**No. 14-3057**

# UNITED STATES COURT OF APPEALS
# FOR THE SIXTH CIRCUIT

JAMES OBERGEFELL, et al.,
*Plaintiffs-Appellees*,

*v.*

LANCE D. HIMES, in his official capacity as the Interim Director of the Ohio Department of Health,
*Defendant-Appellant*,

CAMILLE JONES,
*Defendant*.

On Appeal from the United States District Court for the Southern District of Ohio, No. 1:13-cv-00501 (Hon. Timothy S. Black)

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

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May 1, 2014

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

# Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 14-3057 Case Name: Obergefell v. Himes

Name of counsel: Paul R.Q. Wolfson

Pursuant to 6th Cir. R. 26.1, Gay & Lesbian Advocates & Defenders
*Name of Party*
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

Not to my knowledge.

CERTIFICATE OF SERVICE

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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.

# TABLE OF CONTENTS

Page

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST ..... i

TABLE OF AUTHORITIES ..... iii

INTEREST OF AMICUS CURIAE ..... 1

SUMMARY OF ARGUMENT ..... 1

ARGUMENT ..... 4

I. RATIONAL-BASIS REVIEW IS A MEANINGFUL CHECK ON STATE AUTHORITY ..... 4

A. Rational-Basis Review Varies Depending On Context ..... 5

B. Rational-Basis Review Requires A Legitimate Legislative Purpose ..... 12

C. Rational-Basis Review Requires A Meaningful Connection Between The State's Classification And Its Asserted Goals ..... 15

II. OHIO'S RECOGNITION BANS LACK A RATIONAL BASIS ..... 18

A. Ohio's Recognition Bans Are Not Rationally Related To Ensuring That Ohioans Alone Democratically Determine Ohio Marriage Policy ..... 18

B. Ohio's Recognition Bans Are Not Rationally Related To Marriage Uniformity ..... 21

C. Ohio's Invocations Of "Tradition" And "Caution" Are Misplaced ..... 23

D. Ohio's Recognition Bans Are Not Rationally Related To Children's Welfare ..... 27

CONCLUSION ..... 32

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

# TABLE OF AUTHORITIES

## CASES

Page(s)

*Armour v. City of Indianapolis*, 132 S. Ct. 2073 (2012) .....11

*Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356 (2001).....13, 19, 21, 29

*City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) .....*passim*

*County of Allegheny v. ACLU*, 492 U.S. 573 (1989).....26

*Craig v. Boren*, 429 U.S. 190 (1976).....30

*Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002) .....14

*Davis v. Prison Health Services*, 679 F.3d 433 (6th Cir. 2012) .....4

*Eisenstadt v. Baird*, 405 U.S. 438 (1972) .....*passim*

*Engquist v. Oregon Department of Agriculture*, 553 U.S. 591 (2008).....4

*Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997) .....12

*FCC v. Beach Communications, Inc.*, 508 U.S. 307 (1993).....11

*Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003) .....29

*Heller v. Doe*, 509 U.S. 312 (1993) .....12, 17, 24

*Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) .....24

*In re Stiles Estate*, 391 N.E.2d 1026 (Ohio 1979).....9

*Kelo v. City of New London*, 545 U.S. 469 (2005) .....14

*Lawrence v. Texas*, 539 U.S. 558 (2003).....6, 8, 14, 25

*Loving v. Virginia*, 388 U.S. 1 (1967) .....8, 10, 20

*M.L.B. v. S.L.J.*, 519 U.S. 102 (1996).....7

*Massachusetts v. HHS*, 682 F.3d 1 (1st Cir. 2012) ..... 1, 5

*Mazzolini v. Mazzolini*, 155 N.E.2d 206 (Ohio 1958) ..... 9

*Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982) ..... 21

*National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012) ..... 5

*Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003) ..... 31

*New York State Club Association v. City of New York*, 487 U.S. 1 (1988) ..... 12

*Obergefell v. Wymyslo*, 962 F. Supp. 2d 968 (S.D. Ohio 2013) ..... 2, 10, 27, 28

*Palmore v. Sidoti*, 466 U.S. 429 (1984) ..... 24

*Pedersen v. OPM*, 881 F. Supp. 2d 294 (D. Conn. 2012) ..... 1

*Peoples Rights Organization, Inc. v. City of Columbus*, 152 F.3d 522 (6th Cir. 1998) ..... 4, 12, 15

*Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012) ..... 24

*Romer v. Evans*, 517 U.S. 620 (1996) ..... *passim*

*Scarbrough v. Morgan County Board of Education*, 470 F.3d 250 (6th Cir. 2006) ..... 13

*Slovenian Mutual Benefit Ass'n v. Knafelj*, 173 N.E. 630 (Ohio Ct. App. 1930) ..... 9

*Smith v. Smith*, 50 N.E.2d 889 (Ohio Ct. App. 1943) ..... 9

*SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471 (9th Cir. 2014) ..... 8

*Stemler v. City of Florence*, 126 F.3d 856 (6th Cir. 1997) ..... 13

*USDA v. Moreno*, 413 U.S. 528 (1973) ..... 6, 13, 18

*United States v. Virginia*, 518 U.S. 515 (1996) ..... 30

*United States v. Windsor*, 133 S. Ct. 2675 (2013) ..... *passim*

*Vance v. Bradley*, 440 U.S. 93 (1979) ..... 5

*Watson v. City of Memphis*, 373 U.S. 526 (1963) ..... 24

*Williams v. Illinois*, 399 U.S. 235 (1970) ..... 25

*Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012) ..... 4, 5

**CONSTITUTIONAL AND STATUTORY PROVISIONS**

28 U.S.C. § 1738C ..... 21

Ohio Const. art. XV, § 11 ..... 1, 10, 23

45 Ohio Jur. 3d Family Law § 11 ..... 8

Ohio Rev. Code
§ 3101.01 ..... 1, 9, 10, 23
§§ 3111.88-3111.96 ..... 30

**AMICUS BRIEFS IN DOCKETED CASES**

American Sociological Association Amicus Brief, *Bostic v. Schaefer*, Nos. 14-1167, 14-1169, & 14-1173 (4th Cir. Apr. 16, 2014) ..... 29, 30

Anti-Defamation League et al. Amicus Brief, *Bostic v. Schaefer*, Nos. 14-1167, 14-1169, & 14-1173 (4th Cir. Apr. 18, 2014) ..... 26

Bishops of the Episcopal Church of Virginia et al. Amicus Brief, *Bostic v. Schaefer*, Nos. 14-1167, 14-1169, & 14-1173 (4th Cir. Apr. 18, 2014) ..... 26

American Jewish Committee Amicus Brief, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), 2013 WL 4737187 ..... 26

**OTHER AUTHORITIES**

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 Apr. 30, 2014) ..... 27

## 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), *petitions for cert. before judgment denied*, 133 S. Ct. 2888 (2013).

## SUMMARY OF ARGUMENT

This case involves a narrow challenge to Ohio's laws banning recognition of out-of-State marriages of same-sex couples, Ohio Rev. Code § 3101.01(C)(2); Ohio Const. art. XV, § 11, cl. 1, and only as applied to death certificates and these Plaintiffs-Appellees. These provisions are but one part of Ohio's constellation of bans on marriage and similar legal status for same-sex couples. *See, e.g.*, Ohio Rev. Code § 3101.01(A), (C)(1); Ohio Const. art. XV, § 11, cl. 2. The question addressed here is whether Ohio's refusal to respect marriages lawfully solemnized

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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. All parties to this appeal have consented to this brief's filing.

outside Ohio because the spouses are of the same sex is rationally related to a legitimate purpose.[2] The answer is no. The selective denial of recognition of same-sex couples' marriages, and the targeted denigration of same-sex relationships also evident from Ohio's other marriage bans, violate the Equal Protection Clause under rational-basis review.

Ohio argues that rational-basis review requires deference to these Ohio policy decisions on domestic relations, and that other States—*i.e.*, those that allow same-sex couples to marry—may not determine this issue for Ohioans. Ohio's policy decision, however, remains subject to constitutional scrutiny. Ohio has failed to articulate any legitimate end served by its bans specifically on recognizing lawful out-of-State marriages of same-sex couples and has failed to identify any rational relationship between the bans and Ohio's purported aims. Because the marriage bans fail these elements of rational-basis review, they violate the Equal Protection Clause.

As the Supreme Court recognized in striking down the Defense of Marriage Act in *United States v. Windsor*, 133 S. Ct. 2675 (2013), excluding gay and lesbian couples from the rights and responsibilities that flow from civil marriage serves no

[2] Although amicus 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 court found, Ohio's recognition bans fail rational-basis scrutiny. *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 991 (S.D. Ohio 2013).

legitimate government purpose. Instead, it "impose[s] a disadvantage, a separate status, and so a stigma" upon same-sex couples. *Id.* 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 Ohio's out-of-State marriage recognition bans. Ohio's anti-recognition measures target only the lawfully solemnized marriages of same-sex couples, not marriages of other couples, even those that likewise could not be solemnized in Ohio. Ohio's singular disapproval of married same-sex couples undermines the credibility of other justifications that it now asserts. Indeed, the purported justifications would apply equally to some heterosexual couples, whom the bans do not affect. This further demonstrates that the bans arise from discredited stereotypes about same-sex couples and bear no logical nexus to their purported justifications. Finally, the

bans depart from Ohio's historic practice of recognizing out-of-State marriages that were lawful where solemnized.

The district court's judgment should be affirmed.

## 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). The fundamental command of the Equal Protection Clause 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 to test a particular law's justification. *See Davis v. Prison Health Servs.*, 679 F.3d 433, 438 (6th Cir. 2012).

"[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 Peoples Rights Org., Inc. v. City of Columbus*, 152 F.3d 522, 532 (6th Cir. 1998) (same). 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.

Amicus recognizes that many laws will pass muster under this standard. But Ohio's recognition bans fall into the category of cases where the Supreme Court requires closer review and, in any event, the purported justifications lack any rational connection to a legitimate legislative goal. Because "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), Ohio's decision to specifically disqualify lawfully-wedded same-sex couples from the institution of civil marriage into which they have already entered is 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 a more in-depth look at the legislature's purpose and the claimed fit between that purpose and the classification. *See, e.g.*, *Windsor*, 699 F.3d at 180. 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 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 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 subject 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, were held in disdain or misunderstood. The Supreme Court recognized that the challenged measures might well be motivated by disapproval of those groups, and it responded by closely assessing potential alternative 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 laws 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 the Defense of Marriage Act was to "demean" married same-sex couples. *Id*. at 2695; *cf. M.L.B. v. S.L.J.*, 519 U.S. 102, 116-117 (1996) (applying "close consideration" to a burden upon "[c]hoices about marriage, family life, and the upbringing of children").

Finally, the scope of review is also informed by whether the legislative act represents a departure from prior acts in the same policy-making 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.

All these factors indicate a more searching review of Ohio's bans on the recognition of lawful out-of-State 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).

Third, Ohio's recognition bans depart from historic Ohio law that generally respects marriages that were lawfully solemnized in another State, even when they could not be solemnized in Ohio:

> Generally, a marriage solemnized outside of Ohio is valid in Ohio if it is valid where solemnized. Thus, the validity of a common-law marriage is determined by the law of the state where it was consummated, and that of a solemnized marriage by the law of the state where it was contracted.

45 Ohio Jur. 3d Family Law § 11 (footnotes omitted). The rule for marriages solemnized outside of the State is known as the *lex loci contractus* rule. Even if "the parties to a marriage left the state to marry in order to evade Ohio's marriage laws," that "is immaterial to the marriage's validity in Ohio." *Id.*

Thus, Ohio has recognized marriages of first cousins that were solemnized in another State, notwithstanding Ohio law that precludes such marriages if solemnized within the State, Ohio Rev. Code § 3101.01(A). *See, e.g.*, *Mazzolini v. Mazzolini*, 155 N.E.2d 206, 208 (Ohio 1958) (marriage of first cousins, lawful when solemnized in Massachusetts, was legal in Ohio notwithstanding contrary Ohio statute); *Slovenian Mut. Ben. Ass'n v. Knafelj*, 173 N.E. 630, 631 (Ohio Ct. App. 1930) (although one could not marry his first cousin "under the laws of Ohio," "they could go to [another State], and intermarry, and then come right back into Ohio and the marriage would be legal").[3]

Ohio's decision to jettison its 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.

In addition, Ohio's recognition bans, combined with Ohio's several other bans on marriage of same-sex couples, impose sweeping, multiple, and class-specific disadvantages on a particular group of persons that are grossly out of proportion to the ways in which Ohio typically effectuates its marriage policies.

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[3] Ohio's cited cases (Br. 28-29) are not to the contrary. *Smith v. Smith*, 50 N.E.2d 889, 894 (Ohio Ct. App. 1943), expressly refrained from deciding the issue for which Ohio quotes it. And the "singular issue" in *In re Stiles Estate*, 391 N.E.2d 1026, 1026-1027 (Ohio 1979), concerned a *common-law marriage* of an uncle and his niece that commenced *within Ohio*. *Stiles* has nothing to do with recognition of out-of-State marriages lawful where solemnized; indeed, it distinguished *Mazzolini* precisely because *Mazzolini* "involved the doctrine of Lex loci contractus" and an out-of-State marriage statute. *Id.* at 1027.

Unlike Ohio laws forbidding marriage for those who are already married or closely consanguineous, Ohio Rev. Code § 3101.01(A), Ohio's multiple bans concerning marriages of same-sex couples are enshrined in Ohio's constitution and proscribe marriage, recognition, and their benefits, as well as any "legal status … that intends to approximate the design, qualities, significance or effect of marriage," solely to same-sex couples within Ohio (including those who already married in another State). *Id.* § 3101.01(A), (C)(1), (2); Ohio Const. art. XV, § 11; *see also Obergefell*, 962 F. Supp. 2d at 975 (Ohio constitutional amendment's primary sponsor said its goal was to protect against the "inherent dangers of the homosexual activists' agenda").

The contrast between Ohio's regulation of multiple-person or consanguineous marriages, on the one hand, and its regulation of same-sex marriages, on the other, aligns the latter with past marriage restrictions invalidated by the Supreme Court, such as historic interracial marriage bans. *See Loving*, 388 U.S. at 4-7 & nn.3-10, 11-12 (interracial marriage bans consisted of numerous and sweeping statutory burdens upon the couples). Indeed, rather than taking Ohio's "traditional" form of marriage regulation (Ohio Br. 51-52), the bans manifest a class-based hostility that shows that their motivating impulse must be animus toward the disadvantaged class. In sum, the sheer breadth of the "disfavored legal status" and "general hardships" imposed by Ohio's bans requires careful judicial

examination, including of the recognition bans challenged here, which must be considered in their full context. *Romer*, 517 U.S. at 633.

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. *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 putting aside these factors counseling in favor of careful consideration, Ohio's generalizations about legislative deference are inapposite. Ohio relies (Br. 45) on a broad statement 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 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, Ohio's decisions here

disqualify an entire swath of persons from a civil institution of fundamental societal importance—with highly stigmatizing consequences.[4]

### B. Rational-Basis Review Requires A Legitimate Legislative 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 and rational justification for the law is fatal under any standard of review. *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"). Thus, even applying rational-basis review, a court may 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). And rational-basis review is not satisfied when the State acts on "little more than a hunch." *Peoples Rights Org.*, 152 F.3d at 532.

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[4] As Obergefell explains (Br. 29-32), Ohio's reliance (Br. 38) on *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997) is mistaken. Regardless, Ohio acknowledges (Br. 38-39) that *Equality Foundation* applied *Romer*'s rational-basis standard, which, as this brief explains, employs closer review than Ohio contends.

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 the consequence of a government policy, but it 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). Such a "desire to effectuate one's animus against homosexuals can never be a legitimate governmental purpose, [and] a state action based on that animus alone violates the Equal Protection Clause." *Stemler v. City of Florence*, 126 F.3d 856, 873-874 (6th Cir. 1997); *see also Scarbrough v. Morgan County Bd. of Educ.*, 470 F.3d 250, 261 (6th Cir. 2006).

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. *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).

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. *See* 539 U.S. at 564, 574-575. Most recently, in *Windsor*, the

Court invalidated the Defense of Marriage Act, 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; *Peoples Rights Org.*, 152 F.3d at 532. It is this "search for the link between classification and objective" that "gives substance to the Equal Protection Clause." *Romer*, 517 U.S. at 632. "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.

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 permits 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 (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]"). 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. *See Heller*, 509 U.S. at 321-325.

In contrast, the Supreme Court has regularly disregarded unsupported and implausible factual assertions that have been offered in defense of discriminatory legislation. *See Moreno*, 413 U.S. at 534-536 (rejecting government's claim as "wholly unsubstantiated"); *Cleburne*, 473 U.S. at 448-450 (rejecting selective application of government's concerns as being "unsubstantiated by factors which are properly cognizable"). 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 also, e.g.*, *Eisenstadt*, 405 U.S. at 448-452.

## II. OHIO'S RECOGNITION BANS LACK A RATIONAL BASIS

None of Ohio's proffered rationales is sufficient to sustain its out-of-State marriage recognition bans. The asserted rationales are illegitimate goals, not meaningfully advanced by the bans, or both.

### A. Ohio's Recognition Bans Are Not Rationally Related To Ensuring That Ohioans Alone Democratically Determine Ohio Marriage Policy

Ohio asserts it has legitimate interests "in ensuring that Ohio's democratic process—not that of [other States]—would continue to set marriage policy within the State" and in "avoiding judicial intrusion upon a historically legislative function." Br. 46. But even if that were true, Ohio's decision to bar recognition

specifically of marriages of same-sex couples is not rationally related to those purposes.

First, Ohio's recognition bans are not rationally related to ensuring that Ohioans alone, not other States, determine which marriages will be recognized by Ohio. Ohio has a longstanding practice of respecting out-of-State marriages of heterosexual couples, even for marriages that are inconsistent with Ohio's own marriage policy. *See supra* pp. 8-9. Thus, under Ohio law it is not only the voters or legislators within Ohio, but also those in the State of solemnization, who effectively determine whether Ohio will recognize an out-of-State marriage. It is only for gay and lesbian couples—the same class that Ohio targets through its several other marriage bans—that Ohio departs from this *lex loci contractus* rule. This fails the rational-relationship requirement and undermines Ohio's assertion about the purpose for its recognition bans. *See Cleburne*, 473 U.S. at 448, 450 (rejecting, under rational-basis review, city ordinance that did not regulate other group homes posing the same density concerns that the city asserted); *Garrett*, 531 U.S. at 366 n.4 (law fails rational-basis review where its purported justifications "ma[k]e no sense" in light of how similarly situated groups are treated); *Eisenstadt*, 405 U.S. at 448-449 (law had too "marginal" a relation to the proffered objective because it did not regulate other activity that could be expected to hinder that objective).

Ohio may not, in defense of its bans, simply invoke its general authority to set marriage policy by democratic methods. Although marriage policy is subject to the State's police power, that power remains limited by the Equal Protection Clause. *Loving*, 388 U.S. at 7; *see Windsor*, 133 S. Ct. at 2691 (citing *Loving*). Because Ohio singles out gay and lesbian couples for marriage-related burdens and disadvantages, it must justify *distinguishing* such couples from others. *See Romer*, 517 U.S. at 532 (link is required between "*the classification* adopted and the object to be attained" (emphasis added)). It does not do so.

Similarly, Ohio's recognition bans are not rationally related to avoiding intrusion on a historically legislative function. Br. 46. In fact, Ohio's constitutional amendment takes the question *out* of legislative hands, enshrining a particular view of marriage against legislative revision. And it does so only for same-sex couples, not for heterosexual couples whose out-of-State marriages are similarly inconsistent with Ohio's in-State marriage policy. *See, e.g.*, *Cleburne*, 473 U.S. at 448, 450.

In fact, Ohio complains of only one prior example of judicial intrusion on Ohio's legislative prerogatives, which involved an opposite-sex consanguineous marriage (Br. 47), not a marriage of a same-sex couple. Yet Ohio has taken no legislative or constitutional action responsive to that example by banning recognition of consanguineous marriages when they were solemnized outside

Ohio. Instead, here, Ohio targeted only married same-sex couples without overriding the *lex loci contractus* rule in general. This "ma[kes] no sense" and offers nothing to justify the classification drawn. *Garrett*, 531 U.S. at 366 n.4.

Contrary to Ohio's contention (Br. 50), Section 2 of the federal Defense of Marriage Act (DOMA) neither immunizes nor justifies Ohio's recognition bans. DOMA Section 2 declares only that no State shall be required to give effect to a same-sex marriage under another State's laws. 28 U.S.C. § 1738C. DOMA cannot exempt Ohio's laws from compliance with the Equal Protection Clause. *See Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 732-733 (1982) (Congress cannot design a "constitutional exemption" from the Equal Protection Clause for a State university, because "neither Congress nor a State can validate a law that denies the rights guaranteed by the Fourteenth Amendment"). Thus, DOMA cannot preclude this Court from requiring the recognition that Ohio denies in violation of the Equal Protection Clause.

### B. Ohio's Recognition Bans Are Not Rationally Related To Marriage Uniformity

Ohio asserts a "desire to maintain marriage uniformity within Ohio." Br. 47-48. But Ohio's recognition bans create *dis*uniformity by treating marriages solemnized outside the State differently when they involve same-sex couples from when they involve heterosexual couples. As *Windsor* explains, the relevant question is whether, under the challenged law, "the incidents, benefits, and

obligations of marriage are uniform for *all* married couples within each State." 133 S. Ct. at 2692 (emphasis added). Ohio's decision to disadvantage already-married same-sex couples "places same-sex couples in an unstable position of being in a second-tier marriage" and "demeans" these couples, whose relationship another "State has sought to dignify." *Id.* at 2694. Therefore, Ohio's marriage recognition bans are uniform only in discriminating against same-sex couples, which cannot justify the challenged classification.

For similar reasons, Ohio's recognition bans do not rationally relate to its purported interest in equal treatment of those couples who have the resources and wherewithal to travel outside of Ohio and then "navigate another State's marriage laws" and those that do not (Br. 48). Ohio recognizes various types of marriages of heterosexual couples, including consanguineous marriages, that are solemnized outside of the State, yet rejects those types of marriages when solemnized within Ohio's borders. *See supra* pp. 8-9. Thus, for heterosexual couples, Ohio treats couples who can travel to marry outside of Ohio differently from those who cannot. Ohio's selective responsiveness to its purported interest (in uniform treatment regardless of brief travel outside the State) only for same-sex couples suggests the interest is not the law's true purpose. *See Eisenstadt*, 405 U.S. at 448-449; *Cleburne*, 473 U.S. at 447, 449-450. Relatedly, Ohio's recognition bans are not confined to same-sex couples who traveled outside of Ohio to marry and then returned. Even

same-sex couples who lived their whole lives in the State in which they were married before one partner happened to die within Ohio's borders are burdened.

### C. Ohio's Invocations Of "Tradition" And "Caution" Are Misplaced

Ohio asserts that it has legitimate interests in preserving a traditional conception of marriage and in addressing this "divisive social issue" cautiously. Br. 36, 48, 49-50. But Ohio's bans excluding same-sex couples from marriage recognition are neither "traditional" nor "cautious," and those purported justifications lack legitimacy here.

Indeed, far from proceeding cautiously to serve tradition, Ohio departs dramatically from its established law by overriding its longstanding *lex loci contractus* rule for married same-sex couples alone. *See supra* pp. 8-9. And Ohio does not merely decline to recognize marriages validly performed in any of seventeen States and the District of Columbia, but also bars same-sex couples from marrying or enjoying the "effect of marriage" through other arrangements and institutions in Ohio. Ohio Const. art. XV, § 11; Ohio Rev. Code § 3101.01(A), (C)(1), (2). The unusually thoroughgoing nature of this disqualification indicates that the impulse behind Ohio's recognition bans, understood in context of Ohio's marriage bans more generally, is not reinforcement of tradition, but rather anti-gay animus.

Moreover, instead of proceeding cautiously, Ohio 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). Contrary to Ohio's assertions (Br. 50), therefore, the State largely *insulated* its new marriage recognition rules designed to injure same-sex couples from further public discourse and debate.

Regardless, Ohio relies too heavily on its view that the issue is "divisive." Br. 49. The Supreme Court has often rejected purported interests in caution simply to avoid public reaction or private opposition. *See Cleburne*, 473 U.S. at 448 (rejecting interest in "deferring to the wishes or objections of some fraction of the body politic"); *Palmore v. Sidoti*, 466 U.S. 429, 433-434 (1984) (rejecting interest in avoiding "conflict[]" from private opposition); *Watson v. City of Memphis*, 373 U.S. 526, 535-536 (1963) (rejecting interest in "gradual" change to prevent "community confusion and turmoil").

Ohio cannot justify its recognition bans by invoking traditional marriage. As Ohio concedes (Br. 51), even if heterosexual marriage has an "[a]ncient lineage," Ohio's laws forbidding recognition of 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.

Although Ohio suggests (Br. 51-52) that the antiquity of a legal practice should be weighed in its favor, citing *Williams v. Illinois*, 399 U.S. 235, 239-240 (1970), Ohio ignores that *Williams* found "an impermissible discrimination" even where a relevant custom "date[d] back to medieval England and ha[d] long been practiced in this country," and that *Williams* emphasized "[t]he need to be open to reassessment of ancient practices other than those explicitly mandated by the Constitution." *Id*. at 239, 240, 241 (footnote omitted); *see also Cleburne*, 473 U.S. at 453 n.6 (Stevens, J., concurring) ("'a traditional classification is more likely to be used without pausing to consider its justification,'" and so may be based on a "'stereotyped reaction'" or "'prejudicial discrimination'").

Nor are Ohio's appeals to religion persuasive. Br. 5, 16, 50; *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 Ohio's stance opposing the recognition of marriages of same-sex couples may reflect one strand of religious belief, several religious traditions and many religious adherents *support* same-sex marriage and its recognition. *See, e.g.*, Bishops of the Episcopal Church of Virginia et al. Amicus Br. 3, 12-21, *Bostic v. Schaefer*, Nos. 14-1167, 14-1169, & 14-1173 (4th Cir. Apr. 18, 2014); Anti-Defamation League et al. Amicus Br. 20-21, *Bostic*, 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.*, Bishops of the Episcopal Church of Virginia et al. Amicus Br., *supra*, at 22-26; American Jewish Committee Amicus Br. 27, *Hollingsworth*, 133 S. Ct. 2652 (2013), 2013 WL 4737187. Thus, concern for "religious liberty" offers no rational basis for disadvantaging same-sex couples. Br. 50. And privileging one faith's preferred conception of marriage out of that concern, as Ohio has done, is not a legitimate State interest. *See, e.g.*, *County of Allegheny v. ACLU*, 492 U.S. 573, 593 (1989) ("[G]overnmental endorsement [doctrine] 'preclude[s]

government from … attempting to convey a message that … a particular religious belief is *favored* or *preferred.*'").

### D. Ohio's Recognition Bans Are Not Rationally Related To Children's Welfare

Amicus Citizens for Community Values (CCV), the primary sponsor of Ohio's constitutional amendment on marriage, argues that Ohio's recognition bans "promote the welfare of children" by ensuring that they are raised in "stable, enduring relationships" and by two parents of different sexes. CCV Amicus Br. 15-16; *see Obergefell*, 962 F. Supp. 2d at 975. Ohio has not advanced this argument, and rightfully so, as it lacks merit.

First, the argument ignores 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 nearly 3,500 same-sex "householder[s]" in Ohio 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 Apr. 30, 2014). For example, Plaintiff-Appellee Michener and his late spouse adopted and raised three children together in their eighteen-year relationship. *Obergefell*, 962 F. Supp. 2d at 976. By denying recognition of out-of-State marriages of these same-sex couples, Ohio's bans undercut the very stability for children that CCV extols.

Ohio's decision to bar recognition of marriages *that were already solemnized* is particularly inconsistent with stability for the affected families. It effectively "eras[es] Plaintiffs' already-established marital and family relations," sowing confusion and undermining their "long-term plans for how they will organize their finances, property, and family lives." *Obergefell*, 962 F. Supp. 2d at 979. The distinction the recognition bans draw—whose pre-existing marital relationships may be recognized—bears no rational relation to CCV's asserted justification—who should *have and raise children*. *See Eisenstadt*, 405 U.S. at 448-449. And CCV's sources focus on parenting arrangements, not marriage. *See, e.g.*, Br. 19 (focusing on "'[y]oung adults conceived through sperm donation'").

CCV attempts to link Ohio's marriage recognition bans to parenting (Br. 16-17) by suggesting that same-sex couples do not need marriage because they face no risk of unplanned pregnancy. This overlooks the many same-sex couples who value the stability that they believe marriage 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.

CCV's focus on unplanned pregnancy also ignores that Ohio does 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. And unplanned pregnancy is even less relevant to *this* as-applied challenge concerning marriage recognition for death certificates, because there is no further risk of unplanned pregnancy for *any* couple after one partner has passed away.

Regardless, CCV's focus on unplanned pregnancy and "natural" procreation (Br. 23, 24) 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 CCV's sources even mention marriage and its relationship to child-rearing (Br. 19-20 & n.3), they 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 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, *Bostic*, Nos. 14-1167, 14-1169, & 14-1173 (4th Cir. Apr. 16, 2014). Some of those sources suggest that recognition of same-sex couples' marriages would "improve, not impair, the wellbeing of children raised by currently unmarried same-sex parents," by fostering stability and financial security

for them. *Id.* at 19 (citing a source also cited by CCV Br. 19 n.3). CCV'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.

Likewise, CCV's suggestion that Ohio's recognition bans further biological parenting is undermined by Ohio laws permitting heterosexual couples the very parenting arrangements that CCV criticizes (Br. 19), such as conception through sperm donation. Ohio Rev. Code §§ 3111.88-3111.96. Ohio's lack of concern whether heterosexual couples raise only their biological children demonstrates that biological child-rearing is not the true motivation for Ohio's recognition bans. *See Eisenstadt*, 405 U.S. at 448-449; *Cleburne*, 473 U.S. at 447, 449-450.

CCV also argues that Ohio's recognition bans promote child welfare by ensuring that children are raised by parents of two different sexes. Br. 21 ("'[M]en and women bring different gifts to the parenting enterprise.'"). This, too, fails rational-basis review. CCV offers no reason to surmise that children raised in stable homes fare better with parents of two sexes than with two parents of the same sex. Moreover, this is not 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'").

Given the utter mismatch between Ohio's recognition bans and their asserted purposes, and the illegitimacy of many of the asserted purposes, the inevitable inference is that Ohio's bans were "born of animosity toward" gay and lesbian couples. *Romer*, 517 U.S. at 634. The Equal Protection Clause does not permit 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 court's judgment.

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 7,000 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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May 1, 2014

## CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of May, 2014, I electronically filed the foregoing Brief of 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 are registered CM/ECF users and will be served by the appellate CM/ECF system.

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