IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

CHELSEA TORRES and JESSAMY TORRES, individually and as next friends and parents of A.T., a minor child, on behalf of themselves and all others similarly situated, Plaintiffs, *versus* KITTY RHOADES, in her official capacity as Secretary of the State of Wisconsin Department of Health Services, Defendant.	CASE NO. 3:15-cv-00288 HON. BARBARA B. CRABB

PLAINTIFFS' CONSOLIDATED REPLY IN SUPPORT OF PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT AND CLASS CERTIFICATION

Plaintiffs Chelsea Torres, Jessamy Torres, and their son, A.T. (collectively, "Named Plaintiffs"), on behalf of themselves and the proposed class of those similarly situated (all collectively, "Plaintiffs"), seek two-parent birth certificates, which would provide them with the same dignity, security, support, and protection that Defendant Rhoades, for the State of Wisconsin, bestows on every single Wisconsin-born marital child of different-sex spouses through the automatic issuance of a two-parent birth certificate. In the wake of the Supreme Court's decision in *Obergefell*, there should be no question that same-sex couples are entitled to all of the rights and benefits of "civil marriage on the same terms and conditions as opposite-sex couples," and that the spousal presumption of parentage is a crucial aspect of marriage. *Obergefell v. Hodges*, 135 S Ct. 2584, 2605 (2015); *see also Henry v. Himes*, 14 F. Supp. 3d 1036 (S.D. Ohio 2014), *rev'd sub nom DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *rev'd sub nom Obergefell*, 135 S. Ct. 2584 (2015). Yet, by her own admission, Defendant "Rhoades

does not agree that *same-sex couples . . . can be treated the same way as different-sex couples* under the birth certificate statutes." (Dkt. No. 33, at 3 (emphasis added).)

That is the heart of this case: Defendant unlawfully refuses to treat the marital children of same-sex spouses in the same way as the marital children of different-sex spouses. Defendant attempts to obfuscate the discrimination taking place by asking this Court to sub-divide the Plaintiff Class, thus parsing out distinctions that Defendant admits have never been imposed on different sex-spouses, and declare that only *certain* same-sex spouses and their children are entitled to the rights that *all* families with different-sex parents currently receive upon birth.[1] Defendant vaguely states that her current practices are "under review," and that she intends to alter some of them in some unspecified way at some unknown point in the future to begin treating equally those families who use reproductive technology. This does not change the fact that the Department of Health Services ("DHS") admittedly has and continues to impose burdens on same-sex spouses and their children that it does not place on different-sex spouses and their children. This unequal treatment denies same-sex spouses essential rights and

[1] In response to Plaintiffs' Motion for Class Certification, Defendant opposes class certification only on commonality and typicality grounds. Because the arguments on those factors are closely intertwined with the arguments on the merits, also before the Court on Plaintiffs' Motion for Summary Judgment, Plaintiffs submit this combined brief which provides Plaintiffs' replies on both motions now pending before the Court. The parties agree that there are no disputes of fact precluding summary judgment. Plaintiffs submit no reply on their Proposed Findings of Fact because the Defendant's disputes to their proposed facts are either immaterial, or not disputes of fact but rather legal disputes or argument.

Notably, with respect to Defendant's arguments on class certification, Defendant has raised no objection or indeed made any response to Plaintiffs' inclusion in the proposed class of *all children* of same same-sex couples who legally married in Wisconsin or in another jurisdiction, at least one member of whom gave birth to a child or children in Wisconsin on or after June 6, 2014, and who request birth certificates for such children listing both spouses as parents, regardless of whether they have already received birth certificates listing only one spouse as a parent.

benefits of marriage and deprives their children of security, dignity, and protections based on the sex, sexual orientation, and status of their parents. This is not constitutional.

Rather, as Plaintiffs explain below: (1) the Wisconsin statute regarding the spousal presumption of parentage, Wis. Stat. § 891.41, must be read in a gender-neutral way based on the Supreme Court's decision in *Obergefell*, such that all marital children have two presumed parents at birth, regardless of how they were conceived or whether they share a genetic connection to both spouses; (2) DHS's selective application and enforcement of the statutory provisions regarding reproductive technology on the marital children of same-sex spouses is unlawful; and (3) the statutory provision denying two-parent birth certificates to children whose parents used reproductive technology in a manner non-compliant with Wis. Stat. § 891.40 is independently unlawful because it impermissibly discriminates against children based on their parents' conduct or status and violates all family members' fundamental rights and liberty interests. Accordingly, the Court should grant Plaintiffs' motions for class certification and summary judgment in full.

ARGUMENT

I. The Gendered Distinctions in Wisconsin's Spousal Presumption Statute Are Now Unconstitutional; The Appropriate Remedy Is For The Court To Apply The Statute In A Gender-Neutral Way.

Defendant Rhoades acknowledges that DHS has refused to read the spousal presumption statute, Wis. Stat. § 891.41(1)(a), in a gender-neutral way applying equally to the marital children of same-sex spouses. (Dkt. No. 33, at 25.) Defendant's refusal conflicts with *Obergefell*, which not only held that two-parent birth certificates are an "aspect[] of marital status" protected by the fundamental right to marry, but also directly required issuance of two-parent birth certificates to marital children as the relief granted in one of the cases consolidated

under the name of *Obergefell v. Hodges* for argument and decision. *See Henry v. Himes*, No. 14-cv-00129, Dkt. No. 1 (Complaint) at 2 (S.D. Ohio Feb. 10, 2014); *see also Henry*, 14 F. Supp. 3d at 1052. Defendant's brief omits any mention of *Henry* whatsoever.

As in this case, the plaintiffs in *Henry* relied on both Ohio's statutory provision regarding "artificial insemination" *and* the spousal presumption statute, which uses the phrase "natural father," just as the Wisconsin statute does. *Compare* Wis. Stat. § 891.41 ("[a] man is presumed to be the natural father of a child if any of the following applies") *with* Ohio Rev. Code § 3111.03(A)(1) ("[a] man is presumed to be the natural father of a child under any of the following circumstances"). As the court in *Henry* recognized, the spousal presumption of parentage "respects the parental status of the non-biologically related parent" regardless of how the child was conceived. *See Henry*, 14 F. Supp. 3d at 1052 (citing *both* the more general spousal presumption statute and the "artificial insemination" statute in holding that it is unconstitutional to deny the marital children of same-sex spouses two-parent birth certificates).

Indeed, a "birth certificate is a legal document, not a medical record." *Id.*[2] In Ohio, as in Wisconsin, the "Department of Health routinely issues birth certificates naming as parents both spouses to opposite-sex married couples who use [artificial insemination] to conceive their children," yet refused to do the same for all same-sex spouses. *Id.* As *Henry* recognized, such unequal treatment cannot stand. "Identification on the child's birth certificate is the basic currency by which parents can freely exercise [their] protected parental rights and

[2] Other states without "artificial insemination" statutes have similarly required the state to provide two-parent birth certificates for same-sex couples based on spousal presumption language using "natural father," and in doing so, dismissed arguments that the spousal presumption is a mere proxy for a biological relationship and therefore inapplicable to children born through donor insemination. *See Gartner v. Iowa Dep't of Pub. Health*, 830 N.W.2d 338 (Iowa 2013); *see generally Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951 (Vt. 2006).

responsibilities." *Id.* at 1051. Moreover, "[t]he inability to obtain an accurate birth certificate saddles the child with the life-long disability of a government identity document that does not reflect the child's parentage and burdens the ability of the child's parents to exercise their parental rights and responsibilities." *Id.*[3]

Defendant Rhoades and DHS refuse to interpret the spousal presumption as applying to the marital children of same-sex spouses, arguing instead that these children and their parents are not similarly situated to different-sex spouses and their children. (Dkt. No. 33, at 18.) Specifically, Defendant claims that this provision reflects unspecified "biological facts of reproduction," (*id.*), that "the legal rights of the biological fathers are of paramount concern," (Dkt. No. 36, at 5), and that a putative genetic father of a marital child has a right to a parentage determination (*id*. at 12; Dkt. No. 33, at 29-30).

Defendant's reliance on "biology" ignores the fact that a well-established framework already exists under Wisconsin law for handling any claim brought by a putative genetic father who seeks a parentage determination with respect to a marital child of different-sex spouses,

[3] Defendant dismisses the value of decisions by other courts interpreting *Obergefell* as mandating issuance of two-parent birth certificates by saying that these decisions were hard to locate or lacked sufficient context from which to draw conclusions. To provide the context Defendant seeks, Plaintiffs attach the memorandum in support of summary judgment and district court's judgment in *Robicheaux v. Caldwell* and two district court orders in *DeLeon v. Abbott* here as Exhibits 1 through 4 hereto. *Robicheaux v. Caldwell*, No. 13-5090, Dkt. No. 86-1 (E.D. La. Apr. 22, 2014); *Robicheaux*, No. 13-5090, 2015 WL 4099353 (E.D. La. July 2, 2015); *DeLeon v. Abbott*, No. 13-cv-00982, Dkt. Nos. 113, 117 (W.D. Tex. Aug. 11, 2015 and Sept. 1, 2015). As the summary judgment briefing in *Robicheaux* makes clear, the district court ruled post-*Obergefell* that lesbian spouses were entitled to a two-parent birth certificate for their marital child *based on the spousal presumption of parentage in Louisiana*, which was the sole argument made by the plaintiff couples in that case, and neither based on an adoption (which the couple in that case had not performed) nor the circumstances of the couple's use of reproductive technology. The two orders in *DeLeon* similarly establish that the district court understood that *Obergefell* required Texas to alter its birth certificate policy with respect to marital children of same-sex spouses.

and there is no reason this framework should apply differently to the marital children of same-sex spouses. *See W.W.W. v. M.C.S.*, 161 Wis. 2d 1015, 1036, 468 N.W.2d 719 (1991); *see also In re Paternity of T.R.B.*, 154 Wis. 2d 637, 454 N.W.2d 561, 562 (Ct. App. 1990). In such cases, both Wisconsin and federal courts have made clear that the child-centered protections provided by the spousal presumption of parentage play a crucial role in resolving such disputes. *See, e.g.*, *W.W.W.*, 161 Wis. 2d at 1036; *see also Michael H. v. Gerald D.*, 491 U.S. 110, 124 (1989) ("our traditions have protected the marital family" in cases involving claims of an unwed putative genetic father). The presumption ensures that the husband has legal standing to participate in such proceedings, and shields the child's bonded relationship to the husband and relatedly, the child's right of support. As these courts have recognized, there are circumstances when it is appropriate to uphold the legal parentage of a birth mother's spouse even though another man is without question the child's genetic parent. *See Randy A.J. v. Norma I.J.*, 2004 WI 41, 270 Wis. 2d 384, 677 N.W.2d 630, 641 (2004) ("Wisconsin favors preserving the status of marital children, even when it can be positively shown that the husband of the mother could not have been the father of the child"). This framework applies equally well to the marital children of same-sex spouses, and Defendant has offered no explanation for why she believes this existing framework is inadequate to address disputes concerning the custody and parentage of these children, or why these children and their parents should be deprived of the protection other marital families receive.

Defendant's reliance on so-called "biological facts of reproduction" also makes no sense given DHS's repeated admissions—in briefing and in documents, including its own policy guidance to DHS staff and to parents filling out birth certificate worksheets—that DHS completely ignores biology when issuing two-parent birth certificates to the marital children of

different-sex spouses. (*See* Dkt. No. 32, at ¶¶ 36-38 (discussing DHS forms, which require that a mother provide the name of her husband as the child's father "whether or not he is the biological father of the child"); *see also* Dkt. No. 33, at 25; *id.* at 31-32.) As Defendant admits, placement of the husband's name on the child's birth certificate as the child's father is mandatory and it makes no difference whatsoever whether the husband is the child's biological parent. Indeed, if a husband's name is not placed on a birth certificate, the mother may face legal action from the State in order to have a father legally declared, *absent any biological determination*, to protect the best interest of the child. *See State v. Robin M. W. (In re Paternity of T.J.D.C.)*, 2008 WI App 60, 310 Wis. 2d 786, 750 N.W.2d 957.

Defendant also has failed to acknowledge, let alone justify the denial of, numerous other protections provided by the spousal presumption long before a birth certificate arrives—such as the ability for a birth mother's spouse to make medical decisions, visit a child in the hospital, and bring a child home as a legally recognized parent if the birth mother is incapacitated during childbirth. (*See* Dkt. No. 30, at ¶¶ 10-13, 18 (discussing Jessamy's fears if something had happened to Chelsea during childbirth).) Defendant tries to claim that the marital children of same-sex spouses are differently situated, arguing inexplicably and contrary to the findings underlying *Obergefell* that these children do not experience stigma associated with being labeled a non-marital child (Dkt. No. 33, at 28). Defendant ignores both the practical needs of same-sex spouses and their children, and the uncontested evidence of pain caused both to children and their parents of omitting one parent from a child's birth certificate. (*See* Dkt. No.

30, at ¶¶ 18-19.)[4] As Jessamy explained, she "was stunned and deeply hurt" when she received a notification from DHS that she would be left off of A.T.'s birth certificate. (*Id.* at ¶16).

> As our son grows older, I worry that he might internalize the State's message that I am somehow less his parent than Chelsea is or that his family is not legitimate. It hurts that my love and contributions and our relationship are erased from his birth certificate. As he grows up, I am concerned that he will feel the same hurt that I feel as he observes people treating us as though we are not related because I cannot prove that I am his parent through a birth certificate. I also worry that his birth certificate may invite discrimination against him or my family or make him feel ashamed because it shows that the State does not see the three of us together as a family.

Id. at ¶19. Thus, Defendant has failed to supply even a legitimate justification, let alone an important or compelling one, for depriving the marital children of same-sex spouses of the protection of the spousal presumption of parentage that attaches to other marital children immediately upon birth. *See, e.g.*, *Baskin v. Bogan*, 766 F.3d 648, 654-55 (7th Cir. 2014) (compelling governmental interest necessary to justify government line-drawing on the basis of sexual orientation).

II. DHS's Selective Enforcement Of The Statutory Provision Regarding "Artificial Insemination" Exclusively As To The Marital Children Of Same-Sex Spouses Is Unlawful.

Defendant proposes to parse out the putative class into three subclasses, including one comprised of those who complied with Wis. Stat. § 69.14(1)(g) (without saying how such determination is to be made), and concedes summary judgment as to that class. In so doing, Defendant admits that DHS is engaging in a systemic policy and practice of discrimination by targeting solely the marital children of same-sex spouses for enforcement of a statute, Wis. Stat.

[4] Since Plaintiffs filed their Motion for Summary Judgment, Chelsea received a letter from the Dane County Child Support Agency seeking her assistance to establish paternity of A.T. due to the Defendant's refusal to include Jessamy as A.T.'s parent on his birth certificate. October 12, 2015 Declaration of Chelsea Torres, ¶ 4, Ex. A.

§ 69.14(1)(g), which DHS has never enforced before as to anyone. (Dkt. No. 33, at 13 fn.5, 23; Dkt. No. 34, at ¶¶ 31, 35-41.) DHS attempts to use the existence of this long-ignored statute as a justification for denying Plaintiffs' motion for class certification, and for at least partial denial of Plaintiffs' motion for summary judgment. This statute, which specifically mandates two-parent birth certificates for marital children conceived through "artificial insemination," states that a husband's name shall be omitted from his child's birth certificate if the insemination did not comply with the standards of Wis. Stat. § 891.40(1)(g), which requires a husband's written consent for insemination and a doctor's certification, among other things.

Defendant has taken the position in her briefing that Wis. Stat. § 69.14(1)(g), in contrast to the other spousal presumption provisions in Wisconsin law, *should* be interpreted in a gender-neutral way as applying to same-sex couples and their children. (Dkt. No. 33, at 14.) However, Defendant admits that DHS has never actually enforced this provision before as to anyone. DHS does not currently seek information from different-sex spouses on birth certificate worksheets or provide any alternative way for these spouses to offer information about whether they used "artificial insemination," let alone whether they complied with Wis. Stat. § 891.40(1)(g), precluding any kind of enforcement of this statute with respect to such families. (*See, e.g.*, Dkt. No. 34, at ¶¶ 31, 35-41; *see also* Dkt. No. 33, at 13 n.5 ("Plaintiffs note that 'the worksheets prescribed by DHS do not even seek information about whether a couple and their doctor complied with Wis. Stat. § 69.14(1)(g).' Rhoades concedes that this is true. Those forms are currently under review by DHS.").) In fact, DHS tells all different-sex spouses that all married women *must* list the name of their husbands as their child's father without exception. (Dkt. No. 34, at ¶¶ 35-38.)

Defendant also admits that DHS now is enforcing this provision exclusively with respect to the marital children of same-sex spouses, denying them two-parent birth certificates until their parents can come forward to meet an evidentiary burden that other families are not required to meet. Indeed, Defendant argues that DHS should be permitted to target the children of same-sex spouses for enforcement of a statute it ignores as to all other families, and asks the Court to overlook its discrimination because its policy of non-enforcement with respect to the marital children of different-sex spouses is "under review" and DHS may choose to apply the statute evenhandedly to all marital children at some unknown point in the future. (*See* Dkt. No. 33, at 13 n.5; Dkt. No. 33 at 17 ("Rhoades intends to apply 69.14(1)(g) equally to same-sex and different-sex couples" in the future, without specifying when or how).)

This admission, which Defendant buries in a footnote, is significant. State action with the purpose and effect of singling out same-sex spouses and their children to impose a burden on them not shared by others is a violation of the Equal Protection Clause. *See, e.g.*, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) ("an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion, that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners"). The Equal Protection Clause precludes such selective enforcement of the law. *See Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979) (unequal enforcement of a facially neutral statute violates equal protection guarantee when claimant can show that government action had both the purpose and effect of targeting the disfavored group); *see also Sandra T.E. v. Grindle*, 599 F.3d 583, 589 (7th Cir. 2010) (citing *Feeney* in holding

that selective enforcement of rules governing employee misconduct could constitute equal protection violation if such selective enforcement were motivated at least in part by plaintiffs' membership in a protected class). Again, Defendant has failed to give any explanation at all, let alone a legitimate justification, for why DHS intentionally has targeted solely the marital children of same-sex spouses for denial of a two-parent birth certificate, and consequently, Defendant's discriminatory policy cannot survive any level of review.

III. Enforcing Wis. Stat. § 69.14(1)(g) To Deprive Any Marital Child Of A Two-Parent Birth Certificate Violates the Equal Protection And Due Process Clauses.

Furthermore, enforcement of Wis. Stat. § 69.14(1)(g) is unconstitutional for an additional and independent reason—depriving *any* marital child of a two-parent birth certificate based solely on whether the assisted insemination that resulted in the child's conception complied with Wis. Stat. § 891.40 violates the Constitution's equal protection guarantee by discriminating impermissibly against such children based on their parents' conduct or status, and violates all family members' fundamental rights and liberty interests in family integrity and association.[5] There is no justification whatsoever for depriving a marital child and the child's legal parents of the one identity document most essential to prove parentage. If Defendant were permitted to do so, it would place an unnecessary and significant practical obstacle in the way of families obtaining vital protections and benefits (*see* Dkt. 28, at 4 (discussing rights and benefits associated with an accurate birth certificate)). Depriving a marital child and the child's

[5] Wisconsin's assisted insemination statute itself recognizes that a birth mother's husband is a legal parent even if the insemination failed to comply with Wis. Stat. § 891.40 in at least one respect. *See* Wis. Stat. § 891.40 (1) (physician's failure to file husband's consent form does not affect husband's status as legal father to the child). Thus, even putting aside Wis. Stat. § 891.41(1)(a) for the moment, which contains Wisconsin's more general spousal presumption of parentage, Wis. Stat. § 69.14(1)(g) on its face requires the omission of a legal parent from a child's birth certificate.

legal parents of the one identity document most essential to prove parentage serves no purpose except an impermissible one—namely, to punish a child and his or her legal parents for the failure of the parents or their doctor to follow precisely the consent, certification and other requirements under Wisconsin law for assisted insemination. A state may not impose penalties or burdens on children because of the status or conduct of their parents. *Levy v. Lousiana*, 391 U.S. 68, 72 (1968). Indeed, as the Supreme Court has reiterated, "imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing." *Weber v. Aetna Ca. 7 Sur. Co.*, 406 U.S. 164, 175 (1972).

Furthermore, there are many practical reasons why couples who achieve pregnancy through assisted insemination may be unable to comply with Wis. Stat. § 891.40 even though a doctor performed the insemination following all applicable medical standards of care at a clinic. Some couples may receive such services in clinics outside of Wisconsin, where Wis. Stat. § 891.40 is inapplicable, but then give birth in Wisconsin. Others may have received infertility treatment, including insemination, at a Wisconsin clinic from a doctor who, for whatever reason, failed to offer consent forms or comply with the certification requirement at the time of their insemination. Some Wisconsin doctors may neglect to offer such forms or to certify them because they lack clarity about whether Wis. Stat. § 891.40 applies to procedures, such as *in vitro* fertilization or intra-uterine insemination, which are medically distinct from "artificial insemination." *See, e.g.*, *Finley v. Astrue*, 372 Ark. 103, 270 S.W.3d 849 (2008) (artificial insemination statute inapplicable to procedures involving *in vitro* fertilization).[6]

[6] Interestingly, although Defendant concedes summary judgment as to those couples whose artificial insemination complied with Wis. Stat. § 891.40, Defendant offers no evidence that DHS has been seeking evidence of compliance from any same-sex spouse prior to issuing a

In sum, Defendant acknowledges that she has targeted same-sex spouses and their marital children for unequal treatment, and she has failed to meet her burden of demonstrating that such unequal treatment is justified by a compelling government interest. *Baskin v. Bogan*, 766 F.3d 648, 654-55 (7th Cir. 2014). It simply makes no sense to deprive marital children born as a result of use of reproductive technology in a manner that does not comply with Wis. Stat. § 891.40 of two-parent birth certificates, but to provide them to the following children: (1) the marital children of same-sex and different-sex spouses whose insemination complied with Wis. Stat. § 891.40; (2) the marital children of different-sex spouses who used non-compliant assisted insemination; and (3) the marital children of different-sex spouses where the pregnancy occurred as a result of non-marital intercourse. To do so would be arbitrary in the extreme, and constitutionally impermissible.

CONCLUSION

WHEREFORE, for the foregoing reasons and as set forth in Plaintiffs' brief in support of their motion for summary judgment and accompanying documents, as well as their brief in support of their motion for class certification, Named Plaintiffs respectfully request that this Court enter an order certifying the class proposed by Named Plaintiffs and granting summary judgment in favor of all Plaintiffs on both counts in the First Amended Complaint and granting the relief requested therein.

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two-parent birth certificate or investigating whether their doctor certification was properly filed; nor does Defendant explain in what form that evidence should be provided given that the birth certificate worksheet does not offer couples a way to provide it.

DATED: October 13, 2015

Respectfully submitted,

/s/ *Tamara B. Packard*

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JONATHAN P. ROBICHEAUX, *et al.*,	*	CIVIL ACTION
Plaintiffs	*	NO. 13-5090 C/W 14-97 & 14-327
v.	*	SECTION F(5)
JAMES D. CALDWELL, *et, al.*,	*	JUDGE MARTIN L.C. FELDMAN
	*	MAGISTRATE MICHAEL NORTH
Defendants	*	REF: ALL CASES
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PLAINTIFFS' MEMORANDUM IN SUPPORT OF
MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiffs move the Court to grant partial summary judgment and hold that Article XII, Section 15 of the Louisiana Constitution (the "Louisiana DOMA Amendment"), Article 3520(B) of the Louisiana Civil Code, and any other Louisiana laws denying recognition to valid same-sex marriages celebrated in other jurisdictions (collectively, the "Anti-Recognition Laws") violate the Fourteenth Amendment. Since the Supreme Court's ruling in *United States v. Windsor*, 133 S. Ct. 2675 (2013), ten federal district courts have consecutively held that state bans against same-sex marriage violate the Equal Protection or Due Process Clauses. Several of these courts have held that States must permit same-sex couples to marry.[1] Others have held that States must

[1] *Deboer v. Snyder*, No. 12-CV-10285, 2014 U.S. Dist. LEXIS 37274, at *51-52 (E.D. Mich. Mar. 21, 2014) (enjoining Michigan's ban on same-sex marriage as unconstitutional under the Equal Protection Clause); *De Leon v. Perry*, No. SA-13-CA-00982-OLG, 2014 U.S. Dist. LEXIS 26236, at *51, *68, *79-80 (W.D. Tex. Feb. 26, 2014) (enjoining Texas's ban on same-sex marriage as unconstitutional under the Equal Protection and Due Process Clauses); *Lee v. Orr*, No. 13-cv-8719, 2014 U.S. Dist. LEXIS 21620, at *5 (N.D. Ill. Feb. 21, 2014) (holding that Illinois law prohibiting celebration of same-sex marriages is unconstitutional on equal protection grounds); *Bostic v. Rainey*, No. 2:13-cv-395, 2014 U.S. Dist. LEXIS 19110, *71-72 (E.D. Va. Feb. 13, 2014) (enjoining Virginia's ban on same-sex marriage on due process and equal protection grounds); *Bishop v. United States ex rel. Holder*, 962 F. Supp. 2d 1252, 1296 (N.D. Okla. 2014) (enjoining enforcement of Oklahoma's same-sex marriage ban under the Equal Protection Clause); *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1216 (D. Utah 2013) (granting summary judgment and enjoining enforcement of Utah's same-sex marriage ban on due process and equal protection grounds).

apply the same recognition rules to same-sex marriages from other States that they apply to heterosexual marriages.[2] Plaintiffs' motion is limited to recognition.

As Judge Heyburn explained in *Bourke v. Beshear*, these decisions rest on a solid, well-established body of constitutional precedent. 2014 U.S. Dist. LEXIS 17457, at *40. Like its sister States, Louisiana may not "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The States may not violate the guarantees of the Fourteenth Amendment, even when exercising their traditional power over family law. *See, e.g., Troxel v. Granville,* 530 U.S. 57 (2000). Yet Louisiana employs an unconstitutional scheme for the recognition of marriages celebrated out-of-state. Louisiana virtually always honors the validity of heterosexual marriages, including marriages not permitted by Louisiana law, but categorically denies recognition to the marriages of same-sex couples. The Anti-Recognition Laws deny equal protection to same-sex couples because of their sexual orientation and gender without a constitutionally sufficient justification. The laws also infringe on constitutionally protected fundamental rights. "A State cannot so deem a class of persons a stranger to its laws." *Romer v. Evans*, 517 U.S. 620, 635 (1996). This Court should follow the "growing national judicial

[2] *Henry v. Himes,* No. 1:14-cv-129 (S.D. Ohio Apr. 14, 2014) (order granting motion for declaratory judgment and permanent injunction) (holding that Ohio's ban on the recognition of same-sex marriages is facially unconstitutional under the Due Process and Equal Protection Clauses) (attached as Ex. 21); *Baskin v. Bogan*, No. 1:14-cv-00355-RLY-TAB (S.D. Ind. Apr. 10, 2014) (minute entry issuing a TRO to require Indiana to recognize a same-sex marriage) (attached as Ex. 22); *Tanco v. Haslam*, No. 13-cv-01159, 2014 U.S. Dist. LEXIS 33463, at *25, *33 (M.D. Tenn. Mar. 14, 2014) (enjoining enforcement of Tennessee's anti-recognition laws under the Equal Protection Clause); *Bourke v. Beshear*, No. 3:13-CV-750-H, 2014 U.S. Dist. LEXIS 17457, at *32 (W.D. Ky. Feb. 12, 2014) (enjoining Kentucky's anti-recognition laws under the Equal Protection Clause); *Obergefell v. Wymsyslo*, 962 F. Supp. 2d 968, 997-98 (S.D. Ohio 2013) (holding in an as-applied challenge that Ohio's recognition ban is unconstitutional).

consensus"[3] and hold that Louisiana's refusal to recognize the Plaintiffs' valid marriages is unconstitutional.

I. THE UNDISPUTED FACTS

A. Plaintiffs Are Validly Married and Suffer Harm Due to the Defendants' Enforcement of the Anti-Recognition Laws.

Plaintiffs are six same-sex couples and a nonprofit organization, Forum for Equality Louisiana, Inc. (the "Forum"). Each of the Plaintiff couples resides in Louisiana and is validly married under the law of another jurisdiction.[4] Three of the couples are raising children.[5] The Forum advocates for gay, lesbian, bisexual, and transgender Louisianans and asserts standing on behalf of its dues-paying members who are in same-sex marriages that Louisiana officials refuse to recognize.[6]

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3 *Henry*, Ex. 21 at p. 14.

4 John Paul Robicheaux and Derek Penton reside in New Orleans and were married in Iowa on September 23, 2012. (Robicheaux & Penton Decls., Exs. 1 & 2.) Courtney and Nadine Blanchard reside in Raceland and were married in Iowa on August 30, 2013. (C. Blanchard & N. Blanchard Decls., Exs. 3 & 4.) Nick Van Sickels and Andrew Bond reside in New Orleans and were married in the District of Columbia on December 28, 2012. (Van Sickels & A. Bond Decls., Exs. 5 & 6.) Jacqueline and Lauren Brettner reside in New Orleans and were married in New York on February 14, 2012. (J. Brettner & L. Brettner Decls., Exs. 7 & 8.) Henry Lambert and Carey Bond reside in New Orleans and were married in New York on October 29, 2011. (Lambert & C. Bond Decls., Exs. 9 & 10.) Havard Scott and Sergio March Prieto reside in Shreveport and were married in Vermont on July 9, 2010. (Scott & March Prieto Decls., Exs. 11 & 12.)

5 Blanchard Decls., Exs. 3 & 4 at ¶ 13; Van Sickels Decl., Ex. 5 at ¶ 13; A. Bond Decl., Ex. 6 at ¶ 13; J. Brettner Decls., Ex. 7 & 8 at ¶ 9.

6 The harms sustained by the Forum's membership are exemplified by the declarations from Brandon Robb, Jared Munster, Jodi Gates, and Marilyn McConnell. The Forum satisfies the three-part test for associational standing. *See Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977); *Concerned Citizens Around Murphy v. Murphy Oil USA, Inc.*, 686 F. Supp. 2d 663, 669 (E.D. La. 2010). First, the Forum has members who would have standing to sue in their own right. (Brady Decl., Ex. 13 (affirming declarants' membership in the Forum); Robb & Munster Decls., Exs. 14 & 15; Gates & McConnell Decls., Exs. 16 & 17.) Indeed, all married same-sex couples in Louisiana have sustained or will sustain harm due to Defendant Tim Barfield's refusal to recognize their marriages for state income tax purposes. Second, the interests that the Forum seeks to protect in this suit — equality under Louisiana law for gay and lesbian citizens — are germane to its purpose as an association. (Brady Decl. Ex. 13 at ¶ 5.) Finally, because Plaintiffs seek injunctive relief, neither the claims the Forum asserts nor the relief it requests requires the participation of individual members. *See Concerned Citizens Around Murphy,* 686 F. Supp. 2d at 678 ("Suits for injunctive relief… do not involve individualized proof of damages.").

Louisiana's enforcement of the Anti-Recognition Laws deprives Plaintiffs of the benefits and responsibilities that arise from their marriages. Plaintiffs cannot establish a community property regime. The Plaintiffs raising children cannot form a legally recognized two-parent household. Plaintiffs face differing tax burdens from their opposite-sex counterparts. Louisiana inheritance laws treat the Plaintiff couples as strangers to one another. Plaintiffs must create and carry a series of documents to ensure the right to make decisions for each other or about their children in case of emergency.[7] Plaintiffs are relegated to the "unstable position of being in a second-tier marriage." *Windsor*, 133 S. Ct. at 2694.

B. Louisiana's Discriminatory Scheme for the Recognition of Marriages.

1. Louisiana Virtually Always Recognizes Heterosexual Marriages from Other Jurisdictions.

For heterosexual couples, Louisiana's policy is to uphold the validity of foreign marriages. *Wilkinson v. Wilkinson*, 323 So. 2d 120, 124 (La. 1975). Article 3520(A) of the Louisiana Civil Code expresses this policy, providing that Louisiana will recognize a marriage validly performed in another jurisdiction "unless to do so would violate a strong public policy of the state . . . ." As the commentary to Article 3520(A) explains, it is "[b]ased on the universally espoused policy of favoring the validity of marriages if there is any reasonable basis for doing so." La. Civ. Code art. 3520 cmt. (b) (1991). The commentators describe this deferential recognition policy as "equally important at the multistate level" to support a "policy of avoiding 'limping marriages.'" *Id.*

Pursuant to the policy expressed in Article 3520(A), Louisiana recognizes virtually all heterosexual marriages, even if the marriages could not be celebrated on Louisiana soil. Louisiana recognizes marriages between first cousins entered in another jurisdiction even though

[7] *See, e.g.*, Van Sickels Decl., Ex. 5 at ¶ 23; J. Brettner Decl., Ex. 7 at ¶ 16-17.

first cousins cannot legally marry in Louisiana. *Ghassemi v. Ghassemi,* 2007-1927, p. 26 (La. App. 1 Cir. 10/15/08), 998 So. 2d 731, 750. Common-law marriages cannot be created in Louisiana, but Louisiana upholds common-law marriages validly entered in other states. *See, e.g., Brinson v. Brinson,* 233 La. 417, 425, 96 So. 2d 653, 656 (1957); *Fritsche v. Vermilion Parish Hosp. Serv. Dist. No. 2,* 2004-1192, p. 3 (La. App. 3 Cir. 2/2/05), 893 So. 2d 935, 937-38. Applying this policy, this Court recognized a foreign marriage contracted by proxy, even though the marriage would be absolutely null if contracted in Louisiana. *United States ex rel. Modianos v. Tuttle*, 12 F.2d 927, 929 (E.D. La. 1925). In a Reconstruction-era decision, the Louisiana Supreme Court recognized a Spanish marriage between a white man and a free woman of color, even though the marriage violated Louisiana's anti-miscegenation laws. *Succession of Caballero v. Executor,* 24 La. Ann. 573, 575 (La. 1872).

2. The Anti-Recognition Laws Single Out Plaintiffs' Marriages for Nonrecognition.

Thus, the Anti-Recognition Laws are a departure from Louisiana's history of recognizing foreign marriages. The Anti-Recognition Laws categorically deny recognition to the marriages of Plaintiffs and other same-sex couples solely because the spouses are the same gender.

In 1999, the Louisiana Legislature added paragraph (B) to Article 3520, carving out same-sex couples from Louisiana's policy favoring marital recognition. Paragraph (B) states:

> A purported marriage between persons of the same sex violates a strong public policy of the state of Louisiana and such a marriage contracted in another state shall not be recognized in this state for any purpose, including the assertion of any right or claim as a result of the purported marriage.

La. Civ. Code art. 3520(B). In 2004, the Louisiana legislature passed and Louisiana voters approved the Louisiana DOMA Amendment, which states:

> Marriage in the state of Louisiana shall consist only of the union of one man and one woman. No official or court of the state of Louisiana shall construe this constitution or any state law to require that marriage or the legal incidents thereof

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

La. Const. art. XII, § 15. As a result of the Anti-Recognition Laws, the Plaintiffs and other married same-sex couples are singled out for discriminatory treatment and nonrecognition.

C. The Louisiana Secretary of Revenue Refuses to Recognize the Plaintiffs' Marriages.

Defendant Tim Barfield is the Secretary of the Louisiana Department of Revenue. Under La. R.S. 36:453, Secretary Barfield is the executive officer vested with responsibility for the policies of the Department of Revenue and for its administration, control, and operation. After the Supreme Court announced its decision in *Windsor* and invalidated Section 3 of the federal Defense of Marriage Act, the IRS issued Revenue Ruling 2013-17, which stated that the IRS would follow the "place-of-celebration" rule and treat validly married same-sex couples as married for federal tax purposes regardless of where the couple was domiciled. In response, Secretary Barfield issued Revenue Information Bulletin No. 13-024 ("the Bulletin"), attached as Exhibit 18. The Bulletin states that in accordance with Article XII, Section 15 of the Louisiana Constitution, the Louisiana Department of Revenue would not follow Revenue Ruling 2013-17 and would not recognize same-sex marriages when determining an individual's filing status for the purpose of Louisiana state income taxes. Further, on or about January 31, 2014, the Louisiana Department of Revenue issued the individual income tax return form (Form IT-540) and corresponding instructions for Louisiana taxpayers for tax year 2013 (the "Instructions"). The Instructions are attached as Exhibit 19 and contain the following statement in bold font:

> In compliance with the Louisiana Constitution, the Louisiana Department of Revenue shall not recognize same-sex marriages when determining filing status. Individuals who entered into a same-sex marriage in another state cannot file a

> Louisiana income tax return using a tax status of married filing jointly or married filing separately.

The Instructions also provide that a spouse in a same-sex marriage must choose a filing status other than married and that the spouses must allocate their items of income between them.

The Bulletin and the Instructions are contrary to La. R.S. 47:294, which requires a tax filer to use the same information reported on the filer's federal return for purposes of the Louisiana state return.[8] Plaintiffs Henry Lambert and Carey Bond claimed the status of married filing jointly for their federal and Louisiana income tax returns for tax year 2012.[9] Despite their compliance with La. R.S. 47:294, the Louisiana Department of Revenue rejected their Louisiana return, citing the Bulletin and the Louisiana Constitution. Exhibit G to Lambert Decl., Exhibit 9. Remarkably, in a letter to Lambert and Bond, Secretary Barfield wrote, "[a]lthough Louisiana Revised Statutes 47:294 instructs taxpayers to use the same filing status on their return as they used on their federal tax returns, the Louisiana Constitution preempts this statute." *Id.* Thus, Plaintiffs and other married same-sex couples are targeted for negative tax treatment that violates Louisiana's own tax statutes, specifically La. R.S. 47:294.

D. The Louisiana State Registrar Refuses to Recognize Plaintiff Jacqueline Brettner as the Parent of a Child Born to Her Spouse During Her Marriage.

Defendant Devin George is the Louisiana State Registrar. Pursuant to La. R.S. 40:33, Registrar George is vested with the responsibility to enforce Louisiana's vital statistics laws, including the issuance of birth certificates to the parents of newborns. Due to the Anti-Recognition Laws, Registrar George refuses to issue birth certificates naming same-sex spouses as the parents of a child born of their marriage. Thus, Registrar George refused to issue

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[8] Under La. R.S. 47:294, "Taxpayers are required to use the same filing status and claim the same exemptions on their [state income tax] return … as they used on their federal income tax return."

[9] Lambert Decl., Ex. 9, ¶ 14; C. Bond Decl., Ex. 10, ¶ 14.

a birth certificate for the baby of Jackie and Lauren Brettner that identified Jackie as a parent of the child, even though Jackie and Lauren were married at the time of the child's birth.[10] But for the fact that Jackie is a woman, Registrar George would have issued a birth certificate identifying her as a parent of the child. Indeed, the Louisiana vital records laws require Registrar George to identify the mother's husband as the father on a child's birth certificate, regardless of any biological connection, unless the husband successfully disavows the child or unless a biological father other than the husband has acknowledged paternity. *See* La. R.S. 40:34. Further, the Louisiana Civil Code affords the mother's husband a presumption of paternity. La. Civ. Code art. 185. "The husband of the mother may not disavow a child born to his wife as a result of an assisted conception to which he consented," regardless of whether he has a biological tie to the child, La. Civ. Code art. 188. If Jackie were a man, the Registrar would have recognized her marriage to Lauren, and she would be listed as a parent of their daughter on her birth certificate, regardless of whether there was a biological link between them.

The State Registrar's refusal to recognize Jackie as a parent on her daughter's birth certificate harms their family.[11] For example, if Jackie died, her daughter would not be considered Jackie's forced heir under Louisiana inheritance laws. *See* La. Civ. Code art. 1492. If Jackie were killed in a tort, both Lauren and their daughter would be precluded from pursuing a wrongful death or survival action. *See* La. Civ. Code arts. 2315.1 & 2315.2. Jackie and Lauren

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[10] See J. Brettner Decl., Ex. 7 ¶¶ 6, 9.

[11] The importance of an accurate birth certificate was emphasized by the *Henry* court: "Identification on the child's birth certificate is the basic currency by which parents can freely exercise [their] parental rights and responsibilities. It is also the only common governmentally-conferred, uniformly-recognized, readily-accepted record that establishes identity, parentage and citizenship, and it is required in an array of legal contexts . . . . The inability to obtain an accurate birth certificate saddles the child with the life-long disability of a government identity document that does not reflect the child's parentage and burdens the ability of the child's parents to exercise their parental rights and responsibilities." Ex. 21 at pp. 23-24.

must carry papers with them at all times when traveling with their daughter in order to prove that they are both the legal guardians of their child.[12]

II. LAW AND ARGUMENT

In order to succeed on their 42 U.S.C. § 1983 claims, Plaintiffs[13] "must prove a violation of a right secured by the constitution or laws of the United States and demonstrate that the deprivation was committed by a person acting under color of state law." *Doe v. Jindal*, 851 F. Supp. 2d 995, 1004 (E.D. La. 2012) (Feldman, J.). It is undisputed that Defendants have acted at all times under color of state law, specifically the Anti-Recognition Laws. Therefore, Plaintiffs need only demonstrate a violation of a constitutionally protected right.

A. The Anti-Recognition Laws Violate the Equal Protection Clause.

The Constitution "neither knows nor tolerates classes among citizens." *Plessy v. Ferguson,* 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). The Equal Protection Clause mandates that the States treat all similarly situated persons alike. *See City of Cleburne, Tex. v.*

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[12] J. Brettner Decl., Ex. 7 at ¶ 16-17. For example, Jackie and Lauren were questioned by a security official at New Orleans International Airport when traveling to Panama to visit family because they could not produce a birth certificate identifying both Lauren and Jackie as parents of their daughter. The official specifically stated that their daughter "could not leave without her father's permission." Jackie and Lauren were eventually able to explain that they were co-parents of their daughter because they travel with copies of the sperm donor contract in addition to their daughter's birth certificate. But the anecdote exemplifies the day-to-day harm Jackie and Lauren face due to the Registrar's refusal to recognize their marriage.

[13] All Plaintiffs have standing. To establish standing, Plaintiffs must demonstrate an actual or threatened injury-in-fact, fairly traceable to action of the defendants that would be redressed by a favorable court decision. *Doe v. Jindal,* 851 F. Supp. 2d at 1003. Plaintiffs satisfy these requirements. Plaintiffs and all other married same-sex couples in Louisiana bear an actual or imminent injury traceable to Secretary Barfield's refusal to recognize their marriages for state income tax purposes. The Court need not inquire whether the Plaintiffs actually shouldered an additional tax burden because the stigmatic injury caused by the Secretary's discrimination against Plaintiffs as same-sex couples is sufficient. *See Heckler v. Mathews,* 465 U.S. 728, 739-40 (1984) ("[D]iscrimination itself, by perpetuating 'archaic and stereotypic notions' or by stigmatizing members of the disfavored group as 'innately inferior' and therefore as less worthy participants in the political community, can cause serious noneconomic injuries" that are sufficient for standing (internal citations omitted)); *see also Apache Bend Apartments v. United States*, 964 F.2d 1556, 1560 (5th Cir. 1992) (holding that the plaintiffs had standing to bring an equal-protection challenge even though the relief requested "would not directly enlarge their own pocketbooks"). Jackie Brettner also sustained direct injury due to Defendant George's refusal to identify her as a parent on her daughter's birth certificate. There is no doubt that this Court has the power to redress the constitutional harms that Plaintiffs suffer.

Cleburne Living Ctr., 473 U.S. 432, 439 (1985); *John Corp. v. City of Houston,* 214 F.3d 573, 577 (5th Cir. 2000); *Doe v. Jindal*, 851 F. Supp. 2d at 1005. Here, like the federal DOMA that was declared unconstitutional in *United States v. Windsor*, the Anti-Recognition Laws "place[] same-sex couples in an unstable position of being in a second-tier marriage" and "demean[] the couple, whose moral and sexual choices the Constitution protects." 133 S. Ct. 2675, 2694.

"When a state law adversely affects members of a certain class, but does not significantly interfere with their fundamental rights,[14] courts first determine how closely they should scrutinize the challenged regulation." *De Leon,* 2014 U.S. Dist LEXIS 16136, at *32. Although the Anti-Recognition Laws cannot pass *any* form of constitutional scrutiny, the Court should apply heightened equal-protection scrutiny because the Anti-Recognition Laws discriminate on the basis of sexual orientation or, alternatively, because they discriminate on the basis of sex.

1. The Anti-Recognition Laws Are Subject to Heightened Equal-Protection Scrutiny Because They Target Sexual Orientation.

Because the Anti-Recognition Laws target only same-sex couples for nonrecognition, on their face they discriminate against gay, lesbian, and bisexual persons on the basis of sexual orientation. *See, e.g., Windsor v. United States,* 699 F.3d 169, 181 (2d Cir. 2012) (analyzing DOMA as sexual-orientation discrimination); *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 11 (1st Cir. 2012) (same); *Bourke,* 2014 U.S. Dist. LEXIS 17457, at *15 ("The Kentucky provisions challenged here impose a classification on the basis of sexual orientation."); *Kitchen*, 961 F. Supp. 2d at 1215 (Utah same-sex marriage ban "discriminates on the basis of sexual identity without a rational reason to do so").

[14] As discussed in Section II(C), the Anti-Recognition Laws interfere with the Plaintiffs' fundamental rights, including the fundamental right to marry, and for that reason should alternatively be analyzed under a heightened scrutiny standard.

a. *Windsor*'s "Careful Consideration" Standard Requires the Application of Heightened Scrutiny.

In *Windsor*, the Court reiterated that "[d]is-criminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision." 133 S. Ct. at 2692. (quoting *Romer,* 517 U.S. at 633; *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37-38 (1928)). Just as DOMA was a departure from the federal government's history and tradition of reliance on state law to define marriage, *id.,* so too the Anti-Recognition Laws are a departure from Louisiana's history and tradition of upholding the validity of out-of-state marriages. Like DOMA, they warrant "careful consideration."

The Fifth Circuit has applied the lowest level of equal protection scrutiny, rational basis, to sexual-orientation classifications. *E.g., Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004) (citing *Romer*). But Fifth Circuit "precedent remains binding [only] until the Supreme Court provides contrary guidance." *Neville v. Johnson*, 440 F.3d 221, 222 (5th Cir. 2006). The Supreme Court supplied contrary guidance in *Windsor*. The Fifth Circuit is likely to revisit the level of scrutiny to be applied to sexual orientation classifications in light of *Windsor's* holding that DOMA was subject to "careful consideration." 133 S. Ct. at 2693. Indeed, Justice Scalia noted in his dissenting opinion that the Court's careful consideration of DOMA was not traditional rational-basis scrutiny. *Id.* at 2706 ("But the Court certainly does not *apply* anything that resembles that deferential framework." (emphasis in original)).

In *SmithKline Beecham Corp. v. Abbott Laboratories*, the Ninth Circuit held that *Windsor* requires the application of heightened scrutiny to sexual-orientation classifications. 740 F.3d 471 (9th Cir. 2014). The appeal centered on a party's use of a peremptory strike to exclude a juror based on his perceived sexual orientation. Under the Supreme Court's *Batson* jurisprudence, a litigant may strike a juror because he belongs to a group or class normally

subject to rational basis review, but a litigant may not strike a juror because he belongs to a group subject to strict or heightened scrutiny. *See id.* at 479-80. Thus, the issue before the court was the level of scrutiny that should be applied to sexual orientation classifications. Because the Supreme Court did not announce the level of scrutiny that it applied in *Windsor*, the Ninth Circuit decided to analyze "what the Court actually did." *Id.* at 480. The court agreed with Justice Scalia's dissenting opinion that the Supreme Court did not apply traditional rational-basis review to DOMA. Under traditional rational basis review, a law must be upheld as constitutional "'if any state of facts reasonably may be conceived to justify' the classifications imposed by the law." *Id.* at 481 (quoting *McGowan v. Maryland*, 366 U.S. 420, 426 (1961)); *accord LeClerc v. Webb*, 419 F.3d 405, 421 (5th Cir. 2005) (under rational basis review, "[t]he key principle is the deference to legislative policy decisions embodied in courts' reluctance to judge the wisdom, fairness, logic or desirability of those choices."). In *Windsor*, "instead of conceiving of hypothetical justifications for the law, the Court evaluated the 'essence' of the law" and "looked to DOMA's 'design, purpose, and effect.'" *SmithKline*, 740 F.3d at 481 (quoting *Windsor*, 133 S.Ct. at 2689, 2693). Thus, the Ninth Circuit determined that *Windsor* requires courts to look at a law's actual purpose, not hypothetical purposes, when examining a law that discriminates based on sexual orientation. According to the court, "*Windsor's* 'careful consideration' of DOMA's actual purpose and its failure to consider other unsupported bases is antithetical to the very concept of rational basis review." *SmithKline*, 740 F.3d at 482. Thus, the court determined that heightened scrutiny applied:

> *Windsor* requires that when state action discriminates on the basis of sexual orientation, we must examine its actual purposes and carefully consider the resulting inequality to ensure that our most fundamental institutions neither send nor reinforce messages of stigma or second-class status. In short, *Windsor* requires heightened scrutiny.

740 F.3d at 483. This Court should follow *SmithKline's* interpretation of *Windsor* and apply heightened scrutiny to the Anti-Recognition Laws.

b. The Court Should Apply Heightened Scrutiny Because Sexual Orientation Should Be Considered a Suspect or Quasi-Suspect Classification.

The Ninth Circuit's reasoning that sexual orientation classifications are subject to heightened scrutiny is buttressed by an analysis of the traditional factors that courts use to determine whether a statute employs a suspect or quasi-suspect classification. The Supreme Court has determined that a class is suspect or quasi-suspect if the targeted group has experienced a "history of purposeful unequal treatment" or has been "subjected to unique disabilities . . . not truly indicative of their abilities." *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976). Courts may also consider whether the classification bears on group members' ability to contribute to society. *City of Cleburne*, 473 U.S. at 440-41. Additional factors include whether the group is a minority or politically powerless, *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987), and whether the distinguishing characteristic defining the group is immutable or beyond the group members' control. *Lyng v. Castillo*, 477 U.S. 635, 638 (1986); *see also De Leon*, 2014 U.S. Dist. LEXIS 26236 at *32-33 (outlining factors).

The Anti-Recognition Laws target gay, lesbian, and bisexual Louisianans and their children, who satisfy all four criteria. The gay and lesbian community in the United States, and in Louisiana particularly, has experienced and continues to experience invidious discrimination.[15]

[15] The history of discrimination against homosexuals is well-documented. For many years gay and lesbian Americans were routinely arrested, prosecuted, and declared unfit for employment. *See, e.g.,* Michael J. Klarman, *From the Closet to the Altar* 3-15 (2013); *Pedersen v. OPM*, 881 F. Supp. 2d 294, 314-19 (D. Conn. 2012) (discussing the persecution of gay and lesbian Americans); *De Leon*, 2014 U.S. Dist LEXIS 26236, at *35. As of the date of this filing, over ten years after the Supreme Court's decision in *Lawrence v. Texas* that declared state anti-sodomy laws unconstitutional, 539 U.S. 558, 574 (2003), Louisiana's crimes against nature statute remains on its books. *See* La. R.S. 14:89. Incredibly, as recently as 2013 gay men in Baton Rouge continued to be arrested for

It cannot reasonably be debated whether gay, lesbian, and bisexual citizens contribute to society. *See, e.g., Windsor v. United States*, 699 F.3d at 182; *Watkins v. U.S. Army,* 875 F.2d 699, 725 (9th Cir. 1989); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 967 (N.D. Cal. 2010). The Plaintiffs work in various fields such as medicine, education, business, law, and the arts, and include a decorated Vietnam veteran. Three of the couples are raising children in stable, two-parent households. Plaintiffs contribute to society.

Many courts have also found that sexual orientation is either immutable or so fundamental to a person's identity that a person should not be required to deny it, even if a person could make a choice. *See, e.g., De Leon*, 2014 U.S. Dist LEXIS 26236, at *38 (citing *Lawrence*, 539 U.S. at 576-77, for the proposition that the freedom for consenting adults to make individual decisions regarding physical intimacy is "an integral part of human freedom"); *Bassett v. Snyder*, 951 F. Supp. 2d 939, 960 (E.D. Mich. 2013); *Golinski v. OPM*, 824 F. Supp. 2d 968, 986 (N.D. Cal. 2012); *Perry*, 704 F. Supp. 2d at 966.

Finally, gay, lesbian, and bisexual Louisianans are subject to majoritarian political pressures. As noted by the *De Leon* court, the history of same-sex marriage bans illustrates their lack of political power. 2014 U.S. Dist LEXIS 26236, at *38-39. No federal or Louisiana-wide law expressly prohibits discrimination on the basis of sexual orientation in employment, education, access to public accommodations, or housing. Considering the ongoing

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sodomy under the law. Campbell Robertson, *After Arrests on Charges of Sodomy, an Apology*, N.Y. Times, July 30, 2013, http://www.nytimes.com/2013/07/30/us/after-arrests-on-charges-of-sodomy-an-apology.html?_r=1&. In February 2014, a symbolic resolution before the Baton Rouge Metro Council to encourage repeal of the unconstitutional law failed. Rebekah Allen, *Metro Council Rejects Anti-Sodomy Law Resolution*, The Advocate, Feb. 13, 2014, http://theadvocate.com /home/8362443-125/metro-council-rejects-anti-sodomy-law. On April 15, 2014, by a vote of 27 to 67, the Louisiana House of Representatives rejected a proposed bill to repeal the portions of the law that criminalized "consensual, uncompensated activity between persons of the same sex." H.B. 12, 40th Reg. Sess. (La. 2014) (digest), attached as Exhibit 20 at p. 3.

discrimination that gay, lesbian, and bisexual Louisianans experience, it cannot be reasonably questioned that they are a disfavored minority.

Thus, heightened scrutiny applies. Under heightened scrutiny, the Defendants bear the burden of proof to demonstrate that the Anti-Recognition Laws are constitutional. These laws can only survive if the Defendants present an "exceedingly persuasive justification" that furthers an important governmental interest. *United States v. Virginia*, 518 U.S. 515, 524 (1996). The Anti-Recognition Laws cannot withstand any level of constitutional scrutiny, let alone heightened scrutiny.

2. The Anti-Recognition Laws Discriminate on the Basis of Gender and Are Subject to Heightened Scrutiny.

Defendants' enforcement of the Anti-Recognition Laws also discriminates against Plaintiffs on the basis of their sex. Because each Plaintiff is married to a person of the same sex, rather than a person of the opposite sex, and only for that reason, Defendants have denied Plaintiffs the benefits that are afforded to opposite-sex couples, including opposite-sex couples who could not marry in Louisiana. Sex-based classifications are subject to heightened scrutiny. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 723 (1982).

Sex-based classifications are apparent on the face of the Anti-Recognition Laws. They limit recognition to marriages comprised of "one man and one woman," La. Const. art XII, § 15, and provide that "a purported marriage between persons of the same sex…shall not be recognized in this state for any purpose," La. Civ. Code art. 3520(B). As a result of these sex-based classifications, Plaintiffs are prevented from having their marriages recognized solely because of their sex. For example, if Jackie were a man rather than a woman, her marriage to Lauren, validly celebrated in New York, would be fully respected under Louisiana law. But

because Jackie is a woman, Louisiana categorically denies recognition of her marriage and her parental rights to the child born of the marriage.

The Anti-Recognition Laws also discriminate based on gender because they are based on impermissible gender stereotypes. Laws that discriminate based on stereotypes about the proper or traditional roles of men and women are unconstitutional. *See, e.g., Hogan,* 458 U.S. at 729*; Shipp v. McMahon*, 234 F.3d 907, 913 (5th Cir. 2000). The Anti-Recognition Laws discriminate on the basis of gender because they are based on the stereotype that gender should determine the person one may love, marry, and with whom one may start a family. The laws penalize Plaintiffs and other same-sex couples who defy gender-based stereotypes by relegating those couples to a second-tier, nonrecognized marriage.

The Equal Protection Clause prohibits discrimination based on sex without an "exceedingly persuasive justification." *Virginia*, 518 U.S at 523. Defendants lack any persuasive justification to deny recognition to the Plaintiffs' marriages.

B. The Anti-Recognition Laws Violate Due Process.

A statute is also subject to a higher level of constitutional scrutiny if it burdens a fundamental right. *Zablocki v. Redhail*, 434 U.S. 374, 386-87 (1978). The protections of the due process clause of the Fourteenth Amendment extend to all citizens and cannot be infringed by majority vote. Indeed, as the Court noted in *West Virginia State Board of Education v. Barnette*:

> 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. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; *they depend on the outcome of no elections.*

319 U.S. 624, 638 (1943) (emphasis added).

Louisiana submitted the fundamental right to marry of its gay, lesbian, and bisexual citizens to a vote. Based on majority approval, the Anti-Recognition Laws deprive Plaintiffs, and all same-sex couples validly married in other jurisdictions, of this fundamental right. No compelling state interest authorizes this categorical exclusion of citizens from the privileges and benefits of marriage. Thus, the Anti-Recognition Laws violate due process.

1. The Fundamental Right to Marry Is a Protected Liberty Interest that Gays, Lesbians, and Bisexuals Share in Equally.

The Due Process Clause includes a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). Among these rights is the fundamental right to marry. *Zablocki*, 434 U.S. at 384. Marriage is "central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992). "[T]he decision to marry is a fundamental right" that the Supreme Court has long protected against intrusion by the states. *Turner v. Safley*, 482 U.S. 78, 95 (1987); *see also, Zablocki*, 434 U.S. at 383; *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965). The Due Process Clause guarantees the right "to marry, establish a home and bring up children, to worship God according to the dictates of [one's] own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). In *Griswold v. Connecticut*, 381 U.S. at 486, the Court stated that "[m]arriage is a coming together for better or worse, hopefully enduring, and intimate to the degree of being sacred." As explained in *Loving v. Virginia,* "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of

happiness by free men." 388 U.S. at 12. Chief Justice Warren further wrote that "[t]o deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes . . . is surely to deprive *all* the State's citizens of liberty without due process of law." *Id.* (emphasis added). States cannot unduly burden the fundamental right to marry. *See, e.g., Boddie v. Connecticut*, 401 U.S. 371, 382 (1971) (holding that due process requires that States provide a means for indigents to divorce because marriage and divorce are fundamental rights).

Lawrence v. Texas emphasized that the protections of the Due Process Clause extend to gay, lesbian, and bisexual individuals. 539 U.S. at 574. In striking down Texas's criminal sodomy statute, the Court found that the Due Process Clause protected gays and lesbians from state interference into their personal relationships. *Id.* at 578. The Court declared that "[p]ersons in a homosexual relationship may seek autonomy" in "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education." *Id.* at 574. *Lawrence* also clarified that the right of privacy, which includes the right to marry, *Zablocki*, 434 U.S. at 384, shields gay and lesbian relationships from state intervention. As another district court recently held in *Bostic*:

> Gay and lesbian individuals share the same capacity as heterosexual individuals to form, preserve, and celebrate loving, intimate and lasting relationships. Such relationships are created through the exercise of sacred, personal choices—choices, like the choices made by every other citizen, that must be free from unwarranted government interference.

Bostic v. Rainey, 2014 U.S. Dist. LEXIS 19110, at *38. Louisiana cannot infringe on its gay, lesbian, and bisexual citizens' fundamental right to marry. *See also Roberts v. U.S. Jaycees*, 468 U.S. 609, 620 (1984) (the Constitution "undoubtedly imposes constraints on the State's power to control the selection of one's spouse").

Accordingly, the right to privacy found in the Due Process Clause protects the right to marry of all citizens, including those in same-sex relationships. The Anti-Recognition Laws

impermissibly interfere with this right. The fact that Louisiana has not historically recognized same-sex marriages does not mean that gay, lesbian, and bisexual Louisianans do not share the fundamental right to marry. In *Henry v. Himes,* the court emphasized that "the fundamental right to marry is available even to those who have not traditionally been eligible to exercise that right." Ex. 21 at p. 18. The court noted that prisoners are also individuals who were not traditionally understood to have a fundamental right to marry, yet the Supreme Court held in *Turner* that a state may not restrict a prisoner's right to marry without a sufficient justification. *Id.* (citing *Turner,* 482 U.S. at 95-97). Louisiana cannot infringe on the fundamental rights of its gay, lesbian, and bisexual citizens without adequate justification.

2. The Anti-Recognition Laws Burden the Fundamental Right to Remain Married.

The Anti-Recognition laws do not merely "interfere directly and substantially" with same-sex couples' right to marry, *Zablocki*, 434 U.S. at 386-87; the laws disrupt — and effectively invalidate — previously formed marriages, violating the right to remain married. *See Obergefell*, 962 F. Supp. 2d at 978. The Supreme Court has recognized that the right of association protects intimate relationships, such as marriage, in order to "safeguard[] the ability independently to define one's identity that is central to any concept of liberty." *Roberts*, 468 U.S. at 619. Interpreting these words, the *Obergefell* court held that "*existing* marital, family and intimate relationships" are entitled to constitutional protection under the due process clause. 962 F. Supp. 2d at 978 (emphasis in original) (citing *Roberts*, 468 U.S. at 618; *Lawrence*, 539 U.S. at 578). All citizens, including those in same-sex relationships, have a fundamental liberty interest in the protection of their existing marriages from state intervention. *Id.* By enacting and enforcing the Anti-Recognition Laws, Louisiana has violated its citizens' fundamental right to remain married.

3. The Anti-Recognition Laws Burden the Fundamental Right to Parental Authority.

The Anti-Recognition Laws also interfere with Plaintiffs' relationship with their children and violate the Plaintiffs' fundamental right to parental authority. The Supreme Court has long held that States may not interfere with the rights of parents to care, custody, and control of their children. *See, e.g., Troxel,* 530 U.S. at 66; *Parham v. J.R.*, 442 U.S. 584, 602 (1979). Yet, by denying recognition to Plaintiffs' marriages, the Anti-Recognition Laws do just that. For example, although Jackie and Lauren Brettner were married when Lauren gave birth to their daughter, Louisiana denies Jackie parental rights to their child. This is an unconstitutional infringement of her fundamental parental rights.

4. The Anti-Recognition Laws Are Subject to Heightened Scrutiny Because They Significantly Burden Fundamental Rights.

Under the Due Process Clause, a state law burdening a fundamental right must be narrowly drawn to serve a compelling state interest. *See Carey v. Population Servs. Int'l*, 431 U.S. 678, 686 (1977). While "reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed," a statute that "interfere[s] directly and substantially with the right to marry" must pass "rigorous scrutiny." *Zablocki,* 434 U.S. at 386-87 (1978). The statute must be drawn to address "sufficiently important state interests" and be "closely tailored to effectuate only those interests." *Id.* at 388. The Anti-Recognition Laws satisfy neither requirement.

C. Louisiana Cannot Offer a Rational Basis for Its Discriminatory Scheme That Would Satisfy Even the Lowest Tier of Constitutional Scrutiny.

As discussed above, the Anti-Recognition Laws should be subject to strict or heightened scrutiny. However, they cannot withstand any level of constitutional scrutiny, even rational basis. To satisfy rational basis review, Plaintiffs must prove (1) that they have been treated

differently by the state from others similarly situated, and (2) that there is no rational basis for the difference in treatment. *Doe v. Jindal,* 851 F. Supp. 2d at 1006. The first requirement is satisfied because it is undisputed that Plaintiffs are treated differently from similarly-situated heterosexual couples. Thus, even under the rational basis test, Plaintiffs should prevail because Louisiana cannot demonstrate a rational basis for the Anti-Recognition Laws.

1. Tradition Is Not a Sufficient Justification.

Louisiana's history of recognition of only opposite-sex marriages, standing alone, cannot justify the Anti-Recognition Laws. "[N]either the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack." *Williams v. Illinois*, 399 U.S. 235, 239 (1970); *see also Heller v. Doe,* 509 U.S. 312, 326 (1993) ("Ancient lineage of a legal concept does not give it immunity from attack for lacking a rational basis.").

Plaintiffs do not dispute that same-sex marriage is a new concept for many. But the Plaintiff couples, who are all already married in other jurisdictions, do not request that Louisiana issue them a marriage license or change the requirements that Louisiana has decided to enforce for the creation of a marriage within its borders. Rather, Plaintiffs ask that the law be restored to its status before the Anti-Recognition Laws were enacted in 1999 and 2004. It is the Anti-Recognition Laws themselves that are the unprecedented departure from longstanding Louisiana tradition. Louisiana's policy of *favor matrimonii* has been repeatedly enforced and extended to marriages that Louisiana itself would not sanction. *E.g., Succession of Caballero*, 24 La. Ann. 573. Like the Colorado amendment that the Supreme Court struck down in *Romer v. Evans*, it is the Anti-Recognition Laws that are untraditional: "It is not within our constitutional tradition to enact laws of this sort." 517 U.S. at 633.

2. Moral Objection to Homosexuality Alone Is Not a Permissible Justification.

Moral or religious objections to homosexuality and same-sex relationships cannot justify this departure from Louisiana's rule of liberally recognizing out-of-state marriages. Moral condemnation of same-sex couples and relationships is not a legitimate constitutional justification for legislation and indeed reflects an improper aim to demean same-sex couples and their children. *See, e.g., Lawrence*, 539 U.S. at 571 (2003); *accord Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 745 (5th Cir. 2008) (public morality is an insufficient basis to uphold a statute that burdens the fundamental right to private intimate conduct).

Religious and moral objections to same-sex marriage were reflected in the Louisiana Legislature's debate on the Louisiana DOMA Amendment.[16] Some citizens may oppose same-sex marriage on religious grounds; other religious faiths support it.[17] The relief that Plaintiffs request will not infringe on any religious freedoms and will, in fact, permit supporters of same-sex marriage "the freedom to practice their religious beliefs without mandating that other groups must adopt similar practices." *Bostic*, 2014 U.S. Dist. LEXIS 19110, at *80.

3. The Anti-Recognition Laws Have No Rational Relationship to an Interest in Responsible Procreation and Child-Rearing and Indeed Cause Harm to the Plaintiffs' Children.

Louisiana cannot justify its refusal to recognize same-sex marriage on the basis of an interest in promoting responsible procreation within marriage. It would be absurd to suggest that heterosexual couples make decisions regarding marriage and procreation based on the status or

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[16] For example, one speaker remarked that the amendment was justified on religious grounds, stating, "God put man to sleep, took a rib out and performed the first marriage." Video of the debate is available online at http://house.louisiana.gov/ H_Video/2004/May2004.htm. The same speaker compared opponents of the amendment to "descendants" of "Judas Iscariot."

[17] *See, e.g.,* Amicus Briefs of the Bishops of the Episcopal Church, *et al.*, and the American Jewish Committee, *et al.*, submitted in *Windsor, available at* http://www.americanbar.org/publications/preview_home/12-307.html.

recognition of same-sex marriages. Further, "[b]oth opposite-sex and same-sex couples model the formation of committed, exclusive relationships, and both establish families based on mutual love and support." *Kitchen*, 961 F. Supp. 2d at 1211. The Anti-Recognition Laws bear no rational relationship to the promotion of stable, two-parent households. As demonstrated by Jackie and Lauren's experience, the Anti-Recognition Laws only undermine families.

Louisiana also cannot justify the Anti-Recognition Laws by citing a purported goal of promoting an optimal environment for child-raising. There is no reason to believe that the recognition or nonrecognition of same-sex marriages will have any effect on the decision of opposite-sex couples whether to have children. Nor would the deterrence of committed same-sex couples from having children be a permissible justification for the Anti-Recognition Laws. *See, e.g., Windsor,* 133 S. Ct. at 2696 (holding DOMA unconstitutional because "no legitimate purpose overcomes the purpose and effect to disparage" married same-sex couples). Indeed, as three of the couples demonstrate, same-sex couples in Louisiana are having and raising children in loving, stable households despite the Anti-Recognition Laws. The Anti-Recognition Laws injure these children by denying them and their families the benefits that Louisiana offers to families headed by a couple whose marriage is recognized. And the courts that have considered social science evidence on gay parenting have uniformly concluded that the State lacks a legitimate interest in preventing same-sex couples from becoming parents. *See, e.g., Deboer*, 2014 U.S. Dist. LEXIS 37274, *Perry*, 704 F. Supp. 2d at 980; *Henry,* Exhibit 21 at 35 ("[T]he overwhelming scientific consensus, based on decades of peer-reviewed scientific research, shows unequivocally that children raised by same-sex couples are just as well adjusted as those raised by heterosexual couples.").

4. Federalism Concerns Should Not Salvage the Unconstitutional Laws.

Defendants may argue that this Court should uphold the Anti-Recognition Laws out of respect for state sovereignty. It is true that in *Windsor*, the Supreme Court expressed concern that DOMA intruded on the traditional State prerogative to define marriage within its borders. *See* 133 S. Ct. at 2691-92. However, the Court determined it "unnecessary" to decide whether DOMA "disrupt[ed] the federal balance." *Id.* Rather, the Court's ruling rested on its holding that DOMA's withdrawal of federal recognition to legally wed same-sex couples "violates basic due process and equal protection principles." *Id.* at 2693. As the ten federal district court decisions that have examined state-level marriage bans since *Windsor* demonstrate, *Windsor* was an equal-protection and due-process case, not a federalism case.

In *Loving*, the Commonwealth of Virginia advanced a federalism argument and urged the Court to uphold its anti-miscegenation statutes because "marriage has traditionally been subject to state regulation without federal intervention, and consequently, the regulation of marriage should be left to exclusive state control by the Tenth Amendment." 388 U.S. at 7. Virginia also argued that "the Court should defer to the wisdom of the state legislature" regarding interracial marriage because "the scientific evidence is substantially in doubt." *Id.* at 8. Of course, the Court rejected that argument and held Virginia's anti-miscegenation statute to be unconstitutional.

So, too, Louisiana must permit its gay and lesbian citizens to share in the fundamental freedom to marry. The Defendants may argue that the drafters of the Fourteenth Amendment did not envision or intend it to encompass a right to equal recognition of same-sex marriages. But the fact that the drafters of the Fourteenth Amendment may not have anticipated the right is not determinative of whether the right exists. It would be equally true that the drafters did not

envision that the Amendment would protect a right to marry for the incarcerated (*Turner*) or parents who failed to pay child support (*Zablocki*). And as Justice Kennedy wrote in *Lawrence*:

> Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew that times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact only serve to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

539 U.S. at 578-79.

III. CONCLUSION

For all these reasons, the Court should grant Plaintiffs' Motion for Partial Summary Judgment.

Respectfully submitted,

/s/ J. Dalton Courson
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Dated: April 22, 2014

CERTIFICATE

I hereby certify that a copy of the preceding Memorandum in Support of Motion for Partial Summary Judgment has been served upon all counsel of record by electronic notice via the Court's CM/ECF system, this 22nd day of April, 2014.

/s/ J. Dalton Courson

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

JONATHAN P. ROBICHEAUX, ET AL.	CIVIL ACTION
v.	NO. 13-5090 C/W NO. 14-97 & NO. 14-327
JAMES D. CALDWELL, LOUISIANA ATTORNEY GENERAL, ET AL.	SECTION "F"

JUDGMENT

IT IS ORDERED that this Court's Order and Reasons and the accompanying Judgment dated September 3, 2014, are hereby recalled and rescinded;

IT IS FURTHER ORDERED that Article XII, Section 15 of the Louisiana Constitution, Article 89 of the Louisiana Civil Code, and laws enacted pursuant thereto, violate the Fourteenth Amendment to the United States Constitution and may not be enforced against the Plaintiffs or any other same-sex couple;

IT IS FURTHER ORDERED that Article XII, Section 15 of the Louisiana Constitution, Article 3520(B) of the Louisiana Civil Code, and laws enacted pursuant thereto, violate the Fourteenth Amendment to the United States Constitution and may not be enforced against the Plaintiffs or any other same-sex couple;

IT IS FURTHER ORDERED that Defendants Devin George and Kathy Kliebert, in their official capacities, and their officers,

employees, agents, and all other individuals under their supervision, direction, or control, and all persons acting in concert or participation with any of them are permanently enjoined from enforcing Article XII, Section 15 of the Louisiana Constitution, Article 89 of the Louisiana Civil Code, and laws enacted pursuant thereto;

IT IS FURTHER ORDERED that Defendants Devin George, Tim Barfield, and Kathy Kliebert in their official capacities and their officers, employees, agents, and all other individuals under Defendants' supervision, direction, or control, and all persons acting in concert or participation with any Defendants are permanently enjoined from enforcing Article XII, Section 15 of the Louisiana Constitution, Article 3520(B) of the Louisiana Civil Code, and laws enacted pursuant thereto;

IT IS FURTHER ORDERED that Defendants Devin George and Kathy Kliebert in their official capacities and their officers, employees, agents, and all other individuals under Defendants' supervision, direction, or control, and all persons acting in concert or participation with any Defendant must provide marriage licenses to Plaintiffs Robert Welles and Garth Beauregard and other same-sex couples who provide a complete application for a marriage license that complies with all relevant provisions of Louisiana law, except those purporting to prohibit same-sex couples from marrying;

IT IS FURTHER ORDERED that Defendants Devin George, Tim Barfield, and Kathy Kliebert in their official capacities and their officers, employees, agents, and all other individuals under Defendants' supervision, direction, or control, and all persons acting in concert or participation with any Defendant must recognize the marriages of Plaintiffs Jonathan P. Robicheaux and Derek Penton; Courtney Blanchard and Nadine Blanchard; Jacqueline M. Brettner and M. Lauren Brettner; Nicholas J. Van Sickels and Andrew Bond; Henry Lambert and R. Carey Bond; L. Havard Scott, III and Sergio March Prieto; and other same-sex couples who have validly married under the law of another jurisdiction as valid and enforceable under Louisiana law;

IT IS FURTHER ORDERED that Defendant Devin George, in his official capacity as Louisiana State Registrar, must issue forthwith a birth certificate for the child of Plaintiff M. Lauren Brettner identifying Jacqueline M. Brettner as one of the child's parents;

IT IS FURTHER ORDERED that Defendant Tim Barfield, in his official capacity as Secretary of the Louisiana Department of Revenue, is permanently enjoined from enforcing Louisiana Revenue Information Bulletin 13-024 or otherwise requiring married same-sex spouses to choose a filing status of "single" rather than "married."

IT IS FURTHER ORDERED that Plaintiffs in each of these consolidated cases are awarded their costs, expenses, and reasonable attorneys' fees according to 42 U.S.C. § 1988 and any other applicable laws. The question of quantum is referred to the magistrate judge.[1]

New Orleans, Louisiana, July 2, 2015

MARTIN L. C. FELDMAN
UNITED STATES DISTRICT JUDGE

[1] Obergefell v. Hodges, Nos. 14-556, 14-562, 14-571, 14-574, 2015 WL 2473451 (U.S. June 26, 2015).

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CLEOPATRA DE LEON, NICOLE DIMETMAN, VICTOR HOLEMS, and MARK PHARISS, Plaintiffs,	§	
v.	§	
GREG ABBOTT, in his official capacity as Governor of the State of Texas, KEN PAXTON, in his official capacity as Texas Attorney General, and KIRK COLE, in his official capacity as interim Commissioner of the Texas Department of State Health Services, Defendants.	§	Cause No. SA-13-CA-00982-OLG

ORDER

On August 10, 2015, the Court held a telephonic status conference in which all parties in the above-styled case appeared by and through their counsel of record. The parties advised the Court that the death certificate of James H. Stone-Hoskins had been amended, as ordered by this Court. Furthermore, the Texas Attorney General's office advised the Court that "in the next couple of days," and in conjunction with the State Department of Health Services, it would issue policy guidance related to the recognition of same-sex marriage in death and birth certificates, and assuring that "the State and its agencies will fully be in compliance with [this Court's] final judgment that was issued on July 7th" (docket no. 112, p. 15).

The Court notes that Ken Paxton, as Attorney General for the State of Texas, is in the unique position to insure the proper implementation of the law across all state agencies, and Kirk Cole, as interim Commissioner of the Texas Department of State Health Services, is in the unique position to ensure that his office promptly complies with this Court's order and recognizes same-sex marriages when issuing death and birth certificates.

Accordingly, the Court ORDERS Defendants to submit an advisory to the Court, **no later than Monday August 24, 2015**: (1) notifying the Court they have created, issued, and implemented policy guidelines recognizing same-sex marriage in death and birth certificates issued in the State of Texas, and (2) assuring the Court that the Department of State Health Services has granted all pending applications for death and birth certificates involving same-sex couples, assuming the applications are otherwise complete and qualify for approval.

It is so ORDERED.

SIGNED this 11th day of August, 2015.

United States District Judge Orlando L. Garcia

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CLEOPATRA DE LEON, NICOLE DIMETMAN, VICTOR HOLEMS, and MARK PHARISS, Plaintiffs,	§	
v.	§	
GREG ABBOTT, in his official capacity as Governor of the State of Texas, KEN PAXTON, in his official capacity as Texas Attorney General, and KIRK COLE, in his official capacity as interim Commissioner of the Texas Department of State Health Services, Defendants.	§	Cause No. SA-13-CA-00982-OLG

ORDER

Pending before this Court are State Defendants' Opposed Motion for Reconsideration of the Order dated August 5, 2015 (docket no. 106) and State Defendants' Emergency Motion to Rescind or, in the Alternative, to Quash the Court's August 5 Order Compelling the Attendance of the Interim Commissioner of the Department of State Health Services and the Texas Attorney General (docket no. 108).

On August 10, 2015, the Court held a telephonic status conference in which all parties in the above-styled case appeared by and through their counsel of record. The parties advised the Court that the death certificate of James H. Stone-Hoskins had been amended, as ordered by this Court. Furthermore, the Texas Attorney General's office advised the Court that in conjunction with the State Department of Health Services, it would issue policy guidelines related to the recognition of same-sex marriage in death and birth certificates, and assured that "the State and its agencies will fully be in compliance with [this Court's] final judgment that was issued on July 7th" (*see* docket no. 112, p. 15).

On August 11, 2015, the Court ordered State Defendants to submit an advisory: (1) notifying the Court they have created, issued, and implemented policy guidelines recognizing same-sex marriage in death and birth certificates issued in the State of Texas, and (2) assuring the Court that the Department of State Health Services has granted all pending applications for death and birth certificates involving same-sex couples, assuming the applications are otherwise complete and qualify for approval.

On August 12 and August 24, 2015, the Texas Attorney General's office filed advisories with the Court stating it had fully complied with this Court's August 11, 2015 order. Specifically, the Court received notification that "the Department of State Health Services issued an Action Memorandum implementing changes to vital records for vital events in compliance with the U.S. Supreme Court ruling in *Obergefell v. Hodges*, No. 14-566 (U.S. 2015), and this Court's July 7 ruling" (*see* docket no. 114). Also, the Attorney General's office notified this Court it had "created and implemented policy guidelines that comply with *Obergefell* and this Court's injunction, [] has granted complete applications that qualify for approval ... [and] has contacted persons with pending applications that require additional information or payment to complete" (*see* docket no. 115).

Based on this information, the Court is of the opinion that State Defendants have fully complied with this Court's orders and the Supreme Court's *Obergefell* opinion recognizing same-sex marriage. Accordingly, the Court finds the contempt hearing scheduled for September 10, 2015 is no longer necessary and is hereby VACATED. Furthermore, State Defendants' Motion for Reconsideration of the Order dated August 5, 2015 (docket no. 106) and Emergency Motion to Rescind or, in the Alternative, to Quash the Court's August 5 Order Compelling the

Attendance of the Interim Commissioner of the Department of State Health Services and the Texas Attorney General (docket no. 108) are hereby DENIED AS MOOT.[1]

Lastly, the Court notes that since the filing of Defendants' advisories, it has received mailings from individuals alleging that certain clerks across the State of Texas continue to deny marriage licenses to same-sex couples. These incidents have not been properly filed and are not before this Court. Nonetheless, the Court understands, as advised by the Attorney General's counsel during the August 10, 2015 telephonic conference, that the Attorney General does not intend to represent any clerk facing litigation for its failure to issue marriage licenses to same-sex couples (*see* docket no. 112, p. 14). The Court expects that Ken Paxton, as Texas Attorney General, and Kirk Cole, as interim Commissioner of the Texas Department of State Health Services, will utilize their unique positions to ensure proper implementation of the law across the State of Texas. Ensuring full compliance with this Court's July 7, 2015 final judgment and the Supreme Court's *Obergefell*'s decision will preclude the need for this Court's intervention and will allow Attorney General Paxton and Commissioner Cole to focus on other State affairs.

It is so ORDERED.

SIGNED this 1st day of September, 2015.

United States District Judge Orlando L. Garcia

[1] For purposes of clarity, and in response to State Defendants' argument that the Court improperly granted Stone Hoskins' intervention in this case , the Court would like to remind State Defendants that the decision whether to allow a third party to permissively intervene in a lawsuit is *within the sound discretion of this Court*. *United States v. Texas*, 457 F.3d 472, 476 (5th Cir. 2006) (emphasis added). Stone Hoskins's intervention in this case did not unduly delay or prejudice the adjudication of the original parties' rights, but to the contrary, compelled State Defendants to promptly implement the necessary policy guidelines and to ensure full compliance with this Court's July 7, 2015 order and the Supreme Court's *Obergefell* decision.