APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT

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FINAL JUDGMENT

September 4, 2014

Before: RICHARD A. POSNER, Circuit Judge
ANN CLAIRE WILLIAMS, Circuit Judge
DAVID F. HAMILTON, Circuit Judge

Nos.: 14-2386 to 14-2388

MARILYN RAE BASKIN, et al.,
Plaintiffs-Appellees
v.
PENNY BOGAN, et al.,
Defendants-Appellants

No.: 14-2526

VIRGINIA WOLF, et al.,
Plaintiffs-Appellees
v.
SCOTT WALKER, et al.,

Defendants-Appellants

Originating Case Information:

District Court Nos.: 1:14-cv-00355-RLY-TAB, 1:14-cv-00404-RLY-TAB, 1:14-cv-00406-RLY-MJD
Southern District of Indiana, Indianapolis Division
District Judge Richard L. Young

Originating Case Information:

District Court No: 3:14-cv-00064-bbc
Western District of Wisconsin

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 14-2386 to 14-2388

MARILYN RAE BASKIN, *et al.*,

Plaintiffs-Appellees,

v.

PENNY BOGAN, *et al.*,

Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Indiana,
Indianapolis Division.
Nos. 1:14-cv-00355-RLY-TAB, 1:14-cv-00404-RLY-TAB,
1:14-cv-00406-RLY-MJD — **Richard L. Young**,
Chief Judge.

No. 14-2526

VIRGINIA WOLF, *et al.*,

Plaintiffs-Appellees,

v.

SCOTT WALKER, *et al.*,

Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 3:14-cv-00064-bbc — **Barbara B. Crabb**,
Judge.

ARGUED AUGUST 26, 2014 — DECIDED
SEPTEMBER 4, 2014

Before POSNER, WILLIAMS, and HAMILTON,
Circuit Judges.

POSNER, *Circuit Judge*. Indiana and Wisconsin are among the shrinking majority of states that do not recognize the validity of same-sex marriages, whether contracted in these states or in states (or foreign countries) where they are lawful. The states have appealed from district court decisions invalidating the states' laws that ordain such refusal.

Formally these cases are about discrimination against the small homosexual minority in the United States. But at a deeper level, as we shall see, they are about the welfare of American children. The argument that the states press hardest in defense of their prohibition of same-sex marriage is that the only reason government

encourages marriage is to induce heterosexuals to marry so that there will be fewer "accidental births," which when they occur outside of marriage often lead to abandonment of the child to the mother (unaided by the father) or to foster care. Overlooked by this argument is that many of those abandoned children are adopted by homosexual couples, and those children would be better off both emotionally and economically if their adoptive parents were married.

We are mindful of the Supreme Court's insistence that "whether embodied in the Fourteenth Amendment or inferred from the Fifth, equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds *along suspect lines* nor infringes fundamental constitutional rights 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." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993) (emphasis added). The phrase we've italicized is the exception applicable to this pair of cases.

We hasten to add that even when the group discriminated against is not a "suspect class," courts examine, and sometimes reject, the rationale offered by government for the challenged discrimination. See, e.g., *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000) (per curiam); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432,

448–50 (1985). In *Vance v. Bradley*, 440 U.S. 93, 111 (1979), an illustrative case in which the Supreme Court accepted the government's rationale for discriminating on the basis of age, the majority opinion devoted 17 pages to analyzing whether Congress had had a "reasonable basis" for the challenged discrimination (requiring foreign service officers but not ordinary civil servants to retire at the age of 60), before concluding that it did.

We'll see that the governments of Indiana and Wisconsin have given us no reason to think they have a "reasonable basis" for forbidding same-sex marriage. And more than a reasonable basis is required because this is a case in which the challenged discrimination is, in the formula from the *Beach* case, "along suspect lines." Discrimination by a state or the federal government against a minority, when based on an immutable characteristic of the members of that minority (most familiarly skin color and gender), and occurring against an historical background of discrimination against the persons who have that characteristic, makes the discriminatory law or policy constitutionally suspect. See, e.g., *Bowen v. Gilliard*, 483 U.S. 587, 602–03 (1987); *Regents of University of California v. Bakke*, 438 U.S. 265, 360–62 (1978); *St. John's United Church of Christ v. City of Chicago*, 502 F.3d 616, 638 (7th Cir. 2007); *Wilkins v. Gaddy*, 734 F.3d 344, 348 (4th Cir. 2013); *Gallagher v. City of Clayton*, 699 F.3d 1013, 1018–19 (8th Cir. 2012). These circumstances create a presumption that the discrimination is a

denial of the equal protection of the laws (it may violate other provisions of the Constitution as well, but we won't have to consider that possibility). The presumption is rebuttable, if at all, only by a compelling showing that the benefits of the discrimination to society as a whole clearly outweigh the harms to its victims. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 326–27 (2003); *United States v. Virginia*, 518 U.S. 515, 531–33 (1996).

The approach is straightforward but comes wrapped, in many of the decisions applying it, in a formidable doctrinal terminology—the terminology of rational basis, of strict, heightened, and intermediate scrutiny, of narrow tailoring, fundamental rights, and the rest. We'll be invoking in places the conceptual apparatus that has grown up around this terminology, but our main focus will be on the states' arguments, which are based largely on the assertion that banning same-sex marriage is justified by the state's interest in channeling procreative sex into (necessarily heterosexual) marriage. We will engage the states' arguments on their own terms, enabling us to decide our brace of cases on the basis of a sequence of four questions:

1. Does the challenged practice involve discrimination, rooted in a history of prejudice, against some identifiable group of persons, resulting in unequal treatment harmful to them?

2. Is the unequal treatment based on some immutable or at least tenacious characteristic of

the people discriminated against (biological, such as skin color, or a deep psychological commitment, as religious belief often is, both types being distinct from characteristics that are easy for a person to change, such as the length of his or her fingernails)? The characteristic must be one that isn't relevant to a person's ability to participate in society. Intellect, for example, has a large immutable component but also a direct and substantial bearing on qualifications for certain types of employment and for legal privileges such as entitlement to a driver's license, and there may be no reason to be particularly suspicious of a statute that classifies on that basis.

3. Does the discrimination, even if based on an immutable characteristic, nevertheless confer an important offsetting benefit on society as a whole? Age is an immutable characteristic, but a rule prohibiting persons over 70 to pilot airliners might reasonably be thought to confer an essential benefit in the form of improved airline safety.

4. Though it does confer an offsetting benefit, is the discriminatory policy overinclusive because the benefit it confers on society could be achieved in a way less harmful to the discriminated-against group, or underinclusive because the government's purported rationale for the policy implies that it should equally apply to other groups as well? One way to decide whether a policy is overinclusive is to ask whether unequal treatment is *essential* to attaining the desired benefit. Imagine a statute that imposes a $2 tax on women but not men. The

proceeds from that tax are, let's assume, essential to the efficient operation of government. The tax is therefore socially efficient, and the benefits clearly outweigh the costs. But that's not the end of the inquiry. Still to be determined is whether the benefits from imposing the tax only on women outweigh the costs. And likewise in a same-sex marriage case the issue is not whether heterosexual marriage is a socially beneficial institution but whether the benefits to the state from discriminating against same-sex couples clearly outweigh the harms that this discrimination imposes.

Our questions go to the heart of equal protection doctrine. Questions 1 and 2 are consistent with the various formulas for what entitles a discriminated-against group to heightened scrutiny of the discrimination, and questions 3 and 4 capture the essence of the Supreme Court's approach in heightened scrutiny cases: "To succeed, the defender of the challenged action must show 'at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.'" *United States v. Virginia, supra*, 518 U.S. at 524 (1996), quoting *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982).

The difference between the approach we take in these two cases and the more conventional approach is semantic rather than substantive. The conventional approach doesn't purport to balance

the costs and benefits of the challenged discriminatory law. Instead it evaluates the importance of the state's objective in enacting the law and the extent to which the law is suited ("tailored") to achieving that objective. It asks whether the statute actually furthers the interest that the state asserts and whether there might be some less burdensome alternative. The analysis thus focuses not on "costs" and "benefits" as such, but on "fit." That is why the briefs in these two cases overflow with debate over whether prohibiting same-sex marriage is "over- or underinclusive"—for example, overinclusive in ignoring the effect of the ban on the children adopted by same-sex couples, under-inclusive in extending marriage rights to other non-procreative couples. But to say that a discriminatory policy is overinclusive is to say that the policy does more harm to the members of the discriminated-against group than necessary to attain the legitimate goals of the policy, and to say that the policy is underinclusive is to say that its exclusion of other, very similar groups is indicative of arbitrariness.

Although the cases discuss, as we shall be doing in this opinion, the harms that a challenged statute may visit upon the discriminated-against group, those harms don't formally enter into the conventional analysis. When a statute discriminates against a protected class (as defined for example in our question 2), it doesn't matter whether the harm inflicted by the discrimination is a grave harm. As we said, a statute that imposed a $2 tax on women but not men would be struck

down unless there were a compelling reason for the discrimination. It wouldn't matter that the harm to each person discriminated against was slight if the benefit of imposing the tax only on women was even slighter.

Our pair of cases is rich in detail but ultimately straightforward to decide. The challenged laws discriminate against a minority defined by an immutable characteristic, and the only rationale that the states put forth with any conviction—that same-sex couples and their children don't *need* marriage because same-sex couples can't *produce* children, intended or unintended—is so full of holes that it cannot be taken seriously. To the extent that children are better off in families in which the parents are married, they are better off whether they are raised by their biological parents or by adoptive parents. The discrimination against same-sex couples is irrational, and therefore unconstitutional even if the discrimination is not subjected to heightened scrutiny, which is why we can largely elide the more complex analysis found in more closely balanced equal protection cases.

It is also why we can avoid engaging with the plaintiffs' further argument that the states' prohibition of same-sex marriage violates a fundamental right protected by the due process clause of the Fourteenth Amendment. The plaintiffs rely on cases such as *Hodgson v. Minnesota*, 497 U.S. 417, 435 (1990), and *Zablocki v. Redhail*, 434 U.S. 374, 383–86 (1978), that hold that the right to choose whom to marry is indeed a

fundamental right. The states reply that the right recognized in such cases is the right to choose from within the class of persons eligible to marry, thus excluding children, close relatives, and persons already married—and, the states contend, persons of the same sex. The plaintiffs riposte that there are good reasons for ineligibility to marry children, close relatives, and the already married, but not for ineligibility to marry persons of the same sex. In light of the compelling alternative grounds that we'll be exploring for allowing same-sex marriage, we won't have to engage with the parties' "fundamental right" debate; we can confine our attention to equal protection.

We begin our detailed analysis of whether prohibiting same-sex marriage denies equal protection of the laws by noting that Indiana and Wisconsin, in refusing to authorize such marriage or (with limited exceptions discussed later) to recognize such marriages made in other states by residents of Indiana or Wisconsin, are discriminating against homosexuals by denying them a right that these states grant to heterosexuals, namely the right to marry an unmarried adult of their choice. And there is little doubt that sexual orientation, the ground of the discrimination, is an immutable (and probably an innate, in the sense of inborn) characteristic rather than a choice. Wisely, neither Indiana nor Wisconsin argues otherwise. The American Psychological Association has said that "most people experience little or no sense of choice about their sexual orientation." APA, "Answers to Your

Questions: For a Better Understanding of Sexual Orientation & Homosexuality" 2 (2008), www.apa.org/topics/lgbt/orientation.pdf (visited Sept. 2, 2014, as were the other websites cited in this opinion); see also Gregory M. Herek et al., "Demographic, Psychological, and Social Characteristics of Self-Identified Lesbian, Gay, and Bisexual Adults in a US Probability Sample," 7 *Sexuality Research and Social Policy* 176, 188 (2010) ("combining respondents who said they'd had a small amount of choice with those reporting no choice, 95% of gay men and 84% of lesbians could be characterized as perceiving that they had little or no choice about their sexual orientation"). That homosexual orientation is not a choice is further suggested by the absence of evidence (despite extensive efforts to find it) that psychotherapy is effective in altering sexual orientation in general and homosexual orientation in particular. APA, "Answers to Your Questions," supra, at 3; Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation 35–41 (2009).

The leading scientific theories of the causes of homosexuality are genetic and neuroendocrine theories, the latter being theories that sexual orientation is shaped by a fetus's exposure to certain hormones. See, e.g., J. Michael Bailey, "Biological Perspectives on Sexual Orientation," in Lesbian, Gay, and Bisexual Identities Over the Lifespan: Psychological Perspectives 102–30 (Anthony R. D'Augelli and Charlotte J. Patterson eds. 1995); Barbara L. Frankowski, "Sexual

Orientation and Adolescents," 113 Pediatrics 1827, 1828 (2004). Although it seems paradoxical to suggest that homosexuality could have a genetic origin, given that homosexual sex is non-procreative, homosexuality may, like menopause, by reducing procreation by some members of society free them to provide child-caring assistance to their procreative relatives, thus increasing the survival and hence procreative prospects of these relatives. This is called the "kin selection hypothesis" or the "helper in the nest theory." See, e.g., Association for Psychological Science, "Study Reveals Potential Evolutionary Role for Same-Sex Attraction," Feb. 4, 2010, www.psychological science.org/media/releases/2010/vasey.cfm. There are other genetic theories of such attraction as well. See, e.g., Nathan W. Bailey and Marlene Zuk, "Same-Sex Sexual Behavior and Evolution," forthcoming in *Trends in Ecology and Evolution*, www.faculty.ucr.edu/~mzuk/Bailey%20and%20Zuk %202009%20Same%20sex%20behaviour.pdf. For a responsible popular treatment of the subject see William Kremer, "The Evolutionary Puzzle of Homosexuality," *BBC News Magazine*, Feb. 17, 2014, www.bbc.com/news/magazine-26089486.

The harm to homosexuals (and, as we'll emphasize, to their adopted children) of being denied the right to marry is considerable. Marriage confers respectability on a sexual relationship; to exclude a couple from marriage is thus to deny it a coveted status. Because homosexuality is not a voluntary condition and homosexuals are among the most stigmatized, misunderstood, and

discriminated-against minorities in the history of the world, the disparagement of their sexual orientation, implicit in the denial of marriage rights to same-sex couples, is a source of continuing pain to the homosexual community. Not that allowing same-sex marriage will change in the short run the negative views that many Americans hold of same-sex marriage. But it will enhance the status of these marriages in the eyes of other Americans, and in the long run it may convert some of the opponents of such marriage by demonstrating that homosexual married couples are in essential respects, notably in the care of their adopted children, like other married couples.

The tangible as distinct from the psychological benefits of marriage, which (along with the psychological benefits) enure directly or indirectly to the children of the marriage, whether biological or adopted, are also considerable. In Indiana they include the right to file state tax returns jointly, Ind. Code § 6-3-4-2(d); the marital testimonial privilege, § 34-46-3-1(4); spousal-support obligations, § 35-46-1-6(a); survivor benefits for the spouse of a public safety officer killed in the line of duty, § 36-8-8-13.8(c); the right to inherit when a spouse dies intestate, § 29-1-2-1(b), (c); custodial rights to and child support obligations for children of the marriage, and protections for marital property upon the death of a spouse. §§ 12-15-8.5-3(1); 12-20-27-1(a)(2)(A). Because Wisconsin allows domestic partnerships, some spousal benefits are available to same-sex couples in that state. But others are not, such as the right to adopt children

jointly, Wis. Stat. § 48.82(1); spousal-support obligations, §§ 765.001(2), 766.15(1), 766.55; the presumption that all property of married couples is marital property, § 766.31(2); and state-mandated access to enrollment in a spouse's health insurance plan, § 632.746(7).

Of great importance are the extensive federal benefits to which married couples are entitled: the right to file income taxes jointly, 26 U.S.C. § 6013; social security spousal and surviving-spouse benefits, 42 U.S.C. § 402; death benefits for surviving spouse of a military veteran, 38 U.S.C. § 1311; the right to transfer assets to one's spouse during marriage or at divorce without additional tax liability, 26 U.S.C. § 1041; exemption from federal estate tax of property that passes to the surviving spouse, 26 U.S.C. § 2056(a); the tax exemption for employer-provided healthcare to a spouse, 26 U.S.C. § 106; Treas. Reg. § 1.106–1; and healthcare benefits for spouses of federal employees, 5 U.S.C. §§ 8901(5), 8905.

The denial of these federal benefits to same-sex couples brings to mind the Supreme Court's opinion in *United States v. Windsor*, 133 S. Ct. 2675, 2694–95 (2013), which held unconstitutional the denial of all federal marital benefits to same-sex marriages recognized by state law. The Court's criticisms of such denial apply with even greater force to Indiana's law. The denial "tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition. [No same-sex marriages are valid in Indiana.] This places same-

sex couples in an unstable position of being in a second-tier marriage [in Indiana, in the lowest—the unmarried—tier]. The differentiation demeans the couple . . . [and] humiliates tens of thousands of children now being raised by same-sex couples. The law . . . makes 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." *Id.* at 2694.

The Court went on to describe at length the federal marital benefits denied by the Defense of Marriage Act to married same-sex couples. Of particular relevance to our two cases is the Court's finding that denial of those benefits causes economic harm to children of same-sex couples. "It raises the cost of health care for families by taxing health benefits provided by employers to their workers' same-sex spouses. And it denies or reduces benefits allowed to families upon the loss of a spouse and parent, benefits that are an integral part of family security. [The Act also] divests married same-sex couples of the duties and responsibilities that are an essential part of married life and that they in most cases would be honored to accept." *Id.* at 2695 (citations omitted).

Of course there are costs to marriage as well as benefits, not only the trivial cost of the marriage license but also the obligations, such as alimony, that a divorcing spouse may be forced to bear. But those are among "the duties and responsibilities that are an essential part of married life and that

[the spouses] in most cases would be honored to accept." That marriage continues to predominate over cohabitation as a choice of couples indicates that on average the sum of the tangible and intangible benefits of marriage outweighs the costs.

In light of the foregoing analysis it is apparent that *groundless* rejection of same-sex marriage by government must be a denial of equal protection of the laws, and therefore that Indiana and Wisconsin must to prevail establish a clearly offsetting governmental interest in that rejection. Whether they have done so is really the only issue before us, and the balance of this opinion is devoted to it—except that before addressing it we must address the states' argument that whatever the merits of the plaintiffs' claims, we are bound by *Baker v. Nelson*, 409 U.S. 810 (1972) (mem.), to reject them. For there the Supreme Court, without issuing an opinion, dismissed "for want of a substantial federal question" an appeal from a state court that had held that prohibiting same-sex marriage did not violate the Constitution. Although even a decision without opinion is on the merits and so binds lower courts, the Supreme Court carved an exception to this principle of judicial hierarchy in *Hicks v. Miranda*, 422 U.S. 332, 344 (1975), for "when doctrinal developments indicate otherwise"; see also *United States v. Blaine County*, 363 F.3d 897, 904 (9th Cir. 2004); *Soto-Lopez v. New York City Civil Service Commission*, 755 F.2d 266, 272 (2d Cir. 1985). *Baker* was decided in 1972—42 years ago and the dark ages so far as litigation over discrimination against homosexuals is concerned.

Subsequent decisions such as *Romer v. Evans*, 517 U.S. 620, 634–36 (1996); *Lawrence v. Texas*, 539 U.S. 558, 577–79 (2003), and *United States v. Windsor* are distinguishable from the present two cases but make clear that *Baker* is no longer authoritative. At least *we* think they're distinguishable. But Justice Scalia, in a dissenting opinion in *Lawrence*, 539 U.S. at 586, joined by Chief Justice Rehnquist and Justice Thomas, thought not. He wrote that "principle and logic" would *require* the Court, given its decision in *Lawrence*, to hold that there is a constitutional right to same-sex marriage. *Id*. at 605.

First up to bat is Indiana, which defends its refusal to allow same-sex marriage on a single ground, namely that government's sole purpose (or at least Indiana's sole purpose) in making marriage a legal relation (unlike cohabitation, which is purely contractual) is to enhance child welfare. Notably the state does not argue that recognizing same-sex marriage undermines conventional marriage.

When a child is conceived intentionally, the parents normally intend to raise the child together. But pregnancy, and the resulting birth (in the absence of abortion), are sometimes accidental, unintended; and often in such circumstances the mother is stuck with the baby—the father, not having wanted to become a father, refuses to take any responsibility for the child's welfare. The sole reason for Indiana's marriage law, the state's argument continues, is to try to channel

unintentionally procreative sex into a legal regime in which the biological father is required to assume parental responsibility. The state recognizes that some or even many homosexuals want to enter into same-sex marriages, but points out that many people want to enter into relations that government refuses to enforce or protect (friendship being a notable example). Government has no interest in recognizing and protecting same-sex marriage, Indiana argues, because homosexual sex cannot result in unintended births.

As for the considerable benefits that marriage confers on the married couple, these in the state's view are a part of the regulatory regime: the carrot supplementing the stick. Marital benefits for homosexual couples would not serve the regulatory purpose of marital benefits for heterosexual couples because homosexual couples don't produce babies.

The state's argument can be analogized to requiring drivers' licenses for drivers of motor vehicles but not for bicyclists. Motor vehicles are more dangerous to other users of the roads than bicycles are, and therefore a driver's license is required to drive the former but not to pedal the latter. Bicyclists do not and cannot complain about not having to have a license to pedal, because obtaining, renewing, etc., the license would involve a cost in time and money. The analogy is not perfect (if it were, it would be an identity not an analogy) because marriage confers benefits as well as imposing costs, as we have emphasized (indeed it confers on most couples benefits greater than the

costs). But those benefits, in Indiana's view, would serve no state interest if extended to homosexual couples, who should therefore be content with the benefits they derive from being excluded from the marriage licensing regime: the cost of the license and the burden of marital duties, such as support, and the costs associated with divorce. Moreover, even if possession of a driver's license conferred benefits not available to bicyclists (discounts, or tax credits, perhaps), the state could argue that it offered these benefits only to induce drivers to obtain a license (the carrot supplementing the stick), and that bicyclists don't create the same regulatory concern and so don't deserve a carrot.

Another analogy: The federal government extends a $2000 "saver's credit" to low- and middle-income workers who contribute to a retirement account. Although everyone would like a $2000 credit, only lower-income workers are entitled to it. Should higher-income workers complain about being left out of the program, the government could reply that only lower-income workers create a regulatory concern—the concern that they'd be unable to support themselves in retirement without government encouragement to save while they're young.

In short, Indiana argues that homosexual relationships are created and dissolved without legal consequences because they don't create family-related regulatory concerns. Yet encouraging marriage is less about forcing fathers to take responsibility for their unintended

children—state law has mechanisms for determining paternity and requiring the father to contribute to the support of his children—than about enhancing child welfare by encouraging parents to commit to a stable relationship in which they will be raising the child together. Moreover, if channeling procreative sex into marriage were the only reason that Indiana recognizes marriage, the state would not allow an infertile person to marry. Indeed it would make marriage licenses expire when one of the spouses (fertile upon marriage) became infertile because of age or disease. The state treats married homosexuals as would be "free riders" on heterosexual marriage, unreasonably reaping benefits intended by the state for fertile couples. But infertile couples are free riders too. Why are they allowed to reap the benefits accorded marriages of fertile couples, and homosexuals are not?

The state offers an involuted pair of answers, neither of which answers the charge that its policy toward same-sex marriage is underinclusive. It points out that in the case of most infertile heterosexual couples, only one spouse is infertile, and it argues that if these couples were forbidden to marry there would be a risk of the fertile spouse's seeking a fertile person of the other sex to breed with and the result would be "multiple relationships that might yield unintentional babies." True, though the fertile member of an infertile couple might decide instead to produce a child for the couple by surrogacy or (if the fertile member is the woman) a sperm bank, or to adopt,

or to divorce. But what is most unlikely is that the fertile member, though *desiring* a biological child, would have procreative sex with another person and then *abandon* the child—which is the state's professed fear.

The state tells us that "non-procreating opposite-sex couples who marry model the optimal, socially expected behavior for other opposite-sex couples whose sexual intercourse may well produce children." That's a strange argument; fertile couples don't learn about childrearing from infertile couples. And why wouldn't same-sex marriage send the same message that the state thinks marriage of infertile heterosexuals sends—that marriage is a desirable state?

It's true that infertile or otherwise non-procreative heterosexual couples (some fertile couples decide not to have children) differ from same-sex couples in that it is easier for the state to determine whether a couple is infertile by reason of being of the same sex. It would be considered an invasion of privacy to condition the eligibility of a heterosexual couple to marry on whether both prospective spouses were fertile (although later we'll see Wisconsin flirting with such an approach with respect to another class of infertile couples). And often the couple wouldn't know in advance of marriage whether they were fertile. But then how to explain Indiana's decision to carve an exception to its prohibition against marriage of close relatives for first cousins 65 or older—a population guaranteed to be infertile because women can't

conceive at that age? Ind. Code § 31-11-1-2. If the state's only interest in allowing marriage is to protect children, why has it gone out of its way to permit marriage of first cousins *only after* they are provably infertile? The state must think marriage valuable for something other than just procreation—that even non-procreative couples benefit from marriage. And among non-procreative couples, those that raise children, such as same-sex couples with adopted children, gain more from marriage than those who do not raise children, such as elderly cousins; elderly persons rarely adopt.

Indiana has thus invented an insidious form of discrimination: favoring first cousins, provided they are not of the same sex, over homosexuals. Elderly first cousins are permitted to marry because they can't produce children; homosexuals are forbidden to marry because they can't produce children. The state's argument that a marriage of first cousins who are past childbearing age provides a "model [of] family life for younger, potentially procreative men and women" is impossible to take seriously.

At oral argument the state's lawyer was asked whether "Indiana's law is about successfully raising children," and since "you agree same-sex couples can successfully raise children, why shouldn't the ban be lifted as to them?" The lawyer answered that "the assumption is that with opposite-sex couples there is very little thought given during the sexual act, sometimes, to whether babies may be a consequence." In other words, Indiana's

government thinks that straight couples tend to be sexually irresponsible, producing unwanted children by the carload, and so must be pressured (in the form of governmental encouragement of marriage through a combination of sticks and carrots) to marry, but that gay couples, unable as they are to produce children wanted or unwanted, are model parents—model citizens really—so have no need for marriage. Heterosexuals get drunk and pregnant, producing unwanted children; their reward is to be allowed to marry. Homosexual couples do not produce unwanted children; their reward is to be denied the right to marry. Go figure.

Which brings us to Indiana's weakest defense of its distinction among different types of infertile couple: its assumption that same-sex marriage cannot contribute to alleviating the problem of "accidental births," which the state contends is the sole governmental interest in marriage. Suppose the consequences of accidental births are indeed the state's sole reason for giving marriage a legal status. In advancing this as *the* reason to forbid same-sex marriage, Indiana has ignored adoption—an extraordinary oversight. Unintentional offspring are the children most likely to be put up for adoption, and if not adopted, to end up in a foster home. Accidental pregnancies are the major source of unwanted children, and unwanted children are a major problem for society, which is doubtless the reason homosexuals are permitted to adopt in most states—including Indiana and Wisconsin.

It's been estimated that more than 200,000 American children (some 3000 in Indiana and about the same number in Wisconsin) are being raised by homosexuals, mainly homosexual couples. Gary J. Gates, "LGBT Parenting in the United States" 3 (Williams Institute, UCLA School of Law, Feb. 2013), http://williamsinstitute.law.ucla.edu/wp-content/uploads/lgbt-parenting.pdf; Gates, "Same-Sex Couples in Indiana: A Demographic Summary" (Williams Institute, UCLA School of Law, 2014), http://williamsinstitute.law.ucla.edu/wp-content/uploads/IN-same-sex-couples-demo-aug-2014.pdf; Gates, "Same-Sex Couples in Wisconsin: A Demo-graphic Survey" (Williams Institute, UCLA School of Law, Aug. 2014), http://williamsinstitute.law.ucla.edu/wp-content/uploads/WI-same-sex-couples-demo-aug-2014.pdf. Gary Gates's demographic surveys find that among couples who have children, homosexual couples are five times as likely to be raising an adopted child as heterosexual couples in Indiana, and two and a half times as likely as heterosexual couples in Wisconsin.

If the fact that a child's parents are married enhances the child's prospects for a happy and successful life, as Indiana believes not without reason, this should be true whether the child's parents are natural or adoptive. The state's lawyers tell us that "the point of marriage's associated benefits and protections is to encourage child rearing environments where parents care for their biological children in tandem." Why the qualifier "biological"? The state recognizes that family is

about raising children and not just about producing them. It does not explain why the "point of marriage's associated benefits and protections" is inapplicable to a couple's adopted as distinct from biological children.

Married homosexuals are more likely to want to adopt than unmarried ones if only because of the many state and federal benefits to which married people are entitled. And so same-sex marriage improves the prospects of unintended children by increasing the number and resources of prospective adopters. Notably, same-sex couples are *more* likely to adopt foster children than opposite-sex couples are. Gates, "LGBT Parenting in the United States," *supra*, at 3. As of 2011, there were some 400,000 American children in foster care, of whom 10,800 were in Indiana and about 6500 in Wisconsin. U.S. Dept. of Health & Human Services, Children's Bureau, "How Many Children Are in Foster Care in the U.S.? In My State?" www.acf.hhs.gov/programs/cb/faq/foster-care4.

Also, the more willing adopters there are, not only the fewer children there will be in foster care or being raised by single mothers but also the fewer abortions there will be. Carrying a baby to term and putting the baby up for adoption is an alternative to abortion for a pregnant woman who thinks that as a single mother she could not cope with the baby. The pro-life community recognizes this. See, e.g., Students for Life of America, "Adoption, Another Option," http://studentsforlife.org/resources/organize-an-event/adoption: "There

may be times when a mother facing an unplanned pregnancy may feel completely unequipped to parent her child. She may feel her *only option* is to kill her preborn child. Pro-life individuals touch lives by helping women place their baby or child for adoption. *It is important to show women on your campus that adoption can be the answer to all of her fears"* (emphasis in original).

Consider now the emotional comfort that having married parents is likely to provide to children adopted by same-sex couples. Suppose such a child comes home from school one day and reports to his parents that all his classmates have a mom and a dad, while he has two moms (or two dads, as the case may be). Children, being natural conformists, tend to be upset upon discovering that they're not in step with their peers. If a child's same-sex parents are married, however, the parents can tell the child truthfully that an adult is permitted to marry a person of the opposite sex, or if the adult prefers as some do a person of his or her own sex, but that either way the parents are married and therefore the child can feel secure in being the child of a married couple. Conversely, imagine the parents having to tell their child that same-sex couples can't marry, and so the child is not the child of a married couple, unlike his classmates.

Indiana permits joint adoption by homosexuals (Wisconsin does not). But an unmarried homosexual couple is less stable than a married one, or so at least the state's insistence that marriage is better for children implies. If marriage

is better for children who are being brought up by their biological parents, it must be better for children who are being brought up by their adoptive parents. The state should *want* homosexual couples who adopt children—as, to repeat, they are permitted to do—to be married, if it is serious in arguing that the only governmental interest in marriage derives from the problem of accidental births. (We doubt that it is serious.)

The state's claim that conventional marriage is the solution to that problem is belied by the state's experience with births out of wedlock. Accidental pregnancies are found among married couples as well as unmarried couples, and among individuals who are not in a committed relationship and have sexual intercourse that results in an unintended pregnancy. But the state believes that married couples are less likely to abandon a child of the marriage even if the child's birth was unintended. So if the state's policy of trying to channel procreative sex into marriage were succeeding, we would expect a drop in the percentage of children born to an unmarried woman, or at least not an increase in that percentage. Yet in fact that percentage has been rising even since Indiana in 1997 reenacted its prohibition of same-sex marriage (thus underscoring its determined opposition to such marriage) and for the first time declared that it would not recognize same-sex marriages contracted in other states or abroad. The legislature was fearful that Hoosier homosexuals would flock to Hawaii to get married, for in 1996 the Hawaii courts appeared to be moving toward

invalidating the state's ban on same-sex marriage, though as things turned out Hawaii did not authorize such marriage until 2013.

In 1997, the year of the enactment, 33 percent of births in Indiana were to unmarried women; in 2012 (the latest year for which we have statistics) the percentage was 43 percent. The corresponding figures for Wisconsin are 28 percent and 37 percent and for the nation as a whole 32 percent and 41 percent. (The source of all these data is Kids Count Data Center, "Births to Unmarried Women," http://datacenter.kidscount.org/data/tables/7-births-to-unmarried-women#detailed/2/16,51/false/868,867,133,38,35/any/257,258.) There is no indication that these states' laws, ostensibly aimed at channeling procreation into marriage, have had any such effect.

A degree of arbitrariness is inherent in government regulation, but when there is no justification for government's treating a traditionally discriminated-against group significantly worse than the dominant group in the society, doing so denies equal protection of the laws. One wouldn't know, reading Wisconsin's brief, that there is or ever has been discrimination against homosexuals anywhere in the United States. The state either is oblivious to, or thinks irrelevant, that until quite recently homosexuality was anathematized by the vast majority of heterosexuals (which means, the vast majority of the American people), including by most Americans who were otherwise quite liberal. Homosexuals

had, as homosexuals, no rights; homosexual sex was criminal (though rarely prosecuted); homosexuals were formally banned from the armed forces and many other types of government work (though again enforcement was sporadic); and there were no laws prohibiting employment discrimination against homosexuals. Because homosexuality is more easily concealed than race, homosexuals did not experience the same economic and educational discrimination, and public humiliation, that African-Americans experienced. But to avoid discrimination and ostracism they had to conceal their homosexuality and so were reluctant to participate openly in homosexual relationships or reveal their homosexuality to the heterosexuals with whom they associated. Most of them stayed "in the closet." Same-sex marriage was out of the question, even though interracial marriage was legal in most states. Although discrimination against homosexuals has diminished greatly, it remains widespread. It persists in statutory form in Indiana and in Wisconsin's constitution.

At the very least, "a [discriminatory] law must bear a rational relationship to a legitimate governmental purpose." *Romer v. Evans, supra*, 517 U.S. at 635. Indiana's ban flunks this undemanding test.

Wisconsin's prohibition of same-sex marriage, to which we now turn, is found in a 2006 amendment to the state's constitution. The amendment, Article XIII, § 13, provides: "Only a marriage between one

man and one woman shall be valid or recognized as a marriage in this state. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state." Opponents of same-sex marriage in Indiana have tried for a number of years to insert a prohibition of such marriages into the state's constitution, as yet without success. A number of large businesses in Indiana oppose such a constitutional amendment. With 19 states having authorized same-sex marriage, the businesses may feel that it's only a matter of time before Indiana joins the bandwagon, and that a constitutional amendment would impede the process—and also would signal to Indiana's gay and lesbian citizens, some of whom are employees of these businesses, that they are in a very unwelcoming environment, with statutory reform blocked. (On the attitude of business in Indiana and Wisconsin to same-sex marriage, see, e.g., Nick Halter, "Target Files Court Papers Supporting Same-Sex Marriage in Wisconsin and Indiana," Aug. 5, 2014, www.bizjournals.com/twincities/news/2014/08/05/target-amicus-same-sex-marriage-wisconsin-indiana.html.)

Wisconsin's brief in defense of its prohibition of same-sex marriage adopts Indiana's ground ("accidental births") but does not amplify it. Its "accidental births" rationale for prohibiting same-sex marriage is, like Indiana's, undermined by a "first cousin" exemption—but, as a statutory matter at least, an even broader one: "No marriage shall be contracted . . . between persons who are

nearer of kin than 2nd cousins except that marriage may be contracted between first cousins where the female has attained the age of 55 years or where either party, at the time of application for a marriage license, submits an affidavit signed by a physician stating that either party is permanently sterile." Wis. Stat. § 65.03(1). Indiana's marriage law, as we know, authorizes first cousin marriages if both cousins are at least 65 years old. But—and here's the kicker—Indiana apparently will as a matter of comity recognize any marriage lawful where contracted, including therefore (as an Indiana court has held) marriages of first cousins contracted in Tennessee, a state that places no restrictions on such marriages. See Tenn. Code Ann. § 36-3-101; *Mason v. Mason*, 775 N.E.2d 706, 709 (Ind. App. 2002). Indiana has not tried to explain to us the logic of recognizing marriages of fertile first cousins (prohibited in Indiana) that happen to be contracted in states that permit such marriages, but of refusing, by virtue of the 1997 amendment, to recognize same-sex marriages (also prohibited in Indiana) contracted in states that permit them. This suggests animus against same-sex marriage, as is further suggested by the state's inability to make a plausible argument for its refusal to recognize same-sex marriage.

But back to Wisconsin, which makes four arguments of its own against such marriage: First, limiting marriage to heterosexuals is traditional and tradition is a valid basis for limiting legal rights. Second, the consequences of allowing same-sex marriage cannot be foreseen and therefore a

state should be permitted to move cautiously—that is, to do nothing, for Wisconsin does not suggest that it plans to take any steps in the direction of eventually authorizing such marriage. Third, the decision whether to permit or forbid same-sex marriage should be left to the democratic process, that is, to the legislature and the electorate. And fourth, same-sex marriage is analogous in its effects to no-fault divorce, which, the state argues, makes marriage fragile and unreliable—though of course Wisconsin has no-fault divorce, and it's surprising that the state's assistant attorney general, who argued the state's appeal, would trash his own state's law. The contention, built on the analogy to no-fault divorce and sensibly dropped in the state's briefs in this court—but the assistant attorney general could not resist resuscitating it at the oral argument—is that, as the state had put it in submissions to the district court, allowing same-sex marriage creates a danger of "shifting the public understanding of marriage away from a largely child-centric institution to an adult-centric institution focused on emotion." No evidence is presented that same-sex marriage is on average less "child-centric" and more emotional than an infertile marriage of heterosexuals, or for that matter that no-fault divorce has rendered marriage less "child-centric."

The state's argument from tradition runs head on into *Loving v. Virginia*, 388 U.S. 1 (1967), since the limitation of marriage to persons of the same race was traditional in a number of states when the Supreme Court invalidated it. Laws forbidding

black-white marriage dated back to colonial times and were found in northern as well as southern colonies and states. See Peggy Pascoe, *What Comes Naturally: Miscegenation Law and the Making of Race in America* (2009). Tradition per se has no positive or negative significance. There are good traditions, bad traditions pilloried in such famous literary stories as Franz Kafka's "In the Penal Colony" and Shirley Jackson's "The Lottery," bad traditions that are historical realities such as cannibalism, foot binding, and suttee, and traditions that from a public policy standpoint are neither good nor bad (such as trick-or-treating on Halloween). Tradition per se therefore cannot be a lawful ground for discrimination—regardless of the age of the tradition. Holmes thought it "revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV." Oliver Wendell Holmes, Jr., "The Path of the Law," 10 *Harv. L. Rev.* 457, 469 (1897). Henry IV (the English Henry IV, not the French one—Holmes presumably was referring to the former) died in 1413. Criticism of homosexuality is far older. In Leviticus 18:22 we read that "thou shalt not lie with mankind, as with womankind: it is abomination."

The limitation on interracial marriage invalidated in *Loving* was in one respect less severe than Wisconsin's law. It did not forbid members of any racial group to marry, just to marry a member of a different race. Members of different races had in 1967, as before and since, abundant possibilities for finding a suitable marriage partner of the same

race. In contrast, Wisconsin's law, like Indiana's, prevents a homosexual from marrying any person with the same sexual orientation, which is to say (with occasional exceptions) any person a homosexual would want or be willing to marry.

Wisconsin points out that many venerable customs appear to rest on nothing more than tradition—one might even say on mindless tradition. Why do men wear ties? Why do people shake hands (thus spreading germs) or give a peck on the cheek (ditto) when greeting a friend? Why does the President at Thanksgiving spare a brace of turkeys (two out of the more than 40 million turkeys killed for Thanksgiving dinners) from the butcher's knife? But these traditions, while to the fastidious they may seem silly, are at least harmless. If no social benefit is conferred by a tradition and it is written into law and it discriminates against a number of people and does them harm beyond just offending them, it is not just a harmless anachronism; it is a violation of the equal protection clause, as in *Loving*. See 388 U.S. at 8–12.

Against this the state argues in its opening brief that *Loving* "should be read as recognizing the constitutional restrictions on the government's ability to infringe the freedom of individuals to decide for themselves how to arrange their own private and domestic affairs." But that sounds just like what the government of Wisconsin has done: told homosexuals that they are forbidden to decide for themselves how to arrange their private and

domestic affairs. If they want to marry, they have to marry a person of the opposite sex.

The state elaborates its argument from the wonders of tradition by asserting, again in its opening brief, that "thousands of years of collective experience has [*sic*] established traditional marriage, between one man and one woman, as optimal for the family, society, and civilization." No evidence in support of the claim of optimality is offered, and there is no acknowledgment that a number of countries permit polygamy—Syria, Yemen, Iraq, Iran, Egypt, Sudan, Morocco, and Algeria—and that it flourishes in many African countries that do not actually authorize it, as well as in parts of Utah. (Indeed it's been said that "polygyny, whereby a man can have multiple wives, is the marriage form found in more places and at more times than any other." Stephanie Coontz, *Marriage, a History: How Love Conquered Marriage* 10 (2006).) But suppose the assertion is correct. How does that bear on same-sex marriage? Does Wisconsin want to push homosexuals to marry persons of the opposite sex because opposite-sex marriage is "optimal"? Does it think that allowing same-sex marriage will cause heterosexuals to convert to homosexuality? Efforts to convert homosexuals to heterosexuality have been a bust; is the opposite conversion more feasible?

Arguments from tradition must be distinguished from arguments based on morals. Many unquestioned laws are founded on moral principles that cannot be reduced to cost benefit

analysis. Laws forbidding gratuitous cruelty to animals, and laws providing public assistance for poor and disabled persons, are examples. There is widespread moral opposition to homosexuality. The opponents are entitled to their opinion. But neither Indiana nor Wisconsin make a moral argument against permitting same-sex marriage.

The state's second argument is: "go slow": maintaining the prohibition of same-sex marriage is the "prudent, cautious approach," and the state should therefore be allowed "to act deliberately and with prudence—or, at the very least, to gather sufficient information—before transforming this cornerstone of civilization and society." There is no suggestion that the state has any interest in gathering information, for notice the assumption in the quoted passage that the state already knows that allowing same-sex marriage would transform a "cornerstone of civilization and society," namely monogamous heterosexual marriage. One would expect the state to have provided *some* evidence, *some* reason to believe, however speculative and tenuous, that allowing same-sex marriage will or may "transform" marriage. At the oral argument the state's lawyer conceded that he had no knowledge of any study underway to determine the possible effects on heterosexual marriage in Wisconsin of allowing same-sex marriage. He did say that same-sex marriage might somehow devalue marriage, thus making it less attractive to opposite-sex couples. But he quickly acknowledged that he hadn't studied how same-sex marriage might harm marriage for heterosexuals and wasn't

prepared to argue the point. Massachusetts, the first state to legalize same-sex marriage, did so a decade ago. Has heterosexual marriage in Massachusetts been "transformed"? Wisconsin's lawyer didn't suggest it has been.

He may have been gesturing toward the concern expressed by some that same-sex marriage is likely to cause the heterosexual marriage rate to decline because heterosexuals who are hostile to homosexuals, or who whether hostile to them or not think that allowing them to marry degrades the institution of marriage (as might happen if people were allowed to marry their pets or their sports cars), might decide not to marry. Yet the only study that we've discovered, a reputable statistical study, finds that allowing same-sex marriage has no effect on the heterosexual marriage rate. Marcus Dillender, "The Death of Marriage? The Effects of New Forms of Legal Recognition on Marriage Rates in the United States," 51 *Demography* 563 (2014). No doubt there are more persons more violently opposed to same-sex marriage in states that have not yet permitted it than in states that have, yet in all states there are opponents of same-sex marriage. But they would tend also to be the citizens of the state who were most committed to heterosexual marriage (devout Catholics, for example).

No one knows exactly how many Americans are homosexual. Estimates vary from about 1.5 percent to about 4 percent. The estimate for Wisconsin is 2.8 percent, which includes bisexual and

transgendered persons. Gary J. Gates & Frank Newport, "LGBT Percentage Highest in D.C., Lowest in North Dakota," *Gallup* (Feb. 15, 2013), www.gallup.com/poll/160517/lgbt-percentage-highest-lowest-north-dakota.aspx. Given how small the percentage is, it is sufficiently implausible that allowing same-sex marriage would cause palpable harm to family, society, or civilization to require the state to tender evidence justifying its fears; it has provided none.

The state falls back on Justice Alito's statement in dissent in *United States v. Windsor*, *supra*, 133 S. Ct. at 2716, that "at present, no one—including social scientists, philosophers, and historians—can predict with any certainty what the long-term ramifications of widespread acceptance of same-sex marriage will be. And judges are certainly not equipped to make such an assessment." What follows, if prediction is impossible? Justice Alito thought what follows is that the Supreme Court should not interfere with Congress's determination in the Defense of Marriage Act that "marriage," for purposes of entitlement to federal marital benefits, excludes same-sex marriage even if lawful under state law. But can the "long-term ramifications" of *any* constitutional decision be predicted with certainty at the time the decision is rendered?

The state does not mention Justice Alito's invocation of a moral case against same-sex marriage, when he states in his dissent that "others explain the basis for the institution in more philosophical terms. They argue that marriage is

essentially the solemnizing of a comprehensive, exclusive, permanent union that is intrinsically ordered to producing new life, even if it does not always do so." *Id.* at 2718. That is a moral argument for limiting marriage to heterosexuals. The state does not mention the argument because as we said it mounts no moral arguments against same-sex marriage.

We know that many people want to enter into a same-sex marriage (there are millions of homosexual Americans, though of course not all of them want to marry), and that forbidding them to do so imposes a heavy cost, financial and emotional, on them and their children. What Wisconsin has not told us is whether any heterosexuals have been harmed by same-sex marriage. Obviously many people are distressed by the idea or reality of such marriage; otherwise these two cases wouldn't be here. But there is a difference, famously emphasized by John Stuart Mill in On Liberty (1869), between the distress that is caused by an assault, or a theft of property, or an invasion of privacy, or for that matter discrimination, and the distress that is caused by behavior that disgusts some people but does no (other) harm to them. Mill argued that neither law (government regulation) nor morality (condemnation by public opinion) has any proper concern with acts that, unlike a punch in the nose, inflict no temporal harm on another person without consent or justification. The qualification *temporal* is key. To be the basis of legal or moral concern, Mill argued, the harm must be tangible, secular, material—physical or

financial, or, if emotional, focused and direct—rather than moral or spiritual. Mill illustrated nontemporal harm with revulsion against polygamy in Utah (he was writing before Utah agreed, as a condition of being admitted to the union as a state, to amend its constitution to prohibit polygamy). The English people were fiercely critical of polygamy wherever it occurred. As they were entitled to be. But there was no way polygamy in Utah could have adverse effects in England, 4000 miles away. Mill didn't think that polygamy, however offensive, was a proper political concern of England.

Similarly, while many heterosexuals (though in America a rapidly diminishing number) disapprove of same-sex marriage, there is no way they are going to be hurt by it in a way that the law would take cognizance of. Wisconsin doesn't argue otherwise. Many people strongly disapproved of interracial marriage, and, more to the point, many people strongly disapproved (and still strongly disapprove) of homosexual sex, yet *Loving v. Virginia* invalidated state laws banning interracial marriage, and *Lawrence v. Texas* invalidated state laws banning homosexual sex acts.

Though these decisions are in the spirit of Mill, Mill is not the last word on public morality. But Wisconsin like Indiana does not base its prohibition of same-sex marriage on morality, perhaps because it believes plausibly that *Lawrence* rules out moral objections to homosexuality as legitimate grounds for discrimination.

In passing, Wisconsin in its opening brief notes that it "recogniz[es] domestic partnerships." Indeed it does: Wis. Stat. ch. 770. And the domestic partners must be of the same sex. *Id*., § 770.05(5). But the preamble to the statute states: "The legislature . . . finds that the legal status of domestic partnership as established in this chapter is not substantially similar to that of marriage," § 770.001, citing for this proposition a decision by a Wisconsin intermediate appellate court. *Appling v. Doyle*, 826 N.W.2d 666 (Wis. App. 2012), affirmed, 2014 WI 96 (Wis. July 31, 2014). Indeed that is what the court held. It pointed out that chapter 770 doesn't specify the rights and obligations of the parties to a domestic partnership. Rather you must go to provisions specifying the rights and obligations of married persons and see whether a provision that you're concerned with is made expressly applicable to domestic partnerships, as is for example the provision that gives a surviving spouse the deceased spouse's interest in their home. 826 N.W.2d at 668. But as the court further explained, the rights and obligations of domestic partners are far more limited than those of married persons. See *id*. at 682–86. (For example, only spouses may jointly adopt a child. *Id*. at 685.) They have to be far more limited, because of the state's constitutional provision quoted above that "a legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized." Wis. Const. Art. XIII, § 13. Domestic partnership in Wisconsin is not and cannot be marriage by another name.

It is true that because the state does not regard same-sex marriages contracted in other states as wholly void (though they are not "recognized" in Wisconsin), citizens of Wisconsin who contract same-sex marriages in states in which such marriages are legal are not debarred from receiving some of the federal benefits to which legally married persons (including parties to a same-sex marriage) are entitled. Not to all those benefits, however, because a number of them are limited by federal law to persons who reside in a state in which their marriages are recognized. These include benefits under the Family & Medical Leave Act, see 29 C.F.R. § 825.122(b), and access to a spouse's social security benefits. See 42 U.S.C. § 416(h)(1)(A)(i).

So look what the state has done: it has thrown a crumb to same-sex couples, denying them not only many of the rights and many of the benefits of marriage but also of course the name. Imagine if in the 1960s the states that forbade interracial marriage had said to interracial couples: "you can have domestic partnerships that create the identical rights and obligations of marriage, but you can call them only 'civil unions' or 'domestic partnerships.' The term 'marriage' is reserved for same-race unions." This would give interracial couples much more than Wisconsin's domestic partnership statute gives same-sex couples. Yet withholding the term "marriage" would be considered deeply offensive, and, having no justification other than bigotry, would be invalidated as a denial of equal protection.

The most arbitrary feature of Wisconsin's treatment of same-sex couples is its refusal to allow couples in domestic partnerships to adopt jointly, as married heterosexual couples are allowed to do (and in Indiana, even unmarried ones). The refusal harms the children, by telling them they don't have two parents, like other children, and harms the parent who is not the adoptive parent by depriving him or her of the legal status of a parent. The state offers no justification.

Wisconsin's remaining argument is that the ban on same-sex marriage is the outcome of a democratic process—the enactment of a constitutional ban by popular vote. But homosexuals are only a small part of the state's population—2.8 percent, we said, grouping transgendered and bisexual persons with homosexuals. Minorities trampled on by the democratic process have recourse to the courts; the recourse is called constitutional law.

In its reply brief Indiana adopts Wisconsin's democracy argument, adding that "homosexuals are politically powerful out of proportion to their numbers." No evidence is presented by the state to support this contention. It is true that an increasing number of heterosexuals support same-sex marriage; otherwise 11 states would not have changed their laws to permit such marriage (the other 8 states that allow same-sex marriage do so as a result of judicial decisions invalidating the states' bans). No inference of manipulation of the

democratic process by homosexuals can be drawn, however, any more than it could be inferred from the enactment of civil rights laws that African-Americans "are politically powerful out of proportion to their numbers." It is to the credit of American voters that they do not support only laws that are in their palpable self-interest. They support laws punishing cruelty to animals, even though not a single animal has a vote.

To return to where we started in this opinion, more than unsupported conjecture that same-sex marriage will harm heterosexual marriage or children or any other valid and important interest of a state is necessary to justify discrimination on the basis of sexual orientation. As we have been at pains to explain, the grounds advanced by Indiana and Wisconsin for their discriminatory policies are not only conjectural; they are totally implausible.

For completeness we note the ultimate convergence of our simplified four step analysis with the more familiar, but also more complex, approach found in many cases. In *SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471, 483 (9th Cir. 2014), the Ninth Circuit concluded, based on a reading of the Supreme Court's decisions in *Lawrence* and *Windsor*, that statutes that discriminate on the basis of sexual orientation are subject to "heightened scrutiny"—and in doing so noted that *Windsor*, in invalidating the Defense of Marriage Act, had balanced the Act's harms and offsetting benefits: "Notably absent from *Windsor's* review of DOMA are the 'strong

presumption' in favor of the constitutionality of laws and the 'extremely deferential' posture toward government action that are the marks of rational basis review. . . . In its parting sentences, *Windsor* explicitly announces its balancing of the government's interest against the harm or injury to gays and lesbians: 'The federal statute is invalid, for no legitimate purpose *overcomes* the purpose and effect to disparage and injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.' 133 S. Ct. at 2696 (emphasis added). *Windsor's* balancing is not the work of rational basis review."

The Supreme Court also said in *Windsor* that "the Act's demonstrated purpose is to ensure that if any State decides to recognize same-sex marriages, those unions will be treated as second class marriages for purposes of federal law." 133 S. Ct. at 2693–94. A second class marriage would be a lot better than the cohabitation to which Indiana and Wisconsin have consigned same-sex couples.

The states' concern with the problem of unwanted children is valid and important, but their solution is not "tailored" to the problem, because by denying marital rights to same-sex couples it reduces the incentive of such couples to adopt unwanted children and impairs the welfare of those children who are adopted by such couples. The states' solution is thus, in the familiar terminology of constitutional discrimination law, "overinclusive." It is also underinclusive, in

allowing infertile heterosexual couples to marry, but not same-sex couples.

Before ending this long opinion we need to address, though only very briefly, Wisconsin's complaint about the wording of the injunction entered by the district judge. Its lawyers claim to fear the state's being held in contempt because it doesn't know what measures would satisfy the injunction's command that all relevant state officials "treat same-sex couples the same as different sex couples in the context of processing a marriage license or determining the rights, protections, obligations or benefits of marriage." If the state's lawyers really find this command unclear, they should ask the district judge for clarification. (They should have done so already; they haven't.) Better yet, they should draw up a plan of compliance and submit it to the judge for approval.

The district court judgments invalidating and enjoining these two states' prohibitions of same-sex marriage are

AFFIRMED.

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

July 25, 2014

By the Court:

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

Nos. 14-2386, 14-2387, and 14-2388 v.

PENNY BOGAN, et al.,
Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Indiana, Indianapolis Division.

Nos. 1:14-cv-00355-RLY-TAB, 1:14-cv-00404-RLY-TAB, 1:14-cv-00406-RLY-MJD

Richard L. Young, Chief Judge.

VIRGINIA WOLF, et al.,
Plaintiffs-Appellees,

No. 14-2526 v.

SCOTT WALKER, et al.,
Defendants-Appellants.

Appeal from the United States District Court for the Western District of Wisconsin.

No. 3:14-cv-00064-bbc

Barbara B. Crabb,
Judge.

Petitions for Initial Hearing En Banc were filed by counsel for the appellants on July 11, 2014, in appeal nos. 14-2386, 14-2387, and 14-2388 and on July 16, 2014, in appeal no. 14-2526. On July 21, 2014, counsel for the appellees filed answers to the petitions. A majority of the judges in regular active service have voted to deny initial hearing en banc.[1] Accordingly,

IT IS ORDERED that the petitions for hearing en banc are **DENIED**.

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[1] Judge Flaum did not participate in consideration of whether to hear the cases en banc.

UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT

Everett McKinley Dirksen United States
Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604

Office of the Clerk
Phone: (312) 435-5850
www.ca7.uscourts.gov

July 14, 2014

No.: 14-2037

MARILYN RAE BASKIN, et al.,
Plaintiffs-Appellees
v.
PENNY BOGAN, et al.,
Defendants-Appellants

Originating Case Information:

District Court No: 1:14-cv-00355-RLY-TAB
Southern District of Indiana, Indianapolis Division
District Judge Richard L. Young

Upon consideration of the **JOINT MOTION TO DISMISS APPEAL OF THE DISTRICT COURT'S ENTRY OF A PRELIMINARY INJUNCTION AS MOOT**, filed on July 14, 2014, by counsel for the appellants,

IT IS ORDERED that this case is **DISMISSED**, pursuant to Federal Rule of Appellate Procedure 42(b).

UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT

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Chicago, Illinois 60604

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NOTICE OF ISSUANCE OF MANDATE

July 14, 2014

TO: Laura A. Briggs
UNITED STATES DISTRICT COURT
Southern District of Indiana
United States Courthouse
Indianapolis, IN 46204-0000

No.: 14-2037

MARILYN RAE BASKIN, et al.,
Plaintiffs-Appellees
v.
PENNY BOGAN, et al.,
Defendants-Appellants

Originating Case Information:

District Court No: 1:14-cv-00355-RLY-TAB
Southern District of Indiana, Indianapolis Division

District Judge Richard L. Young

Herewith is the mandate of this court in this appeal, along with the Bill of Costs, if any. A certified copy of the opinion/order of the court and judgment, if any, and any direction as to costs shall constitute the mandate.

TYPE OF DISMISSAL: F.R.A.P. 42(b)

STATUS OF THE RECORD: no record to be returned

NOTE TO COUNSEL:
If any physical and large documentary exhibits have been filed in the above-entitled cause, they are to be withdrawn ten (10) days from the date of this notice. Exhibits not withdrawn during this period will be disposed of.

Please acknowledge receipt of these documents on the enclosed copy of this notice.

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UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT

Everett McKinley Dirksen United States
Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604

Office of the Clerk
Phone: (312) 435-5850
www.ca7.uscourts.gov

ORDER

July 2, 2014

Before
RICHARD A. POSNER, *Circuit Judge*
ANN CLAIRE WILLIAMS, *Circuit Judge*
DAVID F. HAMILTON, *Circuit Judge*

Nos.: 14-2386

MARILYN RAE BASKIN, et al.,
Plaintiffs-Appellees
v.
PENNY BOGAN, et al.,
Defendants-Appellants

No.: 14-2387

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

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

No.: 14-2388

PAMELA LEE, et al.,
Plaintiffs-Appellees
v.
BRIAN ABBOTT, et al.,
Defendants-Appellants

Originating Case Information:

District Court Nos: 1:14-cv-00355-RLY-TAB, 1:14-cv-00404-RLY-TAB, 1:14-cv-00406-RLY-MJD
Southern District of Indiana, Indianapolis Division

Upon consideration of the **PLAINTIFFS-APPELLEES OFFICER PAMELA LEE, ET AL., EMERGENCY MOTION TO LIFT THE COURT'S STAY IN PART**, filed on July 1, 2014, by counsel for the appellees,

IT IS ORDERED that the motion is **DENIED**.

UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT

Everett McKinley Dirksen United States
Courthouse
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Chicago, Illinois 60604

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ORDER

July 1, 2014

Before
RICHARD A. POSNER, *Circuit Judge*
ANN CLAIRE WILLIAMS, *Circuit Judge*
DAVID F. HAMILTON, *Circuit Judge*

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Originating Case Information:

District Court No: 1:14-cv-00355-RLY-TAB
Southern District of Indiana, Indianapolis Division
District Judge Richard L. Young

Originating Case Information:

District Court No: 1:14-cv-00404-RLY-TAB
Southern District of Indiana, Indianapolis Division
District Judge Richard L. Young

Originating Case Information:

District Court No: 1:14-cv-00406-RLY-MJD
Southern District of Indiana, Indianapolis Division
District Judge Richard L. Young

The following are before the court:

1. **PLAINTIFFS-APPELLEES QUASNEY AND SANDLER'S EMERGENCY MOTION TO LIFE THE COURT'S STAY IN PART**, filed on June 30, 2014, by counsel for the appellees Amy Sandler and Nikole Quasney.

2. **RESPONSE IN OPPOSITION TO PLAINTIFFS-APPELLEES QUASNEY AND SANDLER'S EMERGENCY MOTION TO LIFT THE COURT'S STAY IN PART**, filed on July 1, 2014, by counsel for the appellants Greg Zoeller and William C. Vanness, II.

IT IS **ORDERED** that the motion is **GRANTED**. The appellants are **ORDERED** to recognize the validity of the 2013 marriage between appellees Amy Sandler and Nikole Quasney on an emergency basis pending further order of the court.

UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT

Everett McKinley Dirksen United States
Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604

Office of the Clerk
Phone: (312) 435-5850
www.ca7.uscourts.gov

ORDER

June 27, 2014

Before
RICHARD A. POSNER, *Circuit Judge*
ANN CLAIRE WILLIAMS, *Circuit Judge*
DAVID F. HAMILTON, *Circuit Judge*

No.: 14-2386

MARILYN RAE BASKIN, et al.,
Plaintiffs-Appellees
v.
PENNY BOGAN, et al.,
Defendants-Appellants

No.: 14-2387

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

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

No.: 14-2388

PAMELA LEE, et al.,
Plaintiffs-Appellees
v.
BRIAN ABBOTT, et al.,
Defendants-Appellants

Originating Case Information:

District Court No: 1:14-cv-00355-RLY-TAB
Southern District of Indiana, Indianapolis Division
District Judge Richard L. Young

Originating Case Information:

District Court No: 1:14-cv-00404-RLY-TAB
Southern District of Indiana, Indianapolis Division
District Judge Richard L. Young

Originating Case Information:

District Court No: 1:14-cv-00406-RLY-MJD
Southern District of Indiana, Indianapolis Division
District Judge Richard L. Young

Upon consideration of the **EMERGENCY MOTION FOR STAY PENDING APPEAL**, filed on June 27, 2014, by counsel for the appellants,

IT IS ORDERED that the motion is **GRANTED**. The district court's order dated 6/25/14 is **STAYED** pending resolution of this appeal.

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

June 27, 2014

By the Court:

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

No. 14-2386 v.

PENNY BOGAN, et al.,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

No. 1:14-cv-00355-RLY-TAB

Richard L. Young, Chief Judge.

MIDORI FUJII, et al.,
Plaintiffs-Appellees,

No. 14-2387 v.

COMMISSIONER OF THE INDIANA STATE DEPARTMENT OF REVENUE, in his official capacity, et al.,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

No. 1:14-cv-00404-RLY-TAB

Richard L. Young, Chief Judge.

PAMELA LEE, et al.,
Plaintiffs-Appellees,

No. 14-2388 v.

BRIAN ABBOTT, et al.,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

No. 1:14-cv-00406-RLY-MJD

Richard L. Young, Chief Judge.

ORDER

The court, on its own motion, orders that these appeals are CONSOLIDATED for purposes of briefing and disposition.

The briefing schedule is as follows:

1. The appellants shall file a single, consolidated brief and required short appendix on or before August 6, 2014.

2. The appellees shall file a single, consolidated brief on or before September 5, 2014.

3. The appellants shall file a single, consolidated reply brief, if any, on or before September 19, 2014.

Important Scheduling Notice!

Notices of hearing for particular appeals are mailed shortly before the date of oral argument. Criminal appeals are scheduled shortly after the filing of the appellant's main brief; civil appeals after the filing of the appellee's brief. If you foresee that you will be unavailable during a period in which your particular appeal might be scheduled, please write the clerk advising him of the time period and the reason for such unavailability. Session data is located at http//www.ca7.uscourts.gov/cal/calendar.pdf.
Once an appeal is formally scheduled for a certain date, it is very difficult to have the setting changed. See Circuit Rule 34(e).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

1:14-cv-00355-RLY-TAB

MARILYN RAE BASKIN and ESTHER FULLER; BONNIE EVERLY and LINDA JUDKINS; DAWN LYNN CARVER and PAMELA RUTH ELEASE EANES; HENRY GREENE and GLENN FUNKHOUSER, individually and as parents and next friends of C.A.G.; NIKOLE QUASNEY, and AMY SANDLER, individually and as parents and next friends of A.Q.-S. and M.Q.-S.,

Plaintiffs,

vs.

PENNY BOGAN, in her official capacity as BOONE COUNTY CLERK; KAREN M. MARTIN, in her official capacity as PORTER COUNTY CLERK; MICHAEL A. BROWN, in his official capacity as LAKE COUNTY CLERK; PEGGY BEAVER, in her official capacity as HAMILTON COUNTY CLERK; WILLIAM C. VANNESS II, M.D., in his official capacity as the COMMISSIONER, INDIANA STATE DEPARTMENT OF HEALTH; and GREG ZOELLER, in his official capacity as INDIANA

ATTORNEY GENERAL,)
)
Defendants.)

1:14-cv-00404-RLY-TAB

MIDORI FUJII; MELODY LAYNE and TARA BETTERMAN; SCOTT and Rodney MOUBRAY-CARRICO; MONICA WEHRLE and HARRIET MILLER; GREGORY HASTY and CHRISTOPHER VALLERO; ROB MACPHERSON and STEVEN STOLEN, individually and as parents and next friends of L. M.-C. and A. M.-S.,)
)
Plaintiffs,)
)
vs.)
)
GOVERNOR, STATE OF INDIANA, in his official capacity; COMMISSIONER, INDIANA STATE DEPARTMENT OF HEALTH, in his official capacity; COMMISSIONER, INDIANA STATE DEPARTMENT OF REVENUE, in his official capacity; CLERK, ALLEN COUNTY, INDIANA, in her official capacity; CLERK, HAMILTON COUNTY, INDIANA, in her official capacity,)
)
Defendants.)

1:14-cv-00406-RLY-MJD

OFFICER PAMELA LEE, CANDACE BATTEN-LEE, OFFICER TERESA WELBORN, ELIZABETH J. PIETTE, BATALLION CHIEF RUTH MORRISON, MARTHA LEVERETT, SERGEANT KAREN VAUGHN-KAJMOWICZ, TAMMY VAUGHN-KAJMOWICZ, and J. S. V., T. S. V., T. R. V., by their parents and next friends SERGEANT KAREN VAUGHN-KAJMOWICZ and TAMMY VAUGHN-KAJMOWICZ,	)
Plaintiffs,	)
vs.	)
MIKE PENCE, in his official capacity as GOVERNOR OF THE STATE OF INDIANA; BRIAN ABBOTT, CHRIS ATKINS, KEN COCHRAN, STEVE DANIELS, JODI GOLDEN, MICHAEL PINKHAM, KYLE ROSEBROUGH, and BRET SWANSON, in their official capacities as members of the Board of Trustees of the Indiana Public Retirement System; and STEVE RUSSO, in his official capacity as Executive Director of the Indiana Public Retirement System,	)
Defendants.	)

ENTRY ON CROSS MOTIONS FOR SUMMARY JUDGMENT

The court has before it three cases, *Baskin v. Bogan*, *Fujii v. Pence*, and *Lee v. Pence*. All three allege that Indiana Code Section 31-11-1-1 ("Section 31-11-1-1"), which defines marriage as between one man and one woman and voids marriages between same-sex persons, is facially unconstitutional. Plaintiffs in the *Baskin* and *Fujii* cases challenge the entirety of Section 31-11-1-1, while Plaintiffs in the *Lee* case challenge only Section 31-11-1-1(b). Plaintiffs, in all three cases, allege that Section 31-11-1-1 violates their rights to due process and equal protection under the Fourteenth Amendment of the United States Constitution. In each case, Plaintiffs seek declaratory and injunctive relief against the respective Defendants. Also in each case, Plaintiffs and Defendants have moved for summary judgment, agreeing that there are no issues of material fact. For the reasons set forth below, the court finds that Indiana's same sex marriage ban violates the due process clause and equal protection clause and is, therefore, unconstitutional. The court **GRANTS in part and DENIES in part** the Plaintiffs' motions for summary judgment and **GRANTS in part and DENIES in part** the Defendants' motions.

I. Background

A. The *Baskin* Plaintiffs

The court considers the case of *Baskin v. Bogan* to be the lead case and thus will recite only those facts relevant to that dispute. In *Baskin v. Bogan*, Plaintiffs are comprised of five same-sex couples and three minor children of two of the couples. (Amended Complaint ¶ 1, Filing No. 30).[1] Four couples, Marilyn Rae Baskin and Esther Fuller, Bonnie Everly and Linda Judkins, Dawn Carver and Pamela Eanes, Henry Greene and Glenn Funkhouser (collectively the "unmarried plaintiffs"), are not married; one couple, Nikole Quasney and Amy Sandler (collectively the "married plaintiffs"), married in Massachusetts while on their annual vacation to the Sandler family home. Each couple resides in Indiana and has been in a loving, committed relationship for over a decade. Each couple has their own set of fears and concerns should something happen to his or her significant other.

> Plaintiffs challenge Section 31-11-1-1, which states:
>
> (a) Only a female may marry a male. Only a male may marry a female. (hereinafter "Section A")
>
> (b) A marriage between persons of the same gender is void in Indiana even if the marriage is lawful in the place where it is solemnized. (hereinafter "Section B")

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[1] Filing Numbers will refer to those documents in *Baskin v. Bogan* unless stated otherwise.

In addition, Plaintiffs broadly challenge other Indiana statutes that have the effect of carrying out the marriage ban. (hereinafter, collectively, with Section 31-11-1-1, referred to as "Indiana's marriage laws"). On April 10, 2014, the court granted a temporary restraining order (Filing No. 51) prohibiting the *Baskin* Defendants from enforcing Section B against Nikole Quasney and Amy Sandler. The parties in *Baskin* agreed to fully brief their motions for preliminary injunction and summary judgments for a combined hearing held on May 2, 2014. The court granted a preliminary injunction extending the temporary restraining order. (Filing No. 65). The court now considers the cross motions for summary judgment in the three cases.

B. Indiana's Marriage Laws

In order to marry in the State of Indiana, a couple must apply for and be issued a marriage license. *See* Ind. Code § 31-11-4-1. The couple need not be residents of the state. *See* Ind. Code § 31-11-4-3. However, the two individuals must be at least eighteen years of age or meet certain exceptions. *See* Ind. Code § 31-11-1-4; Ind. Code § 31-11-1-5. An application for a marriage license must include information such as full name, birthplace, residence, age, and information about each person's parents. *See* Ind. Code § 31-11-4-4.[2] The application

[2] The State Department of Health is charged under Ind. Code § 31-11-4-4(c) with developing a uniform application for marriage licenses.

only has blanks for information from a male and female applicant. See Marriage License Application, *available at* www.in.gov/judiciary/2605.htm. It is a Class D Felony to provide inaccurate information in the marriage license or to provide inaccurate information about one's physical condition.[3] *See* Ind. Code § 31-11-11-1; Ind. Code § 31-11-11-3. The clerk may not issue a license if an individual has been adjudged mentally incompetent or is under the influence of alcohol or drugs. *See* Ind. Code § 31-11-4-11.

The marriage license serves as the legal authority to solemnize a marriage. *See* Ind. Code § 31-11-4-14. The marriage may be solemnized by religious or non-religious figures. *See* Ind. Code § 31-11-6-1. If an individual attempts to solemnize a marriage in violation of Indiana Code Chapter 31-11-1, which includes same-sex marriages, then that person has committed a Class B Misdemeanor. *See* Ind. Code § 31-11-11-7.

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[3] In an official opinion concerning the authority of clerks to issue marriage licenses and only referencing one occasion where they cannot –same-sex marriages, the Attorney General appeared to consider inaccurate physical information to include gender. See 2004 Ind. Op. Att'y Gen. No. 4 (Apr. 29, 2004). The Attorney General noted that a clerk can be charged with a misdemeanor for issuing a marriage license knowing the information concerning the physical condition of the applicant is false. See id.

In addition to prohibiting same-sex marriages, Indiana prohibits bigamous marriages and marriages between relatives more closely related than second cousins unless they are first cousins over the age of sixty-five. *See* Ind. Code § 31-11-1-2 (cousins); see Ind. Code § 31-11-1-3 (polygamy). Nevertheless, when evaluating the legality of marriages, the Indiana Supreme Court found that "the presumption in favor of matrimony is one of the strongest known to law." *Teter v. Teter*, 101 Ind. 129, 131-32 (Ind. 1885). In general, Indiana recognizes out-of-state marriages that were valid in the location performed. *Bolkovac v. State*, 98 N.E.2d 250, 304 (Ind. 1951) ("[t]he validity of a marriage depends upon the law of the place where it occurs.").

II. Summary Judgment Standard

The purpose of summary judgment is to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Summary judgment is appropriate if the record "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED R. CIV. P. 56(a). A genuine issue of material fact exists if there is sufficient evidence for a reasonable jury to return a verdict in favor of the non-moving party on the particular issue. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

On a motion for summary judgment, the burden rests with the moving party to demonstrate "that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). After the moving party demonstrates the absence of a genuine issue for trial, the responsibility shifts to the non-movant to "go beyond the pleadings" and point to evidence of a genuine factual dispute precluding summary judgment. *Id.* at 322-23. "If the non-movant does not come forward with evidence that would reasonably permit the finder of fact to find in her favor on a material question, then the court must enter summary judgment against her." *Waldridge v. Am. Hoechst Corp.*, 24 F.3d 918, 920 (7th Cir. 1994) (citing *Matsushita Elec. Indus. Co.*, 475 U.S. at 585-87); *see Celotex*, 477 U.S. at 322-24; *see also Anderson*, 477 U.S. at 249-52.

Prior to discussing the merits of the summary judgment motions, the court must decide several threshold issues. First, the court must determine whether Defendants Attorney General Zoeller, Governor Pence, and the Commissioner of the Indiana State Department of Revenue ("Department of Revenue Commissioner") are proper parties, and second, whether *Baker v. Nelson*, 409 U.S. 810 (1972) bars the present lawsuit.

III. Proper Party Defendants

Under the Eleventh Amendment, a citizen cannot sue their state in federal court unless the

state consents. However, the Supreme Court created an important exception to that immunity in *Ex Parte Young*. 209 U.S. 123 (1908). Under that doctrine, "a private party can sue a state officer in his or her official capacity to enjoin prospective action that would violate federal law." *Ameritech Corp. v. McCann*, 297 F.3d 582, 585-86 (7th Cir. 2002)(quoting *Dean Foods Co. v. Brancel*, 187 F.3d 609, 613 (7th Cir. 1999)). Because Plaintiffs seek an injunction to enjoin actions which violate federal law, *Ex Parte Young* applies. The question here rather, is who is a proper defendant?

The proper defendants are those who bear "'legal responsibility for the flaws [plaintiffs] perceive in the system' and not one[s] from whom they 'could not ask anything . . . that could conceivably help their cause.'" *Sweeney v. Daniels*, No. 2:12-cv-81-PPS/PRC, 2013 WL 209047, * 3 (N.D. Ind. Jan. 17, 2013) (quoting *Hearne v. Bd. Of Educ.*, 185 F.3d 770, 777 (7th Cir. 1999)). Defendants Zoeller, Pence, and the Department of Revenue Commissioner assert that they are not the proper parties. For the reasons explained below, the court agrees with Governor Pence and disagrees with Attorney General Zoeller and the Department of Revenue Commissioner.

A. Defendant Zoeller

Defendant Zoeller, sued in *Baskin v. Bogan*, asserts that he neither has the authority to enforce nor has any other role respecting Section 31-11-1-1 as the Attorney General. However, the *Baskin*

Plaintiffs' complaint broadly challenges Section 31-11-1-1 and the State's other laws precluding such marriages, and requests that the court declare Section 31-11-1-1 "and all other sources of Indiana law that preclude marriage for same-sex couples or prevent recognition of their marriages" unconstitutional. (Amended Complaint §§ 3, 80, Filing No. 30, at ECF p. 2, 26). This relief would encompass such criminal statutes as listed above in Part I.B.

The Attorney General has the broad authority to assist in the prosecution of any offense if he decides that it is in the public interest. See Ind. Code. § 4-6-1-6. Noting this broad authority, the court has previously found that the Attorney General is a proper party when challenging statutes regarding abortion. *See Arnold v. Sendak*, 416 F. Supp. 22, 23 (S.D. Ind. 1976), *aff'd*, 429 U.S. 476 (1976) (finding "[t]he Attorney General thus has broad powers in the enforcement of criminal laws of the state, and is accordingly a proper defendant."); *see also Gary-Northwest Indiana Women's Services, Inc. v. Bowen*, 496 F. Supp. 894 (N.D. Ind. 1980) (attorney general as a party to a law challenging statute criminalizing abortion). Although Section 31-11-1-1 does not specifically define criminal penalties, Indiana has criminal provisions in place to prevent individuals from marrying in violation of it. *See* Ind. Code §§ 31-11-11-7; 31-11-11-1; and 31-11-11-13. Because the Attorney General has broad powers in the enforcement of such criminal statutes, he has a sufficient connection and role in enforcing such

statutes for purposes of *Ex Parte Young*. 209 U.S. at 157. Therefore, the court **DENIES** the Attorney General's motion for summary judgment on that ground. (Filing No. 55).

B. Governor Pence

Governor Pence is sued in the *Fujii* and *Lee* cases. As the court found in *Love v. Pence*, another case challenging the constitutionality of Section 31-11-1-1, the Governor is not a proper party because the Plaintiffs' injuries are not fairly traceable to him and cannot be redressed by him. (*Love v. Pence*, No. 4:14-cv-15-RLY-TAB, Filing No. 32 (S.D. Ind. June 24, 2014). Therefore, the court **GRANTS** the Governor's motions for summary judgment (*Fujii* Filing No. 44) (*Lee* Filing No. 41).

C. Commissioner of the Indiana State Department of Revenue

The *Fujii* Plaintiffs also brought suit against the Department of Revenue Commissioner. The Commissioner claims he is the wrong party because any harms caused by him do not constitute a concrete injury. The court disagrees and finds that Plaintiffs have alleged a concrete injury by having to fill out three federal tax returns in order to file separate returns for Indiana. *See e.g. Harris v. City of Zion, Lake County, Ill.*, 927 F.2d 1401, 1406 (7th Cir. 1991) ("[a]n identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation."). The court finds that this

is an identifiable trifle. Therefore, the court **DENIES** the Department of Revenue Commissioner's motion for summary judgment on that ground. (*Fujii* Filing No. 44).

IV. The Effect of *Baker v. Nelson*

Defendants argue that this case is barred by *Baker v. Nelson*. In *Baker*, the United States Supreme Court dismissed an appeal from the Supreme Court of Minnesota for want of a substantial federal question. 409 U.S. at 810. The Supreme Court of Minnesota held that: (1) the absence of an express statutory prohibition against same-sex marriages did not mean same-sex marriages are authorized, and (2) state authorization of same-sex marriages is not required by the United States Constitution. *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *aff'd*, 409 U.S. 810 (1972).

The parties agree that the Supreme Court's ruling has the effect of a ruling on the merits. *See Ill. Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 182-83 (1979) ("a summary disposition affirms only the judgment of the court below, and no more may be read into [the] action than was essential to sustain the judgment."). Defendants contend that this case raises the precise issue addressed by *Baker* and thus binds the court to find in Defendants' favor. *See Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975) (quotation omitted) ("the lower courts are bound . . . until such time as the [Supreme] Court tells them that they are not.").

The court agrees that the issue of whether same-sex couples may be constitutionally prohibited from marrying is the exact issue presented in *Baker*. Nevertheless, the Supreme Court created an important exception that "when doctrinal developments indicate," lower courts need not adhere to the summary disposition. *Id*. Plaintiffs argue that three decisions in particular are such developments: *Romer v. Evans*, 517 U.S. 620 (1996), *Lawrence v. Texas*, 539 U.S. 558 (2003), and *United States v. Windsor*, 133 S. Ct. 2675 (2013), and thus, the court no longer must adhere to *Baker*.

The Supreme Court decided *Baker* at a different time in the country's equal protection jurisprudence. The following are examples of the jurisprudence at and around the time of *Baker*. The Court struck down a law for discriminating on the basis of gender for the first time only one year before *Baker*. *Reed v. Reed*, 404 U.S. 71 (1971). Moreover, at the time *Baker* was decided, the Court had not yet recognized gender as a quasi-suspect classification. Regarding homosexuality, merely four years after *Baker*, the Supreme Court granted a summary affirmance in a case challenging the constitutionality of the criminalization of sodomy for homosexuals. *Doe v. Commonwealth's Attorney for City of Richmond*, 425 U.S. 901 (1976). Thus, the Supreme Court upheld the district court's finding that "[i]t is enough for upholding the legislation that the conduct is likely to end in a contribution to moral delinquency." *Doe v.*

Commonwealth's Attorney for City of Richmond, 403 F. Supp. 1199, 1202 (E.D. Va. 1975), *aff'd* 425 U.S. 901 (1976). Nine years later in 1985, the Eleventh Circuit found that particular summary affirmance was no longer binding. *Hardwick v. Bowers*, 760 F.2d 1202 (11th Cir. 1985), *rev'd* 478 U.S. 186 (1986). However, on review, the Supreme Court held that states were permitted to criminalize private, consensual sex between adults of the same-sex based merely on moral disapproval. *See Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by Lawrence*, 539 U.S. at 578. For ten more years, states were free to legislate against homosexuals based merely on the majority's disapproval of such conduct.

Then in 1996, the Supreme Court decided *Romer* – the first case that clearly shows a change in direction away from *Baker*. The Court held that an amendment to the Colorado Constitution, specifically depriving homosexual persons from the protection of anti-discrimination measures, violated the Equal Protection Clause. *Romer*, 517 U.S. at 635. The next change occurred in 2003 with *Lawrence* when the Supreme Court overruled *Bowers*, finding that the promotion of morality is not a legitimate state interest under the Equal Protection Clause and the state may not criminalize sodomy between individuals of the same sex. *Lawrence*, 539 U.S. at 582.

Finally, in the last year even more has changed in the Supreme Court's jurisprudence shedding any doubt regarding the effect of *Baker*. The Supreme Court granted certiorari for two cases involving the

constitutionality of laws adversely affecting individuals based on sexual orientation. First, in *United States v. Windsor*, the Supreme Court invalidated Section 3 of The Defense of Marriage Act ("DOMA"), which defined marriage for purposes of federal law as "only a legal union between one man and one woman." 133 S. Ct. at 2694 (quoting 1 U.S.C. § 7). The Court noted that the differentiation within a state caused by DOMA "demeans the couple, whose moral and sexual choices the Constitution protects." *Windsor*, 133 S. Ct. at 2694. Additionally, the Court found that the purpose of DOMA "is to ensure that if any State decides to recognize same-sex marriages, those unions will be treated as second-class marriages." *Id*. at 2693. Second, the Supreme Court dismissed an appeal of California's prohibition on same-sex marriages, not because *Baker* rendered the question insubstantial, but because the law's supporters lacked standing to defend it. *Hollingsworth v. Perry*, 133 S. Ct. 6252 (2013). These developments strongly suggest, if not compel, the conclusion that *Baker* is no longer controlling and does not bar the present challenge to Indiana's laws. *See Windsor v. United States*, 699 F.3d 169, 178 (2d Cir. 2012), *aff'd*, 133 S. Ct. 2675 (2013) (holding that *Baker* was not controlling as to the constitutionality of DOMA, reasoning that "[i]n the forty years after *Baker*, there have been manifold changes to the Supreme Court's equal protection jurisprudence" and that "[e]ven if *Baker* might have had resonance . . . in 1971, it does not today").

The court acknowledges that this conclusion is shared with all other district courts that have considered the issue post-*Windsor*. *See Wolf v. Walker*, No. 3:14-cv-00064-bbc, 2014 WL 2558444, ** 3-6 (W.D. Wisc. June 6, 2014); *Whitewood v. Wolf*, No. 1:13-cv-1861, 2014 WL 2058105, ** 4-6 (M.D. Penn. May 20, 2014); *Geiger v. Kitzhaber*, No. 6:13-cv-01834-MC, 2014 WL 2054264, *1 n. 1 (D. Or. May 19, 2014); *Latta v. Otter*, 1:13-cv-482-CWD, 2014 WL 1909999, ** 7-10 (D. Idaho May 13, 2013); *DeBoer v. Snyder*, 973 F. Supp. 2d 757, 773 n. 6 (E.D. Mich. 2014); *DeLeon v. Perry*, 975 F. Supp. 2d 632, 648 (W.D. Tex. 2014) (order granting preliminary injunction); *Bostic v. Rainey*, 970 F. Supp. 2d 456, 469-70 (E.D. Va. 2014); *Bishop v. U.S. ex rel. Holder*, 962 F. Supp. 2d 1252, 1274-77 (N.D. Okla. 2014); *McGee v. Cole*, No. 3:13-cv-24068, 2014 WL 321122, ** 8-10 (S.D.W. Va. Jan. 29, 2014); *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1195 (D. Utah 2013). Finding that *Baker* does not bar the present action, the court turns to the merits of Plaintiffs' claims.

V. Right to Marry Whom?

As the court has recognized before, marriage and domestic relations are traditionally left to the states; however, the restrictions put in place by the state must comply with the United States Constitution's guarantees of equal protection of the laws and due process. *See Windsor*, 133 S. Ct. at 2691 (citing *Loving v. Virginia*, 388 U.S. 1 (1967)). Plaintiffs assert that Indiana's marriage laws violate those guarantees.

A. Due Process Clause

1. Fundamental Right

The Due Process Clause of the Fourteenth Amendment guarantees that no state shall "deprive any person of life, liberty, or property without the due process of law." U.S. Const. amend. XIV § 1. The purpose of the Due Process Clause is to "protect[] those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty . . . ." *Washington v. Glucksburg*, 521 U.S. 702, 720-21 (1997) (quotations and citations omitted). Because such rights are so important, "an individual's fundamental rights may not be submitted to vote." *DeLeon*, 975 F. Supp. 2d at 657 (citing *W. Va. State Bd. Of Educ. v. Barnette*, 319 U.S. 624, 638 (1943)). Plaintiffs assert that the State of Indiana impedes upon their fundamental right to marry, and thus, violates the Due Process Clause.

The parties agree that a fundamental right to marry exists; however they dispute the scope of that right. The fact that the right to marry is a fundamental right, although not explicitly stated by the Supreme Court, can hardly be disputed. *See, e.g., Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) ("[D]ecisions of this Court confirm that the right to marry is of fundamental importance for all individuals."); *United States v. Kras*, 409 U.S. 434, 446 (1973) (concluding the Court has come to

regard marriage as fundamental); *Loving*, 388 U.S. at 12 ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."); *Skinner v. Okla. ex. rel. Williamson*, 316 U.S. 535 (1942) (noting marriage is one of the basic civil rights of man fundamental to our existence and survival); *Maynard v. Hill*, 125 U.S. 190, 205 (1888) (characterizing marriage as "the most important relation in life" and as "the foundation of the family and society, without which there would be neither civilization nor progress."). Additionally, the parties agree that the right to marry necessarily entails the right to marry the person of one's choice. *See Lawrence*, 539 U.S. at 574 (2003) ("Our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.").

Defendants, relying on *Glucksberg*, argue that the fundamental right to marry should be limited to its traditional definition of one man and one woman because fundamental rights are based in history. The concept of same-sex marriage is not deeply rooted in history; thus, according to Defendants, the Plaintiffs are asking the court to recognize a new fundamental right. Plaintiffs counter that Defendants' reliance on *Glucksberg* is mistaken because the Supreme Court has repeatedly defined the fundamental right to marry in broad terms.

The court agrees with Plaintiffs. "Fundamental rights, once recognized, cannot be denied to particular groups on the ground that these groups have historically been denied those rights." *In re Marriage Cases*, 183 P.3d 384, 430 (Cal. 2008) (superseded by constitutional amendment). In fact, "the history of our Constitution . . . is the story of the extension of constitutional rights and protections to people once ignored or excluded." *United States v. Virginia*, 518 U.S. 515, 557 (1996). The reasoning in *Henry v. Himes* is particularly persuasive on this point:

> The Supreme Court has consistently refused to narrow the scope of the fundamental right to marry by reframing a plaintiff's asserted right to marry as a more limited right that is about the characteristics of the couple seeking marriage. . . **[T]he Court consistently describes a general 'fundamental right to marry' rather than 'the right to interracial marriage,' 'the right to inmate marriage,' or 'the right of people owing child support to marry.'**

No.1:14-cv-129, 2014 WL 1418395, *7 (S.D. Ohio Apr. 14, 2014) (emphasis added) (citing *Loving*, 388 U.S. at 12; *Turner v. Safley*, 482 U.S. 78, 94-96 (1987); *Zablocki*, 434 U.S. at 383-86).

The court finds *Loving v. Virginia* best illustrates that concept. In that case, the Court held that Virginia's ban on interracial marriage violated the plaintiffs' rights under the Due Process

Clause. 388 U.S. at 12. The *Loving* Court stated "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men," and further recognized that, "marriage is one of the 'basic civil rights of man.'" *Id.* If the Court in *Loving* had looked only to the "traditional" approach to marriage prior to 1967, the Court would not have recognized that there was a fundamental right for Mildred and Richard Loving to be married, because the nation's history was replete with statutes banning interracial marriages between Caucasians and African Americans. Notably, the Court did not frame the issue of interracial marriage as a "new" right, but recognized the fundamental right to marry regardless of that "traditional" classification.

Unfortunately, the courts have failed to recognize the breadth of our Due Process rights before in cases such as *Bowers*. 478 U.S. at 186, overruled by *Lawrence*, 539 U.S. at 578. There, the court narrowly framed the issue as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy . . . ." *Id.* at 190. Not surprisingly, with the issue framed so narrowly and applying only to a small classification of people, the Court found that there was no fundamental right at issue because our history and tradition proscribed such conduct. *Id.* at 192-94. In 2003, the Supreme Court recognized its error and reversed course. *Lawrence*, 539 U.S. at 567 (finding that the *Bowers* Court's statement of the issue "discloses the Court's own failure to appreciate the

extent of the liberty interest at stake."). The court found that the sodomy laws violated plaintiffs' Due Process right to engage in such conduct and intruded into "the personal and private life of the individual." *Id*. at 578. Notably, the Court did not limit the right to a classification of certain people who had historical access to that right.

Here, Plaintiffs are not asking the court to recognize a new right; but rather, "[t]hey seek 'simply the same right that is currently enjoyed by heterosexual individuals: the right to make a public commitment to form an exclusive relationship and create a family with a partner with whom the person shares an intimate and sustaining emotional bond.'" *Bostic*, 970 F. Supp. 2d at 472 (quoting *Kitchen*, 961 F. Supp. 2d at 1202-03). The courts have routinely protected the choices and circumstances defining sexuality, family, marriage, and procreation. As the Supreme Court found in *Windsor*, "[m]arriage is more than a routine classification for purposes of certain statutory benefits," and "[p]rivate, consensual intimacy between two adult persons of the same sex . . . can form 'but one element in a personal bond that is more enduring.'" *Windsor*, 133 S. Ct. at 2693 (quoting *Lawrence*, 539 U.S. at 567). The court concludes that the right to marry should not be interpreted as narrowly as Defendants urge, but rather encompasses the ability of same-sex couples to marry.

2. Level of Scrutiny

The level of scrutiny describes how in depth the court must review the Defendants' proffered reasons for a law. Scrutiny ranges from rational basis (the most deferential to the State) to strict scrutiny (the least deferential to the State). Defendants agree that if the court finds that the fundamental right to marry encompasses same-sex marriages, then heightened scrutiny is appropriate. (Transcript 40:9-17). "When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." *Zablocki*, 434 U.S. at 388. Strict scrutiny requires the government to show that the law is narrowly tailored to a compelling government interest. *See id*. The burden to show the constitutionality of the law rests with the Defendants. *See id*.

For strict scrutiny to be appropriate, the court must find: (1) there is a fundamental right, and (2) the classification significantly interferes with the exercise of that right. *Id*. First, as stated above, the court finds that the fundamental right to marry includes the right of the individual to marry a person of the same sex. Second, Section 31-11-1-1 significantly interferes with that right because it completely bans the Plaintiffs from marrying that one person of their choosing. Therefore, Indiana's marriage laws are subject to strict scrutiny. *See Bostic*, 970 F. Supp. 2d at 473.

3. Application

Section 31-11-1-1, classifying same-sex couples, "cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." *Zablocki*, 434 U.S. at 388. Here, Defendants proffer that the state's interest in conferring the special benefit of civil marriage to only one man and one woman is justified by its interest in encouraging the couple to stay together for the sake of any unintended children that their sexual union may create. The court does not weigh whether or not this is a sufficiently important interest, but will assume that it is.

Defendants have failed to show that the law is "closely tailored" to that interest. Indiana's marriage laws are both over- and under-inclusive. The marriage laws are under-inclusive because they only prevent one subset of couples, those who cannot naturally conceive children, from marrying. For example, the State's laws do not consider those post-menopausal women, infertile couples, or couples that do not wish to have children. Additionally, Indiana specifically allows first cousins to marry once they reach the age that procreation is not a realistic possibility. *See* Ind. Code § 31-11-1-2. On the other hand, Indiana's marriage laws are over-inclusive in that they prohibit some opposite-sex couples, who can naturally and unintentionally procreate, from marriage. For example, relatives closer in degree than second cousins can naturally and

unintentionally procreate; however, they still may not marry.[4] Most importantly, excluding same-sex couples from marriage has absolutely no effect on opposite-sex couples, whether they will procreate, and whether such couples will stay together if they do procreate. Therefore, the law is not closely tailored, and the Defendants have failed to meet their burden.

The state, by excluding same-sex couples from marriage, violates Plaintiffs' fundamental right to marry under the Due Process Clause. *See Wolf*, 2014 WL 2558444, at * 21; *Lee v. Orr*, No. 1:13-cv-08719, 2014 WL 683680, * 2 (N.D. Ill. Feb. 21, 2014) ("This Court has no trepidation that marriage is a fundamental right to be equally enjoyed by all individuals of consenting age regardless of their race, religion, or sexual orientation."); *Whitewood*, 2014 WL 2058105 at ** 8-9; *Latta*, 2014 WL 1909999 at * 13; *DeLeon*, 975 F. Supp. 2d at 659; *Bostic*, 970 F. Supp. 2d at 483; *Kitchen*, 961 F. Supp. 2d at 1204.

B. Equal Protection Clause

Plaintiffs also argue that Section 31-11-1-1 violates the Fourteenth Amendment's Equal Protection Clause. The Equal Protection Clause "commands that no State shall 'deny to any person

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[4] The court does not evaluate the constitutionality of such laws, but merely uses this example to show that the present law would be over-inclusive in regard to Defendants' stated reason for marriage.

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 v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985) (quoting U.S. Const., amend. XIV., § 1). The clause must take into account the fact that governments must draw lines between people and groups. *See Romer*, 517 U.S. at 631.

1. Level of Scrutiny

"[I]f a law neither burdens a fundamental right nor targets a suspect class, [the court] will uphold the legislative classification so long as it bears a rational relation to some legitimate end." *Romer*, 517 U.S. at 631. The court must "insist on knowing the relation between the classification adopted and the object to be attained." *Id.* at 632. This is to ensure that the classification was not enacted for the purpose of disadvantaging the group burdened by the law. *See id.* at 633. If a law "impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class" then the court applies strict scrutiny. *See Zablocki*, 434 U.S. at 383. To survive strict scrutiny, Indiana must show that the law is narrowly tailored to a compelling government interest. *See id.* at 388. As indicated in Part V.A. above, the court finds that the law impermissibly interferes with a fundamental right, and Defendants failed to satisfy strict scrutiny. Nevertheless, the court will evaluate the Equal Protection claim independent from that conclusion

and as an alternative reason to find the marriage law unconstitutional.

a. Form of Discrimination

Plaintiffs argue that Indiana's marriage laws discriminate against individuals on the basis of gender and sexual orientation.

i. Gender

According to Plaintiffs, Indiana's marriage laws discriminate against them based on their gender. For example, if Rae Baskin was a man she would be allowed to marry Esther Fuller; however, because she is a female, she cannot marry Esther. Additionally, Plaintiffs allege the law enforces sex stereotypes, requiring men and women to adhere to traditional marital roles. *See e.g., J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994). Defendants respond that the laws do not discriminate on the basis of gender because the laws do not affect any gender disproportionately. Plaintiffs respond that a mere equal application of the law was rejected by the Court in *Loving*.

The court is not persuaded by Plaintiffs' arguments and finds *Loving* to be distinguishable on this point. Unlike *Loving*, where the court found evidence of an invidious racial discrimination, the court finds no evidence of an invidious gender-based discrimination here. *See Geiger*, 2014 WL 2054264 at * 7. Moreover, there is no evidence that the purpose of the marriage laws is to ratify a

stereotype about the relative abilities of men and women or to impose traditional gender roles on individuals. *See id.*; *see also Bishop*, 962 F. Supp. 2d at 1286.

ii. Sexual Orientation

Plaintiffs also argue that Indiana's marriage laws classify individuals based on their sexual orientation, because they prevent all same-sex couples from marrying the person of their choice. Defendants respond that the marriage laws do not discriminate against same-sex couples because they may marry just like opposite-sex couples may marry; the law merely impacts them differently. The court rejects this notion. As the court stated above, the right to marry is about the ability to form a partnership, hopefully lasting a lifetime, with that one special person of your choosing. Additionally, although Indiana previously defined marriage in this manner, the title of Section 31-11-1-1 – "Same sex marriages prohibited" – makes clear that the law was reaffirmed in 1997 not to define marriage but to prohibit gays and lesbians from marrying the individual of their choice. Thus, the court finds that Indiana's marriage laws discriminate based on sexual orientation.

b. Level of Scrutiny

The Seventh Circuit applies rational basis review in cases of discrimination based on sexual orientation. *See Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 950-51 (7th Cir. 2002) ("Homosexuals

are not entitled to any heightened protection under the Constitution."). The Seventh Circuit relied on *Bowers* and *Romer* for this conclusion. Plaintiffs argue that since *Bowers* has since been overruled, the court is no longer bound by *Schroeder*. The court disagrees and believes it is bound to apply rational basis because one of the cases the Court relied on in *Schroeder*, *e.g. Romer*, is still valid law. The court agrees with Plaintiffs that it is likely time to reconsider this issue, especially in light of the Ninth Circuit's decision in *SmithKline Beecham Corp. v. Abbott Labs*, 740 F.3d 471, 481 (9th Cir. 2014) (interpreting *Windsor* to mean that gay and lesbian persons constitute a suspect class). However, the court will leave that decision to the Seventh Circuit, where this case will surely be headed. The court will, therefore, apply rational basis review.

c. Application

Defendants rely on *Johnson v. Robison* for the proposition that "when . . . the inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not, we cannot say that the statute's classification of beneficiaries and nonbeneficiaries is invidiously discriminatory." 415 U.S. 361, 383 (1974). According to Defendants, *Johnson* means that they must only show that there is a rational reason to provide the right of marriage to opposite-sex couples, not that there is a rational basis to exclude. In essence, Defendants assert that the opposite-sex couples have distinguishing

characteristics, the ability to naturally and unintentionally procreate as a couple, that allow the State to treat them differently from same-sex couples.

Plaintiffs, on the other hand, allege that the primary purpose of the statute is to exclude same-sex couples from marrying and thus the Defendants must show a rational basis to exclude them. The court agrees with Plaintiffs. According to Plaintiffs, the purpose is evident by the timing of the statute, which was passed in an emergency session near the time that DOMA was passed and immediately after and in response to a Hawaiian court's pronouncement in *Baehr v. Miike*, CIV. No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996), *aff'd* 950 P.2d 1234 (Haw. 1997), that same-sex couples should be allowed to marry. *See* Family Law – Marriage – Same Sex Marriages Void, 1997 Ind. Legis. Serv. P.L. 198-1997 (H.E.A. 1265). Because the effect of the law is to exclude and void same-sex marriages, the Plaintiffs argue that the court should analyze whether there is a rational basis to exclude same-sex marriages. Additionally, Plaintiffs assert they are similar in all relevant aspects to opposite-sex couples seeking to marry– they are in long-term, committed, loving relationships and some have children.

The *Johnson* case concerned a challenge brought by a conscientious objector seeking to declare the educational benefits under the Veterans' Readjustment Benefits Act of 1966 unconstitutional on Equal Protection grounds. 415 U.S. at 364. In reviewing whether or not the

classification was arbitrary, the Court looked to the purpose of that Act and found that the legislative objective was to (1) make serving in the Armed Forces more attractive and (2) assist those who served on active duty in the Armed Forces in "readjusting" to civilian life. *See id.* at 376-377. The Court found that conscientious objectors were excluded from the benefits that were offered to the veterans because the benefits could not make service more attractive to a conscientious objector and the need to readjust was absent. *See id.* The Supreme Court found that the two groups were not similarly situated and thus, Congress was justified in making that classification. *See id.* at 382-83.

The court agrees with Plaintiffs that they are similarly situated in all relevant aspects to opposite-sex couples for the purposes of marriage. Also of great importance is the fact that unlike the statute at issue in *Johnson*, "[m]arriage is more than a routine classification for purposes of certain statutory benefits." *Windsor*, 133 S. Ct. at 2693. In fact having the status of "married" comes with hundreds of rights and responsibilities under Indiana and federal law. See 614 Reasons Why Marriage Equality Matters in Indiana, *Fujii*, Filing No. 46-2). As the court in *Kitchen* stated in analyzing the Equal Protection claim before it:

> [T]he State poses the wrong question. The court's focus is not on whether extending marriage benefits to heterosexual couples serves a legitimate governmental interest. No one disputes that marriage benefits serve not just legitimate, but compelling governmental

> interests, which is why the Constitution provides such protection to an individual's fundamental right to marry. Instead, courts are required to determine whether there is a rational connection between the challenged statute and a legitimate state interest. Here, the challenged statute does not grant marriage benefits to opposite-sex couples.[5] The effect of [Utah's marriage ban] is only to disallow same-sex couples from gaining access to these benefits. The court must therefore analyze whether the State's interests in responsible procreation and optimal child-rearing are furthered by prohibiting same-sex couples from marrying.

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[5] Section 30–1–4.1 of the Utah Code, provides:
(1) (a) It is the policy of this state to recognize as marriage only the legal union of a man and a woman as provided in this chapter.
(b) Except for the relationship of marriage between a man and a woman recognized pursuant to this chapter, this state will not recognize, enforce, or give legal effect to any law creating any legal status, rights, benefits, or duties that are substantially equivalent to those provided under Utah law to a man and woman because they are married. Amendment 3 provides: "(1) Marriage consists only of the legal union between a man and a woman.
(2) No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect."

961 F. Supp. 2d at 1210-11 (reference and footnote added). Like Utah's laws, the effect of Indiana's marriage laws is to exclude certain people from marrying that one special person of their choosing. This is evident by the title of Section 31-11-1-1 – "Same sex marriages prohibited." Consequently, the question is whether it is rational to treat same-sex couples differently by excluding them from marriage and the hundreds of rights that come along with that marriage. *See e.g. City of Cleburne*, Tex., 473 U.S. at 449.

The court finds that there is no rational basis to exclude same-sex couples. The purpose of marriage – to keep the couple together for the sake of their children – is served by marriage regardless of the sexes of the spouses. In order to fit under *Johnson's* rationale, Defendants point to the one extremely limited difference between opposite-sex and same-sex couples, the ability of the couple to naturally and unintentionally procreate, as justification to deny same-sex couples a vast array of rights. The connection between these rights and responsibilities and the ability to conceive unintentionally is too attenuated to support such a broad prohibition. *See Romer*, 517 U.S. at 635. Furthermore, the exclusion has no effect on opposite-sex couples and whether they have children or stay together for those children. Defendants proffer no reason why excluding same-sex couples from marriage benefits opposite-sex couples. The court concludes that there simply is no rational link between the two. *See Tanco*, 2014 WL

997525 at * 6; *see also Bishop*, 962 F. Supp. 2d at 1290-93 (finding there is no rational link between excluding same-sex marriages and "steering 'naturally procreative' relationships into marriage, in order to reduce the number of children born out of wedlock and reduce economic burdens on the State); *see also DeBoer*, 973 F. Supp. 2d at 771-72 (noting that prohibiting same-sex marriages "does not stop [gay men and lesbian women] from forming families and raising children. Nor does prohibiting same-sex marriage increase the number of heterosexual marriages or the number of children raised by heterosexual parents.").

VI. Recognition of Out-of-state Marriages

Defendants concede that whether Indiana can refuse to recognize out-of-state, same-sex marriages turns entirely on whether Indiana may enforce Section A. Because the court finds that Indiana may not exclude same-sex couples from marriage, the court also finds it cannot refuse to recognize out-of-state, same-sex marriages. *See e.g. Loving*, 388 U.S. at 4, 11. Nevertheless, the court finds that Section B violates the Equal Protection Clause independent of its decision regarding Section A.

The parties agree that out-of-state, same-sex marriages are treated differently than out-of-state, opposite-sex marriages. Thus, the question is whether that difference violates the Equal Protection Clause. In *Windsor*, the Supreme Court concluded that by treating same-sex married couples differently than opposite-sex married

couples, Section 3 of DOMA "violate[d] basic due process and equal protection principles applicable to the Federal Government." 133 S. Ct. at 2693. The Eastern District of Kentucky found two guiding principles from *Windsor* that strongly suggest the result here. *See Bourke v. Beshear*, No. 3:13-cv-750-H, 2014 WL 556729, * 7 (W.D. Ky. Feb 12, 2014). First, the court should look to the actual purpose of the law. *Id.* The second principle is that such a law "demeans the couple, whose moral and sexual choices the Constitution protects." *Id.* (quoting *Windsor*, 133 S. Ct. at 2694).

The purpose of the law is to prevent the recognition of same-sex marriage in Indiana, which Plaintiffs assert was motivated by animus. If Section 31-11-1-1 was in fact motivated by animus, it violates the principles of the Equal Protection Clause. *See Romer*, 517 U.S. at 633-35 ("[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate state interest.") (emphasis in original) (quoting *Dep't of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973)). Section 31-11-1-1, like DOMA, was passed during the time that Hawaii courts were deciding whether the United States Constitution required it to allow same-sex marriages. According to the bill's author, his "intent [was] to clarify present Indiana law and strengthen it." Barb Albert, *Same-sex Marriage Takes Hit in Senate*, Indianapolis Star, Feb. 11, 1997, at B2. He did not see the statute as denying rights, because he considered marriage to

be a privilege, rather than a right. *Id*. Opponents of the bill saw it as "inflaming the biases and prejudices of individuals," "thumbing your nose" at the Constitution, and "legislat[ing] hate." *Id*.; *see also* Stuart A. Hirsch, *Ban on Gay Marriages to go to Governor*, Indianapolis Star, Apr. 26, 1997, at B1.

Additionally, Section 31-11-1-1 is an unusual law for Indiana to pass. As described above, in Indiana "[t]he validity of a marriage depends upon the law of the place where it occurs." This includes recognizing marriages between first cousins despite the fact that they cannot marry in Indiana unless they are over 65 years of age. *See Mason v. Mason*, 775 N.E.2d 706, 709 (Ind. Ct. App. 2002). The State of Indiana chose one group to single out for disparate treatment. The State's laws place same-sex marriages in a second class category, unlike other marriages performed in other states. Thus, like the Supreme Court in *Windsor*, this court can conclude that this law is motivated by animus, thus violating the Equal Protection Clause.

Even if it were not, the law fails rational basis review. Defendants proffer that the state refuses to recognize same-sex marriages because it conflicts with the State's philosophy of marriage – that is that marriage is to ameliorate the consequences of unintended children. Recognizing the valid same-sex marriages performed in other states, however, has no link whatsoever to whether opposite-sex couples have children or stay together for those children. Thus, there is no rational basis to refuse

recognition and void out-of-state, same-sex marriages. Therefore, Part B violates the Fourteenth Amendment's Equal Protection Clause. *See Tanco v. Haslem*, No. 3:13-cv-01159, 2014 WL 997525 (M.D. Tenn. Mar. 14, 2014); *see also Bourke*, 2014 WL 556729.

VII. Conclusion

The court has never witnessed a phenomenon throughout the federal court system as is presented with this issue. In less than a year, every federal district court to consider the issue has reached the same conclusion in thoughtful and thorough opinions – laws prohibiting the celebration and recognition of same-sex marriages are unconstitutional. It is clear that the fundamental right to marry shall not be deprived to some individuals based solely on the person they choose to love. In time, Americans will look at the marriage of couples such as Plaintiffs, and refer to it simply as a marriage – not a same-sex marriage. These couples, when gender and sexual orientation are taken away, are in all respects like the family down the street. The Constitution demands that we treat them as such. Today, the "injustice that [we] had not earlier known or understood" ends. *Windsor*, 133 S. Ct. at 2689 (citing Marriage Equality Act, 2011 N.Y. Laws 749). Because "[a]s the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom." *Lawrence*, 539 U.S. at 579.

Therefore, the court finds as follows:

1. The *Baskin* Plaintiffs' motion for summary judgment (No. 1:14-cv-355, Filing No. 38) is **GRANTED**;

2. The *Baskin* Defendants' motion for summary judgment (No. 1:14-cv-355, Filing No. 55) is **DENIED**;

3. The *Baskin* Plaintiffs' motion to consolidate preliminary injunction proceedings with final trial on the merits (No. 1:14-cv-355, Filing No. 37) and the *Baskin* Defendants' motion for stay of the preliminary injunction (No. 1:14-cv-355, Filing No. 68) are **DENIED as moot**.

4. The *Fujii* Plaintiffs' motion for summary judgment (No. 1:14-cv-404, Filing No. 33) is **GRANTED in part** for all Defendants except Governor Pence and **DENIED in part** as to Governor Pence;

5. The *Fujii* Defendants' motion for summary judgment (No. 1:14-cv-404, Filing No. 44) is **GRANTED in part** for Governor Pence and **DENIED in part** for the other Defendants;

6. The *Fujii* Plaintiffs' motion for preliminary injunction (No. 1:14-cv-404, Filing No. 23) and motion to consolidate preliminary injunction proceedings with final trial on the merits (No. 1:14-cv-404, Filing No. 24) are **DENIED as moot**.

7. The *Lee* Plaintiffs' motion for summary judgment (No. 1:14-cv-406, Filing No. 27) is **GRANTED in part** for all Defendants except Governor Pence and **DENIED in part** as to Governor Pence;

8. The *Lee* Defendants' motion for summary judgment (No. 1:14-cv-406, Filing No. 41) is **GRANTED in part** for Governor Pence and **DENIED in part** for the other Defendants;

9. The *Lee* Plaintiffs' motion for preliminary injunction (No. 1:14-cv-406, Filing No. 29), motion to consolidate preliminary injunction proceedings with final trial on the merits (No. 1:14-cv-406, Filing No. 31), and the *Lee* Defendants' motion for extension of time (No. 1:14-cv-406, Filing No. 53) are **DENIED as moot**.

ORDER

Pursuant to the reasoning contained above, the court **DECLARES** that Indiana Code § 31-11-1-1(a), both facially and as applied to Plaintiffs, violates the Fourteenth Amendment's Due Process Clause and Equal Protection Clause. Additionally, the court **DECLARES** that Indiana Code § 31-11-1-1(b), both facially and as applied to Plaintiffs, violates the Fourteenth Amendment's Equal Protection Clause. Because this is a facial challenge, same-sex couples, who would otherwise

qualify to marry in Indiana, have the right to marry in Indiana.

Having found that Indiana Code § 31-11-1-1 and the laws in place enforcing such violate the Plaintiffs' rights under the Due Process Clause and the Equal Protection Clause, Defendants and their officers, agents, servants, employees and attorneys, and those acting in concert with them are **PERMANENTLY ENJOINED** from enforcing Indiana Code Section 31-11-1-1 and other Indiana laws preventing the celebration or recognition of same-sex marriages. Additionally, Defendants and officers, agents, servants, employees and attorneys, and those acting in concert with them, are **PERMANENTLY ENJOINED** from enforcing or applying any other state or local law, rule, regulation or ordinance as the basis to deny marriage to same-sex couples otherwise qualified to marry in Indiana, or to deny married same-sex couples any of the rights, benefits, privileges, obligations, responsibilities, and immunities that accompany marriage in Indiana.

Specifically, this permanent injunction requires the following, and the court **ORDERS** the following:

1. The Defendant Clerks, their officers, agents, servants, employees and attorneys, and all those acting in concert with them, are **PERMANENTLY ENJOINED** from denying a marriage license to a couple because both applicants for the license are the same sex. Thus

they must act pursuant to their authority under Indiana Code Chapter 31-11-4 and issue marriage licenses to couples who, but for their sex, satisfy all the requirements to marry under Indiana law;

2. The Attorney General, Greg Zoeller, his officers, agents, servants, employees and attorneys, and all those acting in concert with them, are **PERMANENTLY ENJOINED** from prosecuting or assisting in the prosecution, using his authority from Indiana Code § 4-6-1-6, of the following:

   a. same-sex couples who fill out the current marriage license application where the spaces provided only allow for a male and female (Ind. Code §§ 31-11-11-1 and 31-11-11-3),

   b. clerks who grant the marriage licenses to qualified same-sex couples (Ind. Code § 31-11-11-4), or

   c. those who choose to solemnize same-sex marriages (Ind. Code §§ 31-11-11-5 and 31-11-11-7). .

3. William C. Vanness II, M.D., the Commissioner of the Indiana State Department of Health, his officers, agents, servants, employees and attorneys, and all those acting in concert with them, are **PERMANENTLY ENJOINED** to:

a. Act pursuant to their authority under Indiana Code § 16-37-1 to change the death certificate form to allow for same-sex spouses,

b. Act pursuant to their authority under Indiana Code § 16-37-3 to issue death certificates listing same-sex spouses, and

c. Act pursuant to their authority under Indiana Code § 31-11-4-4 to revise the marriage license application to allow for same-sex applicants.

4. The Commissioner of the Indiana State Department of Revenue, his officers, agents, servants, employees and attorneys, and all those acting in concert with them, are **PERMANENTLY ENJOINED** to exercise their authority under Indiana Code § 6-8.1-3 to revise the filing guidelines to allow and process joint tax returns for same-sex married couples as they do for opposite-sex married couples.

5. The Board of Trustees of the Indiana Public Retirement System and Steve Russo, the Executive Director of the Indiana Public Retirement System, and their officers, agents, servants, employees and attorneys, and all those acting in concert with them, are **PERMANENTLY ENJOINED** to administer the Pension Fund pursuant to Indiana Code Chapters 5-10.5-3, 5-10.5-4, and 5-10.5-6, so as to provide the same benefits for all married

couples, regardless of whether the couples are of the opposite sex or the same sex.

This Order does not apply to Governor Pence, who the court found was not a proper party. This Order takes effect on the 25th day of June 2014.

SO ORDERED this 25th day of June 2014.

Richard L. Young
RICHARD L. YOUNG, CHIEF JUDGE
United States District Court
Southern District of Indiana

Distributed Electronically to Registered Counsel of Record.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

1:14-cv-00355-RLY-TAB

MARILYN RAE BASKIN and ESTHER FULLER; BONNIE EVERLY and LINDA JUDKINS; DAWN LYNN CARVER and PAMELA RUTH ELEASE EANES; HENRY GREENE and GLENN FUNKHOUSER, individually and as parents and next friends of C.A.G.; NIKOLE QUASNEY, and AMY SANDLER, individually and as parents and next friends of A.Q.-S. and M.Q.-S.,

Plaintiffs,

vs.

PENNY BOGAN, in her official capacity as BOONE COUNTY CLERK; KAREN M. MARTIN, in her official capacity as PORTER COUNTY CLERK; MICHAEL A. BROWN, in his official capacity as LAKE COUNTY CLERK; PEGGY BEAVER, in her official capacity as HAMILTON COUNTY CLERK; WILLIAM C. VANNESS II, M.D., in his official capacity as the COMMISSIONER, INDIANA STATE DEPARTMENT OF HEALTH; and GREG ZOELLER, in his official capacity as INDIANA

ATTORNEY GENERAL,)
)
Defendants.)

ENTRY ON PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Plaintiffs, Amy Sandler ("Amy"), Nikole ("Niki") Quasney, A.Q.-S. and M.Q.-S asked this court to grant them a temporary restraining order ("TRO") and a preliminary injunction requiring the State of Indiana to recognize the out-of-state marriage of Amy and Niki. (Filing No. 31). The court granted the TRO, which expires on May 8, 2014. (Filing No. 44; Filing No. 51). On May 2, 2014, the court held a hearing on the pending motions for summary judgment and preliminary injunction. For the reasons set forth below, the court **GRANTS** Plaintiffs' motion for a preliminary injunction.

I. Background

Niki and Amy have been in a loving and committed relationship for more than thirteen years. (Declaration of Nikole Quasney ("Quasney Dec.") ¶ 2, Filing No. 32-2). They are the parents to two very young children, Plaintiffs, A.Q.-S. and M.Q.-S. (*Id*. at ¶ 2). On June 7, 2011, Amy and Niki entered into a civil union in Illinois, and on August 29, 2013, they were legally married in Massachusetts. (*Id*. at ¶ 3).

In late May of 2009, Niki was diagnosed with Stage IV Ovarian cancer, which has a probable

survival rate of five years. (*Id.* at ¶ 9). Since June 2009, Niki has endured several rounds of chemotherapy; yet, her cancer has progressed to the point where chemotherapy is no longer a viable option. Niki is receiving no further treatment; her death is imminent.

Niki and Amy joined the other Plaintiffs to this lawsuit to present a facial challenge to Indiana Code 31-11-1-1, titled "Same sex marriages prohibited" and states:

(a) Only a female may marry a male. Only a male may marry a female.
(b) A marriage between persons of the same gender is void in Indiana even if the marriage is lawful in the place where it is solemnized.

Because Niki is fighting a fatal disease and is nearing the five year survival rate, she and Amy requested that the court issue a preliminary injunction preventing Indiana from enforcing Indiana Code § 31-11-1-1(b) as applied to them, and requiring the State of Indiana, through the Defendants, to recognize Niki as married to Amy on her death certificate.

II. Preliminary Injunction Standard

A preliminary injunction "is an exercise of a very far-reaching power, never to be indulged in except in a case clearly demanding it." *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S.A.*, Inc., 549 F.3d 1079, 1085-86 (7th Cir. 2008)

(citations omitted). The court analyzes a motion for a preliminary injunction "in two distinct phases: a threshold phase and a balancing phase." *Id*. Under the threshold phase for preliminary injunctive relief, a plaintiff must establish – and has the ultimate burden of proving by a preponderance of the evidence – each of the following elements: (1) some likelihood of success on the merits, (2) absent a preliminary injunction, she will suffer irreparable harm, and (3) traditional legal remedies would be inadequate. *Id*. at 1806. To satisfy the first requirement, a plaintiff's chance of success must be more than negligible. *See Brunswick Corp. v. Jones*, 784 F.2d 271, 275 (7th Cir. 1986).

"If the court determines that the moving party has failed to demonstrate any one of these [] threshold requirements, it must deny the injunction." *Girl Scouts of Manitou Council, Inc.*, 549 F.3d at 1086 (citation omitted). If, on the other hand, the court determines the moving party has satisfied the threshold phase, the court then proceeds to the balancing phase of the analysis. *Id*. The balancing phase requires the court to balance the harm to the moving party if the injunction is denied against the harm to the nonmoving party if the injunction is granted. *Id*. In so doing, the court utilizes what is known as the sliding scale approach; "the more likely the [movant] will succeed on the merits, the less the balance of irreparable harms need favor the [movant's] position." *Id*. Additionally, this stage requires the court to consider "any effects that granting or denying the preliminary injunction would have on

nonparties (something courts have termed the 'public interest')." *Id.*

III. Discussion

Before reaching the merits, Defendants pose two challenges that the court must initially address. First, they argue the Plaintiffs, Niki and Amy, lack standing to assert preliminary injunctive relief. Second, in light of the Supreme Court's recent decision in *Herbert v. Kitchen*, 134 S.Ct. 893 (2013), they argue preliminary injunctive relief is inappropriate.

A. Standing

To have standing a plaintiff "must present an injury that is concrete, particularized, and actual or imminent, fairly traceable to the defendant's challenged behavior, and likely to be redressed by a favorable ruling." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 733 (2008). Defendants argue that the harms alleged by Plaintiffs as arising from Indiana's non-recognition statute are not concrete and particularized, nor fairly traceable to them. Thus, according to Defendants, a preliminary injunction cannot favorably address Plaintiffs' harms.

The Defendants in this case, the Attorney General; the County Clerks from Boone, Porter, Lake, and Hamilton Counties; and the Commissioner of the Indiana Department of Health, are statutorily required to enforce Indiana

Code § 31-11-1-1 by not recognizing the marriage. *See* Ind. Code § 4-6-1-6; see also Ind. Code § 31-11-4-2; *see also* Ind. Code § 16-37-1-3 and Ind. Code § 16-37-1-3.1. The injury to Plaintiffs resulting from Indiana's non-recognition statute harms the Plaintiffs in numerous tangible and intangible ways, including causing Niki to drive to Illinois where her marriage will be recognized in order to receive medical care and the dignity of marital status. Thus, a preliminary injunction enjoining Defendants from enforcing the non-recognition statute against Plaintiffs will, therefore, redress their claimed injury. Therefore, the court finds that the Plaintiffs have standing to seek a preliminary injunction.

B. Is preliminary injunctive relief appropriate?

Citing *Herbert v. Kitchen*, Defendants contend that Plaintiffs' demands for preliminary relief are inappropriate under Federal Rule of Civil Procedure 65. *Herbert v. Kitchen*, 134 S.Ct. 893 (Jan. 6, 2013). In that case, the Supreme Court issued a stay of the District of Utah's permanent injunction requiring officials to issue marriage licenses to same-sex couples and to recognize all same-sex marriages performed in other states. Since that ruling, all decisions by federal district courts have been stayed while the requisite preliminary and permanent injunctions are appealed to the respective circuit courts.

Nevertheless, the court does not interpret the fact that the other federal courts are staying injunctions to mean that preliminary injunctive relief is inappropriate in this case. Nor does the court agree that a stay by the Supreme Court of such a broad injunction conclusively determines that the Plaintiffs here are not entitled to the narrow form of injunctive relief they seek. Additionally, despite these stays, no court has found that preliminary injunctive relief is inappropriate simply because a stay may be issued. Therefore, the court finds that preliminary injunctive relief is still appropriate in this matter and proceeds to that analysis.

C. Is there a likelihood of success on the merits?

Plaintiffs argue that Indiana's statute prohibiting the recognition of same-sex marriages and in fact, voiding such marriages, violates the Fourteenth Amendment's Due Process Clause and Equal Protection Clause.

1. Equal Protection Clause

Plaintiffs argue that Indiana's non-recognition statute, codified at Indiana Code § 31-11-1-1(b), which provides that their state-sanctioned out-of-state marriage will not be recognized in Indiana and is indeed, void in Indiana, deprives them of equal protection. The Equal Protection Clause commands that no state shall deny to any person

within its jurisdiction the equal protection of the laws. U.S. CONST. amend. XIV, § 1.

The theory underlying Plaintiffs' claim is the notion that Indiana denies same-sex couples the same equal rights, responsibilities and benefits that heterosexual couples receive through "traditional marriage." According to Defendants, the State's interest in traditional marriage is to encourage heterosexual couples to stay together for the sake of any unintended children that their sexual relationship may produce, and to raise those children in a household with both male and female role models. The State views heterosexual couples who, for whatever reason, are not capable of producing children, to further the state's interest in being good male-female role models.

In the wake of the Supreme Court's decision in *United States v. Windsor*, 134 S.Ct. 2675 (2013), district courts from around the country have rejected the idea that a state's non-recognition statute bears a rational relation to the state's interest in traditional marriage as a means to foster responsible procreation and rear those children in a stable male-female household. *See Tanco*, 2014 WL 997525 at * 6; *see also Bishop v. U.S. ex rel. Holder*, 962 F. Supp. 2d 1252 (N.D. Okla. 2014) (finding there is no rational link between excluding same-sex marriages and "steering 'naturally procreative' relationships into marriage, in order to reduce the number of children born out of wedlock and reduce economic burdens on the State); *see also DeBoer v. Snyder*, No.1:12-cv-

10285, 2014 WL 1100794, * 2 (E.D. Mich. Mar. 21, 2014) (noting that prohibiting same-sex marriages "does not stop [gay men and lesbian women] from forming families and raising children). Indeed, as the court found in its prior Entry, with the wave of persuasive cases supporting Plaintiffs' position, there is a reasonable likelihood that the Plaintiffs will prevail on the merits, even under the highly-deferential rational basis standard of review. *See Henry*, 2014 WL 1418395 at ** 1-2 (noting that since the Supreme Court's ruling in *Windsor*, all federal district courts have declared unconstitutional and enjoined similar bans); *see also Tanco*, 2014 WL 997525 at * 6 ("in light of the rising tide of persuasive post-*Windsor* federal case law, it is no leap to conclude that the plaintiffs here are likely to succeed in their challenge.") The reasons advanced by the State in support of Indiana's non-recognition statute do not distinguish this case from the district court cases cited above.

The court is not persuaded that, at this stage, Indiana's anti-recognition law will suffer a different fate than those around the country. Thus, the Plaintiffs have shown that they have a reasonable likelihood of success on the merits of their equal protection challenge, even under a rational basis standard of review. Therefore, the court at this stage does not need to determine whether sexual orientation discrimination merits a higher standard of constitutional review.

2. Due Process Clause

Plaintiffs assert that they have a due process right to not be deprived of one's already-existing legal marriage and its attendant benefits and protections. *See Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 978 (S.D. Ohio 2013) (finding that non-recognition invokes "the right not to be deprived of one's already-existing legal marriage and its attendant benefits and protections."); *see also Henry v. Himes*, No. 1:14-cv-129, 2014 WL 1418395, * 9 (S.D. Ohio Apr. 14, 2014) (applying intermediate scrutiny where Ohio is "intruding into and in fact erasing" the marriage relationship); *see also De Leon v. Perry*, No. SA-13-CA-00982-OLG, 2014 WL 715741, ** 21-24 (W.D. Tex Feb. 26, 2014) (applying rational basis review and finding "that by declaring lawful same-sex marriages void and denying married couples the rights, responsibilities, and benefits of marriage, Texas denies same-sex couples who have been married in other states their due process").

Defendants counter that there is no due process right to have one's marriage recognized. According to Defendants, recognition of marriages from other states is only a matter of comity, not a matter of right. *See e.g., Sclamberg v. Sclamberg*, 41 N.E.2d 801 (Ind. 1942) (recognizing parties' concession that their marriage, performed in Russia, was void under Indiana law because they were uncle and niece). Defendants again stress that *Windsor* is a case merely about federalism and did not create a

right under the Due Process Clause to have one's marriage recognized.

The court found in its prior ruling that as a general rule, Indiana recognizes those marriages performed out of state. *Bolkovac v. State*, 98 N.E.2d 250, 304 (Ind. 1951) ("[t]he validity of a marriage depends upon the law of the place where it occurs."). This includes recognizing marriages between first cousins despite the fact that they cannot marry in Indiana. *See Mason v. Mason*, 775 N.E.2d 706, 709 (Ind. Ct. App. 2002). Indiana's non-recognition of Plaintiffs' marriage is a departure from the traditional rule in Indiana. Furthermore, the court notes that by declaring these marraiges void, the State of Indiana may be depriving Plaintiffs of their liberty without due process of law. *See e.g. Loving v. Virginia*, 388 U.S. 1, 12 (1967) ("to deny this fundamental freedom on so unsupportable a basis as the racial classification embodied in these statutes, . . . is surely to deprive all of the State's citizens of liberty without due process of law.") Therefore, the court finds that Plaintiffs have shown some likelihood of success on this claim.

D. Are any injuries to Plaintiffs irreparable?

"Irreparable harm is harm which cannot be repaired, retrieved, put down again, atoned for . . . . [T]he injury must be of a particular nature, so that compensation in money cannot atone for it." *Graham v. Med. Mut. of Ohio*, 130 F.3d 293, 296

(7th Cir. 1997) (internal quotation and citation omitted). Defendants first argue that there is not irreparable harm here, because Plaintiffs have endured these injuries for a substantial period of time. *See Celebration Int'l, Inc. v. Chosum Int'l, Inc.*, 234 F. Supp. 2d 905, 920 (S.D. Ind. 2002) (Though not dispositive, "tardiness weighs against a plaintiff's claim of irreparable harm . . . ."). The court does not find that the requested relief is tardy for two reasons: (1) there has been a recent, substantial change in the law, and (2) in June 2014, Niki will have reached the average survival rate for her disease.

Defendants challenge the Plaintiffs' claim and this court's prior finding that the constitutional injury alleged herein is sufficient evidence of irreparable harm. In support, Defendants rely on cases decided in other circuits. These cases are not binding on this court, but merely persuasive. After a more thorough review of the cases in the Seventh Circuit, the court reaffirms its conclusion that a constitutional violation, like the one alleged here, is indeed irreparable harm for purposes of preliminary injunctive relief. *See Preston v. Thompson*, 589 F.2d 300, 303 n. 3 (7th Cir. 1978) ("[t]he existence of a continuing constitutional violation constitutes proof of an irreparable harm."); *see Does v. City of Indianapolis*, No. 1:06-cv-865-RLY-WTL, 2006 WL 2927598, *11 (S.D. Ind. Oct. 5, 2006) (quoting *Cohen v. Coahoma Cnty., Miss.*, 805 F. Supp. 398, 406 (N.D. Miss. 1992) for the proposition that "[i]t has been repeatedly recognized by federal courts at all levels that

violation of constitutional rights constitutes irreparable harm as a matter of law."); *see also Back v. Carter*, 933 F. Supp. 738, 754 (N.D. Ind. 1996) ("When violations of constitutional rights are alleged, further showing of irreparable injury may not be required if what is at stake is not monetary damages. This rule is based on the belief that equal protection rights are so fundamental to our society that any violation of those rights causes irreparable harm."); *see also Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011) (finding irreparable harm when Plaintiffs' Second Amendment rights were likely violated); *see also Hodgkins v. Peterson*, No. 1:04-cv-569-JDT-TAB, 2004 WL 1854194, * 5 (S.D. Ind. Jul. 23, 2004) (granting a preliminary injunction enjoining enforcement of Indianapolis' curfew law as it likely violated the parents' due process rights and finding that "when an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.)

Even if a further showing of irreparable harm is required, the court finds that Plaintiffs have met this burden. Niki suffers irreparable harm as she drives to Illinois to receive treatment at a hospital where her marriage will be recognized. In addition, Niki may pass away without enjoying the dignity that official marriage status confers. *See Obergefell v. Kasich*, No. 1:13-cv-501, 2013 WL 3814262, * 7 (S.D. Ohio Jul. 22, 2013) ("Dying with an incorrect death certificate that prohibits Mr. Arthur from being buried with dignity constitutes irreparable harm. Furthermore, Mr. Arthur's harm is

irreparable because his injury is present now, while he is alive. A later decision allowing an amendment to the death certificate cannot remediate the harm to Mr. Arthur, as he will have passed away."); *see also Gray v. Orr*, (N.D. Ill. Dec. 5, 2013) ("Equally, if not more, compelling is Plaintiffs' argument that without temporary relief, they will also be deprived of enjoying less tangible but nonetheless significant personal and emotional benefits that the dignity of official marriage status confers."). These are concrete, tangible injuries that are fairly traceable to Defendants and can be remedied by a preliminary injunction.

E. Balance of Harms and Public Interest

Having satisfied the threshold phase of a preliminary injunction, the court now turns to the balancing phase. Plaintiffs assert that Defendants have not suffered and will not suffer irreparable harm from this preliminary injunction, and that the public interest is served by a preliminary injunction because there is no interest in upholding unconstitutional laws. Defendants counter that while they can point to no specific instances of harm or confusion since the court granted the TRO three weeks ago, the State is harmed in the abstract by not being able to enforce this law uniformly and against Plaintiffs. Defendants argue that the public interest weighs in their favor because (1) the State has a compelling interest in defining marriage and administering its own marriage laws, and (2) the continuity of Indiana's

marriage laws avoids potential confusion over a series of injunctions.

As the court has recognized before, marriage and domestic relations are traditionally left to the states; however, the restrictions put in place by the state must comply with the United States Constitution's guarantees of equal protection of the laws and due process. *See Windsor*, 133 S.Ct. at 2691 (citing *Loving v. Virginia*, 388 U.S. 1 (1967)). The State does not have a valid interest in upholding and applying a law that violates these constitutional guarantees. *See Joeiner v. Vill. Of Washington Park*, 378 F.3d 613, 620 (7th Cir. 2004). Although the court recognizes the State's concern that injunctions of this sort will cause confusion with the administration of Indiana's marriage laws and to the public in general, that concern does not apply here.[1] The court is faced

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[1] This argument had more strength when all of the Plaintiffs in the present lawsuit were seeking preliminary injunctive relief, because they (as opposed to Niki and Amy) were never married, and challenged the constitutionality of Indiana's traditional marriage law. The motion for preliminary injunctive relief from the unmarried Plaintiffs (Filing No. 35) is **WITHDRAWN**; therefore, the court does not see the potential of creating great confusion from the court's grant of the present motion which affects only one couple. Should this injunction be reversed or a permanent injunction not issued at a later time, only the parties to this case may suffer from confusion. The

with one injunction affecting one couple in a State with a population of over 6.5 million people. This will not disrupt the public understanding of Indiana's marriage laws.

IV. Conclusion

The court finds that the Plaintiffs, Amy, Niki, A.Q-S., and M.Q.-S., have satisfied their burden for a preliminary injunction. They have shown a reasonable likelihood of success on the merits, irreparable harm with no adequate remedy at law, that the public interest is in favor of the relief, and the balance of harm weighs in their favor. Therefore, the court **GRANTS** Plaintiffs' motion for a preliminary injunction (Filing No. 31).

Defendants and all those acting in concert are **ENJOINED** from enforcing Indiana statute § 31-11-1-1(b) against recognition of Plaintiffs', Niki Quasney's and Amy Sandler's, valid out-of-state marriage; the State of Indiana must recognize their marriage. In addition, should Niki pass away in Indiana, the court orders William C. VanNess II, M.D., in his official capacity as the Commissioner of the Indiana State Department of Health and all those acting in concert, to issue a death certificate that records her marital status as "married" and lists Plaintiff Amy Sandler as the "surviving spouse." This order shall require that Defendant

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court has faith that their respective attorneys can explain any decisions and effects from those decisions to them.

VanNess issue directives to local health departments, funeral homes, physicians, coroners, medical examiners, and others who may assist with the completion of said death certificate explaining their duties under the order of this court. This preliminary injunction will remain in force until the court renders judgment on the merits of the Plaintiffs' claims.

In conclusion, the court recognizes that the issues with which it is confronted are highly contentious and provoke strong emotions both in favor and against same-sex marriages. The court's ruling today is not a final resolution of the merits of the case – it is a preliminary look, or in other words, a best guess by the court as to what the outcome will be. Currently, all federal district court cases decided post-*Windsor* indicate that Plaintiffs are likely to prevail. Nevertheless, the strength or weakness of Plaintiffs' case at the time of final dissolution will inevitably be impacted as more courts are presented with this issue.

SO ORDERED this 8th day of May 2014.

Richard L. Young
RICHARD L. YOUNG, CHIEF JUDGE
United States District Court
Southern District of Indiana

Distributed Electronically to Registered Counsel of Record.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

1:14-cv-00355-RLY-TAB

MARILYN RAE BASKIN and ESTHER FULLER; BONNIE EVERLY and LINDA JUDKINS; DAWN LYNN CARVER and PAMELA RUTH ELEASE EANES; HENRY GREENE and GLENN FUNKHOUSER, individually and as parents and next friends of C.A.G.; and AMY SANDLER and NIKOLE QUASNEY,

Plaintiffs,

vs.

PENNY BOGAN, in her official capacity as BOONE COUNTY CLERK; KAREN M. MARTIN, in her official capacity as PORTER COUNTY CLERK; MICHAEL A. BROWN, in his official capacity as LAKE COUNTY CLERK; PEGGY BEAVER, in her official capacity as HAMILTON COUNTY CLERK; WILLIAM C. VANNESS, in his official capacity as the COMMISSIONER, INDIANA STATE DEPARTMENT OF HEALTH; and GREG ZOELLER, in his official capacity as INDIANA ATTORNEY GENERAL,

Defendants.)

ENTRY ON PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER

Plaintiffs, Amy Sandler and Nikole ("Niki") Quasney, ask this court to grant a temporary restraining order requiring the state of Indiana to recognize their out-of-state marriage. The court held a hearing on April 10, 2014, and issued a bench ruling **GRANTING** the temporary restraining order, which expires 28 days from that date, on May 8, 2014. Consistent with that ruling, the court issues the following written order.

I. Background

Plaintiffs, Niki Quasney and Amy Sandler, have been in a loving and committed relationship for more than thirteen years. (Declaration of Nikole Quasney ("Quasney Dec.") ¶ 2, Filing No. 32-2). They have two very young children, A.Q.-S. and M.Q.-S. (Id. at ¶ 2). On June 7, 2011, Amy and Niki entered into a civil union in Illinois. (*Id*. at ¶ 3). Then, on August 29, 2013, they were married in Massachusetts.[1] (*Id*.).

In late May of 2009, Niki was diagnosed with Stage IV Ovarian cancer. (*Id*. at ¶ 9). She and Amy immediately flew to Chicago for treatment, and just a couple of days later in June 2009, surgeons

[1] Massachusetts allows for same-sex couples to marry.

removed over 100 tumors throughout Niki's abdomen, including her liver, kidneys, diaphragm, and bladder. (*Id*. at ¶ 11). At that time, the median survival rate for her cancer was five years. (*Id*. at ¶ 5). Ever since, Niki has been battling her cancer with the most aggressive treatments she can endure while maintaining some quality of life.[2] (*Id*. at ¶ 7). Every three weeks, Niki's doctor performs a CA-125 test, which is a blood test to check the tumor marker for ovarian cancer. (Supplemental Declaration of Nikole Quasney ("Quasney Supp. Dec.") ¶ 1; Hearing Exhibit C). Three weeks ago, the test showed Niki's level was near normal at 37. (*Id*.). Unfortunately, on April 9, 2014, that level soared to 106. (*Id*. at ¶ 2). On Wednesday, April 16, 2014, Niki will begin a new chemotherapy treatment. (*Id*. at ¶ 4).

Because Niki is fighting a fatal disease and is nearing the five year survival rate, she and Amy requested that the court issue a temporary restraining order and/or preliminary injunction preventing Indiana from enforcing Indiana Code § 31-11-1-1(b) as applied against them and requiring the state, through the Defendants, to recognize Niki as married to Amy on her death certificate.

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[2] Niki went into remission in July 2010. (Quasney Dec. ¶ 13). She had more tumors removed in September of 2011. (Id. at ¶ 18). In May of 2012, Niki again was in remission. (Id. at ¶ 20). She completed her most recent treatment of chemotherapy approximately four weeks ago. (Quasney Supp. Dec. ¶ 4).

II. Standard

The court has the power to issue a temporary restraining order ("TRO") under Federal Rule of Civil Procedure 65. The court may grant a TRO if the movant: (1) has some likelihood of succeeding on the merits, (2) has no adequate remedy at law, and (3) will suffer irreparable harm if the order is denied. *See Abott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 11 (7th Cir. 1992). If these three elements are met, the court will consider any irreparable harm to the non-movant and balance it against the harm to the movant. *See id.* at 12. The Seventh Circuit evaluates the balance on a sliding scale so that "the more likely it is the plaintiff will succeed on the merits, the less balance of irreparable harm need weigh towards its side." *Kraft Foods Grp. Brands LLC v. Cracker Barrel Old Country Store, Inc.*, 735 F.3d 735, 740 (7th Cir. 2013).

III. Discussion

A. Standing for Temporary Restraining Order

Defendants first argued that the Plaintiffs are in actuality seeking a declaratory judgment rather than a TRO. According to Defendants, the court cannot grant a TRO here because the Plaintiffs suffer no cognizable Article III harm that a restraining order can remedy. The court disagrees with Defendants. To satisfy Article III, the injuries alleged may be slight. As the United States Supreme Court said, "[a]n identifiable trifle is

enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation." *Harris*, 927 F.2d at 1406 (finding a cognizable injury when plaintiff "mightily strives to avoid any visible contact" with the Rolling Meadows seal by utilizing alternative travel routes) (quoting *United States v. SCRAP*, 412 U.S. 669, 689 n. 14 (1972). The Plaintiffs here have shown cognizable injuries that a TRO can remedy because Niki drives across state lines to receive treatment from a hospital that will recognize her marriage, Niki and Amy have been denied a family fitness membership, and they suffer anxiety, sadness, and stress about the non-recognition of their marriage and what that means if and when Niki succumbs to her disease. (Quasney Dec. ¶ 24, 25, 26, 30; Quasney Supp. Dec. ¶ 7).

Additionally, Defendants argue that the dignitary harm suffered by Plaintiffs is not cognizable under Article III of the United States Constitution, and therefore an adequate remedy at law need not exist for that harm and it cannot qualify as irreparable. *See Harris v. City of Zion, Lake County*, Ill., 927 F.2d 1401, 1405 (7th Cir. 1991) ("the requirement that the plaintiff allege an 'injury-in-fact,' whether economic or noneconomic, excludes simple indignation as a basis for Article III standing."). The court again disagrees and finds that the deprivation of the dignity of a state sanctioned marriage is a cognizable injury under Article III. *See Windsor*, 133 S.Ct. at 2694. In *Windsor*, Justice Kennedy emphasized the

dignitary harms suffered as a result of the Defense of Marriage Act ("DOMA"). For example, he noted that "[t]he differentiation demeans the couple, whose moral and sexual choices the Constitution protects. . . . And it humiliates tens of thousands of children now being raised by same-sex couples." *Id.* (citing *Texas v. Lawrence*, 539 U.S. 558 (2003)). He stressed the fact that the states wished to confer dignity on certain marriages that the federal government, through DOMA, was taking away by not recognizing the marriages. *See id.* Thus, the court finds that *Windsor* recognized and remedied a dignitary injury. Finding that a TRO is an appropriate remedy, the court now turns to the criteria for a TRO.

B. Temporary Restraining Order

i. Some Likelihood of Success on the Merits

To satisfy the first requirement, the Plaintiffs' chance of success must be more than negligible. *See Brunswick Corp. v. Jones*, 784 F.2d 271, 275 (7th Cir. 1986). In support of their position that Indiana Code 31-11-1-1(b) is unconstitutional, Plaintiffs rely on the wave of recent cases finding that similar state statutes and state constitutional amendments violate the Equal Protection Clause and the Due Process Clause. *See Tanco v. Haslam*, No. 3:13-cv-01159, 2014 WL 997525 (M.D. Tenn. Mar. 14, 2014); *De Leon v. Perry*, No. SA-13-CA-00982, 2014 WL 715741 (W.D. Tex. Feb. 26, 2014); *Lee v. Orr*, No. 1:13-cv-08719, 2014 WL 683680 (N.D. Ill. Feb.

21, 2014); *Bostic v. Rainey*, No. 2:13cv0395, 2014 WL 561978 (E.D. Va. Feb. 13, 2014); *Bourke v. Beshear*, No.3:13-cv-750-H, 2014 W.D. Ky. Feb. 12, 2014); *Kitchen v. Hubert*, 961 F. Supp. 2d 1181 (D. Utah 2013); *Bishop v. United States ex. rel. Holder*, No. 04-cv-848, 2014 WL 116013 (N.D. Okla. Jan. 14, 2014). In particular, Plaintiffs rely on two cases where temporary relief was granted when one of the spouses was suffering from a fatal disease. *See Obergefell v. Kasich*, No. 1:13-cv-501, 2013 WL 3814262 (S.D. Ohio Jul. 22, 2103) (granting TRO ordering Ohio to recognize the marriage of a same-sex couple where one spouse was terminally ill); *see also Gray v. Orr*, No. 13C8449, 2013 WL 6355918 (N.D. Ill. Dec. 5, 2013) (granting a TRO to allow same-sex couple to marry before the effective date of newly enacted statute authorizing same-sex marriages because one partner was terminally ill). The court finds these decisions to be particularly persuasive.

Defendants counter that the authority of the states to define marriage can be traced back to this nation's founding, and that the district court opinions favoring Plaintiffs' position have misunderstood *United States v. Windsor*, 133 S.Ct. 2675 (2013). According to Defendants, there is no right to have one's marriage recognized; rather, recognition is merely a matter of comity that is left to the states. In support, Defendants rely on a case where Indiana did not recognize the marriage between an uncle and niece from Russia; however, the court notes that the parties did not contest that their marriage was void on appeal. *See Sclamberg*

v. Sclamberg, 41 N.E.2d 801 (Ind. 1942). Defendants concede that Indiana will recognize marriages between first cousins, even though such a marriage is generally prohibited within the state. Therefore, the court finds that as a general rule, Indiana recognizes valid marriages performed in other states.

The court agrees with Defendants that marriage and domestic relations are generally left to the states. Nevertheless, the restrictions put in place by the state must comply with the United States Constitution's guarantees of equal protection of the laws and due process. *See Windsor* at 2691 (citing *Loving v. Virginia*, 388 U.S. 1 (1967) (invalidating Virginia's statute banning marriages based on race). The Equal Protection Clause requires states to treat people equally under the law; if the state wishes to differentiate between people and make them unequal, then it must have at least a legitimate purpose.

According to Defendants the state of Indiana does not recognize same-sex marriages performed elsewhere because:

> it calls into question the State's own philosophical understanding of the nature of government-recognized marriage, the State's traditional marriage definition being predicated on the idea that we want to attract and then regulate couples that may unintentionally procreate for the sake of the children.

Additionally, "[i]t creates a social norm and relieves burdens on the State that may occur in the event that unwanted children are uncared for. . . . It's the idea of ameliorating the consequences of unintended children." This philosophy on marriage, however, does not distinguish Indiana from the wave of recent cases finding similar statutes to be unconstitutional. *See Bishop v. U.S. ex rel. Holder*, 962 F. Supp. 2d 1252 (N.D. Okla. 2014)(finding there is no rational link between excluding same-sex marriages and "steering 'naturally procreative' relationships into marriage, in order to reduce the number of children born out of wedlock and reduce economic burdens on the State); *see also DeBoer v. Snyder*, No.1:12-cv-10285, 2014 WL 1100794, *2 (E.D. Mich. Mar. 21, 2014) (noting that prohibiting same-sex marriages "does not stop [gay men and lesbian women] from forming families and raising children).

The court finds that this cannot be the entire rationale underlying the traditional marriage. Additionally, this philosophy is problematic in that the state of Indiana generally recognizes marriages of individuals who cannot procreate. For example, Indiana recognizes the marriages of opposite-sex couples that occurred in Florida that are well past their procreative years.[3] This philosophy does not

[3] On the other hand, the state of Indiana did not recognize the marriage of an uncle and niece who had two children together. This marriage had the potential for unintentional procreation, yet it was a void marriage. *See Sclamberg*, 41 N.E.2d at 802.

apply to them, so under the state's philosophy, their marriage should not be recognized here. Further, before recognizing an out-of-state marriage on a death certificate, the state of Indiana does not inquire whether the couple had the ability to procreate unintentionally.

Therefore, on this record, the court finds there will likely be insufficient evidence of a legitimate state interest to justify the singling out of same-sex married couples for non-recognition. The court thus finds that Plaintiffs have at least some likelihood of success on the merits because "the principal effect" of Indiana's statute "is to identify a subset of state-sanctioned marriages and make them unequal." *Windsor*, 133 S.Ct. at 2694.

ii. Availability of an Adequate Remedy at Law

Defendants argue that adequate remedies at law exist for Plaintiffs. For example, assuming arguendo the state eventually does recognize same-sex marriages, if Niki should pass away prior to the state recognizing their marriage, Amy could receive an amended death certificate. Additionally, Amy and Niki can create a health care directive, which the hospitals must honor, and a last will and testament, which the courts will enforce. The court finds that these are not adequate remedies because they do not address survivor benefits and the dignitary harm Plaintiffs suffer. Additionally, state recognition of their marriage brings financial

benefits, health care decision benefits, and death benefits.[4]

iii. Irreparable Harm if the Order is Denied

The court finds Plaintiffs suffer a cognizable and irreparable harm stemming from the violation of their constitutional rights of due process and equal protection. As the Seventh Circuit noted, "[t]he existence of a continuing constitutional violation constitutes proof of an irreparable harm." *Preston v. Thompson*, 589 F.2d 300, 303 n. 3 (7th Cir. 1978); *see also Does v. City of Indianapolis*, No. 1:06-cv-865-RLY-WTL, 2006 WL 2927598, *11 (S.D. Ind. Oct. 5, 2006) (quoting *Cohen v. Coahoma Cnty., Miss.*, 805 F. Supp. 398, 406 (N.D. Miss. 1992) for the proposition that "[i]t has been repeatedly recognized by federal courts at all levels that violation of constitutional rights constitutes irreparable harm as a matter of law."). A further showing of irreparable harm often is not required when monetary damages are not at stake. *See Back v. Carter*, 933 F. Supp. 738, 754 (N.D. Ind. 1996) (internal quotation and citation omitted). The rule that courts do not require a further showing of

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[4] These death benefits include an elective share of Niki's estate regardless of her will and possibly the ability to receive Social Security benefits. See Ind. Code 29-1-3-1 and 20 C.F.R. § 404.345. These are benefits that Niki and/or Amy cannot receive via contractual agreements, but only through Indiana's recognition of their marriage.

irreparable harm "is based on the belief that equal protection rights are so fundamental to our society that any violation of these rules causes irreparable harm." *Id.*

iv. Balancing of Harms

Finding that the Plaintiffs have met the criteria for a temporary restraining order, the court must balance the irreparable harm that Defendants may suffer against Plaintiffs' irreparable harm. Defendants did not allege that they or the state would suffer irreparable harm if the court granted the TRO. Additionally, as this court and others have previously held, the state experiences no harm when it is prevented from enforcing an unconstitutional statute. Therefore, the court finds that the balance weighs in favor of Niki and Amy.

C. Length of the TRO

According to Federal Rule of Civil Procedure 65(b)(2), a TRO may last up to 14 days or be extended for another 14 days to a total of 28 days for good cause. The court finds that good cause exists here to extend the expiration of this ruling to twenty-eight days from today. These reasons include judicial economy (the court is adjudicating four other cases challenging Indiana Code § 31-11-1-1) and fairness to those four other cases whose dispositive motions are due on April 21, 2014.

IV. Conclusion

For the reasons set forth above, the court **GRANTS** Plaintiff's Motion for a Temporary Restraining Order. (Filing No. 31). Defendants and all those acting in concert are **ENJOINED** from enforcing Indiana statute § 31-11-1-1(b) against recognition of Plaintiffs Niki Quasney's and Amy Sandler's valid out-of-state marriage, and therefore, the state of Indiana must recognize only their marriage. In addition, should Ms. Quasney pass away in Indiana, the court orders William C. VanNess II, M.D., in his official capacity as the Commissioner of the Indiana State Department of Health and all those acting in concert, to issue a death certificate that records her marital status as "married" and lists Plaintiff Amy Sandler as the "surviving spouse." This order shall require that Defendant VanNess issue directives to local health departments, funeral homes, physicians, coroners, medical examiners, and others who may assist with the completion of said death certificate explaining their duties under the order of this court.

This order is set to **EXPIRE** on May 8, 2014.

SO ORDERED this 18th day of April 2014.

Richard L. Young
RICHARD L. YOUNG, CHIEF JUDGE
United States District Court
Southern District of Indiana

Distributed Electronically to Registered Counsel of Record.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. XIV, § 1

"No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Ind. Code § 31-11-1-1

(a) Only a female may marry a male. Only a male may marry a female.

(b) A marriage between persons of the same gender is void in Indiana even if the marriage is lawful in the place where it is solemnized.