NO. 14-5291

IN THE 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/APPELLEE

On Appeal from United States District Court
for the Western District of Kentucky
Hon. John G. Heyburn II, Judge
Civil Action No. 3:13-CV-750-JGH

BRIEF FOR DEFENDANT/APPELLANT, STEVE BESHEAR, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF KENTUCKY

Leigh Gross Latherow
William H. Jones, Jr.
Gregory L. Monge
VANANTWERP, MONGE, JONES, EDWARDS & McCANN, LLP
1544 Winchester Avenue, Fifth Floor
Ashland, KY 41105-1111
Telephone (606) 329-2929; Telefax (606) 329-0490
Counsel for Appellant, Steve Beshear, in his official
capacity as Governor of Kentucky

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

STATUTES **Page**

STATE CONSTITUTIONS

FEDERAL CONSTITUTION

PROCEDURAL RULES

ADDITIONAL SOURCES

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Oral arguments in this matter may be beneficial. Therefore, Appellant requests the opportunity to be heard by the Court.

JURISDICTIONAL STATEMENT

This case is on appeal from the Western District of Kentucky. The district court had subject matter jurisdiction pursuant to 42 U.S.C. § 1983, 28 U.S.C. §1331 and 28 U.S.C. § 1343.

The Sixth Circuit Court of Appeals has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 and Federal Rules of Appellate Procedure Rules 3-4. The trial court's final judgment was entered on February 27, 2014. [Order, RE 55, Page ID #773]. Defendant Governor Beshear filed a timely notice of appeal on March 19, 2014. [Notice of Appeal, RE 68, Page ID #981]

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether the district court erred as a matter of law when it found that Section 233A of the Kentucky Constitution and KRS §§ 402.005, 402.020(1)(d), 402.040(2), 402.045, which collectively prohibit Kentucky's recognition of marriage licenses issued to same-sex couples by other jurisdictions, violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

Kentucky, like 33 other states, has exercised its broad authority to regulate domestic relations by adopting a traditional man-woman definition of marriage. The Kentucky legislature has passed a number of statutes recognizing that same-sex marriages are against Kentucky public policy, including KRS §§ 402.005, 402.020(1)(d), 402.040(2), and 402.045.[1] Less than ten years ago, the Kentucky General Assembly and 74% of participating voters passed and ratified the following amendment to Kentucky's constitution, re-affirming Kentucky's existing policy:

> Only a marriage between one man and one woman shall be valid or recognized as a marriage in Kentucky. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized.

KY. CONST. § 233A. Read together, these laws declare Kentucky's public policy in favor of traditional marriage, define marriage as between one man and one woman, prohibit the creation of non-traditional same-sex marriages in Kentucky, and prohibit Kentucky's recognition of non-traditional same-sex marriages from other jurisdictions.

Four same-sex couples who were issued marriage licenses by other jurisdictions, along with their respective children, filed the action below. Plaintiffs sought a declaration that *United States v. Windsor*, 133 S.Ct. 2675 (2013),

[1] The text of these statutes is set forth in the attached Addendum.

prohibits Kentucky from defining marriage as a traditional man-woman institution and further compels Kentucky to recognize same-sex marriage licenses issued in other jurisdictions. Plaintiffs asserted that Kentucky's definition of marriage based on the traditional view violated their federal constitutional rights. Plaintiffs claimed violations of their constitutional rights protected by the Fourteenth Amendment (Due Process, Equal Protection and Right to Travel), First Amendment (Freedom of Association and Establishment of Religion), Article Four (Full Faith and Credit), and Article Six (Supremacy). The Complaint also challenged the validity of Section 2 of DOMA, 28 U.S.C.A. § 1738C, in light of *Windsor* "and any other relevant provision which would allow Kentucky's continued refusal to respect their legal marriages." [Second Amended Complaint, Introduction, RE 31, Page ID #283].

Plaintiffs contend that Kentucky's refusal to recognize their out-of-state same-sex marriage licenses denies them benefits they would otherwise receive, including preferential treatment for inheritance taxes, compelled spousal financial support, spousal privilege in trial proceedings, intestacy inheritance rights, loss of consortium benefits, health care coverage, standing to bring workers' compensation claims for deceased spouses, and certain federal benefits such as social security benefits and FMLA leave to care for a spouse. Plaintiffs also argue that children being raised by same-sex couples are "humiliated" because same-sex

couples are not permitted to marry and that such children are further harmed by the reduction of "family resources and by denying their family social and legal recognition and respect." According to Plaintiffs, non-recognition of their status as spouses also limits their rights with regard to adoption and status as parents. [Second Amended Complaint ¶¶ 81-93, RE 31, Page # 294-97].

Plaintiffs originally named as defendants two Kentucky county court clerks, Kentucky Attorney General Jack Conway, and Kentucky Governor Steven L. Beshear, in their official capacities. Plaintiffs later moved to dismiss the claims against the county clerks and moved to amend their complaint, leaving the Attorney General and Governor as the sole defendants. The merits were presented to the district court on Plaintiffs' motion for summary judgment. [Plaintiffs' Motion for Summary Judgment, RE 38, Page ID # 330-314].

The district court issued its opinion after full briefing from the parties and an amicus brief from The Family Foundation. [Memorandum Opinion, RE 47, Page ID# 724-46]. The district court held that Plaintiffs' claims could be resolved under an Equal Protection analysis and did not address their other claims. Relying upon *Windsor*, the district court found no rational basis for Kentucky's adherence to a traditional man-woman marriage definition. The district court concluded that *Windsor* required Kentucky to recognize as valid marriages licenses issued to

same-sex couples by other jurisdictions.[2] [Memorandum Opinion, RE 47, Page ID #745-46]. The district court found that Plaintiffs were entitled to their requested permanent injunctive relief, but stayed enforcement of its Order "until further order of the Sixth Circuit." [Memorandum Opinion and Order, RE 71, Page ID # 995]. Plaintiffs have not moved this Court to lift the stay.

SUMMARY OF ARGUMENT

The district court erroneously concluded that Kentucky's adoption of a traditional man-woman marriage model for its marriage laws violates the Equal

[2] The issue of Kentucky's refusal to issue marriage licenses to same-sex couples was not originally presented in this case, *i.e.*, the *Bourke* case, and therefore was not adjudicated in the district court's summary judgment order. Immediately following entry of the summary judgment order, however, a group of same-sex couples who purportedly had been denied marriage licenses by Kentucky county court clerks moved to intervene in the case. [Motion to Intervene, Doc. No. 49, Page ID # 748-50]. These intervening same-sex couples and their children sought to enjoin Kentucky from enforcing its traditional marriage public policy with regard to the issuance of marriage licenses. Judge Heyburn granted the motion to intervene and bifurcated the Intervening Complaint (re-styled as *Love v. Beshear*) so that the *Bourke* case could proceed upon appeal and *Love* could remain before the district court for resolution. [Order, Doc. No. 53, Page ID # 766]. *Love* remains pending before the district court, and a briefing schedule has been issued. The *Love* Intervening Plaintiffs filed their Motion for Summary Judgment on April 18, 2014. [Plaintiffs' Motion for Summary Judgment, Doc. No. 77, Page ID # 1067-68]. The *Love* case should be fully briefed before briefing is completed in this matter.

There are also currently pending before the Franklin County, Kentucky Circuit Court two cases, now consolidated, in which the plaintiffs have also challenged Kentucky's prohibition on issuing same-sex marriage licenses and Kentucky's refusal to recognize marriage licenses issued to same-sex couples by other jurisdictions. *Kentucky Equality Federation v. Beshear*, 13-CI-01074, Franklin Circuit Court. Briefing should be completed in that consolidated action by August, 2014.

Protection Clause of the Fourteenth Amendment. The power to define and regulate marriage is one uniquely within the realm of the state legislatures. The Supreme Court affirmed the states' role as such in *United States v. Windsor*, 133 S.Ct. 2675 (2013). Additionally, *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), appeal dismissed by 409 U.S. 810 (1972), affirmatively rejected the notion that state law same-sex marriage prohibitions violate the Equal Protection Clause. *Baker* remains valid binding precedent upon the lower federal courts.

Even if *Baker* were not preclusive, Plaintiffs' equal protection claims fail. Same-sex couples are materially different from traditional man-woman couples. Only man-woman couples can naturally procreate. Fostering procreation serves a legitimate economic interest that is rationally related to the traditional man-woman marriage model. Thus, same-sex couples are not similarly situated to man-woman couples, and the distinction drawn by Kentucky's statutes is rationally related to a legitimate interest of Kentucky.

The district court justified its finding of no rational relation by erroneously requiring the Commonwealth to disprove Plaintiffs' assertions that same-sex couples can be loving parents and spouses, by requiring the Commonwealth to draw exact lines between its classifications and its legislative interests, and by failing to recognize that procreation is a legitimate state interest.

Same-sex couples are not a protected class, and they do not seek access to a recognized fundamental right. They seek recognition of a new right. The Commonwealth has a legitimate interest in encouraging procreation through a traditional man-woman model. Thus, Kentucky's refusal to recognize as valid same-sex marriage licenses issued by other jurisdictions does not violate the Equal Protection Clause of the Fourteenth Amendment. Entry of summary judgment for Plaintiffs was erroneous, and the decision of the district court should be reversed.

STANDARD OF REVIEW

The court of appeals reviews *de novo* an order granting summary judgment. *Henderson v. Walled Lake Consol. Schools,* 469 F.3d 479, 486 (6th Cir. 2006). Summary judgment is appropriate when there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). Determining whether a particular legislative scheme is rationally related to a legitimate government interest is a question of law. *Seal v. Morgan*, 229 F.3d 567, 580 (6th Cir. 2000).

ARGUMENT

I. The district court erred by judicially re-defining and regulating Kentucky's constitutional and statutory marriage laws.

The inherent function and role of the states to define and regulate marriage is beyond dispute. *Windsor* re-affirmed the states' province to define marriage:

> The recognition of civil marriages is central to state domestic relations law applicable to residents and citizens. See *Williams v. North Carolina*, 317 U.S. 287, 63 S.Ct. 207, 87 L.Ed. 279 (1942) ("Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders.") The definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the "[p]rotection of offspring, property interests, and the enforcement of marital responsibilities." *Ibid.* "[T]he state, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce . . . [and] the Constitution delegated no authority to the Government of the United States on the subject of marriage and divorce." *Haddock v. Haddock*, 201 U.S. 562, 575, 26 S.Ct. 525, 50 L.Ed. 867 (1906); see also *In re Burrus*, 136 U.S. 586, 593-594, 10 S.Ct. 850, 34 L.Ed. 500 (1890) ("The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.")

United States v. Windsor, 133 S.Ct. 2675, 2691 (2012). *See also McLaughlin v. Cotner*, 193 F.3d 410, 412-413 (6th Cir. 1999) (finding that family law and domestic relations are purely within the states' provinces). The Supreme Court has long recognized the strict rules prohibiting the judiciary's interference with these rights:

> [T]he power to make rules to establish, protect, and strengthen family life as well as to regulate the disposition of property left in [the States by its citizens] is committed by the Constitution of the United States and the people of the [State] to the legislature of that State. Absent a specific constitutional guarantee, it is for that legislature, not the life-tenured judges of this Court, to select from among possible laws.

Labine v. Vincent, 401 U.S. 532, 538-39 (1971). The Supreme Court has further instructed that "[w]hen **social or economic legislation** is at issue, the Equal Protection Clause allows the States wide latitude, and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic process." *City of Cleburne, Texas v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985) (citations omitted)(emphasis added).

The *Windsor* majority recognized that when states (like New York) act to recognize and sanction same-sex marriage, those "actions were without doubt a proper exercise of [New York's] sovereign authority within our federal system, all in the way that the Framers of the Constitution intended." *Windsor*, 133 S.Ct. at 2692. The Court held that "[t]he dynamics of state government in the federal system are to ***allow the formation of consensus respecting the way the members of a discrete community treat each other in their daily contact and constant interaction with each other***." *Id.* (emphasis added). The consensus of the Kentucky legislature and the citizens of the Commonwealth to promote traditional man-woman marriage is no less a proper exercise of Kentucky's sovereign authority within the federal system than New York's exercise of its sovereign authority to recognize same-sex marriage.

Thus, contrary to the district court's expression otherwise, *Windsor* does not compel judicial re-writing of Kentucky's traditional marriage laws. *Windsor* does

not stand for the proposition that the federal constitution compels states to issue marriage licenses to same-sex couples or to recognize marriage licenses issued to same-sex couples in other jurisdictions. As the Supreme Court held in *Labine*, "Absent a specific constitutional guarantee, it is for the legislature, not the life-tenured judges of this Court, to select from among possible laws." *Labine*, 401 U.S. at 538-39. And, contrary to the Plaintiffs' argument otherwise, there is no constitutional guarantee of a right to same-sex marriage.

II. The district court erred by concluding that the Equal Protection Clause guarantees the right to same-sex marriage.

A. *Baker v. Nelson* remains binding precedent.

The Supreme Court declined the opportunity in *Windsor* to declare that states were required to recognize same-sex marriages, confirming that the matter is properly left to the states. The only definitive statement from the Supreme Court regarding the constitutionality of same-sex-marriage prohibitions came in *Baker v. Nelson*, 409 U.S. 810 (1972), when the Supreme Court "dismissed for want of a substantial federal question" the Minnesota Supreme Court's determination that the Equal Protection Clause of the United States Constitution does *not* guarantee the right to same-sex marriage. *Windsor* did not disturb the *Baker* holding. *Baker* remains binding precedent.

In *Baker*, two men applied for and were denied the issuance of a marriage license in Minnesota. The basis of the denial was a Minnesota statute that

indicated marriage was to be only between a man and a woman. The men argued they were denied a marriage license based solely on their sex and that the statute was unconstitutional. *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971).

Like Kentucky, Minnesota did not recognize same-sex marriages. Although *Baker* involved the issuance of a marriage license to same-sex couples, and the present case involves the recognition of an out-of-state marriage license issued to same-sex couples, the basis for non-recognition of each is the same – limitation of marriages to the traditional man-woman model. The *Baker* plaintiffs, like Plaintiffs here, alleged that the state's denial of a same-sex marriage license deprived them of their liberty to marry and their property without due process of law under the Fourteenth Amendment and violated their rights under the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 186.

The Minnesota Supreme Court rejected these constitutional challenges. In reaching its decision, the Minnesota Supreme Court quoted *Skinner v. State of Okl. ex rel. Williamson,* 316 U.S. 535, 541 (1942):

> "Marriage and procreation are fundamental to the very existence and survival of the race." The historic institution manifestly is more deeply founded than the asserted contemporary concept of marriage and societal interests for which petitioners contend. The due process clause of the Fourteenth Amendment is not a charter for restructuring it by judicial legislation.

Baker, 191 N.W. at 186 (internal citations omitted). Following this, the Minnesota Supreme Court held: "The equal protection clause of the Fourteenth

Amendment, like the due process clause, is not offended by the state's classification of persons authorized to marry. There is no irrational or invidious discrimination." *Id.* at 187.

The *Baker* plaintiffs appealed to the United States Supreme Court and presented three questions in the Jurisdictional Statement: (1) whether Minnesota's "refusal to sanctify appellants' [same-sex] marriage deprives appellants of their liberty to marry and of their property without due process of law under the Fourteenth Amendment"; (2) whether Minnesota's "refusal, pursuant to Minnesota marriage statutes, to sanctify appellants' [same-sex] marriage because both are of the male sex violates their rights under the equal protection clause of the Fourteenth Amendment"; and (3) whether Minnesota's "refusal to sanctify appellants' [same-sex] marriage deprives appellants of their right to privacy under the Ninth and the Fourteenth Amendments." *Baker*, Jurisdictional Statement, No. 71-1027, at 3 (Feb. 11, 1971). In response, the Supreme Court then issued an order of "dismiss[al] for want of a substantial federal question." *Baker v. Nelson*, 409 U.S. at 810.

The Supreme Court's summary dismissal of the appeal operated to affirm the Minnesota Supreme Court's decision and creates binding precedent upon all lower courts until the Supreme Court directs otherwise or except when "doctrinal developments indicate otherwise." *Hicks v. Miranda,* 422 U.S. 332, 344-45

(1972). A summary dismissal "without doubt reject[s] the specific challenges presented in the statement of jurisdiction," and "prevent[s] lower courts from coming to opposite conclusions [1] on the precise issues presented and [2] necessarily decided by those actions." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (per curiam). *Baker* has not been overruled either expressly or by implication. *Baker* is binding on this Court and dispositive of Plaintiffs' Equal Protection claims. *See also Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

B. Kentucky's traditional man-woman marriage laws do not violate the Equal Protection Clause of the Constitution.

"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne, Texas v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985)(internal citations omitted). "The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *Id.* at 440 (internal citations omitted). The district court appropriately applied the rational

basis test, but erroneously determined that the Commonwealth and its 1,222,125 voters lacked a single rational basis for Kentucky's adoption of the traditional man-woman marriage model.

1. Same-sex couples are not similarly situated to traditional marriage man-woman couples.

Time and again the Supreme Court has affirmed the rights of the States to establish classifications for the purpose of serving a legitimate public purpose:

> The Equal Protection Clause directs that "all persons similarly circumstanced shall be treated alike." But so too, "[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." The initial determination of what is "different" and what is "the same" resides in the legislatures of the States. A legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of the state to remedy every ill. In applying the Equal Protection Clause to most forms of state action, we thus seek only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose.

Plyler v. Doe, 457 U.S. 202, 216 (1982)(internal citations omitted). Further, the Supreme Court "has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways." *Reed v. Reed,* 404 U.S. 71, 75 (1971).

Plaintiffs bear the burden of demonstrating that they were treated differently than man-woman couples "in all material respects." *See Loesel v. City of Frankenmuth*, 692 F.3d 452, 462-63 (6th Cir. 2012). "Materiality is an integral

element of the rational basis inquiry. Disparate treatment of similarly situated persons who are dissimilar only in immaterial respects is not rational. Conversely, disparate treatment of persons is reasonably justified if they are dissimilar in some material respect." *TriHealth, Inc. v. Board of Com'rs, Hamilton Co., Ohio*, 430 F.3d 783, 790 (6th Cir. 2005). "It is unnecessary to say that the 'equal protection of the laws' required by the Fourteenth Amendment does not prevent the states from resorting to classifications for the purposes of legislation." *F.S. Foyster Guano Co. v. Commonwealth of Virginia*, 253 U.S. 412, 415 (1920).

Man-man and woman-woman couples are not similarly situated to man-woman couples in a significant material aspect. Only man-woman couples have the ability to naturally procreate. As set forth more fully below, procreation is reasonably related to the object of Kentucky's traditional marriage statutes. This distinction between same-sex couples and man-woman couples is critical and provides a lawful basis to treat same-sex couples differently than man-woman couples with regard to the institution of marriage without offending the Equal Protection Clause.

The distinction in natural procreation abilities between man-woman and same-sex couples should not be interpreted to mean that same-sex couples cannot have stable, loving familial relationships or contribute to society in important and

meaningful ways. It cannot be disputed, however, that same-sex couples cannot naturally procreate, which is of vital importance to the state as explained below.

2. Application of the rational basis test was correct.

The district court appropriately applied the rational basis test rather than a heightened standard. "Under the Equal Protection Clause, courts apply strict scrutiny to statutes that involve suspect classifications or infringe upon fundamental rights." *Moore v. Detroit School Reform Bd.*, 293 F.3d 352, 368 (6th Cir. 2002) (citing *Clark v. Jeter*, 486 U.S. 456, 461 (1998)). However, laws that do not involve suspect classifications and do not infringe upon fundamental rights "will be upheld if they are rationally related to a legitimate state interest." *Id.* (internal citation omitted).

Plaintiffs claim to be gays/lesbians and entitled to the strict scrutiny standard as a suspect class. They also claim they are seeking access to a fundamental right, further entitling them to application of the strict scrutiny standard. Plaintiffs' arguments are without merit. They are not a protected class. Further, they are not seeking access to a fundamental right. They are seeking access to a newly asserted right – same-sex marriage - which has never been identified as a fundamental right and does not meet the criteria.

a. Homosexuality/gender orientation are not protected classifications.

The district court correctly concluded that under Sixth Circuit precedent "sexual orientation is not a suspect classification and thus is not subject to heightened scrutiny." [Memorandum Opinion, RE 47, Page ID # 731 (citing *Davis v. Prison Health Servs.*, 679 F.3d 433, 438 (6th Cir. 2012))]. Indeed, the Sixth Circuit has repeatedly held that "this court has not recognized sexual orientation as a suspect classification" for Equal Protection analysis. *Davis v. Prison Health Services*, 679 F.3d 433, 438 (6th Cir. 2012). Hence, Plaintiffs are not entitled to strict scrutiny based upon their classification as gays or lesbians.

b. There is no fundamental right to same-sex marriage.

The institution of the man-woman marriage is deeply rooted in the history and traditions of our country. A right to same-sex marriage is not. The *Windsor* Court's historical description of society's views on traditional marriage and same-sex marriage precludes any argument that Plaintiffs are seeking access to a fundamental right:

> It seems fair to conclude that, until recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage. For marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of the civilization. . . . The limitation of lawful marriage to heterosexual couples, which for centuries had been deemed both

> necessary and fundamental, came to be seen in New York and certain other States as an unjust exclusion.

Windsor, 133 S.Ct. at 2689. The Supreme Court's description of this nation's view of traditional man-woman marriage as "necessary and fundamental" is consistent with other Supreme Court descriptions of this right, such as in *Skinner v. State of Okl. ex rel. Williamson*, 316 U.S. 535, 541 (1942) (finding that "marriage and procreation are fundamental to the very existence and survival of the race"); *Maynard v. Hill*, 125 U.S. 190, 211 (1888) (characterizing marriage as "the foundation of the family and of society, without which there would be neither civilization nor progress"); and *Lawrence v. Texas*, 539 U.S. 558, 585 (2003) (O'Connor concurring) (stating that a state court have a "legitimate state interest . . . [in] preserving the traditional institution of marriage" providing a basis to distinguish between homosexuals and heterosexuals).

Plaintiffs do not allege violation of this fundamental, deeply-rooted right. Instead, they want to re-define the right and create a new right – a new institution, one never recognized by the Supreme Court, as a fundamental right and until relatively recently never associated with the institution of marriage.

The district court did not address whether same-sex marriage involves a fundamental right. Based upon the district court's application of a rational basis test, however, the Court presumptively rejected Plaintiffs' argument that it does. The district court apparently agreed that Plaintiffs have repackaged a newly

claimed right and attempted to cloak it as a fundamental deeply, rooted right. The Supreme Court has not, however, made the leap requested by Plaintiffs.

It is well-established that courts should not readily create new fundamental rights. *See Does v. Munoz*, 507 F.3d 961, 964 (6th Cir. 2007) ("[I]dentifying a new fundamental right subject to the protections of substantive due process is often an 'uphill battle' as the list of fundamental rights 'is short.'")(internal citations omitted) [3] and *San Antonio School District v. Rodriquez*, 411 U.S. 1, 33 (1973) ("It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws."). Further, "to qualify such rights must be 'deeply rooted in this Nation's history and tradition,' or 'implicit in the concept of ordered liberty,' such that neither liberty nor justice would exist if they were sacrificed.'" *Does*, 507 F.3d at 964. (citing *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1997) and *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

The fundamental right being asserted must be articulated with a "careful description." *Id.* at 720-21. Here, Plaintiffs are not asserting a right to a

[3] *See McGuire v. Ameritech Services, Inc.*, 253 F.Supp.2d 988, 999, n. 9 (S.D. Ohio 2003)(explaining that claims regarding the interference with "fundamental rights" are at times analyzed under the Due Process Clause and sometimes under the Equal Protection Clause, and at times under other Constitution provisions such as the Privileges and Immunities Clause, but recognizing that "in truth, whether invoked under the Equal Protection Clause, the Due Process Clause, the Privileges or (sic) Immunities Clause, or a more explicit provision of the Constitution, the fundamental rights analysis is the same.").

traditional man-woman marriage, of which procreation can be a natural result. Rather, they are seeking access to a different institution – a same-sex marriage, from which procreation can never naturally result. Thus, Plaintiffs' newly asserted "right" is not one esteemed in the tradition and history of this Nation. It is a new "right" – a new concept - and recognized by only 17 of the States in the United States. As such, Plaintiffs' deprivation of their claimed "right" is not subject to a heightened scrutiny.

3. Kentucky's marriage laws are rationally related to the state's interest of preserving the traditional man-woman marriage model.

The Supreme Court has articulated the deference to be given to the state under a rational-basis review:

> [The] rational-basis review in equal protection analysis "is not a license for courts to judge the wisdom, fairness or logic or legislative choices." Nor does it authorize "the judiciary [to] sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." For these reasons, a classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity. Such classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose. Further, a legislature that creates these categories need not "actually articulate at any time the purpose or rationale supporting its classification." Instead, a classification "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."

Heller v. Doe, 509 U.S. 312, 319-20 (1993) (internal citations omitted).

Procreation is vital to continuation of the human race, and only man-woman couples can naturally procreate. *See Skinner v. State of Okl. ex rel. Williamson*, 316 U.S. 535, 541 (1942) ("Marriage and procreation are fundamental to the very existence and survival of the race.") and *Maynard v. Hill*, 125 U.S. 190, 211 (1888)(characterizing marriage as "the foundation of the family and of society, without which there would be neither civilization nor progress").

In this way, this case is different from *Loving v. Virginia*, 388 U.S. 1 (1967), and the analogy between race and gender with regard to marriage fails. Virginia's miscegenation laws prohibited marriages between couples of mixed races. The Supreme Court correctly concluded that race had no bearing upon any legitimate interest of the government with regard to marriage and that the laws violated the Fourteenth Amendment.

In contrast, it cannot be said that gender has no bearing on the government's interest with regard to marriage. Man-man and woman-woman couples cannot procreate. Traditional man-woman couples can. Procreation is a legitimate interest of the Commonwealth.

Procreation is "fundamental to the very existence and survival of the race", *Skinner*, 316 U.S. at 541, and, therefore is a legitimate state interest. Encouraging, promoting, and supporting the formation of relationships that have the natural ability to procreate furthers the Commonwealth's basic and fundamental interest

in ensuring the existence of the human race. This alone should be sufficient to satisfy any standard of review.[4] The Commonwealth, however, has an additional interest in promoting procreation – supporting long-term economic stability through stable birth rates.

One need look no further than economic journal and news sources to see the correlation between a society's birth rates and its long-term ability to support a strong economy. *See, e.g., How Declining Birth Rates Hurt Global Economies*, National Public Radio (Oct. 3, 2011) (transcript reprinted at www.npr.org /2011 /10/02/131000410/how-declining-birth-rates-hurt-global_economies). On August 13, 2013, The New York Times reported that "[t]here is perhaps nowhere better than the German countryside to see the dawning impact of Europe's plunge in fertility rates over the decades, a problem that has frightening implications for the economy and the psyche of the Continent." Suzanne Daley and Nicholas, *Germany Fights Population Drop*, N.Y. Times, August 13, 2013, http://www.nytimes.com/2013/09.14/world/europe/germany-fights-population-drop.html. The economic crisis created from declining birth rates results from a reduced demand for goods and services and an aging work force, which results in

[4] Only the rational basis level of review is discussed in this brief because the district court rejected Plaintiffs' argument that a higher level of scrutiny should be applied, and Plaintiffs have not appealed that determination. Regardless of the level of review, however, Kentucky's classification does not violate the Equal Protection Clause.

fewer available laborers and members of the work force to support social programs.

Japan has adopted a policy of encouraging marriage to improve its declining birth rates. The Japanese government provides financial aid to matchmaking programs in the hopes of encouraging marriage, which the government believes is crucial to improving birth rate statistics. According to reports, "Japan Prime Minister Shinzo Abe's administration assigned 3 billion yen ($32.5 million) for birthrate-boosting programs in this fiscal year's extra budget, which included consultations and marriage information for singles." Keiko Ujikane, *Japan Plays Cupid to Bid Boost in Birthrate*, The Sydney Morning Herald, March 28, 2014, www.smh.com.au/action/printArticle?id=30026715.

France has undertaken measures to improve its declining birth rates as well. The government has adopted a policy of encouraging couples to have children by covering child-care costs to toddlers up to 3 years old and free child-care centers from age 3 to kindergarten and by providing child allowances, extended maternity care laws (including a year-long leave for the birth of a third child with a monthly stipend from the government and increased allowance for the third child), increased tax deductions, and discounts on transportation and cultural events. Molly Moore, *As Europe Grows Grayer, France Devices a Baby Boom*, The

Washington Post, October 18, 2006. http://washingtonpost.com/wp-dyn/content/article/2006/10/17/AR2006101701652.html.

Kentucky has an economic interest in procreation. Just as governments around the globe promote procreation and birth rates, so does Kentucky's traditional marriage policy. Though there is a cost to Kentucky by granting tax and other benefits to man-woman couples, a stable or growing birth rate offsets the cost. Only man-woman relationships can naturally procreate, and only those relationships, therefore, are afforded the state sponsored benefit. The Plaintiffs, however, seek the same tax and other benefits without furthering Kentucky's legitimate and vital economic interest. Kentucky's support of the only type of relationship that can naturally procreate – traditional man-woman couples –by only recognizing traditional marriage is not only rational, but also consistent with sound economic policy.

4. The district court erred by imposing the burden of proof upon the state to disprove same-sex couples' abilities to raise families in a loving environment.

Although the Commonwealth did not argue below that same-sex couples cannot provide a loving or caring environment in which to raise children, the district court erroneously charged Kentucky with the burden of proof of doing so. It is well-established that Kentucky's legislation is required to be "presumed constitutional [with] "[t]he burden [] on the one attacking the legislative

arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record." *Heller v. Doe*, 509 U.S. 312, 320 (1993). The Commonwealth had "no obligation to produce evidence to sustain the rationality of a statutory classification. '[A] legislative choice is not subject to courtroom fact finding and may be based upon rational speculation unsupported by evidence or empirical data.'" *Id.* (internal citations omitted).

The Supreme Court has provided the legal framework for analyzing Equal Protection challenges and the respective burdens of proof. Equal protection challenges do not involve a typical civil litigation burden of proof framework where one party shows that a disputed fact may be more likely true than not. "In an equal protection case of this type [*.i.e.*, one based upon legislative classifications], those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decision maker." V*ance v. Bradley*, 440 U.S. 93, 110-11 (1979) (internal citations omitted). *See also FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993) ("[A] legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.")

Likewise, the state is not required to show that there are no similarities between same-sex couples and man-woman couples. Indeed, there are many.

Couples, regardless of their gender, buy homes, pay mortgages, and actively participate in their communities. The existence of similarities in the groups, however, does not eliminate the existence of differences between the groups, nor does it necessitate a finding that there is no rational basis for the differential treatment. *See Johnson v. Robison*, 415 U.S. 361, 378 (1974). ("But this finding of similarity ignores that a common characteristic shared by beneficiaries and non-beneficaries alike, is not sufficient to invalidate a statute when other characteristics peculiar to only one group rationally explain the statute's different treatment of the two groups.")

The Commonwealth has not identified its interest as creating loving, nurturing family units "capable of raising children" or creating relationships with couples "faithful in their marriage vows." (Memorandum Opinion, RE 47, Doc. ID #739). The Commonwealth has an economic interest in procreation. Only man-woman couples have the ability to naturally procreate. Whether or not same-sex couples may capably raise children in a loving environment or engage in loving relationships has no bearing on the Commonwealth's legitimate interest of fostering natural procreation through a traditional marriage model.

Therefore, the district court erred in requiring the Commonwealth to demonstrate that same-sex couples had no similarities with man-woman couples

with regard to their capability of raising children and entering into faithful relationships.

5. The district court erred by requiring exact lines to be drawn for the state's classification.

The district court offered the following flawed rationale for rejecting procreation as a rational basis for the state's limitation of marriage to man-woman couples: "Kentucky does not require proof of procreative ability to have an out-of-state marriage recognized. The exclusion of same-sex couples on procreation grounds makes just as little sense as excluding post-menopausal couples or infertile couples on procreation grounds." [Memorandum Opinion, RE 47, Page ID #739]. The district court further rejected the rational basis argument because "no one has offered evidence that same-sex couples would be any less capable of raising children or any less faithful in their marriage vows." [RE 47, Page ID #739]. The district court erroneously imposed a burden upon the Commonwealth not required in a rational basis analysis.

The Minnesota Supreme Court rejected the same "line drawing" argument raised by the same-sex plaintiffs in that case:

> Petitioners note that the state does not impose upon heterosexual married couples a condition that they have a proved capacity or declared willingness to procreate, posing a rhetorical demand that this court must read such condition into the statute if same-sex marriages are to be prohibited. Even assuming that such a condition would be neither unrealistic nor offensive under the *Griswold* rationale, the classification is no more than theoretically imperfect.

> We are reminded, however, that 'abstract symmetry' is not demanded by the Fourteenth Amendment.

Baker, 191 N.W.2d at 187. Further, the Supreme Court has repeatedly stated that the state is not required to draw perfect lines in its classifications. "[C]ourts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between the means and ends. A classification does not fail rational basis review because it 'is not made with mathematical nicety or because in practice it results in some inequality.'" *Heller*, 509 U.S. at 321 (internal citations omitted). Thus, that man-woman couples who are infertile or incapable of naturally procreating are allowed to marry does not nullify the rational basis for a man-woman marriage classification. *See Dandridge v. Williams*, 397 U.S. 471, 486-87 (1970)("[T]he Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all. It is enough that the State's action be rationally based and free from invidious discrimination.")(internal citations omitted).

Thus, the district court's symmetry requirement was erroneous.

CONCLUSION

That a court may have a philosophical disagreement with Kentucky's public policy of a traditional man-woman marriage, that the definition does not comport with a court's sense of fairness, or that a court might have adopted another means to support the public policy, does not empower the judiciary to re-define

Kentucky's definition of marriage. The Supreme Court in *Labine* recognized that although there may be "discrimination" against one group or more favorable treatment of another group and there may be more choices that are more "rational," the "power to make rules to establish, protect, and strengthen family life . . . is committed by the Constitution of the United States and the people of [that State] to the legislature of that State. Absent a specific constitutional guarantee, it is for that legislature, not the life-tenured judges of this Court to select from among possible laws." *Labine v. Vincent*, 401 U.S. 532, 538-39 (1971).

There is no constitutional guarantee to same-sex marriage. Kentucky's gender based marriage laws are rationally related to a legitimate interest of the Commonwealth of Kentucky, and the decision of the district court should be reversed.

Respectfully submitted,

/s/ Leigh Gross Latherow
Counsel for Appellant
Steve Beshear, in his official capacity
as Governor of Kentucky

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this Brief does not exceed the page limitation set forth in Fed. R. App. P. 32(a)(7)(B). The type-volume if Appellant's principal brief contains 6,712 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

/s/ Leigh Gross Latherow
Counsel for Appellant
Steve Beshear, in his official capacity
as Governor of Kentucky
Dated: May 7, 2014

CERTIFICATE OF SERVICE

It here hereby certified that on May 7, 2014, I electronically filed the foregoing with the Clerk of Court for the Sixth Circuit Court of Appeals using the CM/ECF system.

/s/ Leigh Gross Latherow
Counsel for Appellant Steve Beshear,
in his official capacity
as Governor of Kentucky
Dated: May 7, 2014

DESIGNATION OF RECORD

Record Entry	Document Description	Page ID# Range
31	Second Amended Complaint	282-300
38	Plaintiffs' Motion for Summary Judgment	330-331
47	Memorandum Opinion	724-746
49	Motion to Intervene	748-750
53	Order	766-767
55	Order	773
68	Notice of Appeal	981-983
71	Memorandum Opinion and Order	992-995

ADDENDUM

KRS 402.005 Definition of Marriage

As used and recognized in the law of the Commonwealth, "marriage" refers only to the civil status, condition, or relation of one (1) man and one (1) woman united in law for life, for the discharge to each other and the community of the duties legally incumbent upon those whose association is founded on the distinction of sex.

KRS 402.020 Other Prohibited Marriages

(1) Marriage is prohibited and void

* * * *

(d) Between members of the same sex.

KRS 402.040 Marriage in Another State

(1) (1) If any resident of this state marries in another state, the marriage shall be valid here if valid in the state where solemnized, unless the marriage is against Kentucky public policy.

(2) A marriage between members of the same sex is against Kentucky public policy and shall be subject to the prohibitions established in KRS 402.045.

KRS 402.045 Same-sex marriage in another jurisdiction void and unenforceable.

(1) A marriage between members of the same sex which occurs in another jurisdiction shall be void in Kentucky.

(2) Any rights granted by virtue of the marriage, or its termination, shall be unenforceable in Kentucky courts.