NO. 14-5291

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GOVERNOR STEVE BESHEAR — APPELLANT

vs.

GREGORY BOURKE, et al. — APPELLEES

On Appeal From The United States District Court
for the Western District of Kentucky
Judge John G. Heyburn
CASE NO. 3:13-CV-750-JGH

BRIEF FOR APPELLEES

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Plaintiffs respectfully request oral argument in this case. The issues involved are significant to all parties, including other same-sex couples who reside in or are considering relocating to Kentucky from other jurisdictions.

STATEMENT OF JURISDICTION

This case is on appeal from the Western District of Kentucky's grant of summary judgment to Plaintiffs, entered on February 27, 2014. Federal jurisdiction is proper pursuant to 28 U.S.C. § 1331, and 28 U.S.C. § 1343 which confer subject matter jurisdiction for claims brought under 42 U.S.C. § 1983. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

ISSUE PRESENTED

Section 233A of the Kentucky Constitution and KRS §§ 402.005, 402.020, 402.040, and 402.045 prohibit state recognition of same-sex marriages performed in jurisdictions outside the Commonwealth of Kentucky. Does this prohibition violate the Equal Protection Clause of the Fourteenth Amendment?

INTRODUCTION

Marriage occupies a unique place in our society, where social and intimate commitments converge into an institution sacred to individuals and their communities. It is "central to personal dignity and autonomy." *Lawrence v. Texas*, 539 U.S. 558, 574 (2003). It has been described as "the most important relation in life," and "of fundamental importance for all individuals." *Zablocki v. Redhail*, 434 U.S. 374, 384 (1972). Marriage is "one of the basic civil rights of [humankind]." *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942). As such, "the freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness. . ." *Loving v. Va.*, 388 U.S. 1, 12 (U.S. 1967).

Plaintiffs are four same-sex couples married outside of Kentucky. They seek the same respect and recognition for their marital commitments their fellow citizens already enjoy. They do not seek special rights, or a new institution. They do not seek to impinge the respect and dignity Kentucky already grants to other married couples every day. Rather, they seek dignity, autonomy, and respect for their fundamental right to marry the person they love.

The indignity Plaintiffs suffer as the result of Kentucky's constitutional and statutory marriage ban is purposeful, invidious, and irrational; the product of dogma, misunderstanding, and fear. Kentucky's refusal to acknowledge Plaintiffs'

personal and public commitments does not further any legitimate interest of the Commonwealth, and it irrevocably harms Plaintiffs, their children, their families, and our society. It singles them out, demeans them, and denies them equal protection of the law guaranteed by the Fourteenth Amendment of the U.S. Constitution.

"The guaranty of equal protection of the laws is a pledge of the protection of equal laws." *Skinner*, 316 U.S. at 541. Kentucky, however, created a purposeful inequity, drawing irrational lines between same-sex couples and opposite-sex couples. The Fourteenth Amendment does not permit such inequity. The Western District of Kentucky rightly concluded that, "Kentucky's denial of recognition for valid same-sex marriages violates the United States Constitution's guarantee of equal protection under the law." (Memorandum Opinion, RE 47, PageID # 725).

Defendant Governor Steve Beshear argues that the district court erred because Kentucky has a legitimate interest in "natural" procreation among married couples, and excluding same-sex couples from the institution furthers that interest. But Defendant's myopic view of marriage – as a mere vessel for human reproduction – fails to acknowledge the full scope of the intimate relationship and "the extent of the liberty at stake." *Lawrence*, 539 U.S. at 567. The Equal Protection guarantee of the U.S. Constitution will not tolerate this inequity, and this Court should affirm the well-reasoned opinion of the trial court.

STATEMENT OF THE CASE

I. The History of Kentucky's Marriage Ban.

The Kentucky laws challenged by Plaintiffs in the case below are both constitutional and statutory. They confine the issuance of marriage licenses to opposite-sex couples, ban recognition of valid same-sex marriages from other states, and formally declare that same-sex marriages violate the public policy of the Commonwealth. The history of Kentucky's marriage ban is relatively brief, but it does provide significant insight into the true motivations and interests underlying the laws.

Prior to 1998, Kentucky statutes did not define "marriage," nor did they explicitly prohibit marriages by 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, 589 (1973). There, the Court relied on *Webster's*, *The Century Dictionary and Encyclopedia*, and *Black's Law Dictionary* to conclude 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 be a growing trend, in

1998 Kentucky's General Assembly (along with several other state legislatures) passed a series of statutes explicitly limiting marriage to opposite-sex couples. KRS § 402.005 defines marriage as between one man and one woman. KRS § 402.020(1)(d) prohibits marriage between members of the same sex. KRS § 402.040(2) states, "A marriage between members of the same sex is against Kentucky public policy. . ." And KRS § 402.045 declares, "A marriage between members of the same sex which occurs in another jurisdiction shall be void in Kentucky."

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 explicit 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 gave the following justification for 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, and nothing could be more contrary to the spirit than the notion that a personal agreement ratified in a human court satisfies the obligation of this ordinance. Mr. President, 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. Decisive action is needed and that's why I have sponsored Senate Bill 245, which is a constitutional amendment that defines marriage as being between one man and one woman. 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.

(Senate Chambers March 11, 2004, RE 38-7, at 1:00:30—1:05:15).

Sen. Gary Tapp, the bill's Co-Sponsor, then declared, "Mr. President when 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.* at 1:07:45). The only other senator to speak in favor of the bill, Sen. Ed Worley, described marriage as a "cherished" institution (*Id*. at 1:25:55). He bemoaned that "liberal judges" changed the law so that "children can't say the Lord's Prayer in school." (*Id.* at 1:27:19). 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.'" (*Id.* at 1:27:46). In support of the amendment, he cited to the Bible's "constant" reference to men and women being married. (*Id.* at 1:29:55). By way of example, he quoted a passage from Proverbs 21:19, "Better to live in the desert than with a quarrelsome, ill-tempered wife." (*Id.* at 1:30:15). 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 Kentucky Constitution § 233A.

II. The Case Below.

Following the landmark decision by the United States Supreme Court in *United States v. Windsor*, 133 S. Ct. 2675 (2013), Plaintiffs brought this challenge to Kentucky's marriage laws in the district court for the Western District of Kentucky. The original defendants to the case below included two Kentucky county clerks, Kentucky Attorney General Jack Conway, and Kentucky Governor

Steve Beshear. The court below granted Plaintiffs' subsequent motion to voluntarily dismiss the clerks and for leave to file a Second Amended Complaint. The Second Amended Complaint alleged violations of the Fourteenth Amendment, as well as violations of the First Amendment, the Full Faith and Credit Clause, and the Supremacy Clause of the U.S. Constitution. (Second Amended Complaint, RE 31, PageID # 289-94). Plaintiffs also challenged Section 2 of the federal Defense of Marriage Act, 28 U.S.C. § 1738C. The court then approved an expedited briefing schedule for dispositive motions.

In their Motion for Summary Judgment, Plaintiffs argued that they suffered a number of harms caused by Kentucky's marriage laws. Among those tangible harms are higher income and estate taxes, a denial of benefits under the Family Medical Leave Act, a denial of insurance coverage and benefits, an inability 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 a loss of inheritance rights under the state's intestacy statutes. Of greater importance, however, is the loss of other intangible benefits of marriage: societal respect and acknowledgement of their relationships with each other and their children. (Plaintiffs' Memorandum in Support of Motion for Summary Judgment, RE 38-1, PageID # 336).

Defendants Conway and Beshear filed a response to Plaintiffs' motion which alleged just one legitimate state interest justifying Kentucky's marriage laws: the preservation of tradition. (Defendants' Response to Plaintiffs' Motion for Summary Judgment, RE 39). Additional briefing was provided by the Family Foundation of Kentucky, which filed an *amicus curiae* brief alleging that Kentucky's marriage laws were rationally related to a state interest in procreation and responsible child-rearing. (Brief of *Amicus Curiae*, RE 43). Plaintiffs responded to Defendants and to the Family Foundation's arguments (Pl. Reply in Support of MSJ, RE 40; Pl. Resp. to *Amicus Curiae*, RE 46).

On February 12, 2014, the district court issued a memorandum opinion granting Plaintiffs' Motion for Summary Judgment. (RE 47). The court, applying the Equal Protection framework, found that none of the government interests offered by either the Defendants or the Family Foundation were rationally related to Kentucky's marriage laws. The court recognized that *United States v. Windsor*, as the Supreme Court's most recent pronouncement on these issues, must guide its decision. The trial court opined that Plaintiffs may well be a suspect class requiring heightened scrutiny, but declined to make that holding in light of Sixth Circuit precedent. (*Id*. at PageID # 730-32). The court also opined that the nature of marriage as a fundamental right might also require that Kentucky's laws receive heightened scrutiny. (*Id*. at PageID # 732-33). The court ultimately 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.

In its well-reasoned opinion, the district court also 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 PageID # 725). The court issued a final Order on February 27, 2014. (Order, RE 55).

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] That same day, Defendant Governor Beshear announced his intention to appeal using outside counsel.

1. Joe Arnold, *Conway Says He Won't Appeal Order to Recognize Gay Marriages*, WHAS11.com, March 4, 2014, http://www.whas11.com/news/Conway-to-address-same-sex-marriage-decision-248351301.html.

STANDARD OF REVIEW

The Sixth Circuit Court of Appeals reviews a district court's grant of summary judgment *de novo*. *Henderson v. Walled Lake Consol. Sch*., 469 F.3d 479, 486 (6th Cir. 2006). Summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. Determining the appropriate level of judicial scrutiny for laws challenged under the Fourteenth Amendment is a question of law. *See, e.g*., *Seal v. Morgan*, 229 F.3d 567, 580 (6th Cir. 2000). "Under the Equal Protection Clause . . . courts apply strict scrutiny to statutes that involve suspect classifications or infringe upon fundamental rights . . . [whereas] [l]aws that do not involve suspect classifications and do not implicate fundamental rights. . .will be upheld if they are rationally related to a legitimate state interest." *Moore v. Detroit Sch. Reform Bd*., 293 F.3d 352, 368 (6th Cir. 2002) (internal quotations and citations omitted).

SUMMARY OF ARGUMENT

The district court correctly held that Section 233A of the Kentucky Constitution and KRS §§ 402.005, 402.020, 402.040, and 402.045, collectively denying the recognition of valid same-sex marriages from other jurisdictions outside the Commonwealth, violate the Equal Protection Clause of the Fourteenth Amendment. The judgment below should be affirmed.

Baker v. Nelson, 409 U.S. 810 (1972) is not binding precedent and does not control this case. Jurisdictional developments in subsequent Supreme Court cases regarding marriage and discrimination against homosexuals and same-sex couples have eroded *Baker*'s precedential effect. Every federal district court to consider the question of same-sex marriage since *United States v. Windsor* has recognized that *Baker* is not controlling.

Kentucky's marriage laws violate the Equal Protection Clause of the Fourteenth Amendment because they unjustifiably infringe the fundamental right to marry, target a suspect class, and do not factually or rationally further any legitimate state interest. The purpose and effect of Kentucky's marriage laws are to demean and exclude same-sex couples from the protections and benefits allotted to similarly-situated opposite-sex couples.

Laws which infringe fundamental rights or target a suspect class, such as Kentucky's marriage laws, are subject to heightened scrutiny. Marriage is a fundamental right belonging to all individuals. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Turner v. Safley*, 482 U.S. 78, 95 (1987). The understanding of that fundamental right has evolved over time and has become inclusive of relationships not formally recognized or protected in the past. *See, e.g.*, *Loving*, 388 U.S. 1. Heightened scrutiny is further appropriate because gays and lesbians are a "discrete and insular" minority which has been subject to "a history of purposeful unequal

treatment." *United States v. Carolene Products Co*., 304 U.S. 144, 152, n.4 (1938); *see also San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

Even under rational basis review, the most deferential form of constitutional scrutiny, Kentucky's marriage laws cannot survive. The district court properly considered and denied the various state interests alleged in the case below: tradition, procreation, federalism, and child-rearing. Defendant now argues that procreation and "stable birth rates" are a legitimate state interest, and that excluding same-sex couples from the benefits of marriage rationally relates to that interest. However, the state's alleged interest in the private, sexual decisions of its citizens cannot be a legitimate interest because it thrusts the state into the penumbra of privacy rights cast by the Constitution. Furthermore, Defendant's rational basis argument is both illogical and belied by the fact that Kentucky's marriage laws are properly mute on the subject of procreation. They do not exclude the infertile or voluntarily childless.

Kentucky's marriage laws were designed to impose "a disadvantage . . . and so a stigma" on same-sex couples by excluding them from the benefits of marriage enjoyed by opposite-sex couples. *Windsor*, 133 S. Ct. at 2693. The laws were enacted to carry out "[a]rbitrary and invidious discrimination," motivated by "a bare desire to harm a politically unpopular group," and thus lack legitimacy.

Loving, 388 U.S. at 10; *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

ARGUMENT

I. *Baker v. Nelson* Is Not Binding Precedent.

Defendant Beshear incorrectly argues that *Baker v. Nelson*, 409 U.S. 810 (1972), "remains binding precedent," and therefore the district court improperly ruled on the merits of this case. Defendant's argument elevates *Baker*'s precedential power while ignoring the new precedent in *United States v. Windsor*.

In 1972, the U.S. Supreme Court summarily dismissed for "want of a substantial federal question" an appeal from a Minnesota Supreme Court case. *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971). The *Baker* plaintiffs challenged Minnesota's refusal to issue a marriage license to a same-sex couple on due process and equal protection grounds. *Id*. Defendant Beshear argues that *Baker* is "the only definitive statement from the Supreme Court regarding the constitutionality of same-sex-marriage prohibitions," and it therefore "remains binding precedent." (Beshear Br. 17).

Summary dispositions of lower court decisions "have considerably less precedential value than an opinion on the merits," *Illinois State Bd. of Elections v. Social Workers Party*, 440 U.S. 173, 180-81 (1979), and are only binding on lower courts "on the precise issues presented and necessarily decided." *Mandel v.*

Bradley, 432 U.S. 173, 176 (1977) (*per curiam*). They have "limited precedential effect" and constitute a "slender reed on which to rest" a subsequent decision on the merits. *Anderson v. Celebrezze*, 664 F.2d 554, 560 (6th Cir. 1981), *rev'd on other grounds*, 460 U.S. 780 (1983). Furthermore, summary dispositions like *Baker* are binding on lower courts – if at all – only until later "doctrinal developments indicate otherwise." *Hicks v. Miranda*, 422 U.S. 332, 344 (1975) (internal quotations omitted).[2]

First, the underlying facts of *Baker* must be distinguished. The *Baker* plaintiffs challenged then-existing Minnesota marriage laws which had "an absence of an express statutory prohibition against same-sex marriages." 191 N.W.2d 185 (Minn. 1971). The Minnesota Supreme Court relied on a dictionary and "words of heterosexual import" from the statute itself to discern the "common usage" of the term "marriage." *Id*. at 186, n. 1. The Kentucky marriage laws at issue in this case *explicitly* prohibit same-sex marriages and marriage recognition and therefore create clear controversies of equal protection and due process. And unlike the Minnesota laws at issue in *Baker*, the Kentucky laws are intentionally discriminatory. *Baker* also did not address the sole issue before this Court, the

2. Defendant also quotes *Rodriguez de Quijas v. Shearson/Am. Express, Inc*., 490 U.S. 477, 484 (1989) (". . . the Court of Appeals should follow the case which directly controls . . ."), but the rule in that case applies only to cases decided on the merits after a grant of *certiorari* and oral argument. *Baker v. Nelson* was not such a case.

recognition of out-of-state marriages. These critical differences on "precise issues" extinguish any precedential effect *Baker* may have once had. *Mandel*, 432 U.S. at 176.

Second, significant doctrinal developments in U.S. Supreme Court jurisprudence since 1972 further strip any precedential effect of *Baker*. In 1976, the Supreme Court articulated an intermediate level of scrutiny above rational basis review for classifications based on gender. *Craig v. Boren*, 429 U.S. 190 (1976). In 1996, the Supreme Court ruled that a Colorado law targeting homosexuals for disparate legal treatment was unconstitutional under the Fourteenth Amendment. *Romer*, 517 U.S. 620. In 2003, the Court struck down an anti-sodomy statute in Texas because the Fourteenth Amendment provides "protection to personal decisions relating to marriage, procreation, contraception, family relationships, [and] child rearing" and both homosexuals and heterosexuals are entitled to autonomy in those decisions. *Lawrence,* 539 U.S. at 574. Most recently, the Supreme Court ruled that due process and equal protection prohibit the federal government from interfering with the intimate choices (including marriage) of same-sex couples. *Windsor*, 122 S. Ct. 2675.

Citing these doctrinal developments, most federal district courts since *Windsor* have specifically and consistently distinguished *Baker*. *See, e.g.*, *DeBoer v. Snyder*, No. 12-10285, 2014 WL 1100794, at *15 n.6 (E.D. Mich. 2014); *De*

Leon v. Perry, No. 13-00982, 2014 WL 715741, at *10 (W.D. Tex 2014); *Bishop v. United States*, 962 F. Supp. 2d 1252, 1274 (N.D. Okla. 2014); *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1195 (D. Utah 2013). In this case, the court below mentioned *Baker* only in passing to add historical context to the Kentucky case of *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973). (Memorandum Opinion, RE 47, PageID # 727). These doctrinal developments not only undercut any precedential effect *Baker v. Nelson* may have on this case, they also lay the groundwork for the unavoidable conclusion: discriminatory marriage laws such as Kentucky's refusal to recognize valid, out-of-state same sex marriages are unconstitutional under the Fourteenth Amendment.

II. Kentucky's Marriage Laws Violate Equal Protection.

The district court correctly ruled that Kentucky's refusal to recognize valid same-sex marriages from other states violates the Equal Protection Clause of the Fourteenth Amendment. "No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of laws." U.S. Const., amend. XIV. "The guaranty of equal protection of the laws is a pledge of the protection of equal laws." *Skinner*, 316 U.S. at 541 (internal quotations omitted). The Constitutional promise of equal protection is violated when laws create "an indiscriminate imposition of inequalities." *Lawrence,* 539 U.S. at 575.

Though the court should have applied heightened scrutiny to the challenged laws, it nevertheless was correct that there is no rational basis sufficient to sustain them.

Defendant argues that the district court erred in finding that Kentucky's marriage laws denied equal protection to same-sex couples because: 1) same-sex couples are not similarly situated to opposite-sex couples; 2) homosexuality is not a protected classification; 3) the fundamental right to marriage excludes same-sex marriages; and 4) Kentucky has a legitimate interest in "natural" procreation, which is a rational basis for the challenged laws. Defendant is incorrect on all counts.

A. Same-Sex Couples are Similarly Situated to Opposite-Sex Couples.

As a threshold matter, Defendant begins his argument by framing the Equal Protection analysis as a question of situation – if same-sex couples are not "similarly situated" with or are "dissimilar in some material respect" to opposite-sex couples, then Kentucky's discriminatory marriage laws could survive judicial scrutiny. (Beshear Br. 21-22). This analysis arises under the "class of one theory." *Trihealth, Inc. v. Bd. of Comm'rs*, 430 F.3d 783, 788 (6th Cir. 2005). "Class of one" claims are brought "where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment," but the difference is unrelated to a protected

classification such as race, sex, or national origin. *Willowbrook v. Olech*, 528 U.S. 562, 564 (U.S. 2000). This theory arises because "the Equal Protection Clause protects persons, not groups." *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 597 (2008) (internal quotations and citations omitted).

First, it should be noted that the court below was not presented with, and thus did not consider the "class of one" analysis now urged by Defendant. The district court instead recognized that Plaintiffs are members of a class of individuals whose differential treatment should be evaluated under the traditional, classification-based Equal Protection analysis set forth in controlling U.S. Supreme Court precedents such as *Zablocki,* 434 U.S. at 388, and *Romer*, 517 U.S. at 633. (*See* Memorandum Opinion, RE 47, PageID # 730). Nevertheless, Plaintiffs will address Defendant's "class of one" arguments.

"The Equal Protection Clause prohibits discrimination by government which either burdens a fundamental right, targets a suspect class, or intentionally treats one differently than others similarly situated without any rational basis for the difference." *Loesel v. City of Frankenmuth*, 692 F.3d 452, 461 (6th Cir. 2012). Though "the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways," a classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation . . ." *Reed v. Reed*, 404 U.S. 71,

75-76 (1971). (internal quotations omitted). "Disparate treatment of similarly situated persons who are dissimilar only in immaterial respects is not rational." *Trihealth*, 430 F.3d at 790. Determining whether two classifications are similarly situated does "not demand exact correlation, but should instead seek *relevant* similarity." *Loesel*, 692 F.3d at 462 (internal quotations omitted, emphasis added). "[T]he degree to which others are viewed as similarly situated depends substantially on the facts and context of the case." *Id*., quoting *Jennings v. City of Stillwater*, 383 F.3d 1199, 1214 (10th Cir. 2004).

Defendant argues that same-sex couples are not similarly situated with opposite-sex couples because "only man-woman couples have the ability to procreate," and because "procreation is reasonably related to the object of Kentucky's traditional marriage statutes," those statutes should survive rational basis review. (Beshear Br. 22). However, Defendant frames the inquiry too narrowly. For the purpose of the state's marital institution, same-sex couples and opposite-sex couples are not materially dissimilar.

As explained more fully below, marriage encompasses far more than mere procreation. "[M]arriage involves interests of basic importance in our society." *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971). Indeed, marriage has "many important attributes" including emotional support, public commitment, exercise of religious faith, and the receipt of government benefits. *Turner*, 482 U.S. at 95-96.

Marriage "is an association that promotes a way of life, not causes; a harmony of living, not political faiths; a bilateral loyalty, not commercial or social projects." *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965). In fact, the Supreme Court embraced the concept that legitimate marriages can be procreation-free in *Griswold* when it struck down a state ban on contraception. *Id*.

As Defendant admits, same-sex couples are capable of having "stable, loving familial relationships" and can "contribute to society in important and meaningful ways." (Beshear Br. 22-23). The members of same-sex couples are human beings, just like opposite-sex couples, with the same capacities to love, to bond, to be loyal, to be supportive, and to raise children. Those abilities are truly material to the marital relationship, not mere procreation. And despite Defendant's selective perception of "natural" procreation, members of many same-sex couples retain that ability, too. Entering a same-sex relationship does not render a person infertile. Many same-sex couples have procreated or someday will procreate through a variety of means, and have or will successfully raise their children together in loving, stable homes. The only difference between same-sex couples and opposite-sex couples is the sex of the partners.

Finally, Kentucky marriage laws include no procreative mandate. Opposite-sex couples who are infertile or voluntarily child-free are not prohibited from being married in the Commonwealth or from having their out-of-state marriages

recognized. Because the marital relationship involves far more than childbearing, and because opposite-sex couples may be married in Kentucky without regard to their procreative ability or desires, there is no material dissimilarity between same-sex and opposite-sex couples in the context of this case. The "class of one" analysis cannot salvage Defendant Beshear's argument.

B. Kentucky's Discriminatory Laws are Subject to Heightened Scrutiny.

"Under the Equal Protection Clause, courts apply strict scrutiny to statutes that involve suspect classifications or infringe upon fundamental rights." *Moore v. Detroit Sch. Reform Bd.*, 239 F.3d at 368. This analysis is the same under the Due Process Clause. *See, e.g.*, *Zablocki*, 434 U.S. at 388. Heightened scrutiny is appropriate here because Kentucky's refusal to recognize valid same-sex marriages from other states burdens the fundamental right to marriage, and because the laws target a suspect class.

Once strict scrutiny is chosen as the appropriate standard of review, the proponent of the challenged law must prove that "it is the least restrictive means" or "narrowly tailored" to achieve some compelling state interest. *See Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 718 (1981); *Reno v. Flores*, 507 U.S. 292, 301-02 (1993). Under this standard, Kentucky's marriage

laws must not survive, because they are neither narrowly tailored nor serve any compelling government purpose.

1. Kentucky's Marriage Laws Burden the Fundamental Right to Marriage.

Defendant argues that because opposite-sex marriage is "deeply rooted in the history and traditions of our country," but "a right to same-sex marriage is not," same-sex couples have no fundamental right to marriage. (Beshear Br. 24). He contends further that Plaintiffs "want to re-define the right and create a new right – a new institution . . ." (*Id*. at 25). This argument misstates Plaintiffs' claim and misrepresents the nature of the right to marriage.

Defendant correctly notes that neither the Supreme Court nor the Sixth Circuit has explicitly declared that the fundamental right to marry includes a fundamental right to marry someone of the same sex. Since this is an issue of first impression for this Court, the lack of such an explicit pronouncement is of little import. What is certain is that marriage is a liberty interest to which all individuals are entitled. *Meyer v. Nebraska*, 262 U.S. at 399; *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639 (1974). "Because the freedom to marry has long been recognized as one of the vital personal rights essential to orderly pursuit of happiness of by free men," the Supreme Court has declared, "the decision to marry is a fundamental right." *Loving v. Va.*, 388 U.S. at 12. One cannot reconcile the

concept of marriage as a fundamental right for all individuals while denying that right to couples whose partners are of the same sex.

Prior to *Loving v. Virginia*, the Supreme Court had never formally declared that the fundamental right to marry included a right to marry someone of a different race. 388 U.S. 1 (1967). This comparison is valuable because it illustrates how our legal concepts of marriage and equality have grown to become more inclusive over time, even in the face of hostile judicial precedent.

As long ago as 1888, the Supreme Court acknowledged that marriage is "the most important relation in life." *Maynard v. Hill*, 125 U.S. 190, 205 (1888). In 1942, that Court formally declared marriage to be "one of the basic civil rights of man." *Skinner*, 316 U.S. at 541. Though it would take another 25 years before anti-miscegenation laws were finally ruled unconstitutional, the fact that interracial relationships had not been previously included in the fundamental right to marriage did not stop the Supreme Court from declaring them so. *Loving*, 388 U.S. at 7. By 1967, the vast weight of the Court's precedent on issues of familial relations made that conclusion irresistible. As the Court noted two decades before *Windsor*:

> Marriage is mentioned nowhere in the Bill of Rights and interracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by [the Fourteenth Amendment].

Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 847-48 (1992).

That precedent has only grown more inclusive with time. Marriage as a fundamental right implicates numerous liberty interests, including the right to privacy, the right to intimate choice, and the right to free association. *Griswold*, 381 U.S. at 486; *Lawrence*, 539 U.S. at 574; and *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996). Marriage involves "the most intimate and personal choices a person may make in a lifetime, choices central to dignity and autonomy. . ." *Casey*, 505 U.S. at 851. As such, the Constitution demands respect "for the autonomy of the person in making these choices." *Lawrence*, 539 U.S. at 574. "[T]he Constitution undoubtedly imposes constraints on the State's power to control the selection of one's spouse . . ." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 620 (1984). There is simply no constitutional basis to deny the members of same-sex couples the right to autonomy in familial decisions that they would enjoy if they were members of opposite-sex couples. *Lawrence,* 539 U.S. at 574.

More recently, Justice Kennedy, writing in *United States v. Windsor*, synthesized this collective body of precedent to express the basic concept of marriage as a fundamental right for all, including same-sex couples:

> The States' interest in defining and regulating the marital relation, subject to constitutional guarantees, stems from the understanding that marriage is more than a routine classification for purposes of certain statutory benefits. Private, consensual sexual intimacy between two adult persons of the same sex may not be punished by the State, and it can form "but one element in a personal bond that is more enduring." *Lawrence v. Texas*, 539 U. S. 558, 567, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003) . . . For same-sex couples who wished to be married, the

> State acted to give their lawful conduct a lawful status. This status is a far-reaching legal acknowledgment of the intimate relationship between two people, a relationship deemed by the State worthy of dignity in the community equal with all other marriages.

133 S. Ct. at 2692 (U.S. 2013).

Justice Kennedy makes clear that same-sex marriages do not, in any way, run afoul of the fundamental concept of marriage as an "intimate relationship . . . deemed . . . worthy of dignity . . ." *Id*. In the same way that the Supreme Court in *Loving* did not require prior case law to expressly include interracial relationships within the idea of marriage as a fundamental right, this Court has no need for precedent to expressly include same-sex relationships.[3]

Defendant relies upon case law from 1942 and before to argue that same-sex marriage, though functionally and legally identical to opposite-sex marriage aside from the sex of the partners, constitutes a "new institution." (Beshear Br. 25). Based upon the unfounded assumption that "marriage and procreation is fundamental to the very existence and survival of the race," Defendant attempts to tie a right to marriage to the ability to procreate. (*Id*., quoting *Skinner*, 316 U.S. at 541). This defies logic and the express language of Kentucky's marriage laws.

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3. At least three U.S. District Courts have recently declared that same-sex couples enjoy the same fundamental right to marriage as all other citizens and applied a heightened form of scrutiny. *Bostic v. Rainey*, 970 F. Supp. 2d 456, 472 (E.D. Va. 2014); *Latta v. Otter*, 2014 U.S. Dist. LEXIS 66417, *39-41 (D. Idaho May 13, 2014); and *Whitewood v. Wolf*, 2014 U.S. Dist. LEXIS 68771, *26-27 (M.D. Pa. 2014).

Defendant does not characterize opposite-sex couples who are infertile but seek to marry as demanding the creation of a new right to marriage or a new institution. Even though "procreation can never naturally result" from their union, Defendant ignores the fact that they are as entitled to marry as fertile opposite-sex couples. (Beshear Br. 27). Similarly, married opposite-sex couples who are capable of procreation but voluntarily choose not to have children do not "re-define the right" to marry. It is illogical to argue that procreative ability alone determines the extent of the right to marriage all citizens enjoy.

Finally, Defendant neglects to note that Kentucky's marriage laws contain no language whatsoever about procreative ability. They contain no mandate for married couples to have children, and childless opposite-sex couples are not forced to divorce. By the legislature's design, procreation has no role at all in determining the outer bounds of the fundamental right to marry in the context of Kentucky law. Heightened scrutiny is the appropriate standard of review.

2. Kentucky's Marriage Laws Target a Suspect Class.

Heightened scrutiny is also applicable because Kentucky's laws discriminate on the basis of a suspect classification. "Prejudice against discrete and insular minorities" calls for "a correspondingly more searching judicial inquiry." *Carolene Products Co*., 304 U.S. at 152, n.4 (1938); *see, e.g*., *Adarand Constructors v. Pena*, 515 U.S. 200, 227 (1995) (strict scrutiny applied to a racial classification). "[T]he

traditional indicia of suspectness" include when a class is "subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Rodriguez*, 411 U.S. at 28. Additionally, a class will be identified as a "discrete and insular minority" when its members share immutable characteristics. *Lyng v. Castillo*, 477 U.S. 635, 638 (1968). Race, sex, and national origin are all immutable characteristics that trigger heightened scrutiny when laws that discriminate on those bases are challenged. *See, e.g.*, *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

Defendant argues that sexual orientation is not a suspect classification because this Court has not yet recognized it as such. (Beshear Br. 24). The district court, relying on *Davis v. Prison Health Servs*., 679 F.3d 433, 438 (6th Cir. 2012), agreed that this court has not yet recognized sexual orientation as a suspect class. (Memorandum Opinion, RE 47, PageID # 731). While declining to depart from precedent, the district court also noted, "[i]t would be no surprise, however, were the Sixth Circuit to reconsider its view" on sexual orientation as a suspect class. (*Id*.). *Davis* is ripe for reconsideration since it relies on the precedent set by *Bowers v. Hardwick*, 478 U.S. 186 (1986), which has been explicitly overruled by *Lawrence v. Texas*, 539 U.S. at 578.

As the district court found, gay and lesbian individuals "share many characteristics of other groups that are afforded heightened scrutiny, such as historical discrimination, immutable or distinguishing characteristics that define them as a discrete group, and relative political powerlessness." (RE 47, PageID # 732, citing *Lyng,* 477 U.S at 638). Defendant does not dispute that same-sex couples have suffered historical discrimination. Indeed, the very laws challenged here are evidence of the public animus and political powerlessness of gays and lesbians in Kentucky. Homosexuals have experienced a "history of purposeful unequal treatment or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities." *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976).

In recent years, the Supreme Court itself has heard challenges to other laws targeting gays and lesbians. In *Romer v. Evans*, the Supreme Court declared unconstitutional a Colorado law which, based on a "bare desire to harm" them, purposely excluded homosexuals from anti-discrimination protection. 517 U.S. at 634. In *Lawrence v. Texas*, the Supreme Court struck down anti-sodomy laws which singled out private, consensual conduct among homosexuals. 539 U.S. at 574.

Academics have also studied the long history of discrimination faced by gays and lesbians. For example, gay men and lesbian women receive lower pay

and disparate treatment in the workplace. Bruce Elmslie & Edinaldo Tebaldi, *Sexual Orientation and Labor Market Discrimination*, 28 J. LAB. RES. 436 (2007); M.V. Lee Badgett, Brad Sears, Holning Lau, & Deborah Ho, *Bias in the Workplace: Consistent Evidence of Sexual Orientation and Gender Identity Discrimination 1998-2008*, 84 CHI.-KENT L. REV. 559 (2009); Gays and lesbians also endure regular discrimination in public accommodations. Andrew S. Walters & Maria-Cristina Curran, *"Excuse me, sir? May I help you and your boyfriend?" Salespersons' Differential Treatment of Homosexual and Straight Customers*, 31 J. OF HOMOSEXUALITY, 135 (1996); David A. Jones, *Discrimination Against Same-Sex Couples in Hotel Reservation Policies*, 31 J. OF HOMOSEXUALITY 153 (1996).

The array of discrimination suffered by gays and lesbians exceeds these economic and social injustices and enters the realm of physical violence. Many Americans can recall the infamous police raids at New York's Stonewall Inn in 1969; the unsolved burning of the UpStairs Lounge in New Orleans in 1973 that killed 32 people, most of whom were gay men; and the vicious torture and murder of Matthew Shephard in 1998. The Department of Justice reports that in 2012 (the most recent available data), 19.6% of hate crimes investigated by the F.B.I. were motivated by sexual-orientation bias. U.S. DEP. OF JUSTICE, F.B.I., HATE CRIME STATISTICS (2012) (Addendum).

This long history of discrimination is testament to the relative political powerlessness of gays and lesbians to protect themselves from the majority bias. After all, the discriminatory Kentucky marriage laws, like their counterparts in other states, were enacted through the democratic process in legislative sessions and at the ballot box. Plaintiffs, and others like them, lack the political power to prevent the passage of these laws that single them out for exclusion, or to engender enough support for repeal. The courts have been their only recourse.

Defendant declines to argue that members of same-sex couples do not share "immutable or distinguishing characteristics that define them as a discrete group." The laws at issue in this case classify people on the basis of sex and sexual orientation. Such classifications trigger heightened scrutiny because sex and sexual orientation are among the defining characteristics of personhood and they are beyond a person's control. (Medical and Psychological *Amicus* Br., RE 38-8). Quite recently, a district court within the Sixth Circuit declared that gay and lesbians, "exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group" because sexual orientation is an integral part of personal identity and cannot be changed through conscious decision or any other method. *Bassett v. Snyder*, 2013 U.S. Dist. LEXIS 93345 (E.D. Mich. 2013), quoting *Lyng*, 47 U.S. at 638. Even if a person's sexual orientation could change over time, the state cannot produce any evidence that it would be the result of a conscious choice.

See Zavaleta-Lopez v. AG of the United States, 360 Fed. Appx. 331, 333 (3rd Cir. 2010) ("[W]e focus on whether putative group members possess common, immutable characteristics. . .or characteristics that are capable of being changed but are of such fundamental importance that persons should not be required to change them, such as religious beliefs.").

As the district court suggested, this Court should take the opportunity to revisit *Davis* since it relied on overruled precedent. Should the Court look upon this issue with fresh eyes, it must find that gays and lesbians have been subjected to historical and ongoing discrimination (of which this case is an example), they share immutable traits that define them as a discrete group, and they are still politically powerless. Sexual orientation should be considered a suspect class, and heightened scrutiny should be applied to the review of Kentucky's discriminatory marriage laws.

C. Kentucky's Marriage Laws Cannot Withstand Rational Basis Review.

Defendant argues that "procreation is a legitimate interest of the Commonwealth," which justifies Kentucky's discriminatory marriage laws under the rational basis standard. (Beshear Br. 28). This twisted and disjointed argument fails because procreation is not a legitimate state interest and the Kentucky marriage laws at issue here are not rationally related to furthering any such interest.

Facially discriminatory classifications can be upheld "if there is any reasonably conceivable set of facts that could provide a rational basis for the classification." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993). This discrimination is permissible only where "there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller v. Doe*, 509 U.S. 312, 320 (1993). While rational basis review is deferential to legislative prerogatives, it is "not toothless." *Peoples Rights Org., Inc. v. City of Columbus*, 152 F.3d 522, 532 (6th Cir. 1998) (internal quotations omitted). Classifications may not be drawn "for the purpose of disadvantaging the group burdened by the law." *Romer*, 517 U.S at 633. And critically, courts must "insist on knowing the relation between the classification adopted and the object to be obtained." *Id*. at 632. A legitimate object alone is not enough for a discriminatory law to survive rational basis review; the law must rationally relate to that object.

The court below noted that Defendant's original declination to offer procreation as the rational basis for marriage discrimination was not surprising because it "has failed rational basis review in every court to consider [it] post-*Windsor*, and most courts pre-*Windsor*." (RE 47, PageID # 738). Further, "Kentucky does not require proof of procreative ability to have an out-of-state marriage recognized. The exclusion of same-sex couples on procreation grounds makes just as little sense as excluding post-menopausal couples or infertile couples

on procreation grounds." (*Id*.). In the end, the court could not "conceive of any reasons for enacting the laws challenged here," and even without finding animus, Kentucky's marriage laws "cannot withstand traditional rational basis review." (*Id*.).

1. Procreation is Not a Legitimate State Interest.

Procreation is of dubious legitimacy as a state interest. Defendant's argument that Kentucky has a legitimate interest in procreation means that Kentucky has an interest in the private sexual and familial decisions of its individual citizens. This alleged government interest in the intimate decisions of its residents raises serious privacy concerns for the citizens of the Commonwealth.

Defendant makes the following summary declaration:

> [I]t cannot be said that gender has no bearing on the government's interest with regard to marriage.[4] Man-man and woman-woman couples cannot procreate. Traditional man-woman couples can. Procreation is a legitimate interest of the Commonwealth . . .
>
> Encouraging, promoting, and supporting the formation of relationships that have the natural ability to procreate furthers the Commonwealth's basic and fundamental interest in ensuring the existence of the human race.

4. Defendant repeatedly confuses the concepts of gender and sex. Sex refers to physical anatomy, while gender is a term that refers to a person's social, psychological, and physical expression of their sex. Kentucky's marriage laws discriminate on the basis of sex, not gender.

(Beshear Br. 29). The very existence of humanity, according to Defendant, is the pressing business of Kentucky's legislature.

Defendant cites only to *Skinner*, 316 U.S. at 54 as authority for the proposition that procreation is "fundamental to the very existence and survival of the race" and should therefore be considered a legitimate state interest. (*Id*. at 28). This *post hoc* justification for Kentucky's marriage laws finds no support in the language of the laws themselves, which are completely silent on procreation. Furthermore, none of the testimony offered by Kentucky Senators prior to the adoption of Amendment 233A makes any reference at all to procreation, only to religious tradition, the sovereign majority, and the sinister specter of "judicial activism."

The intimate physical and emotional relationships that accompany decisions on whether and when to have children is protected from government intrusion by a general right to privacy under the Bill of Rights. *Griswold*, 381 U.S. at 485. Matters "involving the most intimate personal choices a person may make in a lifetime, choices central to personal dignity and autonomy," especially procreation, are "central to the liberty protected by the Fourteenth Amendment." *Casey*, 505 U.S at 851. And "the right to make certain decisions regarding sexual conduct extends beyond the marital relationship." *Lawrence*, 539 U.S. at 565, citing *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

The Supreme Court has repeatedly declared that these decisions should be free of government interference. Defendant relies exclusively on *Skinner* for support, but *Skinner* specifically restricted the state's power to impose itself in matters of procreation by striking down Oklahoma's use of sterilization to punish "habitual criminals." 316 U.S. at 536. Not even in the prominent cases involving abortion or contraception has the Supreme Court acknowledged any general state interest in promoting procreation. *See Roe v. Wade*, 410 U.S. 113, 147-150 (1973); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *Casey*, 505 U.S. 833; *Griswold*, 381 U.S. 479; and *Eisenstadt*, 405 U.S. 438.

To fill the gap in its legal authority, Defendant cites the pro-birth policies of Japan and France. The government of Japan has set aside considerable funds "for birthrate-boosting programs . . . which included consultations and marriage information for singles." (Beshear Br. 23). France is covering child-care costs, giving tax deductions, and providing discounts for transportation. (*Id*.)

The comparison between these foreign programs and Kentucky's marriage ban is inapt. The generous provision of childcare benefits and marriage "consultations" in other countries cannot be conflated with Kentucky's discriminatory laws *excluding* citizens – of whom many have children – from the benefits of marriage.[5] Defendant's reliance on the benevolent programs in France

5. Notably, same-sex marriage is legal in France.

and Japan invites acknowledgement of the less benign consequences of other sovereign interests in procreation. Procreation was of great concern when China implemented its one-child policy. Fascist interests in procreation resulted in infamous eugenics programs in the first half of the last century. And tribal governments throughout North and West Africa use their interest in procreation to perpetuate forced marriages of young girls. The notion that the State has an interest in procreation is repulsive to the personal autonomy enshrined in our Constitution. The *Skinner* Court itself was wary of what might happen should the state's power fall into "evil or reckless hands[.]. . ." 316 U.S. at 541.

2. Banning Same-Sex Couples From the State's Marriage System is Not Rationally Related to Promoting Procreation

Even if Kentucky were to have a legitimate interest in private, procreative decision-making, the rational basis standard is not so low that any justification will suffice. Defendant must do more than simply articulate a legitimate governmental purpose. He must also demonstrate that there is an actual rational connection between that purpose and the disparity of treatment imposed by the challenged laws. Courts must "insist on knowing the relation between the classification adopted and the object to be obtained." *Romer v. Evans*, 517 U.S. at 632. Defendant, however, merely articulates an interest in procreation and leaves it at that. Missing is any explanation as to how Kentucky's exclusion of same-sex

couples from marriage actually furthers any interest in promoting, encouraging, or supporting the formation of relationships that have the natural ability to procreate.

Defendant's silence on this essential link is not an oversight. It is a tacit acknowledgment that the relationship between the two is beyond tenuous; it is nonexistent. There is no rational relationship between a state interest in opposite-sex procreation and the exclusion of same-sex couples from marriage benefits. Defendant does not explain how denying same-sex couples entry into Kentucky's marital scheme promotes opposite-sex procreation because he cannot. Prohibiting farmers from growing tomatoes in greenhouses does not increase the yield of farmers growing tomatoes in the field.

Even if the Court agrees that promoting procreation among opposite-sex couples is a legitimate state interest, and also agrees that allowing opposite-sex couples to marry furthers that interest in a rational way, there is no reason to agree that excluding same-sex couples from the institution of marriage furthers that legitimate state interest. Kentucky "may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985). The State has no evidence to support this supposition. It cannot point to a single statistic or study that would indicate even a single birth attributable to refusing to recognize Plaintiffs' out-of-state marriages. Plaintiffs are at a slight disadvantage in

arguing this point because the link is apparently so attenuated that no one has ever even thought to do a study on the effects of same-sex marriage bans on birth rates. What we do know is that Kentucky's birth rate, along with the nation's, has been in steady decline. According to census data available through the Kentucky State Data Center, the birth rate dropped significantly in the mid-1960s and has slowly been declining since.[6] Throughout this period, same-sex couples were precluded from marrying in Kentucky. And yet this discrimination has done nothing to stop the decline.

The irrationality of Defendant's argument is not its only flaw. Despite his summary protest, the Defenant's position necessarily means that Kentucky could permissibly deny marital recognition to anyone who is unable or unwilling to bear children, not just same-sex couples. Just as couples do not need the State's marital institution in order to procreate, the marital institution itself does not need procreation to exist. The U.S. Supreme Court has long acknowledged that marriage is more than the lone task of reproduction. In *Griswold*, the Court explained:

> Marriage is a coming together for 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 of living, not political faiths; a bilateral loyalty, *not commercial or social projects*.

[6] Available at http://ksdc.louisville.edu/index.php/kentucky-demographic-data/births-and-deaths (accessed May 28, 2014).

381 U.S. at 486 (emphasis added). In *Turner v. Safley*, the Supreme Court identified "many important attributes of marriage" beyond procreation, including emotional support, public commitment, personal dedication, exercise of religious faith, and the receipt of government benefits. 482 U.S. at 95-96. Marriage is far more than mere procreation. To reduce state approval to only those relationships which can "naturally procreate" is truly demeaning to all other loving couples, including opposite-sex couples who cannot or choose not to have children.[7]

3. No Other Justification for Kentucky's Marriage Laws Survives Rational Basis Review.

Though Defendant cites only procreation as the *post hoc* government interest justifying Kentucky's discriminatory marriage laws, Plaintiffs, as challengers to those laws, must combat all possible alternatives. *Heller*, 509 U.S. at 320. Plaintiffs gladly accept this challenge, as other alternatives further reveal the injustice of Kentucky's ban on same-sex marriage.

a. Tradition Alone Cannot Form a Rational Basis.

7. Defendant repeatedly distinguishes "natural" procreation from unnamed alternative methods. Never does the Defendant admit that many opposite-sex married couples have children through a variety of ways (including "natural" procreation in previous relationships, or through surrogates, or through *in vitro* methods). The only method of procreation of any interest to the Defendant is "man-woman" sexual intercourse. By implication, that is the only legitimate method of reproduction in the prying eyes of the Commonwealth of Kentucky.

Defendant uses the word "traditional" more than twenty times in his brief to describe opposite-sex couples and marriages, purposely distinguishing them from same-sex couples and marriages, which are described as "non-traditional" at least twice. (Beshear Br. 9). But as the court below properly ruled, tradition alone cannot protect a law from rational basis attack.

"Ancient lineage of a legal concept does not give it immunity from attack for lacking a rational basis." *Heller*, 509 U.S. at 326. "Neither the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack." *Williams v. Illinois*, 399 U.S. 235, 239 (1970). Even where "the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice." *Lawrence*, 539 U.S. at 577. Tradition alone is therefore not a rational basis for a discriminatory law. After all, the concept of "traditional marriage" has changed dramatically throughout history, and Kentucky's marriage laws have undergone significant evolution over time.[8]

8. The court below acknowledged the troublesome history of marriage laws in Kentucky and the United States as a whole. (Memorandum Opinion, RE 47, pageID # 738).

In the Bible, for example, the "one man, one woman" model shared space with polygamy,[9] sexual slavery,[10] and forced marriage between rapists and their victims.[11] Marriage to foreigners was considered blasphemous.[12] What proponents now call "traditional" marriage was certainly not the only accepted form in the Judeo-Christian religious heritage.

Similarly, the Commonwealth's conception of marriage has evolved. Kentucky prohibited marriage between people of different races from the state's creation in 1792 until 1967, when the U.S. Supreme Court finally struck down all anti-miscegenation laws. *See Loving*, 388 U.S. 1. In 1915, Kentucky's marriage laws included specific prohibitions for marriage "[b]etween a white person and a negro or mulatto," and such marriages were considered criminal. Ky. Stat. sec. 2097 (1915). Interracial marriages were subject to fines as high as five thousand dollars, "and if, after conviction, the parties continue to cohabit as man and wife, they, or either of them, shall be imprisoned not less than three nor more than twelve months in the penitentiary." Ky. Stat. sec. 2114 (1915). The prohibition of

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9. See Genesis 4:19 (Lamech has two wives); Genesis 26:34, 28:9 (Easau has three wives); Genesis 29:28, 30:4-9 (Jacob has four wives); Judges 8:30 (Gideon has "many" wives); and II Chronicles 13:21 (Abijah has fourteen wives).
10. Genesis 16:1-5 (Sarah gives Abraham her slave Hagar to bear his children); Numbers 31:17-18 (Moses instructs the Israelites to kill boy prisoners and keep the girls as a spoil of the war); Exodus 21:4 (the wife and children of a slave belong to the master when the slave is free).
11. Deuteronomy 22:28-29.
12. Ezra 10:2-11.

interracial marriage dating from the state's birth and lasting more than one hundred sixty years is certainly part of the "traditional" marriage institution. And yet, that concept of "traditional marriage" was struck down as unconstitutional.

Kentucky's conception of marriage once included the concept of "feme covert," which prevented married women from having a separate legal identity from their husbands. *See, e.g.*, *Johnston v. Jones*, 51 Ky. 326 (Ky. 1851) (discussing protections to property owned by women before marriage in contrast to property acquired after marriage). Kentucky also refused to allow a woman who left her husband to change her domicile. *Maguire v. Maguire*, 37 Ky. 181, 186 (Ky. 1838). Kentucky marriages voided under the anti-miscegenation laws (cited above) left the wife and children, regardless of their race, unable to inherit property from the husband and father. *Moore v. Moore*, 98 S.W. 1027 (Ky. 1907).

Though Defendant no longer explicitly claims tradition as the justification for Kentucky's discriminatory marriage laws, his frequent reference to "traditional" marriage and relationships betrays his true intent. But tradition alone cannot form a rational basis under equal protection analysis, therefore Kentucky's refusal to recognize out-of-state marriages cannot be sustained on that ground.

b. Federalism and State Sovereignty do Not Form a Rational Basis.

Neither federalism nor the democratic enactment of Kentucky's marriage laws can insulate them from constitutional attack. Defendant accuses the district court of "judicially re-defining and regulating" Kentucky's democratically enacted marriage laws, in violation of Kentucky's "inherent function and role" to "define and regulate marriage" which is "beyond dispute." (Beshear Br. 14). In Defendant's words, the majority consensus of Kentucky legislators and voters to discriminate against same-sex couples is a "proper exercise of Kentucky's sovereign authority . . ." (*Id*. at 16). Defendant points to dicta in *Windsor* regarding the right of states to determine for themselves "the way members of a discrete community treat each other." 133 S. Ct. at 2692. In support, Defendant then turns to *Labine v. Vincent* for the proposition that, "[a]bsent a specific constitutional guarantee, it is for the legislature, not the life-tenured judges of this Court, to select from among possible laws." 401 U.S. 532, 538-39 (1971).[13]

Defendant's reliance on certain language from *Windsor* ignores the explicit rebuttal of that language within *Windsor* itself and in related precedent. It is a well-

13. Defendant argues in a later section of his brief that there is no constitutional guarantee to same-sex marriage, which he considers to be distinct from marriage by opposite-sex couples. "Plaintiffs . . . are not seeking access to a fundamental right. They are seeking access to a newly asserted right – same sex[sic] marriage – which has never been identified as a fundamental right and does not meet the criteria." (Beshear Br. 23). Without this dubious distinction, Defendant would seem to imply that *Loving v. Virginia* was incorrectly decided, and that state governments should retain total autonomy over marriage, even when they violate equal protection and due process.

established principle that even though states enjoy great power over domestic relations, "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). Prior Supreme Court decisions have also held that the Fourteenth Amendment limits state power over 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).[14]

Defendant omits this principle from his discussion of *Windsor* and state power, and instead argues that "*Windsor* does not stand for the proposition that the federal constitution[sic] compels states to issue marriage licenses to same-sex couples or to recognize marriage licenses issued . . . in other jurisdictions." (Beshear Br. 16-17).

While Defendant is correct that *Windsor* does not affirmatively compel the states to issue marriage licenses or respect out-of-state marriages, he misses the crucial piece of the analysis: Kentucky already issues marriage licenses and recognizes licenses from other jurisdictions. *Windsor* and the Fourteenth Amendment compel states to *stop discriminating* against same-sex couples when

14. No state legislation can be totally free of judicial scrutiny. "The delicate balance implicit in the doctrine of separation of powers would be destroyed if [the legislative branch] were allowed not only to legislate, but also to judge the constitutionality of its own actions." *Bartlett v. Bowen*, 816 F.2d 695, 707 (D.C. Cir. 1987).

issuing licenses or recognizing out-of-state marriages. This is an important distinction. Kentucky can establish its own marriage laws, or abandon them altogether, but it cannot violate the Fourteenth Amendment when doing so. No appeal to federalism or state sovereignty can provide a rational basis for or otherwise sustain a discriminatory law.

c. Optimal Child-Rearing is Not a Rational Basis.

In the court below, the Family Foundation of Kentucky argued that "no other purpose" than responsible parenting "can plausibly explain the ubiquity" of the institution of marriage. (Brief of *Amicus Curiae*, RE 43, PageID # 652). Because "mothers and fathers make unique contributions to a child's development," the state has a legitimate interest in excluding same-sex couples from marriage. (*Id*. at PageID # 631).

In support, the Family Foundation cited several studies, including one by sociologist Mark Regnerus. (*Id*. at PageID # 629). This study has been roundly rejected by Regnerus' academic peers, including the American Sociological Association. The ASA filed an *amicus curiae* brief in the case of *Hollingsworth v. Perry,* 133 S. Ct. 2652 (U.S. 2013) in which a subsection directly refuted Regnerus' conclusions because they are contrary to the clear scientific consensus that married same-sex couples provide a nurturing environment for children. (Pl. Resp. to *Amicus Curiae*, RE 46, PageID # 679-80).

The district court in this case specifically rejected optimal child-rearing as a rational basis for Kentucky's marriage laws. (Memorandum Opinion, RE 47, PageID # 738-39). In *Windsor*, the Supreme Court recognized that discriminatory marriage laws such as the federal Defense of Marriage Act humiliate "tens of thousands of children now being raised by same-sex couples," because they make it "even more difficult for the children to understand the integrity and closeness of their own family." 133 S.Ct. at 2694. For his part, Defendant distances himself from this argument, stating that Kentucky "has not identified its interest as creating loving, nurturing family units 'capable of raising children.'" (Beshear Br. 33).

Defendant provides only a *post hoc* justification for the discriminatory laws challenged in this case: "natural" procreation. As discussed above, procreation is neither mentioned nor required as a condition of Kentucky's marriage laws, and may not be a legitimate government purpose at any rate, because it invades the privacy rights and intimate autonomy of all citizens. Beyond tradition, procreation, and child-rearing, the court below could not "conceive of any reasons for enacting the laws challenged here." (Memorandum Opinion, RE 47, PageID # 739). Plaintiffs cannot conceive of any others, either, beside outright animus (discussed below), and Defendant has proposed none. As the court below held, Plaintiffs met their burden under rational basis review and the Defendant failed to provide

sufficient justification for Kentucky's marriage laws. This was not in error, and the decision below should be affirmed.

D. Kentucky's Marriage Laws Were Motivated by Animus.

A more likely basis for Kentucky's refusal to recognize valid same-sex marriages from other states is "animus" – in this case, a bare desire to exclude same-sex couples from government recognition and benefits. Such "[a]rbitrary and invidious discrimination" cannot be a legitimate purpose. *Loving*, 388 U.S. at 10. [T]he governmental objective must be a legitimate and neutral one." *Turner*, 482 U.S. at 90. Classifications driven by animus against a minority are particularly prone to constitutional attack because "bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* government interest." *Moreno*, 413 U.S. 528, 534 (1973) (emphasis in original).

"Animus" sufficient to invalidate a discriminatory law need not be an overt, "bare desire" to harm an unpopular group, however. "[M]ere negative attitudes, or fear" may also lead a majority to treat a minority group unequally. *City of Cleburne*, 473 U.S. at 448. Negative attitudes may result from "insensitivity caused by simple want of careful, rational reflection or from instinctive mechanism to guard against people who appear to be different in some respects from ourselves." *Bd. of Trs. of Univ. of Alabama v. Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring). Therefore, this Court need not find an express legislative intent to

demean or exclude in order to find the purpose of Kentucky's laws to be improper due to animus. An implied intent is sufficient.

In *Loving v. Virginia*, the Supreme Court ruled that anti-miscegenation laws (which were still in effect in Kentucky at the time) rested "solely upon distinctions drawn according to race," for which there was "patently no legitimate overriding purpose independent of invidious racial discrimination which justifies the classification." 388 U.S. at 11. Despite Defendant's attempt to distinguish *Loving* on procreation grounds (Beshear Br. 28), the analogy should be obvious. This Court need only substitute one discrete minority group for another to see that Kentucky's marriage laws rest solely upon distinctions for which there is patently no legitimate overriding purpose independent of invidious discriminations against same-sex couples.

But this Court need not analogize. The question of laws which classify and exclude same-sex couples from marriage or otherwise single them out for unequal treatment has already been addressed by the Supreme Court on several occasions. And on every such occasion, no proponent of discrimination against same-sex couples has been able to prove a single legitimate purpose for which such laws are a reasonable means to achieve. Unable to survive even rational basis review, the Court has consistently held such laws unconstitutional.

In *Romer v. Evans*, the Supreme Court concluded that Colorado's constitutional amendment to exclude homosexuals from the protection of anti-discrimination laws "failed, indeed defied, even the conventional inquiry" of rational basis review. 517 U.S. at 631-32. Having considered numerous possible justifications for Colorado's law, the court dismissed all of them and concluded that it "classified homosexuals not to further a proper legislative end but to make them unequal to everyone else." *Id*. at 635. "[A] bare desire to harm a politically unpopular group cannot constitute a legitimate government interest." *Id*. at 634, quoting *Moreno*, 413 U.S. at 534.

In *Lawrence v. Texas*, the Court considered a state law which criminalized specific, private sexual behaviors common among consenting homosexual couples. 539 U.S. 558 (1973). None of the state's proposed justifications for the law convinced the Court, which even proposed some possible legitimate purposes of its own (such as the protection of minors, the prevention of coercion or injury, the regulation of public conduct, or the prohibition of prostitution) but found none of these present in the language, purpose, or application of the Texas law. *Id*. at 578. Applying rational basis review, the Court ruled that "[t]he Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual" and was therefore unconstitutional. *Id*. Even in dissent,

Justice Antonin Scalia acknowledged the obvious constitutional conflict presented by laws such as those at issue here:

> If moral disapprobation of homosexual conduct is "no legitimate state interest" for purposes of proscribing that conduct; and if . . . "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring;" what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising "[t]he liberty protected by the Constitution?"

Id. at 604-05 (SCALIA, J. dissenting; citations omitted).

More recently, in the case of *United States v. Windsor*, the Supreme Court considered the constitutionality of DOMA § 3, which defined marriage at the federal level as an institution exclusive to opposite-sex couples. 133 S. Ct. 2675. The Court considered each possible justification for the law but disregarded them all, instead finding that DOMA § 3 operated only to "demean those persons who are in a lawful same-sex marriage." *Id*. at 2695. In so doing, "it violate[d] basic due process and equal protection principles." *Id*. at 2693. Relying on language from cases that applied rational basis review such as *Moreno* and *Romer* (though not mentioning the standard explicitly), the Court found the law unconstitutional. *Id*. at 2695. Further, "[w]hile the Fifth Amendment withdraws from the 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*.

Relying on the analysis of *Windsor*, the court below ruled that "the legislative history of Kentucky's laws clearly demonstrate the intent to permanently prevent the recognition of same-sex marriage in Kentucky." (Memorandum Opinion, RE 47, PageID # 735). Further, the court found that "a law refusing to recognize valid out-of-state same-sex marriages has only one effect: to impose inequality." (*Id*. at 736). Though the district court recognized that "Kentucky's laws treat gay and lesbian persons differently in a way that demeans them," it stopped short of finding "a clear showing of animus." (*Id*.).

Plaintiffs encourage this Court to reconsider the express language of Kentucky's marriage laws, their legislative history, and the social climate in which they were formulated and enacted. The discriminatory and demeaning effects of those laws were not a coincidental or unintended consequence at all, but the anticipated and inevitable result of a bare desire to harm an unpopular group. Such a desire is present on the very face of the challenged laws, which specifically single out same-sex couples, excluding them from marriage and refusing to recognize valid marriages from other states.[15] The very purpose and effect of Kentucky's refusal to recognize valid out-of-state marriages is arbitrary and invidious discrimination.

15. *See also Secsys, LLC v. Vigil*, 666 F.3d 678, 685 (10th Cir. 2012) ("When a distinction between groups of persons appears on the face of a state law or action, an intent to discriminate is presumed and no further examination of legislative purpose is required.").

In sum, the analysis in this case should be no different from that in *Romer*, *Lawrence*, or *Windsor*. Kentucky has not articulated, and cannot articulate, any basis for its laws other than: 1) the supposed "antiquity of a practice," i.e., "traditional marriage"; 2) an inconsistent and unsubstantiated interest in "natural" procreation and stable birth rates not actually related to Kentucky's laws, which do not and cannot mandate procreation; 3) other justifications such as federalism and state sovereignty irrespective of the federal constitution; or 4) a "bare desire to harm" same-sex couples by purposely making their valid marriages unequal. None of these bases are permissible or "rational" within the meaning of Supreme Court jurisprudence. Therefore, Kentucky's discriminatory marriage laws cannot withstand even the most deferential standard of review, and were correctly ruled unconstitutional under the Fourteenth Amendment.

CONCLUSION

Plaintiffs Gregory Bourke, Michael DeLeon, Luther Barlowe, Jimmy Meade, Paul Campion, Randell Johnson, Kimberly Franklin, and Tamera Boyd are committed married couples who wish not to change or disrupt the institution of marriage in Kentucky. They want only to be part of it, by receiving the same respect and dignity that opposite-sex couples receive every day in the

Commonwealth. They have a right to such respect and dignity; a right which is protected by the Constitution.

For the foregoing reasons, this Court should affirm the judgment of the district court.

Dated: June 9, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. The undersigned certifies that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). This brief contains 12,249 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. The undersigned certifies that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). This brief has been prepared in 14-point Times New Roman font.

s/ L. Joe Dunman
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Dated: June 9, 2014

CERTIFICATE OF SERVICE

It is hereby certified that on June 9, 2014, I electronically filed the foregoing Brief for Appellees with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system, and service was accomplished through same.

s/ L. Joe Dunman
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Dated: June 9, 2014

ADDENDUM

DESIGNATION OF RELEVANT LOWER COURT DOCUMENTS

Record Entry	**Description**	**PageID#**
31	Second Amended Complaint	289-294
38-1	Plaintiffs' Memorandum in Support of Summary Judgment	336
38-7	Video from Kentucky State Senate proceedings, March 11, 2004	Physical Exhibit
38-8	Medical and Psychological *Amicus* Brief	402-463
38-9	Bassett v. Snyder, 2013 U.S. Dist. LEXIS 93345 (E.D. Mich. 2013)	475
39	Defendants' Response to Plaintiffs' Motion for Summary Judgment	487
40	Plaintiffs' Reply in Support of Motion for Summary Judgment	498
43	Brief of *Amicus Curiae* Family Trust Foundation of Kentucky	639-
46	Plaintiffs' Response to *Amicus Curiae*	672
47	Memorandum Opinion	724- 746
55	Order Granting Plaintiffs' Motion for Summary Judgment	773

Incidents and Offenses

The Uniform Crime Reporting Program collects data about both single-bias and multiple-bias hate crimes. For each offense type reported, law enforcement must indicate at least one bias motivation. A single-bias incident is defined as an incident in which one or more offense types are motivated by the same bias. A multiple-bias incident is defined as an incident in which more than one offense type occurs and at least two offense types are motivated by different biases.

- In 2012, 1,730 law enforcement agencies reported 5,796 hate crime incidents involving 6,718 offenses.
- There were 5,790 single-bias incidents that involved 6,705 offenses, 7,151 victims, and 5,322 offenders.
- The 6 multiple-bias incidents reported in 2012 involved 13 offenses, 13 victims, and 9 offenders. (See Tables 1 and 12.)

Single-bias incidents

Analysis of the 5,790 single-bias incidents reported in 2012 revealed that:

- 48.3 percent were racially motivated.
- 19.6 percent resulted from sexual-orientation bias.
- 19.0 percent were motivated by religious bias.
- 11.5 percent stemmed from ethnicity/national origin bias.
- 1.6 percent were prompted by disability bias. (Based on Table 1.)

Offenses by bias motivation within incidents

Of the 6,705 single-bias hate crime offenses reported in the above incidents:

- 49.2 percent stemmed from racial bias.

- 19.7 percent were motivated by sexual-orientation bias.
- 17.4 percent resulted from religious bias.
- 12.3 percent were prompted by ethnicity/national origin bias.
- 1.5 percent resulted from biases against disabilities. (Based on Table 1.)

Racial bias

In 2012, law enforcement agencies reported that 3,297 single-bias hate crime offenses were racially motivated. Of these offenses:

- 66.1 percent were motivated by anti-black bias.
- 22.4 percent stemmed from anti-white bias.
- 4.1 percent resulted from anti-Asian/Pacific Islander bias.
- 4.1 percent were a result of bias against groups of individuals consisting of more than one race (anti-multiple races, group).
- 3.3 percent were motivated by anti-American Indian/Alaskan Native bias. (Based on Table 1.)

Religious bias

Hate crimes motivated by religious bias accounted for 1,166 offenses reported by law enforcement. A breakdown of the bias motivation of religious-biased offenses showed:

- 59.7 percent were anti-Jewish.
- 12.8 percent were anti-Islamic.
- 7.6 percent were anti-multiple religions, group.
- 6.8 percent were anti-Catholic.
- 2.9 percent were anti-Protestant.
- 1.0 percent were anti-Atheism/Agnosticism/etc.

- 9. 2 percent were anti-other (unspecified) religion. (Based on Table 1.)

Sexual-orientation bias

In 2012, law enforcement agencies reported 1,318 hate crime offenses based on sexual-orientation bias. Of these offenses:

- 54.6 percent were classified as anti-male homosexual bias.
- 28.0 percent were reported as anti-homosexual bias.
- 12.3 percent were prompted by an anti-female homosexual bias.
- 3.1 percent were classified as anti-bisexual bias.
- 2.0 percent were the result of an anti-heterosexual bias. (Based on Table 1.)

Ethnicity/national origin bias

Of the single-bias incidents, 822 offenses were committed based on the offenders' bias toward the perceived ethnicity or national origin of the victim. Of these offenses:

- 59.4 percent were anti-Hispanic bias.
- 40.6 percent were anti-other ethnicity/national origin bias. (Based on Table 1.)

Disability bias

There were 102 reported hate crime offenses committed based on disability bias. Of these:

- 82 offenses were classified as anti-mental disability.
- 20 offenses were reported as anti-physical disability. (See Table 1.)

By offense types

Of the 6,718 reported hate crime offenses in 2012:

- 28.4 percent were destruction/damage/vandalism.
- 23.4 percent were simple assault.

- 22.2 percent were intimidation.
- 12.7 percent were aggravated assault.
- The remainder were comprised of additional crimes against persons and property. (Based on Table 2.)

Offenses by crime category

Among the 6,718 hate crime offenses reported:

- 59.1 percent were crimes against persons.
- 37.9 percent were crimes against property.
- The remainder were crimes against society. (Based on Table 2.) (See Data Collection in Methodology.)

Crimes against persons

Law enforcement reported 3,968 hate crime offenses as crimes against persons. By offense type:

- 39.6 percent were simple assault.
- 37.5 percent were intimidation.
- 21.5 percent were aggravated assault.
- 0.6 percent consisted of 10 murders and 15 forcible rapes.
- 0.8 percent involved the offense category *other*, which is collected only in the National Incident-Based Reporting System. (Based on Table 2.)

Crimes against property

- The majority of the 2,547 hate crime offenses that were crimes against property (74.8 percent) were acts of destruction/damage/vandalism.

- The remaining 25.2 percent of crimes against property consisted of robbery, burglary, larceny-theft, motor vehicle theft, arson, and other crimes. (Based on Table 2.)

Crimes against society

There were 203 offenses defined as crimes against society (e.g., drug or narcotic offenses or prostitution).

By victim type

When considering the type of victims among the reported 6,718 hate crime offenses:

- 79.6 percent were directed at individuals.
- 4.6 percent were against businesses or financial institutions.
- 3.0 percent were against society.
- 2.9 percent were against government.
- 2.7 percent were against religious organizations.
- The remaining 7.2 percent were directed at other, multiple, or unknown victim types. (Based on Table 6.)