No. 14-

IN THE

Supreme Court of the United States

TIMOTHY LOVE, *et al.*
AND GREGORY BOURKE, *et al.*,

Petitioners,

v.

STEVE BESHEAR, in his official capacity as Governor of Kentucky,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does a State violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment by prohibiting gay men and lesbians from marrying an individual of the same sex?

2. Does a State violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment by refusing to recognize legal marriages between individuals of the same sex performed in other jurisdictions?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the United States Court of Appeals for the Sixth Circuit included Petitioners Timothy Love, Lawrence Ysunza, Maurice Blanchard, Dominique James, Gregory Bourke, Michael De Leon, Kim Franklin, Tamera Boyd, Randell Johnson, Paul Campion, Jimmy Meade, and Luke Barlowe. Respondent herein, and Defendant/Appellant below, is Steve Beshear, in his official capacity as Governor of the Commonwealth of Kentucky.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Timothy Love, et al., and Gregory Bourke, et al., respectfully petition for a writ of certiorari to review the opinion and judgment of the U.S. Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Sixth Circuit, dated November 6, 2014, styled *DeBoer v. Snyder*, is reproduced at Petitioners' Appendix ("App.") A, 1a-95a. The opinion and order of the U.S. District Court for the Western District of Kentucky, in *Bourke v. Beshear* , dated February 12, 2014, is reported at 996 F. Supp. 2d 542, and is reproduced at Petitioners' Appendix C, 124a-157a. The subsequent opinion and order of the same court in *Love v. Beshear*, dated July 1, 2014, is reported at 989 F. Supp. 2d 536, and is reproduced at Petitioners' Appendix B, 96a-123a.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Sixth Circuit sought to be reviewed was entered on November 6, 2014. This petition is timely under 28 U.S.C. § 2102(c) and Supreme Court Rules 13.1 & 13.3 because it is being filed within 90 days after the judgment of the Sixth Circuit. This Court has jurisdiction to review the judgment of the U.S. Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant portions of pertinent constitutional and statutory provisions are set forth in the Petitioners' Appendix D, 158a-161a.

STATEMENT OF THE CASE

I. Introduction

As long ago as 1888, this Court acknowledged that marriage is "the most important relation in life." *Maynard v. Hill*, 125 U.S. 190, 205 (1888). Since that time, the Court has repeatedly recognized that "[t]he freedom to marry . . . [is] one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Loving v. Virginia*, 388 U.S. 1, 12 (1967). It is this enduring conception of marriage as an essential expression of individual liberty and dignity that prompted this Court to hold that "[c]hoices about marriage" belong to the individual and are "sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996).

Last year, this Court reaffirmed the fundamental importance of marriage to individuals and families in *United States v. Windsor*, 133 S. Ct. 2675 (2013). *Windsor* held that a federal law denying recognition of same-sex marriages demeaned and degraded them in violation of the Constitution's Due Process and Equal Protection guarantees. *See id.* at 2693–94. Despite this Court's unequivocal insistence that the Fourteenth Amendment encompasses a fundamental right to marry "for all

individuals," *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978), the Commonwealth of Kentucky has established a scheme that singles out gay men and lesbians for exclusion from the right to marry the person they love. Kentucky's constitution and statutes prohibit (1) marriage between individuals of the same sex, (2) recognition of such marriages legally performed in other jurisdictions, and (3) any alternative classification that would provide the benefits of marriage to same-sex couples.

Together, these laws deny Petitioners and all other gay men and lesbians living in Kentucky the right to marry the person they love. Even those who have been validly married in other jurisdictions cannot enjoy the rights, responsibilities, and privileges of married life that their heterosexual counterparts enjoy. In addition to these concrete deprivations, Kentucky's Marriage Prohibition marks same-sex relationships and the families they create as less valuable and less worthy of respect than opposite-sex relationships, thus "impos[ing] a disadvantage, a separate status, and so a stigma" on gay and lesbian Kentuckians that is incompatible with the bedrock constitutional principles animating the Fourteenth Amendment. *Windsor*, 133 S. Ct. at 2693.

Since *Windsor*, federal courts have almost uniformly held that state laws denying gay men and lesbians the right to marry violate the Fourteenth Amendment. This includes the Courts of Appeals in the Fourth, Seventh, Ninth, and Tenth circuits. *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014); *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014); *Baskin v. Bogan,* 766 F.3d 648 (7th Cir. 2014); *Latta v. Otter,* 2014 U.S. App. LEXIS 19620 (9th Cir. 2014). On October 6, 2014, this Court denied petitions for writs

of certiorari arising from the decisions from the Fourth, Seventh, and Tenth Circuits. *See Bogan v. Baskin*, 190 L. Ed. 2d 142 (U.S. 2014); *Rainey v. Bostic*, 190 L. Ed. 2d 140 (U.S. 2014); *Herbert v. Kitchen*, 190 L. Ed. 2d 138 (U.S. 2014). As of the date of this Petition, only two federal district courts have upheld same-sex marriage bans: *Conde-Vidal v. Garcia-Padilla*, No. 3:14-cv-01253-PG, 2014 U.S. Dist. LEXIS 150487 (D.P.R. Oct. 21, 2014); and *Robicheaux v. Caldwell*, 2 F. Supp. 3d 910 (E.D. La. 2014).

Despite contrary decisions from four of its sister circuits, on November 6, 2014, the Sixth Circuit upheld the discriminatory marriage schemes of four states without any meaningful analysis justifying its rejection of that precedent, App. 1a-60a. Included in that opinion were Petitioners' challenges in Kentucky, *Love v. Beshear* (No. 14-5818) and *Bourke v. Beshear* (No. 14-5291). The former case concerns the right to marry; the latter concerns recognition of valid, out-of-state marriages.

This Court should grant certiorari because the decision below presents a marked departure from the reasoning of other circuits on a question of exceptional importance. Given the significance of this issue to Petitioners and to hundreds of thousands of families across the country, this Court's review is needed to settle the question first presented in *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013): whether it is constitutional to relegate gay men and lesbians to second-class status by denying them the right to marry the person they love. This case provides an excellent vehicle for resolution of the underlying constitutional question and the attendant gulf between circuits created by the Sixth Circuit's opinion.

II. Kentucky's Discriminatory Framework

Prior to 1998, Kentucky statutes neither defined marriage nor explicitly prohibited marriages between same-sex couples. The only law addressing the issue of same-sex marriage came from a 1973 Kentucky Supreme Court case, *Jones v. Hallahan*, 501 S.W.2d 588 (1973). There, the Court concluded that two women could not marry "because what they propose is not a marriage." *Id.* at 590. In 1993, the Hawaii Supreme Court held that the state must assert a compelling interest for its refusal to issue marriage licenses to same-sex couples in order to survive an equal protection challenge. *Baehr v. Lewine*, 74 Haw. 530, 536 (Haw. 1993). Responding to fears that such challenges may represent a growing trend, in 1998 Kentucky's General Assembly enacted a series of statutes explicitly limiting marriage to opposite-sex couples. Ky. Rev. Stat. Ann. § 402.005 defines marriage as an institution existing exclusively between one man and one woman. Ky. Rev. Stat. Ann. § 402.020(1)(d) prohibits marriage between members of the same sex. Ky. Rev. Stat. Ann. § 402.040(2) declares that marriage between members of the same sex is against Kentucky public policy. And Ky. Rev. Stat. Ann. § 402.045 voids same-sex marriages performed in other jurisdictions.

In the following years, respect for the rights of same-sex couples began to gain ground in the United States and abroad. In 2003, the Massachusetts Supreme Judicial Court struck down that state's prohibition of same-sex marriage. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003). A visceral, nationwide response by anti-same-sex marriage advocates ensued. On March 11, 2004, in response to the Massachusetts case, the

Kentucky Senate passed Senate Bill 245, which proposed the following amendment to the Kentucky Constitution:

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

The amendment was sponsored by Sen. Vernie McGaha, who promoted the bill on the Senate floor:

> Marriage is a divine institution designed to form a permanent union between man and woman. According to the principles that have been laid down, marriage is not merely a civil contract; the scriptures make it the most sacred relationship of life . . . . I'm a firm believer in the Bible. And Genesis 1, it tells us that God created man in his own image, and the image of God created he him; male and female created he them. And I love the passage in Genesis 2 where Adam says 'this is now a bone of my bones and flesh of my flesh. She shall be called woman because she was taken out of man. Therefore shall a man leave his father and his mother and cleave to his wife and they shall be one flesh.' The first marriage, Mr. President. And in First Corinthians 7:2, if you notice the pronouns that are used in this scripture, it says, 'Let every man have his own wife, and let every woman have her own husband.'

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> We in the legislature, I think, have no other choice but to protect our communities from the desecration of these traditional values. We must stand strong and against arbitrary court decisions, endless lawsuits, the local officials who would disregard these laws, and we must protect our neighbors and our families and our children. . . . . Once this amendment passes, no activist judge, no legislature or county clerk whether in the Commonwealth or outside of it will be able to change this fundamental fact: The sacred institution of marriage joins together a man and a woman for the stability of society and for the greater glory of God.

App. 141a-143a. Sen. Gary Tapp, the bill's Co-Sponsor, then declared, ". . . [W]hen the citizens of Kentucky accept this amendment, no one, no judge, no mayor, no county clerk will be able to question their beliefs in the traditions of stable marriages and strong families." *Id*. The only other senator to speak in favor of the bill, Sen. Ed Worley, described marriage as a "cherished" institution. He bemoaned that "liberal judges" changed the law so that "children can't say the Lord's Prayer in school." Soon, he concluded, we will all be prohibited from saying "the Pledge to the 'Legiance [*sic*] in public places because it has the words 'in God we trust.'" In support of the amendment, he cited the Bible's "constant" reference to men and women being married. *Id*. The Senate passed the bill, and the amendment was placed on the ballot. On November 2, 2004, voters ratified the amendment, which is now codified as Ky. Const. § 233A.

III. PROCEEDINGS BELOW

A. *Bourke v. Beshear*

The *Bourke* Petitioners are four same-sex couples who are legally married in other jurisdictions and currently live in Kentucky. Gregory Bourke and Michael De Leon were married in Ontario, Canada in March, 2004. They live in Louisville, Kentucky, where they are raising two teenage children. Because Kentucky does not recognize their marriage, Michael De Leon is the children's only adoptive parent. Kim Franklin and Tamera Boyd were married in Stratford, Connecticut in July, 2010, and now reside in Cropper, Kentucky. Randell Johnson and Paul Campion were married in Riverside, California in July, 2008. They live in Louisville, Kentucky, and are currently raising four children. Randell Johnson is the sole adoptive parent of the couple's three sons; Paul Campion is the sole adoptive parent of their daughter. Jimmy Meade and Luke Barlowe have been together for forty-seven years. They were married in Davenport, Iowa in July, 2009, and currently reside in Bardstown, Kentucky. App. 130a-131a.

Following the landmark decision by this Court in *Windsor*, the *Bourke* Plaintiffs filed suit in the district court for the Western District of Kentucky, challenging Kentucky's refusal to recognize their valid out-of-state marriages. The original defendants to the case below included Kentucky Attorney General Jack Conway and Kentucky Governor Steve Beshear. The Complaint alleged that Kentucky's marriage scheme violated the Fourteenth Amendment, as well as the First Amendment, the Full Faith and Credit Clause, and the Supremacy Clause of the U.S. Constitution. Petitioners also challenged Section 2 of

the federal Defense of Marriage Act, 28 U.S.C. § 1738C. The parties and the court agreed that there was no factual dispute and the case should be decided as a matter of law.

In their Motion for Summary Judgment, Petitioners argued that they suffered a number of tangible harms under Kentucky's marital scheme including higher income and estate taxes, restricted benefits under the Family Medical Leave Act, an inability to obtain family insurance plans, impediments to the ability to make medical and legal decisions for their spouses, an increase in related legal costs, an inability to divorce, a denial of Social Security benefits, and the loss of inheritance rights under the state's intestacy statutes. Of greater importance, however, was the deprivation of the intangible benefits of marriage: societal respect and acknowledgment of their relationships with each other and their children. The Commonwealth argued that tradition and state sovereignty justified discrimination against these couples.

On February 12, 2014, the district court issued a memorandum opinion granting Petitioners' Motion for Summary Judgment. App. 124a-157a. In its well-reasoned opinion, the district court relied on *Windsor*, *Lawrence v. Texas,* 539 U.S. 558 (2003), *Romer v. Evans*, 517 U.S. 620 (1996), and *Loving v. Virginia*, 388 U.S. 1 (1967) to conclude that "Kentucky's denial of recognition for valid same-sex marriage violates the United States Constitution's guarantee of equal protection under the law, even under the most deferential standard of review." *Id.* at 125a. The trial court opined that Petitioners may well be a suspect class requiring heightened scrutiny, but declined to make that holding. The court further suggested that the nature of marriage as a fundamental right might also

require heightened scrutiny. Ultimately, the district court concluded that the application of heightened scrutiny ought to emanate from a higher court, particularly since its application would not affect the outcome of the case before it. The court issued a final Order on February 27, 2014.

On March 4, 2014, five days after the district court issued its final Order, Defendant Attorney General Jack Conway publicly announced that he would not appeal the district court's decision. Conway explained, "as Attorney General of Kentucky, I must draw the line when it comes to discrimination."[1] Governor Beshear appealed the ruling using outside counsel.

B. *Love v. Beshear*

Timothy Love and Lawrence Ysunza share a home in Louisville, Kentucky. They have lived together in a committed relationship for thirty-three years. Maurice Blanchard and Dominique James also live together in Louisville, Kentucky. Their relationship has endured for ten years. Both couples attempted, with the requisite identification and filing fees, to apply for marriage licenses at the Jefferson County Clerk's Office in Louisville, Kentucky. Both couples are otherwise qualified to receive a marriage license in the state of Kentucky; they are over the age of 18, not married to anyone else, not mentally disabled, and not "nearer in kin to each other...than second cousins." Ky. Rev. Stat. Ann. §§ 402.010-020 (2014).

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1. Dan Hirschhorn, *Kentucky Gov Will Defend Gay Marriage Ban After AG Refuses*, Time, March 4, 2014, http://time.com/12387/kentuck-gay-marriage-steve-beshear-jack-conway/. (accessed Nov. 14, 2014).

However, pursuant to the laws challenged here, the clerk refused to issue a marriage license to either couple.

On February 14, 2014, shortly after the *Bourke* opinion was issued but before entry of final judgment, the *Love* plaintiffs moved to intervene. The Intervening Complaint, like the *Bourke* Complaint, alleged violations of the Fourteenth Amendment, the First Amendment, and the Supremacy Clause of the U.S. Constitution. The district court granted intervention and approved an expedited briefing schedule for dispositive motions. Governor Beshear's response to the *Love* plaintiffs' motion for summary judgment alleged two new "legitimate state interests" justifying Kentucky's marriage laws: "natural procreation" and stable birth rates.

On July 1, 2014, the district court granted Intervening Plaintiffs' Motion for Summary Judgment, again finding that Kentucky's marriage laws violated the Equal Protection Clause of the Fourteenth Amendment. App. 96a-123a. The district court also stayed enforcement of its final order "until further notice of the Sixth Circuit." *Id.*

Governor Beshear appealed the district court's ruling, and the parties filed a Joint Motion to Consolidate *Love* with *Bourke* at the Court of Appeals for the Sixth Circuit. The cases were consolidated on July 16, 2014.

C. The Sixth Circuit Opinion

On August 6, 2014, the Sixth Circuit heard oral arguments in the *Love* and *Bourke* cases, along with similar challenges from Tennessee (*Tanco v. Haslam*, No. 14-5297), Ohio (*Obergefell v. Hodges*, No. 14-3057 and

Henry v. Hodges, No. 14-3464), and Michigan (*DeBoer v. Snyder*, No.14-1341). On November 6, 2014, the Sixth Circuit Court of Appeals rendered one opinion for all four cases. App. 1a-95a. Judge Jeffrey Sutton authored the majority opinion. Judge Martha Craig Daughtrey dissented.

Though Plaintiffs in this case specifically challenged Kentucky's discriminatory marriage laws under the Fourteenth Amendment and other provisions of the federal Constitution, the Sixth Circuit characterized the case as a question of "how best to handle" social change: legislatively or judicially? *Id*. at 4a. In answer, the majority noted that it was bound by existing Supreme Court precedent, finding only the one-line summary dismissal in *Baker v. Nelson* applicable. 409 U.S. 810 (1972). App. at 15a-17a.

According to the majority below, an inferior court can "ignore a Supreme Court decision" only when that decision is overruled by name or outcome. *Id*. at 17a. Neither *Windsor*, *Lawrence*, nor this Court's October 6, 2014 orders denying petitions for writ of certiorari originating from the Fourth, Seventh, and Tenth Circuits changed the binding effect of *Baker*. Those denials "tell us nothing about the democracy-versus-litigation path to same-sex marriage," the majority says, so it considers other ways to assess it: "originalism; rational basis review; animus; fundamental rights; suspect classifications; evolving meaning." *Id.* at 19a.

Originalism. The Sixth Circuit frames its first analysis as "original meaning," in which it applied a "long-accepted usage" approach to interpreting rights to marry

under the Fourteenth Amendment. *Id.* This approach, gleaned entirely from precedent arising under the First Amendment and Article II, relies upon tradition alone. "From the founding of the Republic to 2003, every State defined marriage as a relationship between a man and a woman, meaning that the Fourteenth Amendment permits, though it does not require, States to define marriage in that way." *Id.* at 22a. The majority does not discuss how this view can be reconciled with *Loving v. Virginia*'s rejection of the long tradition of anti-miscegenation laws.

Rational basis. Next, the majority below considers whether there is "any plausible reason" for Kentucky's exclusion of same-sex couples from marriage, finding two: "to regulate sex, most especially the intended and unintended effects of male-female intercourse" *Id.* at 23a; and a desire "to wait and see before changing a norm that our society (like all others) has accepted for centuries." *Id.* at 26a.

Animus. The majority distinguishes *Romer,* finding that the Kentucky marriage ban does not fit the pattern of a novel law "born of animosity toward gays" designed "to make gays unequal to everyone else." *Id.* at 32a. Because the initiative "codified a long-existing, widely held social norm already reflected in state law," it was not unusual. Rather, it was born of a reasonable fear "that the courts would seize control over an issue that people of good faith care deeply about," and thus could not be the result of unconstitutional animus. *Id.* at 32a. Also, the impossibility of individually assessing the motives of all 1.2 million people who voted for Kentucky's marriage amendment precluded any such finding. *Id.* at 34a.

Fundamental rights. The majority below points out that, "the right to marry in general, and the right to gay marriage in particular, nowhere appear in the Constitution." So, whether the marriage bans interfere with a fundamental right justifying strict scrutiny "turns on bedrock assumptions of liberty." *Id.* at 38a. Only by summarily distinguishing precedent such as *Loving*, *Zablocki*, and *Turner v. Safley*, 482 U.S. 78 (1987), on the grounds that this Court has always assumed a heterosexual definition of marriage, is the majority able to conclude that no fundamental right is implicated in this case. App. at 39a.

Suspect classification. The Sixth Circuit next rejects the Plaintiffs' argument that Kentucky's marriage laws discriminate against a "discrete and insular class without political power." *Id.* at 42a. First, the majority cites three circuit cases which explicitly rely on the overruled case of *Bowers v. Hardwick*, 478 U.S. 186 (1986), to evade application of the four-factor test from *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973). App. at 42a. Then, the court pays lip service to the test by acknowledging "the lamentable reality that gay individuals have experienced prejudice in this country," but distinguishes prejudice in state marriage laws because "the institution of marriage arose independently of this record of discrimination." *Id.* The majority below then changes the subject entirely to discuss federalism, which it says "permeates" state marriage laws and therefore negates any need for "extraordinary protection from the majoritarian political process." *Id.* at 46a.

Evolving meaning. The Sixth Circuit then distills the present case to a societal debate about "public norms"

and "societal values" in which much progress has been made nationwide in favor of same-sex couples. *Id.* at 48a. The court dismisses Plaintiffs' demand for the dignity and respect withheld by Kentucky's marriage scheme. Instead, the court reframes Plaintiffs' claim as one "to resolve today's debate and to change heads and hearts in the process." *Id.* at 52a. Federal litigation is the wrong method, the majority says, because "[i]t is dangerous and demeaning to the citizenry to assume that [judges], and only [judges], can fairly understand the arguments for and against gay marriage." *Id.* at 53a.

Full Faith and Credit. Turning to the issue of recognition, the subject of the *Bourke* case, the Sixth Circuit rules again in favor of Kentucky's scheme of marital discrimination because the Full Faith and Credit Clause does not require Kentucky to apply "another State's law in violation of its own public policy." *Id.* at 55a. And under the Fourteenth Amendment, "a State does not behave irrationally by insisting upon its own definition of marriage rather than deferring to the definition adopted by another State." *Id.*

As discussed in detail below, the Sixth Circuit's Opinion is a dramatic departure from the rulings of its sister circuits on the issue of marriage equality, and a dramatic step backwards for proponents of marriage equality nationwide. The requirements of both SUP. CT. R. 10(a) and (c) are easily satisfied. For these reasons, the Court should grant certiorari.

REASONS TO GRANT THE PETITION

I. The Sixth Circuit's Opinion Represents a Dramatic Split from the Fourth, Seventh, Ninth, and Tenth Circuits

Petitioners state the obvious: there exists a split among the circuits on the questions presented in this case. Indeed, it is rare that a split among the circuits is so stark and so infamous that the average layperson may be expected to know of its existence, but this is such an instance. Specifically, and as explained in Judge Daughtrey's well-reasoned dissent below, the Sixth Circuit's Opinion diverges sharply from decisions earlier this year in four other circuits: *Kitchen*, 755 F.3d 1193 (holding Utah statutes and voter-approved state constitutional amendment banning same-sex marriage unconstitutional under the Fourteenth Amendment); *Bostic*, 760 F.3d 352 (same, Virginia); *Baskin,* 766 F.3d 648 (same, Indiana statute and Wisconsin state constitutional amendment); and *Latta,* 2014 WL 4977682 (same, Idaho and Nevada statutes and state constitutional amendments). App. pp.76a-77a.

Convinced of its correctness, and despite driving a sizable wedge between the circuits, the Sixth Circuit neither analyzed nor distinguished the opinions of its sister courts, nor did it meaningfully analyze the opinions of the district courts it reversed. Although the Seventh Circuit's opinion two months prior contradicts nearly every single point made by the majority, the latter does not address Judge Richard Posner's reasoning. Where jurists of the caliber of Judges Posner and Sutton are so sharply divided on issues fundamentally important to so

many Americans, an explanation is commanded. The lack of such explanation from the Sixth Circuit leaves a gaping void for this Court to fill.

It should be noted that the lower courts (both district and circuit), Respondent, representatives of various states, legal scholars, and the media have long taken for granted that the issue of marriage equality will ultimately be resolved by this Court. During oral arguments in *Bostic,* Judge Paul V. Niemeyer joked that his court was a "way station" as the issue "moved up I-95 to Washington." During oral argument below, even Judge Sutton recognized the inevitability of this Court's review, stating "I'm really hopeful it will help us reach what I'm afraid counts as an interim decision, and I don't think anyone is under the illusion that this is the end of the road for anyone."

The differences between the circuits are not trivial. Nor are these differences merely abstract legal distinctions. The fundamental differences between the circuits have had, and will continue to have, a profound effect on the day-to-day lives of thousands of American families. Naturally, these effects will be most acutely felt by same-sex couples unfortunate enough to live within the Sixth Circuit. They will be accorded far different treatment as to benefits, parenting, and basic dignity than their counterparts in other circuits, many of whom, like Petitioners here, may be separated by no more than a few miles.

A. The Circuits Are Split on Almost Every Major Point

The circuits that have decided this issue differ from the Sixth Circuit on nearly every major point. The first circuit to decide the issue was the Tenth Circuit in *Kitchen v. Herbert.* That court found that the statutory and voter-approved constitutional amendments banning same-sex marriage in Utah violated both the Due Process and Equal Protection Clauses of the Fourteenth Amendment. In *Bostic v. Schaefer*, the Fourth Circuit reached a similar conclusion on similar grounds. Denying same-sex couples the choice of whether and whom to marry, the Fourth Circuit concluded, "prohibits them from participating fully in our society, which is precisely the type of segregation that the Fourteenth Amendment cannot countenance." 760 F.3d. at 384.

The Seventh Circuit in *Baskin* did not reach the issue under the Due Process Clause, unanimously concluding instead that Indiana and Wisconsin's marriage bans violate the Equal Protection Clause. Recognizing that "this is a case in which the challenged discrimination is . . . along suspect lines," the Seventh Circuit applied elevated scrutiny, requiring "a compelling showing that the benefits of the discrimination to society as a whole clearly outweigh the harms to its victims." 766 F.3d at 654-655. After closely examining each argument offered by the states, the Seventh Circuit found that none justified the denial of marriage to same-sex couples:

> [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. As we have been at pains to explain, the grounds advanced by Indiana . . . for [its] discriminatory policies are not only conjectural; they are totally implausible.

Id. at 671.

The most recent circuit to disagree with the Sixth Circuit's majority, just weeks before its opinion was issued, was the Ninth Circuit in *Latta.* That court also applied a heightened form of scrutiny to determine that marriage bans in Idaho and Nevada violated the Equal Protection Clause of the Fourteenth Amendment. 2014 U.S. App. LEXIS 19620. It rejected the states' arguments that the bans were justified because they promoted child welfare through "procreative channeling" and "complementary" opposite-sex parenting. *Id.* at 30-31.

In short, although virtually every lower court disagrees with Judge Sutton's conclusions, they do so "in many ways, often more than one way in the same decision." App. at 19a. These disparities underscore the need for review by this Court.

B. The Circuits Are Split as to the Level of Scrutiny which Should Be Used to Analyze Marriage Restrictions

The circuit split on the issue of the applicable standard of review in itself warrants a grant of certiorari. Every circuit court to have ruled on same-sex marriage restrictions since this Court decided *Windsor* has

considered the level of scrutiny differently. According to the opinion below, rational basis is the correct standard to apply to Kentucky's discriminatory marriage restrictions based upon Sixth Circuit precedent as well as the majority's view that Plaintiffs are seeking recognition of a "new" right. App. at 27a. This view could not be more distinct from the level of scrutiny applied by the other circuits.

The Seventh Circuit analyzed whether sexual orientation constitutes a suspect classification by tracking the approach taken by this Court in applying heightened scrutiny. 766 F.3d at 671 (citing the analysis of *Windsor* in *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 483 (9th Cir. 2014)). Rather than presume the constitutionality of the ban, Judge Posner analyzed the "fit" between the classification and the governmental objective, weighing the degree of harm or intrusion imposed on the individuals burdened by the law. In doing so, the court took into account factors this Court has used to determine whether a particular classification is suspect, thus triggering heightened scrutiny. *See Rodriguez*, 411 U.S. 1, 28. As the Seventh Circuit explained, the difference between its approach and the more conventional heightened scrutiny approach "is semantic rather than substantive." *Baskin*, 766 F.3d at 656. Following *SmithKline*, the Ninth Circuit also applied heightened scrutiny. *Latta*, 2014 U.S. App. LEXIS 19620 at 19.

The Fourth and Tenth Circuits, however, forwent the *SmithKline/Rodriguez* analysis and applied strict scrutiny because the laws impinged a fundamental right. The Fourth Circuit considered each of the rationales offered by the state to justify Virginia's Marriage Prohibition—

federalism, history and tradition, safeguarding marriage, "responsible procreation," and "optimal childrearing"—and concluded that none were sufficient to satisfy strict scrutiny. *Bostic*, 760 F.3d at 384. The Tenth Circuit rejected the four justifications offered by Utah: the effects on child rearing, the creation of stable homes, interests in population, and religious freedom. *Kitchen*, 755 F.3d at 1219. The court assumed that Utah's interests in encouraging reproduction, "fostering a child-centric marriage culture" and "children being raised by their biological mothers and fathers" qualified as compelling, but found that these justifications "falter[ed] on the means prong of the strict scrutiny test," as the laws at issue were not narrowly tailored to achieve their purpose. *Id.* at 1219.

A substantial majority of federal court decisions have applied some form of heightened scrutiny to prohibitions on same-sex marriage.[2] Several district courts have applied rational basis review but nonetheless invalidated marriage bans under the Equal Protection Clause,

2. *See*, *e.g.*, *Condon v. Haley*, No. 2:14-4010-RMG (D.S.C. Nov. 12, 2014), *Marie v. Moser*, 2014 U.S. Dist. LEXIS 157093 (D. Kan. Nov. 4, 2014), *McGee v. Cole*, 2014 U.S. Dist. LEXIS 158680 (S.D. W. Va. Nov. 7, 2014); *Lawson v. Kelly*, 2014 U.S. Dist. LEXIS 157802 (W.D. Mo. Nov. 7, 2014); *Brenner v. Scott*, 999 F. Supp. 2d 1278 (N.D. Fla. Aug. 21, 2014); *Bostic*, 760 F.3d 352; *Bishop v. Smith*, 760 F.3d 1070 (10th Cir. July 18, 2014)*; Kitchen*; *Baskin v. Bogan*, 12 F. Supp. 3d 1144 (S.D. Ind. June 25, 2014); *Wolf v. Walker*, 986 F. Supp. 2d 982 (W.D. Wis. June 6, 2014); *Whitewood v. Wolf*, 992 F. Supp. 2d 410 (M.D. Pa. May 20, 2014); *Latta v. Otter,* 2014 U.S. Dist. LEXIS 66417 (D. Idaho May 13, 2014); *Henry v. Himes,* 2014 U.S. Dist. LEXIS 51211 (S.D. Ohio Apr. 14, 2014); *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968 (S.D. Ohio December 23, 2013); *Kitchen v. Herbert*, 961 F. Supp. 2d 1181 (D. Utah December 20, 2013).

including the Kentucky court below.[3] No circuit court, until now, has held that rational basis review should apply, or that marriage restrictions would survive even that low level of scrutiny. As recognized by the *Latta* court, "These courts have applied varying types of scrutiny or have failed to identify clearly any applicable level, but irrespective of the standard have all reached the same result." *Latta v. Otter*, 2014 U.S. App. LEXIS 19828 at 16 (9th Cir. Idaho Oct. 15, 2014) (*per curiam* order dissolving stay of the district court's order enjoining enforcement of Idaho's marriage bans).

Nonetheless, the Sixth Circuit applied rational basis review, and determined that Kentucky's laws easily survive. The Court should grant certiorari in order to clarify the appropriate standard of review for marriage restrictions and other sexual orientation classifications.

C. The Circuits Are Split as to the Nature of Marriage as a Fundamental Right

In characterizing Plaintiffs' claim as one for recognition of "a new constitutional right," the court below departed sharply from the holdings of its sister circuits, creating yet another conflict warranting this Court's review. *See* App. at 36-37. Plaintiffs argued below that the right to marry is a *fundamental* right, and hardly a "new" one. Marriage is a liberty interest to which all

3. *See Love,* App. at 96a; *Geiger v. Kitzhaber,* 994 F. Supp. 2d 1128 (D. Or. 2014); *DeBoer v. Snyder*, 973 F. Supp. 2d 757 (E.D. Mich. 2014); *Tanco v. Haslam,* 7 F. Supp. 3d 759 (M.D. Tenn. 2014); *DeLeon v. Perry*, 975 F. Supp. 2d 632 (W.D. Tex. 2014); *Bourke,* App. at 124a; *Bishop v. Smith*, 962 F. Supp. 2d 1252 (N.D. Okla. 2014).

individuals are entitled. *Meyer v. Neb.*, 262 U.S. 390, 399 (1923). It is a right which is "central to personal dignity and autonomy." *Lawrence*, 539 U.S. at 574. It has been described as "the most important relation in life," and "of fundamental importance for all individuals." *Zablocki*, 434 U.S. at 384. Marriage is "one of the basic civil rights of [humankind]." *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942). In accord with the precedents of this Court, Plaintiffs argued below that one cannot reconcile the concept of marriage as a fundamental right for all individuals with the denial of that right to persons whose partners are of the same sex.

Other circuits to decide this issue are in accord with this interpretation, and in conflict with the court below. The Fourth Circuit in *Bostic* rejected the states' argument that the right at issue was a new right to *same-sex* marriage, rather than the fundamental right to marry. 760 F.3d at 376. Relying on this Court's marriage jurisprudence, the Fourth Circuit concluded that "the broad right to marry is not circumscribed based on the characteristics of the individuals seeking to exercise that right." *Id*. In *Kitchen*, the Tenth Circuit rejected Utah's argument that the fundamental right to marry is limited to opposite-sex couples, reasoning that "in describing the liberty interest at stake, it is impermissible to focus on the identity or class-membership of the individual exercising the right." 755 F.3d at 1215. Thus, both courts concluded that same-sex couples have a fundamental right to marry.

The scope of the fundamental right to marry is therefore a critical issue which, given the sharp division that now exists between the circuits, can only be resolved by this Court.

D. The Circuits Are Split as to the Meaning of *Windsor*

Similarly, the issue of whether *Windsor* is a case about individual rights, or about federalism, or something else, is a question that now divides the circuit courts. As the Sixth Circuit states, "Plaintiffs read [*Windsor*] as an endorsement of heightened review . . . [and] as proof that individual dignity, not federalism, animates *Windsor*'s holding." App. at 32a. Petitioners are not alone in this sentiment; it is one shared by nearly every federal court to have decided the issue. *See Latta*, 2014 U.S. App. LEXIS 19620 at 46; *Bostic*, 760 F.3d at 378-79; and *Kitchen*, 755 F.3d at 1207. These lower courts did not pull their conclusions out of thin air. In *Windsor*, this Court clearly articulated that the Fifth and Fourteenth Amendments were implicated by the government's infringement upon *individual rights.* 133 S. Ct. at 2695 (*See also Id.* at 2706 (Scalia, J. dissenting) and *Id.* at 2714 (Alito, J., dissenting)). However, Justice Roberts' dissent suggests that even *this* Court is divided as to the ultimate meaning of *Windsor.*[4]

On the issue of recognition, the Sixth Circuit majority holds that *Windsor* actually "reinforces" the rights of states to discriminate against gay and lesbian couples. App. at 39a. Even conceding that *Windsor* deals primarily with federalism, this interpretation is difficult to reconcile with the plain language of the majority opinion in *Windsor*:

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4. "I think the majority goes off course . . . but it is undeniable that its judgment is based on federalism." *Id.* at 2697 (Roberts, J., dissenting).

> What has been explained to this point should more than suffice to establish that the principal purpose and the necessary effect of this law are to demean those persons who are in a lawful same-sex marriage. This requires the Court to hold, as it now does, that DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution.

133 S. Ct. at 2695. Review is warranted to correct the Sixth Circuit's failure to follow *Windsor* on this point, in conflict with the other courts of appeals.

E. The Circuits are Split as to the Controlling Effect of *Baker v. Nelson*

The Sixth Circuit acknowledges that *Windsor* recognizes marriage –specifically same-sex marriage – as "a dignity and status of immense import." App. at 44a. Yet the court inexplicably holds that that outcome does not "clash" with *Baker v. Nelson's* pronouncement that the issue of same-sex marriage did not raise "a substantial federal question." This, too, is diametrically opposed to the way the other circuits have viewed *Baker* (and by extension, other summary decisions of its kind).

For example, the Fourth Circuit held that *Baker* did not control because it was a summary dismissal, this Court decided *Windsor* without mentioning *Baker*, and "[e]very federal court to consider this issue since" *Windsor* had determined that *Baker* was no longer controlling. *Bostic*, 760 F.3d at 373. Likewise, the Tenth Circuit held that "it is clear that doctrinal developments foreclose the

conclusion that the issue is, as *Baker* determined, wholly insubstantial." *Kitchen*, 755 F.3d 1208. The Seventh Circuit mentions *Baker* just once, and puts it down forcefully: "*Baker* was decided in 1972—42 years ago and the dark ages so far as litigation over discrimination against homosexuals is concerned." *Baskin,* 766 F.3d at 660. Similarly dismissive language was used by the Ninth Circuit: "Although these cases did not tell us the *answers* to the federal questions before us *Windsor* and *Lawrence* make clear that these are substantial federal *questions* we, as federal judges, must hear and decide." *Latta*, 2014 U.S. App. LEXIS 19620 at *25 n.6 (emphasis original).

Nonetheless, the Sixth Circuit's view is that these courts have overstepped their bounds, and instead ought to throw up their hands and direct litigants to the entirely unhelpful opinion in *Baker*. Indeed, Judge Sutton goes so far as to opine that non-reliance on *Baker* would lead to lower courts "anticipatorily overrul[ing] all manner of Supreme Court decisions[.]"*Id*. By that logic, the last word on marriage equality under the federal Constitution was delivered by the Minnesota Supreme Court in 1971.

The clear consensus prior to the Sixth Circuit's ruling was that substantial doctrinal developments since 1972, culminating in this Court's decision in *Windsor*, have made reliance on *Baker* untenable. The other courts of appeals recognized that, while "the question presented in *Windsor* is not identical to the question" of whether state-level discrimination against same-sex couples violates the Constitution, the critical point is that *Windsor* could not have been decided as it was if the constitutional status of same-sex couples did not raise a substantial federal question. *Kitchen*, 755 F.3d at 1206.

Doctrinal developments have made plain that the core issues raised by this petition – whether Petitioners possess a fundamental right to marriage, whether their relationships are entitled to equal protection of the laws, and the appropriate standard by which to judge those questions – are substantial. While Petitioners believe the Sixth Circuit's reliance on *Baker* is clear error, a grant of certiorari in this case would give the Court the opportunity to resolve an important sub-question, i.e., what constitutes doctrinal developments sufficient to permit lower courts to discount a summary decision.

II. THE QUESTIONS PRESENTED ARE EXCEPTIONALLY IMPORTANT

There is little doubt this case presents "an important question of federal law that has not been, but should be, settled by this Court." SUP. CT. R.10(c); *See, e.g., Olmstead v. Zimring*, 527 U.S. 581, 596 (1999) ("We granted certiorari in view of the importance of the question presented to the States and affected individuals."). At stake in this case is whether states may, within constitutional parameters, relegate same-sex couples' relationships to a "second-tier" status, and by doing so "demean the couple" and "humiliate . . . children now being raised by same-sex couples," *Windsor*, 133 S. Ct. at 2694. Or, conversely, whether the Fourteenth Amendment demands the equal dignity of same-sex couples and their children. No less at issue, as the dissent below recognized, is the welfare of American children being raised by same-sex parents. App. at 62a.

Aside from the salient questions of fundamental rights and dignity which, if left unanswered, would unjustly

disadvantage thousands of American couples in loving, committed, stable relationships, there are additional consequences of letting the Sixth Circuit's Opinion go unchecked.

A. If Left Unresolved, the Sixth Circuit's Opinion Will Create Inconsistent and Absurd Results Within and Between States, and Between States and Federal Governments

The specter of "chaos" has often been invoked by both sides of the marriage debate over the last twenty years.[5] In the ten years since *Goodridge*, there has indeed been tension between the federal government and the states, and among the states themselves, as to the status of same-sex marriage. This tension continued to grow as some states (and countries) began recognizing same-sex marriage and others reacted with bans. *Windsor* resolved this tension in part, but has created new issues requiring resolution, which culminated in the various and sundry opinions below.

According to the Sixth Circuit, this Court's October 6, 2014 denial of certiorari in the cases from the Fourth, Seventh, and Tenth circuits should be disregarded. App. 18a-19a. But even if one concedes that these denials should be held for naught as legal precedent, they are undeniably relevant in a practical sense. These denials led to numerous marriages in at least 12 different states.

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5. Associated Press, *Kentucky Governor Warns of "Legal Chaos" in Same-Sex Marriage Case*, CBS News (March 4, 2014), http://www.cbsnews.com/news/kentucky-governor-warns-of-legal-chaos-in-same-sex-marriage-case/ (accessed Nov. 14, 2014).

More than thirty states now allow same-sex marriage, and approximately 60% of the U.S. population lives in a state which allows consenting, loving same-sex couples to marry. While there are now states which must, under the federal Constitution, recognize the out-of-state marriages of same-sex couples, states in the Sixth Circuit, under Judge Sutton's interpretation of the same Constitution, need not do so. While Governor Beshear's fear of "legal chaos," is a dramatization, it is no exaggeration to say the legal landscape is in an unprecedented state of disorder.

B. The Sixth Circuit's Approach Would Allow Federal Courts to Abdicate their Role under Article III in Controversial Cases

The theme of the Sixth Circuit's opinion is clear: courts should wait for the democratic process to run its course. It identified the dichotomy as "the democracy-versus-litigation path to same-sex marriage[.]" App. 19a. The court reiterated its view by way of a series of rhetorical questions, e.g.: "Isn't the goal to create a culture in which a majority of citizens dignify and respect the rights of minority groups through majoritarian laws rather than through decisions issued by a majority of Supreme Court Justices?" *Id.* at 53a.

The court below cited no case law to support this utopian vision of judicial restraint. It seemed not to recognize the inherent danger in such reasoning, that federal courts will simply pass on issues that, in the subjective view of the judges, would be better addressed by popular vote. The dissent recognizes this danger, and lambasts the majority for it. Judge Daughtrey writes, "If we in the judiciary do not have the authority, and

indeed the responsibility, to right fundamental wrongs left excused by a majority of the electorate, our whole intricate, constitutional system of checks and balances, as well as the oaths to which we swore, prove to be nothing but shams." *Id*. at 95a.

The majority writes that when a "federal court denies the people suffrage over an issue long thought to be within their power, they deserve an explanation." *Id.* at 19a. The explanation, of course, is the United States Constitution. There is nothing particularly novel about the invalidation of discriminatory legislation by an Article III Court. Courts have been shaping the contours of fundamental rights under the Fourteenth Amendment for as long as the Amendment has existed. "The Equal Protection Clause [denies] to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute." *Reed v. Reed*, 404 U.S. 71, 75-76 (1971) (quotations omitted). Federal courts have repeatedly upheld the supremacy of the Fourteenth Amendment over state power in domestic relations. *See Loving*, 388 U.S. at 7; *Zablocki,* 434 U.S. at 383-385; *see also Sturgell v. Creasy*, 640 F.2d 843, 850-851 (6th Cir. 1981).

Yet, the Sixth Circuit gleans from *Dandridge v. Williams,* 397 U.S. 471 (1970), a principle of near-total judicial deference to state prerogatives, and from *Windsor* that "regulation of domestic relations is an area that has long been regarded as a virtually exclusive province of the States." 133 S. Ct. at 2691. But the States' sovereignty over domestic relations is not without constitutional limits, and the federal judiciary is not restrained from striking

down discriminatory laws which conflict with the Due Process and Equal Protection clauses of the Fourteenth Amendment. Though each state does retain "vast leeway in the management of its internal affairs," federal courts have the power, and duty, to strike down state laws which "[run] afoul of a federally protected right." *Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623, 1638 (2014). Indeed, as this Court has already stated in the context of same-sex marriage that, "state laws defining and regulating marriage, of course, must respect the constitutional rights of persons." *Windsor*, 133 S. Ct. at 2691 (citing *Loving*, 388 U.S. at 7).

It takes little imagination to perceive disturbing implications of the court's hands-off approach. For example, as hinted at by the dissent, a ballot measure reverting women to the status of chattel within the context of marriage – a status which most women "enjoyed" until very recently in history –would undeniably also be in keeping with "norm[s] that our society (like all others) [have] accepted for centuries." App. 26a. This reversion to a despicable "tradition" would not absolve the federal courts of overturning it simply because it was the subject of a popular vote.

Another example is demonstrated by *Plessy v. Ferguson*:

> The object of the [Fourteenth] [A]mendment was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished

> from political, equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power.

163 U.S. 537, 544 (1896). *Plessy* enshrined a "long-accepted usage" of the Fourteenth Amendment better known as "separate-but-equal," which lasted eighty-seven years after ratification. It permitted racial discrimination in housing, public accommodations, and schools. And it turned a blind eye to anti-miscegenation laws, which predated the Revolution and lasted more than a century beyond the Civil War. "Separate-but-equal," as this Court is well aware, was not overturned by popular vote.

Similarly, federal and state courts alike, relying on "traditional" conceptions of race relations and state sovereignty, repeatedly upheld the constitutionality of racist state marriage restrictions prior to *Loving*. [6] "Laws forbidding the intermarriage of the two races

6. The Sixth Circuit's brief analysis of *Loving* – a case which is perhaps the most important precedent aside from *Windsor* – consists of one paragraph. (Appx. 38a-39a.) *Loving*, according to the lower court, bolsters the *states'* arguments because the denial of a marriage license to "a gay African-American male and a gay Caucasian male" would not have violated the Fourteenth Amendment at that time. In hindsight, it is difficult to argue that such result was injurious to American democracy.

. . . have been universally recognized as within the police power of the State." *Id*. at 545. Had this Court relied upon a "long-accepted usage" approach to Fourteenth Amendment interpretation, as the Sixth Circuit suggests it should, both *Brown v. Board of Education* and *Loving v. Virginia* would have been decided quite differently, because the issues would have been subject to a 'wait-and-see' approach. In hindsight, it is difficult to argue that the results in these cases were injurious to American democracy.

Aside from clear-cut legal issues, as a practical matter, waiting for the people to decide an issue of fundamental individual rights by popular vote is often an exquisitely bad idea. For example, in 2000, Alabama became the last state to remove a law banning marriage between a "Negro and a Caucasian."[7] The ballot initiative to purge the law succeeded, but 40 percent of Alabaman voters were against it.[8] It is inconceivable that in 1967, when *Loving v. Virginia* was decided, such an initiative would have passed. Indeed, to assume that it would have passed 10 or even 20 years later is an expression of purest optimism.

Elsewhere in its opinion, the Sixth Circuit explains that the democratic process will work for same-sex couples because they are not quite as bad off as other minority groups throughout American history. "It is not a setting in which the recalcitrance of Jim Crow demands judicial, rather than we-can't-wait-forever legislative, answers." App. 46a (citing *Brown v. Bd. Of Educ*., 347 U.S. 483

7. Alabama State Constitution, Article IV, Section 102.

8. *See* Suzy Hansen, *Mixing it Up*, Salon (March 8, 2001), http://www.salon.com/2001/03/08/sollors/. (accessed Nov. 14, 2014).

(1954)). In the majority's view, Petitioners' families *can* wait. If they would simply be patient, and perhaps try a little harder, the democratic process will surely vindicate them. The majority's optimism does nothing to address the palpable harm suffered by thousands of couples in the Sixth Circuit who are *today* relegated to second-class status.

Furthermore, while the Sixth Circuit prefers to abdicate its role in the federal judiciary in favor of the "democratic process," the majority fails to recognize that this "process" is over. The provision was put on the ballot by the legislature and approved by a popular vote in 2004. There is no ongoing political process in Kentucky that would justify the "wait-and-see" approach the court below prefers. *Cf. United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938) (noting that "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation," might be "subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation."). In this case, the democratic process failed to protect the unpopular minority from the majority.

Petitioners and other individuals in that minority deserve a definitive answer from this Court. The Sixth Circuit does not identify any case in which any court has been constrained to wait and see what the electorate intended to do to address individual constitutional rights. That is likely because "wait-and-see" is not a legal doctrine, nor a legitimate excuse, upon which the rights of individuals may be deferred. This Court should accept certiorari if for no other reason than to resolve the issue

of the precise role of federal courts in determining issues of individual rights under the Fourteenth Amendment.

III. THIS CASE IS AN EXCELLENT VEHICLE TO RESOLVE THE QUESTIONS PRESENTED

While all of the cases reversed by the Sixth Circuit below present substantially identical questions for this Court to resolve, the *Love* and *Bourke* cases are particularly well-suited for review. There are in fact two separate cases: one involving recognition, the other involving the right to marry. If the Court is disinclined to resolve the question regarding the right to marry (the *Love* case), it can choose to resolve only the recognition issue by granting certiorari for the *Bourke* case alone. Petitioners are directly harmed by Kentucky's legal framework, and there is no dispute that Governor Beshear has the duty and authority to enforce and uphold Kentucky's laws. The question that this Court granted certiorari to review in *Hollingsworth v. Perry,* 133 S. Ct. 2652 (2013), is therefore presented in this case free of jurisdictional obstacles.

Moreover, the factual record below is uncomplicated. The Western District of Kentucky based its opinions almost exclusively on the well-established precedents of this Court. Petitioners and their attorneys are not polarizing political figures, nor are they intimately connected with any special interest groups. They are simply private individuals who care deeply about the issues discussed above. This case is therefore an excellent vehicle for issues which the Court almost inevitably must address.

CONCLUSION

For the foregoing reasons, petitioner requests that the Court grant the petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

Dated:

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