Windsor*, 133 S. Ct. at 2693.

Even putting aside these factors, the States' generalizations about legislative deference are inapposite. The States (Ind. Br. 31; Wis. Br. 48, 54 n.7) make broad statements about the deferential nature of rational-basis review, relying upon *FCC v. Beach Communications, Inc.*, 508 U.S. 307 (1993). But *Beach* involved a challenge to a legislative "[d]efin[ition] [of] the class of persons subject to a regulatory requirement," which is an "unavoidable component[]" of *economic regulatory* legislation. *Id.* at 315-316. In such a context, there is generally little danger that a State is morally disapproving of whole categories of citizens, and therefore little reason for skepticism about its justification. *See Armour v. City of Indianapolis*, 132 S. Ct. 2073, 2080 (2012). By contrast, the States' decisions here

disqualify an entire swath of persons from a civil institution of fundamental societal importance—with highly stigmatizing consequences.

Likewise, in advocating deference to the democratic process, Wisconsin overreads (Wis. Br. 42-43, 55; *see also* Colorado et al. Amicus Br. 17) the plurality opinion in *Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623 (2014). These marriage bans, unlike the law in *Schuette*, do not merely involve the "sensitive issue" of whether to preclude *preferential* treatment for a minority, 134 S. Ct. at 1638; instead, they impose unequal, *injurious* treatment upon that minority. The *Schuette* opinion emphasizes that "the Constitution requires redress by the courts" when "hurt or injury is inflicted on" a minority by the "command of laws or other state action." *Id.* at 1626. That is the case here, where the challenged bans "place[] same-sex couples in an unstable position of being in a second-tier marriage," "demean[] the couple, whose moral and sexual choices the Constitution protects," and "humiliate[] … children now being raised by same-sex couples." *Windsor*, 133 S. Ct. at 2694. The fact that voters directly enacted a State constitutional amendment does not insulate it from constitutional scrutiny. *See, e.g*, *Schuette*, 134 S. Ct. at 1631-1632 (reaffirming *Reitman v. Mulkey*, 387 U.S. 369 (1967), which invalidated a California constitutional amendment that "encouraged discrimination, causing real and specific injury"); *Romer*, 517 U.S. at 635 (invalidating Colorado constitutional amendment that "inflict[ed] on [gays and

lesbians] immediate, continuing, and real injuries"); *Lucas v. Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713, 736-737 (1964) ("A citizen's constitutional [equal protection] rights can hardly be infringed simply because a majority of the people choose that it be.").

B. Rational-Basis Review Requires A Legitimate Government Purpose

Under rational-basis review, the court must first determine whether the challenged classification was imposed for a *legitimate* purpose. A State's failure to articulate a legitimate justification for the law is fatal under any standard of review. Thus, even applying rational-basis review, a court should not unquestioningly accept a State's representation about the classification's purpose. *See Eisenstadt*, 405 U.S. at 452 (a "statute's superficial earmarks as a health measure" could not cloak its purpose).

As the Supreme Court has recognized, "some objectives … are not legitimate state interests." *Cleburne*, 473 U.S. at 446-447. Disfavoring a particular group of individuals might be a consequence of a government policy, but cannot be its object. "The Constitution's guarantee of equality 'must at the very least mean that a bare [governmental] desire to harm a politically unpopular group cannot' justify disparate treatment of that group." *Windsor*, 133 S. Ct. at 2693 (quoting *Moreno*, 413 U.S. at 534-535). The equal protection guarantee prohibits not only classifications based on "negative attitudes," "fear," or "irrational

prejudice," *Cleburne*, 473 U.S. at 448, 450, but also those based on "indifference," "insecurity," "insensitivity," or "some instinctive mechanism to guard against people who appear to be different in some respects from ourselves," *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374-375 (2001) (Kennedy, J., concurring); *see also id.* at 375 ("malicious ill will" is not necessary to invalidate a classification).

Likewise, legislative classifications that "identif[y] persons by a single trait," *Romer*, 517 U.S. at 633, and treat them as "not as worthy or deserving as others," *Cleburne*, 473 U.S. at 440, violate the individual's right to equal protection. And the bare desire to *favor* one set of individuals is just as invalid as the desire to *disfavor* the opposite set. *Kelo v. City of New London*, 545 U.S. 469, 491 (2005) (Kennedy, J., concurring) (government action "intended to favor a particular private party" or "intended to injure a particular class of private parties" fails rational-basis review); *see also Sklar*, 727 F.2d at 639 (closer scrutiny required for provisions that "grant preferences to a special group").

The Supreme Court has repeatedly confirmed that laws that target gays and lesbians for exclusion from benefits or the imposition of burdens on account of their sexual orientation cannot survive review. In *Romer*, the Court considered a Colorado constitutional amendment that prohibited local legislation that would protect citizens from discrimination on account of their sexual orientation. The

local legislation was meant, in the Court's view, to ensure gay people's right to participate in "transactions and endeavors that constitute ordinary civic life." *Romer*, 517 U.S. at 631. The Court reasoned that the amendment, by precluding laws meant to provide that modicum of civil rights, "classifie[d] homosexuals … to make them unequal to everyone else." *Id.* at 635. *Lawrence* followed *Romer*, affirming that all adults share an equal liberty to exercise their private, consensual sexual intimacy. 539 U.S. at 564, 574-575. Most recently, in *Windsor*, the Court invalidated DOMA, which sought to differentiate marriages of same-sex and heterosexual couples, because "no legitimate purpose overcomes the purpose and effect to disparage and to injure" the "personhood and dignity" of same-sex couples. 133 S. Ct. at 2696.

These decisions are unified by a common instruction: Because denying gay people the same opportunities and freedoms that other citizens enjoy impermissibly demeans them, laws that disfavor gay people and their relationships—or that privilege heterosexual people and their relationships—cannot survive even rational-basis review if they were designed for that purpose.

C. Rational-Basis Review Requires A Meaningful Connection Between The State's Classification And Its Asserted Goals

The second step of rational-basis review requires assessing the rationality of the connection between the challenged classification and the goals it purportedly serves. "[E]ven 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*, 517 U.S. at 632. It is this "search for the link between classification and objective" that "gives substance to the Equal Protection Clause." *Id.* "By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, [the court] ensure[s] that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Id.* at 633; *see Heller v. Doe*, 509 U.S. 312, 321 (1993) ("[E]ven the standard of rationality … must find some footing in the realities of the subject addressed by the legislation."); *New York State Club Ass'n v. City of N.Y.*, 487 U.S. 1, 17 (1988) (classification lacks a rational basis where "the asserted grounds for the legislative classification lack any reasonable support in fact").

In evaluating this connection, the Supreme Court considers the proportionality between the classification and the legislative end. If a classification has sweeping or particularly profound consequences—like the marriage bans at issue in this case—a more forceful justification is required. The State constitutional amendment in *Romer*, for example, "identifie[d] persons by a single trait and then denie[d] them protection across the board," disqualifying them from seeking protection from the State legislature or State courts. 517 U.S. at 633. Given the

amendment's scope, the Court found that there could be no explanation for it other than a desire to disadvantage gay people. *Id*. at 634-635.

Courts will also find a lack of the required relationship between the classification and a legitimate justification where the justification offered suggests the unfavorable treatment should extend to a wider class of persons, but the measure exclusively burdens the disfavored group. In *Cleburne*, the city cited residential density concerns to defend an ordinance requiring a special-use permit for a group home for people with mental disabilities. 473 U.S. at 449-450. The Court was skeptical because no similar permit was required for other group living arrangements causing the same density issues. *Id.* at 447. Likewise in *Eisenstadt*, although unmarried persons were prohibited certain contraceptives, married couples could obtain them "without regard to their intended use" and without regard to the claimed purpose of deterring all persons from "engaging in illicit sexual relations." 405 U.S. at 449.

The rational-relationship requirement is not met by mere speculation about factual circumstances under which the law might advance some legitimate purpose. While the Supreme Court affords leeway for legislators to make reasonable predictions and judgments about unknown facts, it does not permit States to invent facts, or declare them by fiat, in order to justify a law that would otherwise appear impermissible. *See Heller*, 509 U.S. at 321; *Romer*, 517 U.S. at 632-633. Thus, in

Heller, where the Supreme Court considered Kentucky's differentiation between mental retardation and mental illness for purposes of civil confinement, the State was not permitted simply to speculate that mental retardation is more likely to manifest itself earlier, and is easier to diagnose, than mental illness. Instead, the Court relied upon several diagnostic manuals and journals to determine for itself that Kentucky had legislated based on reasonably conceivable facts rather than stereotypes or misunderstandings. *Heller*, 509 U.S. at 321-325.

In contrast, the Supreme Court has regularly disregarded unsupported and implausible factual assertions offered in defense of discriminatory legislation. *See Moreno*, 413 U.S. at 534-536; *Cleburne*, 473 U.S. at 448-450. Stated otherwise, the Court has rejected some classifications because the fit between them and their purported goals was "attenuated" or "irrational." *Cleburne*, 473 U.S. at 446; *Moreno*, 413 U.S. at 532-533; *see Eisenstadt*, 405 U.S. at 448-452; *see also Turner v. Glickman*, 207 F.3d 419, 424 (7th Cir. 2000).

II. THE STATES' MARRIAGE BANS LACK A RATIONAL BASIS

A. The States' Invocations Of "Tradition" And "Caution" Are Misplaced

The States' protestations (*e.g.*, Ind. Br. 12, 17, 24-26, 42, 49; Wis. Br. 50-54) that excluding same-sex couples from marriage is "traditional" or "historic," or that they seek only to proceed with caution, are wide of the mark. These States go far beyond merely defining marriage in a "traditional" manner. They single out

same-sex couples' marriages for special prohibitions by declaring an entire class of marriages already validly solemnized in other States to be unworthy of recognition, in a manner inconsistent with these States' historic marriage law. *See supra* pp. 7-10. Furthermore, Wisconsin also bars same-sex couples from any "legal status … substantially similar to that of marriage." Wis. Const. art. XIII, § 13. These thoroughgoing disqualifications indicate that the impulse behind the marriage bans is not reinforcement of tradition, but anti-gay animus.

Wisconsin's suggestion (Br. 52-54) that its marriage bans can be justified by an interest in "proceeding cautiously" is belied by their nature. Rather than proceeding cautiously, Wisconsin has enacted "an absolute ban, unlimited in time, on [the recognition of] same-sex marriage in the state constitution," which tends to foreclose any incremental legislative policymaking on the issue. *Perry v. Brown*, 671 F.3d 1052, 1090 (9th Cir. 2012), *vacated for lack of jurisdiction*, 133 S. Ct. 2652 (2013).

A reflexive reference to "tradition" is insufficient to justify these marriage bans; no matter how traditional the practice of heterosexual marriage, the States' laws forbidding recognition or legal status for marriages of same-sex couples must still be scrutinized for rationality. *Heller*, 509 U.S. at 326. And those laws cannot be upheld based simply on a tradition of moral disapproval of same-sex couples or their relationships. *Lawrence*, 539 U.S. at 577 ("'[T]he fact that the governing

majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.'"). In *Windsor*, for example, the Supreme Court treated the expressed legislative desires to "'defend the institution of traditional heterosexual marriage'" and to "'better comport[] with traditional … morality'" and "'protect[] the traditional moral teachings'" as evidence that DOMA was designed to "interfere[] with the equal dignity of same-sex marriages." 133 S. Ct. at 2693 (quoting H.R. Rep. No. 104-664, at 12-13, 16 (1996)).

Nor can appeals to religion (*e.g.*, U.S. Conference of Catholic Bishops et al. Amicus Br. 6-9) rescue the laws. *See Windsor*, 133 S. Ct. at 2693 (noting, disapprovingly, the legislative statement that DOMA's view on marriage "'better comports with traditional (especially Judeo-Christian) morality'"). While the States' stance opposing marriages of same-sex couples and the recognition thereof may reflect one strand of religious belief, several religious traditions and many religious adherents support same-sex couples joining in marriage and the recognition of those marriages. *See, e.g.*, Bishops of the Episcopal Church in Ohio et al. Amicus Br. 3, 10-21, *Henry v. Himes*, No. 14-3464 (6th Cir. July 15, 2014); Anti-Defamation League et al. Amicus Br. 20-21, *Henry*, No. 14-3464 (6th Cir. July 15, 2014). Indeed, several religious groups have argued for allowing government marriage licenses for same-sex couples, explaining that the First

Amendment permits religious bodies to have their own definitions of marriage. *See, e.g.*, Bishops of the Episcopal Church in Ohio et al. Br. 21-25; American Jewish Committee Amicus Br. 27, *Perry v. Hollingsworth*, No. 12-144 (U.S. Feb. 28, 2013). And advancing one faith's preferred conception of marriage (by coercively denying access to the civil institution of marriage to same-sex couples) is not a legitimate State interest. *See, e.g.*, *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1817-1823 (2014) (purpose of government action cannot be "'to proselytize or advance any one, or to disparage any other, faith or belief,'" or "to promote a preferred system of belief or code of moral behavior").

B. The States' Bans Are Not Rationally Related To Encouraging "Responsible Procreation" Or Children's Welfare

Indiana argues (Br. 33-34), and Wisconsin adopts the argument by reference (Br. 56), that the States' marriage bans are designed to encourage responsible procreation and to ensure that children receive stable care from their biological parents. In fact, the bans are not rationally related to those purposes.

First, the States ignore that many same-sex couples already have children and wish to raise them in a stable family environment. The Census estimates that, as of 2010, 2,090 same-sex "householder[s]" in Indiana and 1,505 in Wisconsin resided with their "own children under 18 years" of age. U.S. Census Bureau, *Same-Sex Unmarried Partner or Spouse Households by Sex of Householder by Presence of Own Children: 2010 Census and 2010 American Community Survey*,

http://www.census.gov/hhes/samesex/files/supp-table-AFF.xls (last visited Aug. 4, 2014). Plaintiffs-Appellees in these appeals illustrate the point. Two of the couples are raising at least three children in their "loving, committed relationship[s] [of] over a decade." *Baskin*, 2014 WL 2884868, at *1. In addition, Virginia Wolf and Carol Schumacher have raised two children, and now have four grandchildren, in their loving, committed relationship of over 38 years, Am. Compl. ¶ 30, *Wolf v. Walker*, No. 14-cv-64 (Feb. 27, 2014); Salud Garcia and Pam Kleiss have raised their daughter since her 2001 birth in their relationship of over 18 years (*id.* ¶¶ 80-81); and Bill Hurtubise and Leslie Palmer are raising three children together (*id.* ¶ 86).

By denying the benefits and responsibilities of marriage to these families, the challenged bans undercut the very stability for children that these States extol (Ind. Br. 33; Wis. Br. 56). And the States' decisions to bar recognition of marriages that were already solemnized elsewhere are particularly inconsistent with stability for the affected families. They effectively "eras[e] … Plaintiffs' already-established marital and family relations," sowing confusion and undermining Plaintiffs' "long-term plans for how they will organize their finances, property, and family lives." *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 979 (S.D. Ohio 2013).

The distinction the States' marriage bans draw—whose marriages may be permitted and/or whose pre-existing marriages may be recognized—bears no rational relation to the proffered justification, which focuses on the having and raising of children. *See Eisenstadt*, 405 U.S. at 448-449. The States suggest that same-sex couples do not need marriage because they face no risk of unplanned pregnancy. Ind. Br. 33-34, 42, 52; Wis. Br. 56. This fails for several reasons.

First, the States give no value to the benefits, including stability, that children already being raised by same-sex couples would receive from marriage. The States' bans thereby "humiliate[] … thousands of children now being raised by same-sex couples" by "mak[ing] 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.

Second, the focus on unplanned pregnancy ignores that these States do not preclude marriage recognition for other couples who do not face the prospect of an unplanned pregnancy, such as older or infertile couples. In fact, both Indiana and Wisconsin expressly *exempt* certain older or infertile couples from their bans on consanguineous marriages. Ind. Code § 31-11-1-2 (relatives closer than second cousins may not marry, except first cousins who are both over age 65); Wis. Stat. § 765.03(1) (relatives closer than second cousins may not marry, except first

cousins where the woman is over age 55 or where either partner submits a physician's affidavit that he/she is "permanently sterile"). These facts undercut the States' claims that their laws were designed to promote procreation within marriage by opposite-sex couples, and demonstrate that their marriage bans are not rationally related to that purpose. *See Garrett*, 531 U.S. at 366 n.4; *Eisenstadt*, 405 U.S. at 449; *Cleburne*, 473 U.S. at 447, 449-450; *see also Bostic v. Schaefer*, 2014 WL 3702493, at *14 (4th Cir. July 28, 2014) ("extreme underinclusivity" of Virginia's marriage bans with respect to the State's asserted goals, like the law at issue in *Cleburne*, evinced irrational prejudice); *Kitchen v. Herbert*, 2014 WL 2868044, at *22 & n.9 (10th Cir. June 25, 2014) (a statutory exception for old age or sterility from a consanguineous marriage ban evinced a constitutionally meaningful inconsistency with "the [procreation-focused] message appellants claim the same-sex marriage ban conveys").

The States fail to explain away these inconsistencies and lack of rational fit between their bans and asserted purposes. Indiana claims (Br. 11, 30), for example, that it need not justify the exclusion of same-sex couples from marriage, but only the *inclusion* of opposite-sex couples. That proposition, for which Indiana relies (Br. 30) on *Johnson v. Robison*, 415 U.S. 361 (1974), is legally and factually incorrect. First, the structure and history of Indiana's and Wisconsin's marriage bans shows their design to exclude same-sex couples. *See supra* pp. 7-8. Second,

a desire to privilege heterosexual couples over gay and lesbian couples (whose "choices the Constitution protects," *Windsor*, 133 S. Ct. at 2694), is not a legitimate purpose in any event. *See Kelo*, 545 U.S. at 491 (Kennedy, J., concurring).

Johnson does not help the States. In *Johnson*, the statute at issue denied benefits not only to the challenging class of conscientious objectors, but also to other classes of veterans. 415 U.S. at 363 & nn.1-2. Here, by contrast, only same-sex couples are targeted, even though other classes (such as infertile heterosexual couples, including the older and infertile first-cousin couples for which Indiana and Wisconsin expressly *permit* marriage) similarly threaten or fail to promote the asserted State interests in procreative marriages. *See Cleburne*, 473 U.S. at 449-450. Moreover, the statute in *Johnson* drew a defensible distinction between the excluded and included classes of affected individuals: The active duty veterans who were granted statutory benefits had experienced "quantitatively greater" and "qualitatively different" disruptions from military service than conscientious objectors. 415 U.S. 378-381. But here, as explained below, opposite-sex couples do not have a quantitatively or qualitatively greater entitlement to the benefits—or need for the protections—of marriage than same-sex couples.

Affording marriage to non-procreating opposite-sex couples, but not same-sex couples, cannot be rationally related to the State's proffered justifications.

Indiana suggests (Br. 36) that affording marriage to infertile couples "channel[s] sexual activities" into the infertile marital relationship rather than a fertile relationship one partner might have elsewhere. But this only reinforces that Indiana permits heterosexual marriage based on a couple's wish to engage to solemnize an intimate bond, not the couple's plan to have children—a fact that undercuts Indiana's claim to a procreation-focused view of marriage. And the argument, which rests on the proposition that often "at least one spouse is fertile" (Ind. Br. 36), cannot be reconciled with Indiana's express permission of marriage for first-cousin couples only when *both* partners are over age 65.

Indiana next argues (Br. 36, 37 n.4) that "non-procreating opposite-sex couples who marry model the optimal, socially expected behavior for other opposite-sex couples whose sexual intercourse may well produce children," but this is similarly flawed. Indiana never explains why *same-sex* couples cannot model that behavior. *See Bostic*, 2014 WL 3702493, at *14 ("We see no reason why committed same-sex couples cannot serve as similar role models."). Moreover, if, as Indiana claims, its interest were in encouraging responsible procreation, it fails to explain why opposite-sex couples who cannot or do not wish to have or raise children would "model family life" as Indiana describes (Br. 37 n.4), let alone to a greater degree than same-sex couples who have and raise children. And Indiana's argument is internally inconsistent, because it

simultaneously claims that elderly consanguineous heterosexual couples should be permitted to marry in order to model family life for their "younger, potentially procreative" counterparts (*id.*), yet asserts that it does not want such counterpart "kin [couples] to procreate *at all*" (Br. 37).

The States additionally contend (Ind. Br. 13, 34, 38; Wis. Br. 56) that their marriage bans are rationally related to an interest in ensuring biological parenting. But their laws permit heterosexual couples the very parenting arrangements that they criticize (Ind. Br. 34), such as adoption, Ind. Code § 31-19-2-2; Wis. Stat. § 48.82(1)(a), or sperm donation, Ind. Code § 16-41-14-13; Wis. Stat. § 891.40, which contemplate that children will be raised by persons who are not their biological parents. The States' lack of concern as to whether heterosexual couples raise only their biological children demonstrates that biological child-rearing is neither rationally related to, nor the true motivation for, the marriage bans. *See Cleburne*, 473 U.S. at 447, 449-450; *Eisenstadt*, 405 U.S. at 448-449; *Bostic*, 2014 WL 3702493, at *14 (comparing Virginia's marriage bans' "extreme underinclusivity" to that of the irrationally prejudicial law in *Cleburne*).

Regardless, the focus on unplanned pregnancy, "natural" procreation, and "biological" parenting cannot be rationally related to these States' marriage bans because "it is wholly illogical to believe that state recognition of the love and commitment between same-sex couples will alter the most intimate and personal

decisions of opposite-sex couples." *Kitchen*, 2014 WL 2868044, at *26. The focus also seeks to "single[] out the one unbridgeable difference between same-sex and opposite-sex couples, and transform[] that difference into the essence of legal marriage." *Goodridge v. Department of Pub. Health*, 798 N.E.2d 941, 962 (Mass. 2003). This "impermissibly 'identifies persons by a single trait and then denies them protection across the board.'" *Id.* (quoting *Romer*, 517 U.S. at 633).

To the extent that sources cited by the States' amici (*e.g.*, Mark D. Regnerus et al. Amicus Br. 25-31) even mention marriage and its relationship to children or reproduction, those sources only underscore the importance of stable relationships to children's welfare, but do not indicate that children raised by two parents—let alone a married couple—experience worse outcomes if the parents are of the same sex. *See* American Sociological Ass'n Amicus Br. 2-5, 13-19, 22-29, *Henry*, No. 14-3464 (6th Cir. June 16, 2014). The sources themselves suggest that marriage of same-sex couples and recognition thereof would "improve, not impair, the wellbeing of children raised by currently unmarried same-sex parents," by fostering stability and financial security for them. American Sociological Ass'n Br. 19 (citing a source also cited by Regnerus et al. Amicus Br. 5). The States' amici's unsupported assertions to the contrary are at odds with decades of other research into children of same-sex couples. *See id.* 2-3, 5-13.

The States' amici also argue that the States' marriage bans promote child welfare by ensuring that children are raised by parents of two different sexes. Colorado et al. Amicus Br. 16-17. But there is no reason to surmise that children raised in stable homes fare worse with two parents of the same sex than with parents of two sexes. Moreover, banning marriage based on assumptions of sex-differentiated parenting in individual couples is not rationally related to a legitimate State interest because it is based on sex stereotypes, which the Supreme Court has long held are constitutionally suspect, including with respect to sex stereotypes about parental roles. *Craig v. Boren*, 429 U.S. 190, 198 (1976); *United States v. Virginia*, 518 U.S. 515, 541-542 (1996); *Nevada Dep't of Hum. Res. v. Hibbs*, 538 U.S. 721, 736 (2003).

C. The States' Bans Are Not Rationally Related To "Encouraging Adequate Reproduction"

The States' amici argue that the marriage bans "[e]ncourag[e] adequate reproduction for society to support itself." *See, e.g.*, Colorado et al. Amicus Br. 17. Yet there is no rational basis to predict that banning marriages of same-sex couples or recognition thereof increases birth rates. *See Moreno*, 413 U.S. at 534-536 (rejecting "wholly unsubstantiated" government claim); *Cleburne*, 473 U.S. at 448-450 (similar). If anything, denying marriage recognition to same-sex couples who might seek to have children, albeit by assisted means, would likely decrease birth rates because it would deny couples the structure of recognized marriage that

the States' own amici claim encourages couples to have and raise children (Colorado et al. Amicus Br. 17).

* * *

Given the utter mismatch between the States' bans and the asserted purposes, and the illegitimacy of many of the States' asserted purposes, the inevitable inference is that the bans were "born of animosity toward" gay and lesbian couples. *Romer*, 517 U.S. at 634. The Equal Protection Clause forbids such class-based discrimination to be given the sanction of law under any standard of review.

CONCLUSION

For the foregoing reasons, the Court should affirm the district courts' judgments.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that this brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 32(a)(7)(B) and 29(d).

1. In compliance with Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6), the brief has been prepared in proportionally spaced Times New Roman font with 14-point type using Microsoft Word 2010.

2. Exclusive of the exempted portions of the brief, as provided in Federal Rule of Appellate Procedure 32(a)(7)(B), the brief contains 6,886 words. As permitted by Federal Rule of Appellate Procedure 32(a)(7)(C), I have relied upon the word count feature of Microsoft Word 2010 in preparing this certificate.

/s/ Paul R.Q. Wolfson
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August 5, 2014

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of August, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit using the appellate CM/ECF system. At least one attorney for each party to these appeals is a registered CM/ECF user and will be served by the appellate CM/ECF system.

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