

No. _____

IN THE
Supreme Court of the United States

JONATHAN P. ROBICHEAUX, ET AL.,
Petitioners,

v.

DEVIN GEORGE, IN HIS OFFICIAL CAPACITY AS LOUISIANA
STATE REGISTRAR AND CENTER DIRECTOR AT LOUISIANA
DEPARTMENT OF HEALTH AND HOSPITALS, ET AL.,
Respondents.

**On Petition for a Writ of Certiorari
Before Judgment to the United States
Court of Appeals for the Fifth Circuit**

**PETITION FOR WRIT OF CERTIORARI
BEFORE JUDGMENT**

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QUESTION PRESENTED

Whether a state's constitutional and statutory bans denying same-sex couples the freedom to marry and recognition of their marriages validly entered in other jurisdictions violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the U.S. Constitution.

PARTIES TO THE PROCEEDING

The Petitioners are Jonathan P. Robicheaux and Derek Penton, Nadine Blanchard and Courtney Blanchard, Robert Welles and Garth Beauregard, Jacqueline M. Brettner and M. Lauren Brettner, Nicholas J. Van Sickels and Andrew S. Bond, Henry Lambert and R. Carey Bond, L. Havard Scott, III and Sergio March Prieto, and Forum for Equality Louisiana, Incorporated. The Petitioners were the Plaintiffs in the District Court, and they are the Appellants in the Court of Appeals.

The Respondents are Devin George, in his official capacity as Louisiana State Registrar and Center Director at Louisiana Department of Health and Hospitals; Kathy Kliebert, in her official capacity as the Louisiana Secretary of Health and Hospitals; and Tim Barfield, in his official capacity as Secretary of the Louisiana Department of Revenue. The Respondents were Defendants in the District Court, and they are the Appellees in the Court of Appeals.

James D. Caldwell, in his official capacity as Louisiana Attorney General, was a Defendant in the District Court; however, Petitioners did not appeal the dismissal of claims against Caldwell. Therefore, he is no longer a party at the Fifth Circuit or before this Court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to SUP. CT. R. 29.6, Petitioner Forum for Equality Louisiana, Incorporated (the “Forum”) states as follows:

The Forum is a Louisiana nonprofit corporation with its primary office in New Orleans, Louisiana. The Forum is a social welfare organization within the meaning of Section 501(c)(4) of the Internal Revenue Code. The Forum has no parent corporation(s). As a 501(c)(4) organization, The Forum does not have shareholders or issue stock and, thus, is not a nongovernmental corporate entity in which a publicly held corporation owns 10% or more of its stock.

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**PETITION FOR WRIT OF CERTIORARI
BEFORE JUDGMENT**

Petitioners Jonathan P. Robicheaux and Derek Penton, Nadine Blanchard and Courtney Blanchard, Robert Welles and Garth Beauregard, Jacqueline M. Brettner and M. Lauren Brettner, Nicholas J. Van Sickels and Andrew S. Bond, Henry Lambert and R. Carey Bond, and L. Havard Scott, III and Sergio March Prieto—seven Louisiana same-sex couples—as well as the Forum for Equality Louisiana, Incorporated, respectfully petition for a writ of certiorari before judgment in a case currently pending on appeal to the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The opinion of the United States District Court for the Eastern District of Louisiana (“District Court”) denying Petitioners’ motion for summary judgment and granting Respondents’ motion for summary judgment is published at 2 F. Supp. 3d 910. The District Court’s opinion is reprinted in the Appendix (“App.”) at a1-a33.

JURISDICTION

The judgment of the District Court was entered on September 3, 2014. App. a34. Notices of appeal were timely filed on September 4, 2014, and September 5, 2014. App. a36-a37. The consolidated cases were docketed in the Court of Appeals for the Fifth Circuit as *Jonathan Robicheaux, et al. v. James*

Caldwell, et al., No. 14-31037. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) and 28 U.S.C. § 2101(e).

**CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED**

U.S. CONST. amend. XIV, § 1

No State shall . . . 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.

LA. CONST. art. XII, § 15

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 any union other than the union of one man and one woman. A legal status identical to 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. CIV. CODE art. 86

Marriage is a legal relationship between a man and a woman that is created by civil contract. The relationship and the contract are subject to special rules prescribed by law.

LA. CIV. CODE art. 89

Persons of the same sex may not contract marriage with each other. A purported marriage between persons of the same sex contracted in another state shall be governed by the provisions of Title II of Book IV of the Civil Code. [*See art. 3520(B)*]

LA. CIV. CODE art. 3520(B)

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.

STATEMENT OF THE CASE

Petitioners are seven Louisiana same-sex couples, several of whom are raising children, and a statewide organization whose members include Louisiana same-sex couples and their families. They challenge Louisiana laws that forbid them access to the status, rights, and protections of marriage, disparage their families, and inflict harms particularly on their

children. These laws, collectively referred to as Louisiana's "Marriage Ban," deny Petitioners who are unmarried the right to marry within the state and deny Petitioners who have married outside of the state all legal recognition of their marriages. The Marriage Ban infringes on the constitutional rights to due process and equal protection of these families, and should be struck down.

In the first federal decision after this Court's 2013 ruling in *United States v. Windsor*, 133 S. Ct. 2675, both to uphold discriminatory state marriage laws and to have been appealed, the District Court ruled that the majority's will to strip same-sex couples of the protections of marriage must prevail over Petitioners' constitutional claims.¹ Although inconsistent with the vast majority of courts addressing this question—including four circuit courts of appeal—the District Court's decision unfortunately has proven not to be an isolated anomaly. Two months after the ruling below, the Sixth Circuit followed suit, issuing a very similar decision reversing district courts in four states that

¹ Only two other district court decisions have ruled in favor of marriage bans post-*Windsor*, both resting on *Baker v. Nelson*, 409 U.S. 810 (1972), and neither fully addressing the merits of the issue. See *Conde-Vidal v. Garcia-Padilla*, No. 14-cv-1253, 2014, 2014 U.S. Dist. LEXIS 150487 (D. P.R. Oct. 21, 2014) (citing *Baker* as controlling in dismissing complaint in challenge to Puerto Rico's marriage ban); *Merritt v. Attorney Gen.*, No. 13-215, 2013 U.S. Dist. LEXIS 162583 (M.D. La. Nov. 13, 2013) (adopting magistrate's report citing *Baker* as controlling in dismissing *pro se* plaintiff's complaint challenging Louisiana marriage ban).

had struck down marriage laws that discriminate against same-sex couples. *DeBoer v. Snyder*, No. 14-1341, 2014 U.S. App. LEXIS 21191 (6th Cir. Nov. 6, 2014), *petitions for cert. filed*, No. 14-571 (Nov. 14, 2014), No. 14-556 (Nov. 14, 2014), No. 14-562 (Nov. 14, 2014), No. 14-574 (Nov. 18, 2014). The Sixth Circuit ruling and the decision below are now aligned against the great consensus of courts holding that majoritarian preferences cannot justify depriving lesbian and gay Americans and their children the protections of marriage.

This case, along with those in which review has been sought from the Sixth Circuit's decision, demonstrates the harms inflicted on same-sex families in states from the Canadian border to the Gulf of Mexico, and the pressing need for this Court's intervention to address this persisting discrimination against same-sex families. Accordingly, Petitioners respectfully request this Court to grant certiorari before judgment pursuant to 28 U.S.C. §§ 1254(1) and 2101(e) and SUP. CT. R. 11, to review the District Court decision.

I. Louisiana's Marriage Ban

The Louisiana Constitution bars same-sex couples from marrying in Louisiana and prohibits state recognition of their valid out-of-state marriages. LA. CONST. art. XII, § 15. Similarly, articles 86, 89, and 3520(B) of the Louisiana Civil Code preclude same-sex couples from marrying in Louisiana or from seeking recognition of their marriages entered into under the laws of another jurisdiction. Louisiana

amended its marriage laws in response to rulings from other states that began to open the door to marriage rights for same-sex couples. *See Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 968 (Mass. 2003).

In 1999, the state legislature passed a law providing that marriages of same-sex couples violate Louisiana's "strong public policy," and that such marriages "shall not be recognized . . . for any purpose, including any right or claim as a result of the purported marriage." LA. CIV. CODE art. 3520(B) (1999); *see also id.* art. 89 (1987) ("Persons of the same sex may not contract marriage with each other.").

Five years later, in 2004, the legislature formulated and the electorate approved Act 926, which the Louisiana Supreme Court has described as "a single plan in 'defense of marriage,'" by constitutional amendment. *See Forum for Equality PAC v. McKeithen*, 893 So.2d 715, 716-718 (La. 2005) (discussing amendment's history).

The stated purpose of Act 926, titled "Defense of Marriage," was

to enact Article 12, Section 15, relative to marriage; to require that marriage in the state shall consist only of the union of one man and one woman; to provide that the legal incidents of marriage shall be conferred only upon such union; to prohibit the validation or recognition of the legal status of any union of unmarried individuals; to prohibit the recognition of a

marriage contracted in another jurisdiction which is not the union of one man or one woman.

Id. at 733.

The Louisiana Supreme Court described Act 926 as not merely a ban on marriage by same-sex couples—“[a]lthough such a ban is effected by the provisions of the constitutional amendment.” *Id.* at 734. Rather, the “object of this constitutional amendment is ‘defense of marriage,’ i.e., to defend this state’s civil tradition of marriage.” *Id.* “[A]ny adequate defense of marriage would have to be premised upon the understanding that our civil tradition of marriage necessarily entails both the concept of marriage and the civil effects and legal incidents flowing directly from marriage as provided by our civil law and our Civil Code.” *Id.* at 736.

The measure was approved on September 18, 2004, by 77.78% of the electorate: 619,908 votes for and 177,067 votes against the amendment. *Id.* at 718.

Collectively, these provisions constitute the challenged Louisiana Marriage Ban.

II. Petitioners

Petitioner same-sex couples, all Louisiana residents, wish to marry or have marriages some of them have entered outside Louisiana recognized in the state where they live. They wish to celebrate and publicly declare their love and commitment before their families, friends, and communities, through

marriage, which provides unparalleled intimacy, companionship, emotional support, security, and legal rights, benefits, and responsibilities. Their experiences illustrate the far-reaching effects the Marriage Ban has had on their families.

Because Louisiana refuses to allow same-sex couples to marry, hundreds of statutes in Louisiana treat these families differently, to their disadvantage. For example, unmarried same-sex couples, like Petitioners Robert Welles and Garth Beauregard who have been in a loving, committed relationship for 24 years, wish to marry in their home state, surrounded by family and friends, and to have the dignity and legal protections that come with entering into marriage, but are unable to do so. Thus, they are unable to take advantage of the opportunity to create a community property regime upon the celebration of their marriage, LA. CIV. CODE art. 2334, or benefit from the protections of the marital privilege, LA. CODE EVID. arts. 504, 505. They are denied the opportunity to make health care decisions for the other if he becomes incapacitated, LA. REV. STAT. § 40:1299.53; obtain state retirement fund survivor benefits if one predeceases the other, LA. REV. STAT. § 11:471; or be appointed as curator for the other if incapacitated (interdicted), LA. CODE CIV. PROC. art. 4561. They are deprived of the opportunity to provide security for each other in times of overwhelming grief through spousal protections upon death, including rights to inheritance when a spouse dies intestate, LA. CIV. CODE arts. 889, 890, 894, or to benefit from the homestead exemption, LA. REV. STAT. § 20:1. Similarly, should their relationship not endure, they

would lack the protections provided by spousal support obligations, LA. CIV. CODE art. 98.

Even if unmarried Louisiana same-sex couples, including Garth and Robert, married elsewhere and returned home, they would face the same types of problems and challenges their co-Petitioners face. Petitioners Henry Lambert and Carey Bond have been in a loving, committed relationship for 42 years. They married in New York in 2011. Unlike different-sex married couples, however, married same-sex couples in Louisiana are denied the right to file joint state tax returns. LA. REV. STAT. § 47:293, La. Revenue Info. Bulletin No. 13-024 (Sept. 13, 2013). As a result, Petitioners and other same-sex couples suffer stigma and additional tax burdens. Indeed, as a result of Louisiana's Marriage Ban, Respondent Barfield has demanded payment of \$15,928.01 from Henry and Carey because he did not accept their joint return.

Petitioners Nick Van Sickels and Andrew Bond have been in a loving, committed relationship for 11 years. They married in the District of Columbia in 2012. Both men longed to be parents, but because Louisiana neither allows unmarried couples to jointly adopt nor same-sex couples to marry or have their marriages recognized, Nick, by himself, adopted their daughter. As a result, every year Nick must execute a provisional custody by mandate in order to provide Andrew with a limited set of rights to care for their child. *See* LA. REV. STAT. § 9:951.

Petitioners Jacqueline Brettner and Lauren Brettner, who have been together for four years and

married in New York in 2012, have a young daughter. Lauren gave birth to their child in 2013. Even though Louisiana applies a presumption of parentage for children born into a marriage, LA. CHILD. CODE art. 185, their daughter's birth certificate identifies only Lauren as her parent, depriving Jackie and her daughter the legal protections for their parent-child relationship.

Petitioners L. Havard Scott, III, and Sergio Prieto have been in a loving, committed relationship for more than 16 years. They entered into a civil union in Vermont in 2000, and returned to Vermont in 2010 to marry. Havard and Sergio, like other same-sex couples in Louisiana, are forced to deny the existence of their marriage on important documents, such as bank records, credit applications, real property records, hospital and medical provider records. Moreover, they have incurred considerable time and expense executing wills, medical directives, and provisional custody documents to ensure they retain access to and decision-making powers for each other in times of crisis.

And even after the federal recognition afforded by *Windsor*, 133 S. Ct. at 2683, all of these and other same-sex couples still are deprived of those federal benefits that inure only to couples whose marriages are recognized by their domicile, such as spousal veteran's and Social Security benefits. *See, e.g.*, 38 U.S.C. § 103(c) (federal spousal veterans benefits determined "according to the law of the place where the parties resided"); 42 U.S.C. § 416(h)(1)(A) (determining marital status for purposes of federal

Social Security benefits by reference to laws of state of domicile).

Finally, compounding the tangible harms caused by the Marriage Ban, Petitioners and their families also suffer stigma and humiliation as a result of state-sanctioned discrimination. The Marriage Ban denies them the symbolic imprimatur and dignity that the label “marriage” uniquely confers. It is the only term in our society that, without further explanation, conveys that a relationship is deep and abiding, and commands instant respect.

Petitioners challenged the Marriage Ban in three separate actions: *Robicheaux v. Caldwell*, No. 13-cv-05090; *Robicheaux v. George*, No. 14-cv-00097; and *Forum for Equality Louisiana, Inc. v. Barfield*, No. 14-cv-00327.² All three cases were consolidated by Orders of the District Court dated January 21, 2014, App. a50, and March 18, 2014. App. a48.

III. District Court Opinion

On September 3, 2014, following cross-motions for summary judgment, Judge Martin L.C. Feldman of the United States District Court for the Eastern District of Louisiana granted Respondents’ motion for summary judgment and denied Petitioners’ cross-motion. App. a1. According to the court, the question boiled down to “how and where best to

² In *Robicheaux v. Caldwell*, No. 13-cv-05090, the District Court dismissed defendant Caldwell on November 26, 2013. The propriety of his dismissal is not raised on appeal.

resolve these conflicting notions about what is marriage and what influence should the U.S. Supreme Court decision in *United States v. Windsor* have?” App. a6.

First discussing a minority view regarding the import of *Windsor*, the court asserted that the decision “merely offers bits and pieces of hope to both sides” because on the one hand, it references an “amorphous but alluring ‘evolving understanding of the meaning of equality,’ while on the other, the “opinion and its holding are confined to those lawful marriages” located in states where marriages of same-sex couples are performed and recognized. App. a9-a10. In the court’s view, *Windsor* “leaves unchanged ‘the concerns for state diversity and sovereignty.’” App. a12.

The court then evaluated the Petitioners’ assertion that the Marriage Ban violates the Equal Protection Clause. The court reasoned that *Windsor* “only required ‘careful consideration’ because of Congress’ odd intrusion on . . . [the] historic and essential state authority to define marriage.” *Id.* However, “no additional or different consideration is warranted” here, the court asserted, because Louisiana was acting “squarely within the scope of traditional authority.” App. a10-a11.

The court also declined to apply “more exacting review standards,” noting that neither this Court nor the Fifth Circuit has ever identified sexual orientation as a suspect classification. To find this, the court stated, would “distort precedent and demean the democratic process.” App. a13. Further,

rejecting Petitioners' sex discrimination argument, the court concluded that "Louisiana laws apply evenhandedly to both genders—whether two men or two women." Thus, the court was "satisfied that rational basis applies." App. a15.

The court acknowledged that its decision runs counter to other federal court decisions across the country striking down similar laws. App. a9. Nonetheless, the District Court determined that both of Louisiana's purported justifications for the Marriage Ban survive rational basis review. The court held that the laws rationally further the government's interest in "linking children to an intact family formed by their biological parents." App. a15. Additionally, and "of even more consequence" to the court, was its conclusion that Louisiana has a legitimate interest in "safeguarding fundamental social change" that is "better cultivated through democratic consensus." *Id.*

The court rejected Petitioners' argument that such justifications were grossly under- and over-inclusive, asserting that the "fact that marriage has many differing, even perhaps unproved dimensions, does not render Louisiana's decision irrational." App. a16. "Nor does the opinion of a set of social scientists . . . that other associated forms may be equally stable, or the view that such judgments vilify a group" render the Marriage Ban irrational. *Id.* The court further adopted a narrow view of "animus," stating that it rejected "the notion that this state's choice could only be inspired by hate and intolerance." App. a17. Rather, the court was

“persuaded” by traditional marriage “that has endured in history for thousands of years.” *Id.*

The court similarly rejected the Petitioners’ assertion that the Marriage Ban violates the Due Process Clause. The court held that the challenged laws do not infringe upon the fundamental right to marry under *Washington v. Glucksberg*, 521 U.S. 702 (1997), which in the court’s view compelled Petitioners to “specifically assert a fundamental right to same-sex marriage.” The court discounted *Loving v. Virginia*, 388 U.S. 1 (1967), *Zablocki v. Redhail*, 434 U.S. 374 (1978), and *Turner v. Safley*, 482 U.S. 78 (1987), asserting that this trinity of cases “involved marriages between one man and one woman,” While acknowledging the procession of federal courts that rejected this view. App. a21. Finding no fundamental right at stake, the Court upheld the Marriage Ban against Petitioners’ due process challenge under rational basis review.

The District Court characterized the case as a “clash between convictions regarding the value of state decisions reached by way of the democratic process as contrasted with personal, genuine, and sincere lifestyle choice recognition.” App. a5. *Windsor*, according to the court, reaffirmed the state’s authority to regulate domestic relations, “subject to indistinct future constitutional guarantees that in *Windsor* were, by its express limits, left open and rather inexact.” App. a18. It held that Louisiana did not overstep its sovereign authority, and,

therefore, the court entered judgment in favor of the Respondents.³

On September 4, 2014, and September 5, 2014, Petitioners timely filed notices of appeal to the United States Court of Appeals for the Fifth Circuit. App. a36-a45. The court of appeals has jurisdiction pursuant to 28 U.S.C. § 1291. The appeal was docketed as No. 14-31037.

The cross-motions for summary judgment are subject to *de novo* appellate review.

On September 19, 2014, Respondents filed a motion to expedite the appeal to advance it for argument at the same time as the Fifth Circuit's review of the decision regarding the marriage ban from Texas, *DeLeon v. Perry*, 975 F. Supp. 2d 632 (W.D. Tex. 2014), *appeal docketed*, No. 14-50196 (5th Cir. Mar. 1, 2014). The Fifth Circuit granted the motion and assigned Petitioners' appeal in this case to the same merits panel that would hear *DeLeon*. Briefing concluded on November 7, 2014, and the Fifth Circuit has scheduled oral argument for the week of January 5, 2015.

The case is pending before a panel of the Fifth Circuit and, therefore, is "in the court of appeals" within the meaning of 28 U.S.C. § 2101. *See* Stephen M. Shapiro et al., *Supreme Court Practice* § 2.4, at 85 (10th ed. 2013).

³ The District Court also denied a First Amendment challenge to the Marriage Ban. Petitioners did not appeal that aspect of the court's ruling.

REASONS FOR GRANTING THE PETITION

The decision below stands alone as the sole District Court decision post-*Windsor* to have addressed the merits of a challenge to a state's marriage ban, joined only by the Sixth Circuit among the dozens of federal circuit and district courts around the nation instead striking down such discriminatory marriage bans. *See DeBoer*, 2014 U.S. App. LEXIS 21191. The decision below, aligned as it is with the Sixth Circuit's recent ruling, presents an added counterpoint to the otherwise unanimous consensus among the lower courts that denying same-sex couples the right to marry and to have their existing marriages recognized offends our Constitution. Certiorari before judgment may be granted when a "case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." SUP. CT. R. 11. *See* U.S. Pet. For Cert. Before J., *United States v. Fanfan*, No. 04-105, *cert. granted*, 125 S. Ct. 12 (2004). This case satisfies that standard.

In the past week, this Court has received four petitions for certiorari from Petitioners in Ohio, Michigan, Tennessee, and Kentucky, seeking review of the Sixth Circuit's ruling that state bans on the freedom to marry and recognition of marriages do not violate due process and equal protection guarantees. As these petitions demonstrate, this is undoubtedly a question of great national importance, on which there is a stark and irreconcilable split between the Circuits. *See e.g.*, U.S. Pet. for Cert., *Obergefell v.*

Hodges, No. 14-556 (filed Nov. 14, 2014); U.S. Pet. for Cert., *DeBoer v. Snyder*, No. 14-571 (filed Nov. 14, 2014). These petitions demonstrate the urgent need for this Court's intervention to resolve this divide among the Circuits on this pressing issue.

Should this Court accept any of the certiorari petitions to review the Sixth Circuit ruling, Petitioners seek to join and to have the District Court's ruling reviewed, before judgment, as well. Consideration of this case in tandem with any of the cases from the Sixth Circuit would sharpen the legal issues in the following ways: *one*, as the first post-*Windsor* federal court decision in the nation to uphold a marriage ban, it represents the minority view with a full decision on the merits; *two*, this case challenges *both* Louisiana's ban on celebration of marriages by same-sex couples and on recognition of marriages entered by same-sex couples, allowing consideration of the spectrum of discrimination confronting same-sex couples in a single consolidated case; *three*, it provides an optimal vehicle to clarify growing confusion regarding the limits of judicial deference to democratic processes when the majority has denied constitutionally protected rights to members of a minority group; and *four*, it offers geographic range in the Court's consideration of the nationally important question of the marriage rights of same-sex couples.

I. This Court Should Exercise Its Power to Grant Certiorari Before Judgment to Consider the Louisiana District Court’s Ruling In Tandem with the Sixth Circuit’s Ruling, the Only Two Federal Decisions in the Nation to Uphold State Marriage Bans on the Merits After *Windsor*.

This Court should exercise its power to grant certiorari before judgment because this case—the first and only district court decision post-*Windsor* to uphold a state marriage ban on the merits—represents a distinct minority view, joined by the Sixth Circuit in *DeBoer*, 2014 U.S. App. LEXIS 21191. Together, these cases present the swath of legal arguments that stand in direct conflict with the correct analysis of the Fourth, Seventh, Ninth, and Tenth Circuits, each declaring unconstitutional state bans on the right to marry and on the recognition of out-of-state marriages of same-sex couples. *See Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014), *cert. denied and cert denied sub nom.*, 135 S. Ct. 308; *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014), *cert. denied and cert denied sub nom.*, 135 S. Ct. 316; *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 265; *Bishop v. Smith*, 760 F.3d 1070 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 271; *Latta v. Otter*, No. 14–35420, 2014 U.S. App. LEXIS 16057 (9th Cir. Oct. 7, 2014).

As the first decision since this Court’s opinion in *Windsor* to uphold a state marriage ban, the decision below, for a time, stood alone—in stark contrast to

four circuit court, 34 district court, and 15 state court rulings striking down similar state marriage bans throughout the country. Acknowledging its status as the judicial outlier, the court below dismissed the clear judicial consensus as merely “a pageant of empathy; decisions impelled by a response of innate pathos.” App. a26. While professing that it had “arduously studied the volley of nationally orchestrated court rulings,” the District Court primarily relied on dissents to *Furman v. Georgia*, 408 U.S. 238 (1972), *Kitchen*, 755 F.3d at 1230, *Bishop*, 760 F.3d at 1109, and *Bostic*, 760 F.3d at 384.

With the Sixth Circuit’s similar ruling two months later, the decision below is no longer a lone outlier. Indeed, themes prominent in the decision—including elevating deference to democratic processes over judicial responsibility to protect the minority’s constitutional rights—were echoed in the Sixth Circuit’s subsequent ruling. The Sixth Circuit’s decision now creates an irreconcilable split with the four other circuits, making imperative this Court’s intervention on this question of urgent importance not just to same-sex couples within the Sixth Circuit but to those in Louisiana and beyond as well.

Given this head-on circuit split—and the daily harms inflicted on same-sex couples denied marriage rights—further percolation of the issue in the courts of appeal would serve little utility, militating against further review in the Fifth Circuit of the decision below. At the same time, this case offers an additional counter-balance to the overwhelming

authority that stands contrary to the Sixth Circuit, presenting the Court with a second lower court decision to flesh out arguments central to this urgent question. Thus, the decision below is uniquely appropriate for certiorari before judgment and consideration along with the Sixth Circuit ruling.

II. This Petition Offers the Court the Opportunity to Address in a Single Case the Constitutionality of a State's Denial to Same-Sex Couples of Both the Right to Marry Within the State and to Recognition of Marriages Entered Without the State.

Petitioners in this case, consolidated before the same judge in the District Court, have challenged all aspects of the Louisiana Marriage Ban. Thus, this case presents both the question whether a state may refuse to issue a marriage license to a same-sex couple and whether the state is required to recognize the marriage of a same-sex couple validly entered in another jurisdiction. This Petition offers the opportunity to resolve in a single case the constitutionality of state laws depriving same-sex couples both the right to marry and to recognition as spouses once married. It allows the Court to rule definitively on all aspects of marriage challenges that are being litigated across the country, presenting a strong vehicle to address the merits of the marriage issue. The Louisiana Attorney General, through special counsel, has vigorously defended the action at all stages of the litigation. Further, the District Court considered and reached the merits of all the due

process and equal protection claims raised by the Petitioners.

III. This Case Provides an Appropriate Vehicle to Address Confusion Regarding the Judicial Deference Due to Popularly Enacted Laws That Infringe on Constitutionally Protected Rights of Members of a Minority Group.

The Petitioners challenge Louisiana’s “laws defining and regulating marriage” because they fail to “respect the constitutional rights of persons” by depriving Louisiana same-sex couples of the guarantees of liberty and equality under the Fourteenth Amendment. *Windsor*, 133 S. Ct. at 2691 (“State laws defining and regulating marriage, of course, must respect the constitutional rights of persons, *see, e.g., Loving v. Virginia*, 388 U.S. 1 (1967).”). Louisiana and the remaining states still vigorously defending discriminatory marriage bans attempt to recast this issue impacting tens of thousands of same-sex couples as a federalism battle over a state’s right to regulate marriage, rather than the battle that it is—to protect the constitutional rights of a state’s residents.

But Petitioners do not contest the state’s authority, as a general matter, to define and regulate marriage. The issue here is narrower: Can Louisiana’s laws excluding same-sex couples from marriage satisfy the “constitutional guarantees” the Court referenced as controlling in *Windsor*? *Id.* at 2692 (“The States’ interest in defining and regulating

the marital relation, *subject to constitutional guarantees*, stems from the understanding that marriage is more than a routine classification for purposes of certain statutory benefits.”) (emphasis added). Intervention by this Court would alleviate such confusion.

Here, the District Court went to great lengths to argue that the political process is owed great deference, citing Judge Holmes’s dissent in *Bishop* and the legislative history in Oklahoma to support a conclusion that the process was not tainted by animus. App. a17. The court viewed this case, and the Marriage Ban itself, as simply “addressing the meaning of marriage.” App. a1. But *Forum for Equality PAC*, decided by the Louisiana Supreme Court, paints a very different picture of the Louisiana Marriage Ban—one not intended to further define marriage for the benefit of different-sex couples, but rather intended to target same-sex couples and defend marriage from so-called “contemporary threats.” 893 So.2d at 736.

The District Court below, along with the Sixth Circuit, would have Article III courts abdicate their role as adjudicators of challenges to protect constitutional rights and would grant the states unfettered discretion to determine who is and is not deserving of those protections. But Louisiana’s Marriage Ban cannot contravene the Petitioners’ constitutional rights. *See W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) (“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.”). As this Court recently reiterated, it is a “well-established principle that when hurt or injury is inflicted . . . by the encouragement or command of laws or other state action, the Constitution requires redress by the courts.” *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1637 (2014); see also *Hall v. Florida*, 134 S. Ct. 1986, 2001 (2014) (“The States are laboratories for experimentation, but those experiments may not deny the basic dignity the Constitution protects.”).

Neither federalism nor the democratic process trump the constitutional constraints placed upon a state’s authority to regulate marriage. Thus, “a citizen’s constitutional rights can hardly be infringed simply because a majority of the people choose that it be.” *Lucas v. Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713, 736-37 (1964).

Cases involving acute national issues regarding the civil rights of minorities, like the present case, have been recognized as particularly fitting for exercise of the Court’s authority to grant certiorari before judgment in order to facilitate swift and definitive resolution by this Court. This has been especially true where other cases pending before the Court are raising the same constitutional issues. See, e.g., *Gratz v. Bollinger*, 539 U.S. 244, 259- 60 (2003) (noting decision to hear and decide prior to judgment in *Grutter v. Bollinger*, 539 U.S. 306 (2003)); *Brown v. Bd. of Educ.*, 344 U.S. 1, 3 (1952) (inviting filing of petition for certiorari before judgment in *Bolling v.*

Sharpe, 347 U.S. 497, 498 (1954)). This case, with the District Court staunchly insisting that a majority through the democratic process may trump the individual rights of a minority group, provides the optimal vehicle for this Court to clarify such confusion.

IV. This Case, Coming from a Southern State, Demonstrates the Untenable Patchwork of State Marriage Laws and Brings Additional Perspectives on This Question of Nationwide Importance.

This Court has on numerous occasions invoked its power to grant a petition for certiorari before judgment to render prompt and final resolution of the constitutionality of a law addressing a broad or pressing concern. *See, e.g., United States v. Booker*, 543 U.S. 220 (2005); *Mistretta v. United States*, 488 U.S. 361 (1989); *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *United States v. Nixon*, 418 U.S. 683 (1974); *Reid v. Covert*, 354 U.S. 1 (1957); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Norman v. Baltimore & Ohio R.R. Co.*, 294 U.S. 240 (1935). Without question, the complex and discriminatory patchwork of marriage laws that exists today is unsustainable.

Without this Court's intervention in this issue of importance to same-sex couples and their families in all parts of our country, we are fast becoming two nations, one in which same-sex spouses can live and travel freely, secure in protections and equality for their families, and another in which they suffer state-

sanctioned legal disrespect and stigma. We cannot as a nation continue on this uneven path.

This case offers the Court the opportunity to address the geographic range of existing marriage bans, from the Midwest states of the Sixth Circuit, to the southern region of the country by including the state of Louisiana. Under the circumstances presented here, the issues should be considered to be at least as important as those presented in many of the cases where immediate review has been permitted under Rule 11.

Authoritative resolution of the issue is of great importance to Petitioners and tens of thousands of same-sex couples and their families throughout the nation, from the Canadian border to the Gulf of Mexico, who are denied the equal enjoyment of civil marriage, including the benefits and responsibilities that state and federal laws make available to persons who are legally married.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court grant their petition for writ of certiorari before judgment.

Respectfully submitted,

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November 20, 2014

**APPENDIX TO PETITION FOR WRIT OF
CERTIORARI BEFORE JUDGMENT**

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Appendix A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

No. 13-5090 C/W,
No. 14-97 & No. 14-327

JONATHAN P. ROBICHEAUX, ET AL.,
PLAINTIFFS
v.
JAMES D. CALDWELL,
LOUISIANA ATTORNEY GENERAL, ET AL.,
DEFENDANTS

Filed: September 3, 2014

ORDER AND REASONS

MARTIN L. C. FELDMAN
UNITED STATES DISTRICT JUDGE

Before the Court are cross motions for summary judgment. The Court finds that defendants in this passionately charged national issue have the more persuasive argument. The State of Louisiana has a legitimate interest under a rational basis standard of review for addressing the meaning of

marriage through the democratic process. For the reasons that follow, plaintiffs' motion for summary judgment is DENIED and defendants' motion for summary judgment is GRANTED.

Background

These consolidated cases challenge the constitutionality of Louisiana's ban on same-sex marriage and its choice not to recognize same-sex marriages that are lawful in other states. Plaintiffs include six same-sex couples who live in Louisiana and are validly married under the law of another state, one same-sex couple who seeks the right to marry in Louisiana, and the Forum for Equality Louisiana, Inc., a nonprofit advocacy organization.

Plaintiffs allege that Article XII, Section 15 of the Louisiana Constitution,¹ which defines marriage as between one man and one woman, and article 3520(B) of the Louisiana Civil Code,² which denies

¹ 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 any union other than the union of one man and one woman. A legal status identical to 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. 12, § 15.

² A purported marriage between persons of the same sex violates a strong public policy of the state of Louisiana and

recognition of same-sex marriages contracted in other states as being against Louisiana's strong public policy, violate their constitutional rights to Equal Protection and Due Process.³ They also urge that the Louisiana Department of Revenue Information Bulletin No. 13-024,⁴ which requires same-sex

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).

³ Plaintiffs in Case Number 14-97 challenge Article XII, Section 15 of the Louisiana Constitution and Louisiana Civil Code article 3520(B). In their prayer for relief in their complaint, those plaintiffs mistakenly refer to Code article 3520(B)(1), which does not exist, and to Article XII, Section 18 of the Constitution, but elsewhere in the complaint make clear that they mean Section 15. Plaintiffs in Case Number 14-327 challenge "Article XII, Section 15 of the Louisiana Constitution, Article 3520(B) of the Louisiana Civil Code, and any other Louisiana laws that purport to deny recognition to the marriages of Plaintiffs and other same-sex couples who are married under the law of another jurisdiction." Although those plaintiffs do not specifically identify the "other Louisiana laws" in their complaint, plaintiffs' supplemental brief submitted on July 16, 2014 requests "declaratory judgment holding that Louisiana Civil Code articles 86, 89, 3520(B), and Article 12, Section 15 of the Louisiana Constitution are unconstitutional...and the Court should enjoin their enforcement." Article 86 of the Louisiana Civil Code, like Section 15 of the Louisiana Constitution, defines marriage as "a legal relationship between a man and a woman." Code article 89, similar to Code article 3520, prohibits purported marriages between persons of the same sex.

⁴ The bulletin provides in part:

In compliance with the Louisiana Constitution, the Louisiana Department of Revenue shall not recognize same-

couples lawfully married in other states to certify on their Louisiana state income tax returns that they are single, violates their First Amendment freedom of speech. Plaintiffs name Tim Barfield, the Louisiana Secretary of Revenue, Devin George, the Louisiana State Registrar, and Kathy Kliebert, the Louisiana Secretary of Health and Hospitals, as defendants.

The parties have filed cross motions for summary judgment. All issues have been briefed and the Court has held oral argument.⁵

I.

Federal Rule of Civil Procedure 56 instructs that summary judgment is proper if the record discloses no genuine dispute as to any material fact such that the moving party is entitled to judgment as

sex marriages when determining filing status. If a taxpayer's federal filing status of married filing jointly, married filing separately or qualifying widow is pursuant to IRS Revenue Ruling 2013-17 [ruling that same-sex couples legally married in states that recognize such marriages will be treated as married for federal tax purposes], the taxpayer must file a separate Louisiana return as single, head of household or qualifying widow, as applicable. The taxpayer(s) who filed a federal return pursuant to IRS Revenue Ruling 2013-17 may not file a Louisiana state income tax return as married filing jointly, married filing separately or qualifying widow. The taxpayer must provide the same federal income tax information on the Louisiana State Return that would have been provided prior to the issuance of Internal Revenue Service Ruling 2013-17.

La. Revenue Info. Bulletin No. 13-024 (Sept. 13, 2013).

⁵ Plaintiffs have seemingly abandoned their Full Faith and Credit Clause claim.

a matter of law. No genuine dispute of fact exists if the record taken as a whole could not lead a rational trier of fact to find for the non-moving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). A genuine dispute of fact exists only "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The Court emphasizes that the mere argued existence of a factual dispute does not defeat an otherwise properly supported motion. *See id.* Therefore, "[i]f the evidence is merely colorable, or is not significantly probative," summary judgment is appropriate. *Id.* at 249-50 (citations omitted). Summary judgment is also proper if the party opposing the motion fails to establish an essential element of his case. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). In this regard, the non-moving party must do more than simply deny the allegations raised by the moving party. *See Donaghey v. Ocean Drilling & Exploration Co.*, 974 F.2d 646, 649 (5th Cir. 1992). Rather, he must come forward with competent evidence, such as affidavits or depositions, to buttress his claims. *Id.* Finally, in evaluating the summary judgment motion, the Court must read the facts in the light most favorable to the non-moving party. *Anderson*, 477 U.S. at 255.

This national same-sex marriage struggle animates a clash between convictions regarding the value of state decisions reached by way of the democratic process as contrasted with personal, genuine, and sincere lifestyle choices recognition. The defendants maintain that marriage is a legitimate concern of state law and policy. That it may be rightly regulated because of what for centuries has

been understood to be its role. Not so say plaintiffs, who vigorously submit if two people wish to enter into a bond of commitment and care and have that bond recognized by law as a marriage, they should be free to do so, and their choice should be recognized by law as a marriage; never mind the historic authority of the state or the democratic process. These are earnest and thoughtful disputes, but they have become society's latest short fuse. One may be firmly resolved in favor of same-sex marriage, others may be just as determined that marriage is between a man and a woman. The challenge is how and where best to resolve these conflicting notions about what is marriage and what influence should the U.S. Supreme Court decision in *United States v. Windsor* have? See 133 S. Ct. 2675 (2013).

II.

A.

The Court first takes up the most hefty constitutional issue: Equal Protection. The Fourteenth Amendment to the Constitution commands that no state shall “deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1. “The Equal Protection Clause...essentially directs that all persons similarly situated be treated alike.” *Stoneburner v. Sec’y of the Army*, 152 F.3d 485, 491 (5th Cir. 1998)(citing *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985)). However, “if a law neither burdens a fundamental right nor targets a suspect class,” the Supreme Court has held, “the legislative classification [will survive] so long as it bears a rational relation to some

legitimate end.” *Romer v. Evans*, 517 U.S. 620, 631 (1996)(citing *Heller v. Doe*, 509 U.S. 312, 319-20 (1993)); *City of Cleburne*, 473 U.S. at 440 (“The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.”). In the Equal Protection joust, a court's standard of review is central to this analysis. At play are three specialized lines of thought: rational basis, intermediate scrutiny, and heightened scrutiny. Rational basis is the least austere; heightened scrutiny the most arduous.

When conducting rational basis review, the Supreme Court has instructed that “we will not overturn such [government action] unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the [government’s] actions were irrational.” *Kimel v. Fl. Bd. of Regents*, 528 U.S. 62, 84 (2000)(alterations in original)(internal quotation marks and citation omitted). “In the ordinary case, a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale seems tenuous.” *Romer*, 517 U.S. at 632 (citations omitted). If, however, heightened scrutiny, the most unforgiving, is warranted, then a law must be “necessary to the accomplishment” of “a compelling governmental interest.” *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984).⁶

⁶ All federal court decisions post-*Windsor* have stricken same-sex marriage bans under all three standards. *Bostic v. Schaefer*, Nos. 14-1167, 14-1169 & 14-1173, 2014 U.S. App. LEXIS 14298

Plaintiffs submit that Louisiana's constitutional amendment and Civil Code article violate the Equal Protection Clause by prohibiting same-sex marriage within Louisiana, and by declining to recognize same-sex marriages that are lawful in other states. Plaintiffs argue that the laws are subject to heightened scrutiny analysis because they discriminate on the basis of sexual orientation and gender. Defendants counter that the laws trigger rational basis review, which is satisfied by Louisiana's legitimate interest in linking children with intact families formed by their biological parents, and by ensuring that fundamental social

(4th Cir. July 28, 2014); *Bishop v. Smith*, Nos. 14-5003 & 14-5006, 2014 U.S. App. LEXIS 13733 (10th Cir. July 18, 2014); *Kitchenv. Hebert*, No. 13-4178, 2014 U.S. App. LEXIS 11935 (10th Cir. June 25, 2014); *Brenner v. Scott*, Nos. 14-107 & 14-138, 2014 U.S. Dist. LEXIS 116684 (N.D. Fl. Aug. 21, 2014); *Burns v. Hickenlooper*, No. 14-1817, 2014 U.S. Dist. LEXIS 100894 (D. Colo. July 23, 2014); *Love v. Beshear*, No. 13-750, 2014 U.S. Dist. LEXIS 89119 (W.D. Ky. July 1, 2014); *Baskin v. Bogan*, Nos. 14-355, 14-404 & 14-406, 2014 U.S. Dist. LEXIS 86114 (S.D. Ind. June 25, 2014); *Wolf v. Walker*, No. 14-64, 2014 U.S. Dist. LEXIS 77125 (W.D. Wis. June 6, 2014); *Whitewood v. Wolf*, No. 13-1861, 2014 U.S. Dist. LEXIS 68771 (M.D. Pa. May 20, 2014); *Geiger v. Kitzhaber*, Nos. 13-1834 & 13-2256, 2014 U.S. Dist. LEXIS 68171 (D. Or. May 19, 2014); *Latta v. Otter*, No. 13-482, 2014 U.S. Dist. LEXIS 66417 (D. Idaho May 13, 2014); *DeBoer v. Snyder*, 973 F. Supp. 2d 757 (E.D. Mich. 2014); *Tanco v. Haslam*, No. 13-1159, 2014 U.S. Dist. LEXIS 33463 (M.D. Tenn. March 14, 2014); *De Leon v. Perry*, 975 F. Supp. 2d 632 (W.D. Tex. 2014); *Lee v. Orr*, No. 13-8719, 2014 U.S. Dist. LEXIS 21620 (N.D. Ill. Feb. 21, 2014); *McGee v. Cole*, No. 13-24068, 2014 U.S. Dist. LEXIS 10864 (S.D. W. Va. Jan. 29, 2014). *Contra Sevcik v. Sandoval*, 911 F. Supp. 2d 996 (D. Nev. 2012)(applying rational basis to reject an Equal Protection challenge to Nevada's same-sex marriage ban). See *United States v. Windsor*, 133 S. Ct. 2675 (2013).

change occurs by social consensus through democratic processes. *See Windsor*, 133 S. Ct. at 2697 (Roberts, C.J., dissenting)("[F]or it is entirely expected that state definitions would 'vary, subject to constitutional guarantees, from one State to the next.'" (citation omitted)). Defendants point out that over 30 states choose not to recognize same-sex marriages, and some 20 states haven chosen to recognize same-sex marriages in free and open debate through the democratic process. Both sides invoke the Supreme Court's decision in *United States v. Windsor*, 133 S. Ct. 2675 (Kennedy, J., majority opinion). But *Windsor* does little more than give both sides in this case something to hope for.

In *Windsor*, the Supreme Court held that Section 3 of the Federal Defense of Marriage Act (DOMA), which defined marriage as a union between one man and one woman only, violated Equal Protection and Due Process principles when applied to New York state law permitting same-sex marriage. *Id.* at 2693. Observing "DOMA's unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage," the Court inferred that Congress had acted with a discriminatory purpose. *Id.* The Court reasoned, to that point, that "[d]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision." *Id.* at 2692 (quoting *Romer*, 517 U.S. at 633).⁷

⁷ *Windsor*, in the context of the issues presented to this Court, is unclear (contrary to the conclusions in many recent federal court decisions). It is by its own terms, limited. Its "opinion and its holding are confined to those lawful marriages." 133 S. Ct. at 2696. However, *Windsor* also references an amorphous but

As to standard of review, *Windsor* starkly avoids mention of heightened scrutiny. Plaintiffs' effort to equate *Windsor*'s elusive phrase "careful consideration" with intermediate or heightened scrutiny seems like intellectual anarchy. In the past, the Supreme Court considered rational basis as fulfilling the notion of "careful consideration." See *Romer*, 517 U.S. at 633-35 (requiring "careful consideration" by applying a rational basis standard of review). If the Supreme Court meant to apply heightened scrutiny, it would have said so.⁸ More importantly, the Court only required "careful consideration" because of Congress' odd intrusion on what the Court repeatedly emphasized was historic and essential state authority to define marriage. By that same logic, no additional or different consideration is warranted here, where Louisiana is acting squarely within the scope of its traditional

alluring "evolving understanding of the meaning of equality." *Id.* at 2693. Hence this Court's unease that *Windsor* merely offers bits and pieces of hope to both sides. See also *id.* at 2696 (Roberts, C.J., dissenting)("The Court does not have before it, and the logic of its opinion does not decide, the distinct question whether the States, in the exercise of their 'historic and essential authority to define the marital relation,'...may continue to utilize the traditional definition of marriage.").

⁸ This Court is not persuaded by the Ninth Circuit's decision to the contrary in *SmithKline Beecham Corp. v. Abbott Labs*, 740 F.3d 471 (9th Cir. 2014). Even less explicit regarding the appropriate standard of review are the split decisions in the Tenth and Fourth Circuits. See *Bostic v. Schaefer*, Nos. 14-1167, 14-1169 & 14-1173, 2014 U.S. App. LEXIS 14298 (4th Cir. July 28, 2014); *Bishop v. Smith*, Nos. 14-5003 & 14-5006, 2014 U.S. App. LEXIS 13733 (10th Cir. July 18, 2014); *Kitchen v. Hebert*, No. 13-4178, 2014 U.S. App. LEXIS 11935 (10th Cir. June 25, 2014).

authority, as underscored by Justice Kennedy. *See Windsor*, 133 S. Ct. at 2693. Although both sides seek the safe haven of *Windsor* to their side of this national struggle, and it is certainly without dispute that the Supreme Court correctly discredited the tainted unconstitutional result that DOMA had on democratically debated and then adopted New York state law blessing same-sex marriages, this Court finds it difficult to minimize, indeed, ignore, the high court's powerful reminder in *Windsor*:

The recognition of civil marriages is central to state domestic relations law applicable to its residents and citizens. *See Williams v. North Carolina*, 317 U.S. 287, 298 (1942) ("Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders"). The definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the "[p]rotection of offspring, property interests, and the enforcement of marital responsibilities." *Ibid.* "[T]he states, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce...[and] the Constitution delegated no authority to the Government of the United States on the subject of marriage and divorce." *Haddock v. Haddock*, 201 U.S. 562, 525 (1906); see also *In re Burrus*, 136 U.S. 586, 593-594 (1890) ("The whole subject of the domestic relations of husband and wife, parent and

child, belongs to the laws of the States and not to the laws of the United States").

Id. at 2691 (alterations in original). Justice Kennedy further instructs:

The significance of state responsibilities for the definition and regulation of marriage dates to the Nation's beginning; for "when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States." *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379, 383-384 (1930). Marriage laws vary in some respects from State to State....

Id. And, finally, he emphasizes why:

The responsibility of the States for the regulation of domestic relations is an important indicator of the substantial societal impact the State's classifications have in the daily lives and customs of its people.

Id. at 2693. *Windsor* leaves unchanged "the concerns for state diversity and sovereignty." See *id.* at 2697 (Roberts, C.J., dissenting).

But even apart from *Windsor*, plaintiffs seek to justify the application of heightened scrutiny because, they argue, Louisiana's laws and Constitution discriminate based on sexual orientation. They fail, however, to recognize that neither the Supreme Court nor the Fifth Circuit has ever before defined sexual orientation as a protected class, despite opportunities to do so. See, e.g.,

Windsor, 133 S. Ct. 2675 (majority opinion); *Romer*, 517 U.S. 620; *Johnson v. Johnson*, 385 F.3d 503 (5th Cir. 2004); *see also Baskin v. Bogan*, Nos. 14-355, 14-404 & 14-406, 2014 U.S. Dist. LEXIS 86114, at *34-*35 (S.D. Ind. June 25, 2014)(7th Circuit precedent mandates application of rational basis scrutiny to the issue of sexual orientation discrimination). Admittedly, other federal courts throughout the country have spoken as if they were deciding the issue by discovering, at best, unclear case models on the more demanding standard of review. Or, in the name of rational basis, they have at times applied the more exacting review standards. This Court would be more circumspect. In light of still-binding precedent, this Court declines to fashion a new suspect class. To do so would distort precedent and demean the democratic process. As Justice Powell stressed and cautioned in *Furman v. Georgia* in a robust dissent regarding state-adopted capital punishment:

Less measurable, but certainly of no less significance, is the shattering effect this collection of views has on the root principles of stare decisis, federalism, judicial restraint and--most importantly--separation of powers....In a democracy the first indicator of the public's attitude must always be found in the legislative judgments of the people's chosen representatives.

408 U.S. 238, 417, 436-37 (1972). Of the role of the courts in such matters:

First, where as here, the language of the applicable provision provides great

leeway and where the underlying social policies are felt to be of vital importance, the temptation to read personal preference into the Constitution is understandably great....But it is not the business of this Court to pronounce policy. It must observe a fastidious regard for limitations on its own power, and this precludes the Court giving effect to its own notions of what is wise or politic.

Id. at 431, 433. And his emphatic trust in deference for free and open debate in a democracy resonates:

It seems to me that the sweeping judicial action undertaken today reflects a basic lack of faith and confidence in the democratic process.

Id. at 464-65.

Plaintiffs also add that they suffer discrimination based on gender. Plaintiffs, as do most other federal courts confronted with these issues, equate this case with *Loving v. Virginia*, 388 U.S. 1, 8 (1967), where the Supreme Court rightly condemned racial discrimination even though Virginia's antimiscegenation marriage laws equally applied to both races. Plaintiffs' argument betrays itself. Heightened scrutiny was warranted in *Loving* because the Fourteenth Amendment expressly condemns racial discrimination as a constitutional evil; in short, the Constitution specifically bans differentiation based on race. *See id.*; *see also Bishop v. Smith*, Nos. 14-5003 & 14-5006, 2014 U.S. App. LEXIS 13733, at *145 (10th Cir. July 18, 2014)(Kelly, J., concurring in part and dissenting in part)("Oklahoma's efforts to retain its definition of

marriage are benign, and very much unlike race-based restrictions on marriage invalidated in *Loving v. Virginia*." (citation omitted)). Even ignoring the obvious difference between this case and *Loving*, no analogy can defeat the plain reality that Louisiana's laws apply evenhandedly to both genders--whether between two men or two women. Same-sex marriage is not recognized in Louisiana and is reasonably anchored to the democratic process. The Court is therefore satisfied that rational basis applies. See also *Bostic v. Schaefer*, Nos. 14-1167, 14-1169 & 14-1173, 2014 U.S. App. LEXIS 14298, at *92 (4th Cir. July 28, 2014)(Niemeyer, J., dissenting).

B.

So, is there even any rational basis for Louisiana's resistance to recognize same-sex marriages entered into in other states, or to authorize same-sex marriages in Louisiana? Plaintiffs contend not, and conclude that Louisiana's laws and Constitution can only be supported by a hateful animus. Defendants rejoin that the laws serve a central state interest of linking children to an intact family formed by their biological parents. Of even more consequence, in this Court's judgment, defendants assert a legitimate state interest in safeguarding that fundamental social change, in this instance, is better cultivated through democratic consensus. This Court agrees.⁹

⁹ The Court acknowledges that its decision runs counter to all but two other federal court decisions. See *Merritt v. Attorney Gen.*, No. 13-215, 2013 WL 6044329 (M.D. La. Nov. 14, 2013); *Sevcik v. Sandoval*, 911 F. Supp. 2d 996 (D. Nev. 2012). But see *Bostic v. Schaefer*, Nos. 14-1167, 14-1169 & 14-1173, 2014 U.S.

Louisiana's laws and Constitution are directly related to achieving marriage's historically preeminent purpose of linking children to their biological parents. Louisiana's regime pays respect to the democratic process; to vigorous debate. To predictable controversy, of course. The fact that marriage has many differing, even perhaps unproved dimensions, does not render Louisiana's decision irrational. Nor does the opinion of a set of social scientists (ardently disputed by many others, it should be noted) that other associative forms may be equally stable, or the view that such judgments vilify

App. LEXIS 14298 (4th Cir. July 28, 2014); *Bishop v. Smith*, Nos. 14-5003 & 14-5006, 2014 U.S. App. LEXIS 13733 (10th Cir. July 18, 2014); *Kitchen v. Hebert*, No. 13-4178, 2014 U.S. App. LEXIS 11935 (10th Cir. June 25, 2014); *Brenner v. Scott*, Nos. 14-107 & 14-138, 2014 U.S. Dist. LEXIS 116684 (N.D. Fl. Aug. 21, 2014); *Burns v. Hickenlooper*, No. 14-1817, 2014 U.S. Dist. LEXIS 100894 (D. Colo. July 23, 2014); *Love v. Beshear*, No. 13-750, 2014 U.S. Dist. LEXIS 89119 (W.D. Ky. July 1, 2014); *Baskin v. Bogan*, Nos. 14-355, 14-404 & 14-406, 2014 U.S. Dist. LEXIS 86114 (S.D. Ind. June 25, 2014); *Wolf v. Walker*, No. 14-64, 2014 U.S. Dist. LEXIS 77125 (W.D. Wis. June 6, 2014); *Whitewood v. Wolf*, No. 13-1861, 2014 U.S. Dist. LEXIS 68771 (M.D. Pa. May 20, 2014); *Geiger v. Kitzhaber*, Nos. 13-1834 & 13-2256, 2014 U.S. Dist. LEXIS 68171 (D. Or. May 19, 2014); *Latta v. Otter*, No. 13-482, 2014 U.S. Dist. LEXIS 66417 (D. Idaho May 13, 2014); *DeBoer v. Snyder*, 973 F. Supp. 2d 757 (E.D. Mich. 2014); *Tanco v. Haslam*, No. 13-1159, 2014 U.S. Dist. LEXIS 33463 (M.D. Tenn. March 14, 2014); *De Leon v. Perry*, 975 F. Supp. 2d 632 (W.D. Tex. 2014); *Lee v. Orr*, No. 13-8719, 2014 U.S. Dist. LEXIS 21620 (N.D. Ill. Feb. 21, 2014); *McGee v. Cole*, No. 13-24068, 2014 U.S. Dist. LEXIS 10864 (S.D. W. Va. Jan. 29, 2014). *But cf. Bishop*, 2014 U.S. App. LEXIS 13733, at *148 (Kelly, J., concurring in part and dissenting in part)("Absent a fundamental right, traditional rational basis equal protection principles should apply, and apparently as a majority of this panel believes, the Plaintiffs cannot prevail on that basis.").

a group (even though one finds them in a majority of the states, but not in all states).¹⁰ Even the fact that the state's precepts work to one group's disadvantage does not mandate that they serve no rational basis. *See Romer*, 517 U.S. at 632. The Court is persuaded that a meaning of what is marriage that has endured in history for thousands of years, and prevails in a majority of states today, is not universally irrational on the constitutional grid. *See Kimel*, 528 U.S. at 84; *Sevcik v. Sandoval*, 911 F. Supp. 2d 996, 1014 (D. Nev. 2012). (Shortly before *Windsor*, the district court in *Sevcik* adopted arguments by Nevada that closely mirror Louisiana's submissions).

The Court also hesitates with the notion that this state's choice could only be inspired by hate and intolerance. Louisiana unquestionably respected "a statewide deliberative process that allowed its citizens to discuss and weigh arguments for and against same-sex marriage." *See Windsor*, 133 S. Ct. at 2689. All sides for and against grappled with this solemn issue. The Court declines to assign an illicit motive on the basis of this record, as have also two federal appellate judges as well.¹¹

¹⁰ This Court does not enter the dispute of which "science" on this issue is correct. The contentious debate in social science literature about what is "marriage" in today's world does not drive or inform the Court's decision.

¹¹ In his concurrence in the recent case of *Bishop v. Smith*, Nos. 14-5003 & 14-5006, 2014 U.S. App. LEXIS 13733, *93-*133 (10th Cir. July 18, 2014), Judge Holmes also declined to agree that state laws limiting same-sex marriage suffer from unconstitutional animus. Judge Holmes, in a very careful opinion, explained that a finding of animus generally requires some structural aberration in the law at issue, like the

Windsor repeatedly and emphatically reaffirmed the longstanding principle that the authority to regulate the subject of domestic relations belongs to the states, subject to indistinct future constitutional guarantees that in *Windsor* were, by its expressed limits, left open and rather inexact. *Id.* at 2691, 2692, 2693, 2696. Although opinions about same-sex marriage will understandably vary among the states, and other states in free and open debate will and have chosen differently, that does not mandate that Louisiana has overstepped its sovereign authority. *See id.* at 2692. Because this Court concludes that Louisiana's laws are rationally related to its legitimate state interests, as defendants plausibly focus, they do not offend plaintiffs' rights to Equal Protection.¹²

imposition of wide-ranging and novel deprivations upon the disfavored group or deviation from the historical territory of the sovereign simply to eliminate privileges that the disfavored group might otherwise enjoy. *Id.* at *106. Judge Holmes offered *Romer* as an example of the former, and *Windsor* of the latter, but distinguished the same-sex marriage ban cases because of the stark absence of any structural irregularity. *Id.* at *133. Judge Holmes reasoned that Oklahoma's prohibition was neither as far reaching as the amendment in *Romer* nor a departure from traditional sovereign roles like DOMA was in *Windsor*. *Id.* This Court agrees entirely with Judge Holmes on this point and concludes the animus doctrine is inapplicable here. To reach a contrary result, it would be necessary to "stretch to accommodate changing societal norms." *See Bostic v. Schaefer*, Nos. 14-1167, 14-1169 & 14-1173, 2014 U.S. App. LEXIS 14298, at *43 (4th Cir. July 28, 2014).

¹² This Court finds common cause with Justice Powell's cautionary injunction in *Furman v. Georgia* about judicial action that "reflects a basic lack of faith and confidence in the democratic process." 408 U.S. at 464-65.

C.

The parties also seek summary judgment on Due Process Clause grounds. The Fourteenth Amendment prohibits a state from “depriv[ing] any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV, § 1. This protection has been viewed as having both procedural and substantive components when state action is challenged. As the Fifth Circuit has observed:

Procedural due process promotes fairness in government decisions “by requiring the government to follow appropriate procedures when its agents decide ‘to deprive any person of life, liberty, or property.’” *Daniels v. Williams*, 474 U.S. 327, 331 (1986). Substantive due process, “by barring certain government actions regardless of the fairness of the procedures used to implement them, [] serves to prevent government power from being ‘used for purposes of oppression.’” *Id.*

The John Corp. v. The City of Houston, 214 F.3d 573, 577 (5th Cir. 2000)(additional citation omitted).

The substantive component of due process, which plaintiffs count on here, protects fundamental rights that are so “implicit in the concept of ordered liberty” that “neither liberty nor justice would exist if they were sacrificed.” *Palko v. Connecticut*, 302 U.S. 319, 325-36 (1937). “Fundamental rights protected by substantive due process are protected from certain

state actions regardless of what procedures the state uses.” *Doe v. Moore*, 410 F.3d 1337, 1343 (11th Cir. 2005)(citing the prominent decision in *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)). And such fundamental rights have been held to include “the rights to marry, to have children, to direct the education and upbringing of one’s children, to marital privacy, to use contraception, to bodily integrity, and to abortion.” *Glucksberg*, 521 U.S. at 720 (citations omitted). The Supreme Court has, however, “always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended.” *Id.* (internal quotation marks and citation omitted). There exists then, a central notion that anchors the doctrine of substantive due process: the indispensable presence of a fundamental right.

To establish a substantive due process violation, the aggrieved person must describe the infringed right with particularity and must establish it as “deeply rooted in this Nation’s history and tradition.” *Malagon de Fuentes v. Gonzales*, 462 F.3d 498, 505 (5th Cir. 2006) (internal quotation marks and citations omitted). If a right is so “deeply rooted” as to be fundamental at its core, a more exacting scrutiny is required; if not, the Court applies the less demanding rational basis review. *Id.*

Plaintiffs fervently insist that Louisiana’s laws and Constitution violate their right to substantive due process by depriving them of the fundamental right to marry. Plaintiffs argue that Louisiana substantially burdens what they envision as their fundamental right to marry and that strict scrutiny

is the standard of review to guide this Court. Defendants counter, however, that there is no fundamental right to same-sex marriage and that rational basis review is appropriate. Defendants correctly point to *Washington v. Glucksberg*, 521 U.S. at 721, which mandates that plaintiffs provide a "careful description" of the asserted fundamental right to succeed on a substantive due process challenge. The Court agrees that *Glucksberg* requires a "careful description," which, here, means that plaintiffs must specifically assert a fundamental right to same-sex marriage.¹³

No authority dictates, and plaintiffs do not contend, that same-sex marriage is anchored to

¹³ The cases invoked by plaintiffs, including *Turner v. Safely*, 482 U.S. 78 (1987), *Zablocki v. Redhail*, 434 U.S. 374 (1978), and *Loving*, 388 U.S. 1, do not relieve them of their obligation to carefully describe the fundamental right at issue here. Although a procession of federal courts accepted similar arguments, that trinity of Supreme Court cases does not support the proposition that marriage is a fundamental right guaranteed to everyone without limitation; indeed, each case involved marriages between one man and one woman. See *Zablocki*, 434 U.S. at 386 ("By affirming the fundamental character of the right to marry, we do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to strict scrutiny."). Defendants aptly note that it could not be maintained that the states violate a general fundamental right to marry when they restrict marriages between minors, first cousins, or more than two people, for example. In a case such as this, the plaintiffs necessarily assert an interest apart from and beyond the historic and traditional right to marry. Even plaintiffs admit that such unions would have unacceptable "significant societal harms."

history or tradition.¹⁴ The concept of same-sex marriage is "a new perspective, a new insight," nonexistent and even inconceivable until very recently. *Windsor*, 133 S. Ct. at 2689. Many states have democratically chosen to recognize same-sex marriage. But until recent years, it had no place at all in this nation's history and tradition. Public attitude might be becoming more diverse, but any right to same-sex marriage is not yet so entrenched as to be fundamental. *See Malagon*, 462 F.3d at 505. There is simply no fundamental right, historically or traditionally, to same-sex marriage.¹⁵

¹⁴ Defendants point to *Baker v. Nelson*, 409 U.S. 810 (1972), in support of the proposition that there is no Supreme Court precedent for a fundamental right to marry someone of the same sex. In *Baker v. Nelson*, the Supreme Court summarily rejected "for want of a substantial federal question" the claim that the Constitution requires a state to authorize same-sex marriage. Defendants point out that *Baker* was decided five years after *Loving*. Unlike the defendants in many of the other same-sex marriage cases before other federal courts, however, defendants here do not contend that *Baker* forecloses this Court's review or mandates the disposition of this case. *See also Merritt v. Attorney Gen.*, No. 13-215, 2013 WL 6044329, at *2 (M.D. La. Nov. 14, 2013)(citing *Baker* for the proposition that the Constitution does not require states to permit same-sex marriage). The Court need not enter the differing contentions about the viability of *Baker v. Nelson*.

¹⁵ This Court is not the first to reach this conclusion, even post-*Windsor*. *See Love v. Beshear*, No. 13-750, 2014 U.S. Dist. LEXIS 89119, at *18 (W.D. Ky. July 1, 2014)("If the inquiry here is viewed as a contours-of-the-right question, holding that the fundamental right to marry encompasses same-sex marriage would be a dramatic step that the Supreme Court has not yet indicated a willingness to take."); *see also Bostic v. Schaefer*, Nos. 14-1167, 14-1169 & 14-1173, 2014 U.S. App. LEXIS 14298, at *92 (4th Cir. July 28, 2014)(Niemeyer, J.,

With no fundamental right at stake,¹⁶ the Court again reviews under rational basis. The Court has already held that Louisiana's law and Constitution survive under a rational basis review.

Although plaintiffs maintain that the laws are improperly grounded only in tradition and moral objection, defendants offer a credible, and convincing, rational basis to the contrary. See *Heller v. Doe*, 509 U.S. 312, 319-20 (1993).

Although plaintiffs would fashion a modern constitutional construct and place side by side this case to *Lawrence v. Texas*, 539 U.S. 558 (2003), in which the Supreme Court held that Texas' antisodomy statute violated substantive due process, the Court in *Lawrence* specifically found that the Texas law furthered no legitimate state interest sufficient to justify its intrusion on the right to

dissenting)("At bottom, the fundamental right to marriage does not include a right to same-sex marriage."); *Bishop v. Smith*, Nos. 14-5003 & 14-5006, 2014 U.S. App. LEXIS 13733, *147-*148 (10th Cir. July 18, 2014)(Kelly J., concurring in part and dissenting in part)("Removing gender complementarity from the historical definition of marriage is simply contrary to the careful analysis prescribed by the Supreme Court when it comes to substantive due process.").

¹⁶ Plaintiffs also summarily allege violations of their fundamental rights to remain married and to parental authority, but these claims fail for the same reason. The Court notes, however, that other federal district court opinions post-*Windsor* have favored same-sex marriages under all standards of review. See, e.g., *Kitchen v. Herbert*, No. 13-217, 2013 U.S. Dist. LEXIS 179331 (D. Utah Dec. 20, 2013), *aff'd*, No. 13-4178, 2014 U.S. App. LEXIS 11935 (10th Cir. June 25, 2014); *Wolf v. Walker*, No. 14-64, 2014 U.S. Dist. LEXIS 77125 (W.D. Wis. June 6, 2014); *Whitewood v. Wolf*, 13-1861, 2014 U.S. Dist. LEXIS 68771 (M.D. Pa. May 20, 2014).

privacy. *Id.* at 578. This Court is persuaded that Louisiana has a legitimate interest...whether obsolete in the opinion of some, or not, in the opinion of others...in linking children to an intact family formed by their two biological parents, as specifically underscored by Justice Kennedy in *Windsor*. And the Court is not persuaded that *Lawrence*, a right to privacy model, provides any support for a substantive due process liberty to same-sex marriage. The Court finds it helpful to call attention that *Lawrence*, by its own terms, did "not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." *Id.*; see also *id.* at 585 (O'Connor, J., concurring)("Texas cannot assert any legitimate state interest here, such as national security or preserving the traditional institution of marriage. Unlike the moral disapproval of same-sex relations--the asserted interest in this case--other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group." (emphasis added)).

D.

Both sides also seek summary judgment on plaintiffs' claim that Louisiana Department of Revenue Information Bulletin No. 13-024 violates their First Amendment rights. The First Amendment to the United States Constitution declares that "Congress shall make no law...abridging the freedom of speech." U.S. Const. amend. I. "As a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *United States v. Stevens*, 559 U.S.

460, 468 (2010)(internal quotation marks and citation omitted). And the First Amendment also means that the government cannot compel a person to speak or to parrot a favored viewpoint. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)("We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all."); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein."). In the context of compelled speech, courts must discern whether a law "regulates conduct, not speech"; only infringements of speech, and not conduct, warrant First Amendment protection. *Rumsfeld v. Forum for Academic & Inst. Rights*, 547 U.S. 47, 60 (2006)(distinguishing regulation of what someone "must do" from "what they may or may not say" (emphasis in original)).

Bulletin No. 13-024 requires same-sex couples who are lawfully married in other states to nevertheless describe that they are of single status on their Louisiana state income tax returns. Plaintiffs say that compels speech. Defendants answer that the targeted bulletin merely prescribes conduct. They add that the required conduct is necessary to an essential government function, collecting state taxes. They stress helpfully that the Fifth Circuit recently agreed with the Eighth Circuit that the required disclosure of information on a tax form is simply not compelled speech under the First

Amendment. See *United States v. Arnold*, 740 F.3d 1032, 1035 (5th Cir. 2014) ("There is no right to refrain from speaking when essential operations of government require it for the preservation of an orderly society...." (quoting *United States v. Sindel*, 53 F.3d 874, 878 (8th Cir. 1995))).

The Court is satisfied that Bulletin No. 13-024 does not contravene the First Amendment; that the disclosure requirement regulates conduct, not speech. See *Rumsfeld*, 547 U.S. at 60; *Arnold*, 740 F.3d at 1034-35. Despite plaintiffs' contentions to the contrary, the bulletin has nothing to do with forcing plaintiffs to disclaim their "deep spiritual and emotional belief in the inviolability of their marriages," but, rather, it simply requires plaintiffs to provide the government with information necessary for the purpose of state tax collection. See *Sindel*, 53 F.3d at 878. Taking plaintiffs' argument to its logical conclusion, any state policy with which one disagrees could constitute compelled speech. The Court declines to endorse that shapeless result.

III.

This Court has arduously studied the volley of nationally orchestrated court rulings against states whose voters chose in free and open elections, whose legislatures, after a robust, even fractious debate and exchange of competing, vigorously differing views, listened to their citizens regarding the harshly divisive and passionate issue on same-sex marriage. The federal court decisions thus far exemplify a pageant of empathy; decisions impelled by a response of innate pathos. Courts that, in the words of Justice Scalia in a different context in *Bond v. United States*, 134 S. Ct. 2077, 2094 (2014)(concurring opinion),

appear to have assumed the mantle of a legislative body. In fact Judge Niemeyer in his "linguistic manipulation" dissent in *Bostic v. Schaefer* puts it even more candidly:

This analysis is fundamentally flawed because it fails to take into account that the "marriage" that has long been recognized by the Supreme Court as a fundamental right is distinct from the newly purposed relationship of a "same-sex marriage." And this failure is even more pronounced by the majority's acknowledgment that same-sex marriage is a new notion that has not been recognized for "most of our country's history." Moreover, the majority fails to explain how this new notion became incorporated into the traditional definition of marriage *except by linguistic manipulation*.

Nos. 14-1167, 14-1169 & 14-1173, 2014 U.S. App. LEXIS 14298, at *71-*72 (4th Cir. July 28, 2014)(emphasis added)(citation omitted).¹⁷

It would no doubt be celebrated to be in the company of the near-unanimity of the many other federal courts that have spoken to this pressing

¹⁷ One case, pre-Windsor but rather close in time, *Sevcik v. Sandoval*, 911 F. Supp. 2d 996 (D. Nev. 2012), from Nevada, stands apart from the decisions descriptively spawned by *Windsor* and the contests that followed throughout the nation. Plaintiffs say little, if anything, about *Sevcik*. See also *Merritt v. Attorney Gen.*, No. 13-215, 2013 WL 6044329 (M.D. La. Nov. 14, 2013).

issue, if this Court were confident in the belief that those cases provide a correct guide.

Clearly, many other courts will have an opportunity to take up the issue of same-sex marriage; courts of appeals and, at some point, the U.S. Supreme Court. The decision of this Court is but one studied decision among many. Our Fifth Circuit has not yet spoken.

The depth of passion inherent in the issues before this Court defies definition. That federal courts¹⁸ thus far have joined in the hopeful chorus that the tide is turning seems ardent and is an arguably popular, indeed, poignant, outcome (whether or not credibly constitutionally driven). Perhaps, in the wake of today's blurry notion of evolving understanding, the result is ordained. Perhaps in a new established point of view, marriage will be reduced to contract law, and, by contract, anyone will be able to claim marriage. Perhaps that is the next frontier, the next phase of some "evolving understanding of equality," where what is marriage will be explored. And as plaintiffs vigorously remind, there have been embattled times when the federal judiciary properly inserted itself to correct a wrong in our society. But that is an incomplete answer to today's social issue. When a federal court is obliged to confront a constitutional struggle over what is marriage, a singularly pivotal issue, the consequence

¹⁸ The Tenth Circuit, in a split decision, has recently spoken. *Kitchen v. Herbert*, No. 13-4178, 2014 U.S. App. LEXIS 11935 (10th Cir. June 25, 2014). As has the Fourth Circuit. *Bostic v. Schaefer*, Nos. 14-1167, 14-1169 & 14-1173, 2014 U.S. App. LEXIS 14298 (4th Cir. July 28, 2014).

of outcomes, intended or otherwise, seems an equally compelling part of the equation. It seems unjust to ignore. And so, inconvenient questions persist. For example, must the states permit or recognize a marriage between an aunt and niece? Aunt and nephew? Brother/brother? Father and child? May minors marry? Must marriage be limited to only two people? What about a transgender spouse? Is such a union same-gender or male-female? All such unions would undeniably be equally committed to love and caring for one another, just like the plaintiffs.¹⁹

Plaintiffs' counsel was unable to answer such kinds of questions; the only hesitant response given was that such unions would result in "significant societal harms" that the states could indeed regulate. But not same-gender unions. This Court is powerless to be indifferent to the unknown and possibly imprudent consequences of such a decision. A decision for which there remains the arena of democratic debate. Free and open and probing debate. Indeed, fractious debate. The Court remains drawn to the forceful and prophetic circumspection expressed by Justice Powell, and turns the spotlight again not only on his dissent in *Furman v. Georgia*,

¹⁹ In the words of the Fourth Circuit: "Civil marriage is one of the cornerstones of our way of life. It allows individuals to celebrate and publicly declare their intentions to form lifelong partnerships, which provide unparalleled intimacy, companionship, emotional support, and security." *Bostic*, 2014 U.S. App. LEXIS 14298, at *67. *But see id.* at *86-*87 (Niemeyer, J., dissenting) ("To now define the previously recognized fundamental right to 'marriage' as a concept that includes the new notion of 'same-sex marriage' amounts to a dictionary jurisprudence, which defines terms as convenient to attain an end.").

408 U.S. 238, 414 (1972), but also to Judge Kelly in his dissent in the recent Tenth Circuit decision in *Kitchen v. Herbert*, No. 13-4178, 2014 U.S. App. LEXIS 11935 (10th Cir. June 25, 2014). Their words lead this Court today and ought not be slighted:

[W]here, as here, the language of the applicable provision provides great leeway and where the underlying social policies are felt to be of vital importance, the temptation to read personal preference into the Constitution is understandably great....But it is not the business of this Court to pronounce policy. It must observe a fastidious regard for limitations on its own power, and this precludes the Court's giving effect to its own notions of what is wise or politic.

Furman, 408 U.S. at 431, 433.

[O]n this issue we should defer. To be sure, the constant refrain in these cases has been that the States' justifications are not advanced by excluding same-gender couples from marriage. But that is a matter of opinion; any "improvement" on the classification should be left to the state political process.

Kitchen, 2014 U.S. App. LEXIS 11935, at *146. And, of we judges as philosopher-kings:

Though the Plaintiffs would weigh the interests of the State differently and discount the procreation, childrearing, and caution rationales, that prerogative belongs to the electorate and their

representatives....We should resist the temptation to become philosopher-kings, imposing our views under the guise of constitutional interpretation of the Fourteenth Amendment.

Id. at *149-*150. Heeding those cautions, it is not for this Court to resolve the wisdom of same-sex marriage.²⁰ The nation is witness to a strong conversation about what is marriage. The central question that must first be asked, is what is the

²⁰ Windsor offers no obstacle to this point, which the Supreme Court even more recently reaffirmed in *Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623 (2014). In *Schuette*, the Court held that a Michigan constitutional amendment preventing the use of race-based preferences as part of the admissions process for state universities did not violate the Equal Protection Clause of the Fourteenth Amendment. Justice Kennedy, the author of *Windsor*, writing for the Court, emphasized that the question before the Court was "not the permissibility of race-conscious admissions policies under the Constitution but whether, and in what manner, voters in the States may choose to prohibit consideration of racial preferences in governmental decisions." *Id.* at 1630. In other words, the question was whether "the courts [may or] may not disempower the voters from choosing which path to follow." *Id.* at 1635. The Supreme Court held not. It reasoned: "This case is not about how the debate about racial preferences should be resolved. It is about who may resolve it. There is no authority in the Constitution of the United States or in this Court's precedents for the Judiciary to set aside Michigan laws that commit this policy determination to the voters." *Id.* at 1638. This case shares striking similarities with *Schuette*. Just as in *Schuette*, this case involves "[d]eliberative debate on sensitive issues [that] all too often may shade into rancor." *Id.* And so just like the Supreme Court very recently held, this Court agrees "that does not justify removing certain court-determined issues from the voters' reach. Democracy does not presume that some subjects are either too divisive or too profound for public debate." *Id.*

fairest forum for the answer? A new right may or may not be affirmed by the democratic process. "Perhaps someday same-gender marriage will become part of this country's history and tradition, but that is not a choice this court should make." *Id.* at *133. As Judge Niemeyer bluntly wrote in his insightful dissent in *Bostic*:

Because there is no fundamental right to same-sex marriage and there are rational reasons for not recognizing it, just as there are rational reasons for recognizing it, I conclude that we, the Third Branch, must allow the States to enact legislation on the subject in accordance with their political processes. The U.S. Constitution does not, in my judgment, restrict the States' policy choices on this issue. If given the choice, some States will surely recognize same-sex marriage and some will surely not. But that is, to be sure, the beauty of federalism.

2014 U.S. App. LEXIS 14298, at *109. Federalism is not extinct. Federalism remains a vibrant and essential component of our nation's constitutional structure. *See Windsor*, 133 S. Ct. at 2697 (Roberts, C.J., dissenting)("[B]ut a State's definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the protection of offspring, property interests, and the enforcement of marital responsibilities." (internal quotation marks and citations omitted)).

For all of these reasons, the Court finds that Louisiana's definition of marriage as between one

man and one woman and the limitation on recognition of same-sex marriages permitted by law in other states found in Article XII, Section 15 of the Louisiana Constitution and article 3520(B) of the Louisiana Civil Code do not infringe the guarantees of the Equal Protection and Due Process Clauses of the United States Constitution. The record reveals no material dispute: the defendants have shown that Louisiana's decision to neither permit nor recognize same-sex marriage, formed in the arena of the democratic process, is supported by a rational basis.²¹ The Court further finds that plaintiffs have failed to establish a genuine dispute regarding a First Amendment violation on this record. Accordingly, plaintiffs' motion for summary judgment is DENIED and defendants' motion for summary judgment is GRANTED.

New Orleans, Louisiana, September 3, 2014.

MARTIN L. C. FELDMAN

MARTIN L. C. FELDMAN
UNITED STATES DISTRICT JUDGE

²¹ The public contradictions and heated disputes among the community of social scientists, clergy, politicians, and thinkers about what is marriage confirms and clearly sends the message that the state has a legitimate interest, a rational basis, in addressing the meaning of marriage.

Appendix B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

No. 13-5090 c/w,
14-0097 & 14-0327

JONATHAN P. ROBICHEAUX, ET AL., PLAINTIFF
v.
JAMES D. CALDWELL,
LOUISIANA ATTORNEY GENERAL, ET AL., DEFENDANT

Filed: September 3, 2014

JUDGMENT

MARTIN L. C. FELDMAN
UNITED STATES DISTRICT JUDGE

For the written reasons of the Court on file
herein, accordingly;

IT IS ORDERED, ADJUDGED AND
DECREED that the plaintiffs' motion for summary
judgment is DENIED and defendants' motion for
summary judgment is GRANTED.

New Orleans, Louisiana, this 3rd day of September,
2014.

Martin L.C. Feldman

MARTIN L.C. FELDMAN
UNITED STATES DISTRICT JUDGE

Appendix C

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF LOUISIANA

No. 14-CV-0097 c/w
13-CV-5090 & 14-CV-0327

JONATHAN P. ROBICHEAUX, ET AL.
PLAINTIFFS,

v.

JAMES D. "BUDDY" CALDWELL, ET AL.,
DEFENDANTS

Filed: September 5, 2014

NOTICE OF APPEAL

MARTIN L. C. FELDMAN
UNITED STATES DISTRICT JUDGE

Pursuant to Federal Rules of Appellate Procedure 3 and 4(a) and 28 U.S.C. § 1291, notice is hereby given that plaintiffs Jonathan P. Robicheaux, Derek Penton, Nadine Blanchard, and Courtney Blanchard appeal to the United States Court of Appeals for the Fifth Circuit from this Court's Judgments entered on September 3, 2014 (Rec. Doc. 132), and any and all other rulings, orders, or actions

of this Court entered or taken in connection with the
aforementioned Judgments.

Respectfully Submitted,

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(Case No. 13-5090)

CERTIFICATE OF SERVICE

I hereby certify that on September 5, 2014, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system which will send notice of filing to all counsel of record.

Respectfully Submitted,

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(Case No. 13-5090)*

Appendix D

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF LOUISIANA

No. 13-CV-5090 c/w
14-CV-0097 & 14-CV-0327

JONATHAN P. ROBICHEAUX, ET AL.
PLAINTIFFS,

v.

JAMES D. "BUDDY" CALDWELL, ET AL.,
DEFENDANTS

Filed: September 5, 2014

NOTICE OF APPEAL

MARTIN L. C. FELDMAN
UNITED STATES DISTRICT JUDGE

Pursuant to Federal Rules of Appellate Procedure 3 and 4(a) and 28 U.S.C. § 1291, notice is hereby given that plaintiffs Jonathan P. Robicheaux, Derek Penton, Nadine Blanchard, and Courtney Blanchard appeal to the United States Court of Appeals for the Fifth Circuit from this Court's Judgments entered on September 3, 2014 (Rec. Doc. 132), and any and all other rulings, orders, or actions

of this Court entered or taken in connection with the
aforementioned Judgments.

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(Case No. 13-5090)

CERTIFICATE OF SERVICE

I hereby certify that on September 5, 2014, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system which will send notice of filing to all counsel of record.

Respectfully Submitted,

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(Case No. 13-5090)

Appendix E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

No. 14-cv- 0097 C/W,
13-5090 & 14-0327

JONATHAN P. ROBICHEAUX,
PLAINTIFF,
v.
DEVIN GEORGE, ET AL.,
DEFENDANTS

Filed: September 5, 2014

NOTICE OF APPEAL

**MARTIN LEACH CROSS FELDMAN
UNITED STATES DISTRICT JUDGE**

Pursuant to Federal Rules of Appellate Procedure 3 and 4(a) and 28 U.S.C. § 1291, notice is hereby given that plaintiffs Garth Beauregard and Robert Welles appeal to the United States Court of Appeals for the Fifth Circuit from this Court's Judgments entered on September 3, 2014 (Rec. Doc. 7), and any and all other rulings, orders, or actions of

this Court entered or taken in connection with the
aforementioned Judgments.

Respectfully submitted:

/s/ Scott J. Spivey

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CERTIFICATE OF SERVICE

I hereby certify that on September 5, 2014, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system which will send notice of filing to all counsel of record.

Respectfully submitted:

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Appendix F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

No. 14-327 C/W,
13-5090 & 14-0097

FORUM FOR EQUALITY LOUISIANA, INC., ET AL.
PLAINTIFFS,
v.
BARFIELD, ET AL.,
DEFENDANTS.

Filed: September 4, 2014

NOTICE OF APPEAL

MARTIN L. C. FELDMAN
UNITED STATES DISTRICT JUDGE

Pursuant to Federal Rules of Appellate Procedure 3 and 4(a) and 28 U.S.C. § 1291, notice is hereby given that Plaintiffs Forum for Equality Louisiana, Inc., Jacqueline M. Brettner, M. Lauren Brettner, Nicholas J. Van Sickels, Andrew S. Bond, Henry Lambert, R. Carey Bond, L. Havard Scott, III, and Sergio March Prieto, appeal to the United States Court of Appeals for the Fifth Circuit from this Court's Judgment entered on September 3, 2014

(Rec. Doc. 17), and any and all other rulings, orders, or actions of this Court entered or taken in connection with the aforementioned Judgment.

Dated: September 4, 2014

Respectfully submitted,

/s/ Lesli D. Harris

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M. Lauren Brettner, Nicholas J. Van
Sickels, Andrew S. Bond, Henry
Lambert, R. Carey Bond, L. Havard
Scott, III, and Sergio March Prieto*

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of September, 2014, the foregoing Plaintiffs' Notice of Appeal has been served upon all counsel of record by the Court's CM/ECF system.

/s/ Lesli D. Harris

Appendix G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

No. 14-0327

FORUM FOR EQUALITY, INC., ET AL.,
PLAINTIFFS

v.

TIM BARFIELD, ET AL.,
DEFENDANTS

Filed: March 18, 2014

ORDER

MARTIN L. C. FELDMAN
UNITED STATES DISTRICT JUDGE

It having come to the Court's attention that Civil Action No. 13-5090, Section F(5) is related to the above case, IT IS SO ORDERED that the above matters are consolidated.

Pursuant to the Court's directive, all pleadings hereafter filed in this consolidated proceeding shall bear the caption of the lead consolidated case together with the docket number of all cases within the consolidation to which the document applies or the notation "ALL CASES" if it applies to all cases.

The clerk of court is directed to establish a master file and a master docket sheet for the consolidated group of cases.

All entries shall be made on the master docket sheet only, with a notation listing the cases to which the document applies, except that orders and documents terminating a party or disposing of a case will also be entered on the individual docket sheet. All documents shall be filed in the master file only, except that orders and documents terminating a party or disposing of a case will also be filed in the record of the individual case.

In the event that a case is separated from the consolidated group it shall be the responsibility of counsel to jointly designate the documents necessary to the continued litigation of the case to file such designation and copies of the documents.

IT IS FURTHER ORDERED that the above captioned cause be transferred to Division (5) of this Court.

New Orleans, Louisiana, this 18th day of March, 2014.

Martin L.C. Feldman
UNITED STATES DISTRICT JUDGE

Appendix H

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

No. 14-0097

JONATHAN P. ROBICHEAUX, ET AL.,
PLAINTIFF

v.

DEVIN GEORGE,
DEFENDANT

Filed: January 21, 2014

ORDER

MARTIN L. C. FELDMAN
UNITED STATES DISTRICT JUDGE

It having come to the Court's attention that Civil Action No. 13-5090, Section F(5) is related to the above case,

IT IS ORDERED that the above matters are consolidated.

Pursuant to the Court's directive, all pleadings hereafter filed in this consolidated proceeding shall bear the caption of the lead consolidated case together with the docket number of all cases within

the consolidation to which the document applies or the notation "ALL CASES" if it applies to all cases.

The clerk of court is directed to establish a master file and a master docket sheet for the consolidated group of cases.

All entries shall be made on the master docket sheet only, with a notation listing the cases to which the document applies, except that orders and documents terminating a party or disposing of a case will also be entered on the individual docket sheet. All documents shall be filed in the master file only, except that orders and documents terminating a party or disposing of a case will also be filed in the record of the individual case.

In the event that a case is separated from the consolidated group it shall be the responsibility of counsel to jointly designate the documents necessary to the continued litigation of the case to file such designation and copies of the documents.

MF

Appendix I

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

No. 13-5090

JONATHAN P. ROBICHEUX, ET AL.,

v.

JAMES D. CALDWEL

Filed: January 21, 2014

JUDGMENT

MARTIN L. C. FELDMAN
UNITED STATES DISTRICT JUDGE

For the written reasons of the Court on file herein, accordingly;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendant, James D. Caldwell and against plaintiffs, Jonathan P. Robicheaux, Derek Penton, Nadine Blanchard and Courtney Blanchard, dismissing plaintiffs claims for lack of jurisdiction based on sovereign immunity.

New Orleans, Louisiana, this 21st day of
January, 2014.

Martin L. C. Feldman
UNITED STATES DISTRICT JUDGE