No. _____

Supreme Court of Louisiana

ANGELA MARIE COSTANZA, et al.,

Plaintiffs-Appellees,

v.

JAMES D. CALDWELL, in his official capacity as Louisiana Attorney General, TIM BARFIELD, in his official capacity as Secretary of the Louisiana Department of Revenue, and DEVIN GEORGE, in his official capacity as Louisiana State Registrar of Vital Records,

Defendants-Appellants

On Application for Direct Appeal from the
Fifteenth Judicial District Court, Parish of Lafayette
Hon. Edward D. Rubin, District Judge

APPLICATION FOR DIRECT APPEAL UNDER LOUISIANA CONSTITUTION ARTICLE V, §5 BY APPELLANTS JAMES D. CALDWELL, TIM BARFIELD, AND DEVIN GEORGE

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STATEMENT ON CONSIDERATIONS FOR DIRECT APPEAL

1. This Court has appellate jurisdiction under article V, §5(D)(1) of the Louisiana Constitution to review the trial court's ruling declaring that several marriage provisions of the Louisiana Constitution and Civil Code (collectively, "Louisiana's marriage laws") violate the U.S. Constitution to the extent they decline to recognize same-sex marriages in Louisiana. Specifically, the trial court expressly declared that Article XII, Section 15 of the Louisiana Constitution,[1] as well as Articles 86, 89, and 3520(B) of the Louisiana Civil Code[2] "are unconstitutional because they violate the Due Process and Equal Protection Clauses of the [Fourteenth] Amendment … and Article IV, Section 1, the Full Faith and Credit Clause." App. A at 23. The Court also declared that Revenue Information Bulletin No. 13-024—issued September 13, 2013 by the Department of Revenue to enforce Louisiana's marriage laws—is unconstitutional under the federal due process and

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[1] Louisiana Constitution article XII, §15 provides:

> Marriage in the state of Louisiana shall consist only of the union of one man and one woman. No official or court of the state of Louisiana shall construe this constitution or any state law to require that marriage or the legal incidents thereof be conferred upon any member of a union other than the union of one man and one woman. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized. No official or court of the state of Louisiana shall recognize any marriage contracted in any other jurisdiction which is not the union of one man and one woman.

[2] Louisiana Civil Code article 86 provides in relevant part that "[m]arriage is a legal relationship between a man and a woman that is created by civil contract." Article 89 provides in relevant part that "[p]ersons of the same sex may not contract marriage with each other." Article 3520(B) provides that "[a] purported marriage between persons of the same sex violates a strong public policy of the state of Louisiana and such a marriage contracted in another state shall not be recognized in this state for any purpose, including the assertion of any right or claim as a result of the purported marriage."

equal protection clauses. *Id.*[3] The jurisdictional requirements of Article V, §5(D)(1) are satisfied because it "'affirmatively and clearly appear[s] that the judgment of the lower court was based wholly'" on what the court believed to be "'the unconstitutionality of the law[s].'" *State v. Williams*, 2011-0958, at *6 (La. 7/2/12); 94 So.3d 770, 775 (quoting *State v. Clement*, 150 So. 842, 842 (La. 1933)). This Court therefore has appellate jurisdiction to directly review the trial court's ruling. *See generally, e.g., Forum for Equality PAC v. McKeithen*, 2004-2477, at *10 (La. 1/19/05); 893 So.2d 715, 723; *Bd. of Com'rs of Orleans Par. Levee Dist. v. Connick*, 654 So.2d 1073, 1076 (La. 1995); *Church Point Wholesale Beverage Co., Inc. v. Tarver*, 614 So.2d 697, 700 (La. 1993) (all reviewing on direct appeal trial court's declaration of unconstitutionality).

2. Direct appellate review is justified because of the vital importance of the laws at issue. The trial court invalidated the Civil Code articles defining marriage as a man-woman union, *see* LA. CIV. CODE arts. 86, 89, and 3520(B), the Louisiana adoption, tax, and vital records laws enforcing those provisions, as well as the "Defense of Marriage Amendment" in article XII, §15 of the Louisiana Constitution. When this Court previously upheld the validity of that Amendment under the

[3] Revenue Information Bulletin No. 13-024 (Sept. 13, 2013) provides in relevant part that "the Louisiana Department of Revenue shall not recognize same-sex marriages when determining filing status," and that a person who contracted a same-sex marriage in another State "may not file a Louisiana state income tax return as marriage filing jointly, marriage filing separately or qualifying widow." Rev. Bull. at 1. Instead, the person must file "a separate Louisiana return as single, head of household, or qualifying widow, as applicable." *Id.* The Bulletin is available at http://revenue.louisiana.gov/forms/lawspolicies/RIB%2013-024.pdf (last visited Sept. 25, 2014).

Louisiana Constitution, it did so on direct appeal from a trial court's declaration of unconstitutionality. *See Forum for Equality PAC*, 2004-2477 at *1 n.1 & *10, 893 So.2d at 716 n.1, 722-23. Appellants urge the Court to do the same here.

3. Direct appellate review is also justified because the extraordinary sweep of the trial court's decision threatens to subvert the orderly administration of Louisiana's marriage, adoption, tax, and vital records laws. In one fell swoop, the trial court (1) ordered the Secretary of Revenue—in contravention of the Louisiana Constitution, Civil Code, and tax laws—to "allow the petitioners to file their state tax returns as a couple whose marriage is valid and recognized in Louisiana" (App. A at 23); (2) granted a stepparent adoption based on an out-of-state same-sex marriage, in contravention of the Louisiana Children's Code (*id.*); and (3) ordered the State Registrar "to issue a new birth certificate" to the child naming a same-sex spouse as the child's mother, in contravention of the Louisiana Constitution, Civil Code, and vital records laws (*id.*). Stunningly, the trial court also purported to "enjoin[ ] the State from enforcing [Louisiana's marriage laws] to the extent that these laws prohibit a person from marrying another person of the same sex." *Id.* But the plaintiffs below never *asked* to marry a same-sex partner in Louisiana, because they *had already contracted a same-sex marriage in California*. Consequently, the trial court had no jurisdiction to enter the order, whose sweeping language nonetheless casts a cloud on the viability of Louisiana's marriage laws.

4. Additionally, direct appellate review is justified because Appellants are now subject to conflicting state and federal judicial decisions. Just three weeks before the trial court's ruling in this case, a federal district court in New Orleans—in a decision the trial court failed to acknowledge—rejected *precisely* the same constitutional claims against *precisely* the same state officials by same-sex couples seeking recognition of their marriages in Louisiana. *See Robicheaux v. Caldwell*, __ F.Supp.2d __, 2014 WL 4347099 (E.D. La. Sept. 3, 2014), *appeals docketed* Sept. 5 & 8, 2014 (5th Cir. No. 14-31037). So, in the space of three weeks, Appellants Barfield and George were first told by a New Orleans federal court that they *can* enforce Louisiana's marriage laws under the Fourteenth Amendment, but they have now been told by a Lafayette state court that they *cannot*. This is an intolerable situation. This Court can resolve it by granting direct appellate review and reversing the trial court's erroneous decision.

5. Finally, in addition to direct review, this appeal warrants expedited review under this Court's rules because it arises out of an adoption proceeding brought under Title XII of the Louisiana Children's Code. *See* LA. SUP. CT. R. XXXIV, pt. I, §§1-2 (providing for "expeditious Supreme Court review procedures" in appeals "arising from … Adoption of Children … cases brought pursuant to Title XII of the Louisiana Children's Code"). This direct appeal therefore merits expedited and prioritized record preparation, briefing, argument, and disposition. *See id.* pt. II, §§1-6. This simply underscores the magnitude of the issues involved.

6. In sum, Appellants respectfully urge the Court to grant direct appellate review in this matter and to expedite briefing, argument, and disposition in accordance with the Court's rules.

Supreme Court of Louisiana

ANGELA MARIE COSTANZA, et al.,
Plaintiffs-Appellees,

v.

JAMES D. CALDWELL, et al.,
Defendants-Appellants

MEMORANDUM IN SUPPORT OF APPLICATION FOR DIRECT APPEAL BY APPELLANTS JAMES D. CALDWELL, TIM BARFIELD, AND DEVIN GEORGE

STATEMENT OF THE CASE

Angela Marie Brewer and Chasity Shanelle Brewer ("Appellees" or "plaintiffs") are two women married to each other under California law.[4] On July 12, 2013, they filed a joint petition in the 15th Judicial District Court in Lafayette, Louisiana asking that that Angela be allowed to adopt Chasity's biological child through stepparent adoption under Children's Code article 1243. They alleged that Chasity became pregnant through artificial insemination in California and gave birth to the child in Metairie, Louisiana in 2004. Subsequently, plaintiffs filed an amended petition on September 23, 2013, asserting that any Louisiana law denying a same-sex couple the right to adopt violates the federal Constitution. The amended petition was served on the Attorney General, who requested that the trial court give his office written notice ten days before any hearing in the matter.

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[4] The facts and procedural history are taken from the trial court's September 22, 2014 ruling (App. A), as well as the Third Circuit's decision in *In re Adoption of N.B.*, 2014-314 (La. App. 3 Cir. 6/11/14); 140 So.3d 1263, 1263-66.

On December 3, 2013, the trial court ordered the adoption petition heard in chambers on January 27, 2014. No notice of the hearing was given to the Attorney General. The court heard argument and considered evidence in chambers on January 27. Present were plaintiffs and their counsel. On February 5, the court entered a final decree granting the stepparent adoption to Angela Costanza.

On March 6, the Attorney General timely moved for suspensive appeal on behalf of himself and the Department of Health and Hospitals. After hearing oral argument, the Third Circuit found that (1) the stepparent adoption ordered by the trial court was contrary to Louisiana law, and (2) the trial court had not afforded the Attorney General proper notice of the adoption hearing. *See In re Adoption of N.B.*, 2014-314 (La. App. 3 Cir. 6/11/14); 140 So.3d 1263, 1265-66 (concluding that "the state is absolutely correct" that the adoption decree "violate[d] [Louisiana Children's Code] art. 1243 and [Louisiana Civil Code] art. 3520(B)")[5]; *id.* at 1266 (concluding that "the trial court erred by holding the hearing on this matter without notifying the Attorney General as required by La. Code Civ. P. art. 1572"). The court of appeals therefore vacated the adoption and provided that, "[o]n remand, the trial court is instructed to hear arguments on all issues raised by both the petitioners and the Attorney General." *Id.*

[5] The Third Circuit's statutory ruling that the stepparent adoption is not authorized by Children's Code article 1243 and Civil Code article 3520(B) is law of the case. In fact, as the Third Circuit pointed out, plaintiffs themselves "acknowledged" in a related case that the stepparent adoption they sought was not permitted by Louisiana law. *See id.* at 1265-66.

On remand, plaintiffs filed amended petitions naming as defendants Governor Jindal and Attorney General Caldwell, as well as Tim Barfield, the Secretary of the Louisiana Department of Revenue, and Devin George, the Louisiana State Registrar of Vital Records. The amended petitions claimed the provisions of Louisiana law barring recognition of their same-sex marriage as a basis for the stepparent adoption violate the federal Equal Protection, Due Process, and Full Faith and Credit Clauses. They also claimed that Louisiana Revenue Bulletin 13-024 violates the same constitutional provisions by requiring persons in an out-of-state same-sex marriage to file Louisiana tax returns as single persons instead of jointly as a married couple. Based on those claims, plaintiffs sought declaratory and injunctive relief requiring recognition of their same-sex marriage for purposes of Louisiana tax, adoption, and vital records laws.

The Governor and Attorney General filed peremptory exceptions of no cause of action, arguing they had no direct legal responsibility for enforcing the challenged laws and were therefore not proper defendants. Defendants Barfield and George, who admitted they were responsible for enforcing the challenged tax and vital records laws, agreed with plaintiffs that there were no disputed material facts and that the constitutional issues could be resolved on summary judgment. The parties then filed cross-motions for summary judgment and oral argument was held on September 15, 2014. One week later, on September 22, 2014, the trial court issued a

23-page, signed "Minute Entry Ruling" and "Order," granting plaintiffs' motion for summary judgment and denying defendants' cross-motion.

The court granted the peremptory exception of no cause of action as to the Governor, but denied it as to the Attorney General. App. A at 3-6. On the merits of the constitutional claims, the court reasoned that, by refusing to recognize plaintiffs' out-of-state same sex marriage as a basis for the stepparent adoption, Louisiana's marriage laws infringed plaintiffs' equal protection and due process rights under the Fourteenth Amendment, as well as the Full Faith and Credit Clause (*see* App. A at 18-23). Additionally, the court reasoned that, by refusing to allow plaintiffs to file a Louisiana tax return as a married couple, Revenue Bulletin 13-024 infringed due process and equal protection (*see* App. A at 21-22). Consequently, the court:

- "declare[d]" that Article XII, §15 of the Louisiana Constitution, as well as articles 86, 89, and 3520 of the Louisiana Civil Code, violate the equal protection, due process, and full faith and credit guarantees of the federal Constitution (App. A at 23);
- "declare[d]" that Louisiana Revenue Bulletin No. 13-024 violates the equal protection and due process guarantees of the Fourteenth Amendment (*id.*);
- "ordered" defendant Barfield "to … allow the petitioners to file their state tax returns as a couple whose marriage is valid and recognized in Louisiana" (*id.*);
- granted Angela Costanza a stepparent adoption of the child, who "is declared, for all purposes, to be the child of petitioner, Angela Marie Costanza to the same extent as if [the child] had been born to Angela Costanza in marriage" (*id.*);
- "order[ed]" defendant Devin George "to issue a new birth certificate naming Angela Costanza as [the child]'s mother" (*id.*); and finally,

- "enjoin[ed] the State from enforcing the above referenced laws to the extent that these laws prohibit a person from marrying another person of the same sex" (*id.*).

The court entered two final judgments on September 24, 2014, reflecting its September 22 order. App B. Appellants timely moved for suspensive appeal on September 25, which the court granted the same day. App. C.

ASSIGNMENT OF ERRORS IN TRIAL COURT'S RULING

1. The trial court erred in declaring that Louisiana's marriage laws violate the federal Equal Protection Clause by declining to recognize an out-of-state same-sex marriage as the basis for a stepparent adoption.

2. The trial court erred in declaring that Louisiana's marriage laws violate the federal Due Process Clause by declining to recognize an out-of-state same-sex marriage as the basis for a stepparent adoption.

3. The trial court erred in declaring that Louisiana's marriage laws violate the federal Full Faith and Credit Clause by declining to recognize an out-of-state same-sex marriage as the basis for a stepparent adoption.

4. The trial court erred in declaring that Revenue Bulletin 13-024 violates the federal Equal Protection and Due Process Clauses by declining to recognize an out-of-state same-sex marriage for purposes of state income-tax filing status.

5. The trial court erred in ordering Appellant Barfield to allow Appellees to file a state income-tax return as a married couple.

6. The trial court erred in granting Appellee Angela Costanza a stepparent adoption under Children's Code article 1243 on the basis of her out-of-state same-sex marriage to the adoptive child's biological mother.

7. The trial court erred in ordering Appellant George to issue a revised birth certificate recognizing Angela Costanza as the adoptive child's mother.

8. The trial court erred in enjoining "the State from enforcing [Louisiana's marriage] laws to the extent that these laws prohibit a person from marrying another person of the same sex." (App. 24)

9. The trial court erred in denying the Attorney General's peremptory exception of no cause of action.

SUMMARY OF ARGUMENT

The trial court's sweeping decision to invalidate Louisiana's marriage and adoption laws merits this Court's immediate intervention. Not only does the decision undermine the enforceability of bedrock provisions of Louisiana family law, but it is directly contrary to a federal district court decision from earlier this month which upheld precisely the same laws against precisely the same constitutional attacks. While these issues *may* be addressed by the U.S. Supreme Court by the summer of 2015, Louisiana officials are *now* laboring under irreconcilable obligations caused by the trial court's erroneous decision. This Court should therefore grant direct, expedited review of the trial court's ruling and confirm the validity of Louisiana's marriage laws under the federal Constitution.

In retaining the man-woman definition of marriage in 2004, Louisiana's citizens legitimately "address[ed] the meaning of marriage through the democratic process." *Robicheaux*, 2014 WL 4347099 at *1. By doing so, they exercised their "historic and essential authority to define the marital relation." *United States v. Windsor*, 133 S. Ct. 2675, 2692 (2013). Their exercise of that authority, fundamental to self-government, does not offend the federal Constitution. Removing this difficult and controversial issue from the citizens of Louisiana—as the trial court would do—"is inconsistent with the underlying premises of a responsible, functioning democracy."

Schuette v. Coalition to Defend Affirmative Action, 134 S. Ct. 1623, 1637 (2014) (plurality op. of Kennedy, J.).

ARGUMENT

I. THE TRIAL COURT'S SWEEPING INVALIDATION OF LOUISIANA'S MARRIAGE AND ADOPTION LAWS MERITS THIS COURT'S IMMEDIATE ATTENTION.[6]

The trial court's ruling in this case strikes at the heart of Louisiana's family law. As the U.S. Supreme Court reaffirmed just last year, "[t]he definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the '[p]rotection of offspring, property interests, and the enforcement of marital responsibilities.'" *United States v. Windsor*, 133 S. Ct. 2675, 2691 (2013) (quoting *Williams v. North Carolina*, 317 U.S. 287, 298 (1942)). In the teeth of that basic principle, the trial court declared that Louisiana must recognize a same-sex marriage contracted in another State for purposes of Louisiana's adoption, tax, and vital records laws. And that was not all. Going beyond what even the plaintiffs demanded, the court purported to "enjoin[ ] the State from enforcing [Louisiana's marriage] laws to the extent that these laws prohibit a person from marrying another person of the same sex." (App. A at 23). Nor was that all. In the course of its ruling, the court openly compared Louisiana's marriage laws to the odious racist laws upheld in *Plessy v. Ferguson*, 163 U.S. 537 (1896), and condemned in *Loving v. Virginia*, 388 U.S. 1 (1967). *See* App. A at 18-20 (comparing Louisiana's marriage laws to the laws at issue in *Plessy* and *Loving*).

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[6] This part is responsive to Assignments of Error 1-8.

The court's ruling "is demeaning to the democratic process." *Schuette*, 134 S. Ct. at 1637 (plurality op. of Kennedy, J.). It is demeaning to the more than 600,000 Louisiana citizens who voted to retain Louisiana's man-woman definition of marriage in 2004. *See Forum for Equality PAC*, 2004-2477 at *3, 893 So.2d at 718 (observing that Article XII, §15 of the Louisiana Constitution was approved in September 2004 "by 77.78% of the electorate: 619,908 votes for and 177,067 votes against"). And it is demeaning to the more than 200 million Americans in some 30 States who have democratically defined marriage as the union of a man and a woman—an aspect of marriage which, as the Supreme Court remarked last year, "had been thought of by most people as essential to the definition of that term and to its role and function throughout the history of civilization." *Windsor*, 133 S. Ct. at 2689. This Court should act swiftly to reverse the trial court's stunning decision.

It is no secret that the constitutionality of state marriage laws is the subject of ongoing nationwide litigation. Since last year's *Windsor* decision, numerous federal courts have invalidated state marriage definitions under the Fourteenth Amendment. *See, e.g., Brenner v. Scott*, 999 F.Supp.2d 1278 (N.D. Fla. 2014); *Kitchen v. Herbert*, 961 F.Supp.2d 1181 (D. Utah 2013). Louisiana, however, is in a unique position with respect to this phenomenon. Earlier this month, a federal court in New Orleans issued the only post-*Windsor* federal decision upholding a State's man-woman definition of marriage. Judge Martin Feldman's opinion in *Robicheaux v. Caldwell* rejected *precisely* the same constitutional claims against *precisely* the

same state officials respecting *precisely* the same Louisiana laws as in the present matter. *See Robicheaux v. Caldwell*, __ F.Supp.2d __, 2014 WL 4347099, at *2-6, *6-9 (E.D. La. Sept. 3, 2014), *appeals docketed* Sept. 5 & 8, 2014 (5th Cir. No. 14-31037) (rejecting equal protection and due process claims against Louisiana's marriage laws). Yet the trial court's decision below did not even cite, acknowledge, or discuss Judge Feldman's decision, and instead relied on federal court decisions from elsewhere. *See* App. A at 17-18 (relying on *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014), *cert filed* Aug. 5, 2014 (No. 14-124)).

Because of these directly conflicting federal and state decisions issued within three weeks of each other, the state officials in this case are now subject to radically inconsistent guidance on the constitutionality of Louisiana's marriage laws. Consider their situation. On September 3, these officials received from the Eastern District of Louisiana a ringing endorsement of the constitutionality of Louisiana's marriage laws. *See Robicheaux*, 2014 WL 4347099, at *6 (concluding "Louisiana's laws and Constitution are directly related to achieving marriage's historically preeminent purpose of linking children to their biological parents" and that Louisiana has "a legitimate state interest in safeguarding that fundamental social change … is better cultivated through democratic consensus"). On September 22, the same officials received from the 15th Judicial District Court a wholesale condemnation of those same laws and an injunction forbidding their enforcement. *See* App. A at 18-19, 23 (ruling that Louisiana's marriage laws have "no rational

connection" to either of those interests and "enjoin[ing] the State from enforcing [those] laws to the extent [they] prohibit a person from marrying another person of the same sex"). This has instantly created intolerable confusion surrounding the enforceability of Louisiana's family laws. For instance, just one day after the trial court's order in this case, a prominent national legal publication linked to the order and reported that "[t]he situation in Louisiana" concerning its marriage laws "has become somewhat muddled." Lyle Denniston, *Rulings differ on same-sex marriage in Louisiana*, SCOTUSblog (Sept. 23, 2014, 7:24 PM), http://www.scotusblog.com/2014/09/rulings-differ-on-same-sex-marriage-in-louisiana/. Such judicially-created confusion demands this Court's immediate intervention.

To be sure, it is widely supposed that the U.S. Supreme Court may address some or all of the issues in the upcoming term.[7] Yet that possibility does not absolve this Court from its responsibility to address the trial court's sweeping decision in an expeditious manner. One cannot know which cases, if any, the Supreme Court will grant, what issues it would address, or—crucially for this case—whether any decision would settle the adoption and interstate recognition issues presented here. Indeed, the full-faith-and-credit question in this case is presented in no other case

[7] *See Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014), *cert. filed* Aug. 5, 2014 (No. 14-124); *Bishop v. Smith*, __ F.3d __, 2014 WL 3537847 (10th Cir. July 18, 2014), *cert. filed* Aug. 6, 2014 (No. 14-136); *Schaefer v. Bostic*, __ F.3d __, 2014 3702493 (4th Cir. July 28, 2014), *cert. filed* Aug. 8, 2014 (No. 14-153), Aug. 22, 2014 (No. 14-225), Aug. 29, 2014 (No. 14-251); *Baskin v. Bogan*, __ F.3d __, 2014 WL 4359059 (7th Cir. Sept. 4, 2014), *cert. filed* Sept. 9, 2014 (Nos. 14-277, 14-278). These seven petitions have been distributed for consideration at the Court's September 29 conference.

to date, nor in any of the cases pending on certiorari. Furthermore, even assuming the U.S. Supreme Court grants one or more marriage cases this term, no decision is likely until June 2015. Nor can one know when the U.S. Fifth Circuit will render a decision in the two marriage appeals pending before it—neither of which has completed briefing or been set for argument.[8]

The upshot is that this Court should act immediately to address the extraordinarily important issues raised by the trial court's dramatic decision. As explained above, *see supra* at x, the Court's rules require expeditious disposition of cases like this involving adoption under Title XII of the Children's Code. This case not only involves a child's purported adoption, but the basic validity of Louisiana's adoption and marriage laws as a whole. And, as already explained, Louisiana's unique situation—where federal and state decisions have exposed state officials to inconsistent obligations respecting enforcement of Louisiana's family laws—cries out for this Court's swift resolution of the state case. Even if one may expect a decision touching some of these issues from the U.S. Supreme Court by June 2015, in the meantime this Court would add a great measure of clarity to the situation in this State by affirming the validity of Louisiana's basic family laws, just as Judge Feldman has already done in *Robicheaux*.

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[8] *See De Leon v. Perry*, 5th Cir. No. 14-50196 (docketed Mar. 1, 2014); *Robicheaux v. Caldwell*, 5th Cir. No. 14-31037 (docketed Sept. 5 & 8, 2014). On September 25, the Fifth Circuit granted the *Robicheaux* appellees' motion to expedite briefing and argument.

II. THE TRIAL COURT'S RULING IS WRONG.

While full examination of the trial court's errors should await merits briefing, the following discussion demonstrates that the court's decision is grievously flawed.

A. The Supreme Court's *Windsor* decision emphatically reaffirmed the States' "historic and essential authority to define the marital relation."[9]

The trial court purportedly "adopt[ed] the reasoning of *Windsor*" to overturn Louisiana's marriage laws, *see* App. 17, but instead turned *Windsor* on its head.

Windsor invalidated under the Fifth Amendment section 3 of DOMA, which defined marriage as a man-woman union for federal purposes. 133 S. Ct. at 2683. The key to *Windsor*'s outcome was that DOMA subverted the principle that the "'regulation of domestic relations' is 'an area that has long been regarded as a virtually exclusive province of *the States*.'" *Id.* at 2691 (quoting *Sosna v. Iowa*, 419 U.S. 393, 404 (1975)) (emphasis added). "The definition of marriage," the Court explained, is "the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the '[p]rotection of offspring, property interests, and the enforcement of marital responsibilities.'" *Id.* (quoting *Williams*, 317 U.S. at 298). That historic allocation of domestic relations authority to the States was central to *Windsor*'s holding. *See id.* at 2692 ("[t]he State's power in defining the marital relation [was] *of central relevance*" to the outcome) (emphasis added).

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[9] This part is responsive to Assignments of Error 1-8.

By finding that DOMA usurped "state responsibilities for the definition and regulation of marriage," *id.* at 2691, *Windsor* tightly linked individual rights to the States' traditional authority over domestic relations law. It vindicated the rights of same-sex married couples by affirming *New York's* authority "to recognize and then to allow same-sex marriages" in the first place. *Id.* at 2692. New York's decision to define marriage was "without doubt a proper exercise of its sovereign authority within our federal system, all in the way that the Framers of the Constitution intended." *Id.* DOMA fell precisely because it undermined that sovereign authority by diminishing the rights New York granted same-sex couples. Underlining this point, the Court expressly limited its holding to persons "joined in same-sex marriages *made lawful by the State*." *Id.* at 2695 (emphasis added).

Instead of recognizing that *Windsor* emphatically supports Louisiana's authority to define marriage, the trial court wrongly thought the decision *invalidates* Louisiana's authority. App. A at 16-17. That nullifies *Windsor*'s core holding. It ignores that *Windsor*: (1) spent seven pages tracing the origins of "*state* responsibilities for the definition and regulation of marriage … to the Nation's beginning" (133 S. Ct. at 2691, 2689-96); (2) praised New York's "*statewide* deliberative process that enabled its citizens to discuss and weigh arguments for and against same-sex marriage" (*id.* at 2689); (3) emphasized that DOMA was "unusual" because it "depart[ed] from [the federal government's] history and tradition of reliance on *state* law to define marriage" (*id.* at 2692), and (4) limited its

"opinion and holding" to "those persons who are joined in same-sex marriages made lawful by *the State*" (*id.* at 2695-96) (emphases added). In short, *Windsor* struck down DOMA—not because it discriminated against same-sex couples, as the trial court thought—but because DOMA's "purpose [was] to influence or interfere with *state sovereign choices* about who may be married." *Id.* at 2693 (emphasis added). To use *Windsor* to invalidate Louisiana's "sovereign choices about who may be married" is effectively to overrule the decision. *See generally, e.g., Robicheaux*, 2014 WL 4347099, at *3-4 (finding it "difficult to minimize [or] ignore, the high court's powerful reminder in *Windsor* [that] … '[t]he recognition of civil marriages is central to state domestic relations law applicable to its residents and citizens'") (quoting *Windsor*, 133 S. Ct. at 2691).

B. The trial court decreed that the marriage definition embraced by every State until a decade ago is irrational.[10]

The trial court did not engage in a full-blown equal protection analysis, but it appeared to rule that Louisiana's marriage laws fail rational basis review. More specifically, the court concluded that Louisiana's man-woman definition of marriage has no "rational connection" to "linking children to intact families formed by their biological parents." App. A at 18. The court reached this conclusion because Louisiana "allows for foster parent adoptions where there is no linkage to a child's biological parent or family." *Id.* Additionally, the court concluded that Louisiana's decision to retain its marriage definition in its Constitution has no "rational

[10] This part is responsive to Assignments of Error 1 and 4-8.

connection" to "ensuring that fundamental social change occurs through widespread social consensus." *Id.* Here is the court's reasoning on this issue in its entirety:

> [T]he State has given no legitimate state interest in waiting to ensure that fundamental social change occurs through widespread social consensus. It hasn't been shown what the widespread social consensus might look like. This court notes that widespread social consensus can vary among our citizens, and not always for reasons that are fair and just, or comport with rights guaranteed by the U.S. Constitution. This court ask [*sic*] the question, *how is there a strong public policy against same-sex marriage in this day and age? It is the opinion of this court that widespread social consensus leading to acceptance of same-sex marriage is already in progress*. The moral disapproval of same-sex marriages is not the same as it was when Louisiana defined marriage as a union between a man and a woman.

Id. (emphasis added).

While Appellants will reserve a complete response for their merits brief, they offer the following brief responses here.

First, the trial court thought defining marriage in terms of a man-woman union has no *rational* connection to linking children to their biological parents. That is stunning. Marriage is legally defined as an opposite-sex union because it is anchored in the reality that children come from the union of a man and a woman. *See, e.g.,* LA. CIV. CODE art. 86, cmt. c ("The marriage contract differs from other contracts in that it creates a social status that affects not only the contracting parties, but also their posterity and the good order of society."). In every known human society, the institution developed "to solidify, standardize, and legalize the relationship between a man, a woman, and their offspring, is civil marriage between one man and one woman." *Sevcik v. Sandoval*, 911 F.Supp.2d 996, 1015 (D. Nev.

2012) (citing *Maynard v. Hill*, 125 U.S. 190, 211 (1888)).[11] Louisiana family law builds a powerful array of presumptions around the commonsense notion that men and women procreate and that the law should promote the stability of the resulting family.[12] The trial court, however, appeared to deny that the legal institution of marriage has any *rational* connection to male-female biology. But equal protection does not brand it "irrational" for marriage laws to reflect biological reality. "To fail to acknowledge even our most basic biological differences … risks making the guarantee of equal protection superficial, and so disserving it." *Nguyen v. I.N.S.*, 533 U.S. 53, 73 (2001); *see also, e.g., Robicheaux*, 2014 WL 4347099, at *6 ("Louisiana's laws and Constitution are directly related to achieving marriage's historically preeminent purpose of linking children to their biological parents[.]").

Second, the trial court thought the biological basis for Louisiana's marriage laws was *irrational* because Louisiana allows adoption by people not biologically related to the child. That misses the point entirely. There is nothing *irrational* about defining marriage as a man-woman union, while allowing children deprived of a mother or father (or both) to be adopted by persons unrelated to the child. This case has nothing to do with the legitimacy of adoption as a general matter. Rather, it

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[11] *See also, e.g., Hernandez v. Robles*, 855 N.E.2d 1, 21 (N.Y. 2006) (Graffeo, J., concurring) ("[A]n orderly society requires some mechanism for coping with the fact that sexual intercourse [between a man and a woman] commonly results in pregnancy and childbirth. The institution of marriage is that mechanism.") (internal quotations omitted).

[12] *See, e.g.,* LA. CIV. CODE art. 185 (providing that the "husband of the mother is presumed to be the father of a child born during the marriage or within three hundred days from the date of the termination of the marriage").

concerns whether Louisiana can limit *joint* adoptions to persons legally married under Louisiana law. *See* LA. CHILD. CODE art. 1198, 1221, 1243 (providing only persons validly married under Louisiana law may *jointly* adopt a child). The *en banc* U.S. Fifth Circuit has already decided that question, holding that Louisiana's adoption laws do not violate Equal Protection by tracking its marriage laws. *See, e.g., Adar v. Smith*, 639 F.3d 146, 162 (5th Cir. 2011) (en banc) (holding that "Louisiana may rationally conclude that having parenthood focused on a married couple or a single individual … furthers the interests of adopted children"). But common sense answers the question as well. When two people seek to jointly adopt a child, they seek to exercise together one of the basic incidents of marriage—legal responsibility for a child. *See, e.g.,* LA. CIV. CODE, tit. IV, ch. 3 ("Incidents and Effects of Marriage"); *id.* art. 99 ("[s]pouses mutually … exercise parental authority"); *id.* art. 3522 cmt. b (listing as one of the "Incidents and Effects of Marriage" the "rights and obligations stemming from parental authority"). Louisiana can rationally limit the joint exercise of parental authority—which is legally indistinguishable from a marriage—to relationships its law defines as a "marriage." That is the whole point of defining "marriage." *See, e.g.,* LA. CIV. CODE art. 86 cmt. c ("[t]he marriage contract … creates a social status and affects not only the contracting parties, but also their posterity and the good order of society").

Third, the trial court rejected Appellants' argument that Louisiana's constitutional marriage definition ensures that change to such a fundamental social

institution occurs only through "widespread social consensus." In response, the court simply declared its own "opinion" that "widespread social consensus leading to acceptance of same-sex marriage is already in progress." App. A. at 19. Once again, however, the court failed to engage Appellants' argument, which was based squarely on the U.S. Supreme Court's *Windsor* opinion. In *Windsor*, the Court explained that, with respect to a serious matter like altering the marriage definition to include same-sex couples, "[t]he dynamics of state government in the federal system are to allow the formation of consensus[.]" 133 S. Ct. at 2692. *Windsor* thus taught that adopting same-sex marriage would involve a "far-reaching legal acknowledgment" and demand "both the community's considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality." *Id.* at 2692-93. Thus, *Windsor* emphasized that New York changed its marriage definition only "[a]fter a statewide deliberative process that enabled its citizens to discuss and weigh arguments for and against same-sex marriage." *Id.* at 2689. These plain statements from *Windsor*, which the trial court failed to acknowledge, fundamentally validate Appellants' social-consensus argument. *See, e.g., Robicheaux*, 2014 WL 4347099, at *5 ("agree[ing]" that Louisiana "assert[s] a legitimate state interest in safeguarding that fundamental social change … is better cultivated through the democratic process").

C. The trial court implicitly found that a right to marry someone of the same sex is deeply rooted in our national history.[13]

The trial court also found that denying the stepparent adoption on the basis of plaintiffs' same-sex marriage violates their rights under the Due Process Clause of the Fourteenth Amendment App. A at 18. The court's conclusion violates the basic requirements for finding a substantive due process right.

Neither plaintiffs nor the trial court could point to any case recognizing a fundamental right to adopt a child, because "adoption is not a fundamental right." *Adar*, 639 F.3d at 162 (citing *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 811 (11th Cir. 2004); *Lindley v. Sullivan*, 889 F.2d 124, 131 (7th Cir. 1989)). Nor did plaintiffs show they have the fundamental right to marry someone of the same sex. Any such claim founders on the settled rule that "[t]o establish a substantive due process violation, a plaintiff must first both carefully describe that right and establish it as 'deeply rooted in this Nation's history and tradition.'" *Malagon de Fuentes v. Gonzales*, 462 F.3d 498, 505 (5th Cir. 2006) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997)) (quotes omitted). First, a "careful description" of the asserted right must include the fact that, here, it involves the right to marry someone *of the same sex*. *See Glucksberg*, 521 U.S. at 722 (noting the Court's "tradition of carefully formulating the interest at stake in substantive-due-process cases"). Plaintiffs cannot simply invoke a generalized "right to marry." *See id.* (rejecting "right to die" as insufficiently "precise", and instead

[13] This part is responsive to Assignments of Error 2 and 4-8.

describing asserted right as the "right to commit suicide which itself includes assistance in doing so"). Relying on a generic "right to marry" proves too much: no one would say, for instance, that a state burdens the "right to marry" by not allowing someone to wed her first cousin. In that hypothetical case, a "careful description" of the asserted right would include the consanguinity of the proposed spouse. Just so here: the right plaintiffs seek is not simply to "marry" but to marry someone of the same sex. The right has not been "carefully" described if the description omits that essential feature. *Windsor* confirmed this: "marriage between a man and a woman no doubt had been thought of by most people as *essential to the very definition of that term* and to its role and function throughout the history of civilization." 133 S. Ct. at 2689 (emphasis added).

Second, *Windsor* also forecloses the argument that a right to same-sex marriage is "objectively, deeply rooted" in our traditions. *Windsor* observed that New York's recognition and adoption of same-sex marriage involved "a new perspective, a new insight," remarking that:

> … until recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and a woman in lawful marriage. For marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization.

133 S. Ct. at 2689. Given that fact, the right to enter into a same-sex marriage cannot be one "deeply rooted in our Nation's history and tradition." *Glucksberg*, 521 U.S. at 720-21; *see also Hernandez*, 855 N.E.2d at 9 ("The right to marry someone of

the same sex … is not 'deeply rooted'; it has not even been asserted until relatively recent times."). That does not disparage same-sex couples who wish to marry. It merely says courts should not place this brand new development "outside the arena of public debate and legislative action" by decreeing it a "fundamental" right. *Id.* at 720 (quoting *Moore v. East Cleveland*, 431 U.S. 494, 502 (1977)); *see also, e.g., Robicheaux*, 2014 WL 4347099, at *8 (noting that, "[w]hile many states have democratically chosen to recognize same-sex marriage, … any right to same-sex marriage is not yet so entrenched as to be fundamental").

D. The trial court incorrectly found that Louisiana owes full faith and credit to out-of-state marriages.[14]

The trial court's conclusion that Louisiana's marriage laws violate the Full Faith and Credit Clause ignores black-letter law. *See* App. 23-24.

Article IV, section 1 of the U.S. Constitution provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." *See also* 28 U.S.C. § 1738 (effectuating the clause). The U.S. Supreme Court has drawn a sharp distinction, however, between the credit owed to sister-state *judgments* and that owed to sister-state *statutes* and other "public Acts." As explained in *Baker v. General Motors Corporation*, "[o]ur precedent differentiates the credit owned to laws (legislative measures and common law) and to judgments." 522 U.S. 222, 232 (1998). While a state's obligation to another state's judgment is "exacting," it is far less so with respect to another state's laws: "The Full Faith and

[14] This part is responsive to Assignments of Error 3 and 4-8.

Credit Clause does not compel 'a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.'" *Id.* at 232-33 (quoting *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 501 (1939)); *see also, e.g., Franchise Tax Bd. of California v. Hyatt*, 538 U.S. 488, 494 (2003) (obligation is "less demanding with respect to choice of laws"). This principle is not new. Five decades ago, the Supreme Court noted "the premise, repeated over and again in the cases, that the Full Faith and Credit Clause does not require a State to substitute for its own statute, applicable to persons and events with it, the statute of another State reflecting a conflicting and opposed policy." *Carroll v. Lanza*, 349 U.S. 408, 412 (1955).

That longstanding principle defeats plaintiffs' claim. Simply put, a marriage is not a "judgment" for full faith and credit purposes. No marriage requires an adversarial court proceeding, notice and opportunity-to-be-heard by affected parties, and a court's final decision. Those are the indicia of a judgment, and a marriage has none of them. *Cf.* Restatement (2d) Conflicts of Laws § 92 (listing requisites of a "judgment" for conflicts purposes). By contrast, a *divorce* results from a adversarial court proceeding and so is owed the exacting full faith and credit reserved for judgments. *See, e.g., Williams*, 317 U.S. at 297-302 (North Carolina owed full faith and credit to a Nevada judgment divorcing spouses previously married in North Carolina). But no federal court has ever held that a marriage contracted in one state is owed the exacting credit due a "judgment" in every other state. That would

invite interstate chaos, since marriage laws vary on important issues such as permissible age and consanguinity. *See, e.g., Windsor*, 133 S. Ct. at 2691-92 ("[m]arriage laws vary in some respects from State to State," such as "the required minimum age" and "the permissible degree of consanguininty") (citations omitted).

For full faith and credit, marriage is not a "judgment" but instead a relation regulated by a state's statute or "public Acts." *See, e.g., Carroll*, 349 U.S. at 411 ("[a] statute is a 'public act' within the meaning of the Full Faith and Credit Clause"). To validly apply its own laws under Full Faith and Credit, the state merely "'must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.'" *Hyatt*, 538 U.S. at 494-95 (quoting *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985)). Under that lenient standard, Louisiana has no obligation to recognize plaintiffs' California marriage. None of Louisiana's interests are more profound than the integrity of its family law. "Each state as a sovereign," the Supreme Court explained in *Williams v. North Carolina*, "has a rightful and legitimate concern in the marital status of persons domiciled within its borders"—a concern that embraces "[p]rotection of offspring, property interests, and the enforcement of marital responsibilities." 317 U.S. at 298.[15]

[15] Indeed, Congress has confirmed that the Full Faith and Credit Clause does not require Louisiana to recognize Appellees' California marriage. Pursuant to its constitutional authority, *see* U.S. CONST. art. IV, § 1, in 1996 Congress provided that "[n]o State … shall be required to give effect to any public act, record, or judicial proceeding of any other State … respecting a relationship between persons of the same sex that is treated as a marriage

E. The trial court incorrectly denied the Attorney General's peremptory exception of no cause of action.[16]

The trial court incorrectly found that plaintiffs stated a cause of action against the Attorney General. The laws plaintiffs challenge are not enforced or administered by the Attorney General. Plaintiffs' petitions therefore failed to state a cause of action against the Attorney General, who should have been dismissed. *See, e.g., Hoag v. State*, 2004-0857, p. 9 (La. 12/1/04); 889 So.2d 1019, 1025 ("The function of the peremptory exception of no cause of action is to question whether the law extends a remedy against the defendant under the factual allegations of the petition."); *Vallo v. Gayle Oil Company, Inc.*, 94-1238 (La. 11/30/94), 646 So.2d 859, 864 (explaining that, whereas the Attorney General must receive notice of constitutional challenges, such notice provisions "did not contemplate that the attorney general be required to be joined as an actual party").

F. The trial court wrongly equated Louisiana's marriage laws with racism.

The trial court spent eight paragraphs of its order comparing Louisiana's marriage laws to the odious racist laws at issue in *Plessy* and *Loving*. *See, e.g.,* App. A at 20 (comparing Louisiana's refusal to recognize same-sex marriage with "'the act of the general assembly of the state of Louisiana, … providing for separate railway carriages for the white and colored races'") (quoting *Plessy*, 163 U.S. at 542);

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under the laws of such other State … or a right or claim arising from such relationship." 28 U.S.C. § 1738C.

[16] This part is responsive to Assignment of Error 9.

App. A at 21 ("This court does not believe that the historical background of *Loving* is so different from the historical background underlying [the] state's bans on same-sex marriage."). A fitting response is simply to quote the eloquent rebuttal from the *Hernandez v. Robles*, which upheld New York's man-woman definition of marriage against similar rhetorical attacks in 2006:

> [T]he historical background of *Loving* is different from the history underlying this case. Racism has been recognized for centuries—at first by a few people, and later by many more—as a revolting moral evil. This country fought a civil war to eliminate racism's worst manifestation, slavery, and passed three constitutional amendments to eliminate that curse and its vestiges. *Loving* was part of the civil rights revolution of the 1950's and 1960's, the triumph of a cause for which many heroes and many ordinary people had struggled since our nation began. […]
>
> [T]he traditional definition of marriage is not merely a by-product of historical injustice. Its history is of a different kind. The idea that same-sex marriage is even possible is a relatively new one. Until a few decades ago, it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex. A court should not lightly conclude that everyone who held this belief was irrational, ignorant or bigoted. We do not so conclude.

Hernandez v. Robles, 855 N.E.2d 1, 8 (N.Y. 2006).

CONCLUSION

For the foregoing reasons, Appellants respectfully ask the Court to directly review the trial court's ruling declaring Louisiana's marriage laws unconstitutional, as well as all other issues decided by the trial court. LA. CONST. art. V, §§5(D), (F). Appellants also ask the Court to expedite briefing, argument, and disposition of this appeal under the Court's rules. LA. SUP. CT. R. XXXIV, pt. I, §§1-2; pt. II, §§1-6.

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CERTIFICATE OF SERVICE

I hereby certify that, on September 26, 2014, I electronically filed the foregoing application through the Court's Court Data / Document Exchange ("CDX") system. I also certify that, on September 26, 2014, I sent a copy by FedEx, as well as an electronic copy by email, to counsel of record for Appellees:

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