No. 14-5291

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

GREGORY BOURKE, et al.,
Plaintiffs-Appellees,

v.

STEVE BESHEAR, in his official capacity as Governor of Kentucky,
Defendant-Appellant,

and JACK CONWAY, in his official capacity as Attorney General of Kentucky,
Defendant.

On Appeal from the United States District Court for the Western District of Kentucky, No. 3:13-cv-00750 (Hon. John G. Heyburn, II)

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

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June 16, 2014

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 14-5291 Case Name: Bourke v. Beshear

Name of counsel: Paul R.Q. Wolfson

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s/ Paul R.Q. Wolfson

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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This brief addresses issues raised in *DeBoer v. Snyder*, No. 14-1341 (6th Cir.); *Bourke v. Beshear*, No. 14-5291 (6th Cir.); and *Tanco v. Haslam*, No. 14-5297 (6th Cir.). It is being submitted for filing with identical content but separate captions in those cases.

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. *See 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. before judgment denied*, 133 S. Ct. 2888 (2013).

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[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. Amicus appeared in the district court on behalf of Plaintiffs in *DeBoer v. Snyder*, No. 2:12-cv-10285 (E.D. Mich.), but has not served as counsel on appeal for any party. All parties to these appeals, with the exception of Defendants-Appellants in *Bourke*, No. 14-5291, have consented to this brief's filing. GLAD has moved for leave to file this brief in *Bourke*, and counsel for Defendants-Appellants in *Bourke* indicated that they will not file any written objections to that motion.

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 a question put to this Court in these cases—is whether a State's refusal to solemnize marriages of same-sex couples or to respect existing marriages of same-sex couples that are lawfully solemnized outside the State is rationally related to a legitimate government purpose. The answer is no. Every federal court to consider the question since *Windsor* has concluded that such a targeted denigration of same-sex couples and their relationships by a State violates the Equal Protection Clause under rational-basis review. That conclusion is correct and warrants affirmance.[2]

As the Supreme Court recognized in striking down the Defense of Marriage Act 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"

[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, the bans at issue fail even rational-basis review. *See DeBoer v. Snyder*, 973 F. Supp. 2d 757, 769-775 (E.D. Mich. 2014); *Bourke v. Beshear*, __ F. Supp. 2d __, 2014 WL 556729, at *6-8 (W.D. Ky. Feb. 12, 2014); *Tanco v. Haslam*, __ F. Supp. 2d __, 2014 WL 997525, at *6 (M.D. Tenn. Mar. 14, 2014) (plaintiffs likely to succeed on the merits even under rational-basis review).

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 that there is animus toward the affected group or that the proffered justifications do not match the classification drawn.

Just as each of these considerations was applicable to the Defense of Marriage Act in *Windsor*, each applies here and requires invalidation of the States' marriage bans—specifically, Michigan's prohibitions on same-sex couples marrying and on recognition of marriages of same-sex couples; and Tennessee's and Kentucky's bans on recognizing marriages of same-sex couples that are validly solemnized in other States. The judgments of the district courts should be affirmed.

ARGUMENT

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

A. Rational-Basis Review Varies Depending On Context

In its amicus brief supporting the plaintiffs-appellees in *Obergefell v. Himes*, No. 14-3057, GLAD detailed the metes and bounds of rational-basis review under Supreme Court and Sixth Circuit precedent. *See* GLAD *Obergefell* Br. 4-18. We do not repeat most of that analysis here. For present purposes, it suffices to reiterate primarily that the nature and scope of the rational-basis inquiry may depend on the context of the classification, *Windsor v. United States*, 699 F.3d 169, 180 (2d Cir. 2012), *aff'd*, 133 S. Ct. 2675 (2013), and circumstances may warrant a more in-depth look at the legislative purpose and the claimed fit between that purpose and the classification. Where, as here, the group targeted by the classification has traditionally been subject to discrimination,[3] important personal interests are at stake,[4] and the classification reflects a departure from past practices,[5] the usual expectations that classifications are being drawn in good faith,

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[3] *See Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring in judgment); *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 453 n.6 (1985) (Stevens, J., concurring).

[4] *See Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring in judgment); *M.L.B. v. S.L.J.*, 519 U.S. 102, 120, 116 (1996) ("close consideration" for burden upon "[c]hoices about marriage, family life, and the upbringing of children").

[5] *See Romer v. Evans*, 517 U.S. 620, 633 (1996); *Windsor*, 133 S. Ct. at 2693.

for genuine purposes, and not arbitrarily or to penalize a disfavored group are undermined. *See Massachusetts v. HHS*, 682 F.3d 1, 11 (1st Cir. 2012), *cert. denied*, 133 S. Ct. 2887 (2013); *cf. Vance v. Bradley*, 440 U.S. 93, 97 (1979) (rational-basis review is deferential "absent some reason to infer antipathy").

All these factors indicate that a searching form of rational-basis review of the marriage bans at issue here is required.

First, it is beyond cavil that gay people have historically been mistreated and disadvantaged. *See Lawrence v. Texas*, 539 U.S. 558, 571 (2003) ("[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), and 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 those States' marriage policies. For example, Michigan's marriage bans deviate from its usual practice in that they impose sweeping, multiple, and targeted disadvantages on a particular group of persons that are grossly out of proportion to the ways in

which Michigan effectuates its other public policies about marriage. Unlike Michigan's specific statutory provisions declaring the "incapacity" of closely consanguineous couples for marriage or precluding marriage for those who are already married, Mich. Comp. Laws §§ 551.3-551.5, Michigan's multiple and general bans concerning the marriages of same-sex couples are enshrined in Michigan's several statutes *and* constitution, and they forbid marriage, its recognition, and any other "similar union for any purpose" solely for same-sex couples. *Id.* §§ 551.1, 551.3, 551.4; Mich. Const. art. I, § 25.

Similarly, Kentucky imposes more sweeping and targeted bans on marriages of same-sex couples (including the bans challenged here, on recognition of out-of-State marriages of same-sex couples) than on marriages of those who are closely consanguineous or already married. *Compare* Ky. Rev. Stat. Ann. § 402.010 (closely consanguineous), *and id.* § 402.020(1)(b) (already married), *with id.* §§ 402.005, 402.020(1)(d), 402.040(2), 402.045; Ky. Const. § 233A (barring marriage, its recognition, enforcement of rights granted by an out-of-State marriage, and any "legal status identical or substantially similar to that of marriage" for same-sex couples). *See also Bourke v. Beshear*, __ F. Supp. 2d __, 2014 WL 556729, at *7 & n.15 (W.D. Ky. Feb. 12, 2014) (summarizing the Kentucky constitutional amendment's legislative history, which "clearly demonstrates the intent" to target marriages of same-sex couples).

Tennessee's marriage bans, including its challenged recognition bans, suffer from the same infirmities. *Compare* Tenn. Code Ann. § 36-3-101 (closely consanguineous), *and id.* § 36-3-102 (already married), *with id.* § 36-3-113, *and* Tenn. Const. art. XI, § 18 (barring marriage, its recognition, and its "unique and exclusive rights and privileges" to same-sex couples).

Although Tennessee claims its recognition bans were not directed at or discriminatory towards same-sex couples (Br. 18-19), the context and legislative history of Tennessee's sweeping bans contradict that claim. *First*, the rest of the challenged statute demonstrates that subsection (d) of that statute, containing an out-of-State marriage recognition ban, was targeted at excluding same-sex couples. *See* Tenn. Code Ann. § 36-3-113(a), (b), (c) (restricting marriage, including "the only recognized marriage in this state," to relationships of "one (1) man and one (1) woman"); *see also* 1996 Tenn. Pub. Acts 1031 (indicating that Tenn. Code Ann. § 36-3-113 was enacted "relative to *same sex marriages* and the enforceability of *such* marriage contracts" (emphases added)). And floor debates on the statute evince its purpose of moral condemnation and disapproval of gay and lesbian relationships. *See* Compl. ¶¶ 64, 66, *Tanco v. Haslam*, No. 3:13-cv-01159 (M.D. Tenn. Oct. 21, 2013) (quoting Representative Peach as questioning whether a "union of two men or two women ha[s] [ever] produced anything of importance to this society" and whether "the union of two men or two women is

against the very nature of our humanity"; and quoting Senator Fowler as saying that "heterosexual relationships are what are intended because they are in the vast majority"). *Second*, the express phrasing of the recognition ban in Tennessee's Constitution shows that it, too, was targeted at excluding same-sex couples. *See* Tenn. Const. art. XI, § 18 (declaring void any "marriage [that] is prohibited in this state *by the provisions of this section*" (emphasis added), where the section prohibits only marriage that is not between "one man and one woman").

The contrast between these States' regulation of multiple-person or consanguineous marriages, on the one hand, and their bans on same-sex couples' marriages and recognition thereof, on the other, aligns the latter with past marriage restrictions invalidated by the Supreme Court, such as historic race-based marriage bans. *See Loving*, 388 U.S. at 4-7 & nn.3-10, 11-12 (bans against interracial marriages consisted of numerous and sweeping statutory burdens upon the couples). Indeed, rather than "retain[ing]" these States' "traditional" form of marriage regulation (Mich. Br. 15, 27-28, 30; Ky. Br. 15; Tenn. Br. 4, 27), the bans manifest a class-based hostility born of animosity toward the disadvantaged class. In sum, the sheer breadth of the "disfavored legal status" and "general hardships" imposed by these States' bans requires careful judicial examination. *Romer v. Evans*, 517 U.S. 620, 633 (1996).

The challenged bans on recognition of out-of-State marriages of same-sex couples are further anomalous in that they depart from those States' historic observation of the principle of *lex loci contractus*, which generally respects marriages lawfully solemnized in another State, even if those marriages could not have been lawfully solemnized within the State itself. *See, e.g.*, *Noble v. Noble*, 300 N.W. 885, 887 (Mich. 1941) (applying *lex loci contractus* principle to recognize a marriage of partners not of age to marry within Michigan because the marriage was valid in Indiana where it was solemnized); *Farnham v. Farnham*, 323 S.W.3d 129, 134-140 (Tenn. Ct. App. 2009) (declaring that "[i]t has long been generally held that 'a marriage valid where celebrated is valid everywhere'" (quoting *Pennegar v. State*, 10 S.W. 305, 306 (Tenn. 1888)); and recognizing a marriage that would have been prohibited as bigamous under Tennessee law because it was valid under the law of Florida where it was celebrated);[6] *Mangrum v. Mangrum*, 220 S.W.2d 406, 406-408 (Ky. 1949) (applying the general rule from Ky. Rev. Stat. Ann. § 402.040 (1942) that a marriage "shall be valid here if valid in the state where solemnized" to recognize the lawfully solemnized Mississippi marriage of a person not of age to marry within Kentucky).

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[6] *See also* Tanco Corrected Br. 20 (citing additional cases in which Tennessee has recognized as valid an out-of-State marriage that would not be valid if commenced within Tennessee's borders).

The States have offered no rational basis to distinguish the out-of-State marriages they recognize under the *lex loci contractus* principle from the out-of-State marriages of same-sex couples for which they have banned recognition. Tennessee argues (Br. 20) that many cases applying the *lex loci contractus* principle preceded in time the enactment of its challenged statute, but that is irrelevant to the question at hand, which is whether a permissible justification exists for excepting same-sex couples from the *lex loci contractus* principle. To the extent the challenged statute, Tenn. Code Ann. § 36-3-113, modifies Tennessee's application of the *lex loci contractus* principle, it does so in a manner and with a history demonstrating it was targeted at barring recognition of marriages of same-sex couples. *See supra* pp. 7-8. That classification has not been justified.[7] Similarly, in 1998, Kentucky modified its longstanding statute codifying the *lex loci contractus* principle to create an exception for marriages "against Kentucky public policy" while declaring only "[a] marriage between members of the same sex" to be "against Kentucky public policy." Ky. H.B. 13, 1998 Ky.

[7] Tennessee acknowledges that its own State court's decision in *Farnham* was decided after Tenn. Code Ann. § 36-3-113 was enacted, but asserts that the case was decided "without addressing § 36-3-113." Br. 20. That is beside the point, and only serves to reinforce that the statute bars recognition of marriages of *same-sex couples*, not other couples (such as the one in *Farnham*) whose out-of-State marriages would be prohibited if solemnized in Tennessee. *See also* Tanco Corrected Br. 23 (citing other Tennessee court cases decided after enactment of § 36-3-113 that recognize marriages entered into in another State, even if the marriage would not be permitted under Tennessee law).

Laws ch. 258 (1998) (codified at Ky. Rev. Stat. Ann. § 402.040). Yet nothing justifies Kentucky's departure from its longstanding approach to out-of-State marriage recognition by targeting same-sex couples alone.

These contextual factors (a group traditionally subject to discrimination, important personal interests at stake, and departure from past practices), 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. *See Romer*, 517 U.S. at 633. Where the above-described factors apply, as here, they tend to indicate 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 aside from these factors warranting careful consideration, the States' generalizations about deference to legislative decisions are insufficient. The States rely (Mich. Br. 31-34, 51; Ky. Br. 25; Tenn. Br. 23) on broad statements about the deferential nature of rational-basis review from *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 expressing moral disapproval 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, the States overgeneralize about deference to the democratic process by overreading the plurality opinion in *Schuette v. Coalition To Defend Affirmative Action*, 134 S. Ct. 1623 (2014). *See* Mich. Br. 14, 23-24, 29, 60; Tenn. Br. 23-24, 27. The States' marriage bans, unlike the law at issue in *Schuette*, do not merely involve the "sensitive issue" of whether to preclude *preferentifal* treatment for a minority, *Schuette*, 134 S. Ct. at 1638; instead, they impose unequal, *injurious* treatment upon that minority. The *Schuette* opinion itself 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. Contrary to the States' suggestion (Mich. Br. 28-29, 60; Tenn. Br. 23-24), in such context, a challenged law cannot be rescued by the fact that voters may have acted through a direct democratic process to enact a State constitutional

amendment. *See, e.g*, *Schuette*, 134 S. Ct. at 1631-1632 (reaffirming *Reitman v. Mulkey*, 387 U.S. 369 (1967), which struck down a California constitutional amendment that "encouraged discrimination, causing real and specific injury"); *Romer*, 517 U.S. at 635 (striking down a Colorado constitutional amendment that "inflict[ed] on [gays and lesbians] immediate, continuing, and real injuries"); *Lucas v. Forty-Fourth Gen. Assembly of State 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 Meaningful Connection Between The State's Classification And A Legitimate Governmental Purpose

As GLAD explains in its brief in *Obergefell*, rational-basis review is not "toothless." *Windsor*, 699 F.3d at 180. Instead, it firmly requires that (1) the legislation be enacted for a legitimate purpose, and not out of prejudice, fear, animus, or moral disapproval of a particular group,[8] and (2) the means chosen be sufficiently and plausibly related to the legitimate purpose, as well as proportional to the burdens imposed.[9] GLAD *Obergefell* Br. 4, 12-18. The equal protection guarantee prohibits not only classifications based on "negative attitudes," "fear," or

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[8] *See, e.g.*, *Windsor*, 133 S. Ct. at 2693; *Cleburne*, 473 U.S. at 448, 450; *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374-375 (2001) (Kennedy, J., concurring).

[9] *See, e.g.*, *Romer*, 517 U.S. at 632; *Cleburne*, 473 U.S. at 447, 449-450; *Eisenstadt v. Baird*, 405 U.S. 438, 449 (1972).

"irrational prejudice," *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448, 450 (1985), 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).

It follows from these principles that a court may not unquestioningly accept a State's representation about the classification's purpose, *see Eisenstadt v. Baird*, 405 U.S. 438, 452 (1972) (a "statute's superficial earmarks as a health measure" could not cloak its purpose), nor permit a State to act on "little more than a hunch," *Peoples Rights Org., Inc. v. City of Columbus*, 152 F.3d 522, 532 (6th Cir. 1998). States may not invent facts, or declare them by fiat, in order to justify a law. *See Heller v. Doe*, 509 U.S. 312, 321 (1993) (rationale "must find some footing in the realities of the subject addressed by the legislation"); *Romer*, 517 U.S. at 632-633 (classification must be "grounded in a sufficient factual context for [the court] to ascertain some relation between the classification and the purpose it serve[s]"). Indeed, the Supreme Court has disregarded unsupported and implausible factual assertions offered in defense of discriminatory legislation. *See USDA v. Moreno*, 413 U.S. 528, 534-536 (1973) (rejecting government's claim as "wholly unsubstantiated"); *Cleburne*, 473 U.S. at 448-450 (rejecting selective application

of government's concerns as "unsubstantiated by factors which are properly cognizable").

The Court has accordingly rejected classifications where the fit between them and their purported goals was "attenuated" or "irrational"—in particular, when the proffered rationale applies equally to a wider class of persons, but the measure exclusively burdens the disfavored group. *E.g.*, *Cleburne*, 473 U.S. at 446-447, 449-450; *Moreno*, 413 U.S. at 532-533; *Eisenstadt*, 405 U.S. at 448-452; *Garrett*, 531 U.S. at 366 n.4. For example, in *Cleburne*, the Supreme Court examined the asserted interests proffered by the city, and determined that the city's zoning ordinance's singling out of group homes for people who are mentally retarded did not rationally relate to any of those interests, particularly since such interests were similarly threatened by other group residences that were unaffected by the ordinance. *Cleburne*, 473 U.S. at 449-450.

In addition, contrary to the States' suggestion (*e.g.*, Mich. Br. 5-6, 48-49), the States' marriage bans would be invalid even if they were designed to favor or privilege heterosexual couples and their relationships rather than to injure same-sex couples and their relationships. *See, e.g.*, *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); *Craigmiles v. Giles*, 312 F.3d 220, 229 (6th

Cir. 2002) (a "measure to privilege certain businessmen over others" fails rational-basis review). Michigan's marriage bans, for example, clearly express an impermissible intent to privilege the "unique relationship[s]" of heterosexual couples over those of same-sex couples. Mich. Comp. Laws § 551.1; *see also* *Tanco* Compl. ¶¶ 64, 66 (quoting the challenged Tennessee statute's legislative history that asserts the superiority of heterosexual couples and their relationships).

II. THE STATES' MARRIAGE BANS LACK A RATIONAL BASIS

None of the States' proffered rationales is sufficient to sustain their marriage bans. Each of the asserted rationales is an illegitimate goal, not meaningfully advanced by the bans, or both.

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

The State's protestations (Ky. Br. 2-6 & n.2, 9, 11, 13, 15, 17-18, 20; Tenn. Br. 4-6, 27; Mich. Br. 15, 27-30) that their exclusions of same-sex couples from marriage are "traditional" or "historical," or that they merely constitute "retain[ing]" the State's existing approach to marriage regulation, are inaccurate and insufficient. These States go far beyond merely defining marriage in a "traditional" manner. As explained, among other things, these States single out same-sex couples' marriages for special prohibition, including in their State constitutions; declare an entire class of marriages already validly solemnized in other States to be unworthy of recognition; and bar same-sex couples from

enjoying even a "legal status … substantially similar to that of marriage," Ky. Const. § 233A, a "similar union for any purpose," Mich. Const. art. I, § 25, or marital "rights and privileges," Tenn. Code Ann. § 36-3-113(a). *See supra* pp. 5-7. These thoroughgoing disqualifications indicate that the impulse behind the marriage bans, including the recognition bans understood in the context of those States' marriage bans more generally, is not reinforcement of tradition, but rather anti-gay animus.

Moreover, Michigan's suggestion (Br. 55-57) that its marriage bans can be justified by an interest in proceeding cautiously is further belied by the nature of those bans. Rather than proceeding cautiously, Michigan 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 sub nom. Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013). The same is true for Kentucky and Tennessee.

These States cannot justify their marriage bans, including on recognition of already existing marriages, by invoking traditional marriage. Even if heterosexual marriage has an "ancient" lineage, 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. They cannot be upheld 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)). If anything, "a traditional classification is more likely to be used without pausing to consider its justification," and so could be based on a "stereotyped reaction" or "prejudicial discrimination." *Cleburne*, 473 U.S. at 453 n.6 (Stevens, J., concurring) (internal quotation marks omitted).

Nor can appeals to religion in the marriage bans' legislative history 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'"). The challenged Kentucky constitutional amendment's sponsors, for example, relied on Biblical descriptions of marriage and "'the sacred institution of marriage [between] a man and a woman … for the greater glory of God.'" *Bourke*, 2014 WL 556729, at *7 n.15. Similarly, floor

debates on the challenged Tennessee statute mentioned the bill's purpose to favor "the traditional family," that is, "the family as intended when God created this world." *Tanco* Compl. ¶ 64.

While these 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.*, Dioceses and Bishops of the Episcopal Church in Ohio et al. Amicus Br. 3, 11-20, *Obergefell*, No. 14-3057 (6th Cir. May 1, 2014); Anti-Defamation League et al. Amicus Br. 20-21, *Bostic v. Schaefer*, Nos. 14-1167, 14-1169, & 14-1173 (4th Cir. Apr. 18, 2014). Indeed, several religious groups have argued *in favor of* 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.*, Episcopal Church in Ohio et al. Br., *supra*, at 21-25; American Jewish Committee Amicus Br. 27, *Hollingsworth*, 133 S. Ct. 2652 (2013), 2013 WL 4737187. And coercively denying access to the civil institution of marriage and its recognition to same-sex couples in order to advance one faith's preferred conception of marriage, as at least Kentucky has done, is not a legitimate State interest. *See, e.g.*, *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1821-1822 (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"); *Lee v. Weisman*, 505 U.S. 577, 590 (1992) ("all creeds must be tolerated and none favored" by the government's action).

B. The States' Marriage Bans Are Not Rationally Related To Children's Welfare

Michigan, along with amici supporting Tennessee and Kentucky, argue that the States' marriage bans, including on recognition of existing marriages of same-sex couples, promote the welfare of children by ensuring they are raised in stable relationships of biological parents of two different sexes. Mich. Br. 37-43; Individual Tennessee Legislators Amicus Br. 5-7, 13-20, *Tanco*, No. 14-5297 (6th Cir. May 14, 2014); Family Trust Foundation of Kentucky, Inc. Amicus Br. 5-7, 13-20, *Bourke*, No. 14-5291 (6th Cir. May 14, 2014). In fact, however, none of the States' bans are rationally related to children's welfare.

The States and their amici ignore that many same-sex couples *already have children* and wish to raise them in a stable family environment. The U.S. Census estimates that, as of 2010, there were 2650 same-sex "householder[s]" in Michigan who reported having their "own children under 18 years" of age residing in their household. U.S. Census Bureau, *Same-Sex Unmarried Partner or Spouse Households by Sex of Householder by Presence of Own Children*, http://www.census.gov/hhes/samesex/files/supp-table-AFF.xls (last visited June

16, 2014). There were also 1328 such householders in Kentucky, and 1968 in Tennessee. *Id.*

Plaintiffs-Appellees in these appeals illustrate the point. Gregory Bourke and Michael Deleon have raised their two minor children in their relationship of thirty-one years, *Bourke*, 2014 WL 556729, at *2; Randell Johnson and Paul Campion have raised their four children in their relationship of twenty-two years, *id.*; and April DeBoer and Jayne Rowse adopted three children and raised them together in their relationship and shared residence of over eight years, *DeBoer v. Snyder*, 973 F. Supp. 2d 757, 759-760 (E.D. Mich. 2014). Drs. Valeria Tanco and Sophy Jesty had a child earlier this year whom they are now raising together. Tanco Corrected Br. 8. Kentucky admits that such same-sex couples can "have stable, loving familial relationships" (Br. 15); and Michigan admits "the obvious point that same-sex couples can provide loving homes" (Br. 4). Thus, by denying marriage and its recognition for these same-sex couples, the challenged bans undercut the very stability for children that Michigan and the other States' amici extol.

The States' decisions to bar recognition of marriages *that were already solemnized* 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—who should *have and raise children*. *See Eisenstadt*, 405 U.S. at 448-449. And the sources relied upon by Michigan in the district court and by the other States' amici on appeal focus on parenting arrangements, not marriage. *See, e.g.*, Tennessee Legislators Br., *supra*, at 17 (focusing on "'[y]oung adults conceived through sperm donation'"); Family Trust Foundation Br., *supra*, at 17 (same).

Michigan and the other States' amici attempt to link the States' marriage bans to parenting by suggesting that same-sex couples do not need marriage because they face no risk of unplanned pregnancy. Mich. Br. 53-54; Tennessee Legislators Br., *supra*, at 21-22; Family Trust Foundation Br., *supra*, at 21-22. This overlooks the many same-sex couples who value the stability that marriage and its recognition would afford to their children. It thereby "humiliates … 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. The focus on unplanned pregnancy also 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. *See Garrett*, 531 U.S. at 366 n.4; *Eisenstadt*, 405 U.S. at 449.

Michigan and amici supporting Kentucky and Tennessee also suggest that the States' marriage bans are rationally related to an interest in ensuring biological parenting. Mich. Br. 15-16, 42-43; Tennessee Legislators Br., *supra*, at 3, 13, 15-18; Family Trust Foundation Br., *supra*, at 3, 13, 15-18. But that suggestion is undermined by the States' laws permitting heterosexual couples the very parenting arrangements that those amici criticize (Tennessee Legislators Br., *supra*, at 17; Family Trust Foundation Br., *supra*, at 17), such as conception through sperm donation. Mich. Comp. Laws §§ 333.2824(1), (6), 333.16273(1); Tenn. Code Ann. § 68-3-306; Ky. Rev. Stat. Ann. §§ 213.046(13), 311.281(7). Similarly, the States permit adoption, which contemplates that children will be raised by persons who are not their biological parents. Mich. Comp. Laws §§ 710.21-710.70; Ky. Rev. Stat. Ann. §§ 199.470-199.590; Tenn. Code Ann. §§ 36-1-101 to 36-1-204. 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 States' marriage bans. *See Eisenstadt*, 405 U.S. at 448-449; *Cleburne*, 473 U.S. at 447, 449-450.[10]

Regardless, the focus on unplanned pregnancy, "natural" procreation, and "biological" parenting (Mich. Br. 52; Tennessee Legislators Br., *supra*, at 22; Family Trust Foundation Br., *supra*, at 22) 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). The Supreme Court in *Windsor*, by contrast, described marriage as "a far-reaching legal

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[10] Michigan's arguments mistakenly focus only on the heterosexual couples its marriage laws *include* (Br. 47-49), rather than the same-sex couples those laws *exclude*. The structure, multiplicity, and history of Michigan's marriage bans shows their design to exclude same-sex couples. *See supra* pp. 5-6. Michigan's reliance (Br. 48-49) on *Johnson v. Robison*, 415 U.S. 361, 383 (1974), is misplaced. In *Johnson*, a class of conscientious objectors challenged a federal statute denying them educational benefits, and the Court upheld the statute on rational-basis grounds. But that statute also denied similar benefits to other classes of veterans, including those who did not serve on "active duty" for the requisite time. *Johnson*, 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) similarly threaten the asserted State interests. *See Cleburne*, 473 U.S. at 449-450. Regardless, a desire to privilege or favor heterosexual couples over gay and lesbian couples (whose "choices the Constitution protects," *Windsor*, 133 S. Ct. at 2694), is not a legitimate purpose. *See Kelo*, 545 U.S. at 491 (Kennedy, J., concurring).

acknowledgement of the intimate relationship between two people," 133 S. Ct. at 2692, not by reference to any reproductive purpose or potential for accident.

To the extent the sources cited by Michigan and the other States' amici even mention marriage and its relationship to child-rearing, 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 couple whose marriage is permitted and recognized—experience worse outcomes if the parents are of the same sex. *See* American Sociological Ass'n Amicus Br. 2-4, 12-19, 22-30, *Obergefell*, No. 14-3057 (6th Cir. May 1, 2014); *DeBoer*, 973 F. Supp. 2d at 770.[11] The State's amici's own sources 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., *supra*, at 19 (citing a source also cited by Tennessee Legislators Br., *supra*, at 16 n.2; and Family Trust Foundation Br., *supra*, at 17 n.2). Michigan's and the other States' amici's unsupported assertions to the contrary are at odds with decades of other research into children of same-sex couples. *See id.* at 2-3, 5-13.

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[11] Indeed, the States' amici's sources concern the *absence* of one parent and so examine differences between single parenting and parenting by couples, rather than between same-sex couples and heterosexual couples. *See, e.g.*, Tennessee Legislators Br., *supra*, at 18-20 (examining "father absence" and effect of growing up with "both" parents); Family Trust Foundation Br., *supra*, at 18-20 (same).

By abandoning reference on appeal to any sources or testimony Michigan presented at trial, Michigan leaves essentially uncontested the scientific consensus that children raised by same-sex couples fare no differently from those raised by heterosexual couples. American Sociological Ass'n Br., *supra*, at 12-13, 22, 28; *DeBoer*, 973 F. Supp. at 762. And Michigan affirmatively admits "the obvious point that same-sex couples can provide loving homes" and purports not to question "a gay or lesbian individual's ability to be a parent" (Br. 4). Thus, Michigan's claims—like those of Kentucky and Tennessee—lack any "footing in the realities of the subject addressed by the legislation," *Heller*, 509 U.S. at 321, and are "wholly unsubstantiated," *Moreno*, 413 U.S. at 534-536; hence, they cannot survive rational-basis review.

Accordingly, there is no viable explanation or evidence suggesting that banning the marriages of same-sex couples furthers the States' interests in child-rearing or improving the marriages or child-rearing prospects of heterosexual couples. To the contrary, all reason and evidence indicates that "[p]rohibiting gays and lesbians from marrying does not stop them from forming families and raising children. Nor does prohibiting same-sex marriage increase the number of heterosexual marriages or the number of children raised by heterosexual parents." *DeBoer*, 973 F. Supp. at 771-772. Rather than justify its marriage bans, Michigan invokes only the specter of negative effects from no-fault divorce laws (Br. 55-56),

which are logically incomparable as they expand the availability of *divorce* (and its effects on relationship and family stability) rather than marriage.

Michigan also argues that its marriage bans promote child welfare by ensuring that children are raised by parents of two different sexes. Br. 40-44 ("Men and women are different …. [and] provide different benefits … to children."). But there is no explanation how any purported sex differences in parenting could reasonably be expected to affect child welfare, particularly when the States admit that same-sex couples can "have stable, loving familial relationships" (Ky. Br. 15) and "provide loving homes" (Mich. Br. 4). As explained, 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, a well-recognized form of constitutionally impermissible sex discrimination. *See Craig v. Boren*, 429 U.S. 190, 198 (1976); *United States v. Virginia*, 518 U.S. 515, 541-542 (1996) (government "may not exclude qualified individuals based on 'fixed notions concerning the roles and abilities of males and females'"). The Supreme Court has indicated that classifications based on sex stereotypes about parental roles are constitutionally suspect. *See, e.g.*, *Nevada Dep't of Hum. Res. v. Hibbs*, 538 U.S. 721, 736 (2003)

(noting prevalence of impermissible sex stereotyping about women's roles "when they are mothers or mothers-to-be" (internal quotation marks omitted)).

Such gender-based stereotypes about parenting roles are constitutionally impermissible bases for classification even if they might reflect patterns observed for many, or even a majority, of members of the two sexes. *See, e.g.*, *Weinberger v. Wiesenfeld*, 420 U.S. 636, 645 (1975) (rejecting law under which father lacked opportunity to show that his wife "would have remained at work while he took over care of the child"); *Virginia*, 518 U.S. at 530, 541-542 (acknowledging without challenging the district court's finding about typically male and typically female tendencies toward cooperative or adversative environments, and even "assum[ing], for purposes of this decision, that most women would not choose [the] adversative method," but clarifying that the question is whether a State can constitutionally deny the opportunity to "women who have the will and capacity").

Regardless, gender stereotypes about parental roles cannot justify excluding same-sex couples from marriage, because the State's amici's own sources (Tennessee Legislators Br., *supra*, at 19; Family Trust Foundation Br., *supra*, at 19) indicate that "those roles are relative" and that same-sex couples are often "able to provide such parenting dynamics." Am Sociological Ass'n Br., *supra*, at 20 (quoting Popenoe, *Life Without Father* 147 (1996), which notes that among

same-sex parents, "one partner commonly fills the male-instrumental role while the other fills the female-expressive role" in rearing children).

C. Kentucky's Marriage Recognition Ban Is Not Rationally Related To Promoting Procreation

Kentucky claims it has "an economic interest in procreation" that justifies banning the recognition of existing marriages of same-sex couples. Br. 22-24, 26. Yet the Commonwealth offers no basis to conclude that banning recognition of existing marriages of same-sex couples in any way increases birth rates or could be rationally predicted to do so. *See Moreno*, 413 U.S. at 534-536 ("wholly unsubstantiated" government claim was rejected); *Cleburne*, 473 U.S. at 448-450 (rejecting government's concerns as "unsubstantiated"). If anything, denying marriage recognition to same-sex couples who might seek to have children, albeit by assisted means, would seem likely to *decrease* birth rates, because it would deny couples the financial and legal structures of recognized marriage that Kentucky itself claims encourage couples to have and raise children (Br. 24).

Moreover, Kentucky's claim to support only "relationship[s] that can naturally procreate" (Br. 24) is inaccurate, as Kentucky permits heterosexual marriages for whom natural procreation is not an option. For this same reason, Kentucky's ban on recognizing existing marriages of same-sex couples is not rationally related to the asserted purpose, as the ban does not apply to others who cannot naturally procreate and who would therefore obtain the benefits of marriage

without serving the asserted goal. *See, e.g.*, *Cleburne*, 473 U.S. at 448-450; *Eisenstadt*, 405 U.S. at 448-452; *Garrett*, 531 U.S. at 366 n.4.

* * *

Given the utter mismatch between the States' bans and their asserted purposes, and the illegitimacy of many of the 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. Excluding the exempted portions of the brief, as provided in Federal Rule of Appellate Procedure 32(a)(7)(B) and Sixth Circuit Rule 32(b)(1), the brief contains 6,958 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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June 16, 2014

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of June, 2014, I electronically filed the foregoing Brief for Amicus Curiae Gay & Lesbian Advocates & Defenders in Support of Plaintiffs-Appellees and Affirmance with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit using the appellate CM/ECF system. Counsel for all parties to the case will be served by the appellate CM/ECF system.

/s/ Paul R.Q. Wolfson
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