UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

BRITTANI HENRY and BRITTNI ROGERS, et al.,	:	
	:	**Case No. 1:14-cv-129**
Plaintiffs,	:	
	:	**Judge: Timothy S. Black**
vs.	:	
	:	
THEODORE E. WYMYSLO, M.D., et al.,	:	
	:	
	:	
Defendants.	:	

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR DECLARATORY AND INJUNCTIVE RELIEF

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I. INTRODUCTION AND SUMMARY PURSUANT TO LOCAL RULE 7.2(A)(3).

When John Arthur and William Ives died the rulings by this Court allowed these men to be forever recorded on their death certificates as "married" and for Jim Obergefell and David Michener to be forever recorded as their respective surviving spouses. Orderly cremation and burial directives followed. Grieving was not aggravated and instead was actually supported as their loving family relationships were officially affirmed by the state. All this mirrored the end of life reality for married opposite-sex couples in Ohio.

Now before the Court are same-sex married couples at the other end of their family journey together — giving birth and adopting their children. Once again the Court is asked to enforce their rights to due process and equal protection. That is, to order Defendants to treat same-sex married parents and their children the same as their opposite-sex counterparts. Having already clearly declared this broad right to marriage recognition in *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968 (S.D. Ohio 2013), the relief due these Plaintiffs is clear. As set out in the complaint and the undisputed declarations of the Plaintiffs, experts, and witnesses, Ohio's refusal to recognize the same-sex marriages of these parents hurts their children and their families. For example, Plaintiffs Georgia Yorksmith and her wife Pam have a three year old son. But Georgia is the only parent named on his birth certificate. She describes the extensive documents that have been drafted to allow Pam the authority to travel alone with their son, secure medical care, and address issues at school. Pam wants all of this responsibility as well as the responsibility to provide support for their son. What if Pam loses an authorization and medical care is urgently needed? What if that happens on a trip in Canada? What if Georgia and Pam break up?[1] The answers to these and many other questions would be clear if Ohio recognized the California

[1] A partial list of the injuries suffered by same-sex parents and children as a result of the Ohio Marriage Recognition bans is attached as Exhibit A.

same-sex marriage of Georgia and Pam. Instead Ohio treats their marriage as void. Now they are expecting a second child. Once again they want to be partners in the fullest sense, accepting *all* the legal duties that come with parenthood. But Ohio says no. Ohio is actually saying to the parents who are not on their children's birth certificates that it will not hold them responsible for their children. How can that serve any government interest? Why should those children have only one parent legally responsible for their welfare when children with married opposite-sex parents have two?

All of these Plaintiffs have valid marriages from states where same-sex marriages are legal. The Ohio marriage recognition ban denies to these same-sex married couples rights secured by the due process and equal protection provisions of the Constitution. Indeed, in the mere nine months since *United States v. Windsor*, nine federal courts have declared unconstitutional and enjoined enforcement of similar bans in states across the country, on grounds of due process, equal protection, or both.[2] In fact the issue is so basic that Eric Holder, Attorney General of the United States of America, and eight state attorneys general have refused to defend provisions similar to Ohio's in cases across the country.[3] Defendants have not

[2] *See, e.g.*, *DeBoer v. Snyder*, No. 12-CV-10285, 2014 WL 1100794, at *17 (E.D. Mich. Mar. 21, 2014) (permanently enjoining Michigan anti-celebration provisions on equal protection grounds); *Tanco v. Haslam*, No. 3:13-cv-01159, 2014 WL 997525, at *6, *9 (Mar. 14, 2014) (preliminarily enjoining enforcement of Tennessee anti-recognition provisions, on equal protection grounds); *De Leon v. Perry*, No. SA-13-CA-00982-OLG, 2014 WL 715741, at *1, *24 (W.D. Tex. Feb. 26, 2014) (preliminarily enjoining Texas anti-celebration and anti-recognition provisions on equal protection and due process grounds); *Lee v. Orr*, No. 13-CV-8719, 2014 WL 683680 (N.D. Ill. Feb. 21, 2014) (declaring Illinois celebration ban unconstitutional on equal protection grounds); *Bourke v. Beshear*, No. 3:13-CV-750-H, 2014 WL 556729, at *1 (W.D. Ky. Feb. 12, 2014) (declaring Kentucky's anti-recognition provisions unconstitutional on equal protection grounds); *Bostic v. Rainey*, No. 2:13cv395, 2014 WL 561978, at *23 (E.D. Va. Feb. 13, 2014) (finding Virginia's anti-celebration and anti-recognition laws unconstitutional on due process and equal protection grounds, and preliminarily enjoining enforcement); *Bishop v. United States ex rel. Holder*, No. 04-CV-848-TCK-TLW, 2014 WL 116013, at *33-34 (N.D. Okla. Jan. 14, 2014) (permanently enjoining Oklahoma's anti-celebration provisions on equal protection grounds); *Obergefell*, 2013 WL 6726688, *23-24 (permanently enjoining as to plaintiffs enforcement of Ohio anti-recognition provisions, on due process and equal protection grounds); *Kitchen v. Herbert*, No. 2:13-cv-217, 2013 WL 6697874, at *30 (Dec. 20, 2013) (permanently enjoining Utah anti-celebration provisions on due process and equal protection grounds).

[3] Emma Margolin, *Kentucky attorney general won't appeal gay marriage ruling*, MSNBC March 4, 2012, available at http://www.msnbc.com/msnbc/the-bluest-red-state ("Conway is the eighth attorney general in the country to abandon such laws in the face of mounting legal victories for marriage equality.").

identified any legitimate state interest that allows Ohio to continue this discrimination. Nor can the State properly deny full faith and credit to the adoption decree presented by the Vitale/Tamales Family. The declaratory judgment and permanent injunction should be granted as requested.

II. OHIO'S DISCRIMINATORY MARRIAGE RECOGNITION BANS ARE FACIALLY UNCONSTITUTIONAL, AND PLAINTIFFS ARE ENTITLED IN THIS ACTION TO DECLARATORY AND INJUNCTIVE RELIEF STRIKING DOWN THESE STIGMATIZING LAWS.

This Court's concluding declaration in *Obergefell* resoundingly expressed the facial invalidity of Ohio's marriage recognition bans, not only as applied to the Plaintiffs and the issue of death certificates, but in *any* application to *any* married same-sex couple:

> Article 15, Section 11, of the Ohio Constitution, and Ohio Revised Code Section 3101.01(C), violate rights secured by the Fourteenth Amendment to the United States Constitution in that same-sex couples married in jurisdictions where same-sex marriage is lawful, who seek to have their out-of-state marriage recognized and accepted as legal in Ohio, are denied their fundamental right to marriage recognition without due process of law; and are denied their fundamental right to equal protection of the laws when Ohio does recognize comparable heterosexual marriages from other jurisdictions, even if obtained to circumvent Ohio law.

962 F. Supp. 2d at 997.

Defendants make much ado about Plaintiffs' request for a ruling that the marriage recognition bans are facially unconstitutional. But this remedy is the only adequate cure for the equal protection and substantive due process violations plainly alleged in the complaint. Ohio's marriage recognition bans embody an unequivocal, purposeful, and explicitly discriminatory classification, singling out same-sex couples alone for disrespect of their out-of-state marriages and denial of their fundamental liberties. This classification, relegating lesbian and gay married couples to a second-class status in which only *their* marriages are deemed void in Ohio, is the

core constitutional violation all the Plaintiff couples challenge. The Constitution "neither knows nor tolerates classes among citizens." *Romer v. Evans*, 517 U.S. 620, 623 (1996) (quotation marks omitted). There can be no circumstances under which this discriminatory classification is constitutional — it was intended to and on its face does stigmatize and disadvantage same-sex couples and their families, denying only them protected rights to recognition of their marriages and violating the guarantee of equal protection. Indeed, this Court already held as much in *Obergefell*, finding that the State enacted the marriage recognition bans with discriminatory animus and without a single legitimate justification. The relief Plaintiffs seek is fully consistent with the U.S. Supreme Court's ruling in *United States v. Windsor*, 133 S. Ct. 2675 (2013), striking down Section 3 of DOMA in its entirety, and with other decisions around the nation striking down similar classifications purposefully relegating same-sex couples to second class statuses and denying them protected liberties.

A. There Is No Procedural Barrier to a Facial Ruling in this Action.

Defendants argue that Plaintiffs assert only now in their merits briefing new "unpleaded allegations" regarding the marriage recognition bans' facial unconstitutionality. (Doc. 20, p. 6). Defendants ignore both the nature of facial relief and the plain allegations in the complaint, which more than support granting this remedy.

The Supreme Court explained in *Citizens United v. Federal Election Commission* that "the distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge." 558 U.S. 310, 331 (2010). The distinction between the two "*goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint*." *Id.* (emphasis added). In that case, the plaintiff was not even pursuing a facial

remedy, *id.* at 329, yet the Supreme Court still held that it could and should rule on the facial validity of the challenged law. *Id.* at 330. Even in a case explicitly framed as only an as-applied challenge (which this case is not), the court has authority to facially invalidate a challenged law. "'[O]nce a case is brought, no general categorical line bars a court from making broader pronouncements of invalidity in properly 'as-applied' cases.'" *Id.* at 331 (quoting Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1339 (2000)). This Court thus is free to declare the Ohio laws facially unconstitutional without any additional pleadings or showings by the parties.

In any event, the allegations in the complaint — as well as the undisputed facts and governing law — amply establish the facial invalidity of the marriage recognition bans and the propriety of a ruling striking them down in their entirety. The Plaintiffs plainly allege that they "seek to be treated the same as married opposite-sex couples." (Complaint, Doc. 1, ¶ 1.) "These families established through same-sex marriages must [be] granted the same status and dignity enjoyed by children and parents in families established through opposite-sex marriages." (*Id.*; *see also, e.g.*, ¶¶ 66-67, 71-73, 77, and ¶ E. of VII. Prayer for Relief ("Award such other and further relief as this Court shall deem just and reasonable.")).

Nor do Defendants suffer unfair prejudice from the Court's consideration of the facial invalidity of the marriage bans. Contrary to Defendants' suggestion (Doc. 20, pp. 6-7), Plaintiffs have not asserted some new claim or cause of action in arguing that the appropriate remedy for their Fourteenth Amendment claim is a ruling that the marriage recognition bans are facially invalid. Under *Citizens United*, a "'claim' remains a single 'claim' even where a plaintiff challenges an enactment both on its face and 'as applied' to the specific facts at issue." *Ass'n of Cmty. Orgs. for Reform Now (ACORN) v. Corbett*, No. 09-951, 2010 WL 3885373, *6 (W.D.

Pa. Sept. 28, 2010) (citing *Citizens United*, 558 U.S. at 893). Likewise, Defendants cannot articulate any additional evidence they could possibly adduce to defend against the marriage recognition bans' facial invalidity; nor have they requested additional time for further briefing.

The reason is obvious: Defendants have nothing to offer beyond the inadequate arguments already rejected in *Obergefell* to defend the facially unconstitutional bans.

B. The Discriminatory Classification Drawn by the Marriage Recognition Bans Calls for Facial Invalidation, Just As Similar Classifications Have Been Invalidated by the Supreme Court and Other Courts Around the Nation.

"It is beyond debate that it is constitutionally prohibited to single out and disadvantage an unpopular group." *Obergefell*, 962 F. Supp. 2d at 996. The challenged marriage recognition bans on their face create a categorical classification that singles out and severely disadvantages lesbian and gay couples; "beyond debate," the bans are unconstitutional. The equal protection challenge to the marriage recognition bans is the quintessential claim calling for facial relief, in the form of a declaration that the bans are facially unconstitutional and an injunction entirely enjoining their enforcement. "Case-by-case adjudication . . . has little, if any, role to play in equal protection analysis. If the statute is invalid to one, it is invalid to all, which explains why equal protection claims are normally adjudicated as facial challenges." David H. Gans, *Strategic Facial Challenges*, 85 B.U.L. Rev. 1333, 1382-83 (2005); *see also* Fallon, *supra*, 113 Harv. L. Rev. at 1324 ("[T]he availability of facial challenges varies on a doctrine-by-doctrine basis and is a function of the applicable substantive tests of constitutional validity.").[4]

[4] The bans' categorical deprivation of recognition to the valid out-of-state marriages of same-sex couples is also facially invalid as a matter of substantive due process. *See, e.g.*, *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (striking down Virginia anti-miscegenation laws as in violation of guarantees of due process, as well as equal protection); *Lawrence v. Texas*, 539 U.S. 558 (2003) (striking down Texas's "homosexual conduct" law as violative of protected liberty interests); *MacDonald v. Moose*, 710 F.3d 154, 166 (4th Cir. 2013) (following *Lawrence* to conclude that Virginia's sodomy prohibition "is facially unconstitutional").

Defendants assert that "'[a] facial challenge to a law's constitutionality is an effort to invalidate the law in each of its applications, to take the law off the books completely.'" (Doc. 20, p. 8) (quoting *Speet v. Schuette*, 726 F.3d 867, 871-72 (6th Cir. 2013). That is exactly what Plaintiffs seek to do; there are no conceivable constitutional applications of the marriage recognition bans, and their very existence in Ohio law imposes an unconstitutional badge of inferiority on married same-sex couples and their families. This stain should be removed once and for all.

Defendants argue that to prevail on a facial challenge, Plaintiffs must demonstrate that "no set of circumstances exists under which [the marriage recognition bans] would be valid." *Speet*, 726 F.3d at 872 (quoting test from *United States v. Salerno*, 481 U.S. 739, 745 (1987)).[5] That is precisely the case here. This Court already found in *Obergefell* that the only "purpose served by treating same-sex married couples differently than heterosexual married couples is the same improper purpose that failed in *Windsor* and in *Romer*: 'to impose inequality' and to make gay citizens unequal under the law." *Obergefell*, 962 F. Supp. 2d at 996. "[T]here is no legitimate state purpose served by Ohio's refusal to recognize same-sex marriages celebrated in states where they are legal." *Id*. at 995. There can be no set of circumstances in which these laws, which aim only to impose inequality on lesbian and gay couples and which serve not a single legitimate purpose, could be validly applied.

[5] As the Sixth Circuit has noted, the standard for facial challenges is not necessarily so clear cut and may impose a lesser burden. *See, e.g.*, *Speet*, 726 F.3d at 872 (observing that while the "no set of circumstances" standard may be the "general rule," exceptions exist, and applying a different standard in First Amendment challenge); *Staley v. Jones*, 239 F.3d 769, 788-91 (6th Cir. 2001) (noting that *Salerno* standard has been criticized by Supreme Court justices and has not been consistently applied in subsequent decisions of that Court); *Women's Med. Prof. Corp. v. Voinovich*, 130 F.3d 187, 194 (6th Cir. 1997) (noting that although test for facial invalidity of abortion regulations on substantive due process grounds — whether regulation would operate as substantial obstacle to abortion in large fraction of cases — articulated in *Planned Parenthood of Southeastern Pa. v. Casey*, 508 U.S. 833, 895 (1992), "does not expressly purport to overrule *Salerno*, in effect it does").

The remedy Plaintiffs seek, striking down the marriage recognition bans in their entirety, is fully consistent with the facial remedies granted in similar cases challenging laws singling out gay people for deprivation of their rights. Notably *Windsor*, challenging DOMA in the context of an estate tax charge that would not have applied had the federal government recognized the plaintiff widow's same-sex marriage, struck down Section 3 of DOMA in its entirety, and not only as applied to Edith Windsor. *Windsor*, 133 S. Ct. at 2696 ("The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity."); *see also Romer*, 517 U.S. at 635 (affirming lower court's invalidation of Colorado amendment, and holding: "We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do."); *De Leon v. Perry*, 2014 WL 715741, *27, n.7 (Texas's marriage ban "fails the constitutional facial challenge because . . . Defendants have failed to provide any — and the Court finds no — rational basis that banning same-sex marriage furthers a legitimate governmental interest; that is, the court finds 'no set of circumstances' under which Section 32 would be valid.").

Plaintiffs in this case seek declaratory and injunctive relief that will end Ohio's enforcement of its facially unconstitutional marriage recognition bans, once and for all.

III. BAKER V. NELSON IS NO LONGER BINDING; WINDSOR AND OBERGEFELL STRONGLY SUPPORT PLAINTIFFS' CLAIMS.

As set out above and throughout Plaintiffs' reply memoranda, this case is squarely based on the holdings of *Windsor* and *Obergefell*. The summary ruling in *Baker v. Nelson*, 409 U.S. 810 (1972), has been overtaken by several overriding doctrinal developments. Moreover, as a federal statute, Section 2 of DOMA cannot provide a defense to a constitutional challenge.

A. *Baker v. Nelson* Does Not Control this Case.

Defendants wrongly suggest that the 1972 summary dismissal in *Baker* requires this Court to reject Plaintiffs' claims. This one-line decision rendered 42 years ago no longer has any weight in light of the intervening case law. Every court that has reviewed this issue since *Windsor* has held that *Baker* is not controlling because the Supreme Court's doctrine has substantially changed since 1972. *See, e.g.*, *DeBoer*, 2014 WL 1100784, at *15 n.6 (concluding that "*Baker* no longer has any precedential effect"); *De Leon*, 2014 WL 715741, at *8-10; *Bostic*, 2014 WL 561987, at *9-10; *Bishop*, 2014 WL 116013, at *15-17; *Kitchen*, 2013 WL 6697874, at *7-9; *see also Bourke*, 2014 WL 556729, at *1 (noting that "[a] lot has changed since [*Baker*]"); *Whitewood v. Wolf*, 1:13-cv-1861, "Memorandum and Order," Nov. 15, 2013 (Exhibit B, attached). In *Whitewood*, the court explained that "significant doctrinal developments in the areas of due process and equal protection . . . eviscerate any utility or controlling effect that Defendants posit *Baker v. Nelson* may have . . . ." *Id.* at 6 (citing *Hicks v. Miranda*, 422 U.S. 332, 344 (1975) ("[I]f the Court has branded a question as unsubstantial, it remains so except when doctrinal developments indicate otherwise [.]")). In recent months, many other courts both within and outside the Sixth Circuit have rightly come to the same conclusion.

In *Baker*, the plaintiffs appealed a decision of the Minnesota Supreme Court declining to recognize marriage between same-sex couples. There have been significant developments affecting marriage equality since 1972, when *Baker*'s one-line summary dismissal was issued, finding "[t]he appeal is dismissed for want of a substantial federal question." 409 U.S. 810. For example, in *Windsor*, the Second Circuit held that one of the reasons *Baker* did not control was that "[i]n the forty years after *Baker*, there have been manifold changes to the Supreme Court's equal protection jurisprudence." *Windsor v. United States*, 699 F.3d 169, 178-79 (2d Cir. 2012),

aff'd, 133 S. Ct. 2675 (2013); *id.* at 179 ("These doctrinal changes constitute another reason why *Baker* does not foreclose our disposition of this case."). As the Second Circuit explained:

> When *Baker* was decided in 1971, "intermediate scrutiny" was not yet in the Court's vernacular. Classifications based on illegitimacy and sex were not yet deemed quasi-suspect. The Court had not yet ruled that "a classification of [homosexuals] undertaken for its own sake" actually lacked a rational basis. And, in 1971, the government could lawfully "demean [homosexuals'] existence or control their destiny by making their private sexual conduct a crime."

Id. (citations omitted).

Similarly, *Baker* could not and did not address how Plaintiffs' substantive due process claims should be evaluated in light of the Court's intervening decisions in *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Turner v. Safley*, 482 U.S. 78 (1987); *Lawrence v. Texas*, 539 U.S. 558 (2003); and *Windsor*, 133 S. Ct. 2675 (2013).

Baker also is not controlling here because it involved different issues than those presented in this case. Summary dispositions "prevent lower courts from coming to opposite conclusions on the *precise issues presented and necessarily decided* by those actions." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (emphasis added). *Baker* addressed the constitutionality of a Minnesota marriage law passed at a time before there was any public discussion about marriage for same-sex couples. It did not consider the constitutionality of a law enacted by a state specifically to preclude marriage for same-sex couples and whether such an enactment had the "purpose and effect to disparage and to injure" same-sex couples. *Windsor*, 133 S. Ct. at 2696. Of central importance for this case is the fact that *Baker* did not consider the constitutionality of a law barring *recognition* of valid marriages of same-sex couples entered into in other jurisdictions. By contrast, in *United States v. Windsor*, decided just last term, the Supreme Court struck down a law prohibiting the federal government from recognizing valid marriages of same-sex couples, marking a critically significant doctrinal development in the

context of marriage recognition bans. Thus, *Baker* poses no bar to the relief requested by Plaintiffs in this case.

B. Section 2 of DOMA Does Not Trump the Constitution or Block this Court from Ordering Relief in this Case.

Section 2 of DOMA does not protect Ohio's marriage recognition ban from constitutional scrutiny. Congress states in Section 2 that states need not give effect to same-sex marriages from other states. But as this Court made clear in *Obergefell*, since the failure to provide recognition to valid same-sex marriages from other states is itself unconstitutional, then, as a federal statute, Section 2 of DOMA will provide no defense: "[T]his Court states affirmatively that Section 2 of DOMA does not provide a legitimate basis for otherwise constitutionally invalid state laws, like Ohio's marriage recognition bans, no matter what the level of scrutiny. Although Section 2 of DOMA is not specifically before this Court, the implications of today's ruling speak for themselves." *Obergefell*, 962 F. Supp. 2d at 981, n. 9 (citing *Kitchen*, 961 F. Supp. 2d 1181).

The Supreme Court has stated that the "requirement of full faith and credit is to be read and interpreted in the light of well-established principles of justice, protected by other constitutional provisions which it was never intended to modify or override." *Bigelow v. Old Dominion Copper Mining & Smelting Co.*, 225 U.S. 111, 134 (1911). *See also Botz v. Helvering*, 134 F.2d 538, 545 (8th Cir. 1943) (same); *Wetmore v. Karrick*, 205 U.S. 141 (1907) (full faith and credit clause necessarily to be interpreted in connection with other provisions of the Constitution). DOMA Section 2 therefore does not give Ohio license to violate core Constitutional civil rights protections, including the Fourteenth Amendment's guarantees of equal protection and due process.

IV. THE MARRIAGE RECOGNITION BANS VIOLATE THE RIGHT TO DUE PROCESS.

A. Defendants Infringe the Plaintiff Couples' Right of Marriage Recognition, Requiring Heightened Scrutiny of the Marriage Recognition Bans.

1. As this Court Already Held in *Obergefell*, Ohio Violates the Fundamental Right to Remain Married.

This Court correctly identified a constitutional due process right "not to be deprived of one's already-existing legal marriage and its attendant benefits and protections." *Obergefell*, 962 F. Supp. 2d at 978.[6] Contrary to Defendants' assertion in their Opposition, this right is a deeply-rooted aspect of the due process protections long accorded to "*existing* marital, family, and intimate relationships." *Id.*; *see also Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (confirming substantive due process protections accorded marriage and childrearing, and noting that "Nation's history, legal traditions, and practices" provide guideposts to discern constitutionally-protected fundamental liberties). The fundamental right to marriage and to make personal decisions with respect to marital relationships is well-settled. *See, e.g.*, *Turner*, 482 U.S. at 95-96; *Griswold v. Connecticut*, 381 U.S. at 486 (1965); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974). The right "to marry," and to "establish a home and bring up children," is central to the liberty protected by the Due Process Clause. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). The long line of decisions recognizing the significance of, and protections accorded, marital relationships would be meaningless if states could unilaterally refuse to recognize the marriages of disfavored groups, thereby depriving these spouses of their constitutionally-protected liberty.

[6] *See also De Leon*, 2014 WL 715741, at *21-24 (noting *Windsor*'s holding that "out-of-state marriage recognition . . . was a right protected under the Constitution," and concluding likelihood of success that plaintiffs will demonstrate Texas lacked even rational basis for withholding recognition to same-sex marriages, in violation of due process); *Bourke*, 2014 WL 556729, at *6 (finding reasoning in *Windsor* "about the legitimacy of laws excluding recognition of same-sex marriages [] instructive," and concluding that Kentucky laws denying recognition of valid out-of-state same-sex marriages are unconstitutional).

There is nothing novel about the principle that couples have fundamental vested rights to have their marriages, once entered, accorded legal recognition by the state. Indeed, in *Loving v. Virginia*, the Supreme Court struck down not only Virginia's law prohibiting inter-racial marriages within the state, but also its statutes denying recognition to and criminally punishing such marriages entered into outside the state. 388 U.S. 1, 4 (1967). It did so in a case involving a couple who had celebrated their nuptials in the District of Columbia and was then prosecuted on return to their Virginia home for marrying out of state. *Id.* at 2-3. Significantly, the Court held that Virginia's statutory scheme, including the penalties imposed on out-of-state marriages and the voiding of marriages obtained elsewhere, "deprive[d] the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment." *Id.* at 12.[7] *See also Zablocki*, 434 U.S. at 397 n.1 (1978) (Powell, J., concurring) ("[T]here is a sphere of privacy or autonomy surrounding *an existing marital relationship* into which the State may not lightly intrude. . . .") (emphasis added).

The expectation that one's marriage, once entered into, will be respected throughout the land is deeply rooted in "[o]ur Nation's history, legal traditions, and practices." *Glucksberg*, 521 U.S. at 721. As one federal court put it 65 years ago, the "policy of the civilized world [] is to sustain marriages, not to upset them." *Madewell v. United States*, 84 F. Supp. 329, 332 (E.D. Tenn. 1949). Historically, certainty that a marital status once obtained will be universally recognized has been understood to be of fundamental importance both to the individual and to society more broadly: "for the peace of the world, for the prosperity of its respective communities, for the well-being of families, for virtue in social life, for good morals, for religion,

[7] Defendants disingenuously claim that "Ohio is not taking away existing marriage rights from same-sex couples," because the couples remain married under the laws of the place of celebration. (Doc. 20, p. 18). The Lovings too remained married under the laws of the District of Columbia, yet their due process rights were plainly violated by Virginia law declaring their marriage void within that state.

for everything held dear by the race of man in common, it is necessary there should be one universal rule whereby to determine whether parties are to be regarded as married or not." 1 Joel Prentiss Bishop, *New Commentaries on Marriage, Divorce, and Separation* § 856, at 369 (1891).

Accordingly, interstate recognition of marriage has been a defining and essential feature of American law. The longstanding, universal rule of marriage recognition dictates that a marriage valid where celebrated is valid everywhere. *See, e.g.*, Joseph Story, *Commentaries on the Conflict of Laws* § 113, at 187 (8th ed. 1883) ("[t]he general principle certainly is . . . that . . . marriage is decided by the law of the place where it is celebrated"); Fletcher W. Battershall, *The Law of Domestic Relations in the State of New York* 7-8 (1910) (describing "the universal practice of civilized nations" that the "permission or prohibition of particular marriages, of right belongs to the country where the marriage is celebrated"); *In re Lenherr Estate*, 314 A.2d 255, 258 (Pa. 1974) ("In an age of widespread travel and ease of mobility, it would create inordinate confusion and defy the reasonable expectations of citizens whose marriage is valid in one state to hold that marriage invalid elsewhere.").

The "public policy" exception to the rule of universal marriage recognition has been little used, and indeed, until states like Ohio began enacting their categorical non-recognition laws for same-sex marriages, had grown nearly "obsolete." Joseph William Singer, *Same Sex Marriage, Full Faith and Credit, and the Evasion of Obligation*, 1 Stan. J. C.R. & C.L. 1, 40 (2005); *see also* Andrew Koppelman, *Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges*, 153 U. Pa. L. Rev. 2143, 2148 (2005) (public policy exception had become "archaic").

Ohio's own history and laws are consistent with the fundamental importance of the marriage recognition principle in U.S. legal history and tradition. As this Court found in

Obergefell, until Ohio's enactment of the marriage recognition bans, Ohio always followed this "firmly rooted," "longstanding legal principle." *Obergefell*, 962 F. Supp. 2d at 986 (noting range of marriages prohibited under Ohio law yet nonetheless accorded recognition when celebrated out of state). "[I]t is absolutely clear that under Ohio law, from the founding of the state through at least 2004, the validity of a heterosexual marriage is to be determined by whether it complies with the law of the jurisdiction where it was celebrated"— even if the marriage would have violated state law if entered in Ohio. *Id.* at 985. Ohio's categorical refusal to give effect to marriages entered in other jurisdictions between spouses of the same sex is an unprecedented departure from the State's historical recognition of all other out-of-state marriages. *Id.* at 993. Far from "conflict[ing] with Ohio's [] marriage policies," as Defendants suggest (Doc. 20, p. 17), requiring recognition of out-of-state same-sex marriages would conform to Ohio's historic policy to accord universal respect to marriages valid where entered. It would also conform to the guarantee of substantive due process, which requires recognition by Ohio of same-sex marriages valid where entered.

2. Defendants Unduly Burden Plaintiffs' Right to Marriage Recognition, As Well As their Rights to Parental Autonomy and Travel.

Defendants suggest that their refusal to recognize the marriages of same-sex couples, including for purposes of issuing accurate two-parent birth certificates, imposes at most trivial burdens on these families. (Doc. 20, pp. 18, 19-22). They do not dispute that Plaintiffs have a protected right to parental autonomy, which is impacted by the State's refusal to accord the marital presumption of parentage that would unquestionably deem both spouses the parents of the children born or adopted in their marriages. (Doc. 18-1, p. 19). Instead, Defendants mischaracterize Plaintiffs' claim as asserting a "fundamental right to a birth certificate with two names." (Doc. 20, p. 20).

But Plaintiffs contend that their fundamental rights of marriage recognition and parental autonomy are infringed by the State's refusal to give legal recognition to the marriages and the parental rights that flow from that recognition. Defendants' sweeping denial of these rights severely burdens the Plaintiff families in numerous ways, many already expressly identified by this Court in *Obergefell*. 962 F. Supp. 2d at 979-980, 983-984; *see also id.* at 980 ("The benefits of state-sanctioned marriage are extensive, and the injuries raised and evidenced by Plaintiffs represent just a portion of the harm suffered by same-sex married couples due to Ohio's refusal to recognize and give the effect of law to their legal unions."); Decl. of Susan J. Becker, Doc. 17-3, ¶¶ 20, 23; Decl. of Bernard L. McKay, Doc. 17-7, ¶¶ 16-67; Decl. of Letitia Anne Peplau, Doc. 17-8, ¶¶ 38-56. Moreover, *Windsor* expressly condemned the harm to children wrought by the government's refusal to recognize the marriages of their same-sex parents, emphasizing the "humiliat[ion]," "financial harm," and stigma imposed on children by governmental disrespect for their parents' marriages. 133 S. Ct. at 2694-2696. "[It] makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Id*. at 2694.

Defendants' refusal to issue accurate birth certificates — but one manifestation of its blanket deprivation of the rights of married same-sex couples and their families — is itself a severe intrusion on Plaintiffs' protected rights. Defendants callously suggest that having only one parent listed on a child's birth certificate imposes no hardship on these two-parent families and their children. (Doc. 20, p. 20-21). Defendants' insupportable policy means that only the named parent may be able to register the child in school;[8] make medical decisions for a child in

[8] *See* Ohio Rev. Code Ann. § 3313.672(A)(1) (birth certificate generally must be presented at time of initial entry into public or nonpublic school); *Enrollment Guidelines*, Cincinnati Public Schools, http://www.cps-k12.org/schools/enroll (last visited Mar. 26, 2014).

times of crisis; rely on the birth certificate as proof of parental status when traveling;[9] or readily insure the child on the parent's health coverage.[10]

Defendants similarly assert that depriving the children of these families birth certificates naming both of their parents does not "directly and substantially interfere with" the right to travel. (Doc. 20, p. 21). Here too Defendants reveal callous disregard for the harms inflicted by the government's animus towards married same-sex couples. According to Defendants, all Plaintiffs Vitale and Talmas need do to obtain their son's birth certificate, with which they could obtain his passport, is yield to Ohio's unreasonable demand that they choose only one of them to be the child's designated parent. But they and their son are entitled to a birth certificate naming *both* his parents. Ohio cannot impose on the Vitale/Talmas Family the Hobson's choice to capitulate to the State's discriminatory conditions and designate only one parent on the document, or receive no amended birth certificate at all. The Plaintiffs should not be required by the State to forego constitutionally-protected rights to marriage recognition and parental autonomy as a condition of receipt of an amended birth certificate — and an inaccurate and incomplete one at that.

Nor can the State impair the family's right to travel by withholding an accurate birth certificate, which is not only the most effective currency to obtain a passport, but also can be

[9] *See* fn. 11, *infra*.

[10] Nor is a shared custody agreement a substitute for an accurate birth certificate acknowledging the non-biologically related parent's legal parental status. Such shared custody agreements are not the universally understood evidence of parentage a birth certificate supplies, within just days of the birth of the child and without the need to petition a juvenile court. Co-custody orders consistent with *In re Bonfield*, 97 Ohio St.3d 387 (Ohio 2002), do not result in declarations of parentage, *see id.* at 394-96, but rather allow for orders by which a court retains jurisdiction until the child is emancipated. A custodian can be denied time with the child based on a best interest test. *Id.* at 396. In contrast, those parents whose parent-child relationships are recognized in Ohio risk losing their parental rights based only upon a showing that they have abused, neglected, or abandoned the child. Married same-sex couples and their children should not be relegated to a regime in which the best security Ohio offers for their parent-child relationships is no more than the ability to petition a juvenile court for a shared custody agreement.

produced by *either* man to demonstrate his parental rights and authority to travel with Adopted Child Doe. Two men or a single man traveling alone with a child can expect to be required to produce proof of parentage, in addition to the child's passport, before boarding a plane, crossing a border, or even traveling in-state.[11] A birth certificate identifying both parents offers the surest, least intrusive proof of parentage, and is far preferable to handing strangers an adoption decree that reveals private information about their son's adoptive status. The lesbian Plaintiff couples will face similar dilemmas when the non-biologically-related parent travels with her child, whose legal connection to his or her mother cannot be clearly established without an accurate birth certificate. The burden on Plaintiffs from being deprived of birth certificates for their children correctly identifying both parents is far weightier than the "negligible" distinction between a "certificate" of driving and a license to drive at issue in *LULAC v. Bredesen*, 500 F.3d 523, 535 (6th Cir. 2007), on which Defendants rely. (Doc. 20, p. 22).

The Supreme Court has applied the unconstitutional conditions doctrine to prohibit states from similarly burdening the right to travel, as well as other protected rights. In *Shapiro v. Thompson*, for example, the Court applied strict scrutiny to a one-year residency requirement for eligibility for welfare benefits because the policy burdened the right to interstate travel. 394 U.S. 618, 629-30, 634 (1969). The residency requirement did not preclude individuals from moving

[11] *See, e.g.*, *Children – Child Traveling With One Parent or Someone Who is Not a Parent or Legal Guardian or a Group*, U.S. Customs & Border Protection (July 31, 2013), https://help.cbp.gov/app/answers/detail/a_id/268/kw/children%20birth%20certificate/sno/1 (noting that many countries require documentation of absent parent's consent when child travels alone with other parent, and that "failure to produce notarized permission letters and/or birth certificates could result in travelers being refused entry (Canada has very strict requirements in this regard)"); *Information About Children Under 18 Years of Age Traveling to Canada*, Government of Canada (Dec. 20, 2013), http://www.canadainternational.gc.ca/united_kingdom-royaume_uni/visas/trav-can_18_voy-can.aspx (if minor child is traveling with one parent only, "[t]he child should have a copy of his/her birth certificate as well as a letter of authorization . . . signed by the parent who is not traveling with him."); *Mexico Entry Requirements*, Consulate Gen. of the U.S., Monterrey, Mexico, http://monterrey.usconsulate.gov/acs_mex_entry.html (last visited Mar. 26, 2014) (Mexico requires non-Mexican citizens under age of 18 departing country with only one parent to carry proof of consent by other parent to travel and proof of parent-child relationship, "usually a birth certificate or court document").

into the state, just as the hurdles Defendants impose do not absolutely preclude all travel by Plaintiff families. The Court nonetheless concluded that because "the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a compelling state interest," a standard it failed to meet. *Id.* at 638. *See also Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 908 (1986) ("we have held that even temporary deprivations of very important benefits and rights can operate to penalize" right to travel); *Mem'l Hosp. v. Maricopa Cnty.*, 415 U.S. 250, 263 (1974) (residency requirement to receive non-emergency public medical care "penalizes" exercise of right to travel).

Every time these parents and their children, as well as third-parties, look at the children's Ohio birth certificates, they will see official disrespect for the families and legal insecurity for their relationships. These are no mere "administrative or evidentiary inconveniences," as Defendants blithely claim, (Doc. 20, p. 21); they erect at least as severe hurdles for Plaintiffs as the denial of accurate death certificates held unconstitutional by this Court in *Obergefell*. *See* 962 F. Supp. 2d at 996-97.

V. THE MARRIAGE RECOGNITION BANS VIOLATE THE RIGHT TO EQUAL PROTECTION.

The Supreme Court held in *Windsor* that Section 3 of the federal Defense of Marriage Act violated equal protection principles because "[t]he avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States." *Windsor*, 133 S.Ct. at 2693.

Since the Supreme Court decision in *Windsor*, a consensus has emerged among the district courts in the Sixth Circuit and throughout the country as to "whether a state can do what

the federal government cannot — i.e., discriminate against same-sex couples . . . simply because the majority of the voters don't like homosexuality." *Obergefell*, 962 F. Supp. 2d at 973-74. The answer is no. *Id.*; *Kitchen*, 961 F. Supp. 2d at 1213; *Bishop*, 2014 WL 116013; *Bourke*, 2014 WL 556729; *Bostic*, 2014 WL 561978; *Lee*, 2014 WL 683680; *De Leon*, 2014 WL 715741; *Tanco*, 2014 WL 997525; *DeBoer*, 2014 WL 1100794.

This Court correctly found that in Ohio, the State's refusal to grant marriage recognition to same-sex couples who could not legally marry in Ohio while granting recognition to opposite-sex couples who could not legally marry in Ohio (due to consanguinity or age), is particularly offensive to the Equal Protection Clause. *Obergefell*, 962 F. Supp. 2d at 986. The analysis does not change simply because the injustice here is reflected in birth certificates instead of death certificates. The Ohio marriage recognition bans violate equal protection under any level of scrutiny and in all applications.

A. Heightened Scrutiny Applies to Plaintiffs' Equal Protection Claim.

This Court held in *Obergefell* that an equal protection claim based on a sexual orientation classification is subject to heightened scrutiny. 962 F. Supp. 2d at 987. Plaintiffs argued in their present motion for permanent injunction that the record in *Obergefell*, also incorporated in this case, supports a finding that each of the factors necessary to find a suspect classification based on sexual orientation discrimination is satisfied. (Doc. 18-1, pp. 23-24). Plaintiffs also sufficiently advanced an argument for heightened scrutiny regarding discrimination against the children of same-sex married couples. (*Id*. at pp. 24-25). In addition, there are several fundamental rights at stake, triggering heightened scrutiny, as described above in Point IV.

B. *Equality Foundation* and Its Progeny Demand Reconsideration.

Defendants argue that this Court is forced to apply rational basis scrutiny to its

equal protection analysis because it is bound by Sixth Circuit precedent, including *Equality Foundation of Greater Cincinnati v. City of Cincinnati*, 128 F.3d 289, 292-94 (6th Cir. 1997); *Scarbrough v. Morgan Cnty. Bd. of Educ.*, 470 F.3d 250, 261 (6th Cir. 2006); and *Davis v. Prison Health Serv.*, 679 F.3d 433, 438 (6th Cir. 2012). (Doc. 20, p. 37.) However, as this Court acknowledged in *Obergefell*, these cases built on one another and relied on the Supreme Court's holding in *Bowers v. Hardwick*, 478 U.S. 186 (1986) (sodomy prohibitions do not violate the Constitution), which was overturned in *Lawrence v. Texas*, 539 U.S. 558 (2003) ("*Bowers* was not correct when it was decided, and it is not correct today"). Defendants do not address this compelling point in their memorandum.

The *Windsor* majority did not explicitly state what level of scrutiny it applied to the sexual orientation discrimination imposed by Section 3 of DOMA. The sweeping language of the decision calls for review of the Sixth Circuit's prior holdings on sexual orientation discrimination. In *Windsor*, the Court held that the federal marriage ban impermissibly "instructs all . . . officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others." 133 S.Ct. at 2696.

This Court noted that since *Windsor*, the Sixth Circuit has not yet reexamined its analysis of whether heightened scrutiny applies to sexual orientation classifications. *Obergefell*, 962 F.Supp. 2d at 986. It is time for such a reexamination, and the district court for the Western District of Kentucky agrees: "It would be no surprise . . . were the Sixth Circuit to reconsider its view [on whether heightened scrutiny applies to sexual orientation classification]. Several theories support heightened review." *Bourke*, 2014 WL 556729 at *4. Although the court applied rational basis review when it struck down Kentucky's marriage recognition ban, it noted "Ultimately, the result in this case is unaffected by the level of scrutiny applied." *Id.* at *5.

C. The Marriage Recognition Bans Fail Even Rational Basis Review.

Defendants argue that "[t]he proper definition of marriage just is not something that is susceptible of judicial divination based on the particular opinions or legal conclusions of hand-picked social scientists." (Doc. 20, p. 44). Plaintiffs do not ask this Court to define marriage, but, rather, to apply the Equal Protection Clause to the State's same-sex marriage recognition bans. In *Windsor*, the Court held that by treating same-sex married couples differently than opposite-sex married couples, Section 3 of DOMA "violate[d] basic . . . equal protection principles applicable to the Federal Government." 133 S. Ct. at 2693. The Ohio marriage recognition bans suffer from the same defect.

There is no conceivable legitimate reason for lawmakers and voters to have enacted Ohio's marriage recognition bans; Defendants have identified none, and, as this Court has already found, the bans were instead the product of impermissible animus. As this Court held, "Even if it were possible to hypothesize regarding a rational connection between Ohio's marriage recognition bans and some legitimate governmental interest, *no hypothetical justification can overcome the clear primary purpose and practical effect of the marriage bans ... to disparage and demean the dignity of same-sex couples in the eyes of the State and the wider community*." *Obergefell*, 962 F. Supp. 2d at 995 (emphasis in original).

The four interests advanced by Defendants for the marriage recognition bans are as follows: 1) Ohio's desire to define marriage through the democratic process and to avoid judicial intrusion; 2) Ohio's interest in approaching social change with deliberation and care; 3) Ohio's desire to act under 28 U.S.C. § 1738(C), or DOMA Section 2; and 4) Ohio's desire to preserve the traditional definition of marriage. These justifications have all been roundly rejected in recent decisions in Kentucky, Tennessee, and Michigan, as well as by this Court in *Obergefell*,

and they should be rejected again here. *Bourke*, 2014 WL 556729, at **7-8, 9-10; *Tanco*, 2014 WL 997525, at *6; *DeBoer*, 2014 WL 1100794, at *10 (Michigan's recognition ban "impermissibly discriminates against same-sex couples in violation of the Equal Protection Clause because the provision does not advance any conceivable legitimate state interest").

1. Democratic Process.

Regardless of how a law is passed, it must be consistent with the Constitution. *City of Cleburne. v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) ("It is plain that the electorate as a whole, whether by referendum or otherwise, could not order city action violative of the Equal Protection Clause"). This Court correctly characterized the "right to define marriage through the democratic process," along with "Ohio's interest in approaching social change with deliberation and due care," as "vague, speculative, and unsubstantiated state interests [that] do not rise anywhere near the level necessary to counterbalance the specific, quantifiable, and particularized injuries evidenced here and suffered by same-sex couples when their existing legal marriages and the attendant protections and benefits are taken from them by the state." *Obergefell*, 962 F. Supp. 2d at 981. Similarly, in *DeBoer*, the Michigan district court "reject[ed] the contention that Michigan's traditional definition of marriage possesses a heightened air of legitimacy because it was approved by voter referendum." 2014 WL 1100794, at *16. That court further stated that its decision striking down same-sex marriage bans "affirms the enduring principle that regardless of whoever finds favor in the eyes of the most recent majority, the guarantee of equal protection must prevail." *Id.*

2. Deliberation/Caution.

Ohio is not harmed by having to align its laws in accordance with non-discriminatory social change, as well as constitutional mandates. The court in *Bourke* explained that, in fact, the

evolution of rights for same-sex couples is not as sudden as opponents contend. 2014 WL 556729, at **11-12. After all, this line of cases began at least 47 years ago with *Loving* in 1967, when the Supreme Court held that a state's right to define marriage is subject to the Fourteenth Amendment. The jurisprudence evolved again with *Romer* in 1996 and with *Windsor* in 2013. Once a constitutional principle is clearly established it cannot be ignored. The *DeBoer* court, in response to the state's "proceed with caution" argument, noted that when constitutional rights are at stake, the "state may not shield itself with the 'wait-and-see' approach and sit idly while social science research takes its plodding and deliberative course." 2014 WL 1100794, at *14. To allow the state to succeed on this rationale "would turn the rational basis analysis into a toothless and perfunctory review," because "the state can plead an interest in proceeding with caution in almost any setting." *Id.*, quoting *Kitchen*, 961 F. Supp. 2d at 1213.

3. DOMA Section 2.

As set out above, Section 2 of DOMA provides no defense. This Court agreed in *Obergefell* that "marriage and domestic relations are matters generally left to the states," but held, importantly, that "the restrictions imposed on marriage must nonetheless comply with the United States Constitution." 962 F. Supp. 2d at 984 (citing *Loving*, 388 U.S. at 12 (state statutes limiting marriage to same-race couples violated equal protection and due process), and *Zablocki*, 434 U.S. at 383 (state statute restricting from marriage persons owing child support violated equal protection)).

In *DeBoer*, the district court rejected a similar argument from Michigan, holding that even though states have control over the domestic relations law within their borders, such control is not free from judicial scrutiny when constitutional rights are at stake. 2014 WL 1100794, at *15, quoting *Windsor*, 133 S.Ct. at 2692 ("[t]he states' interest in defining and regulating the

marital relation [is] subject to constitutional guarantees ..."). No matter what Section 2 of DOMA provides, Ohio's laws must still comport with the Constitution.

4. Tradition.

This Court has already held that "[a]ncient lineage of a legal concept does not give it immunity from attack for lacking a rational basis." *Obergefell*, 962 F. Supp. at 993. To the contrary, "that a form of discrimination has been 'traditional' is a reason to be more skeptical of its rationality." *Id.* The court in *Bourke* also considered the "tradition" justification propounded by the state, along with family-related justifications not advanced here. It held that although states have "wide latitude to codify their traditional and moral values into law," this latitude is limited by the Fourteenth Amendment. 2014 WL 556729 at *11. The Kentucky court rejected the state's tradition justifications and stated that it "cannot conceive of any reasons for enacting the [marriage recognition] laws." *Id.* at *8. Likewise, none can be found here.

Because the four state interests set forth in Defendants' opposition brief cannot meet even rational basis scrutiny, and there are no conceivable legitimate justifications for the marriage recognition bans, the Plaintiffs should be granted relief on their equal protection claim.

VI. DEFENDANT DIRECTOR OF THE DEPARTMENT OF HEALTH'S REFUSAL TO ISSUE AN ACCURATE BIRTH CERTIFICATE FOR ADOPTED CHILD DOE IMPERMISSIBLY DENIES FULL FAITH AND CREDIT TO THE NEW YORK ADOPTION DECREE, AND THE VIOLATION IS REDRESSABLE IN THIS § 1983 ACTION.

The Vitale/Talmas Family (as well as Adoption S.T.A.R.) bring the Second Claim for Relief under 42 U.S.C. § 1983 for violation of the protections of the Full Faith and Credit Clause, Article IV, § 1 of the U.S. Constitution. They assert that the State's refusal to give full faith and credit to Adopted Child Doe's decree of adoption, which was duly issued by a New York court, is unconstitutional. Defendants invoke a non-existent "public policy" exception to

excuse his refusal to accord full faith and credit to the out-of-state judgment. Relying on a lone Fifth Circuit case, *Adar v. Smith*, 639 F.3d 146 (5th Cir. 2011), Defendants further suggest that the Full Faith and Credit Clause applies only to the conduct of state courts and does not constrain an executive branch official, and that Plaintiffs cannot seek enforcement of their rights under that Clause in an action under 42 U.S.C. § 1983. Finally, Defendants assert that, in any event, the State's magnanimous offer to recognize only half of Adopted Child Doe's new family and put just one of his two parents on a reissued birth certificate satisfies the requirements of the Full Faith and Credit Clause. (Doc. 20, p. 41).

But that Clause guarantees more than *half* faith and credit for the New York adoption decree. Pursuant to O.R.C. § 3705.12(A) and (B), upon receipt of a decree of adoption of an Ohio-born child issued by the court of another state, "the department of health *shall* issue . . . a new birth record using the child's adopted name and the names of and data concerning the adoptive parents . . . ." (Emphasis added). The Vitale/Talmas Family is entitled to recognition of the adoption decree, even if the family could not have obtained it in Ohio, and to evenhanded application of this Ohio statute. That is what *full* faith and credit requires.

A. Defendants Mischaracterize the Full Faith and Credit Claim, Ignoring the Long-Established Principle that Duly Issued Judgments of Courts of Sister States Are Entitled to Full Faith and Credit, with No Public Policy Exception.

Defendants devote much of their opposition to this claim to mischaracterizing it, asserting that Plaintiffs seek a declaration that Ohio's refusal to recognize out-of-state marriages of same-sex couples violates the Full Faith and Credit Clause. That is not what Plaintiffs argue in this action. In a distinct cause of action (*see* Compl., Doc. 1, Section V., ¶ 77), Plaintiffs assert that the State's refusal to recognize their out-of-state marriages violates their rights to due process of law, equal protection, and association. The full faith and credit claim, the Second

Claim for Relief (*id.* at Section VI., ¶ 78), does not necessarily depend on the fact of the Vitale/Talmas marriage. Even if this couple were not married, they and their son would be entitled to full faith and credit for the judgment of adoption, and the corrected birth certificate the State is obligated by virtue of the adoption to issue.[12]

Thus, Defendants' arguments regarding the full faith and credit due to marriages conferred under other states' laws and Section 2 of DOMA[13] are entirely irrelevant to the full faith and credit question posed in this case: must Defendant Director of the Ohio Department of Health accord full faith and credit to an out-of-state decree of adoption, including for purposes of issuing a birth certificate consistent with the judgment of adoption? The answer to that question is yes.

As explained in Plaintiffs' opening brief, duly issued court judgments, like the adoption decree in this case, are the gold standard for purposes of full faith and credit. (Doc. 18, pp. 25-26). In the context of judgments, the full faith and credit obligation is exacting, giving nationwide force to a final judgment rendered in a state by a court of competent jurisdiction, even if doing so conflicts with the public policy of non-issuing states. *Baker ex rel. Thomas v. General Motors Corp.*, 522 U.S. 222, 233 (1998). Defendants conflate the differing full faith and credit standard applied to a sister state's public acts, which may be subject to public policy exceptions (so long as consistent with other constitutional constraints, like requirements of substantive due process and equal protection), with the exacting full faith and credit due to judicial decrees. *See id.* at 232 ("Our precedent differentiates the credit owed to laws (legislative measures and common law) and to judgments."); *id.* at 243 (Kennedy, J. concurring) ("We have often recognized the second State's obligation to give effect to another State's judgments even

[12] The two causes of action offer alternative grounds to require Defendants to issue the corrected birth certificate to the Vitale/Talmas Family.
[13] Plaintiffs explain in Point V, *supra*, why Section 2 of DOMA is likewise irrelevant to their equal protection claim.

when the law underlying those judgments contravenes the public policy of the second State."); *Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488, 494 (2003); *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 437-38 (1943). Supreme Court precedent firmly holds that there is "no roving 'public policy exception' to the full faith and credit due *judgments.*" *Baker*, 522 U.S. at 233 (emphasis in original). *See also Estin v. Estin*, 334 U.S. 541, 546 (1948); *Williams v. North Carolina*, 317 U.S. 287 (1942).[14]

Plaintiffs are not asking Ohio to substitute New York law in the areas of marriage, adoption, or vital statistics, but merely to give full faith and credit to New York's valid judgment and, in turn, apply the mandates of existing Ohio birth certificate law.

B. This Court Should Not Follow *Adar*, which Is at Odds with Other Precedent and with the Purposes of the Full Faith and Credit Clause and § 1983.

In *Adar*, a sharply divided en banc Fifth Circuit majority held that the obligations of the Full Faith and Credit Clause apply only to state courts and do not control the actions of non-judicial state officials. 639 F.3d at 154. The majority further held that the Clause is not enforceable under 42 U.S.C. § 1983. *Id.* at 153. The Fifth Circuit upheld Louisiana's denial of an amended birth certificate naming both adoptive male parents who had obtained an adoption decree in another state.

The Fifth Circuit stands alone in holding that federal claims to enforce rights conferred by the Full Faith and Credit Clause are unavailable under § 1983 against non-judicial state officials. Other circuits, unremarkably, have entertained such claims. In *Finstuen v. Crutcher*, 496 F.3d 1139 (10th Cir. 2007), a § 1983 action on all fours here, the Tenth Circuit held that Oklahoma

[14] Defendants' reliance on *Nevada v. Hall*, 440 U.S. 410 (1979), demonstrates their conflation of the less exacting standard for the degree of full faith and credit due another state's laws with the far stricter standard for a judgment from another state. (Doc. 20, p. 38.) *Hall* addressed whether one state is required to apply another state's *statutory law* in a pending tort action, not whether one state is required to respect a judicial judgment issued in another state. In fact, the Court noted in *Hall* that "[a] judgment entered in one State *must be respected* in another provided that the first State had jurisdiction over the parties and the subject matter." *Hall*, 440 U.S. at 421 (emphasis supplied).

state executive officials violated full faith and credit by refusing recognition, for purposes of amending a birth certificate, to another state's judgment of adoption obtained by a same-sex couple. *See also Rosin v. Monken*, 599 F.3d 574, 575 (7th Cir. 2010) (adjudicating full faith and credit claim against state actors on the merits in § 1983 action); *United Farm Workers v Ariz. Agric. Emp't Relations Bd.*, 669 F.2d 1249, 1257 (9th Cir. 1982) (same); *see also Lamb Enters., Inc. v. Kiroff*, 549 F.2d 1052, 1059 (6th Cir. 1977) (propriety of § 1983 claim in federal court to enforce full faith and credit obligation against state judge not questioned, but abstention deemed warranted). As other circuits have recognized, this type of action is consistent with the purposes of both the Full Faith and Credit Clause and § 1983.

The text, history, and purpose of the Full Faith and Credit Clause demonstrate that it is a mandate not just to state courts, but to state executive actors, like the Defendant here. The Clause provides that "Full Faith and Credit shall be given in each State to the Public Acts, Records and Judicial Proceedings of every other State." U.S. Const., art IV, § 1. By its terms, it applies to each "State," not just to the courts of states.[15]

Aiming to prevent discrimination by one state against the other, the Full Faith and Credit Clause "alter[ed] the status of the several states as independent foreign sovereignties each free to ignore the obligations created under the laws or by the judicial proceedings of the others," making them "integral parts of a single nation throughout which a just remedy . . . might be demanded as of right, irrespective of the state of its origin." *Milwaukee County v. M.E. White*

[15] The Constitution's drafters knew how to limit its commands to state courts, as evidenced by the Supremacy Clause, which expressly binds the "Judges in every State." U.S. Const. art. VI, § 2. In contrast, the Privileges and Immunities Clause uses the same passive voice as the Full Faith and Credit Clause to afford protections to persons "*in*" states. U.S. Const. art. IV, § 2 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens *in* the several States.") (emphasis added). That Clause has long been recognized to protect against infringements by state entities beyond state courts. *See, e.g.*, *Toomer v. Witsell*, 334 U.S. 385 (1948). These Clauses, which appear side-by-side in the same Article, share the same "primary purpose" of "help[ing] [to] fuse into one Nation a collection of independent, sovereign States." *Toomer*, 334 U.S. at 395. They should be interpreted consistently to afford protection to the individual against state actions that undermine their constitutional commands, regardless of the branch of state government involved.

Co., 296 U.S. 268, 277 (1935); *see also Haywood v. Drown*, 556 U.S. 729, 755 n.5 (2009) (Thomas, J. dissenting) (describing the Clause as a "prohibition on discrimination," designed to "address state to state discrimination"). The Clause "ordered submission by one State to hostile policies reflected in the judgment of another State, because the practical operation of the federal system . . . demanded it." *Estin*, 334 U.S. at 546.

The duty to effectuate this command has commonly fallen on state courts in actions to enforce judgments obtained in out-of-state litigation, which is why many Supreme Court cases identify state courts as violators of the state's full faith and credit obligations. *See Adar*, 639 F.3d at 171 & n.22 (Weiner, J., dissenting) (citing *Guinness PLC v. Ward*, 955 F.2d 875, 890 (4th Cir. 1992) ("[U]nder the common law, the procedure to enforce the judgment of one jurisdiction in another required the filing of a new suit in the second jurisdiction to enforce the judgment of the first.")). But this historical fact does not dictate that the command is directed only to state courts. Cases like *Finstuen* have recognized this, as have statutory schemes vesting non-judicial state actors with responsibility to enforce the full faith and credit due judgments.

For example, now "all but two or three of the fifty states have enacted some version of the Revised Uniform Enforcement of Foreign Judgments Act, which authorizes non-judicial officers to register out-of-state judgments, thereby entrusting to them their states' obligations under the . . . Clause." *Adar*, 639 F.3d at 171 (Weiner, J., dissenting) (citation omitted). Ohio's vital statistics statutes likewise transfer to state executive officials the responsibility to receive and recognize out-of-state judgments of adoption and to issue amended Ohio birth certificates based on those judgments. *See* O.R.C. § 3705.12(A) and (B). No Ohio court is involved in this process.

Significantly, § 1983 supplies a means for individuals to enforce in federal court rights to have state officials abide by the requirements of the Full Faith and Credit Clause and honor judgments obtained in sister states in the individual's favor. Section 1983 creates a remedy for those denied "rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. It "provides a mechanism for enforcing individual rights 'secured' elsewhere, *i.e.*, rights independently 'secured by the Constitution and laws' of the United States." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 285 (2002); *see also Aldini v. Johnson*, 609 F.3d 858, 864 (6th Cir. Ohio 2010). "The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights — to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.'" *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) (quoting *Ex parte Virginia*, 100 U.S. 339, 346 (1879)).

The Supreme Court has repeatedly held that § 1983 is a remedial statute that must be applied expansively to assure the protection of constitutional rights. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 700-01 (1978) (§ 1983 is "to be broadly construed, against all forms of official violation[s] of federally protected rights."); *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 105 (1989) (§ 1983's coverage is to be "broadly construed"); *Wayne v. Vill. of Sebring*, 36 F.3d 517, 528 (6th Cir. Ohio 1994) (same). The Court has "rejected attempts to limit the types of constitutional rights that are encompassed within the phrase 'rights, privileges, or immunities.'" *Dennis v. Higgins*, 498 U.S. 439, 445 (1991) (holding that § 1983 supports claim for violations of dormant Commerce Clause); *see also Wojcik v. City of Romulus*, 257 F.3d 600 (6th Cir. 2001) (adjudicating Contract Clause claim under § 1983).

The Full Faith and Credit Clause easily meets the Supreme Court's test for whether a constitutional or statutory provision creates a federal right enforceable in an action under § 1983. In *Dennis*, 498 U.S. 439, the Court held that § 1983 supports a cause of action for violations of the dormant Commerce Clause, which is far less focused on protecting and enforcing individual rights than the Full Faith and Credit Clause. The Court employed a three-part test, articulated in *Golden State Transit Corp.*, 493 U.S. at 106, to determine whether a constitutional provision creates a right actionable under § 1983: whether the provision 1) "creates obligations binding on the governmental unit," 2) that are sufficiently concrete and specific as to be judicially enforced, and 3) were "intended to benefit the putative plaintiff." *Dennis*, 498 U.S. at 449 (internal quotations and citations omitted).

The Full Faith and Credit Clause satisfies all these criteria. It explicitly creates obligations binding on the states, is concrete and judicially recognizable, and was intended to protect the rights of individuals to require respect across state lines for judgments in their favor. *See Thomas v. Wash. Gas Light Co.*, 448 U.S. 261, 278 n.23 (1980) ("[T]he purpose of [the Clause] was to preserve *rights* acquired or confirmed under the . . . judicial proceedings of one state by requiring recognition of their validity in other states. . . .") (emphasis added) (quoting *Pac. Emp'rs Ins. Co. v. Indus. Accident Comm'n of Cal.*, 306 U.S. 493, 501 (1939)); *Magnolia Petroleum Co.*, 320 U.S. at 439 (referring to the Clause as preserving judicially established "rights"); *see also Adar*, 639 F.3d at 176 (Weiner, J., dissenting) ("For all the same reasons advanced by the *Dennis* Court in recognizing the private federal right created by the Commerce Clause. . . the [Full Faith and Credit] Clause indisputably does confer a constitutional 'right' for which § 1983 provides an appropriate remedy.").

Adoption decrees in particular have been recognized by numerous courts around the nation, including in Ohio, to give rise to a right of enforcement under the Full Faith and Credit Clause. *See, e.g.*, *Matter of Bosworth*, No. 86-AP-903, 1987 WL 14234, at *2 (Ohio Ct. App. 10th Dist. July 16, 1987) ("Ohio court is mandated to give full faith and credit" to duly issued adoption decree); *see also Finstuen*, 496 F. 3d at 1156 (collecting state authorities holding that adoption judgments are owed full faith and credit).

A § 1983 action in federal court thus permits an individual to vindicate full faith and credit rights against recalcitrant state officials refusing to credit an out-of-state adoption decree.[16] Ohio's statutory vital statistics scheme is a clear-cut mandate to Defendant Director of the Department of Health requiring his office to enforce decrees of adoption by granting reissued birth certificates. He must apply that scheme in an "even-handed" manner to accord full faith and credit to the Vitale/Talmas Family's adoption decree. *Baker*, 522 U.S. at 235; *see also id.* ("'The local law of the forum determines the methods by which a judgment of another state is enforced.'") (quoting Restatement (Second) of Conflict of Laws § 99 (1969)). This means that the Defendant Director Himes must enforce the adoption decree as he would a decree duly

[16] Defendants put misplaced reliance on three cases that did not involve the type of claim here, a challenge by a private individual under §1983 to state executive action to vindicate rights guaranteed by the Full Faith and Credit Clause. In *Thompson v. Thompson*, 484 U.S. 174 (1988), the Supreme Court considered a claim by an ex-husband against his ex-wife under the Parental Kidnapping Protection Act ("PKPA"), asking the Court to choose between conflicting state custody determinations. *Id.* at 177-78. *Thompson* involved only private litigants; it was neither a challenge to state action nor brought under § 1983. *Id.* at 175-178. The Court addressed the PKPA, not the remedial provisions of § 1983, and concluded that Congress did not intend for the PKPA to create a private remedy to enforce rights guaranteed by the Full Faith and Credit Clause. *Id.* at 185-87. The Court concluded that "the context, language, and history of the PKPA together make out a conclusive case against inferring a cause of action in federal court to determine which of two conflicting state custody decrees is valid." *Id.* at 187. The other two cases cited by Defendants likewise did not involve claims under § 1983 to require state executive officials to execute their obligation to give full faith and credit to out-of-state judgments. *See Stewart v. Lastaiti*, 409 Fed. Appx . 235, 236 (11th Cir. 2010) (per curiam decision affirming dismissal of pro se PKPA claim against state court judges to enjoin pending state litigation between co-parents; despite fleeting reference to § 1983 in Circuit Court decision, *id.* at 235, district court opinion did not even mention it, *see Stewart v. Lastaiti*, No. 10-60565-CIV, 2010 WL 1993884 (S.D. Fla. May 17, 2010)); *Minnesota v. Northern Securities Co.*, 194 U.S. 48, 65, 72 (1904) (holding Full Faith and Credit Clause inapplicable in litigation between private corporations).

obtained in-state, by issuing "a new birth record using the child's adopted name and the names of and data concerning the adoptive parents." O.R.C. § 3705.12(A). Until he does, he denies the Vitale/Talmas Family their enforceable right to full faith and credit.

VII. PLAINTIFF ADOPTION S.T.A.R. HAS STANDING TO REPRESENT ITS OWN INTERESTS AND THOSE OF ITS CLIENTS.

Adoptive parents such as Joe Vitale and Robert Talmas are *required* by Ohio law to work through an agency such as Adoption S.T.A.R. or an attorney in order to adopt a child born in Ohio. O.R.C. § 3107.011. Pursuant to that mandate, the Vitale/Talmas family retained Adoption S.T.A.R. to help them adopt Child Doe. (Doc. 1, ¶41). Opposite-sex married couples automatically receive birth certificates that include both their names when they adopt Ohio children. (*Id*. at ¶46). In order to work with same-sex married couples, however, the agency has been forced to change its placement agreement and "expend unbudgeted time and money" assisting same-sex married couples with the obstacles posed by Ohio's marriage recognition ban. (*Id*. at ¶48). Because Adoption S.T.A.R. suffers an injury in fact, its clients are hindered from bringing suit to defend their own constitutional rights, and a ruling on this Plaintiff's claim will redress this injury, Adoption S.T.A.R. has standing to sue.

This Court has walked this path before. In *Obergefell*, applying the elements identified in *Lujan v. Defenders of Wildlife*, this Court correctly held that a funeral director had Article III standing to challenge the marriage ban in the context of death certificates. 2013 WL 5934007 (S.D. Ohio Nov. 1, 2013) (applying *Lujan*, 504 U.S. 555, 559 (1992)). First, the Court held that the plaintiff established the necessary injury in fact based on his well-founded fear of criminal prosecution, which was traceable to the Defendant's enforcement of the Ohio marriage recognition bans. It also determined that injunctive and declaratory relief would redress this

injury. *Id.* at *8. This Court then analyzed the additional factors for allowing third-party standing:

> 'Ordinarily, one may not claim standing […] to vindicate the constitutional rights of some third party.' *Singleton v. Wulff*, 428 U.S. 106, 114 (1976). However, this general rule can be overcome where a plaintiff (1) 'shows that he himself is injured by its operation,' *Barrows v. Jackson*, 346 U.S. 249, 255 (1953), (2) 'has a close relationship with the person who possesses the right,' and (3) where 'there is a hindrance to the possessor's ability to protect his own interests.' *Kowalski v. Tesmer*, 543 U.S. 125, 129-130 (2004).

Obergefell, 2013 WL 5934007, at *4. This Court held that Plaintiff Grunn adequately established that he had a close relationship with his clients, the persons possessing the right, and that his married same-sex clients were hindered in protecting their own interests. Consequently, the Court held that the funeral director had third-party standing to enforce the rights of his married same-sex clients. *Id.* at *7. The same result is appropriate in this case.

The "close relationship" requirement is surely met where, as here, persons seeking to adopt Ohio-born children are required pursuant to O.R.C. § 3107.011 to retain agencies such as Adoption S.T.A.R. Apparently conceding this point, Defendants focus on the injury alleged by the agency and on whether the same-sex married couples seeking to adopt Ohio children are actually hindered. (Doc. 20, pp. 55-58).

A. Adoption S.T.A.R.'s Expenditure of Time and Resources to Oppose and Adapt to Ohio's Same-Sex Marriage Ban Constitutes an Injury for Standing Purposes.

Adoption S.T.A.R. is an adoption agency with offices in Ohio. (Doc. 1, ¶ 9). It serves persons seeking to adopt Ohio children by helping to establish healthy families. The agency transforms "lives through adoption by serving the best interests of children."[17] There was a time when same-sex couples could secure both adoptive parents' names on the birth certificates of

[17] Adoption STAR, Overview of the Agency: Our Core Values, available at http://www.adoptionstar.com/the-agency/#mission (last visited Mar. 31, 2014).

children born in Ohio. The adoption decree from their home state was sufficient to secure two-parent birth certificates in Ohio. (Decl. of Jeffrey Scott Seay, Doc. 4-8, ¶¶ 5-7 and p. 6; Decl. of William Singer, Doc 4-7, ¶¶ 5-6 and p. 3). Adoption S.T.A.R.'s married same-sex clients, however, are now being denied that relief. Now these clients must file an additional lawsuit in Ohio simply to secure the relief they have already been awarded in their home state. The agency is a party to this litigation because it believes that it is not in a child's best interest to be issued an inaccurate birth certificate by the State of Ohio; it is inequitable and unconstitutional. To continue doing business in Ohio, Adoption S.T.A.R. has been forced to change its business practices, procedures, and forms to conform with Ohio's marriage laws. And the agency has helped its clients fight this unjust marriage recognition ban and deprivation of full faith and credit through advocacy at the Ohio Department of Health. Barbara Ginn, counsel to Adoption S.T.A.R., has asked the Ohio Department of Health to issue accurate birth certificates for Adoption S.T.A.R.'s same-sex married clients; her requests have been denied. (Decl. of Barbara Ginn, Doc. 4-6, ¶¶ 5-8 and pp. 4-5). With no other recourse, Adoption S.T.A.R. has now joined this lawsuit.

Numerous federal courts, including the Supreme Court, have recognized that a social service agency suffers an injury for standing purposes when its time and resources are redirected from its central purpose due to the defendant's wrongful acts. In cases involving "testers" for racial discrimination in housing, the Supreme Court found that housing agencies that "provide counseling and referral services for low- and moderate-income "homeseekers" suffer an injury when they "devote significant resources to identify and counteract the defendant's racially discriminatory steering practices." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378 (1982). The Seventh Circuit found that "the only injury which need be shown to confer standing on a

fair-housing agency is deflection of the agency's time and money from counseling to legal efforts directed against discrimination." *Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1526 (7th Cir. 1990). Relying on *Havens*, the Third Circuit recognized that an organization of public assistance recipients was also injured by expending "time, money and resources advocating on behalf of recipients denied or threatened with denial of benefits" because of the statute under challenge. *Robinson v. Block*, 869 F.2d, 202, 207, 210 n. 9 (3rd Cir. 1989). Like the housing and public benefit agencies above, Adoption S.T.A.R. has also reallocated time and money from forming families to dealing with a defendant who is interfering with its clients' rights. Adoption S.T.A.R. joins this lawsuit as another step in its efforts to fulfill its purpose of creating healthy families fully protected under the law.

Defendant argues that Adoption S.T.A.R. has manufactured this injury "by incurring litigation costs or simply choosing to spend money fixing a problem that otherwise would not affect the organization at all." *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1018 (9th Cir. 2013). The plaintiffs in *Valle* were immigrant-serving organizations found to *have* standing because "an organization has direct standing to sue when it shows a drain on its resources from both a diversion of its resources and frustration of its mission." *Id.* Adoption S.T.A.R.'s resources have been drained,[18] and the Defendants' birth certificate policy based on Ohio's marriage recognition ban directly affects the organization. Adoption S.T.A.R. "believes that adoption

[18] Defendant argues that there is no evidence in the record that Adoption S.T.A.R. reallocated resources or suffered any "concrete and particularized" injuries because of Defendant's actions. However, the record contains correspondence from the Ohio Department of Health addressed to Ms. Ginn regarding her attempts to secure a birth certificate for prior clients, and she states in her declaration that she is currently assisting the Vitale/Talmas Family in their adoption efforts — including securing a birth certificate. (Decl. of Barbara Ginn, Doc. 4-6, ¶8 and Page ID 73-74). She also states that opposite-sex couples "routinely have both parents' names listed on the birth certificate of their adopted child." (*Id.* at ¶ 4). Based on this evidence, the Court may certainly infer that Adoption S.T.A.R. has reallocated time and resources in the non-routine adoptions of children by married same-sex parents.

does not end with the placement of a child but rather it begins."[19] Not only are resources diverted by the Ohio marriage recognition bans, but the central philosophy of the organization is frustrated by placing a child in a family without doing everything possible to ensure that family is treated equally under the law.

B. Adoption S.T.A.R. Has Standing Because Its Married Same-Sex Clients Face Serious Obstacles Asserting their Own Rights.

Adoption S.T.A.R.'s married same-sex clients face serious obstacles in asserting their constitutional rights to equal protection and full faith and credit. Requiring adoptive parents, including those living out of state, to bring a lawsuit to ensure they are both named on their adopted child's birth certificate is an exceptional burden to place on new parents. For Adoption S.T.A.R. to have third-party standing, its clients must be hindered in some way from "litigating their rights themselves." *Smith v. Jefferson Cnty. Bd of Sch. Comm'rs*, 641 F.3d 197, 207 (6th Cir. 2011). If there is some "genuine obstacle" to a third party's own standing, "the third party's absence from court loses its tendency to suggest that his right is not truly at stake, or truly important to him, and the party who is in court becomes by default the right's best available proponent." *Singleton*, 428 U.S. at 116.

In *Obergefell*, this Court found that "*the need to file a lawsuit to ensure that a loved one's death certificate accurately reflects their marriage is an incredible burden to place on grieving spouses.*" 2013 WL 5934007, at *6 (emphasis in original). Likewise in this case, the need to file a lawsuit to ensure an adopted child's birth certificate accurately reflects the child's parentage is an *incredible* burden to place on the child and the child's new parents. In all of these instances, the adoptive parents have already engaged in court proceedings in their own state. The

[19] Adoption STAR, Overview of the Agency: Our History, available at http://www.adoptionstar.com/the-agency/#mission (last visited Mar. 31, 2014).

requirement that these adoptive parents file a second action in a far-away state to secure a right they have already secured in their own state is truly onerous, expensive, and impractical.

The Vitale/Talmas Family is fortunate to have the resources and flexible schedules necessary to litigate their child's birth certificate. Many married same-sex couples who live out-of-state are unable to afford the costs, in time and money, of filing a second action and of traveling back and forth to Ohio to litigate their adopted child's birth certificate. For many families, the immediate demands of caring for an infant and the costs of baby food, diapers, and all the rest, will trump the possibility of litigating their constitutional right to equal protection under the law. Further, to require those parents to bring suit to amend an inaccurate birth certificate when life calms down means that years could go by when the constitutional rights of parents and child are violated on a daily basis — the very irreparable harm this lawsuit seeks to address.

To support the hindrance argument, Defendant relies on cases involving the relationship between lawyers or expert witnesses and hypothetical future clients. *See Boland v. Holder*, 682 F.3d 531 (6th Cir. 2012); *Kowalski*, 543 U.S. 125. However, as this Court pointed out in *Obergefell*, not everyone will require legal services within their lifetimes. 2013 WL 5934007, at *5. Unlike hypothetical attorney/client relationships, future adoptive parents and adopted children are *required* by statute to work with an adoption agency, like Adoption S.T.A.R., or with an attorney, like Barbara Ginn, to complete their adoptions. *See* O.R.C. § 3107.011(A).

Lastly, Defendant argues against third-party standing by relying unpersuasively on language from two cases where the plaintiffs were found to *have* third-party standing. *See Miller v. Albright*, 523 U.S. 420 (1988); *Barrows*, 346 U.S. 249. The judgment of the court in *Miller* (unlike the concurrence relied upon by Defendant) found that an out-of-wedlock child had third-

party standing to assert her father's equal protection rights in her challenge to federal immigration law. 523 U.S. at 432. And in *Barrows*, a Caucasian plaintiff was allowed third-party standing to challenge a racially restrictive covenant because the "reasons which underlie our rule denying standing to raise another's rights, which is only a rule of practice, are outweighed by the need to protect the fundamental rights which would [otherwise] be denied." 346 U.S. at 257. The rights at issue here are the fundamental right to remain married and to be treated equally, as well as to full faith and credit for an out-of-state adoption decree. An adoption agency seeking to help married couples build families certainly has standing to advocate for those rights in this litigation.

CONCLUSION.

This Court should issue a declaration that those portions of Ohio Const. Art. XV, § 11 and Ohio Rev. Code § 3101.01(C) and any other provisions of the Ohio Revised Code that may be relied on to deny legal recognition to the marriages of same-sex couples validly entered in the jurisdiction of celebration, violate rights secured by the Fourteenth Amendment to the United States Constitution. The declaration should provide that same-sex couples married in jurisdictions where same-sex marriage is lawful, who seek to have their out-of-state marriage recognized and accepted as legal in Ohio are denied their fundamental right to marriage recognition without due process of law and their right to equal protection. The declaration should further provide that denying full faith and credit to decrees of adoption duly obtained by same-sex couples in sister jurisdictions, including for purposes of reissuing accurate birth certificates for Ohio-born adopted children, violates the Full Faith and Credit Clause.

This Court should further issue a permanent injunction prohibiting the Defendants and their officers and agents from (a) enforcing the marriage recognition bans, (b) denying same-sex

couples validly married in the jurisdiction of celebration all the rights, protections, and benefits of marriage provided under Ohio law, and (c) denying full faith and credit to decrees of adoption duly obtained by same-sex couples in sister jurisdictions.

Finally, the injunctive relief should include but not be limited to requiring Defendants to complete birth certificates as the need arises for the Plaintiffs in a manner consistent with the proposed order (Doc. 18-2).

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CERTIFICATE OF SERVICE

I hereby certify that on April 1, 2014, a copy of the foregoing pleading was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I further certify that a copy of the foregoing pleading and the Notice of Electronic Filing has been served by ordinary U.S. mail upon all parties for whom counsel has not yet entered an appearance electronically.

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