

No. 14-574

IN THE
Supreme Court of the United States

GREGORY BOURKE, *et al.*,

Petitioners,

v.

STEVE BESHEAR, IN HIS OFFICIAL CAPACITY
AS GOVERNOR OF KENTUCKY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

**RESPONDENT'S BRIEF IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI**

LEIGH GROSS LATHEROW
Counsel of Record
WILLIAM H. JONES, JR.
GREGORY L. MONGE
VANANTWERP, MONGE, JONES,
EDWARDS & McCANN, LLP
P.O. Box 1111
Ashland, KY 41105
(606) 329-2929
llatherow@vmje.com

Attorneys for Respondent

256993



COUNSEL PRESS

(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

Whether States in the exercise of their authority to define the marital relation may continue to define marriage as between only a man and a woman in establishing requirements for a marriage license and in recognizing marriage licenses issued by other jurisdictions without violating the U.S. Constitution.

Should state marriage laws restricting the issuance of marriage licenses and recognition of marriage licenses issued by other jurisdictions be reviewed for more than rational basis under the Equal Protection Clause of the U.S. Constitution.

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**RESPONSE TO PETITION FOR
WRIT OF CERTIORARI**

Respondent Steve Beshear, in his official capacity as Governor of Kentucky, files this brief in support of the petition for a writ of certiorari filed by Petitioners.

**CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED**

U.S. Const. Amend. 14, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ky. Const. § 233A

**Valid or recognized marriage; Legal status
of unmarried individuals.**

Only a marriage between one man and one woman shall be valid or recognized as a marriage in Kentucky. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized.

**Ky. Rev. Stat. Ann. § 402.005.
Definition of marriage.**

As used and recognized in the law of the Commonwealth, “marriage” refers only to the civil status, condition, or relation of one (1) man and one (1) woman united in law for life, for the discharge to each other and the community of the duties legally incumbent upon those whose association is founded on the distinction of sex.

**Ky. Rev. Stat. Ann. § 402.020.
Other prohibited marriages.**

(1) Marriage is prohibited and void:

...

(d) Between members of the same sex[.]

**Ky. Rev. Stat. Ann. § 402.040.
Marriage in another state.**

- (1) If any resident of this state marries in another state, the marriage shall be valid here if valid in the state where solemnized, unless the marriage is against Kentucky public policy.
- (2) A marriage between members of the same sex is against Kentucky public policy and shall be subject to the prohibitions established in KRS 402.045.

**Ky. Rev. Stat. Ann. § 402.045.
Same-sex marriage in another jurisdiction
void and unenforceable.**

A marriage between members of the same sex which occurs in another jurisdiction shall be void in Kentucky.

Any rights granted by virtue of the marriage, or its termination, shall be unenforceable in Kentucky courts.

OPINIONS BELOW

The opinion of the court of appeals is available at _____ F.3d ____, 2014 WL 5748990 (6th Cir. Nov. 6, 2014). Pet. App.1a-95a. The opinions of the district court granting summary judgment to Petitioners are reported at *Love v. Beshear*, 989 F.Supp.2d 536 (W.D. Ky. Jul. 1, 2014), and *Bourke v. Beshear*, 996 F.Supp.2d 542 (W.D. Ky. Feb. 12, 2014). Pet. App. B 96a-123a and 124a-157a.

JURISDICTION

The court of appeals entered judgment on November 6, 2014. The Court has jurisdiction under 28 U.S.C. § 1254(1).

INTRODUCTION

This case presents a matter of exceptional importance – the roles of governmental branches and the States with regard to the regulation of marriage. Petitioners recognize that as a constitutional officer Governor Beshear “has the duty and authority to enforce and uphold Kentucky’s laws.” [Pet. Brief, p. 35]. Traditionally, the power to define and

regulate marriage is one uniquely within the realm of state legislatures, and the Kentucky legislature exercised that authority with regard to the definition of marriage in Kentucky.

The right to same-sex marriage has been recognized in 44 states, plus the District of Columbia. Same-sex marriage recognition came as a result of voter approval in 3 of those states, and by legislation in 9 of these jurisdictions (inclusive of the District of Columbia). In the remaining 33 states, recognition of the right to same-sex marriage has been by judicial declaration. A handful of those decisions have been stayed or, as in the Sixth Circuit, have been reversed on appeal. It is important for Kentucky – and the country - that the Court resolve the important question of who has the right to define marriage for a state, and if the role belongs to the States, then what is the appropriate standard by which the definition will be governed – rational basis, strict scrutiny, or a level in between. The cases pending with this Court on petitions for writ of certiorari are reflective of the conflicts among lower courts on these issues and demonstrate the need for final resolution of the dispute by this Court.

STATEMENT OF THE CASE

In 1998, the Kentucky legislature enacted a number of statutes confirming that only man-woman marriages would be recognized as marriages in Kentucky and that same-sex unions would not be recognized as a marriage in Kentucky, specifically KRS §§ 402.005, 402.020(1)(d), 402.040(2), and 402.045. In 2004, 74% of the participating voters amended Kentucky's Constitution confirming that:

Only a marriage between one man and one woman shall be valid or recognized as a

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

KY. CONST. § 233A.

In the district court proceedings, there were two sets of plaintiffs who are same-sex couples. The original group of plaintiffs had been issued marriage licenses by other jurisdictions and sought recognition of those licenses by Kentucky. *Bourke v. Beshear*, 996 F.Supp.2d 542 (W.D. Ky. Feb. 12, 2014). In this marriage recognition case, the plaintiffs raised a number of federal constitutional challenges to the Kentucky marriage laws, including Fourteenth Amendment Due Process deprivation of fundamental right to marry; First Amendment deprivation of freedom of association; Article IV failure to give full faith and credit to valid public record of another state; Fourteenth Amendment deprivation of right to travel; First Amendment violation of the Establishment Clause by establishing a religious definition of marriage; and Fourteenth Amendment discrimination based upon sexual orientation. The district court found it unnecessary to answer the question of whether there is a fundamental right to same-sex marriage because the plaintiffs had been issued a marriage license and were only seeking recognition of that license by Kentucky. Pet. App. 138a. The district court granted summary judgment to the plaintiffs based solely upon Equal Protection grounds. The Court applied a rational basis test. Pet. App. 138a-139a. No discovery was conducted, and there was no trial or hearing; the issues were resolved solely as questions of law.

After summary judgment was issued, but before final judgment was entered, a second group of plaintiffs sought and were granted intervention in the *Bourke* case. The intervening plaintiffs were not married, but they sought to obtain marriage licenses from the Commonwealth. The district court made the *Bourke* summary judgment final, allowing an appeal to be taken, and then considered the merits of the intervening complaint. The case was re-styled as *Love v. Beshear*. Like the companion *Bourke* case, the plaintiffs in the marriage license case raised several constitutional theories. Here, though, the district court addressed the issue of whether the plaintiffs had a fundamental right to same-sex marriage, and found no right existed. Pet. App. 109a. The district court nonetheless found that plaintiffs were entitled to summary judgment upon Equal Protection grounds. Pet. App. 120a. The district court reversed course on the standard of review, and found that “homosexual persons constitute a quasi-suspect class” subjecting Kentucky’s marriage laws to an “intermediate scrutiny” standard of review. Pet App. 115a -116a. *Love v. Beshear*, 989 F.Supp.2d 536 (W.D. Ky. Jul. 1, 2014). The district court found, however, that Kentucky’s laws could “not withstand constitutional review regardless of the standard” and applied a rational basis standard. Pet. App. 116a.

The district court stayed both of its summary judgment decisions pending further orders of the Sixth Circuit Court. Consequently, no marriage licenses have been issued to same-sex couples in Kentucky, and the state has not recognized out-of-state marriage licenses issued to same-sex couples.

The legal result of the two cases was (1) to declare Kentucky's marriage laws unconstitutional to the extent the laws prohibited the issuance of marriage licenses to same-sex couples and refused recognition of out-of-state marriages licenses obtained by same-sex couples and (2) to afford homosexuals quasi-suspect classification requiring application of intermediate scrutiny. The decisions raise important questions regarding the validity of state laws defining marriage as between a man and a woman, and the legal standard applicable to a review of a constitutional equal protection challenge to those laws – rational basis, strict scrutiny, or an intermediate level.

Respondent appealed both cases to the Sixth Circuit Court of Appeals in order to obtain resolution of these important questions. The Sixth Circuit considered the *Bourke* and *Love* cases simultaneously with cases involving similar issues arising out of Michigan, *DeBoer v. Snyder*, 973 F.Supp.2d 757 (E.D. Mich. Mar. 21, 2014), *petition for cert. filed* ___ U.S.L.W. ___ (U.S. No. 14-571); Ohio, *Obergefell v. Wymyslo*, 962 F.Supp.2d 968 (S.D. Ohio Dec. 23, 2013), *petition for cert. filed* ___ U.S.L.W. ___ (U.S. No. 14-556) (Nov. 14, 2014); and Tennessee ___, *Tanco v. Haslam*, 7 F.Supp.3d 759 (M.D. Tenn. Mar. 14, 2014), *petition for cert. filed* ___ U.S.L.W. ___ (U.S. No. 14-562) (Nov. 14, 2014). The district courts in each of the cases had ruled in favor of the plaintiffs declaring each of the respective state's restrictions on same-sex marriages unconstitutional. Oral arguments were heard in all the cases in a single proceeding on August 6, 2014, and a single decision was issued and filed in each of the cases on November 6, 2014. In a lengthy opinion, a divided panel of the Sixth Circuit reversed each of the district court decisions. *DeBoer v. Snyder*, ___ F.3d ___, 2014

WL 5748990 (6th Cir. Nov. 6, 2014). Judge Sutton authored the opinion, joined by Judge Cook, and Judge Daughtrey issued a dissenting opinion. Petitions for certiorari are now pending in each of these cases.

The Sixth Circuit majority held that the court was confined by the summary decision in *Baker v. Nelson*, 409 U.S. 810 (1972), with regard to the threshold question of whether the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment requires States to expand the definition of marriage to include same-sex couples. Pet. App. 13a-20a. The court rejected arguments that *Baker* had been overruled by precedent, including *United States v. Windsor*, 133 S.Ct. 2675 (2013), and that *Windsor*'s reasoning "clashed" with *Baker*.

Nevertheless, the Sixth Circuit went on to consider the merits of the parties' other arguments regarding their respective states' constitutional and statutory provisions. The majority found that it was bound by Sixth Circuit precedent to apply a rational basis standard of review to classifications based upon sexual orientation and, applying that standard, found the laws passed constitutional muster. The court held that the laws were not inconsistent with the original meaning of the Fourteenth Amendment. Pet. App. 20a-22a. The majority also held that the laws were not the result of discriminatory animus, but were "codif[ications of] a long existing, widely held social norm already reflected in state law." Pet. App. 32a. Addressing the plaintiffs' substantive due process claim, the court found that the plaintiffs had no fundamental right to same-sex marriage. Pet. App. 37a-41a. Finally, the majority also held that states that banned same-sex marriage were not constitutionally required to recognize such unions that

were lawfully performed in other states, finding that the Full Faith and Credit “Clause ‘does not require a State to apply another State’s law in violation of its own legitimate public policy.’” Pet. App. 54a.

REASONS FOR GRANTING THE PETITION

I. The Questions Presented are Exceptionally Important.

The issues in this case present questions beyond the right to obtain a marriage license – they include who has the right to determine the criteria for obtaining a marriage license and the standard of review by which that criteria is judged. Petitioners seek through this case to obtain the state sponsored benefits of marriage as well as the intangible benefits of equal or greater importance to them: dignity and respect. On the other side of this debate is the Commonwealth’s interest in regulating and defining marriage through its statutes and Constitution.

Although there are specific Kentucky laws challenged by the Petitioners, the importance of resolving the legal issues presented in the same-sex marriage dispute is not unique to Petitioners or the citizens of the Commonwealth of Kentucky. Rather, final resolution of the constitutional questions presented in the same-sex marriage debate is equally important to all citizens of this nation.

II. There is a Deep Division within the Circuits, Resulting in Legal Chaos.

Decisions from the courts of appeal and district courts are in conflict on the issue of same-sex marriage. In 2006, the Eighth Circuit Court of Appeals in *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 870-71 (8th Cir. 2006), rejected a federal constitutional challenge to Nebraska's state constitutional amendment restricting marriage to a union between a man and a woman. As detailed above, the Sixth Circuit has resolved the issue in favor of allowing the democratic process to work and rejected the plaintiffs' constitutional challenges to the same-sex marriage bans in Kentucky, Ohio, Michigan and Tennessee. Two district courts have reached the same conclusion: *Conde-Vidal v. Garcia-Padilla*, No. 14-1253-PG, ___ F.Supp.3d ___, 2014 WL 5361987 (D.P.R. Oct. 21, 2014), *appeal docketed*, No. 14-2184 (1st Cir. Nov. 13, 2014), which is currently on appeal in the First Circuit, and *Robicheaux v. Caldwell*, 2 F.Supp.3d 910 (E.D. La. Sept. 3, 2014), *appeal docketed*, No. 14-31037 (5th Cir. Sept. 5, 2014), *petition for cert. filed* ___ U.S.L.W. ____ (U.S. Nov. 20, 2014)(No. 14-596), out of the Fifth Circuit and currently pending before this Court upon the plaintiffs' petition for a writ of certiorari before judgment.

On the other side of the conflict are the Fourth, Seventh, Ninth and Tenth Circuits, which upheld constitutional challenges to state statutory and constitutional bans on same-sex marriage. See *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir.), *cert. denied*, 135 S.Ct. 308 (Oct. 6, 2014); *Baskin v. Bogan*, 766 F.3d 648 (7th Cir.), *cert. denied*, 135 S.Ct. 316 (Oct. 6, 2014); *Latta v. Otter*, ___ F.3d ___, 2014 WL 4977682 (9th Cir. Oct. 7, 2014); *Bishop v. Smith*, 760 F.3d 1070 (10th

Cir.), *cert. denied*, 135 S.Ct. 271 (Oct. 6, 2014); and *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir.), *cert. denied*, 135 S.Ct. 265 (Oct. 6, 2014). Even in circuits where many believe the debate appears to be settled, litigation and uncertainty continue. There are currently four cases pending in the Ninth Circuit from the district courts in Montana, Idaho, Alaska, and Nevada pressing the issue. The Ninth Circuit cases are in different stages. The Idaho and Nevada cases are pending upon petitions for rehearing en banc. *See Sevcik v. Sandoval*, 911 F.Supp.2d 996 (D. Nev. 2012), *appeal docketed*, No. 12-17668 (Dec. 3, 2012), appeal consolidated with *Latta v. Otter*, ___ F.Supp. 3d ___, 2014 WL 1909999 (D. Idaho May 13, 2014), *appeal docketed*, No. 14-35420 (May 14, 2014), both decisions affirmed by ___ F.3d ___, 2014 WL 4977682 (Oct. 7, 2014). The Montana and Alaska cases are in the briefing stages. *See Rolando v. Fox*, ___ F.Supp. 3d ___, 2014 WL 6476196 (D. Mont. Nov. 10, 2014), *appeal docketed*, 14-35987 (9th Cir. Nov. 19, 2014), and *Hamby v. Parnell*, ___ F. Supp. 3d ___, 2014 WL 5089399 (D. Alaska Oct. 12, 2014), *appeal docketed*, 14-35856 (9th Cir. Oct. 13, 2014). The Fifth Circuit also has a case pending before it on this side of the equation, with oral arguments scheduled for January 9, 2015. *De Leon v. Perry*, 975 F.Supp.2d 632 (W.D. Tex. Feb. 26, 2014), *appeal docketed*, No. 14-20196 (5th Cir. Mar. 1, 2014).

Even in the cases that agree on the result that the state bans on same-sex marriage are unconstitutional, the courts differ on the means to that end. “They agree on one thing: the result. But they reach that outcome in many ways, often more than one way in the same decision.” *DeBoer*, 2014 WL 5748990 at *7 (citing *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014) (fundamental rights); *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014)

(rational basis, animus); *Latta v. Otter*, No. 14-35420, 2014 WL 4977682 (9th Cir. Oct. 7, 2014) (animus, fundamental rights, suspect classification); *Bishop v. Smith*, 760 F.3d 1070 (10th Cir. 2014) (fundamental rights); and *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014) (same)). In the Sixth Circuit cases, the district courts in Michigan and Tennessee applied a rational basis standard while the Ohio district court applied a heightened standard of review. To compound the confusion, the district court in Kentucky found rational basis applicable in one case and intermediate review in the other, but it applied rational basis in both cases.

In short, the cases have percolated in the district courts and circuits, but the controversy and extensive litigation continues. The proceedings throughout the country have created a patchwork of inconsistent decisions resulting in uncertainty and confusion. The Court can provide finality to the legal questions presented in this petition, guidance to the voters and their legislators, and end the legal chaos affecting Kentuckians and all citizens.

III. These Cases are Excellent Vehicles to Resolve the Questions Presented.

These cases are excellent vehicles to resolve the questions presented. *Bourke* is a “marriage recognition” case. Petitioners were married in jurisdictions other than Kentucky and seek recognition of those marriages in the Commonwealth. *Love* is a “marriage license” case. Petitioners seek to obtain a marriage license from the Commonwealth of Kentucky. The district court did not resolve any fact questions in the lower proceedings, but resolved the issues upon legal grounds. The Kentucky cases, therefore, provide an optimal mechanism to resolve the fundamental legal dispute in this national debate.

CONCLUSION

Petitioners urge this Court to resolve the issues creating the legal chaos that has resulted since *Windsor*. Pet. App. 28. Respondent has consistently taken the position that the citizens of Kentucky deserve to have the highest court of the land determine whether the Sixth Circuit was bound by *Baker v. Nelson* and whether *Windsor* compels invalidating Kentucky's Constitution and its statutes. Therefore, Respondent agrees that this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

LEIGH GROSS LATHEROW
Counsel of Record
WILLIAM H. JONES, JR.
GREGORY L. MONGE
VANANTWERP, MONGE, JONES,
EDWARDS & McCANN, LLP
P.O. Box 1111
Ashland, KY 41105
(606) 329-2929
llatherow@vmje.com

Attorneys for Respondent