No. 14-2526

In The United States Court Of Appeals
For The Seventh Circuit

VIRGINIA WOLF, *et al.*,
Plaintiffs-Appellees,
v.

SCOTT WALKER, *et al.*,
Defendants-Appellants.

On Appeal from the United States District Court
For the Western District of Wisconsin
Case No. 14-cv-64
The Honorable Barbara B. Crabb

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 14-2526

Short Caption: Wolf, et al. v. Walker, et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

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JURISDICTIONAL STATEMENT

The jurisdictional statement in Defendants'-Appellants' brief is complete and correct.

STATEMENT OF THE ISSUES

1. Whether the district court correctly held that Wisconsin's marriage ban violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment by denying Plaintiffs marriage and recognition of their valid out-of-state marriages.

2. Whether the relief granted by the district court declaring the marriage ban unconstitutional and enjoining Defendants to provide same-sex couples the same marriage rights provided to different-sex couples is sufficiently clear to comport with federal law.

STATEMENT OF THE CASE

Marriage plays a "central role" in American society. App. 104.[1] "It is a defining rite of passage and one of the most important events in the lives of millions of people, if not *the* most important for some." *Id*. The State of Wisconsin now has one of the most restrictive bans on marriage for same-sex couples in the nation. Article XIII, § 13 of the Wisconsin Constitution provides: "Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state. A

[1] Citations to the Appellant's Short Appendix are indicated by "App. __". That Appendix includes the June 6, 2014 opinion below, at App. 101-88. Citations beginning with "ECF" refer to the district court record in *Wolf, et al. v. Walker, et al.*, No. 14-cv-64 (W.D. Wis. 2014), unless otherwise indicated.

legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state."

Plaintiffs are eight same-sex couples who wish to marry in Wisconsin or have their out-of-state marriages recognized in the State. App. 105-06. Virginia Wolf and Carol Schumacher, as well as Kami Young and Karina Willes, are legally married under the laws of Minnesota and wish to have their marriages recognized in Wisconsin. *Id.* Roy Badger and Garth Wangemann, Charvonne Kemp and Marie Carlson, Judi Trampf and Katy Heyning, Salud Garcia and Pam Kleiss, and Bill Hurtubise and Dean Palmer are unmarried couples wishing to marry in Wisconsin. *Id*. at 106. Johannes Wallmann and Keith Borden were married in Canada in 2007 and wish to be allowed to continue to live as a married couple as they did for four years in California, where their Canadian marriage was recognized. *Id*.; *see* Decl. of Pl. Wallmann in Supp. of Mot. for S.J., ECF 88 ¶ 4; Decl. of Pl. Borden in Supp. of Mot. for S.J., ECF 89 ¶ 4.

Plaintiffs filed this action pursuant to 42 U.S.C. § 1983 to challenge the validity of Article XIII, § 13 of the Wisconsin Constitution, as well as all provisions of Wisconsin's marriage statutes that could be construed to constitute a statutory ban on marriage for same-sex couples (collectively with Article XIII, § 13, the "marriage ban") under the United States Constitution.

Plaintiffs and all other committed same-sex couples in Wisconsin are harmed by the State's denial to them of the freedom to marry. Some have registered as domestic partners with the State under Wis. Stat. ch. 770 in order to access the

limited protections that status provides. Wisconsin withholds from all Plaintiffs the full complement of state law protections and obligations that are accorded to different-sex married couples. For example, Plaintiffs, including those with domestic partnerships, are excluded from the spousal obligation of mutual responsibility and support, along with the protection that obligation provides. *See* Wis. Stat. §§ 765.001(1), 766.15, 766.55(2). Plaintiffs are also denied the protections that come from the treatment of their property as marital property. *See, e.g.*, Wis. Stat. §§ 766.31(2), 861.01(1).[2]

The unmarried Plaintiffs are also denied all federal spousal protections and obligations, and the married Plaintiffs are denied those federal spousal protections and obligations that are reserved to couples whose marriages are recognized in their state of residence. *See United States v. Windsor*, 133 S. Ct. 2675, 2683 (2013) (more than "1,000 federal laws in which marital or spousal status is addressed as a matter of federal law"); *with respect to benefits tied to state of residence, see also* 29 C.F.R. § 825.122(b) (ability to take time off of work to care for a sick spouse under the Family & Medical Leave Act); 42 U.S.C. § 416(h)(1)(A)(i) (access to a spouse's social security benefits); U.S. Social Security Administration Program Operations Manual System, GN 00210.100 ("Windsor Same-Sex Marriage Claims"), GN 00210.400 ("Same-Sex Marriage—Benefits for Surviving Spouses"), at https://secure.ssa.gov/apps10/poms.nsf/lnx/0200210000.

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[2] For a more comprehensive list of state law provisions applicable to married couples but denied to Plaintiffs, including those with ch. 770 domestic partnerships, *see* Pl. Young's Resp. to Defs.' First Set of Interrogs., ECF 112-1 at 8-16.

Wisconsin's denial of the legal protections of marriage works tangible injury. For example, Plaintiffs Kami Young and Karina Willes are unable to secure recognition of Willes' parental rights with regard to their daughter, to whom Kami gave birth last April. In fact, hospital employees told Karina that she could not be listed as a parent on the baby's birth certificate. Pl. Willes' Resp. to Defs.' First Set of Interrogs., ECF 112-2 at 16. If Kami and Karina's marriage in Minnesota were recognized, Karina would automatically be deemed the baby's parent pursuant to Wisconsin law's presumption of parenthood for children born to married couples. *See* Wis. Stat. §§ 891.40(1), 891.41(1). Without marriage, Wisconsin law prevents Karina even from obtaining a stepparent or second-parent adoption (as other states provide). *See* Defs.' Resp. to Pls.' Proposed Findings of Fact, ECF 105 ¶¶ 24-25. Bill Hurtubise and Dean Palmer are likewise prohibited from jointly adopting their children—and thereby securing the legal protections for them that come from having two parents—because they are unmarried. Wis. Stat. § 48.82(1)(a). Defs.' Resp. to Pls.' Proposed Findings of Fact, ECF 105 ¶ 26.

The marriage ban has resulted in other concrete harms. Plaintiffs have had their express wishes regarding delegation of medical decision-making authority disregarded, have been denied family leave by their employer, and have even been denied a family membership at the YMCA. ECF 105 ¶ 38-39. Keith Borden and Johannes Wallmann have effectively had their long-standing marriage voided for purposes of state law. App. 141.

All Plaintiffs suffer the ongoing harm and indignity of the State's denigration of their relationships and families. By withholding from them the respect, recognition, and support that only marriage confers, Wisconsin stigmatizes these couples and their families as unworthy of the opportunity to express and legally embody their commitment in the most profound way that society provides. Wisconsin inflicts these harms for no reason other than these couples' sexual orientation and sex.

Appellants have adequately described the procedural history of this case. *See* Def. Br. 5-11.

SUMMARY OF ARGUMENT

The freedom to marry is a core aspect of personal liberty for all Americans. However, until recently, lesbians and gays have been denied that right. In 2006, Wisconsin took the unusual step of placing in its constitution a ban on same-sex couples' exercise of this fundamental right. The amendment went further and even denied these families "[a] legal status identical or substantially similar to that of marriage."

In *United States v. Windsor*, the Supreme Court recognized the "equal dignity" of same-sex couples' marriages and the serious tangible and intangible harms that same-sex couples and their children suffer when their relationships are not treated equally. Since then, two federal courts of appeals and eighteen district courts have concluded that denying same-sex couples the freedom to marry violates the U.S. Constitution. There are no exceptions to this string of rulings.

Due process and equal protection guarantee Wisconsin same-sex couples and their children the dignity, recognition, and concrete legal protections of marriage. This basic right may not be redefined narrowly, as Defendants suggest, as a "right for different-sex couples to marry" or a "right to a procreative marriage." Rather, the freedom from government interference with an individual's choice of spouse is the hallmark of marriage. It may not be denied based on sex or sexual orientation. Nor may the right be denied based on the historical exclusion of same-sex couples from marriage. Defendants' attempt to redefine marriage as a "positive right," akin to a form of government aid, that Wisconsin may deny to same-sex couples based on federalism and deference to the democratic process ignores settled legal principles.

Under both due process and equal protection, the marriage ban is subject to review under heightened scrutiny. But it fails any level of constitutional review. *Windsor* confirms that Wisconsin's marriage ban violates the Constitution because of its purpose and effect to disadvantage same-sex couples. However, even under conventional rational basis review, the ban fails because it rationally furthers no conceivable governmental interest.

Finally, the declaratory and injunctive relief granted by the district court easily complies with Rule 65's requirements.

STANDARD OF REVIEW

This Court "review[s] the district court's decision on summary judgment *de novo,* drawing all reasonable inferences in favor of the nonmoving party." *Spitz v. Proven Winners N. Am., LLC*, 2014 WL 3558030, at *4 (7th Cir. July 21, 2014). This

Court reviews a "district court's grant of injunctive relief and the scope of that relief for an abuse of discretion." *Fields v. Smith*, 653 F.3d 550, 554 (7th Cir. 2011).

ARGUMENT

I. The Due Process Clause Guarantees The Right To Marry.

The Supreme Court has already confirmed the fundamental right to marry the partner of one's choosing. *See, e.g.*, *Turner v. Safley*, 482 U.S. 78, 95 (1987); *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974); *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). It has already held that same-sex couples have the same protected interest in their intimate relationships as do different-sex couples. *Lawrence v. Texas*, 539 U.S. 558, 574 (2003). And it has already reaffirmed the "equal dignity" of same-sex couples' marriages. *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013). Defendants' attempt to redefine the "fundamental right to marry" as merely a "fundamental right for different-sex couples to marry" violates these principles.

A. The Marriage Ban Burdens the Fundamental Right To Marry.

1. The fundamental right to marry includes same-sex couples.

The Supreme Court has repeatedly recognized and reaffirmed that the right to marry is a "fundamental right" of elemental importance to all individuals. *Turner*, 482 U.S. at 95; *Zablocki*, 434 U.S. at 384; *Cleveland Bd. of Educ.*, 414 U.S. at 639-40; *Loving*, 388 U.S. at 12; *Meyer*, 262 U.S. at 399. The Court has discussed marriage in terms of liberty, intimate choice, privacy, and association. *See*

Lawrence, 539 U.S. at 574; *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996); *Zablocki*, 434 U.S. at 384; *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965). "Choices about marriage" are "sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." *M.L.B.*, 519 U.S. at 116; *see Hodgson v. Minnesota*, 497 U.S. 417, 435 (1990) ("[T]he regulation of [a person's] constitutionally protected decisions, such as . . . *whom he or she shall marry*, must be predicated on legitimate state concerns *other than disagreement with the choice the individual has made*.") (emphasis added). In accordance with these principles, courts throughout the nation have recognized that the fundamental right to marry and have one's lawful marriage recognized includes same-sex couples. *See Kitchen v. Herbert*, 2014 WL 2868044, at *11-21 (10th Cir. June 25, 2014); *Bostic v. Schaefer*, 2014 WL 3702493, at *1 (4th Cir. July 28, 2014); *Whitewood v. Wolf*, 2014 WL 2058105, at *7-9 (M.D. Pa. May 20, 2014); *Latta v. Otter*, 2014 WL 1909999, at *9-13 (D. Idaho May 13, 2014); *Henry v. Himes*, 2014 WL 1418395, at *7-9 (S.D. Ohio April 14, 2014); *De Leon v. Perry*, 975 F. Supp. 2d 632, 656-59 (W.D. Tex. 2014); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 991-93 (N.D. Cal. 2010).

Defendants argue that same-sex couples are excluded from a fundamental right enjoyed by all other individuals merely because of the gender of the person they wish to marry. They contend that Plaintiffs' right to marry the partner of their choosing is somehow a *new* right. It is not. The Supreme Court did not recognize a fundamental right *for interracial couples* to marry in *Loving*, or a fundamental right *for prisoners* to marry in *Turner*. It has recognized a "fundamental right *to marry*."

See Zablocki, 434 U.S. at 384 ("Although *Loving* arose in the context of racial discrimination, prior and subsequent decisions of this Court confirm that the right to marry is of fundamental importance for *all individuals*.") (emphasis added); *see also Kitchen*, 2014 WL 2868044, at *13 ("[T]he question as stated in *Loving*, and as characterized in subsequent opinions, was not whether there is a deeply rooted tradition of interracial marriage, or whether interracial marriage is implicit in the concept of ordered liberty; the right at issue was '*the freedom of choice to marry*.'") (quoting *Loving*, 388 U.S. at 12) (emphasis added); *Bostic*, 2014 WL 3702493, at *9 (Supreme Court's marriage cases "speak of a broad right to marry that is not circumscribed based on the characteristics of the individuals seeking to exercise that right.").

Defendants argue that the Supreme Court has never explicitly identified a right to same-sex marriage. Def. Br. 45. But the fundamental right to marry has never been defined by the partner chosen. It has been defined by *the right to make the choice*. *See Loving*, 388 U.S. at 12 (the Fourteenth Amendment applies to "the freedom of choice to marry," and hence "the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State"); *Lawrence*, 539 U.S. at 574 ("[O]ur laws and tradition afford constitutional protection to personal decisions relating to marriage" because of the "respect the Constitution demands for the autonomy of the person making [the] choices"—"[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do."); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 620 (1984)

("[T]he Constitution undoubtedly imposes constraints on the State's power to control the selection of one's spouse."); *Kitchen*, 2014 WL 2868044, at *18 ("[T]he Supreme Court has traditionally described the right to marry in broad terms independent of the persons exercising it."); *Bostic*, 2014 WL 3702493, at *9. While states have a legitimate interest in regulating and promoting marriage, the fundamental right to choose one's spouse belongs to the individual.

2. History does not preclude recognition of same-sex couples' fundamental right to marry.

Defendants also argue, by reference to the Indiana State Appellants' Brief, that the fundamental right to marry must exclude same-sex couples because the right is not "deeply rooted in our nation's history and traditions." Def. Br. 44-45. However, "history and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry." *Lawrence*, 539 U.S. at 572 (quotation marks omitted). History and tradition may help identify the interests that due process protects, but courts do not carry forward historical limitations on exercising a right once it is recognized as fundamental. *See Bostic*, 2014 WL 3702493, at *12; *In re Marriage Cases*, 183 P.3d 384, 430 (Cal. 2008) ("'[F]undamental rights, once recognized, cannot be denied to particular groups on the ground that those groups have historically been denied those rights.'"). "Past practices cannot control the scope of a constitutional right. If the scope of the right is so narrow that it extends only to what is so well-established that it has never been challenged, then the right serves to protect only conduct that needs no protection." App. 135.

Lawrence and *Loving* addressed situations where there had been a long history of states denying the rights being asserted, and in both cases "proponents of the laws being challenged relied on this history of exclusion as evidence that the scope of the right should not include the conduct at issue." App. 134-35. But as in *Loving* and *Lawrence*, the argument fails here. The fact that same-sex couples have been denied their rights in the past is no basis to deny them in the future.

3. Marriage is not limited to procreative unions.

Defendants suggest that marriage is a fundamental right only because of the possibility of procreation. However, many different-sex couples cannot or choose not to raise children, and no one contends that those couples do not enjoy the right. *See Perry*, 704 F. Supp. 2d at 992 ("Never has the state inquired into procreative capacity or intent before issuing a marriage license; indeed, a marriage license is more than a license to have procreative sexual intercourse.").

Second, "although the Supreme Court has identified procreation as *a* reason for marriage, it has never described procreation as a requirement." App. 127; *see also Lawrence*, 539 U.S. at 567 ("[I]t would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse."); *Kitchen*, 2014 WL 2868044, at *14 ("[T]he Court has also described the fundamental right to marry as separate from the right to procreate."). "If it were true that the Court viewed procreation as a necessary component of marriage, it could not have found [in *Griswold*] that married couples have a constitutional right *not* to procreate by using contraception." App. 128 (quoting *Griswold*, 381 U.S. at 486). The Supreme Court reaffirmed this principle in *Turner*, when it held that prisoners retain the

right to marry—despite the fact that the vast majority of prisoners cannot procreate with their spouses. "Many important attributes of marriage remain" despite an inmate's incarceration, including "expressions of emotional support and public commitment," "spiritual significance," and "the receipt of government benefits [to which marriage is a precondition]." *Turner*, 482 U.S. at 95-96. The idea that procreation is the sole purpose of marriage defies both law and common sense.[3]

4. The fundamental right to marry includes the right to marriage recognition.

Wisconsin's marriage ban also interferes with same-sex couples' fundamental right *to remain* married. *See Kitchen*, 2014 WL 2868044, at *16 ("In light of *Windsor*, we agree with the multiple district courts that have held that the fundamental right to marry necessarily includes the right to remain married."). The marriage ban denies spousal rights and obligations to Plaintiffs Wolf and Schumacher, Young and Willes, and Wallmann and Borden ("Married Plaintiffs") by declaring that their marriages are not "valid" or "recognized." Wis. Const. art. XIII, § 13.

The fundamental right to marry includes the right to have one's marriage recognized. *Loving*, 388 U.S. at 2, 4 (striking down not only Virginia's ban on interracial marriages within the state, but also its denial of recognition to, and criminal punishment of, the Lovings' marriage in the District of Columbia); *Zablocki*, 434 U.S. at 397 n.1 (Powell, J., concurring) ("there is a sphere of privacy

[3] Defendants also characterize marriage as a mere regulatory scheme, Def. Br. 44-45, but did not make any such argument below. In any event, marriage is a fundamental right, not merely a creation of government regulation. Further, even regulations are subject to due process requirements.

and autonomy surrounding an *existing* marital relationship into which the State may not lightly intrude") (emphasis added); *Whitewood*, 2014 WL 2058105, at *9 (same-sex couples' right to marriage recognition protected by due process); *Henry*, 2014 WL 1418395, at *6 (same); *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 978 (S.D. Ohio 2013) (same). Married Plaintiffs cannot enjoy the numerous rights and responsibilities, as well as the status and recognition, automatically conferred upon different-sex couples in Wisconsin who were legally married in other states. That violates due process.[4]

Plaintiffs Wallmann and Borden were married in Canada in 2007 and lived for years in California as a legally married couple.[5] *See* Decl. of Pl. Wallmann in Supp. of Mot. for S.J., ECF 88 ¶ 4; Decl. of Pl. Borden in Supp. of Mot. for S.J., ECF 89 ¶ 4. When they moved to Wisconsin in 2012, suddenly their marriage was denied recognition. As the California Supreme Court observed, married couples "acquire[] vested property rights as lawfully married spouses with respect to a wide range of subjects, including, among many others, employment benefits, interests in real

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[4] The "place of celebration rule"—the principle that a marriage's validity should be determined by the law of the jurisdiction where it was celebrated, not a subsequent domicile—is deeply rooted in American legal history and tradition, *see, e.g., Restatement (Second) of Conflict of Laws* § 283(2) (1971); *see also In re Campbell's Estate*, 631, 51 N.W.2d 709, 712 (Wis. 1952) ("Marriages valid where celebrated are valid everywhere.") (citing *Lanham v. Lanham*, 117 N.W. 787 (Wis. 1908); and *Owen v. Owen*, 190 N.W. 363 (Wis. 1922)), and is consistent with the right to remain married.

[5] *Strauss v. Horton*, 207 P.3d 48, 122 (Cal. 2009) (2008 constitutional amendment limiting marriage to men and women did not apply retroactively to invalidate marriages of same-sex couples performed prior to its effective date); Cal. Fam. Code 308(b) (repealed and replaced by Cal. S.B. No. 1306, 2014 Cal. Legis. Serv. Ch. 82 (July 7, 2014)) (out-of-state marriages contracted prior to November 5, 2008 were valid in California).

property, and inheritances." *Strauss v. Horton*, 207 P.3d 48, 122 (Cal. 2009). Because of Wisconsin's refusal to recognize their marriage, "property rights are potentially altered, spouses disinherited, children put at risk, and financial, medical, and personal plans and decisions thrown into turmoil." Steve Sanders, *The Constitutional Right to (Keep Your) Same-Sex Marriage*, 110 MICH. L. REV. 1421, 1450 (2012). Just as due process protects the existing legal relationship between parent and child, *Santosky v. Kramer,* 455 U.S. 745, 753 (1982), the constitution prevents a state from denying recognition to an existing legal relationship between two spouses.

Defendants counter that they are entitled to deny the validity of out-of-state marriages under Section 2 of the Defense of Marriage Act ("DOMA"), 28 U.S.C. § 1738C. But Defendants' argument has been rejected by all courts to consider it. *See, e.g.*, *Kitchen*, 2014 WL 2868044, at *16 n.6. "[N]either Congress nor a State can validate a law that denies the rights guaranteed by the Fourteenth Amendment." *Saenz v. Rowe*, 526 U.S. 489, 508 (1999) (quotation marks omitted); *see also Graham v. Richardson*, 403 U.S. 365, 382 (1971) ("Congress does not have the power to authorize the individual States to violate the Equal Protection Clause.").

Defendants' argument that the Wisconsin ban does not nullify Plaintiffs Borden and Wallman's marriage under California law, Def. Br. 57-58, is beside the point. The issue is whether Wisconsin *recognizes* this marriage and treats

Wallmann and Borden like any other legally married couple taking up residence in Wisconsin—and Defendants expressly concede that it does not. Def. Br. 58.

The freedom to marry and have one's lawful marriage recognized are existing fundamental rights protected by the United States Constitution. Wisconsin's marriage ban burdens those fundamental rights.

B. Defendants' Claim That Civil Marriage Is A Positive Right Not Protected By Due Process Is Erroneous And Contradicts Governing Supreme Court Precedent.

Defendants attempt to deny Plaintiffs' right to marry by characterizing it as a "positive right," outside the protection of the Due Process Clause, which they claim "only limits states' power to *deprive* individuals of their negative rights to life, liberty, or property." Def. Br. 16 (citing *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989)). Defendants' entire argument depends on characterizing marriage as merely some kind of government benefit or government aid, akin to Medicaid funds. Def. Br. 19. The district court correctly rejected this argument because it conflicts with controlling Supreme Court cases that establish marriage as a fundamental right, not a matter of government largess. App. 112-13.

Defendants rely on *DeShaney* and *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983), to argue that due process protects only negative liberties and thus does not protect the right to marriage. Defendants claim that *Loving*, *Zablocki*, and *Turner* "should not be read as establishing a positive right requiring government to affirmatively license or endorse a person's domestic relationships or to affirmatively support the relationships with the tangible or intangible benefits of marriage." Def. Br. 20-21. But it is inconceivable that after *Loving* the Supreme

Court would have allowed Virginia to withhold a license, recognition of, and affirmative support for the Lovings' marriage—including whatever tangible benefits it offered to other married couples in 1967.

The fundamental right to marry is indistinguishable from the right to have one's marriage sanctioned by the state. *Accord In re Marriage Cases*, 183 P.3d at 426-27 (construing the California Constitution to find that "[t]he substantive protection embodied in the constitutional right to marry, however, goes beyond what is sometimes characterized as simply a 'negative' right insulating the couple's relationship from overreaching governmental intrusion or interference, and includes a 'positive' right to have the state take at least some affirmative action to acknowledge and support the family unit," including "obligat[ing] the state to take affirmative action to grant official, public recognition to the couple's relationship as a family"). For example, in *Zablocki*, the Supreme Court found that Wisconsin's law banning marriage for individuals delinquent on child support infringed the right to marry because "[t]he State flatly *denies a marriage license* to anyone who cannot afford to fulfill his support obligations and keep his children from becoming wards of the State." 434 U.S. at 394 (emphasis added). *Turner* makes the point even more clearly. There, the Supreme Court clarified that Missouri has an affirmative obligation to facilitate marriage ceremonies for inmates, though it "may regulate the time and circumstances" under which the ceremony occurs. *Turner*, 482 U.S. at 99. *Turner* also noted that, despite the restrictions of the prison setting, "[m]any

important attributes of marriage remain," including qualification for "the receipt of government benefits." *Id.* at 95-96.

Defendants further attempt to distinguish *Loving*, *Zablocki*, and *Turner* by arguing that they did not "involve[] a challenge to the fundamental elements of the legal status of marriage as defined under state law," but instead addressed "certain incidental and peripheral restrictions on who could get married." Def. Br. 24-25. With respect to *Loving*, this argument is breathtakingly ahistorical. Virginia had enacted a "comprehensive statutory scheme aimed at prohibiting and punishing interracial marriages" (*Loving,* 388 U.S. at 4), and the Virginia trial court famously concluded that "'Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.'" *Id.* at 3 (quoting the trial court). Other courts reached similar conclusions regarding interracial marriage. *See*, *e.g.*, *Eggers v. Olson*, 231 P. 483, 484 (Okla. 1924); *W. Chester & Phila. R.R. v. Miles*, 55 Pa. 209, 1867 WL 2422 at *4 (Pa. 1867). That Defendants can now claim restrictions on interracial marriage were "incidental and peripheral" is testament to the success of *Loving*. The framers of the Fourteenth Amendment "knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom." *Lawrence*, 539 U.S. at 579.

Neither *Zablocki* nor *Turner* were decided on the basis of a negative right nor suggested that the Court's protection of the fundamental right to marriage is confined to peripheral or incidental restrictions. Rather, marriage and the issuance of a marriage license are fundamental rights for everyone. *Zablocki*, 434 U.S. at 384 ("[T]he right to marry is of fundamental importance for all individuals."); *see also Turner*, 482 U.S. at 95 (same).

Defendants assert that *Lawrence* and *Windsor* support their characterization of marriage as a positive right. They argue that same-sex couples may be barred from marrying because *Lawrence* "did not hold that due process requires a state to affirmatively recognize, legitimize, endorse, or subsidize the private personal conduct of any individual or group." Def. Br. 27. *Lawrence* was not decided on the basis of a distinction between positive and negative rights and left the question whether same-sex couples have the right to marry for another day. Justice Scalia, however, recognized the impact of the decision's reasoning for the marriage question. *Lawrence*, 539 U.S. at 605 ("This case 'does not involve' the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court.") (Scalia, J. dissenting).

Windsor likewise does not turn on any distinction between negative or positive rights. Indeed, *Windsor* shows that the Constitution requires the federal government to affirmatively recognize and grant the federal spousal protections, obligations, and benefits to same-sex married couples. 133 S. Ct. at 2694-95.

Windsor confirmed same-sex couples' right to federal spousal protections they had never had before.

Defendants' effort to analogize marriage to government funding for abortions is wide of the mark. There is no constitutional right to free medical care, including free abortions. *Maher v. Roe*, 432 U.S. 464, 469 (1977). But there is a constitutional right to marriage, and exercise of that fundamental right necessarily carries with it the protections and benefits the government has chosen to accord that relationship. Further, "[e]ven in cases in which an individual does not have a substantive right to a particular benefit or privilege, once the state extends that benefit to some of its citizens, it is not free to deny the benefit to other citizens for any or no reason on the ground that a 'positive right' is at issue." App. 113.

Finally, Defendants argue, at 30-43, that because marriage purportedly is merely a form of positive government aid, principles of federalism and majoritarianism mean the State is free to "experiment" with conferring and withholding that aid unconstrained by due process. Those arguments must fail because marriage is a fundamental right, not a mere government benefit. Indeed, Defendants' assertion, at 39, that "State laws that are limited to conferring or withholding positive rights and benefits, and that do not interfere with individuals' freedom of choice in constitutionally protected areas of personal autonomy, do *not* violate the Due Process Clause" is precisely why their arguments hold no water—the "freedom of choice to marry," *Loving*, 388 U.S. at 12, is a "constitutionally protected area[] of personal autonomy." In any event, as explained below in Section

III, Defendants' reliance on federalism and "majoritarian policy choices" is insufficient to justify the marriage ban. *Schuette v. Coalition to Defend Affirmative Action*, cited by Defendants, reaffirmed that the outcomes of democratic processes are subject to constitutional review, as "[t]he freedom secured by the Constitution consists, in one of its essential dimensions, of the right of the individual not to be injured by the unlawful exercise of governmental power." 134 S. Ct. 1623, 1636 (2014).

II. The Marriage Ban Is Subject To Heightened Scrutiny.

Wisconsin's marriage ban is subject to heightened scrutiny for three separate reasons: it burdens the exercise of a fundamental right; it discriminates on the basis of sexual orientation, a suspect or quasi-suspect classification; and it discriminates on the basis of gender.

A. The Marriage Ban Is Subject To Heightened Scrutiny Because It Interferes With The Exercise Of Fundamental Rights.

As explained above, "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Loving*, 388 U.S. at 12. The guarantee of due process protects individuals from arbitrary governmental intrusion into fundamental rights. *See, e.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 719-20 (1997). Accordingly, when legislation burdens the exercise of a right deemed to be fundamental—as the Wisconsin marriage ban does—the government must show that the intrusion "is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." *Zablocki*, 434 U.S. at 388.

B. Classifications Based On Sexual Orientation Are Subject To Heightened Scrutiny.

The Seventh Circuit has in the past applied rational basis review in cases of government discrimination based on sexual orientation. *See*, *e.g.*, *Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 950-51 (7th Cir. 2002) (citing cases, including *Bowers v. Hardwick*, 478 U.S. 186 (1986), for the proposition that "homosexuals do not enjoy any heightened protection under the Constitution"). However, the precedent supporting rational basis review for sexual orientation classifications, including *Schroeder*, is abrogated by *Lawrence*, 539 U.S. 558, which overturned *Bowers*. *See Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 312 (D. Conn. 2012) ("[T]he Supreme Court's holding in *Lawrence* 'remov[ed] the precedential underpinnings of the federal case law supporting the defendants' claim that gay persons are not a [suspect or] quasi-suspect class.'"); *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 984 (N.D. Cal. 2012). For this reason, the level of scrutiny to apply to sexual orientation classifications is an open question in this Circuit. *See Nabozny v. Podlesny*, 92 F.3d 446, 457-58 (7th Cir. 1996) (holding in *Ben-Shalom v. Marsh,* 881 F.2d 454, 464 (7th Cir. 1989) that sexual orientation was subject to rational basis review was limited to the military context).

The criteria to determine whether government discrimination based on sexual orientation should receive heightened scrutiny include:

> A) whether the class has been historically "subjected to discrimination"; B) whether the class has a defining characteristic that "frequently bears [a] relation to ability to perform or contribute to society"; C) whether the class exhibits "obvious, immutable, or distinguishing characteristics that define them as a discrete group"; and

> D) whether the class is "a minority or politically powerless."

Windsor v. United States, 699 F.3d 169, 181 (2d Cir. 2012) (quoting *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987), and *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440-41 (1985)), *aff'd*, 133 S. Ct. 2675 (2013). Of these considerations, the first two are the most important. *See Windsor*, 699 F.3d at181; *accord Golinski*, 824 F. Supp. 2d at 987.

As the District Court, App. 158-59, and several other federal and state courts have recently recognized, application of those factors leads to the conclusion that sexual orientation classifications must be recognized as suspect or quasi-suspect and subjected to heightened scrutiny. *See*, *e.g.*, *Windsor*, 699 F.3d at 181-85; *Whitewood*, 2014 WL 2058105, at *14; *De Leon*, 975 F. Supp. 2d at 650-51; *Bassett v. Snyder*, 951 F.Supp.2d 939, 960 (E.D. Mich. 2013); *Golinski*, 824 F. Supp. 2d at 985-90; *Pedersen*, 881 F. Supp. 2d at 310-33; *Obergefell*, 962 F. Supp. 2d at 986-92; *Perry*, 704 F. Supp. 2d at 997; *In re Balas*, 449 B.R. 567, 573-75 (Bankr. C.D. Cal. 2011); *Griego v. Oliver*, 316 P.3d 865, 880-84 (N.M. 2013); *Varnum v. Brien*, 763 N.W.2d 862, 885-96 (Iowa 2009); *In re Marriage Cases*, 183 P.3d at 441-44; *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 425-31 (Conn. 2008). *See also SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 480-84 (9th Cir. 2014) (finding heightened scrutiny applicable to sexual orientation without examining the four factors).

Unequivocally, lesbians and gay men have historically been subjected to discrimination; that "is not much in debate." *Windsor*, 699 F.3d at 182. For

centuries, the prevailing attitude toward lesbians and gay men has been "one of strong disapproval, frequent ostracism, social and legal discrimination, and at times ferocious punishment." Richard A. Posner, SEX AND REASON 291 (1992).

Sexual orientation is irrelevant to one's ability to perform or contribute to society. "There are some distinguishing characteristics, such as age or mental handicap, that may arguably inhibit an individual's ability to contribute to society, at least in some respect. But homosexuality is not one of them." *Windsor*, 699 F.3d at 182. In this respect, sexual orientation is akin to race, gender, alienage, and national origin, all of which "are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy." *City of Cleburne*, 473 U.S. at 440.

The limited ability of gay people as a group to protect themselves in the political process, although not essential for recognition as a suspect or quasi-suspect class, s*ee Windsor*, 699 F.3d at 181, also weighs in favor of heightened scrutiny. In analyzing this factor, "[t]he question is not whether homosexuals have achieved political successes over the years; they clearly have. The question is whether they have the strength to politically protect themselves from wrongful discrimination." *Id*. at 184. The political influence of lesbians and gay men stands in sharp contrast to the political power of women in 1973, when a plurality of the Court concluded in *Frontiero v. Richardson* that sex-based classifications required heightened scrutiny. 411 U.S. 677, 688 (1973). Congress had already passed Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963, both of which protected women from

discrimination in the workplace. *See id.* at 687-88. In contrast, there is still no express federal ban on sexual orientation discrimination in employment, housing, or public accommodations, and 29 states have no such protections either. *See Golinski*, 824 F. Supp. 2d at 988-89; *Pedersen*, 881 F. Supp. 2d at 326-27. And over the past 20 years, more than two-thirds of ballot initiatives that proposed to enact (or prevent the repeal of) basic antidiscrimination protections for gay and lesbian individuals have failed. Indeed, gay people "have seen their civil rights put to a popular vote more often than any other group." Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 AM. J. POL. SCI. 245, 257 (1997); *see also* Donald P. Haider-Markel *et al.*, *Lose, Win, or Draw? A Reexamination of Direct Democracy and Minority Rights*, 60 POL. RESEARCH Q. 304 (2007).

The marriage ban itself acts to lock same-sex couples out of the normal political process. In light of Wisconsin's constitutional marriage provision, Plaintiffs cannot simply lobby the Wisconsin state legislature to remove the marriage ban through the ordinary political process. Instead, they are uniquely burdened with having to amend the Wisconsin Constitution, a much more difficult and cumbersome process. *See* Wis. Const. art. XII, § 1. A selective disparity in the ability to advocate for a change in the law, disadvantaging a single class of people, is constitutionally suspect.

Finally, sexual orientation is an "immutable or distinguishing" characteristic that "calls down discrimination when [the characteristic] is manifest." *Windsor*, 699 F.3d at 183. This Court has noted that an "immutable or fundamental

characteristic" includes "sexual orientation." *Cece v. Holder*, 733 F.3d 662, 669 (7th Cir. 2013). That view is consistent with a broad medical and scientific consensus, *see Perry*, 704 F. Supp. 2d at 966; *accord Golinski*, 824 F. Supp. 2d at 986; *Pedersen*, 881 F. Supp. 2d at 320-24, and also with the Supreme Court's recognition that sexual orientation is so fundamental to a person's identity that one ought not be forced to choose between one's sexual orientation and one's rights as an individual—even if such a choice could be made. *See Lawrence*, 539 U.S. at 576-77 (individual decisions by consenting adults concerning the intimacies of their physical relationships are "an integral part of human freedom").

Because classifications based on sexual orientation are at least quasi-suspect based on the factors identified in *Bowen* and *Cleburne*, they should not be treated as presumptively constitutional, but should be subject to heightened scrutiny.

C. Wisconsin's Marriage Ban Discriminates On The Basis Of Sex And Is Subject To Heightened Scrutiny.

Even though the district court chose not "to wade into this jurisprudential thicket," App. 148, this Court should affirm the holding below on the additional ground that Wisconsin's marriage ban discriminates on the basis of gender and is thus subject to intermediate scrutiny. *See Ruth v. Triumph P'ships*, 577 F.3d 790, 796 (7th Cir. 2009).

This discrimination occurs in two ways. First, the ban discriminates facially by limiting a person's right to marry based on his or her sex—men are permitted choose their spouse from among one group of people, while women are permitted to choose their spouse from another. Second, the ban discriminates because it subjects

Plaintiffs to sex stereotyping by purporting to enshrine in state law historical assumptions regarding the "proper" roles of men and women in families.

Wisconsin's marriage ban facially discriminates on the basis of sex. Each Plaintiff is prohibited from marrying the partner of his or her choosing because of the Plantiff's sex. *See Kitchen v. Herbert,* 961 F. Supp. 2d 1181, 1206 (D. Utah 2013), *aff'd,* 2014 WL 2868044 (10th Cir. June 25, 2014); *Perry*, 704 F. Supp. 2d at 996; *Baehr v. Lewin*, 852 P.2d 44, 64 (Haw. 1993) (marriage statute "on its face and as applied regulates access to the marital status . . . on the basis of the applicants' sex.").

The marriage ban cannot be defended on the ground that it treats men and women equally by denying the right to marry to both men (who wish to marry men) and women (who wish to marry women). This argument, made with regard to race instead of sex, was squarely rejected in *Loving v. Virginia.* In *Loving*, the State of Virginia argued that its anti-miscegenation laws did not discriminate based on race because the prohibition against mixed-race marriage applied equally to both black and white citizens. 388 U.S. at 7-8. The Court held that "the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race." *Id*. at 9. *See also McLaughlin v. Florida*, 379 U.S. 184, 192-93 (1964) (holding that a race-related anti-cohabitation law was a racial classification even though the law applied equally to white and black persons).

Loving and *McLaughlin* cannot be cabined on a theory that those cases addressed race; the Supreme Court has applied the same reasoning to gender. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (striking down preemptory challenges based on gender-based assumptions as to *both* sexes, despite equal application of the rule as to men and women); *Califano v. Westcott*, 443 U.S. 76, 83-85 (1979) (classification can be sex-based even if the effects of its application are felt equally by men and women). Nor can the marriage ban be defended on the ground that it was not enacted with the intent to discriminate against either men or women. *See Loving*, 388 U.S. at 11 n.11 (holding that Virginia's ban on interracial marriage was unconstitutional "even assuming an even-handed state purpose to protect the 'integrity' of all races"). It is the fact of classification itself, not the difference in the burden imposed by the classification, that raises constitutional concerns. *Johnson v. California*, 543 U.S. 499, 506 (2005) (California's racially "neutral" practice of segregating inmates by race to avoid racial violence was a race classification, notwithstanding the fact that prison did not single out one race for differential treatment).

In its opinion, the district court suggested that this Court might view "a sex-based classification [as] permissible if it imposes comparable burdens on both sexes." App. 148 (citing *Hayden ex rel. A.H. v. Greensburg Cmty. Sch. Corp.*, 743 F.3d 569, 581 (7th Cir. 2014)). But *Hayden* does not apply here. The Court addressed only the issue of "[w]hether and when the adoption of differential *grooming standards* for males and females amounts to sex discrimination" in the

school setting. *Hayden*, 743 F.3d at 577 (emphasis added). The opinion in *Hayden* did **not** address the sort of discrimination here (or in *Loving*), where access to a right or benefit turns on the sex (or race) of the participants seeking to enter a relationship like marriage. Obviously, the state could not enact a law allowing only men to be police officers and only women to be firefighters, even if the law imposed a comparable burden on men and women.

Moreover, all of the "judicial and scholarly analysis" of the issue cited in *Hayden* refers exclusively to grooming codes in the narrow contexts of employment and schools. *See* 743 F.3d at 577 (citing cases). Neither *Hayden* nor any other case supports the contention that the State itself could impose a general population-wide grooming code with different standards for men and women. Nor does it hold, or even hint, that a "comparable burden" test applies to *any* law that turns on gender.

The marriage ban also perpetuates and enforces stereotypes regarding the traditional roles of men and women within marriages and families. As Defendants candidly admitted below, Wisconsin's marriage ban classifies on the basis of "marital norms of gender complementarity." Defs.' Reply in Supp. of Mot. to Dismiss, ECF 96 at 19. When government restricts men and women from participation in civil society and its institutions based on sex stereotypes, it does so "on the basis of gender." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989). *See also White v. Fleming*, 522 F.2d 730, 737 (7th Cir. 1975) ("[I]t is impermissible under the equal protection clause to classify on the basis of stereotyped assumptions concerning propensities thought to exist in some members of a given sex."); *Doe ex*

rel. Doe v. City of Belleville, 119 F.3d 563, 581 (7th Cir. 1997) (holding that "reliance upon stereotypical notions about how men and women should appear and behave" "reasonably suggests" that "a particular action . . . can be attributed to sex."), *vacated and remanded on other grounds*, 523 U.S. 1001 (1998).

Gender classifications cannot be based on or validated by "fixed notions concerning the roles and abilities of males and females." *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724-25 (1982). The Court has also recognized that stereotypes about marital roles for men and women foster discrimination in the workplace and elsewhere. *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003) ("Stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. . . . These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers' stereotypical views about women's commitment to work and their value as employees.").

It is well settled that laws that discriminate on the basis of sex can be sustained only where the government demonstrates that they are "substantially related" to an "important governmental objective[.]" *United States v. Virginia.*, 518 U.S. 515, 533 (1996) (quotation marks omitted). *See also Hodgson*, 497 U.S. at 452 ("[A] state interest in standardizing its children and adults, making the 'private realm of family life' conform to some state-designed ideal, is not a legitimate state interest at all.").

III. Wisconsin's Marriage Ban Fails Any Applicable Level Of Review.

Defendants do not attempt to defend Wisconsin's ban under heightened scrutiny. But the marriage ban fails under any other applicable analysis, including rational basis review.

A. Wisconsin's Marriage Ban is Unconstitutional Under *Windsor*.

Wisconsin's marriage ban violates the Constitution under the Court's analysis in *Windsor*. Calling the analysis "careful consideration," 133 S.Ct. at 2692, the *Windsor* Court looked closely at the actual purpose—not hypothetical justifications—behind the law's enactment, as well as looking at the actual effects of the law. *Id*. at 2689 ("[T]he design, purpose, and effect of DOMA" are "the beginning point in deciding" its constitutionality.). Because it found that the "principal purpose and necessary effect" of the law were "to impose inequality," DOMA violated "basic due process and equal protection principles." *Id*. at 2693-95. Lower courts have given different labels to the *Windsor* analysis. *Compare SmithKline Beecham*, 740 F.3d at 480-84 (heightened scrutiny); with *Love v. Beshear*, 989 F. Supp. 2d 536, 2014 WL 2957671 at *5 (W.D. Ky. 2014) ("more than rational basis review").

Regardless of the label, the *Windsor* analysis applies here because the various factors that have prompted the Supreme Court—in *Windsor* and in prior cases—to apply careful consideration analysis are present here. One of those factors is "[d]iscrimination[] of an unusual character," such as DOMA's departure from the federal government's long-standing practice of deferring to state determinations of who is married when administering federal programs. *Windsor,* 133 S. Ct. at 2692

(citing *Romer v. Evans*, 517 U.S. 620, 633 (1996). Here the marriage ban is the only part of Wisconsin's marriage law that appears in the state constitution, and it departs from Wisconsin's long-established tradition of respecting marriages that were valid where entered. *See supra*, n.4.

Another trigger for careful consideration is imposition of a sweeping disability on a narrow class of people, as in *Romer*, 517 U.S. at 633 (state constitutional provision that "identifies persons by a single trait and then denies them protection across the board" warrants "careful consideration"). Here, Wisconsin's marriage ban works a similarly broad disability on lesbians and gay men, excluding them from hundreds of protections and obligations under state and federal law, and preventing them from seeking redress through the ordinary legislative process.

Still another trigger arises where it appears that the actual purpose of the law was to "disadvantage" and "demean." *Windsor*, 133 S. Ct. at 2693, 2695; *see also Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring) ("When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review.").

Careful consideration examines the intent behind the law and its effects. *Windsor*, 133 S. Ct. at 2693. *Windsor* noted that the "history of DOMA's enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages . . . was more than an incidental effect of the federal statute. It was its essence." *Id*. Likewise, legislative sponsors of Wisconsin's ban described their goal

in clear terms: "This proposal would prevent same-sex marriage from being legalized in this state." Decl. of Laurence Dupuis ("Dupuis Decl."), Ex. 1 ("CoSponsorship Memo"), ECF 73-1. A constitutional amendment was necessary, the sponsors urged, because "[n]othing in our state constitution presently protects against our State Supreme Court doing the same thing the Massachusetts Supreme Court did in 2003 . . . and legislating from the bench to radically alter marriage in this state and judicially impose same-sex marriage on this state." *Id*. The Wisconsin Supreme Court has agreed that the intent and purpose of the marriage ban "was to preserve the legal status of marriage in Wisconsin as between only one man and one woman" through a constitutional amendment to "ensure[] that no legislature, court, or any other government entity can get around the first sentence [which "preserves the one man-one woman character of marriage"] by creating or recognizing 'a legal status identical or substantially similar to that of marriage.'" *McConkey v. Van Hollen*, 783 N.W.2d 855, 869 (Wis. 2010); *see also Appling v. Walker*, 2014 WL 3744232, at *3 (Wis. July 31, 2014) (reviewing history and purpose of marriage amendment).

The effect of Wisconsin's marriage laws parallels DOMA as well. The "great reach" of Wisconsin's marriage ban, just like that of DOMA, "touches many aspects of . . . family life, from the mundane to the profound." *Windsor*, 133 S. Ct. at 2694. Wisconsin's marriage ban, no less than DOMA, "tells [same-sex] couples, and all the world," that their committed relationships "are unworthy" and "second-tier." *Id*. And Wisconsin's marriage ban, just like DOMA, "humiliates tens of thousands of

children now being raised by same-sex couples" by making it "even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Id*.

Just as with DOMA, the Court should carefully consider the purpose and effect of the marriage ban and strike down the law where, as here, "no legitimate purpose overcomes the purpose and effect to disparage and to injure" same-sex couples. *Windsor,* 133 S. Ct. at 2696.

B. The Marriage Ban Fails Rational Basis Review.

"[E]ven in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained." *Romer*, 517 U.S. at 632. It is not enough to identify an interest supported by benefiting the favored class; there must be a legitimate purpose for the disparate treatment of the disfavored class. *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 535-38 (1973) (evaluating federal government's interest in *excluding* unrelated household from food stamp benefits, not in maintaining food stamps for related households); *Wisconsin Educ. Ass'n Council v. Walker*, 705 F.3d 640, 653 (7th Cir. 2013) (there must be "a 'rational relationship between the *disparity of treatment* and some legitimate governmenalt purpose'") (emphasis added). And the connection between the purported justifications and the classification cannot be "so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne*, 473 U.S. at 446. It is this "search for the link between classification and objective" that "gives substance to the Equal Protection Clause" and "ensure[s] that classifications are not drawn for the purpose of disadvantaging

the group burdened by the law." *Romer*, 517 U.S. at 633; *see Heller v. Doe ex rel. Doe*, 509 U.S. 312, 321 (1993) (relationship between classifications and governmental interests "must find some footing in the realities of the subject addressed by the legislation").

Defendants also adopt the Indiana State Appellants' argument that rational basis review requires "deference to the State's asserted ends," Def. Br. 49, which taken literally would make rational basis review entirely meaningless. A state's asserted rationales for legislation must be rejected if "an examination of the circumstances forces [the court] to conclude that they could not have been a goal of the legislation." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463 n.7 (1981) (quotation marks omitted).

1. Tradition alone fails to provide a rational basis for the marriage ban.

Absent an independent interest, "it is circular reasoning, not analysis, to maintain that marriage must remain a heterosexual institution because that is what it historically has been." *Goodridge v. Dep't of Pub. Health,* 798 N.E.2d 941, 961 n.23 (Mass. 2003).

Defendants agree that "tradition alone is insufficient" but assert that "traditional marriage laws 'reflect[ ] lessons of experience,'" Def. Br. 50, and therefore "[t]radition can and does provide a rational basis for Wisconsin's traditional marriage laws." Def. Br. 52. However, "it is the reasons for the tradition and not the tradition itself that may provide justification for a law. Otherwise, the state could justify a law simply by pointing to it." App. 167. The same arguments

about tradition as a reflection of experience were made to support laws restricting the rights of women, *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141-42 (1872) (Bradley, J., concurring) (state may pass law "founded on nature, reason, and experience" to deny women the right to practice law), and laws banning interracial marriage, *Naim v. Naim*, 87 S.E.2d 749, 756 (Va. 1955) (state may pass laws based on "sacred and secular history" to ban interracial marriage), but were eventually rejected.

Lawrence, Citizens for Equal Protection v. Bruning, 455 F.3d 859 (8th Cir. 2006), and *Sevcik v. Sandoval,* 911 F. Supp. 2d 996 (D. Nev. 2012), fail to show that tradition is a rational basis for Wisconsin's marriage ban. Justice O'Connor's reference to tradition as a rational basis for marriage in her *Lawrence* concurrence, 539 U.S. at 585, is inconsistent with the majority's rejection of tradition alone as a rational basis. *Id.* at 577-78 ("[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack.") (quotation marks omitted).

Neither *Bruning* nor Justice Cordy's dissent in *Goodridge* found that marriage bans were justified by tradition but relied instead on procreation, addressed in Section III.B.2. *Bruning*, 455 F.3d at 868. *Sevcik*, 911 F. Supp. 2d at 1015-18, was wrongly decided, and its reasoning has been superseded by *Windsor*. Indeed, *Windsor* rejected a congressional purpose to "defend the institution of

traditional heterosexual marriage" as a rational basis for DOMA. 133 S. Ct. at 2693 (quotation marks omitted).

This "Court must be especially vigilant in evaluating the rationality of any classification involving a group that has been subjected to a tradition of disfavor." *City of Cleburne*, 473 U.S. at 453 n.6 (Stevens, J., concurring) (quotation marks omitted). Tradition is not a rational basis for the marriage ban.

2. Procreation has no rational connection to the denial of marriage to same-sex couples.

Defendants adopt Indiana State Appellants' argument regarding "responsible procreation." Def. Br. 56. The argument focuses on a characteristic shared by same-sex couples and certain different-sex couples—the inability to naturally or accidentally procreate—as a justification for the marriage ban. However, the promotion of procreation fails to offer a rational explanation for the ban on same-sex couples marrying, because different-sex couples' procreative decisions do not depend on whether or not same-sex couples can marry, and there is no procreation requirement for marriage.

As an initial matter, procreation fails to distinguish same-sex from different-sex couples. Same-sex couples also procreate, through assisted reproduction or adoption, and they and their children benefit from marriage in the same way as different-sex couples and their children. *See Varnum*, 763 N.W.2d at 902 ("Conceptually, the promotion of procreation as an objective of marriage is compatible with the inclusion of gays and lesbians within the definition of marriage. Gay and lesbian persons are capable of procreation.").

a. The decisions of different-sex couples to procreate and the benefits to their children are unaffected by whether same-sex couples marry.

Neither the incentives for different-sex couples to procreate or marry before having children nor the benefits of marriage to their children are affected by whether same-sex couples marry, as the district court and many other courts have concluded. "One problem with the procreation rationale is that defendants do not identify any reason why denying marriage to same-sex couples will encourage opposite-sex couples to have children, either 'responsibly' or 'irresponsibly.'" App. 170; *see also Perry*, 704 F. Supp. 2d at 972 ("Permitting same-sex couples to marry will not affect the number of opposite-sex couples who marry, divorce, cohabit, have children outside of marriage or otherwise affect the stability of opposite-sex marriages."). Moreover, "[t]he exclusion of gays and lesbians from marriage does not benefit the interests of those children of heterosexual parents, who are able to enjoy the environment supported by marriage with or without the inclusion of same-sex couples." *Varnum*, 763 N.W.2d at 901. Indeed, the Tenth Circuit could not identify "a scenario under which recognizing same-sex marriages would affect the decision of a member of an opposite-sex couple to have a child, to marry or stay married to a partner, or to make personal sacrifices for a child." *Kitchen*, 2014 WL 2868044, at *27.

Wisconsin also adopts, at 49, Indiana State Appellants' argument that "the State may justify limits on government benefits and burdens by reference to whether *including* additional groups would accomplish the government's underlying

objectives." Indiana Br. 30 (citing *Johnson v. Robison*, 415 U.S. 361 (1974)). Wisconsin's treatment of marriage "as just another government benefit that can be offered or withheld at the whim of the state is an indicator either that defendants fail to appreciate the implications for equal citizenship that the right to marry has or that they do not see same-sex couples as equal citizens." App. 171. It is not sufficient to simply "articulate reasons to confer benefits and burdens on opposite-sex couples that do not apply to same-sex couples," Indiana Br. 32, since rational basis review requires "'some ground of difference having *a fair and substantial relation* to the object of the legislation.'" *Friendship Med. Ctr., Ltd. v. Chi. Bd. of Health*, 505 F.2d 1141, 1152 (7th Cir. 1974) (emphasis added) (quoting *F.S. Royster Guano Co. v. Va.*, 253 U.S. 412, 415 (1920)).

Johnson is entirely consistent with Plaintiffs' position that there must be a relationship between the marriage ban and the child welfare interests furthered by marriage. There, the Court analyzed whether there were governmental interests to explain the denial of veteran's benefits to conscientious objectors and found "quantitative and qualitative distinctions" between veterans and conscientious objectors with respect to a number of governmental interests. *Johnson*, 415 U.S. at 381-82. The *Johnson* Court did not simply ask whether certain educational benefits help military veterans, but asked whether conscientious objectors who were denied the benefits were similarly situated to military veterans with regard to those benefits and found that there were not. *Id.* In contrast, same-sex couples are similarly situated with respect to the benefits of marrying, since both same-sex and

different-sex couples have children, and same-sex couples and their children benefit in the same ways from marriage as different-sex couples. *Dragovich v. U.S. Dep't of Treasury*, 872 F. Supp. 2d 954, 958 n.10 (N.D. Cal. 2012) (rejecting similar attempt to use *Johnson* to defend DOMA).

Even if the purpose of marriage were limited to natural procreation, the marriage ban is distinguishable from the classification in *Johnson,* since "the 'carrot' of educational benefits could never actually incentivize military service for the excluded group due to their religious beliefs" whereas "the 'carrot' of marriage is equally attractive to procreative and non-procreative couples, is extended to most non-procreative couples, but is withheld from just one type of non-procreative couple." *Bishop v. United States ex rel. Holder*, 962 F. Supp. 2d 1252, 1293 (N.D. Okla. 2014), *aff'd,* 2014 WL 3537847 (10th Cir. July 18, 2014).

b. The ability or intention to procreate is not required to marry.

A second major flaw with Indiana's argument is that there is no procreation requirement for marriage. "Wisconsin law does not restrict the marriages of opposite-sex couples who are sterile or beyond the age of procreation and it does not require marriage applicants to make a 'procreation promise' in exchange for a license." App. 172. Indiana responds that inquiring of different-sex couples about their procreative ability and plans would implicate individuals' constitutional rights with respect to the decision whether or not to procreate. Indiana Br. 37-38 (citing *Kitchen*, 2014 WL 2868044, at *25). However, "[t]o the extent . . . an inquiry into fertility would be inappropriately intrusive because opposite-sex married couples

have a constitutional right *not* to procreate under *Griswold,* that argument supports a view that the same right must be extended to same-sex couples as well." App. 173-74.[6]

Further, Indiana asserts that "absolute precision" in line-drawing is not required under rational basis review. Indiana Br. 35. To be sure, a legislature may engage in reasonable speculation when making classifications under rational basis review, but "[t]he State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne*, 473 U.S. at 446. "[I]n defining a class subject to legislation, the distinctions that are drawn [must] have some relevance to the purpose for which the classification is made." *Rinaldi v. Yeager*, 384 U.S. 305, 309 (1966) (quotation marks omitted).

3. There is no rational connection between the promotion of optimal childrearing and the denial of marriage to same-sex couples.

Even though the Defendants have not made the argument on appeal,[7] other states have claimed that reserving marriage to different-sex couples promotes parenting of children by different-sex couples who are both biologically related to their parents, which they assert is optimal. Of course, many different-sex Wisconsin couples are raising children with whom they do not share this kind of biological

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[6] As the district court noted, "Wisconsin already *does* inquire into the fertility of some marriage applicants, though in that case it requires the couple to certify that they are *not* able to procreate, which itself is proof that Wisconsin sees value in marriages that do not produce children and is applying a double standard to same-sex couples." App. 173.

[7] Plaintiffs address this and other arguments not made by Defendants to show they are not conceivable reasons for the ban.

relationship. And Wisconsin law draws no distinction between adoptive and biological children. Wis. Stat. § 48.92.

Excluding same-sex couples from marriage does not rationally further any state interest in optimal parenting because it does not result in any additional children being raised by their biological, married, heterosexual parents. *Bostic*, 2014 WL 3702493, at *16 ("There is absolutely no reason to suspect that prohibiting same-sex couples from marrying and refusing to recognize their out of state marriages will cause same-sex couples to raise fewer children or impel married opposite-sex couples to raise more children."). For that reason alone, the optimal childrearing argument "has failed . . . in every court to consider [it] post-*Windsor*, and most courts pre-*Windsor*." *Bourke v. Beshear*, 2014 WL 556729, at *8 (W.D. Ky. Feb. 12, 2014); *see also DeBoer v. Snyder,* 973 F. Supp. 2d 757, 771 (E.D. Mich. 2014); *De Leon*, 975 F. Supp. 2d at 655; *Griego*, 316 P.3d at 886.

Given that total lack of logical connection, the Court need not address the decades of peer-reviewed research showing that children raised by same-sex couples are just as well adjusted as those raised by different-sex couples. Every major pediatric, mental health, and child welfare organization in the United States has endorsed this scientific consensus.[8] Numerous courts have found that "the evidence shows beyond any doubt that parents' genders are irrelevant to children's

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[8] *See* Brief of American Psychological Ass'n, et al., as Amici Curiae on the Merits in Support of Affirmance at 14-26, *Windsor*, 133 S. Ct. 2675 (No. 12-307), 2013 WL 871958; Brief of Amicus Curiae American Sociological Ass'n, in Support of Respondent Kristin M. Perry and Respondent Edith Schlain Windsor at 6-14, *Hollingsworth v. Perry,* 133 S. Ct. 2653 (2013), and *Windsor*, 133 S. Ct. 2675 (Nos. 12-144, 12-307), 2013 WL 840004.

developmental outcomes." *Perry*, 704 F. Supp. 2d at 1000. *See also, e.g., DeBoer*, 973 F. Supp. 2d at 770; *Varnum*, 763 N.W.2d at 899 & n.26; *Golinski*, 824 F. Supp. 2d at 991.

However, even if this Court were to assume that children do better with different-sex parents who are biologically related to them, the district court correctly found the ban is such an "incredibly underinclusive rationale" that it "calls into question the sincerity of this asserted interest." App. 176 (citing *Romer*, 517 U.S. at 635). Wisconsin places no other restrictions on who may marry to ensure optimal parenting and does not take into account the interest of children that it was purported to protect. *Id.*

4. The marriage ban rationally furthers no other governmental interest.

Defendants point to interests in federalism, majoritarian rule, and democratic processes, but those arguments all miss the mark. Def. Br. 30-39. Federalism does not trump the individual's constitutional rights secured against infringement by the State. "State laws defining and regulating marriage, of course, must respect the constitutional rights of persons." *Windsor*, 133 S. Ct at 2691 (citing *Loving*). The "'virtually exclusive province'" of the states to regulate domestic affairs is always "subject to those guarantees." *Id.* (quoting *Sosna v. Iowa*, 419 U.S. 393, 404 (1975)). In short, as the Tenth Circuit concluded, "the experimental value of

federalism cannot overcome plaintiffs' rights to due process and equal protection." *Kitchen,* 2014 WL 2868044, at *31.[9]

Defendants' argument, Def. Br. 40-41, that due process must yield to the judgment of the majority when "citizens or their elected representatives are deciding whether, and to what extent, to legally recognize, endorse, or subsidize particular social practices" falters for the same reasons. "One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). Indeed, almost all of the marriage bans recently struck down by federal courts were enacted by referendum, but that did not exempt them from constitutional review. *See*, *e.g.*, *Kitchen*, 2014 WL 2868044, at *31 ("The protection and exercise of fundamental rights are not matters for opinion polls or the ballot box."). And *Schuette* reaffirmed that the outcomes of democratic processes are subject to constitutional review. 134 S. Ct. at 1632, 1636.

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[9] Defendants claim, Def. Br. 37, that "Wisconsin has taken both a prudent and experimental approach, affirming its traditional marriage laws while also recognizing domestic partnerships," but Defendants have made no effort to defend the "prudent approach" of protecting domestic partnerships from challenge. Defendant Van Hollen refused to defend the state's domestic partnership law, instead stating that he would "concede that the law is unconstitutional [under Wis. Const. art. XIII, § 13] and consent to an order enjoining the domestic partnership registry program." Brief in Support of Motion to Withdraw at 2, *Appling v. Doyle*, No. 2010-CV-4434 (Dane Cty. Cir. Ct. (Wis.) May 13, 2011), at http://www.lambdalegal.org/in-court/legal-docs/appling_wi_20110513_brief-iso-defendants-motion-to-withdraw. Defendant Walker moved to withdraw from defense of Wisconsin's domestic partnership law after determining that "defending [the] law would be contrary to the state's constitution." *Id.* at 4.

Defendants argue that it is rational for Wisconsin to proceed with caution by delaying marriage for same-sex couples. Def. Br. 52-54. However, cautionary delay is not a rational basis for denying a constitutional right. App. 181-82 (citing *Watson v. City of Memphis,* 373 U.S. 526, 533 (1963) ("The basic guarantees of our Constitution are warrants for the here and now and, unless there is an overwhelmingly compelling reason, they are to be promptly fulfilled.").

According to Defendants, "Wisconsinites' desire to retain the right to define marriage through the democratic process is rational." Def. Br. 54-55. But if the fact that a law resulted from a "democratic process" satisfied rational basis review, virtually every law would evade review, no matter how arbitrary and irrational. Such an interpretation would "turn the rational basis analysis into a toothless and perfunctory review" and should be rejected. *Kitchen*, 961 F. Supp. 2d at 1213. The outcome of the democratic process is constrained by the constitution. U.S. Const. art. VI, § 2; *Henry*, 2014 WL 1418395, at *11 (describing "*appeal to the purportedly sacred nature of the will of Ohio voters*" as "*particularly specious*."). There is no "special rule" for the "issue of same-sex marriage," since "[t]here is no asterisk next to the Fourteen[th] Amendment that excludes gay persons from its protections." App. 121 (citing *Romer*, 517 U.S. at 635).

Although the Defendants have not made this argument on appeal, they suggested below that marriage for same-sex couples leads ineluctably to incest and polygamy. This same canard was raised and ultimately rejected in defense of laws banning interracial marriage. *See*, *e.g.*, *Perez v. Lippold*, 198 P.2d 17, 46 (Cal. 1948)

(en banc) (Shenk, J., dissenting) (dissent from decision striking down law banning interracial marriage). But the Supreme Court's decision striking down bans on interracial marriage nearly 50 years ago did not lead to polygamous and incestuous marriages, and neither would ending the exclusion of same-sex couples from marriage. "Past judicial decisions explain why our nation's culture has considered [polygamous and incestuous] relationships inimical to the mutually supportive and healthy family relationships promoted by the constitutional right to marry." *In re Marriage Cases*, 183 P.3d at 434 n.52 (collecting cases). *See also Potter v. Murray City*, 760 F.2d 1065, 1070 & n.8 (10th Cir. 1985) (there is a "compelling state interest" in the bilateral nature of marriage).

5. The marriage ban's purpose was to subject same-sex couples to disparate treatment.

Courts look for a rational basis for legislation to ensure that the State has not engaged in line-drawing merely for "the purpose of disadvantaging the group burdened by the law." *Romer*, 517 U.S. at 633; *see also Windsor*, 133 S. Ct. at 2693; *City of Cleburne*, 473 U.S. at 450; *Moreno*, 413 U.S. at 534. The lack of any rational relationship between the ban and a legitimate interest, as well as the history of Wisconsin's marriage ban discussed above, shows that the law *is* an instance of such impermissible line-drawing.

This is not to say that the marriage ban reflects malice or hatred on the part of the laws' supporters. *See Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring). It may reflect "negative attitudes," *City of Cleburne*, 473 U.S. at 448, "fear," *id.*, "irrational prejudice," *id.* at 450, or nothing

more than an "instinctive mechanism to guard against people who appear to be different in some respects from ourselves," *Garrett*, 531 U.S. at 374 (Kennedy, J., concurring). But whatever the motivation, a "bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." *Moreno*, 413 U.S. at 534. And because no other interest is served by the marriage ban, it fails under any standard of review. Although a finding of animus is not required, *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 565 (2000) (per curiam) (allegations of irrational discrimination "quite apart from the Village's subjective motivation, are sufficient to state a claim for relief under traditional equal protection analysis"), the history and effect of Wisconsin's marriage ban support such a finding here.

It is of no moment that Wisconsin's marriage amendment constitutionalized an existing statutory ban, since equal protection is violated when a government has "selected *or reaffirmed* a particular course of action" because of its negative effect on an identifiable group. *Pers. Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979) (emphasis added). In any event, the Wisconsin marriage ban was not enacted at a time before people had "even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage." *Windsor*, 133 S. Ct. at 2689. The awareness of such aspirations on the part of same-sex couples—and the desire to thwart them—are precisely the reasons the ban was proposed in the first place. The "practical effect" of the ban is consonant with that intent: the marriage ban excludes same-sex couples from marriage, delegitimizes their relationships, and thereby "impose[s] a

disadvantage, a separate status, and so a stigma upon" same-sex couples and their families in the eyes of the state and the broader community. *Id.* at 2693. The ban is not rationally related to any legitimate interest but is "drawn for the purpose of disadvantaging" same-sex couples. *Romer*, 517 U.S. at 633. The ban, accordingly, fails rational basis review.

IV. *Baker v. Nelson* Is Not Dispositive.

Defendants half-heartedly and erroneously suggest that the Supreme Court's 1972 summary dismissal for want of a substantial federal question in *Baker v. Nelson*, 409 U.S. 810 (1972), is dispositive here. Def. Br. 43-44. As a summary adjudication, *Baker* is "not of the same precedential value as would be an opinion of [the Supreme Court] treating the question on the merits." *Gault v. Garrison*, 523 F.2d 205, 207 (7th Cir. 1975) (per curiam) (quoting *Edelman v. Jordan*, 415 U.S. 651, 671 (1974)). In particular, the Supreme Court has explicitly instructed that lower courts are not bound by such a disposition when "doctrinal developments indicate [the Court would now rule] otherwise." *Hicks v. Miranda*, 422 U.S. 332, 344 (1975) (quotation marks omitted).

As the district court put it, "[i]t would be an understatement to say that the Supreme Court's jurisprudence on issues similar to those raised in *Baker* has developed substantially since 1972." App. 109. The decisions in *Frontiero*, 411 U.S. at 688, *Romer*, 517 U.S. at 634-35, *Lawrence*, 539 U.S. at 567, and most recently *Windsor*, 133 S. Ct. at 2694, amount to doctrinal developments that "foreclose the conclusion that the issue is, as *Baker* determined, wholly insubstantial." *Kitchen*, 2014 WL 2868044, at *10.

V. The District Court Did Not Abuse Its Discretion In Granting Injunctive And Declaratory Relief.

Defendants also complain about the District Court's injunctive and declaratory relief. Def. Br. 59-65. This Court reviews a "district court's grant of injunctive relief and the scope of that relief for an abuse of discretion." *Fields v. Smith*, 653 F.3d 550, 554 (7th Cir. 2011); *see also PepsiCo, Inc. v. Redmond*, 54 F.3d 1262, 1272 (7th Cir. 1995) ("A district court ordinarily has wide latitude in fashioning injunctive relief.").

In this case, the district court carefully considered the Plaintiffs' proposed injunction and Defendants' objections to it and entered an injunction that was detailed, specific, and self-contained, but also provided an adequate remedy to Plaintiffs. App. 189-202. Defendants have not proposed alternative injunctive language. "[H]aving failed to suggest alternative language either in the district court or in this court, it has waived the objection [to the injunction's breadth]." *In re Aimster Copyright Litig.*, 334 F.3d 643, 656 (7th Cir. 2003); *see also United States v. Apex Oil Co.*, 579 F.3d 734, 739 (7th Cir. 2009) (rejecting argument that injunction was excessively "vague or open-ended" in part because "Apex has no suggestions for rewriting the injunction").

When a court finds a constitutional violation, it has "not merely the power, but the duty" to provide relief that will adequately halt the violation. *Green v. Cnty. Sch. Bd. of New Kent*, 391 U.S. 430, 438 n.4 (1968) (quotation marks omitted). The district court's remedy does no more than fulfill that duty. Courts must tailor equitable relief to the scope of the violation found, *e360 Insight v. The Spamhaus*

Project, 500 F.3d 594, 604-05 (7th Cir. 2007). While the scope of an injunction should not exceed the scope of the harm to be remedied, it "must also be broad enough to be effective . . . ." *Russian Media Grp., LLC, v. Cable America, Inc.*, 598 F.3d 302, 306-07 (7th Cir. 2010); *see also Judge v. Quinn*, 624 F.3d 352, 360 (7th Cir. 2010) ("[F]ederal courts have the power to issue remedial orders tailored to the scope of the constitutional violation.").

Here, the scope of Defendants' constitutional violation of excluding same-sex couples from civil marriage is inherently broad, so the remedy must be correspondingly broad. The ban permeates Wisconsin statutes that govern not only entry into marriage, but also hundreds of spousal protections, obligations, and benefits. Like Section 3 of DOMA, Wisconsin's ban "frustrates [equality] through a system-wide enactment with no identified connection to any particular area of . . . law." *Windsor*, 133 S. Ct. at 2964. To be broad enough to be effective, the injunction must reach the system-wide nature of the constitutional deprivation.

Defendants argue that the injunction "requires guesswork to comply." Def. Br. 60. They claim that the Governor cannot understand what it means to "direct all department heads, independent agency heads, or other executive officers" he appoints "to treat same-sex couples the same as different sex couples in the context of processing a marriage license or determining the rights, protections, obligations or benefits of marriage." *Id.* at 60-61. That claim borders on the ludicrous. The governor, who routinely "directs" his agency heads to take action, cannot

convincingly claim to not understand how to "direct" those agency heads to treat same-sex couples the same as different-sex couples.

Where, as here, a statutory scheme improperly excludes a class of people, the usual remedy is to expand the beneficiaries of the law to include the previously excluded class. *See Califano*, 443 U.S. at 89-91; *Jimenez v. Weinberger*, 417 U.S. 628, 637-38 (1974); *Frontiero*, 411 U.S. at 690-91 & n.25. The district court's injunction does just that, extending to same-sex couples the right to marry and have their marriages treated in all respects the same as those of different-sex couples.

Defendants claim that it is "unclear" whether the governor must direct his agency heads to apply all state statutes that use the terms "husband" or "wife" or similarly gendered terms so that same-sex spouses are included in marriage. Def. Br. 61. It is difficult to see how the district court could have been more clear that the answer is "yes." The fact that the injunction did not list each and every statute or regulation using those terms does not render it unclear or imprecise. Rule 65(d) requires a sufficient degree of detail to give an enjoined party fair notice of the conduct required or forbidden,[10] but it "does not require a torrent of words when more words would not produce more enlightenment about what is forbidden" or

[10] Defendants' fear of contempt is unwarranted. They can seek clarification of the injunction at any time, either under Fed. R. Civ. P. 60(b) or pursuant to the court's equitable powers, *Scandia Down Corp. v. Euroquilt, Inc.*, 772 F.2d 1423, 1432 (7th Cir. 1985) ("The right to seek clarification or modification of the injunction provides assurance, if any be sought, that proposed conduct is not proscribed."), and any ambiguity would be resolved in favor of the defendant in contempt proceedings. *Schering Corp. v. Illinois Antibiotics Co.*, 62 F.3d 903, 906 (7th Cir. 1995) ("It is enough protection for defendants if close questions of interpretation are resolved in the defendant's favor in order to prevent unfair surprise.").

required. *Scandia Down Corp. v. Euroquilt, Inc.*, 772 F.2d 1423, 1432 (7th Cir. 1985). Indeed, listing specific provisions affected by the law, as Defendants suggest at page 65 of their brief, could have the perverse effect of creating "more opportunities for evasion ('loopholes')." *Id.* at 1431. "Any effort to identify and prohibit" each and every potential violation of Plaintiffs' constitutional marriage rights "would have left [others] subject to dispute." *Id.*; *see also McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 192-93 (1949) (requiring excessively specific injunction "would give tremendous impetus to the program of experimentation with disobedience of the law," by allowing defendants to "work out a plan that was not specifically enjoined").

Defendants make the further perplexing argument that the district court's declaration that use of the terms "husband" and "wife" so as to deprive same-sex couples of marriage is unconstitutional somehow "rewrites" Wisconsin statutes so that Wis. Stat. ch. 765 (the marriage statutes) "can no longer be used by same-sex couples." Def. Br. 63-65.[11] Defendants direct this argument at the language of the *declaration*, not the injunction, which does not create a direct duty to act, as an injunction does. *See Marseilles Hydro Power, LLC v. Marseilles Land & Water Co.*, 299 F.3d 643, 647 (7th Cir. 2002). But in any event, the declaratory judgment makes clear that state officials are to provide same-sex couples the same marriage rights as

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[11] Defendants also make the contradictory argument that the declaratory judgment requires them to "replace the words 'husband' and 'wife' with 'spouse' and 'spouse' . . ." in the statutes. Def. Br. 64. However, the district court did not order the legislature to change words in the statute. Rather, the injunction requires that *Defendants* simply treat same-sex couples equally in applying Wisconsin's marriage laws.

different-sex couples, *not* deprive them of those rights. Moreover, an injunction must be read in light of the context that produced it, including "the mischief the injunction was designed to eradicate." *Youakim v. McDonald*, 71 F.3d 1274, 1283 (7th Cir. 1995). Defendants' distortion of the plain language of the declaratory judgment and injunction would undermine their manifest purpose to allow same-sex couples the same marriage rights as different-sex couples.

CONCLUSION

For the reasons discussed above, Plaintiffs respectfully request that this Court affirm the District Court's grant of summary judgment, permanent injunction, and declaration.

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CERTIFICATE OF RULE 32 COMPLIANCE

Pursuant to Rule 32(a)(7) of the Federal Rules of Appellate Procedure, I hereby certify that this brief complies with the stated type-volume limitations. The text of this brief was prepared in Century Schoolbook 12 point font. All portions of the brief, other than the Disclosure Statement, Table of Contents, Table of Authorities, and the Certificates of Counsel, contain 13,855 words. This certification is based on the word count function of the Microsoft Office Word word processing software, which was used in preparing this brief.

Dated: August 4, 2014 /s/ John A. Knight

CERTIFICATE OF SERVICE

I hereby certify that on August 4, 2014, I caused a true and correct copy of the foregoing Plaintiffs'-Appellees' Brief to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: August 4, 2014 /s/ John A. Knight