UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

MARILYN RAE BASKIN and ESTHER FULLER; BONNIE EVERLY and LINDA JUDKINS; DAWN LYNN CARVER and PAMELA RUTH ELEASE EANES; HENRY GREENE and GLENN FUNKHOUSER, individually and as parents and next friends of C.A.G.; and NIKOLE QUASNEY and AMY SANDLER, individually and as parents and next friends of A.Q.-S. and M.Q.-S.,	
Plaintiffs,	
v.	
PENNY BOGAN, in her official capacity as BOONE COUNTY CLERK; KAREN M. MARTIN, in her official capacity as PORTER COUNTY CLERK; MICHAEL A. BROWN, in his official capacity as LAKE COUNTY CLERK; PEGGY BEAVER, in her official capacity as HAMILTON COUNTY CLERK; WILLIAM C. VANNESS II, M.D., in his official capacity as the COMMISSIONER, INDIANA STATE DEPARTMENT OF HEALTH; and GREG ZOELLER, in his official capacity as INDIANA ATTORNEY GENERAL,	Civil Action No.: 1:14-cv-00355-RLY-TAB
Defendants.	

PLAINTIFFS QUASNEY'S AND SANDLER'S OPPOSITION TO DEFENDANTS' MOTION FOR STAY OF PRELIMINARY INJUNCTION PENDING APPEAL

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INTRODUCTION

Following extensive briefing and oral argument, this Court thoughtfully and thoroughly analyzed the parties' claims and granted a preliminary injunction for Plaintiffs Niki Quasney ("Niki") and Amy Sandler ("Amy"). Consistent with its April 18, 2014 Order on Plaintiffs' Motion for a Temporary Restraining Order (Dkt. 51, "TRO Order"), the Court found that Niki and Amy have demonstrated a likelihood of success on the merits; that they would suffer irreparable harm absent an injunction; that the balance of hardships weighed in their favor; and that the injunction would serve the public interest. (*See* Dkt. 65, Entry on Plaintiffs' Motion for a Preliminary Injunction ("PI Order") at 13.) The Court correctly enjoined Defendants from enforcing Indiana Code § 31-11-1-1(b) against Niki and Amy, and ordered Defendants to recognize their valid Massachusetts marriage. (*Id.* at 13-14.)

Defendants ask this Court to disregard completely the standard for a stay. Granting Defendants' motion would ignore the irreparable harm to Niki and Amy that the Court has found will occur without an injunction, and would allow the State of Indiana to continue enforcing a statute against Niki and Amy that this Court already has concluded is likely unconstitutional—a conclusion squarely in line with every post-*Windsor* decision that has addressed constitutional challenges to state-law marriage bans like Indiana's.[1] A stay of an injunction pending an appeal is a request for extraordinary relief, and Defendants fall far short of satisfying their heavy burden here. And Defendants' reliance on the stay granted by the U.S. Supreme Court in *Kitchen v. Herbert* is unavailing because the injunction here: (1) grants narrow, as-applied relief to one couple based on a developed record documenting singular urgency and depth of harm; and (2)

[1] Indeed, just last Friday—the day after this Court granted Plaintiffs' motion for a preliminary injunction—yet another court struck down a marriage ban as unconstitutional, this time in Arkansas. (*See* May 9, 2014 Order Granting Summary Judgment in Favor of the Plaintiffs, *Wright et al. v. State of Arkansas, et al.*, Case No. 60CV-13-2662 (Pulaski Cty. Cir. Ct., Ark.) (attached hereto as Ex. A).)

requires only that Defendants recognize ***one*** existing marriage that is already respected by seventeen other states and by the federal government for certain purposes. By contrast, the *Kitchen* injunction granted statewide facial relief to all same-sex couples in Utah, which induced over a thousand couples in just a few days to alter their marital status by seeking marriage licenses and getting married.[2] Accordingly, the Court should deny Defendants' motion to stay the injunction.

I. DEFENDANTS ARE NOT ENTITLED TO THE "EXTRAORDINARY RELIEF" OF STAYING THE INJUNCTION PENDING THE APPEAL

A. Defendants Face a High Bar in Seeking a Stay of the Injunction.

"There is no automatic stay of an injunction pending appeal" and such "a stay is not a matter of right." *Barker v. AD Conner*, No. 11 C 2255, 2011 WL 3628850, at *1 (N.D. Ill. Aug. 17, 2011). To the contrary, "a stay is considered '***extraordinary relief***' for which the moving party bears a '***heavy burden***.'" *Hinrichs v. Bosma*, 410 F. Supp. 2d 745, 748-49 (S.D. Ind. 2006) (citation omitted, emphases added); *see also Adams v. Walter*, 488 F.2d 1064, 1065 (7th Cir. 1973) (a motion for injunction or stay pending appeal seeks an "extraordinary remedy").

In determining whether to grant this extraordinary relief, courts generally consider the same factors as when deciding whether to grant a preliminary injunction. That is, the court will "consider the moving party's likelihood of success on the merits, the irreparable harm that will result to each side if the stay is either granted or denied in error, and whether the public interest favors one side or the other." *See In re A & F Enters., Inc. II*, 742 F.3d 763, 766 (7th Cir. 2014) (citations omitted); *accord Hinrichs v. Bosma*, 440 F.3d 393, 396 (7th Cir. 2006).[3]

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[2] *See Tanco v. Haslam*, No. 3:13-cv-01159, 2014 WL 1117069, at *3 (M.D. Tenn. Mar. 20, 2014) (noting that "over a thousand same-sex marriage licenses were issued in Utah" between the district court order and the Supreme Court stay).

[3] Although different rules govern the power of district courts and the courts of appeals to stay an order pending appeal (FED. R. CIV. P. 62(c) and FED. R. APP. P. 8(a), respectively), "[u]nder both Rules . . . the factors regulating the issuance of a stay are generally the same[.]" *ADT Sec. Servs., Inc. v. Lisle-Woodridge Fire*

Importantly, however, to the extent Defendants suggest that the burden to establish a "strong showing" of success on the merits for a stay is *lower* than the requirement of a "likelihood of success" for an injunction (*see* Dkt. 68, Defs.' Mot. for Stay Pending Appeal ("Mot.") at 2, citing *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)), they are incorrect. The Seventh Circuit has explained that a burden for a stay pending an appeal is ***higher*** where the court has previously evaluated arguments on the success scale—as this Court has already done in ruling on the TRO and PI motions. *See Matter of Forty-Eight Insulations, Inc.*, 115 F.3d 1294, 1301 (7th Cir. 1997) ("[I]n the context of a stay pending appeal, where the applicant's arguments have already been evaluated on the success scale, the applicant must make a ***stronger*** threshold showing of likelihood of success to meet his burden.") (emphasis added) (collecting cases). Put otherwise, while a preliminary injunction may be granted merely upon showing that that the movant's chance of success is "better than negligible" (*id.*), to obtain a stay of an injunction pending appeal Defendants here must "demonstrate a ***substantial showing*** of likelihood of success, not merely the possibility of success[.]" *Id.* (emphasis added); *see also, e.g.*, *Hinrichs*, 440 F.3d at 396 (explaining that in seeking a stay pending appeal, the movant must "show that it has a significant probability of success on the merits").[4]

Finally, in the context of a stay pending an appeal, the Seventh Circuit has made clear that a movant's failure to demonstrate ***either*** a substantial likelihood of success or irreparable harm is dispositive, and compels denial of the stay "without further analysis." *See Matter of Forty-Eight Insulations*, 115 F.3d at 1301 ("[I]f the movant does not make the requisite showings on either of

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Protection Dist., 807 F. Supp. 2d 742, 744 (N.D. Ill. 2011) (citation omitted). Thus, Seventh Circuit decisions applying Federal Rule of Appellate Procedure 8(a) are instructive in determining whether a stay under Federal Rule of Civil Procedure 62(c) is proper.

[4] *See also, e.g.*, *Andy's Restaurant & Lounge, Inc. v. City of Gary*, No. 2:01 CV 327, 2005 WL 2430591, at *1 (N.D. Ind. Oct. 3, 2005) (recognizing that the standard under Rule 62, "though similar to that for issuing an injunction in the first instance under Rule 65, places a higher burden upon the movant than required by Rule 65.") (citations omitted).

these two factors [likelihood of success or irreparable harm] . . . the stay should be denied without further analysis."); *see also id.* (affirming "denial of the stay" where movants "have not met their threshold burden to show likelihood of success").[5] As detailed below, Defendants have not demonstrated either likelihood of success or irreparable harm (or any remaining factors, for that matter), and there are multiple dispositive reasons why their request for a stay should be denied.

B. Defendants Have Failed to Make a "Substantial Showing" of Likelihood of Success on the Merits.

In seeking a stay, Defendants have not made any showing—let alone a substantial one—that they are likely to succeed on the merits on their appeal. Instead, Defendants largely rehash the same arguments they had raised in their opposition to Plaintiffs' motion for a preliminary injunction and at oral argument. For example, Defendants continue to argue that *Baker v. Nelson*, 409 U.S. 180 (1972), precludes Plaintiffs' claims here; that *United States v. Windsor*, 133 S. Ct. 2675 (2013), is not relevant; and that recognition of marriages from other states is a matter of comity, not a right. (*See* Mot. at 12-14.) The Court has already correctly rejected those arguments when it issued the preliminary injunction, and it should do the same now.

To say that Defendants face an uphill battle on the merits is an understatement. To date, ***not one*** post-*Windsor* decision has upheld a state-law marriage ban like Indiana's, and an ever-growing number of federal district courts nationwide have concluded that these bans violate the U.S. Constitution. (*See* Dkt. 36, Mem. in Supp. of Pls.' Mot. for Prelim. Inj. ("PI Mem.") at 7 & n.1) (collecting cases); TRO Order at 5 (same).) This "wave of recent cases finding that similar state statutes and state constitutional amendments violate the Equal Protection Clause and the Due Process Clause" (TRO Order at 5)—particularly combined with the lack of any recent authority to

[5] *See also*, *e.g.*, *Bond v. Chase Home Finance LLC*, Nos. 12–C–1050, 12–3614, 2012 WL 5831198, at *3 (E.D. Wis. Nov. 16, 2012) (citing *Matter of Forty-Eight Insulations* and holding that "[i]f the movant fails to make the requisite showing of likelihood of success, or irreparable harm, or both, the analysis must end there and the stay must be denied.").

support Defendants' position—makes clear that Defendants have little chance of prevailing on appeal, and thus fall far short of making the "substantial showing" of likelihood of success that is necessary to support a stay.

Defendants have provided no basis to distinguish Indiana's marriage ban from many others that have been found unconstitutional. Indeed, Defendants' ***sole*** justification in support of Indiana's marriage ban—a purported interest in "encouraging responsible procreation" (Mot. at 15)—is an especially weak argument in the context of the recognition of an existing marriage of two women who have two young children. And what is more, even when raised in support of discrimination in the right to marry, the procreation shibboleth has been squarely rejected by the courts. This Court has recognized that post-*Windsor*, "district courts from around the country have rejected the idea that a state's non-recognition statute bears a rational relation to the state's interest in traditional marriage as a means to foster responsible procreation and rear those children in a stable male-female household." (PI Order at 7 (collecting cases).) Defendants have offered no reason why the Seventh Circuit will conclude otherwise. (*See id.* at 8 ("The court is not persuaded that, at this stage, Indiana's anti-recognition law will suffer a different fate than those around the country.").)

This purported "responsible procreation" interest cannot withstand scrutiny for multiple reasons. First, encouraging responsible procreation bears no logical relationship to the Indiana marriage ban—because, as the Court has already recognized, "Indiana generally recognizes marriages of individuals who cannot procreate" and also recognizes out-of-state different-sex marriages without "inquir[ing] whether the couple had the ability to procreate unintentionally." (TRO Order at 7-8; *accord* PI Order at 9 ("Indiana's non-recognition of Plaintiffs' marriage is a departure from the traditional rule in Indiana."); *see also, e.g.*, *Bishop v. U.S. ex rel. Holder*, 962 F. Supp. 2d 1252, 1291-92 (N.D. Okla. 2014) (explaining that this "purported justification simply

'makes no sense' in light of how [the State] treats other non-procreative couples desiring to marry") (citation omitted).) As this Court put it, "this cannot be the entire rationale underlying the traditional marriage." (TRO Order at 7.) Multiple recent decisions have thus held that a purported interest in encouraging responsible procreation cannot sustain a marriage ban. *See, e.g.*, *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1211-12 (D. Utah 2013) ("[A]ny relationship between [Utah's marriage ban] and the State's interest in responsible procreation 'is so attenuated as to render the distinction arbitrary or irrational.'") (citation omitted).[6] Put simply, "[i]t is implausible to think that denying two men or two women the right to call themselves married could somehow bolster the stability of families headed by one man and one woman." *De Leon*, 2014 WL 715741, at *16 (citation and quotation marks omitted).

More importantly, far from furthering responsible procreation and thus promoting the welfare of Indiana children, the marriage ban in fact ***harms*** children. While "the welfare of our children is a legitimate state interest[,] . . . limiting marriage to opposite-sex couples fails to further this interest. Instead, ***needlessly stigmatizing and humiliating children*** who are being raised by the loving couples targeted [by the State's marriage ban] betrays that interest." *Bostic*, 970 F. Supp. 2d at 478 (emphasis added); *see also Bishop*, 962 F. Supp. 2d at 1292 ("If a same-sex couple is capable of having a child with or without a marriage relationship, and the articulated

[6] *See also Bostic v. Rainey*, 970 F. Supp. 2d 456, 478 (E.D. Va. 2014) ("[R]ecognizing a gay individual's fundamental right to marry can in no way influence whether other individuals will marry, or how other individuals will raise families. 'Marriage is incentivized for naturally procreative couples to precisely the same extent regardless of whether same-sex couples (or other non-procreative couples) are included.'") (citation omitted); *Bishop*, 962 F. Supp. 2d at 1291 ("[T]here is no rational link between excluding same-sex couples from marriage and the goals of encouraging 'responsible procreation' among the 'naturally procreative' and/or steering the 'naturally procreative' toward marriage."); *De Leon v. Perry*, — F. Supp. 2d —, 2014 WL 715741, at *16 (W.D. Tex. Feb. 26, 2014) ("Defendants have failed to establish how banning same-sex marriage in any way furthers responsible procreation."); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 972 (N.D. Cal. 2010) ("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 marriage."); PI Order at 7 (collecting cases).

state goal is to reduce children born outside of a marital relationship, the challenged exclusion hinders rather than promotes that goal.").[7]

In short, the sole interest that Defendants have articulated as the justification for the Indiana marriage ban defies logic, and has been squarely rejected by courts as a legitimate rationale for excluding same-sex couples from marriage. Defendants have not—and cannot—"demonstrate a substantial showing of likelihood of success" that a stay requires. *See Matter of Forty-Eight Insulations*, 115 F.3d at 1301. This lack of showing is dispositive, and renders it unnecessary for this Court to consider other factors before denying the stay. *See id.* (holding that failure to show likelihood of success means that the "stay should be denied without further analysis").[8] But even if the Court were to consider the remaining factors, each of them further confirms that Defendants' request for a stay should be denied.

C. Defendants Have Not Shown an Irreparable Injury Absent a Stay.

Irreparable harm to the movant (here, Defendants) is another crucial element that, if not met, warrants denial of a stay without further analysis. *See Matter of Forty-Eight Insulations*, 115 F.3d at 1301; *e.g.*, *In re Kmart Corp.*, 2002 WL 31898195, at *2 (N.D. Ill. Dec. 30, 2002) (where bankruptcy court had "correctly concluded that [the movant] failed to show that it would suffer irreparable harm absent a stay . . . we concur with the . . . decision to deny [the movant's] motion

[7] *See also, e.g.*, *Henry v. Himes*, —F. Supp. 2d—, 2014 WL 1418395, at *16 & n.22 (S.D. Ohio Apr. 14, 2014) (noting that post-*Windsor*, all federal district court decisions to have addressed this issue found that "child welfare concerns weigh exclusively in favor of recognizing the marital rights of same-sex couples") (collecting cases); *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 992-93 (N.D. Cal. 2012) ("The denial of recognition and withholding of marital benefits to same-sex couples does nothing to support opposite-sex parenting, but rather merely serves to endanger children of same-sex parents by denying them the immeasurable advantages that flow from the assurance of a stable family structure, when afforded equal recognition.") (internal quotation marks omitted); *De Leon*, 2014 WL 715741, at *16 ("In fact, rather than serving the interest of encouraging stable environments for procreation, [the marriage ban] hinders the creation of such environments.") (collecting cases).

[8] *See, e.g.*, *Cmty. Pharms. of Ind., Inc. v. Ind. Fam. and Soc. Servs.*, 823 F. Supp. 2d 876, 882 (S.D. Ind. 2011) ("Courts have previously held that where the movant fails to make . . . the requisite showing of likelihood of success, the analysis must 'end there' and the stay must be denied.") (citations omitted); *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S., Inc.*, No. 08-CV-184, 2010 WL 2292932, at *3 (E.D. Wis. June 3, 2010) ("Not being able to shoulder the burden of demonstrating a substantial likelihood of success on appeal is fatal to the plaintiff and its current motion" for a stay.).

without further analysis") (citing *Matter of Forty-Eight Insulations*). Defendants cannot make this showing for at least two reasons: first, there is no harm when a State is prevented from enforcing an unconstitutional statute; and second, Defendants failed to offer ***any*** evidence of actual (let alone irreparable) harm resulting from enjoining as to Niki and Amy the ban on recognition of their existing Massachusetts marriage.

Defendants cannot show that they will be irreparably harmed in the absence of a stay because, as the Court already recognized in this matter, "the state experiences no harm when it is prevented from enforcing an unconstitutional statute." (TRO Order at 10; *see* PI Order at 12; *e.g.*, *Does v. City of Indianapolis*, 1:06-CV-865, 2006 WL 2927598, at *11 (S.D. Ind. Oct. 5, 2006) ("Defendants will not be harmed by having to conform to constitutional standards.").)[9] The Indiana marriage ban is likely unconstitutional, as this Court recognized both in granting the TRO (TRO Order at 8, concluding that "there will likely be insufficient evidence of a legitimate state interest" to justify the ban) and in granting the preliminary injunction to Niki and Amy (PI Order at 7-8, concluding that "[t]he reasons advanced by the State in support of Indiana's non-recognition statute do not distinguish this case from the district court cases cited above"). There is no harm in requiring Defendants to "having to conform to constitutional standards," *Does*, 2006 WL 2927598, at *11, and to recognize Niki and Amy's valid out-of-state marriage as the U.S. Constitution requires.

Defendants have also failed to introduce any actual evidence of irreparable harm here. It is well established that "[t]he threat of irreparable injury . . . must be real, substantial, and immediate, not speculative or conjectural." *Swan v. Bd. of Educ. of City of Chicago*, Nos. 13 C

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[9] *See also Video-Home-One, Inc. v. Brizzi*, No. 1:05-cv-1712, 2005 WL 3132336, at *6 (S.D. Ind. Nov. 22, 2005) (explaining that "the government experiences no harm when prevented from enforcing an unconstitutional statute"); *Annex Books, Inc. v. City of Indianapolis*, 673 F. Supp. 2d 750, 757 (S.D. Ind. 2009) (recognizing, in the First Amendment context, that "under Seventh Circuit precedent there can be no irreparable harm to a municipality when it is prevented from enforcing an unconstitutional statute") (internal quotation marks omitted).

3623, 13 C 3624, 2013 WL 4401439, at *27 (N.D. Ill. Aug. 15, 2013) (citation and quotation marks omitted); *E. St. Louis Laborers' Local 100 v. Bellon Wrecking & Salvage Co.*, 414 F.3d 700, 705 (7th Cir. 2005) ("speculative" harm is not irreparable harm). Defendants have had multiple opportunities to submit to the Court evidence of harm that would result if the State were required to recognize Niki and Amy's marriage. Yet Defendants have offered only speculation and conjecture, and have failed to articulate ***any*** actual evidence of ***any*** harm to the State—let alone an irreparable injury—flowing from recognizing Niki and Amy's Massachusetts marriage.

In fact, as the Court correctly recognized, Defendants did not even attempt to make a showing of irreparable harm at the TRO stage. (Dkt. 51, TRO Order at 10 ("Defendants did not allege that they or the state would suffer irreparable harm if the court granted the TRO.").) Defendants' opposition to Plaintiffs' motion for summary judgment and a preliminary injunction likewise offered no proof of actual harm, positing only that "the public interest in the continuity of Indiana's marriage laws" works against preliminary relief, and that a preliminary injunction "would disrupt public understanding of the meaning and purpose of marriage in Indiana, prompt unreasonable expectations . . . and generally create unnecessary confusion among the public." (Dkt. 56, Defs.' Combined Mem. in Supp. of Mot. for Summary Judgment and in Opp. to Plaintiffs' Mots. for Prelim. Inj. and Mot. for Summary Judgment at 18.)

Perhaps most tellingly, despite the Court asking Defendants point-blank at the May 2, 2014 hearing to identify ***any*** actual harm that has resulted from the State being required to recognize Niki and Amy's marriage, Defendants could "point to ***no specific instances of harm or confusion*** since the court granted the TRO three weeks ago," other than to claim that "the State is harmed in the abstract by not being able to enforce this law uniformly and against Plaintiffs." (*See* PI Order at 12 (emphasis added).) Such abstract harm, unsupported by anything in the record, plainly does not meet the stringent requirements for a stay. And in any event, the Court was correct to find that

this "one injunction affecting one couple in a State with a population of over 6.5 million people . . . will not disrupt the public understanding of Indiana's marriage laws." (*Id.* at 13.)[10]

D. Unlike Defendants, Who Will Suffer *No* Harm Absent a Stay, Amy and Niki Will Suffer Irreparable Harm if the Injunction is Stayed.

Because Defendants have not demonstrated a substantial likelihood of success or irreparable harm, they are not entitled to a stay pending an appeal: "the court's inquiry into the balance of harms is unnecessary" in such a case, "and the stay should be denied without further analysis." *See Matter of Forty-Eight Insulations*, 115 F.3d at 1301. But even if the Court were to balance the harms, the irreparable harm to Niki and Amy if the injunction is stayed plainly outweighs the minimal (if any) harm Defendants might suffer absent a stay.

In ruling on the TRO, the Court has already correctly recognized that the State will "experience[] no harm" if it is prevented from enforcing the unconstitutional Indiana marriage ban (TRO Order at 10), while, conversely, Niki and Amy do "suffer a ***cognizable and irreparable harm*** stemming from the violation of their constitutional rights of due process and equal protection." (*Id.* at 9 (emphasis added); *accord* PI Order at 9-12 (finding that Niki and Amy will suffer irreparable harm).) And, despite Defendants' claims to the contrary, "[t]he existence of a continuing constitutional violation constitutes proof of an irreparable harm." *Preston v. Thompson*, 589 F.2d 300, 303 n.3 (7th Cir. 1978); *see also* PI Order at 10 (noting that following "a more thorough review of the cases in the Seventh Circuit, the court reaffirms its conclusion that a constitutional violation, like the one alleged here, is indeed irreparable harm for purposes of preliminary injunctive relief") (collecting cases).

Finally, even if irreparable harm had not already been established as a matter of law here (which it has), Niki and Amy offered ample evidence of the harm that they have suffered and will

[10] *See also* PI Order at 13 n.1 ("[T]he court does not see the potential of creating great confusion from the court's grant of the present motion which affects only one couple.").

continue to suffer if Indiana does not recognize their Massachusetts marriage as valid. (*See* Dkt. 62, Pls.' Consolidated Reply in Supp. of Mot. for Summary Judgment and Mot. for Prelim. Inj. at 30-32; *accord* PI Order at 11 ("Even if a further showing of irreparable harm is required, the court finds that Plaintiffs have met this burden."); *id.* at 11-12 (recognizing that Plaintiffs have identified "concrete, tangible injuries that are fairly traceable to Defendants and can be remedied by a preliminary injunction").)

E. The Public Interest Would Be Harmed, Not Served, by the Continued Enforcement of Indiana's Marriage Ban Against Niki and Amy.

The fact that the Indiana marriage ban is likely unconstitutional is alone enough to show that staying the injunction would harm, not serve, the public interest here. As this Court and many others have recognized, "[t]he State does not have a valid interest in upholding and applying a law that violates [Plaintiffs'] constitutional guarantees." PI Order at 12 (citation omitted); *accord, e.g. Back v. Carter*, 933 F. Supp. 738, 761 (N.D. Ind. 1996) ("Unconstitutional legislation is not in the public interest.") (citation omitted); *Preston*, 589 F.2d at 303 n.3 (enjoining "a continuing constitutional violation . . . certainly would serve the public interest"); *O'Brien v. Town of Caledonia*, 748 F.2d 403, 408 (7th Cir. 1984) ("Of course, the public has a strong interest in the vindication of an individual's constitutional rights."). Courts thus have consistently recognized that because "the public has no cognizable interest in enforcing laws that are unconstitutional . . . the public interest is best served by ***preventing*** unconstitutional enforcement." *Midwest Title Loans, Inc. v. Ripley*, 616 F. Supp. 2d 897, 908 (S.D. Ind. 2009) (emphasis added) (collecting cases).

Defendants' argument that a stay is proper because of the purported "public interest in the continuity of Indiana's marriage laws" (Mot. at 6) does not hold water. Again, there is no public interest in the continued enforcement of Indiana's unconstitutional marriage ban. And in any

event, the Court was correct to hold that the concern about "confusion with the administration of Indiana's marriage laws and to public in general . . . does not apply here," because this injunction "affect[s] one couple in a State with a population of over 6.5 million people. This will not disrupt the public understanding of Indiana's marriage laws." (PI Order at 12-13.)[11]

II. THE SUPREME COURT'S STAY OF A STATEWIDE INJUNCTION IN *KITCHEN* DOES NOT CONTROL, AND IS IRRELEVANT TO WHETHER THIS NARROW, AS-APPLIED INJUNCTION FOR ONE COUPLE SHOULD BE STAYED

It is important to bear in mind the extremely narrow scope of the Court's injunction that Defendants now seek to stay. The injunction does ***not*** require the State of Indiana to issue marriage licenses to same-sex couples; nor does it even enjoin the State from enforcing its marriage recognition ban statewide. Rather, it enjoins Defendants' enforcement of the recognition ban against the existing valid marriage of only ***two*** people—and does so based on a well-developed record of specific and severe tangible and dignitary harms that would befall this couple and their children absent an injunction.

In *Kitchen v. Herbert*, the district court granted summary judgment for the plaintiffs, holding that Utah's prohibition against marriage for same-sex couples was facially unconstitutional. 961 F. Supp. 2d at 1216. Both the district court and the Tenth Circuit declined to stay the judgment because each of the four stay factors weighed against the state and in favor of the plaintiffs. *See Kitchen v. Herbert*, No. 2:13-cv-217, 2013 WL 6834634, at *2-3 (D. Utah, Dec. 23, 2013); Order Denying Emergency Motion For Stay and Temporary Motion For Stay, Case No. 13-4178, Dec. 24, 2013. The United States Supreme Court reversed, however, granting a stay

[11] Indeed, the injunction *eliminates* rather than creates confusion for the additional reason that Niki's and Amy's marriage will now be recognized for all purposes under state and federal law, rather than solely for some federal purposes, which will prevent the couple from struggling to navigate state and federal benefits and taxation schemes whose mandates otherwise would conflict with regard to whether their marriage is valid.

pending the Tenth Circuit's final disposition of the case. *Kitchen v. Herbert*, 134 S. Ct. 893 (2014). The Supreme Court did not explain its reasons for doing so. *Id.*

First, the strength of the overwhelming consensus of same-sex marriage decisions across the country distinguishes the Supreme Court's stay in *Kitchen*—which had stayed the ***first*** post-*Windsor* federal court decision to strike down, in a final merits determination, a state prohibition on celebration or recognition of marriages of sex-sex couples. While at that time there was not yet an unbroken string of cases undermining any claim by the Utah defendants to a likelihood of success on appeal, that equation has altered significantly since: in the three months following the Supreme Court's *Kitchen* stay, ***seven*** additional federal courts have declared state bans on same-sex marriage unconstitutional.[12] Whatever uncertainty arguably may have existed at the time of the *Kitchen* stay has all but been put to rest by these recent decisions—which come from geographically, demographically, and politically diverse regions of the United States and from courts in five different federal circuits, yet all uniformly conclude that same-sex marriage bans violate the U.S. Constitution.

Moreover, the factual circumstances of the *Kitchen* stay are simply inapposite here. In the wake of the district court's decision in *Kitchen*, but before the Supreme Court stayed the judgment, hundreds of same-sex couples obtained marriage licenses in Utah, and the state feared that many more would do the same. (*Kitchen v. Herbert*, Case No. 13A687, Application to Stay Judgment Pending Appeal, at 21, Dec. 31, 2013.) Utah issued over a thousand marriage licenses to same-sex couples between the date of the district court's order and the Supreme Court's summary ruling. *See Tanco*, 2014 WL 1117069, at *3. Indeed, the validity of those marriages

[12] *Bishop*, 962 F. Supp. 2d 1252 (N.D. Okla. 2014); *Bourke v. Beshear*, —F. Supp. 2d—, 2014 WL 556729 (W.D. Ky. Feb. 12, 2014); *Bostic*, 970 F. Supp. 2d 456 (E.D. Va. 2014); *Lee v. Orr*, No. 13-cv-8719, 2014 WL 683680 (N.D. Ill. Feb. 21, 2014); *De Leon*, 2014 WL 715741 (W.D. Tex. Feb. 26, 2014); *Tanco v. Haslam*, —F. Supp. 2d—, 2014 WL 997525 (M.D. Tenn. Mar. 14, 2014); *DeBoer v. Snyder*, —F. Supp. 2d—, 2014 WL 1100794 (E.D. Mich. Mar. 21, 2014).

have already been called into question by the State of Utah when it instructed state agencies not to grant benefits to those newly wedded couples, causing great confusion and costs.[13]

Unlike *Kitchen*, this Court did not grant statewide facial relief. Instead, the Court granted narrow, as-applied relief to ***one*** family based on a record that described specific and particularly dire harm. There can thus be no concern that the Court's ruling with respect to one family, if reversed, would cause any confusion or costs. (*See* PI Order at 13 n.1. ("Should this injunction be reversed or a permanent injunction not [be] issued at a later time, only the parties to this case may suffer from confusion. The court has faith that their respective attorneys can explain any decisions and effects from those decisions to them.").) Likewise, while the preliminary injunction in *Kitchen* concerned Utah's prohibition against unmarried couples seeking licenses and marrying in Utah, the preliminary injunction here concerns the State's refusal to recognize an already-existing marriage. Unlike *Kitchen*, there is no concern that same-sex couples will rush to obtain marriage licenses in Indiana, or that those marriages would need to be unwound in the event of a reversal, because no same-sex couples are allowed to marry by virtue of this Court's narrow, as-applied relief. For these reasons, the concerns raised in *Kitchen* and its progeny are not present here and provide no justification to grant a stay in this case.

Only two post-*Kitchen* district courts have considered whether a stay is appropriate for as-applied relief, as distinct from facial relief. *See Henry*, 2014 WL 1512541, at *1-2; *Tanco*, 2014 WL 1117069, at *3-4. In *Henry*, the court stayed its ruling that Ohio's non-recognition ban was facially unconstitutional but did not stay its ruling addressing the as-applied challenge of eight plaintiffs:

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[13] *See Evans v. Utah*, Case No. 2:14-cv-55DAK (D. Utah. 2014), Dkt. 8, Pls.' Mot. and Mem. in Supp. of Prelim. Inj. at 7 (stating that after the Supreme Court's stay in *Kitchen*, the Utah Governor's office issued a directive "instructing members to refuse to recognize the marriages of the same-sex couples who married pursuant to Utah marriage licenses").

> [T]he Court acknowledges that recognition of same-sex marriages is a hotly contested issue in the contemporary legal landscape, and, if Defendant Himes's appeal *is* ultimately successful, the absence of a stay as to this Court's ruling of facial unconstitutionality is likely to lead to confusion, potential inequity, and high costs. These considerations lead the Court to conclude that the public interest would best be served by the granting of a stay. Premature celebration and confusion do not serve anyone's best interests. The federal appeals courts need to rule, as does the United States Supreme Court. . . . ***The same considerations and costs do not attach to Plaintiffs' as-applied claims***, however, as Plaintiffs have demonstrated that a stay will irreparably harm them individually due to the imminent births of their children and other time-sensitive concerns, (as well as due to the continuing Constitutional violations).

2014 WL 1512541, at *1-2 (emphasis added). The court's decision to stay as-applied relief was never reversed. Likewise, in *Tanco*, the district court reached a similar conclusion:

> Here, unlike in *Kitchen*, *Bostic*, *De Leon*, *Bishop*, and *Beshear*, the court's order does not open the floodgates for same-sex couples to marry in Tennessee, nor does it require Tennessee to recognize all legal same-sex marriages performed outside of Tennessee. Instead, the Preliminary Injunction applies only to the three same-sex couples at issue in this case. There is no immediate risk of administrative or legal chaos from implementation of the court's narrow injunction; nor, for that matter, does the government even contend that such risk inheres in the implementation of the court's narrow injunction.

2014 WL 1117069, at *3-4. And although the Sixth Circuit reversed this holding in *Tanco*, citing *Henry v. Himes* for support (*see* Order, *Tanco v. Haslam,* No. 14-5297, Docket No. 29, at 2 (6th Cir. Apr. 25, 2014) (per curiam)), that order failed to address *Henry*'s conclusion that "[t]he same considerations and costs [attached to facial claims] do not attach to Plaintiffs' as-applied claims." 2014 WL 1512541, at *1-2. Even so, *Tanco* is distinguishable. While *Tanco* involved as-applied relief for three couples (only one of which experienced a time-sensitive issue—the impending birth of a child), the case here involves one same-sex couple facing far different harms that will be perpetuated in death if relief is not granted. In light of the urgency of the narrow as-applied relief in this case, a stay is improper.

CONCLUSION

For the foregoing reasons, Plaintiffs Niki Quasney and Amy Sandler respectfully request that the Court deny Defendants' motion to stay the preliminary injunction pending appeal.

Dated: May 12, 2014

Respectfully submitted,

/s/ Barbara J. Baird

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EXHIBIT A

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IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
SECOND DIVISION

M. KENDALL WRIGHT, ET AL.	:	
V.	:	**Case No: 60CV-13-2662**
STATE OF ARKANSAS, ET AL.	:	

ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF THE PLAINTIFFS AND FINDING ACT 144 OF 1997 AND AMENDMENT 83 UNCONSTITUTIONAL

This case involves twelve same-sex couples who seek to marry in Arkansas and eight same-sex couples who have married in states that permit marriage between same-sex couples and seek to have their marriages recognized in Arkansas.

There are two state laws at issue in this matter which expressly prohibit such recognition—Act 144 of 1997 of the Arkansas General Assembly and Amendment 83 to the Arkansas Constitution. Act 144 states that "a marriage shall be only between a man and a woman. A marriage between persons of the same sex is void." Ark. ACT 144 of 1997, § 1 (codified at Ark. Code Ann. § 9-11-109). The Act further provides that a marriage which would be valid by the laws of the state or country entered into by a person of the same sex is void in Arkansas. *Id.* at § 2 (codified at Ark. Code Ann. § 9-11-107).

Amendment 83, which was approved by a majority of voters in a general election on November 2, 2004, states:

§1. Marriage

Marriage consists of only the union of one man and one woman

> §2. Marital Status
>
> Legal status for unmarried persons which is identical or substantially similar to marital status shall not be valid or recognized in Arkansas, except that the legislature may recognize a common law marriage from another state between a man and a woman.
>
> §3. Capacity, rights, obligations, privileges and immunities
>
> The Legislature has the power to determine the capacity of persons to marry, subject to this amendment, and the legal rights, obligations, privileges, and immunities of marriage.

The plaintiffs contend that these prohibitions infringe upon their due process and equal protection rights under the Fourteenth Amendment of the United States Constitution and Article 2, § 3 of the Arkansas Constitution's Declaration of Rights. The State of Arkansas defends that it has the right to define marriage according to the judgment of its citizens through legislative and constitutional acts. Both parties have submitted motions for summary judgment.

The Equal Protection Clause forbids a state from denying "to any person within its jurisdiction the equal protection of the laws," U.S. Const. amend. XIV, § 1, and promotes the ideal that "all persons similarly situated should be treated alike." *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985). However, states are empowered to "perform many of the vital functions of modern government," *Nat'l Fed'n of Indep. Bus. v. Sebelius,* —— U.S. ——, 132 S.Ct. 2566, 2578 (2012), which necessarily involves adopting regulations which distinguish between certain groups within society. *See Romer v. Evans,* 517 U.S. 620, 631 (1996). Therefore, all courts must balance equal protection principles with the practical purposes of government when reviewing constitutional challenges to state laws.

The United States Supreme Court has outlined three categories for analyzing equal protection challenges. The most rigorous is referred to as "strict" scrutiny, which is reserved for laws that interfere with the exercise of a fundamental right or discriminate against "suspect classes." S*ee Plyler v. Doe,* 457 U.S. 202, 216-217 (1982). A more relaxed standard of review is "intermediate" or "heightened" scrutiny, which courts have applied to laws that discriminate against groups on the basis of gender, alienage or illegitimacy (also referred to as "quasi-suspect

classes"). *See Clark v. Jeter,* 486 U.S. 456, 461 (1988); *Miss. Univ. for Women v. Hogan,* 458 U.S. 718, 723–724 (1982). When the law does not interfere with a fundamental right or the rights of a suspect or quasi-suspect class, rational basis review applies. Here, the Arkansas marriage laws implicate both a fundamental right and the rights of a suspect or quasi-suspect class.

Although marriage is not expressly identified as a fundamental right in the Constitution, the United States Supreme Court has repeatedly recognized it as such.[1] It has also consistently applied heightened scrutiny to laws that discriminate against groups considered to be a suspect or quasi-suspect classification. *Mass. Bd. of Ret. v. Murgia,* 427 U.S. 307, 313 (1976) (a group that has experienced a "history of purposeful unequal treatment or [has] been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities."). Courts consider whether the characteristics that distinguish the class indicate a typical class member's ability to contribute to society, *Cleburne,* 473 U.S. at 440–41; whether the distinguishing characteristic is "immutable" or 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

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[1] *See M.L.B. v. S.L.J.,* 519 U.S. 102, 116 (1996) (quoting *Boddie v. Connecticut,* 401 U.S. 371, 376 (1971)) (finding that choices about marriage "are among associational rights this Court has ranked as 'of basic importance in our society' "); *Planned Parenthood of Southern Pennsylvania v. Casey,* 505 U.S. 833, 848 (1992) (finding marriage "to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause"); *Turner v. Safley,* 482 U.S. 78, 97 (1987) (finding that a regulation that prohibited inmates from marrying without the permission of the warden impermissibly burdened their right to marry); *Zablocki v. Redhail,* 434 U.S. 374, 383–84 (1978) (defining marriage as a right of liberty); *Carey v. Population Servs. Int'l,* 431 U.S. 678, 684–85 (1977) (finding that the right to privacy includes personal decisions relating to marriage); *United States v. Kras,* 409 U.S. 434, 446 (1973) (concluding that the Court "has come to regard [marriage] as fundamental"); *Boddie,* 401 U.S. at 376 (defining marriage as a "basic importance in our society"); *Loving v. Virgina,* 388 U.S. 1, 12 ("Marriage is one of the 'basic civil rights of man,' fundamental to our existence and survival" (quoting *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535 541 (1942)); *Griswold v. Connecticut,* 381 U.S. 479, 486 (1965) (defining marriage as a right of privacy and a "coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred"); *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535, 541 (1942) (finding marriage to be a "basic civil right[ ] of man"); *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923) (the right to marry is a central part of Due Process liberty); *Andrews v. Andrews,* 188 U.S. 14, 30 (1903) (quoting *Maynard v. Hill,* 125 U.S. 190, 205 (1888)) (finding marriage to be "most important relation in life"), *abrogated on other grounds, Sherrer v. Sherrer,* 334 U.S. 343, 352 (1948); *Maynard,* 125 U.S. at 205 (marriage creates "the most important relation in life")(same).

U.S. 587, 602 (1987). On this issue, this Court finds the rationale of *De Leon v. Perry*, *Obergefell v. Wymyslo,* and the extensive authority cited in both cases to be highly persuasive, leading to the undeniable conclusion that same-sex couples fulfill all four factors to be considered a suspect or quasi-suspect classification. *See respectively*, SA-13-CA-00982-OLG, 2014 WL 715741, *12 (W.D. Tex. Feb. 26, 2014) and 962 F. Supp.2d 968, 987-88 (S.D. Ohio 2013) (internal citations omitted). Therefore, at a minimum, heightened scrutiny must be applied to this Court's review of the Arkansas marriage laws.

Regardless of the level of review required, Arkansas's marriage laws discriminate against same-sex couples in violation of the Equal Protection Clause because they do not advance any conceivable legitimate state interest necessary to support even a rational basis review. Under this standard, the laws must proscribe conduct in a manner that is rationally related to the achievement of a legitimate governmental purpose. *See Vance v. Bradley,* 440 U.S. 93, 97 (1979). "[S]ome objectives ... are not legitimate state interests" and, even when a law is justified by an ostensibly legitimate purpose, "[t]he 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 446–47.

At the most basic level, by requiring that classifications be justified by an independent and legitimate purpose, the Equal Protection Clause prohibits classifications from being drawn for "the purpose of disadvantaging the group burdened by the law." *Romer,* 517 U.S. at 633; *see also United States v. Windsor*, 570 U.S. ---, 133 S.Ct. 2675 (2013); *Cleburne,* 473 U.S. at 450; Rational basis review is a deferential standard, but it "is not a toothless one". *Mathews v. Lucas,* 427 U.S. 495, 510 (1976).

The Supreme Court invoked this principle most recently in *Windsor* when it held that the principal provision of the federal Defense of Marriage Act ("DOMA") violated equal protection guarantees because the "purpose and practical effect of the law ... [was] to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages." *Windsor,* 570 U.S. ---, 133 S.Ct. at 2693. The case at bar and many around the country have since challenged state laws that ban same-sex marriage as a result of that decision. *See e.g., De Leon,* 2014 WL 715741; *Lee v. Orr,* No. 13–cv–8719, 2014 WL 683680 (N.D. Ill. Feb. 21, 2014); *Bostic v. Rainey,* 970 F. Supp.2d 456 (E.D. Va. Feb. 13, 2014); *Bourke,* ——F.Supp.2d ——, 2014 WL 556729 (W.D. Ky. Mar. 19, 2013); *Bishop v. United States ex rel. Holder,* 962 F.Supp.2d 1252 (N.D. Okla. 2014); *Obergefell,* 962 F. Supp.2d 968; *Kitchen v. Herbert,* 961 F.Supp.2d 1181 (C.D. Utah 2013).

Edith Windsor and Thea Spyer were a same-sex couple that married in Canada and lived in New York, a state that recognizes same-sex marriages. When Spyer died, Windsor attempted to claim the estate tax exemption, but DOMA prevented her from doing so, and she filed suit to obtain a $363,053 tax refund from the federal government.

In the *Windsor* opinion, Justice Kennedy explained how the strict labels placed upon the definition of a marriage have begun to evolve:

> It seems fair to conclude that, until recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in a lawful marriage. For marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization. That belief, for many who have long held it, became even more urgent, more cherished when challenged. For others, however, came the beginnings of a new perspective, a new insight.

Id. at 2689.

He further points out how this restriction on marriage impacts not only the individuals involved but also their families:

> This places same-sex couples in an unstable position of being in a second tier marriage. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects and whose relationship the State has sought to dignify. And it humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.

Id. at 2694 (citation omitted).

The Court concluded that this impact deprived a person of liberty protected by the Fifth Amendment and held that DOMA is unconstitutional.

> While the Fifth Amendment itself withdraws from Government the power to degrade or demean in the way

> this law does, the equal protection guarantee of the Fourteenth Amendment makes that Fifth Amendment right all the more specific and all the better understood and preserved.

Id. at 2695.

Since *Windsor*, a Virginia federal district court has considered the constitutionality of the Virginia law that banned same-sex marriages and found that the laws "fail to display a rational relationship to a legitimate purpose, and so must be viewed as constitutionally infirm under even the least onerous level of scrutiny." *Bostic*, 970 F. Supp. 2d at 482. The court explained, "Justice has often been forged from fires of indignities and prejudices suffered. Our triumphs that celebrate the freedom of choice are hallowed. We have arrived upon another moment in history when "We the People" becomes more inclusive, and our freedom more perfect." *Id.* at 483-484. The *Bostic* opinion includes a statement made by Mildred Loving on the fortieth anniversary of *Loving v. Virginia,* 388 U.S. 1 (1967). Her statement further demonstrates how definitions and concepts of marriage can change and evolve with time:

> We made a commitment to each other in our love and loves, and now had the legal commitment, called marriage, to match. Isn't that what marriage is? ... I have lived long enough now to see big changes. The older generations' fears and prejudices have given way, and today's young people realize that if someone loves someone they have a right to marry. Surrounded as I am now by wonderful children and grandchildren, not a day goes by that I don't think of Richard and our love, our right to marry, and how much it meant to me to have that freedom to marry the person precious to me, even if others thought he was the "wrong kind of person" for me to marry. I believe all Americans, no matter their race, no matter their sex, no matter their sexual orientation, should have that same freedom to marry. Government has no business imposing some people's religious beliefs over others… I support the freedom to marry for all. That's what *Loving*, and loving, are all about.

Id. at 1 (quoting Mildred Loving, "Loving for All").

In *Kitchen v. Herbert*, a Utah federal district court also held that its state's constitutional ban of same-sex marriage violated plaintiffs' federal due process and equal protection rights. 961 F.Supp.2d at 1216. The Court explained:

> Rather than protecting or supporting the families of opposite-sex couples, Amendment 3 perpetuates inequality by holding that the families and relationships of same-sex couples are not now, nor ever will be, worthy of recognition. Amendment 3 does not thereby elevate the status of opposite-sex marriage; it merely demeans the dignity of same-sex couples. And while the State cites an interest in protecting traditional marriage, it protects that interest by denying one of the most traditional aspects of marriage to thousands of its citizens: the right to form a family that is strengthened by a partnership based on love, intimacy, and shared responsibilities. The Plaintiffs' desire to publicly declare their vows of commitment and support to each other is a testament to the strength of marriage in society, not a sign that, by opening its doors to all individuals, it is in danger of collapse.

Id. at 1215-1216.

The defendants offer several rationalizations for the disparate treatment of same-sex couples such as the basic premise of the referendum process, procreation, that denying marriage protections to same-sex couples and their families is justified in the name of protecting children, and continuity of the laws and tradition. None of these reasons provide a rational basis for adopting the amendment.

The state defendants contend that this court must follow the last pronouncement by Arkansas voters, as long as the ban does not violate a fundamental right of the United States Constitution. They argue that the Arkansas Constitution can be amended by the people, and three out of four voters in the 2004 general election said that same-sex couples cannot marry. This position is unsuccessful from both a federal and state constitution perspective.

Article 2, § 2 of the Arkansas Constitution guarantees Arkansans certain inherent and inalienable rights, including the enjoyment of life and liberty and the pursuit of happiness.

> All men are created equally free and independent, and have certain inherent and inalienable rights, amongst which are those of enjoying and defending life and liberty; of acquiring, possessing, and protecting property, and reputation; and of pursuing their own happiness, To secure these rights governments are instituted among men, deriving their just powers from the consent of the governed.

ARK. CONST., art 2, § 2.

In this case, Article 2 § 2 was left intact by the voters, but in Amendment 83 they singled out same-sex couples for the purpose of disparate treatment. This is an unconstitutional attempt to narrow the definition of equality. The exclusion of a minority for no rational reason is a dangerous precedent.

Furthermore, the fact that Amendment 83 was popular with voters does not protect it from constitutional scrutiny as to federal rights. "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. State Bd. of Educ. v. Barnette,* 319 U.S. 624, 638 (1943). The Constitution guarantees that all citizens have certain fundamental rights. These rights vest in every person over whom the Constitution has authority and, because they are so important, an individual's fundamental rights "may not be submitted to vote; they depend on the outcome of no elections." *Id. at 638.*

Defendants also cite *Donaldson v. State*, 367 Mont. 228 (2012), for the proposition that procreation can be a legitimate rational basis for the upholding of a ban on same-sex marriages.

> The replication, by children, of the procreative marital relationship as role-modeled by their married parents not only perpetuates the race-sustaining function by populating the race, but also builds extended families which share hereditary characteristics of a common gene pool.

Id at 237.

In a 1955 decision, the Supreme Court of Appeals of Virginia accepted the state's legitimate purposes "to preserve the racial integrity of its citizens," to prevent "the corruption of blood," "a mongrel breed of citizens" and "the

obliteration of racial pride." *Naim v. Naim*, 197 Va. 80, 90 (1955). In a comparison of *Donaldson* to *Naim*, the state's purposes sound eerily similar.

Procreation is not a prerequisite in Arkansas for a marriage license. Opposite-sex couples may choose not to have children or they may be infertile, and certainly we are beyond trying to protect the gene pool. A marriage license is a civil document and is not, nor can it be, based upon any particular faith. Same-sex couples are a morally disliked minority and the constitutional amendment to ban same-sex marriages is driven by animus rather than a rational basis. This violates the United States Constitution.

Even if it were rational for the state to speculate that children raised by opposite-sex couples are better off than children raised by same-sex couples, there is no rational relationship between the Arkansas same-sex marriage bans and the this goal because Arkansas's marriage laws do not prevent same-sex couples from having children. The only effect the bans have on children is harming those children of same-sex couples who are denied the protection and stability of parents who are legally married.

The defendants also argue that *Windsor* is a federalism issue and claim the states have the authority to regulate marriage as a matter of history and tradition, and that DOMA interfered with New York's law allowing same-sex marriage. The state defendant points to *Baker v. Nelson*, as precedent for upholding the application of Amendment 83 to the Arkansas Constitution. 191 N.W.2d 185 (1971). In that case, the United States Supreme Court dismissed an appeal from the Minnesota Supreme Court for lack of a substantial federal question. 409 U.S. 810 (1972). While a summary disposition is considered precedential, the courts that have considered this issue since *Windsor*, *supra.*, have found that doctrinal developments render the decision in *Baker* no longer binding. *Bostic*, 970 F. Supp. 2d at 469.

Tradition alone cannot form a rational basis for a law. *Heller v. Doe,* 509 U.S. 312, 326 (1993) (stating that the "[a]ncient lineage of a legal concept does not give it immunity from attack for lacking a rational basis."). The fact that a particular discrimination has been "traditional" is even more of a reason to be skeptical of its rationality. "The Court must be especially vigilant in evaluating the rationality of any classification involving a group that has been subjected to a tradition of disfavor for a traditional classification is more likely to be used without pausing to consider its justification than is a newly created classification." *Cleburne,* 473 U.S. at 454 n. 6 (Stevens, J., concurring). Just as the tradition of banning interracial marriage represented the embodiment of deeply-held prejudice and long-term racial discrimination in *Loving,* 388 U.S. at 1, the same is true here

with regard to Arkansas's same-sex marriage bans and discrimination based on sexual orientation.

The traditional view of marriage has in the past included certain views about race and gender roles that were insufficient to uphold laws based on these views. *See Lawrence v. Texas,* 539 U.S. 558, 577–78 (2003) ("[N]either history nor tradition could save a law prohibiting miscegenation from constitutional attack") (citation omitted). And, as Justice Scalia has noted in dissent, " 'preserving the traditional institution of marriage' is just a kinder way of describing the State's *moral disapproval* of same-sex couples." *Lawrence,* 539 U.S. at 601 (Scalia, J., dissenting).

Defendants contend that the Eighth Circuit decision in *Citizens for Equal Protection v. Bruning*, 455 F. 3rd 859 (2006) is dispositive of this issue because it upheld a Nebraska constitutional ban on same-sex marriage. However, both the *Donaldson* and *Bruning* decisions predate *Windsor* where the United States Supreme Court held:

> DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others. The federal statute is invalid, **for no legitimate purpose overcomes the purpose and effect to disparage and to injure** these whom the State, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment. This opinion and its holding are confined to those lawful marriages.

Windsor at 2696 (emphasis added).

The state defendant attempts to distinguish *Windsor* by claiming that DOMA is related only to states that have allowed same-sex marriages. However:

> 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 group.

Dep't of Agriculture v. Moreno, 413 U.S. 528, 534-535 (1973).

The issues presented in the case at bar are of epic constitutional dimensions—the charge is to reconcile the ancient view of marriage as between

one man and one woman, held by most citizens of this and many other states, against a small, politically unpopular group of same-sex couples who seek to be afforded that same right to marry.

Attempting to find a legal label for what transpired in *Windsor* is difficult but as United States District Judge Terence C. Kern wrote in *Bishop v. United States*, "this court knows a rhetorical shift when it sees one." Judge Kern applied deferential rational review and found no "rational link between exclusion of this class from civil marriage and promotion of a legitimate governmental objective." 962 F. Supp. 2d 1252, 1296 (2014).

The strength of our nation is in our freedom which includes, among others, freedom of expression, freedom of religion, the right to marry, the right to bear arms, the right to be free of unreasonable searches and seizures, the right of privacy, the right of due process and equal protection, and the right to vote regardless of race or sex.

The court is not unmindful of the criticism that judges should not be super legislators. However, the issue at hand is the fundamental right to marry being denied to an unpopular minority. Our judiciary has failed such groups in the past.

In *Dred Scott v. John Sandford*, Chief Justice Taney narrowed this issue by contemplating when and if a person can attain certain fundamental rights and freedoms that were not originally granted to that individual or group of individuals. 60 U.S. 393 (1856). Scott, a slave whose ancestors were brought to America on a slave ship, attempted to file a case in federal court to protect his wife and children. In the majority opinion, Chief Justice Taney pondered:

> The question is simply this: Can a negro, whose ancestors were imported in to this country, and sold as slaves, become a member of the political community formed and brought into existence by the constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guaranteed by that instrument to the citizen? One of which rights is the privilege of suing in a court of the United States in the cases specified in the Constitution.

Id. at 403.

The Court majority in 1856 relied on a strict interpretation of the intent of the drafters to come to their decision.

> We think they are not, and that they are not included, and were not intended to be included, under the word "citizens" in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, there were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.

Id. at 404-405.

One hundred years later, in *Loving*, the Supreme Court was still struggling with race in a miscegenation statute from the state of Virginia where interracial marriages were considered a criminal violation. The Lovings were convicted and sentenced to one year in jail suspended for twenty-five years on the condition that they leave the state for twenty-five years. 388 U.S. at 1. The trial judge stated in his opinion that:

> Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages, The fact that he separated the races shows that he did not intend for the races to mix.

Id. at 2 (citation omitted).

The U.S. Supreme Court disagreed with the trial court and in their opinion, Chief Justice Warren stated that "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." *Id.* at 12.

Our freedoms are often acquired slowly, but our country has evolved as a beacon of liberty in what is sometimes a dark world. These freedoms include a right to privacy.

The United States Supreme Court observed:

> We deal with a right of privacy older than the BILL OF RIGHTS—older than our political parties, older than our school system. Marriage is a coming together for the

> better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Griswold v. Connecticut, 381 U.S. 479, 486 (1965).

The Arkansas Supreme Court has previously addressed the right to privacy as it involves same-sex couples. In *Jegley v. Picado*, the Arkansas Supreme Court struck down the sodomy statute as unconstitutional in violating Article 2, § 2 and the right to privacy. 349 Ark. 600, 638 (2002). Justice Brown, in *Arkansas Dep't of Human Services v. Cole*, noted "that Arkansas has a rich and compelling tradition of protecting individual privacy and that a fundamental right to privacy is implicit in the Arkansas Constitution." 2011 Ark. 145, 380 S.W. 3d. 429, 435 (2011) (citing *Jegley*, *id.* at 632). The Arkansas Supreme Court applied a heightened scrutiny and struck down as unconstitutional an initiated act that prohibited unmarried opposite-sex and same-sex couples from adopting children. *Id* at 442. The exclusion of same-sex couples from marriage for no rational basis violates the fundamental right to privacy and equal protection as described in *Jegley* and *Cole*, *supra*. The difference between opposite-sex and same-sex families is within the privacy of their homes.

THEREFORE, THIS COURT HEREBY FINDS the Arkansas constitutional and legislative ban on same-sex marriage through Act 144 of 1997 and Amendment 83 is unconstitutional.

It has been over forty years since Mildred Loving was given the right to marry the person of her choice. The hatred and fears have long since vanished and she and her husband lived full lives together; so it will be for the same-sex couples. It is time to let that beacon of freedom shine brighter on all our brothers and sisters. We will be stronger for it.

IT IS SO ORDERED this 9th day of May, 2014

CHRISTOPHER CHARLES PIAZZA

CIRCUIT COURT JUDGE