No. 14-50196

IN THE

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CLEOPATRA DE LEON, NICOLE DIMETMAN, VICTOR HOLMES, and MARK PHARISS,

Plaintiffs-Appellees,

v.

RICK PERRY, in his official capacity as Governor of the State of Texas; GREG ABBOTT, in his official capacity as Texas Attorney General; and DAVID LAKEY, in his official capacity as Commissioner of the Texas Department of State Health Services,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, SAN ANTONIO DIVISION, NO. 5:13-CV-00982

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No. 14-50196, *De Leon v. Perry et al.*

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

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STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs agree with the State that this case presents important issues warranting oral argument.

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

Do Texas laws denying same-sex couples the right to marry and denying recognition of lawful marriages between same-sex couples violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment?

STATEMENT OF THE CASE

On October 28, 2013, Cleopatra De Leon, Nicole Dimetman, Victor Holmes, and Mark Phariss ("Plaintiffs") brought an action against Governor Rick Perry and the other named defendants (collectively, the "State")[1] requesting (i) a declaration that Texas' law denying same-sex couples the right to marry, set forth in Article I, § 32 of the Texas Constitution and, *inter alia*, Texas Family Code §§ 2.001 and 6.204, violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment and 42 U.S.C. § 1983 and (ii) a permanent injunction barring enforcement of Texas' laws prohibiting same-sex couples from marrying. ROA 30.

On November 22, 2013, Plaintiffs moved for entry of a preliminary injunction enjoining the State from enforcing Texas' law prohibiting marriage of same-sex couples. ROA 1024-88. The State filed its response on December 23, ROA 1583-1621, and the District Court heard oral argument from the parties on February 12, 2014, ROA 2054-2123. On February 26, the District Court issued a

[1] The named defendants were Perry, Texas Attorney General Greg Abbott, Commissioner of the Texas Department of State Health Services David Lakey, and Bexar County Clerk Gerard Rickhoff. Rickhoff is not listed as an appellant in Appellants' Opening Brief ("AOB").

preliminary injunction enjoining the State from enforcing any laws or regulations prohibiting same-sex couples from marrying or prohibiting the recognition of marriages between same-sex couples lawfully solemnized elsewhere. ROA 2042.

Defendants filed this appeal on February 27, 2014. ROA 2043.

STATEMENT OF FACTS

A. The Parties

Plaintiffs-Appellees Holmes and Phariss have been in a relationship since 1997, when Holmes was in the Air Force. ROA 179; ROA 182. Holmes and Phariss want to marry. ROA 180; ROA 183. On October 3, 2013, the Bexar County Clerk rejected their application for a marriage license because they are both men. *Id.*

Plaintiffs-Appellees De Leon, also a United States Air Force veteran, and Dimetman have been in a committed relationship since 2001. ROA 173; ROA 176. In 2009, they married in Massachusetts. ROA 174; ROA 177. De Leon and Dimetman are parents. *Id*. De Leon is the child's biological mother. *Id.* Because Texas law does not recognize their marriage, Dimetman was not the child's parent by law, so she went through formal adoption proceedings, at considerable expense, to obtain parental rights. *Id.*

B. Texas' Statutory Ban on Marriages Between Same-Sex Couples

Three laws at issue in this case prohibit same-sex couples from marrying and declare void lawful out-of-state marriages between same-sex couples: (1) Family

Code § 2.001, originally enacted in 1973 as Family Code § 1.01; (2) Family Code § 6.204, enacted in 2003; and (3) Article I, § 32 of the Texas Constitution, passed as H.J.R. 6 by the Legislature and approved by voters in November 2005. Plaintiffs refer to these laws collectively as "Section 32."

1. Following A Few Efforts By Same-Sex Couples To Marry, Texas Bans Marriages Between Same-Sex Couples in 1973.

Texas' 1973 statute was enacted following a small number of efforts by gays and lesbians to obtain marriage licenses. In one Texas case in late-1972, an unsuccessful legal challenge was brought by a gay couple that obtained a marriage license because the clerk did not realize both applicants were male. James W. Harper and George M. Clifton, *Heterosexuality: A Prerequisite to Marriage in Texas?*, 14 South Texas L.J. 220 (1973). After a lesbian couple sought a marriage license, the county clerk requested a legal opinion from the Texas Attorney General, who concluded their marriage would be illegal and county clerks were "not authorized to issue a marriage license to two persons of the same sex." Tex. Att'y Gen. Op. No. M-1216 (Sept. 14, 1972) (acknowledging this conclusion was "subject to a contrary ruling" by a court). During the same time period, a handful of cases in other states were brought by same-sex couples seeking to marry. *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. Ct. App. 1973); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *aff'd*, 409 U.S. 810 (1972); *Anonymous v. Anonymous*, 325

N.Y.S.2d 499 (N.Y. Sup. Ct. 1971); *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974).

Legislation amending the Family Code was introduced in January 1973. H.B. 103, 63rd Leg., Reg. Sess. (Tex. 1973). The law passed the Senate committee with virtually no debate and only brief discussion centering on the status of the pending lawsuits. *See* Audio Recording of Hearing of Sen. Human Resources Committee, March 19, 1973, File 676, at 32:00, available at https://www.tsl.texas.gov/ref/ senatetapes/63/index.html#human; *id*., File 678, at 36:50-38:10.[2] The passed law changed the wording of the statute to say "a man and woman" (instead of "persons") were entitled to obtain a marriage license and added, "A license may not be issued for the marriage of persons of the same sex." Tex. Fam. Code § 1.01 (1973).

2. Following *Lawrence* And Massachusetts' Affirmation of Same-Sex Couples' Right To Marry, Texas Enacts Law Declaring Void All Marriages And Civil Unions Between Same-Sex Couples.

In the late-1990s, after a Hawaii court declared same-sex couples had the right to marry under state law, Congress enacted the Defense of Marriage Act ("DOMA"), and numerous states followed with "mini-DOMAs" prohibiting the

[2] Regarding the case where the clerk failed to recognize both applicants were male and noting one of the men was an ex-football player, one Senator joked: "I don't think that clerk ever suspected that that football player wanted to marry one of his teammates." File 678, at 36:50-38:10.

state from recognizing marriages between same-sex couples. *See* Jane S. Schacter, *Courts and the Politics of Backlash*, 82 S. Cal. L. Rev. 1153, 1188-89 (Sept. 2009). These mini-DOMAs prevented states from giving full faith and credit to marriages lawfully entered in other jurisdictions.

Initial Texas efforts to pass a mini-DOMA failed. *See, e.g.*, H.B. 11, 75th Leg., Reg. Session (Tex. 1997). However, in 2002 and early 2003, three significant events occurred. First, the Supreme Court granted certiorari in *Lawrence v. Texas*, 539 U.S. 558 (2003), to decide the constitutionality of Texas' sodomy law. Second, the Massachusetts Supreme Court heard argument in *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003). Third, a Beaumont court issued a divorce dissolving an out-of-state civil union. *See* ROA 517 (discussing divorce issued by Beaumont judge to a same-sex couple which was later vacated at the request of the Attorney General).

Shortly after the Beaumont decision, the Legislature passed a mini-DOMA. During hearings before the State Affairs Committees, the Beaumont case, *Lawrence*, and *Goodridge* were discussed. *See* Video Recording of House State Affairs Committee Hearing at 3:45:00-3:57:30 (Mar. 17, 2003), available at http://www.house.state.tx.us/video-audio/committee-broadcasts/78/; Video Recording of Senate State Affairs Committee Hearing, Part I, at 18:50-20:45 and

1:01:30-1:02-03 (Apr. 3, 2003), available at http://www.senate.state.tx.us/avarchive/?yr=2003.

In one official House report, supporters of the mini-DOMA claimed:

> The procreative marriage relationship between a man and a woman is a fundamental institution whose purpose is the propagation of the species in humanity's collective interest. The state has an interest in protecting this relationship, because it gives women and children the surest protection against poverty and abuse, provides for the healthy psychological development of children, and avoids health risks of same-sex relations and promiscuity. The state's recognition of same-sex marriages would undermine the institution of marriage and society's ability to transmit its values to younger generations.

ROA 509. Another report mentioned the Beaumont decision and asserted the new law: (1) was required to "eliminate any legal ambiguity"; (2) would avoid "a new class of children without mothers or fathers"; and (3) would prevent a "breakdown of the family [that] would increase costs to corporations and governmental entities" to "meet needs no longer met by the family unit." ROA 517-18. Supporters said recognizing same-sex unions "could lead to the recognition of bigamy, voluntary incest, pedophilia, and group marriage." ROA 518. Despite identifying the supposed deleterious effects of marriages and civil unions between same-sex couples, supporters of the law acknowledged "same-sex marriages do not affect individual heterosexual marriages." *Id.*

The resulting law, Texas Family Code § 6.204, declares void all marriages and all civil unions between same-sex couples and prohibits the recognition of any such relationships. Tex. Fam. Code § 6.204(b). It further prohibits the state from giving effect to any "legal protection, benefit, or responsibility" allegedly resulting from such marriages or civil unions. Tex. Fam. Code § 6.204(c).

3. Texas Amends Its Constitution In 2005 To Ban Marriage And Civil Unions Between Same-Sex Couples And Prohibit Their Recognition.

Texas subsequently amended its constitution to deny same-sex couples the right to marry and to prohibit the recognition of their lawfully solemnized marriages. Article I, section 32 of the Texas Constitution began as H.J.R. 6, which proposed to define marriage to "consist only of the union of one man and one woman." ROA 526. On April 25, 2005, subdivision (b) was added to H.J.R. 6, expressly barring the state and any political subdivision thereof from creating or recognizing any legal status identical or similar to marriage. ROA 944.

The legislative history of H.J.R. 6 shows the amendment was supported by the same proffered purposes as Family Code § 6.204.[3] The primary support for H.J.R. 6 was the suggestion that "traditional marriage" created "a healthy, successful, stable environment for children" and "the surest way for a family to

[3] H.J.R. 6 was introduced with more than half the House claiming authorship: it lists Representative Chisum as the author, four others as joint authors, and 74 others as co-authors. ROA 952.

enjoy good health, avoid poverty, and contribute to their community." ROA 530-31.

Supporters claimed amending the Constitution was necessary to keep the existing law protected from the types of court challenges filed in other states. *See, e.g.*, ROA 529-30 (discussing *Goodridge* and stating, inter alia, the amendment gave "the citizens of Texas, rather than the courts . . . a chance to decide the definition of marriage"); Senate Research Organization, Bill Analysis, H.J.R. 6. (Aug. 16, 2005) (stating in "Author's/Sponsor Statement of Intent" that "[l]awsuits challenging state DOMA laws are pending in at least 13 states and in the federal courts").

H.J.R. 6 passed the House by a vote of 102-29 and the Senate with a vote of 21-8. ROA 899-902. After these votes, though his approval was unnecessary to put the proposed amendment on the ballot (Tex. Const., art. 17, § 1(a)), Governor Perry held a ceremonial signing of the legislation. ROA 562-63. He was later asked by a reporter what he would say to gay and lesbian military veterans who wanted to live in Texas. He responded: "[I]f there's a state with more lenient views than Texas, then maybe that's where they should live." ROA 495.

The constitutional amendment passed with approximately 76% of the vote. ROA 904. Consequently, the Texas Constitution contains this provision:

> (a) Marriage in this state shall consist only of the union of one man and one woman.

> (b) This state or a political subdivision of this state may not create or recognize any legal status identical or similar to marriage.

Tex. Const., Art. 1, § 32.

C. Section 32 Denies Plaintiffs And Their Children Of State and Federal Protections, Benefits, and Obligations.

Section 32 deprives Plaintiffs of numerous federal protections, benefits, and obligations. *United States v. Windsor*, 133 S.Ct. 2675, 2683 (2013) (noting over 1,000 federal laws address marital or spousal status). These federal rights include, among others, having rights in one another's Social Security benefits, 42 U.S.C. § 416, seeking protections under the Family and Medical Leave Act, 29 U.S.C. § 2612, and federal Medicaid benefits. Texas veterans like Holmes and De Leon cannot share their VA benefits with a same-sex spouse. Department of Veterans Affairs, Memorandum (June 17, 2014), available at http://www.va.gov/OGC/docs/2014/VAOPGCPREC4-2014.pdf.

Section 32 also denies Plaintiffs many state-law benefits. Among other things, Plaintiffs cannot:

- Claim statutory protections afforded married couples upon the death of a spouse, such as intestacy rights, homestead protection, and the ability to bring an action for wrongful death. Tex. Probate Code §§ 38, 45; Tex. Const., art. 16, § 52; Tex. Civ. Prac. & Rem. Code § 71.004.

- Receive the community property presumption afforded to married couples, including the right to share in pension or retirement plans. Tex. Fam. Code §§ 3.003, 7.001, 7.003.
- Seek spousal maintenance. Tex. Fam. Code § 8.051.
- Have the automatic right to make health care decisions and burial decisions for one another.
- Exercise the spousal privilege. Tex. R. Evid. 504.

Section 32 also deprives children of same-sex couples many of these rights and benefits. *Baskin v. Bogan*, Nos. 14-2386-14-2388, 14-2526, 2014 WL 4359059, at *5 (7th Cir. Sept. 3, 2014) ("The harm to homosexuals (and, as we'll emphasize, to their adopted children) of being denied the right to marry is considerable."). For instance, without marriage or formal adoption, the children are not entitled to child support in the event the marriage fails. And, regardless of formal adoption, Section 32 humiliates and stigmatizes children of same-sex couples. *Windsor*, 133 S. Ct. at 2694-95 (finding DOMA "humiliates tens of thousands of children now being raised by same-sex couples" and causes "financial harm").

SUMMARY OF THE ARGUMENT

"Civil marriage is one of the cornerstones of our way of life. It allows individuals to celebrate and publicly declare their intentions to form lifelong

partnerships, which provide unparalleled intimacy, companionship, emotional support, and security." *Bostic v. Schaefer*, No. 14-1167, 2014 WL 3702493, at *17 (4th Cir. July 28, 2014). Denying same-sex couples the right to marry "prohibits them from participating fully in our society, which is precisely the type of segregation that the Fourteenth Amendment cannot countenance." *Id*. As the District Court held, denying same-sex couples their right to marry "demean[s] their dignity for no legitimate reason." ROA 1996.

Since the Supreme Court's decision in *Windsor*, more than a dozen federal courts have found laws banning marriage between same-sex couples are unconstitutional.[4] *Windsor* instructed that laws that "impose a disadvantage, a

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[4] *Baskin*, 2014 WL 4359059, *affirming Baskin v. Bogan*, No. 1:14-cv-00355, 2014 WL 2884868 (S.D. Ind. June 25, 2014), and *Wolf v. Walker*, 986 F.Supp.2d 982 (W.D. Wis. 2014); *Bostic*, 2014 WL 3702493, *affirming Bostic v. Rainey*, 970 F.Supp.2d 456 (E.D. Va. 2014); *Bishop v. Smith*, Nos. 14-5003, 14-5006, 2014 WL 3537847 (10th Cir. July 18, 2014), *affirming Bishop v. U.S. ex rel. Holder*, 962 F.Supp.2d 1252 (N.D. Okla. 2014); *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014), *affirming Kitchen v. Herbert*, 961 F.Supp.2d 1181 (D. Utah 2013); *Brenner v. Scott*, No. 4:14-cv-107, 2014 WL 4113100 (N.D. Fla. Aug. 21, 2013); *Burns v. Hickenlooper*, No. 14-cv-01817, 2014 WL 3634834 (D. Colo. July 23, 2014); *Love v. Beshear*, 989 F.Supp.2d 536 (W.D. Ky. 2014); *Whitewood v. Wolf*, No. 1:13-cv-1861, 2014 WL 2058105 (M.D. Pa. May 20, 2014); *Geiger v. Kitzhaber*, Nos. 6:13-cv-01834, 6:13-cv-02256, 2014 WL 2054264 (D. Or. May 19, 2014); *Evans v. Utah*, No. 2:14-cv-00055, 2014 WL 2048343 (D. Utah, May 19, 2014); *Latta v. Otter*, No. 1:13-cv-00482, 2014 WL 1909999 (D. Idaho May 13, 2014); *Henry v. Himes*, No. 1:14-cv-129, 2014 WL 1418395 (S.D. Ohio Apr. 14, 2014); *DeBoer v. Snyder*, 973 F.Supp.2d 757 (E.D. Mich. 2014); *Tanco v. Haslam*, No. 3:13-cv-01159, 2014 WL997525 (M.D. Tenn. Mar. 14, 2014); *Lee v. Orr*, 13-cv-8719, 2014 WL 683680 (N.D. Ill. Feb. 21, 2014); *Bourke v. Beshear*, 3:13-cv-750-H, 2014 WL

separate status, and so a stigma upon all who enter into same-sex marriages" require "careful" review to test if they pass constitutional scrutiny. 133 S.Ct. at 2693. Since *Windsor*, federal courts have overwhelmingly concluded that state laws banning or refusing to recognize marriages between same-sex couples violate the Fourteenth Amendment's guarantees of due process and equal protection.

This Court should do the same and affirm the District Court's decision striking down Section 32 as unconstitutional. Like DOMA, Section 32 impermissibly infringes the fundamental right to marry, a right federal courts have long recognized, including in *Loving v. Virginia*, 388 U.S. 1 (1967), the landmark case that struck down bans on interracial marriages. Section 32 also deprives gays and lesbians of equal protection by denying them rights granted to other married couples, stigmatizing same-sex couples and their families, and precluding them from receiving state and federal benefits.

Section 32 cannot survive any level of constitutional scrutiny. Though strict scrutiny is warranted, Section 32 fails the most deferential of tests – rational basis. As numerous courts already concluded, no conceivable basis exists to deny same-sex couples their right to marry or to refuse to recognize their lawful out-of-state marriages. The State's claimed interest in encouraging responsible procreation by

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556729 (W.D. Ky. Feb 12, 2014); *Obergefell v. Wymyslo*, 962 F.Supp.2d 968 (S.D. Ohio 2013).

opposite-sex couples who might otherwise procreate outside of marriage provides no justification for Section 32. Even accepting procreation as a legitimate state interest, it defies logic and the undisputed evidence to claim that *preventing* lesbians and gay men from marrying will encourage heterosexual marriage or, conversely, that *allowing* lesbians and gay men to marry will discourage heterosexual marriage.

Nor do principles of federalism support the State's appeal. It is axiomatic that courts will not sit idle when the actions of a majority jeopardize the constitutional rights of minorities, particularly groups subject to historical disfavor, such as gays and lesbians.

Ultimately, this case presents a simple question of equality and fairness, and there can be no justification for Section 32 capable of withstanding constitutional scrutiny. Accordingly, the Constitution mandates that Texas allow same-sex couples to marry and that Texas recognize their out-of-state marriages.

STANDARD OF REVIEW

On appeal of a preliminary injunction, "this court asks 'whether the issuance of the injunction, in the light of the applicable standard, constitutes an abuse of discretion.'" *Daniels Health Sci., L.L.C. v. Vascular Health Sci., L.L.C.*, 710 F.3d 579, 582 (5th Cir. 2013) (quoting *Concerned Women for Am., Inc. v. Lafayette Cnty.*, 883 F.2d 32, 34 (5th Cir. 1989)). Each of the four elements of a preliminary

injunction presents a mixed question of fact and law to the district court. *Hoover v. Morales*, 164 F.3d 221, 224 (5th Cir. 1998). "[F]indings of fact that support the district court's decision are examined for clear error, whereas conclusions of law are reviewed de novo." *Daniels Health Sci.*, 710 F.3d at 582 (quoting *Affiliated Prof'l Home Health Care Agency v. Shalala*, 164 F.3d 282, 284-85 (5th Cir. 1999)).

ARGUMENT

I. *Baker v. Nelson* Does Not Control.

Consistent with every federal court that has considered the issue after *Windsor*, the District Court held doctrinal developments have eliminated any precedential value of the summary disposition in *Baker v. Nelson*, 409 U.S. 810 (1972). ROA 2008-12; *Kitchen*, 755 F.3d at 1208 ("[I]t is clear that doctrinal developments foreclose the conclusion that the issue is, as *Baker* determined, wholly insubstantial."); *Bishop*, 2014 WL 3537847, at *7 (finding *Baker* does not control); *Bostic*, 2014 WL 3702493, at *6-8 (same).

In *Baker*, the Court dismissed "for want of a substantial federal question" an appeal from a Minnesota Supreme Court decision rejecting due process and equal protection challenges to Minnesota's refusal to issue a marriage license to a same-sex couple. *See Baker v. Nelson*, 191 N.W.2d 185. But Supreme Court summary dismissals are binding only to the extent they have not been undermined by subsequent doctrinal developments. *Hicks v. Miranda*, 422 U.S. 332, 344 (1975) ("[U]nless and until the Supreme Court should instruct otherwise, inferior federal

courts had best adhere to the view that if the Court has branded a question as unsubstantial, it remains so *except when doctrinal developments indicate otherwise*.") (quoting *Port Auth. Bondholders Protective Comm. v. Port of N.Y. Auth.*, 387 F.2d 259, 263 n.3 (2d Cir. 1967) (emphasis added)).[5]

Subsequent doctrinal developments eliminate any precedential authority *Baker* once had. *Baker* was decided before the Court recognized the Constitution protects gays and lesbians. *Windsor*, 133 S.Ct. at 2694; *Lawrence*, 539 U.S. at 574; *Romer v. Evans*, 517 U.S. 620, 635-36 (1996). When the Court decided *Baker*, anti-sodomy laws were still legal. Subsequently, the Court ruled such laws violate fundamental rights protected by due process because the Constitution protects "personal decisions relating to marriage, procreation, contraception, family relationships, [and] child rearing" and gays and lesbians "may seek autonomy for these purposes." *Lawrence*, 539 U.S. at 574. Both *Windsor* and *Romer* held, after *Baker*, that the Equal Protection Clause applies to laws that discriminate against gays and lesbians based on their sexual orientation, a claim *Baker* never asserted. *Baker*, 291 Minn. at 315 (describing claim to allege sex discrimination only); Appellants' Jurisdictional Statement at 16, *Baker v. Nelson*,

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[5] The State contends *Hicks* was overruled in two cases, *Agostini v. Felton*, 521 U.S. 203 (1997), and *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989). AOB 29. Neither of those cases dealt with summary dismissals. *See Kitchen*, 755 F.3d at 1205 n.2 (rejecting argument *Rodriguez* overrules *Hicks*).

No. 71-1027, U.S. Supreme Court (filed Feb. 11, 1971) ("The discrimination in this case is one of gender."). Thus, subsequent doctrinal developments destroy *Baker's* precedential value.

II. Strict Scrutiny Governs This Court's Analysis.

A. This Court Must Apply Strict Scrutiny Because Marriage Is A Fundamental Right Protected By The Due Process Clause.

The Due Process clause of the United States Constitution protects the fundamental right to marry. "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." *Loving*, 388 U.S. at 12 (holding interracial couples have a fundamental right to marry); *see also Turner v. Safley*, 482 U.S. 78, 94-96 (1987) (holding prisoners were entitled to fundamental right to marry); *Zablocki v. Redhail*, 434 U.S. 374 (1978) (holding debtors owing child support have fundamental right to marry); *Kitchen*, 755 F.3d at 1209 ("There can be little doubt that the right to marry is a fundamental liberty."). Because the right to marry is a fundamental right, it is protected by the Due Process Clause. *Windsor*, 133 S.Ct. at 2691 ("State laws defining and regulating marriage, of course, must respect the constitutional rights of persons."); U.S. Const., Amend. XIV, § 1. Laws that burden the exercise of a fundamental right protected by the Due Process Clause must survive strict scrutiny, which requires the government to show the intrusion is narrowly tailored to serve a compelling government interest. *Zablocki*, 434 U.S. at 388; *see also Troxel v.*

Granville, 530 U.S. 57, 65 (2000) (plurality opinion) (Due Process Clause "has a substantive component that provides heightened protection against government interference with certain fundamental rights and liberty interests.") (internal quotations omitted).

The State does not dispute the right to marry is fundamental. Instead, the State argues there is no fundamental "right to marry the partner of [one's] choosing" because such a right is not "deeply rooted" in this nation's "history and tradition." AOB 22-23 (citing *Washington v. Glucksberg*, 521 U.S. 702, 703 (1997)). Because states traditionally impose certain limits on marriage, such as preventing polygamy or underage marriages, the State claims there can be no general right to marry freely and, thus, the fundamental right to marriage cannot encompass the right to marry a partner of the same sex. AOB 23.

Numerous courts reject this argument, including the Tenth and Fourth Circuits. The fundamental right to marry is not defined by the identity of the individual or group claiming that right. *Kitchen*, 755 F.3d at 1215 ("[I]n describing the liberty interest at stake, it is impermissible to focus on the identity or class-membership of the individual exercising the right."). As the Fourth Circuit recognized, Supreme Court opinions emphasizing the fundamental right to marry do not "define the rights in question as 'the right to interracial marriage,' 'the right of people owing child support to marry,' and 'the right of prison inmates to

marry.'" *Bostic*, 2014 WL 3702493, at *9 (discussing *Loving*, *Zablocki*, and *Turner*); *see also Kitchen*, 755 F.3d at 1210 (stating that when the Supreme Court decided *Loving* and *Zablocki* it did not ask "whether there is a deeply rooted tradition of interracial marriage" or analyze the history of child-support debtors capacity to marry). Instead, the Supreme Court has described "a broad right to marry that is not circumscribed based on the characteristics of the individuals seeking to exercise that right." *Bostic*, 2014 WL 3702493, at *9 (holding Supreme Court precedent reflects the right to marry is a matter of "freedom of choice," that "resides with the individual").

In fact, the State's argument that marriage between same-sex couples is not rooted in tradition parrots Virginia's failed arguments in *Loving*. In defense of its anti-miscegenation laws, Virginia identified 17 cases upholding such statutes, Br. on Behalf of Appellee, *Loving v. Virginia* (No. 395), 1967 WL 93641, at *33-36, and the *Loving* opinion identified 16 states with existing anti-miscegenation laws and another 14 that recently repealed such laws, *Loving*, 388 U.S. at 13. But the Court refused to narrow its inquiry to whether there was a specific fundamental right to *interracial* marriage, as Virginia urged it to do.

The State's argument also mirrors the Supreme Court's flawed analysis in *Bowers v. Hardwick*, 478 U.S. 186 (1986), which asked "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy."

Id. at 190. In *Lawrence*, however, the Court held that *Bowers*' question "discloses the Court's own failure to appreciate the extent of the liberty at stake." *Lawrence*, 539 U.S. at 567. The fundamental right at stake in *Bowers* and *Lawrence* was the right to make private choices "central to personal dignity and autonomy" – a right "[p]ersons in a homosexual relationship" possess "just as heterosexual persons do." *Id*. at 567-574.

Drawing on *Lawrence* and the subsequent decision in *Windsor*, the Fourth Circuit held, "[T]he choices that individuals make in the context of same-sex relationships enjoy the same constitutional protection as the choices accompanying opposite-sex relationships." *Bostic*, 2014 WL 3702493, at *10. There is "no reason to suspect that the Supreme Court would accord the choice to marry someone of the same sex any less respect than the choice to marry an opposite-sex individual who is of a different race, owes child support, or is imprisoned." *Id.*

This Court should likewise reject the "invitation to characterize the right at issue in this case as the right to same-sex marriage rather than simply the right to marry." *Bostic*, 2014 WL 3702493, at *10. It should instead recognize Plaintiffs are claiming the same fundamental right to marry recognized in *Loving*, *Zablocki*, *Turner*, *Kitchen*, and *Bostic*, and hold Section 32 must survive strict scrutiny.[6]

[6] A recent decision, *Robicheaux v. Caldwell*, No. 13-5090 C/W, No. 1497 & No. 14-327, 2014 WL 4347099 (E.D. La. Sept. 3, 2014), suggests wrongly that

B. This Court Should Apply Strict Or Heightened Scrutiny To Its Equal Protection Analysis.

"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Ctr*., 473 U.S. 432, 439 (1985) (quoting *Plyler v. Doe*, 457 U.S. 202, 216 (1982)). Section 32 identifies a "subset" of relationships (same-sex relationships) for which Texas denies the same rights, responsibilities, and benefits granted to opposite-sex couples. Thus, Section 32 is subject to equal protection scrutiny.

This Court should apply either strict or heightened scrutiny because gays and lesbians are suspect or quasi-suspect classes. Alternatively, this Court should apply the heightened review employed in *Cleburne*, *Plyler,* and *U.S. Dept. of Agriculture v. Moreno,* 413 U.S. 528 (1973).

1. Section 32 should be subject to strict or heightened scrutiny.

Not every equal protection challenge is subject to the same test. The "promise that no person shall be denied the equal protection of the laws must

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other courts have also concluded that same-sex couples do not have a fundamental right to marry. *Id*. at *8 n.15. It bases this suggestion upon a dissent in *Bostic,* the dissenting portion of a concurrence in part and dissent in part in *Bishop*, and a district court order that expressly declined to decide if a marriage ban infringed a fundamental right because it struck down the law for other reasons, *Love,* 989 F.Supp.2d at 544.

coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons." *Romer*, 517 U.S. at 631 (citing *Pers. Admin. of Mass. v. Feeney*, 442 U.S. 256, 271-72 (1979)).[7] Strict or heightened scrutiny applies to laws that discriminate against suspect or quasi-suspect groups, *i.e.*, those that have experienced a "history of purposeful unequal treatment or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities." *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976) (per curiam) (internal quotation marks omitted); *see also Pedersen v. Office of Pers. Mgmt.*, 881 F.Supp.2d 294 (D. Conn. 2012) (finding statutory classifications based on sexual orientation are entitled to heightened scrutiny); *Golinski v. Office of Pers. Mgmt.*, 824 F.Supp.2d 968, 314-33 (N.D. Cal. 2012) (same).

To determine whether a group is a suspect or quasi-suspect class, courts assess four factors. As discussed above, courts look to the history of discrimination. Courts also consider whether the class' distinguishing characteristics indicate a class member's ability to contribute to society, *Cleburne*, 473 U.S. at 440-41; whether the distinguishing characteristic is "immutable" or

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[7] The State may argue in reply that the Supreme Court rejected treating gays and lesbians as suspect classes in *Romer* and *Lawrence*. However, in both cases, the Supreme Court held the laws in question failed a lower standard of review, so there was no need to reach the question of whether strict scrutiny applied.

beyond the group member's control, *Lyng v. Castillo*, 477 U.S. 635, 638 (1986); and whether the group is "a minority or politically powerless," *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987). No single factor is dispositive. *Murgia*, 427 U.S. at 321. And the presence of any of the factors is a signal the classification is "more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective," thus triggering strict scrutiny. *Plyler*, 457 U.S. at 216 n.14.

Each of the factors indicates strict or heightened scrutiny should apply. Plaintiffs offered evidence supporting each factor below, and the State offered none in rebuttal. *See* ROA 185-244, 497-500, 597-905, 951-54. Indeed, in its Opening Brief, the State does not address three of the factors, instead focusing solely on the allegedly growing political influence of gays and lesbians.

(a) Gays and lesbians suffered a long history of discrimination.

The State does not challenge the evidence demonstrating the history of discrimination of gays and lesbians. This lengthy history is well-documented by scholars, ROA 605-06; ROA 608-16; ROA 618-23, reflected in hate-crime statistics, ROA 625-26, and acknowledged by the courts, *Lawrence*, 539 U.S. at 571; *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990); *Ben-Shalom v. Marsh*, 881 F.2d 454, 465-66 (7th Cir. 1989). Discrimination against gays and lesbians also is deeply entrenched in Texas law.

Although *Lawrence* ruled Texas' sodomy law was unconstitutional, it remains in the criminal code. ROA 730-37; *see also* Tex. Health & Safety Code § 85.007 (requiring education programs "state that homosexual conduct is not an acceptable lifestyle and is a criminal offense"). In short, for centuries, the prevailing attitude toward gays and lesbians has been "one of strong disapproval, frequent ostracism, social and legal discrimination, and at times ferocious punishment." ROA 605.

(b) Sexual orientation does not relate to the ability to contribute to society.

Like other suspect classifications such as race, national origin, and religion, sexual orientation has no "relation to [the] ability" of a person "to perform or contribute to society." *Cleburne*, 473 U.S. at 440-41 (citation omitted). "[B]y every available metric, opposite-sex couples are not better than their same-sex counterparts, instead, as partners, parents and citizens, opposite-sex couples and same-sex couples are equal." *Perry v. Schwarzenegger*, 704 F.Supp.2d 921, 1002 (N.D. Cal. 2010).

(c) Sexual orientation is immutable.

The Supreme Court acknowledges sexual orientation is so fundamental to a person's identity that citizens should not have to choose between their sexual orientation and their constitutional rights. *Lawrence*, 539 U.S. at 576-77. The State does not argue sexual orientation is a choice, an argument numerous courts have rejected. *See, e.g.*, *Baskin*, 2014 WL 4359059, at *4; *Hernandez-Montiel v.*

INS, 225 F.3d 1084, 1093 (9th Cir. 2000); *Pedersen*, 881 F.Supp.2d at 320-21. Nor does it dispute the overwhelming evidence offered below. *E.g.*, ROA 847-71.

(d) Gay men and lesbians lack political power to eliminate significant disadvantages.

Gay and lesbian citizens constitute a minority group lacking sufficient political power to protect itself against discriminatory laws. The State's protests to the contrary ring hollow. Gay and lesbian citizens could not protect themselves against the very law at issue. Section 32 passed with overwhelming support in the democratically-elected Legislature and in a popular vote. Only a decade ago, more than half the 150-member House claimed authorship of the 2005 bill. ROA 952. H.J.R. 6 passed the House with a vote of 102-29 and the Senate with a vote of 21-8, ROA 899-902, and was then approved by more than 76% of Texas voters, ROA 904. Thus, gays and lesbians do not wield political power sufficient to protect themselves against state laws that deny equal protection.

Legislative representation also reflects gays and lesbians' lack of power. Only seven of the 535 members of the U.S. Congress are openly gay or lesbian. ROA 887-89. In Texas, the disparity is even greater; in January 2013, Texas elected the first lesbian legislator in its history. ROA 892. That lack of political power is further reflected in legislation, such as the inability to repeal laws stating homosexual conduct is criminal after *Lawrence*. ROA 730-37; Tex. Health & Safety Code § 85.007.

The State's purported "examples" of the allegedly growing political power of gays and lesbians do not show gays and lesbians have political power, particularly in Texas. Yes, Congress repealed "Don't Ask, Don't Tell," AOB 19, but the Texas Governor had no problem telling gay and lesbian veterans they should live in another state if they want to marry, ROA 495. And, while the President signed an executive order prohibiting federal contractors from discriminating based on sexual orientation, AOB 19, Texas Military Forces denied same-sex couples enrollment access to federal healthcare and retirement benefits at Texas-based National Guard facilities, ROA 595-96. Finally, decisions by other states to cease defending other laws denying same-sex couples' marriage rights, AOB 19, reflect a reasonable calculus in light of the post-*Windsor* judicial victories. Those post-*Windsor* victories do not reflect growing "political power," but instead recognition that gays and lesbians have rights that must be protected by the judiciary – a recognition the State denies in this lawsuit. *See also Baskin*, 2014 WL 4359059, at *19 (rejecting argument that same-sex couples have political power).

Even if the modest strides gays and lesbians have made constitute political "power," courts give less weight to this factor than the others. *Pedersen*, 881 F.Supp.2d at 326-27. Indeed, the Supreme Court recognizes women as a quasi-suspect class despite the fact that women are neither a minority nor politically

powerless. *Frontiero v. Richardson*, 411 U.S. 677, 686 n.17 (1973) (plurality opinion).

(e) Neither this Court nor the Supreme Court has rejected strict or heightened scrutiny review of laws that discriminate against gays and lesbians.

The State cannot point to any decision in the post-*Lawrence* era of this Court rejecting the argument that gays and lesbians are suspect or quasi-suspect classifications, and the Supreme Court has not made a definitive statement on the issue. In *Romer*, Colorado's law failed rational-basis review; *Lawrence* was decided on due process grounds; and *Windsor* does not explicitly identify the specific standard employed by the Court.

In one pre-*Lawrence* decision, this Court "refuse[d] to hold, that homosexuals constitute a suspect or quasi-suspect classification." *Baker v. Wade*, 769 F.2d 289, 292 (5th Cir. 1985), *overruling rec'd in Saldano v. Roach*, 363 F.3d 545 (5th Cir. 2004). But that holding was based upon the fact that, at that time, "engaging in homosexual conduct [was] not a constitutionally protected liberty interest." *Wade*, 769 F.2d at 292. That statement, of course, reflected the pre-*Lawrence* law, when states could criminalize homosexual conduct. Thus, *Baker v. Wade* is not good law.

The same is true of cases from other circuits which rationalized that if homosexual conduct could be criminal, then gays and lesbians could not be a suspect class. *E.g.*, *High Tech Gays*, 895 F.2d at 571 (finding "homosexuals cannot

constitute a suspect or quasi-suspect class" because states could criminalize homosexual conduct); *Ben-Shalom*, 881 F.2d at 464 (same). Because the Supreme Court reversed *Bowers* and criminal sodomy laws are unconstitutional, the premise for finding gays and lesbians are not entitled to strict or heightened scrutiny is no longer applicable. *Golinski*, 824 F.Supp.2d at 984; *Pedersen*, 881 F.Supp.2d at 312-13.[8]

2. At the very least, because Section 32 targets gays and lesbians, it requires heightened review.

Even if this Court holds gays and lesbians are not suspect or quasi-suspect classes, Section 32 is still subject to a higher standard of constitutional review than traditional rational basis. The Supreme Court recognizes "[d]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision." *Romer*, 517 U.S. at 633 (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37-38 (1928)); *accord Windsor*, 133 S.Ct. at 2692 (quoting *Romer*). "The Constitution's guarantee of equality 'must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot' justify disparate treatment of that

[8] Post-*Lawrence* decisions finding gays and lesbians are not suspect or quasi-suspect classes either followed pre-*Lawrence* cases or refused to revisit the issue without further Supreme Court authority. *E.g.*, *Cook v. Gates*, 528 F.3d 42, 61 (1st Cir. 2008) (refusing to revisit the issue without additional Supreme Court guidance); *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 818 & n.16 (11th Cir. 2004) (relying on pre-*Lawrence* cases).

group." *Windsor*, 133 S.Ct. at 2693 (quoting *Moreno*, 413 U.S. at 534-35). If the record demonstrates the "principal purpose" and "necessary effect" of a challenged law is to "impose inequality" against such a group, courts must strike down the law.[9] *Id.* at 2694-95. In such cases, courts "undertake[] a more careful assessment of the justifications than the light scrutiny offered by conventional rational-basis review." *Mass. v. Dep't of Health & Human Servs*, 682 F.3d 1, 11 (1st Cir. 2012); *see also Baskin*, 2014 WL 4359059, at *12 ("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.").[10]

Importantly, this standard applies to laws that target a group subject to disfavor or prejudice even if the group is not a suspect or quasi-suspect class. For instance, in *Windsor*, the Supreme Court applied this "careful" review because it concluded DOMA was designed "to impose a disadvantage, a separate status, and

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[9] This standard is not inconsistent with the rational-basis review cases the State cites. For instance, the State relies extensively on *F.C.C. v. Beach Communications*, 508 U.S. 307 (1993), which expressly states traditional rational basis review applies to "a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights." *Id*. at 313.

[10] This test has been given several different labels, sometimes called "heightened rational-basis review," "rational basis plus," or the "animus doctrine." *Bishop*, 2014 WL 3537847, at *23 (Holmes, J., concurring). Plaintiffs refer to it as "heightened review," following this Court's use of "heightened" rational-basis review to describe the standard. *LeClerc v. Webb*, 419 F.3d 405, 417 (5th Cir. 2005); *accord Van Staden v. St. Martin*, 664 F.3d 56, 60 n.8 (5th Cir. 2011).

so a stigma upon all who enter into same-sex marriages." *Windsor*, 133 S.Ct. at 2693. Previous decisions of the Court applied heightened review to laws that targeted non-suspect groups, such as "hippies," the mentally disabled, and undocumented children. *Moreno*, 413 U.S. at 534; *Cleburne*, 473 U.S. at 450; *Plyler*, 457 U.S. at 223-230.

The showing of what is required to trigger heightened review, i.e., to prove an unpopular group has been targeted, has not been clearly defined by the Supreme Court. However, the key questions are whether the law targets a historically disfavored group and, if so, are the proffered justifications for the law over-inclusive or under-inclusive? *See, e.g.*, *Moreno*, 413 U.S. at 538 (finding regulations preventing food stamps from going to households with unrelated adults was not rationally related to purpose of preventing "hippies" from receiving food stamps, because regulations were overinclusive in that they would deny food stamps to legitimate aid recipients that shared housing); *Cleburne*, 473 U.S. at 449 (justification that zoning ordinance prohibited home for mentally disabled in flood plain was underinclusive because city permitted nursing homes, convalescent homes and hospitals in same location); *see also Baskin*, 2014 WL 4359059, at *2 (stating a discriminatory policy is "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.").[11]

The first question – whether the law targets a historically disfavored group – often looks to proof of "animus," but animus can exist without hatred, bigotry, or prejudice. Animus exists when there are "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable" by the government. *Cleburne*, 473 U.S. at 448. Animus may result "from insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves." *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring). A common sign of animus is whether the law represents an unusual departure from general law and policy. *E.g.*, *Romer*, 517 U.S. at 633 (applying heightened review after recognizing the law in question was "unprecedented" and

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[11] In *Baskin*, Judge Posner crafts a four-part test for how courts can examine laws discriminating along "suspect lines." *Baskin*, 2014 WL 4359059, at *2. This appears to be a test designed to apply heightened review "even when the group discriminated against is not a 'suspect class,'" *id*. at *1, and it is based upon cases that did not involve suspect classifications, *e.g.*, *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987) (close relative not a suspect or quasi-suspect class); *St. John's United Church of Christ v. City of Chicago*, 502 F.3d 616, 638 (7th Cir. 2007) (condemnation order affecting religious cemetery was not a classification based on religion). This Court need not adopt the entire *Baskin* test to hold heightened review applies here or to find support for that conclusion in *Baskin*. *Baskin* recognizes the importance of the questions Plaintiffs identify – determining if the law targets a historically disfavored group and if the law is overinclusive or underinclusive. *Baskin*, 2014 WL 4359059, at *2.

of "an unusual character."); *Baskin*, 2014 WL 3537847, at *22 (finding recognition of out-of-state marriages that could not be performed in Indiana while refusing to recognize marriages of same-sex couples suggests animus against same-sex couples). And the historical context of a law's enactment can also demonstrate the law was intended to have a discriminatory effect on a group, triggering heightened review. *Romer*, 517 U.S. at 633; *Windsor*, 133 S.Ct. at 2693 (looking at historical context and statements of Congress to find, "The history of DOMA's enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages" was the "essence" of the statute); *e.g.*, *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-67 (1977) (explaining historical background is relevant when determining legislative intent). In other words, Plaintiffs do not need to show that the Texas Legislature hated gays and lesbians or that the voters who passed Section 32 are bigots for heightened review to apply.

This Court may find Section 32 warrants heightened review based on Section 32's deviation from Texas' general marriage policies and the legislative history of the various laws. *See*, *e.g.*, *Romer*, 517 U.S. at 633; *Windsor*, 133 S.Ct. at 2693. The 2003 and 2005 laws were a significant departure from Texas' general marriage policies. Historically, Texas recognized marriages lawfully performed out of state, even if Texas itself would not allow the marriage to occur within its borders. *E.g.*, *Husband v. Pierce*, 800 S.W.2d 661, 662-63 (Tex. App. 1990)

(marriage performed in Mexico was legal and would be recognized under Texas law even though couple could not have married in Texas). Yet the 2003 and 2005 laws declared void marriages of same-sex couples lawfully performed in other states. As other federal courts have held, this is an unusual departure from normal legislative enactments. *Baskin*, 2014 WL 2884868, at *14 (finding Indiana's law "an unusual law for Indiana to pass"); *Wolf*, 986 F.Supp.2d at 1017-1018 (describing Wisconsin's law as "unusual" and "rare, if not unprecedented").

Moreover, the historical background provides ample basis to apply heightened review to Section 32. Each law was passed during a wave of legislation in response to efforts and legal developments regarding same-sex couples' right to marry. The 1973 law was enacted in response to a same-sex couple's effort to obtain a marriage license, triggering an opinion from the Attorney General, and lawsuits in Texas and elsewhere. The law was changed to expressly prohibit marriages between same-sex couples with no discussion about its constitutional implications—the limited discussion included demeaning jokes at the expense of the couple who sought marriage rights. These circumstances demonstrate the law was, at the very least, the result of the "instinctive mechanism to guard against people who appear to be different in some respects from ourselves." *Garrett*, 531 U.S. at 374.

The circumstances surrounding passage of the 2003 statute and the subsequent 2005 constitutional amendment likewise militate for heightened review. Both were passed as part of a national wave of legislation following *Lawrence* and the 2003 Massachusetts decision that overturned a ban on marriages between same-sex couples, *Goodridge* , 798 N.E.2d 941. *See* Schacter, 82 S. Cal. L. Rev. at 1188-89 ("[O]ver half the states in the country enacted some form of an anti-same-sex marriage measure after *Goodridge*."); *see also* ROA 529 (discussing *Goodridge* and stating, inter alia, the amendment should be presented to voters so "the citizens of Texas, rather than the courts, can have a chance to decide the definition of marriage").

When enacting the 2003 statute, supporters claimed it: (1) "provides for the healthy psychological development of children"—expressing the incorrect belief that gay and lesbian parents negatively affect their children; (2) "avoids health risks of same-sex relations and promiscuity"—apparently suggesting the law would stop same-sex couples from having sex; and (3) prevents marriages between same-sex couples from "undermin[ing] . . . society's ability to transmit its values to younger generations." ROA 509. In passing the 2005 resolution proposing the constitutional amendment, the Legislature claimed opposite-sex marriages are the "basis for a healthy, successful, stable environment for children" and suggested that marriages between same-sex couples would lead to poor health and poverty.

ROA 530-31. Such statements plainly expressed moral disapproval of same-sex relations and perpetuated false stereotypes about the environment same-sex couples provide for their children.[12]

The Court also should not overlook statements made by the House sponsor or the Governor about the 2005 law. Representative Chisum claimed, "This bill does discriminate. It allows only for a man and a woman to be married in this state and to be recognized as married in this state. This bill does discriminate against any other kind of marriage." ROA 523. Such a statement, along with the Governor's suggestion that gays and lesbians who wanted their relationships formally recognized move to other states, expresses animosity toward gays and lesbians.[13]

Finally, Plaintiffs recognize that the concurring opinion in *Bishop* concluded Oklahoma's marriage law was not motivated by animus, but the standard employed in that concurrence is flawed. *Bishop*, 2014 WL 3537837, at *22-30 (Holmes,

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[12] Also showing prejudice were statements equating civil unions with "pedophilia" and "voluntary incest." ROA 516-18.

[13] The State is not immune from a finding that the law targets same-sex couples because amicus Texas Conservative Coalition can point to snippets from the 2005 legislative history they claim show support for traditional marriage. Texas Conservative Coalition Br. at 24 (quoting Senate sponsor's claim that law was designed to hold marriage "higher than any other relationships.") (quoting Senate Journal, H.J.R. 6 on Second Reading, 79th Leg., Reg. Sess. (May 21, 2005)). Those snippets do not override the overwhelming evidence that the laws were intended to disadvantage same-sex couples.

concurring). Citing *Romer*'s and *Windsor*'s facts, the *Bishop* concurrence suggests animus applies only in two instances: "(1) laws that impose wide-ranging and novel deprivations upon the disfavored group; and (2) laws that stray from the historical territory of the lawmaking sovereign just to eliminate privileges that a group would otherwise receive."[14] *Id*. at *24-25. Section 32 is a departure from traditional Texas practice, so it satisfies the second criteria, but, in any event, the limited test identified in the *Bishop* concurrence cannot be squared with other "animus" decisions. For instance, *Moreno* involved Congress' denial of food stamps to hippies – a law that did not involve a wide-ranging deprivation of rights or exceed Congress' traditional power to decide who can receive food stamps. In *Cleburne*, a local zoning ordinance prevented the building of a home for the mentally disabled in a particular location, hardly a wide-ranging denial of rights and well within the scope of a city's traditional powers to make zoning decisions. Thus, the *Bishop* concurrence's attempt to limit animus to *Romer*- and *Windsor*-type situations cannot be reconciled with controlling precedent.

Accordingly, this Court should apply heightened review.

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[14] *Robicheaux*, relies on the *Bishop* concurrence for this point. 2014 WL 4347099, at *6 & n.11. But *Robicheaux* makes the further mistake of requiring a showing of "hate and intolerance" by the state – a standard not required by any precedent. *Id*.

3. Section 32 does not treat everyone equally.

Astonishingly, the State argues that neither heightened review nor strict scrutiny applies because "Texas's marriage laws . . . do not classify based on sexual orientation" as gays and lesbians "are as free to marry an opposite-sex spouse as anyone else in the State." AOB 19-20. This argument fails.

First, contrary to the State's claim, Texas law expressly imposes restrictions based on the classification of the couple. This squarely restricts the pursuit of relationships consistent with gays' and lesbians' sexual orientation. Second, the Supreme Court already rejected the nearly-identical argument in *Loving*:

> [T]he State contends that, because its miscegenation statutes punish equally both the white and the Negro participants in an interracial marriage, these statutes, despite their reliance on racial classifications, do not constitute an invidious discrimination based upon race…. [W]e reject the notion that the mere "equal application" of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations. . . .

Loving, 388 U.S. at 8-9.

Texas attempts to distinguish *Loving* because it involved racial classifications. AOB 20-21. But that fact does not render the Supreme Court's analysis meaningless here. Saying that laws banning marriages of same-sex couples are not discriminatory because a lesbian can marry a man or a gay man can marry a woman is no different from claiming that anti-miscegenation were not

discriminatory because whites could marry whites and blacks could marry blacks. This Court should reject this argument entirely.

III. Section 32 Cannot Survive Constitutional Scrutiny Under Any Level Of Review.

For the reasons discussed above, Section 32 should be subject to strict scrutiny or heightened review, standards the State does not even argue Section 32 could satisfy. Instead, the State only claims the District Court "misapplied rational-basis review." AOB at 6-7; *see* ROA 2018-25 (District Court order stating court need not decide if Section 32 withstands strict scrutiny because it "fails even under the most deferential rational basis level of review"). Although the Court should apply strict scrutiny, it need not reach that issue. Section 32 cannot stand because it fails the most deferential rational-basis review.

A. Rational-Basis Review Requires That A Law Actually Serve A State Interest.

"[E]ven in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained." *Romer*, 517 U.S. at 632. "[T]he rational-basis standard 'is not a toothless one,' and will not be satisfied by flimsy or implausible justifications for the legislative classification, proffered after the fact by Government attorneys." *U.S. R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 184 (1980). A law that favors one group over another will survive rational-basis review only if it is "narrow enough in scope and grounded in a sufficient factual context

for us to ascertain some relation between the classification and the purpose it served." *Romer*, 517 U.S. at 632-33. In other words, the rational basis test requires that the proffered justification for a law "must find some footing in the realities of the subject addressed by the legislation." *Heller v. Doe*, 509 U.S. 312, 321 (1993). Thus, a court will invalidate a law on equal protection grounds under rational-basis review if its "varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [a reviewing court] can only conclude that the government's actions were irrational." *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 84 (2000).[15]

As these cases show, rational basis requires some rational connection between a legitimate state interest and the law denying rights or benefits to a class of people like gays and lesbians. Section 32 has no such connection.

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[15] Contrary to this authority, the State claims there does not have to be an actual connection between Section 32 and a legitimate government interest—all that matters is that Section 32's supporters "rationally believe[d]" the law served a possible interest. AOB 3, 15, 17. This argument is wrong—the "belief" in a relationship between Section 32 and a legitimate government purpose does not magically create such a relationship. As this Court recognizes, "there will be situations where proffered reasons are not rational," and even an earnest belief cannot alone satisfy the rational basis test. *Greater Houston Small Taxicab Co. Owners Ass'n v. City of Houston*, 660 F.3d 235, 239 (5th Cir. 2011) (quoting *Doe v. Pa. Bd. of Prob. & Parole*, 513 F.3d 95, 112 n.9 (3d Cir. 2008)).

B. There Is No Rational Relationship Between Section 32 And A Legitimate State Interest.

In the District Court, the State claimed Section 32 furthered the State's interest in the welfare of children, but it does not argue that purpose on appeal. ROA 2019-21 (finding the marriage ban did not further State's claimed interest in childrearing). The State also repeatedly claimed "tradition" supported the law, another interest discarded on appeal. ROA 2023-24. Plaintiffs address each claim below, focusing primarily on the interests the State advocates here: (1) that Section 32 encourages marriage among opposite-sex couples who "often cannot help but produce offspring," AOB 10-15; and (2) respect for principles of federalism and the "democratic process" permit Section 32 to survive, AOB 34-38. These arguments have no merit.

1. Section 32 does not encourage responsible procreation.

The State's argument that Section 32 serves a legitimate state interest in encouraging responsible procreation is contrary to the overwhelming authority and defies common sense. Procreation is not and never has been a qualification for marriage. "[W]hat justification could there possibly be for denying the benefits of marriage to homosexual couples exercising 'the liberty protected by the Constitution'? Surely not the encouragement of procreation since the sterile and the elderly are allowed to marry." *Lawrence*, 539 U.S. at 605 (Scalia, J., dissenting).

The responsible procreation argument requires the Court to accept the unfounded premise that same-sex couples' marriages will somehow decrease the incidence of heterosexual marriage and cause increased heterosexual procreation outside of marriage. Not surprisingly, courts have soundly rejected that argument. *See, e.g.*, *Kitchen*, 755 F.3d at 1224 ("A state's interest in developing and sustaining committed relationships between childbearing couples is simply not connected to its recognition of same-sex marriages."); *Bostic*, 2014 WL 3702493, at *15 ("Prohibiting same-sex couples from marrying and ignoring their out-of-state marriages does not serve Virginia's goal of preventing out-of-wedlock births."). The Tenth Circuit called the responsible procreation argument "wholly illogical," *Kitchen*, 755 F.3d at 1223, and the Seventh Circuit found it "so full of holes that it cannot be taken seriously," *Baskin*, 2014 WL 4359059, at *3. *See also Geiger*, 2014 WL 2514491, at *12-13 (finding "no logical nexus" between an interest in encouraging responsible procreation and excluding same-sex couples from marrying). Indeed, the argument is so illogical that supporters of the 2003 law expressly disclaimed it, declaring "same-sex marriages do not affect individual heterosexual marriages." ROA 518.

This conclusion also is compelled by the undisputed evidence below. Marriage between same-sex couples has no effect on heterosexual marriage or divorce rates. ROA 310-13. Data from the Netherlands, the first country that

recognized same-sex couples' right to marry, and states that recognize the same rights "show[] that patterns of marriage, divorce, and other indicators are not affected when same-sex couples can marry." ROA 311. "An analysis of demographic trends, population-based surveys, and qualitative interviews in the Netherlands shows no evidence that granting the right to marry to same-sex couples will have any effect on heterosexual couples' willingness to marry, their probability of divorce, or the non-marital birth rate." *Id.* Similarly, "scholars compar[ing] the experience of Massachusetts and other states that allow same-sex couples to marry to the experiences of states that do not allow same-sex couples to marry … find no evidence of any negative effect on measures of heterosexual behavior related to same-sex couples marrying." *Id.*

The State offered no evidence to support a connection between Section 32 and responsible procreation. It is thus not surprising that the District Court found "Defendants have failed to establish how banning same-sex marriage in any way furthers responsible procreation." ROA 2022. That finding is consistent with the findings of the two District Courts that held trials on laws prohibiting same-sex couples from marrying. *Perry*, 704 F.Supp.2d at 972 ("Permitting same-sex couples to marry will not affect the number of opposite-sex couples who marry, divorce, cohabit, have children outside of marriage or otherwise affect the stability of opposite-sex marriages."); *DeBoer*, 973 F.Supp.2d at 764-65 (crediting

testimony of social scientists and witnesses who testified that procreation is not purpose of marriage).[16]

The State nonetheless attempts to argue that different treatment of opposite-sex couples and same-sex couples is justified because opposite-sex couples give into their passions without thinking of the possibility that a child can be conceived while same-sex couples carefully plan to have children. AOB at 11-12. Judge Posner rejected this argument:

> 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.

Baskin, 2014 WL 4359059, at *10.

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[16] The only post-*Windsor* court to find a law banning marriage between same-sex couples survives rational-basis review appears to accept blindly that the law serves the "preeminent purpose of linking children to their biological parents." *Robicheaux*, 2014 WL 4347099, at *6. But *Robicheaux* never explains how the law actually serves that purpose, given that opposite-sex couples were free to marry before the law was enacted and its only practical effect was to prevent same-sex couples from doing the same.

Furthermore, if Section 32 is intended to foster responsible procreation, it is so woefully underinclusive that it demonstrates the law is arbitrary and does not serve the claimed purpose of encouraging responsible procreation. The State concedes the law does not restrict marriages between infertile opposite-sex couples. AOB 12-14. As numerous courts have held, this alone renders bans on marriages between same-sex couples constitutionally infirm. *Geiger*, 2014 WL 2514491, at *12-13 ("Procreative potential is not a marriage prerequisite."); *Latta*, 2014 WL 1909999, at *23 ("Idaho does not condition marriage licenses or marital benefits on heterosexual couples' ability or desire to have children. No heterosexual couple would be denied the right to marry for failure to demonstrate the intent to procreate."); *DeBoer*, 973 F.Supp.2d at 770 ("The prerequisites for obtaining a marriage license under Michigan law do not include the ability to have children."); *Golinski*, 824 F.Supp.2d at 993 ("The ability to procreate cannot and has never been a precondition to marriage."). If the purpose of marriage is to procreate, marriages between the infertile and the post-menopausal cannot accomplish this purpose. The State has never sought to limit such marriages.

Nor does the State limit married heterosexuals' ability to dissolve their marriages. It joins nearly every other state in permitting no-fault divorces. Tex. Fam. Code § 6.001 (permitting divorce "without regard to fault" if the marriage "has become insupportable because of discord or conflict of personalities that

destroys the legitimate ends of the marital relationship and prevents any reasonable expectation of reconciliation"). Such laws undercut the State's claim that the purpose of marriage is related to responsible procreation.[17] As the Tenth Circuit noted:

> It is difficult to imagine how the State's refusal to recognize same-sex marriage undercuts in any meaningful way a state message of support for marital constancy given its adoption of a divorce policy that conveys a message of indifference to marital longevity.

Kitchen, 755 F.3d at 1224.

The State attempts to justify its underinclusive law by arguing that allowing opposite-sex couples to marry despite their inability to procreate, "the State encourages others who *will* procreate to enter into the marriage relationship." AOB 13. It cites no evidence – and offered none below – to support such a theory. Thus, it is pure conjecture that permitting infertile couples to marry somehow encourages fertile couples to marry. But as the Fourth Circuit pointed out, there is "no reason why committed same-sex couples cannot serve as similar role models." *Bostic*, 2014 WL 3702493, at *14; *see also Baskin*, 2014 WL 4359059, at *9 ("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?").

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[17] Texas' no-fault divorce statute concedes that "discord or conflict of personalities" can destroy "the legitimate ends of the marital relationship," further indicating that the purpose of marriage is not procreation. Tex. Fam. Code § 6.001.

Such bald assertions cannot establish the required connection for even rational-basis review. The State's argument that preventing same-sex couples from marrying serves responsible procreation is illogical. It is the type of unsupported conjecture that cannot be a basis for upholding discriminatory legislation. *Baskin*, 2014 WL 4359059, at *19 ("[M]ore 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.").

In truth, Section 32 undermines the very purpose the State claims it serves. As Plaintiffs De Leon and Dimetman demonstrate, same-sex couples procreate. ROA 173-74, 176-77; *see also Bostic*, 2014 WL 3702493, at *14 (citing census data for the thousands of children being raised by same-sex couples). Texas' failure to recognize their marriage could have proven tragic if something happened to De Leon before Dimetman could adopt their child. And that risk still exists, should they have another child in the future. Accordingly, the District Court properly recognized that "rather than serving the interest of encouraging stable environments for procreation, Section 32 hinders the creation of such environments." ROA 2021. Other federal courts agree. *Obergefell*, 962 F.Supp.2d at 995 (bans "harm[ ] the children of same-sex couples who are denied the protection and stability of having parents who are legally married"); *DeBoer*, 973

F.Supp.2d at 771 (ban "actually fosters the potential for childhood destabilization"). Indeed, the Supreme Court recognized that refusing to recognize same-sex couples' valid marriages "humiliates tens of thousands of children now being raised by same-sex couples." *Windsor*, 133 S.Ct. at 2694. Thus, far from encouraging responsible procreation within stable married relationships, Section 32 denies individuals in same-sex relationships the opportunity to do the same.

2. Federalism or preference for the "democratic process" does not provide a basis for Section 32.

The State attempts to cast this case as one involving principles of federalism and argues that courts should not decide this case, but should instead "allow the democratic debate" on same-sex couples' constitutional rights to continue. AOB 34-38. But courts cannot sit by idly when constitutional rights are deprived.

It is a "well-established principle that when hurt or injury is inflicted … by the encouragement or command of laws or other state action, the Constitution requires redress by the courts." *Schuette v. Coalition to Defend Affirmative Action*, 134 S.Ct. 1623, 1637 (2014). "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). "One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be

submitted to vote; they depend on the outcome of no elections." *Id.* Thus, while states "are laboratories for experimentation," "those experiments may not deny the basic dignity the Constitution protects." *Hall v. Florida*, 134 S.Ct. 1986, 2001 (2014).

The State's federalism argument also runs counter to *Windsor*, which recognized that "[s]tate laws defining and regulating marriage . . . must respect the constitutional rights of persons,"[18] *Windsor*, 133 S.Ct. at 2691 (*citing Loving*), and numerous post-*Windsor* decisions reject the State's federalism argument, *Kitchen*, 755 F.3d at 1228; *Bostic*, 2014 WL 3702493, at *11-12; *Baskin*, 2014 WL 4359059, at *19. As the Tenth Circuit explained:

> Plaintiffs in this case have convinced us that Amendment 3 violates their fundamental right to marry and to have their marriages recognized. We may not deny them relief based on a mere preference that their arguments be settled elsewhere. Nor may we defer to majority will in dealing with matters so central to personal autonomy. The protection and exercise of fundamental rights are not matters for opinion polls or the ballot box.

Kitchen, 755 F.3d at 1228.

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[18] Several *amici* claim *Windsor* emphasized federalism in describing the traditional role the state plays in regulating marriage. Plaintiffs do not dispute regulating marriage is traditionally a matter left to the province of states, but state regulation must be constitutional. Moreover, *Windsor* expressly declined to decide the case on federalism principles. *Windsor*, 133 S.Ct. at 2692 ("[I]t is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance.").

The judiciary must protect citizens' constitutional rights. The State cannot ask this Court to abdicate its fundamental role simply because the result might be considered "undemocratic" or the public might change its views at some point in the future.

3. The State's abandoned grounds do not overcome rational-basis review.

The District Court held that childrearing and upholding tradition are not legitimate interests served by Section 32. ROA 2019-21, 2023-24. Although the State does not specifically assert these grounds on appeal, several *amici* do.

(a) Childrearing is not a legitimate basis for upholding Section 32.

(i) The District Court correctly found that childrearing is not a legitimate interest served by Section 32.

The District Court acknowledged that the welfare of children is a legitimate state interest, but held Section 32 does not further that interest. ROA 2019. Instead, the court recognized that "Section 32 causes needless stigmatization and humiliation for children" and "[h]omosexual couples are as capable as other couples of raising well-adjusted children." *Id*.

These findings were supported by the undisputed evidence. Far from encouraging a stable environment for child rearing, Section 32 denies children of same-sex parents the protections and stability they would enjoy if their parents could marry. ROA 910 ("If a child has 2 living and capable parents who choose to create a permanent bond by way of civil marriage, it is in the best interest of their

child(ren) that legal and social institutions allow and support them to do so, irrespective of their sexual orientation."); *see also* ROA 302-305 (preventing same-sex marriage lessens the economic efficiency of and increases costs to the same-sex families). Section 32 precludes children of same-sex couples from enjoying the legal protections and emotional benefits associated with having legally married parents. *Windsor*, 133 S.Ct. at 2694. Among other things, without undergoing formal adoption, children of same-sex couples have no legal right to inherit from the non-biological parent and may be denied rights such as hospital visitation if that parent becomes ill. The non-biological parent may be denied similar visitation rights and the ability to make legal, medical, or educational decisions about the child without the biological parent. Without formal adoption, a child would not be entitled to a non-biological parent's Social Security benefits, 42 U.S.C. § 416(e) (defining "child"), or could not be cared for by a non-biological parent receiving leave under the Family and Medical Leave Act, 29 U.S.C. § 2611(12) (defining "son or daughter").

In addition, the undisputed evidence offered below established that same-sex couples are as capable parents as opposite-sex couples. *See, e.g.*, ROA 779-791, 819-27; *see also* ROA 340 ("[C]hildren and adolescents raised by same-sex parents are as successful psychologically, emotionally, and socially as children and adolescents raised by heterosexual parents, including biological parents."); ROA

347-48 (explaining "scientific community has reached consensus" that sexual orientation of a parent does not affect a child's adjustment); ROA 354-55 ("Research concerning the benefits of being raised by 'biological' parents does not support arguments that same-sex couples are inferior parents.").

Numerous courts have reached the same conclusion. *DeBoer*, 973 F.Supp.2d at 770-71 (finding post-trial that the "overwhelming weight of the scientific evidence" supports the conclusion that no difference exists between children raised in same-sex and opposite-sex households); *Perry*, 704 F.Supp.2d at 980 (finding, post-trial, "[c]hildren raised by gay or lesbian parents are as likely as children raised by heterosexual parents to be healthy, successful and well-adjusted"); *see also Obergefell*, 962 F.Supp.2d at 993–95 (noting the only effect the marriage recognition bans have on children's well-being is harm to the children of same-sex couples who lose the protection of legally married parents); *Golinski*, 824 F.Supp.2d at 992 (same); *Pedersen*, 881 F.Supp.2d at 336-37 (same).

The State did not dispute this evidence below. In fact, other than making a passing reference to "childrearing" in its briefing below and citing some cases for the general proposition that marriage serves such a purpose, the State offered no evidence to show how: (1) denying children of same-sex couples the security of married households serves the claimed state interest; or (2) how marriage between

same-sex couples will undermine childrearing in opposite-sex families. The State also does not argue on appeal that an interest in childrearing supports Section 32.

Based on the record below and the State's failure to raise the argument on appeal, the District Court's finding that Section 32 does not serve an interest in childrearing should not be disturbed.

(ii) The Amici's argument that Section 32 fosters responsible childrearing is based on unreliable sources and is wrong.

Several *amici* purport to introduce studies they claim show children of same-sex couples fare worse than their counterparts raised in opposite-sex relationships. That the State itself did not offer those studies should alone demonstrate how devoid of credibility they are.[19]

These studies' conclusions and analyses have been rejected by the scientific community. For instance, Dr. Loren D. Marks' paper, *Same Sex Parenting and Children's Outcomes: A Closer Examination of the American Psychological Association's Brief on Lesbian and Gay Parenting*, has been described as "an argumentative review paper trying to make a case against a particular conclusion." ROA 484. Dr. Mark Regnerus' work, *How Different Are the Adult Children of Parents Who Have Same-Sex Relationships? Findings from the New Family*

[19] Anticipating the State would offer this evidence, Plaintiffs offered an expert declaration below that detailed why those studies are not credible. ROA 350-55. That declaration was unrefuted.

Structures Study, did not even assess what it purported to study, focusing instead primarily on children of *failed* heterosexual unions whose parents reportedly had same-sex relationships at some point. ROA 350-53, 485. The journal that published both papers later disclosed that "[b]oth papers have serious flaws and distortions" and "neither paper should have been published." ROA 484, 486.

In *DeBoer*, Regnerus, Marks, and another author whose work is now being cited by *amici*, Dr. Douglas Allen, testified as experts, but the court rejected their opinions. The *DeBoer* court cited Regnerus' own testimony that his study failed to account for other events affecting children's outcomes. *DeBoer*, 973 F.Supp.2d at 765, 770. Indeed, "of the only two participants who reported living with their mother and her same-sex partner for their entire childhood, Regnerus found each of them to be 'comparatively well-adjusted on most developmental and contemporary outcomes.'" *Id*. at 765-66. The court also found Regnerus' study was "concocted at the behest of a third-party funder" that "clearly wanted a certain result, and Regnerus obliged." *Id.* at 766. Regnerus' opinions, therefore, were "entirely unbelievable and not worthy of serious consideration." *Id*.

The *DeBoer* court also found that Allen's study of Canadian census data, which concluded that children of same-sex couples had lower graduation rates than their peers, suffered from similar flaws. 973 F.Supp.2d at 770; *see, e.g.*, *id.* at 777-78 ("[W]hen Allen controlled for parental education, marital status and five years

of residential stability, he discovered that there was no statistically significant difference in graduation rates.").

The *DeBoer* court also found Dr. Marks "largely unbelievable." *DeBoer*, 973 F.Supp.2d at 767-68. Accordingly, the *DeBoer* court found that Dr. Marks, Dr. Allen, and Dr. Regnerus "clearly represent a fringe viewpoint that is rejected by the vast majority of their colleagues across a variety of social science fields." *Id.* at 768.

The District Court's finding below – that "[h]omosexual couples are as capable as other couples of raising well-adjusted children" – was supported by ample credible, undisputed evidence. Section 32 does not serve a legitimate state interest in childrearing.

(b) Preserving tradition is not a legitimate basis for upholding Section 32.

The State makes repeated references to "traditional marriage" in its Opening Brief and several *amici* urge tradition as a legitimate basis for Section 32. Tradition, however, does not provide a rational basis for an otherwise unconstitutional law.

The Supreme Court has "not hesitated to strike down an invidious classification even though it had history and tradition on its side." *Levy v. Louisiana*, 391 U.S. 68, 71 (1968). "[N]either the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries

insulates it from constitutional attack." *Williams v. Illinois*, 399 U.S. 235, 239 (1970); *see also Heller*, 509 U.S. at 326 ("Ancient lineage of a legal concept does not give it immunity from attack for lacking rational basis.").

The Supreme Court recognizes that "tradition" cannot be used to justify laws that discriminate against gay men and lesbians. In striking down Texas' sodomy law, the Court held: "'[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack.'"[20] *Lawrence*, 359 U.S. at 577-78 (quoting *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting)).

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[20] The State criticizes the District Court for not "acknowledge[ing] (let alone refut[ing])" two "reasoned defenses of traditional marriage" it cites on appeal. AOB 16, citing Sherif Girgis, Robert P. George & Ryan T. Anderson, *What Is Marriage?*, 34 Harv. J.L. & Pub. Pol'y 245 (2011); George W. Dent, Jr., *Traditional Marriage: Still Worth Defending*, 18 BYU J. Pub. L. 419 (2004). The obvious reason the District Court did not consider those authorities is the State never cited them. In any event, the arguments in those articles are inconsistent with *Lawrence* and *Windsor.* They begin from the perspective that the State may ban marriage between same-sex couples to express moral approval of traditional marriage or what the authors call "real marriage." *Girgis*, at 250 ("[R]eal marriages are *moral realities* that create moral privileges and obligations."); Dent, at 420 ("Nothing in the Constitution should bar a state from denying recognition to same-sex unions simply because the state considers them intrinsically immoral."); *e.g.*, *id*. at 425 (stating "most Americans would consider gay marriage a 'mocking burlesque' or 'mere parody' of the real thing") (footnote omitted).

Similarly, in *Windsor*, the Supreme Court acknowledged that Congress passed DOMA to "defend the institution of traditional heterosexual marriage" and to "promote an 'interest in protecting the traditional moral teachings reflected in heterosexual-only marriage laws.'" 133 S.Ct. at 2693 (quoting H.R. Rep. No. 104-664, at 12-13 (1996)). Plainly, those grounds were insufficient to survive due process and equal protection challenges, as numerous lower courts have since concluded. *DeBoer*, 973 F.Supp.2d at 772-73 (rejecting "contention that preserving traditional marriage is a legitimate goal in and of itself"); *Bourke*, 2014 WL 556729, at *7 ("That Kentucky's laws are rooted in tradition, however, cannot alone justify their infringement on individual liberties."); *Wolf*, 986 F.Supp.2d at 1018 ("[I]f blind adherence to the past is the only justification for the law, it must fail").

"The argument that the definition of marriage should remain the same for the definition's sake is a circular argument, not a rational justification." *Golinski*, 824 F.Supp.2d at 998. In sum, preserving "traditional" marriage cannot serve as a legitimate interest for Section 32.

C. Section 32 Also Fails Strict Scrutiny And Heightened Review.

Section 32 cannot withstand strict scrutiny. Under strict scrutiny, a law "may be justified only by compelling state interests, and must be narrowly drawn to express only those interests." *Carey v. Population Servs. Int'l*, 431 U.S. 678,

686 (1977). Under heightened review, a state may not "rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *Cleburne*, 473 U.S. at 446. If Section 32 cannot survive the lower threshold for rational-basis review, it is axiomatic that it cannot withstand strict scrutiny.

Just because it is underinclusive, Section 32 fails strict scrutiny and heightened review. "A law is narrowly tailored if it 'actually advances the state's interest ..., does not sweep too broadly ..., does not leave significant influences bearing on the interest unregulated (is not underinclusive), and could be replaced by no other regulation that could advance the interest.'" *Dep't of Tex., Veterans of Foreign Wars of U.S. v. Tex. Lottery Comm'n*, No. 11-50932, 2014 WL 3714874, at *10 (5th Cir. July 28, 2014) (quoting *Republican Party of Minn. v. White*, 416 F.3d 738, 751 (8th Cir. 2005) (en banc)); *see also Republican Party of Minn. v. White*, 536 U.S. 765, 783 (2002) (finding law failed strict scrutiny because it was underinclusive). Under heightened review, a law also will be struck down if it is underinclusive. *Cleburne*, 473 U.S. at 339 (justification offered to explain why zoning ordinance did not permit home for mentally disabled could not survive review when homes for similarly situated occupants were permitted); *Baskin*, 2014 WL 4359059, at *3 ("[T]o say that the policy is underinclusive is to say that its exclusion of other, very similar groups is indicative of arbitrariness.").

The State concedes Section 32 is underinclusive in serving the State's articulated purpose behind the law – responsible procreation – because it does not prohibit marriages by infertile or post-menopausal couples. That concession is fatal, and Section 32 fails strict scrutiny and heightened review. *Kitchen*, 755 F.3d at 1221 ("A state may not impinge upon the exercise of a fundamental right as to some, but not all, of the individuals who share a characteristic urged to be relevant."); *Bostic*, 2014 WL 3702493, at *14 (rejecting responsible procreation because law was underinclusive).

IV. The District Court Did Not Abuse Its Discretion By Granting A Preliminary Injunction.

In granting a preliminary injunction, the District Court did not just find that Plaintiffs were likely to prevail on their constitutional claims. The District Court also found: (1) Plaintiffs had shown irreparable injury; (2) the harm to Plaintiffs outweighs any damage from an injunction; and (3) the public interest is served by "overrid[ing] legislation that, as found here, infringes on an individual's federal constitutional rights." ROA 2036-40. The State does not contest those findings or conclusion and, thus, has forfeited any challenge to them on appeal. *United States v. Griffith*, 522 F.3d 607, 610 (5th Cir. 2008) ("It is a well worn principle that the failure to raise an issue on appeal constitutes waiver of that argument."); *Douglas W. ex rel. Jason D.W. v. Hous. Indep. Sch. Dist.*, 158 F.3d 205, 210 n. 4 (5th Cir.

1998) ("[F]ailure to provide any legal or factual analysis of an issue on appeal waives that issue.").

In any event, the District Court did not abuse its discretion in granting the injunction. The finding that Plaintiffs suffer irreparable harm from the denial of their right to marry and the refusal to recognize their marriage is consistent with settled precedent. Denial of fundamental rights is irreparable harm. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable harm."); *Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981) ("We have already determined that the constitutional right of privacy is 'either threatened or in fact being impaired,' and this conclusion mandates a finding of irreparable harm.") (quoting *Elrod*, 427 U.S. at 373).

The District Court also did not err in finding that the Plaintiffs' harm outweighs any damage from the injunction. The State offered no evidence of harm it would suffer if required to recognize and allow Plaintiffs' marriages. Accordingly, the District Court found the equities favored an injunction. ROA 2038-39; *see also Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002).

The State also could point to no error in the District Court's finding that a preliminary injunction serves, not harms, the public interest. ROA 2039-40.

Protecting Plaintiffs' constitutional rights serves the public interest. *Giovani-Carandola*, 303 F.3d at 521 ("[W]e agree with the district court that upholding constitutional rights surely serves the public interest.").

Because the preliminary injunction factors favored Plaintiffs, the District Court did not abuse its discretion in issuing a preliminary injunction.

CONCLUSION

The District Court's decision should be affirmed.

Dated: September 9, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing brief was electronically filed on the 9th day of September, 2014, using the court's CM/ECF system which will provide a notice of electronic filing to counsel of record. I further certify that on this same date, a copy of this brief was served via First Class U.S. Mail to the following:

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