United States District Court
for the
EASTERN DISTRICT OF LOUISIANA

JONATHAN P. ROBICHEAUX, et al.,	*	CIVIL ACTION
	*	NO. 13- 5090
Plaintiffs	*	(CONSOLIDATED
v.	*	WITH 14-00097)
	*	
JAMES D. CALDWELL, et al.,	*	SECTION F(5)
	*	
Defendants.	*	
	*	
	*	JUDGE MARTIN L.C. FELDMAN
	*	MAGISTRATE MICHAEL NORTH
	*	
	*	REF: ALL CASES
	*	
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BRIEF *AMICI CURIAE* OF LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., ACLU FOUNDATION OF LOUISIANA, AND NATIONAL CENTER FOR LESBIAN RIGHTS IN SUPPORT OF PLAINTIFFS

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AMICI'S IDENTITY, INTERESTS, AND AUTHORITY TO FILE[2]

Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is a non-profit national organization committed to achieving full recognition of the civil rights of lesbian, gay, bisexual, and transgender ("LGBT") people and those living with HIV through impact litigation, education, and public policy work. Lambda Legal has participated as party or *amicus* counsel in numerous challenges to state laws prohibiting same-sex couples from marrying or receiving legal respect for their existing marriages including as plaintiffs' counsel in *Henry v. Himes*, No. 1:14- cv-129, 2014 U.S. Dist. LEXIS 51211 (S.D. Ohio Apr. 14, 2014), declaring facially unconstitutional laws similar to those at issue here, and *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009), declaring Iowa's marriage ban unconstitutional. Lambda Legal has participated in the leading Supreme Court cases redressing sexual orientation discrimination, as party counsel in *Romer v. Evans*, 517 U.S. 620 (1996), and *Lawrence v. Texas*, 539 U.S. 558 (2003), and as *amicus* in *United States v. Windsor*, 133 S. Ct. 2675 (2013). Lambda Legal has both an interest in protecting lesbian and gay couples and their children in every state of the nation and extensive expertise in the issues before this Court.

The ACLU Foundation of Louisiana is the non-profit advocacy and litigation arm of the ACLU of Louisiana, which is the state affiliate of the American Civil Liberties Union. The ACLU is the nation's leading organization dedicated to the defense of the constitutional rights of everyone in this country. As a non-profit, non-partisan organization, the ACLU has defended the civil liberties of all segments of society without regard to political affiliation or belief. The

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[2] This *amicus* brief is filed in accordance with the Court's March 20, 2014 Order. [Rec. Doc. 75]. No party's counsel authored the brief in whole or in part; no party or party's counsel contributed money intended to fund preparing or submitting this brief; and no person other than *amici*, their members, or their counsel contributed money intended to fund preparing or submitting the brief.

ACLU Foundation of Louisiana has participated in many of the leading constitutional cases litigated in Louisiana and has a strong organizational commitment to ensuring the fair and equal treatment of all people in Louisiana.

The National Center for Lesbian Rights ("NCLR") is a non-profit legal organization dedicated to protecting and advancing the civil rights of LGBT people and their families through litigation, public policy advocacy, and public education. Since its founding in 1977, NCLR has played a leading role in securing fair and equal treatment for LGBT people and their families in cases across the country involving constitutional and civil rights. NCLR has a particular interest in protecting same-sex couples and their children. NCLR has served as counsel for numerous plaintiffs in litigation seeking the freedom to marry and the recognition of same-sex couples' valid marriages in their states of residence, including currently in *Kitchen v. Herbert*, No. 13-4178 (10th Cir); *Tanco v. Haslam*, No. 14-5297 (6th Cir.); and *Latta v. Otter*, No. 1:13-cv-00482-CWD (D. Idaho).

Amici fully agree with all grounds Plaintiffs have advanced to strike down Article XII, Section 15 of the Louisiana Constitution and Article 3520(B) of the Louisiana Civil Code, which ban recognition of out-of-state marriages of same-sex couples (the "marriage recognition bans" or "bans"). This brief focuses on the infringement of fundamental substantive due process marriage rights, which requires that the bans be subject to strict scrutiny.

SUMMARY OF ARGUMENT

Recognizing that lesbian and gay individuals share the same fundamental right to marry that all others enjoy, a growing number of states around the country have eliminated discrimination in their marriage law, conferring on same-sex couples "a dignity and status of immense import." *Windsor*, 133 S. Ct. at 2681. Plaintiffs Jon Robicheaux, Derek Robicheaux,

Courtney Blanchard, Nadine Blanchard, Lauren Brettner, Jacqueline Brettner, Nicholas Van Sickels, Andrew Bond, Henry Lambert, Carey Bond, Havard Scott, III and Sergio March Prieto, as well as the married Forum for Equality Louisiana members all wed in states that opened their doors to same-sex couples and in so doing sought the full dignity, status, and legal protections that come with marriage. Had they married different-sex spouses, Louisiana would have welcomed the newlyweds home with open arms, granting full legal recognition to their marriages. Louisiana's 1999 legislative[3] and 2004 constitutional bans[4] on recognition of out-of-state marriages for same-sex couples deprive Plaintiffs of the right to due process protected under the Fourteenth Amendment to the U.S. Constitution. For this reason and the others asserted in Plaintiffs' brief, Louisiana's marriage recognition bans should be struck down.

The well-settled fundamental right to marry is about far more than obtaining a marriage license and having a wedding ceremony – important as these are as the gateway to the institution of marriage. The constitutionally-guaranteed right to marry would be worthless if the government were free to refuse all recognition to a couple's marriage once entered, effectively annulling the marriage as if it had never occurred. Only when the wedding is over, the guests are gone, and the couple returns home as spouses, does marriage as "a way of life" commence. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965). In the words of the Supreme Court, marriage is an "enduring" bond, a commitment to remain "together for better or for worse," "a bilateral loyalty," "an association for [a] noble . . . purpose." *Id.* This constitutionally-protected "status is a far-reaching legal acknowledgment of the intimate relationship between two people," *Windsor*, 133 S. Ct. at 2692, a commitment of enormous import that spouses carry wherever they go throughout their married lives. But as soon as married same-sex couples set foot in

[3] *See* La. Civ. Code art. 3520(B).
[4] *See* La. Const. art. XII, § 15.

Louisiana, the State's marriage recognition bans strip them of their rights and dignity as married spouses. The bans strike at the heart of the right to be married, violating the fundamental due process and equal protection rights of lesbian and gay spouses.

Defendant wrongly attempts to recast the right to marry asserted here as a "novel" right to marry a person of the same sex. *Loving v. Virginia*, 388 U.S. 1 (1967), establishes that a state violates its residents' right to marry if it refuses recognition to their marriages based on unjustified disagreement with a person's choice of spouse, no matter how steeped in history and tradition that disagreement is. In this respect, *Loving* is but one in a long line of cases establishing that courts define fundamental rights by the nature of the liberty sought, not the identity of the person invoking it. And this point is underscored, not undermined, by *Washington v. Glucksberg*, which exhorts courts to rely on "guideposts for responsible decisionmaking." 521 U.S. 702, 720 (1997).

Marriage is an enduring relationship carrying tremendous legal, financial, cultural, and personal significance for any couple who enters into it. A married couple can expect to have myriad interactions with governments, private parties, and one another over the course of the marriage, and even after the death of one spouse. Throughout these interactions, a person's status as a present or former spouse remains critical. In recognition of the monumental importance of this enduring status, the settled rule applied for centuries throughout our nation has been to accord universal recognition across state lines to a marriage valid where celebrated, even if the marriage could not be legally celebrated in the forum jurisdiction. This universal rule of interstate marriage recognition, while cast as a comity rather than a constitutional principle, is an essential point in the constellation of protections accorded the institution of marriage. As the Supreme Court understood in ruling that Virginia's ban on recognition of the Lovings' out-of-

state interracial marriage violated due process, *Loving*, 388 U.S. at 12, the recognition by one government of a marital status obtained in another is "implicit in the concept of ordered liberty," *Glucksberg*, 521 U.S. at 721 (internal quotations and citations omitted).

A person's right to carry his or her marriage and marital status wherever the person goes in this nation accords spouses and their children the dignity of a legally respected and universally understood relationship. It ensures predictability and stability for the spouses, their children, employers, and others with whom the couple interacts. This right reflects the intent and expectations of couples who have legally married. It also reflects the reality that the state of celebration has bestowed on the couple the enduring status of being "married" under its laws. Under the traditional place-of-celebration standard, any couple that has entered into a valid marriage can count on being respected as married by the federal and state governments, regardless of where the couple may live or relocate.

Although the states' longstanding, uniform place-of-celebration rule has commonly included an articulated exception for marriages contrary to the strong public policy of the state, in practice, this exception has rarely applied to void a marriage valid where entered. Our nation's history and tradition of extensive state recognition of marriages entered elsewhere, even if the marriages could not have been legally obtained in the forum state, reflects the depth of the liberty interest we all share in having our marriages universally respected.

Furthermore, neither the Full Faith and Credit Clause nor Section 2 of the Defense of Marriage Act ("DOMA"), 28 U.S.C. § 1738C, insulates Louisiana's marriage recognition bans from due process challenge.

ARGUMENT

I. The Fundamental Right To Marry Applies To Same-Sex Spouses.

This Court can decide this case without reaching the fundamental right to marry itself and the protection it affords to same-sex couples. Nonetheless, Louisiana's marriage recognition bans strike at the heart of the fundamental right to marry, purporting to erase Plaintiffs' marriages.

In case after case, the Supreme Court has reaffirmed not only the right to enter into the institution of marriage, but also an aspect of that right which makes it most cherished and meaningful, the right to marry the one you love. The Court has made clear that *freedom of choice of whom to marry* is a critical component of that right. These cases demonstrate the Constitution's respect for our autonomy to make the personal decisions at stake here – decisions about with whom a person will build a life and a family. Moreover, "the Supreme Court has consistently adhered to the principle that *a fundamental right*, once recognized, properly *belongs to everyone*." *Henry*, 2014 U.S. Dist. LEXIS 51211, at *29. Fundamental rights are thus defined by the nature of the liberty sought, not by *who* seeks to exercise the liberty.

The right to marry has long been recognized as fundamental, protected under the due process guarantee, because deciding whether and whom to marry is exactly the kind of personal matter about which government should have little say. *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 564-65 (1989) (Stevens, J., concurring in part and dissenting in part) ("*freedom of personal choice* in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment" (emphasis added)); *Zablocki v. Redhail*, 434 U.S. 374, 387 (1978) (finding burden on right to marry unconstitutional because it infringed "*freedom of choice* in an area in which we have held such freedom to be fundamental" (emphasis added)); *Moore v. East Cleveland*, 431 U.S. 494, 499 (1977). Indeed, "[t]he freedom to marry has long

been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Loving*, 388 U.S. at 12 (citation omitted).

Because the right to make personal decisions central to marriage would have little meaning if the government dictated one's marriage partner, courts have placed special emphasis on protecting one's free choice of spouse. "[T]he regulation of constitutionally protected decisions, such as where a person shall reside or *whom he or she shall marry*, must be predicated on legitimate state concerns other than disagreement with the choice the individual has made." *Hodgson v. Minnesota*, 497 U.S. 417, 435 (1990) (emphasis added); *see also Roberts v. United States Jaycees*, 468 U.S. 609, 620 (1984). In keeping with the right to autonomy in deciding whether and whom to marry, Louisiana imposes very few restrictions on who can marry.[5]

The scope of a fundamental right is defined by the *attributes of the right itself,* and not the identity of the people who seek to exercise it or who have been excluded from doing so in the past. The Supreme Court has adhered to the principle that a fundamental right, once recognized, properly belongs to *everyone* – regardless of whether a particular claimant can point to a historical tradition supporting the claimant's ability to exercise that right. For example, in *Youngberg v. Romeo*, 457 U.S. 307, 315-16 (1982), the Supreme Court held that an individual involuntarily committed to a custodial facility because of a disability retained liberty interests, including the right to freedom from bodily restraint. The Court thus departed from the longstanding tradition in which people with serious disabilities were viewed as not sharing such substantive due process rights and were routinely subjected to bodily restraints. *See also Eisenstadt v. Baird,* 405 U.S. 438, 453 (1972) (liberty interest in controlling the decision whether

[5] Louisiana permits persons to marry anyone who is not an ascendant or descendant, nor closer than the fourth degree, so long as both are unmarried. *See* La. Civ. Code arts. 88 and 90.

or not to have children, previously recognized for married persons in *Griswold*, extended equally to unmarried persons).

Specifically in the context of the fundamental right to marry, the Supreme Court has rejected attempts to reframe the right narrowly so as to include only those previously acknowledged to enjoy that liberty. Thus, the fundamental right to marry could no more be a right to "same-sex marriage" than the right enforced in *Loving* was to "interracial marriage," 388 U.S. 1; or in *Turner v. Safley* to "prisoner marriage," 482 U.S. 78 (1987). And, indeed, neither interracial marriages nor marriages involving inmates had any longstanding support in our nation's traditions. *See Planned Parenthood v. Casey*, 505 U.S. 833, 847-48 (1992) ("[I]nterracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause in *Loving* . . . ."); Virginia L. Hardwick, *Punishing the Innocent: Unconstitutional Restrictions on Prison Marriage and Visitation*, 60 N.Y.U. L. Rev. 275, 277-79 (1985) (right to marry as traditionally understood did not extend to prisoners).[6]

The argument that same-sex couples seek a "new" right rather than the same right exercised by others makes the identical mistake of *Bowers v. Hardwick,* 478 U.S. 186 (1986), corrected in *Lawrence,* 539 U.S. 558. In a challenge by a gay man to Georgia's sodomy statute, *Bowers* recast the right at stake, shared by all, to consensual intimacy with the person of one's choice, to a claimed "fundamental right" of "homosexuals to engage in sodomy." *Id.* at 566-67

[6] The right to marry traditionally did not include a right to remarriage after divorce, but that also changed. *See Boddie v. Connecticut*, 401 U.S. 371, 376 (1971) (violation of due process to impose fees on indigent as condition to seek divorce, the only way to be free from "prohibition against remarriage"). Likewise, after *Zablocki*, 434 U.S. 374, the right to marry could not be withheld based on a parent's unwillingness or inability to support children from a prior relationship.

(quoting *Bowers*, 478 U.S. at 190). Significantly, *Lawrence* overruled *Bowers*, holding that *Bowers*'s constricted framing "fail[ed] to appreciate the extent of the liberty at stake." *Lawrence*, 539 U.S. at 567.

Defendants' attempt to limit the fundamental right to marry at issue here to the right to marry a person of the same sex finds no support in, and indeed is undermined by, *Glucksberg*, 521 U.S. 702. *Glucksberg* does not support constricting a long-honored fundamental right to deny it to those historically excluded from the freedom to exercise it. *Glucksberg* focused on liberty interests shared by *all* individuals, not just those in the majority, and found that the liberty interest advanced for assistance with suicide was not sufficiently grounded in history to constitute a fundamental right. It is entirely different, and contrary to constitutional standards, to define a fundamental right so narrowly as to exclude a *group of individuals* from sharing it.

Turner, which addressed whether marriage between a prison inmate and an un-incarcerated person qualifies as a "constitutionally protected marital relationship" despite differences from "traditional" marriages, demonstrates this. *Turner*, 482 U.S. at 96. Rather than dismiss the claim in that case because the union would lack physical companionship, sexual intimacy, and shared short-term goals, the Court unanimously found that many of the "incidents of marriage, like the religious and personal aspects of the marriage commitment, are unaffected" by incarceration and "are sufficient to form a constitutionally protected marital relationship in the prison context." *Id*. *Turner* thus definitively established that the fundamental right to marry does not vanish merely because the state points to an attribute that differs from prevailing notions of "traditional" marriage.[7]

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[7] Another way of framing this issue is that the exercise urged by *Glucksberg* in refining the asserted right must involve legally relevant limitations. *See, e.g.*, *U.S. Citizens Association v. Sebelius*, 705 F.3d 588, 601 (6th Cir. 2013) (rejecting plaintiffs' assertion that the

The history of marriage belies Defendant's argument that marriage, as a fundamental right, is understood only in static terms. For example, marriage laws have undergone substantial changes in past generations to end subordination of married women and race-based entry requirements. Marriage laws, through court decisions and legislation, have undergone profound changes over time and are virtually unrecognizable from the way they operated a century ago. *See generally* Nancy F. Cott, *Public Vows: A History of Marriage and the Nation* (2000).

And yet, couples continue to come together, join their lives, and form new families, and marriage continues to support and stabilize them. The Supreme Court confirmed in *Windsor* that the due process guarantee protects the rights of same-sex couples to the essential dignity, security, and tangible legal and financial protections that marriage offers. *See* 133 S. Ct. at 2694-97.

II. Louisiana's Refusal To Recognize Existing Marriages Of Same-Sex Couples Entered Out Of State Violates Constitutionally Protected Fundamental Marriage Rights.

The constitutional due process right "not to be deprived of one's already-existing legal marriage and its attendant benefits and protections" is a deeply-rooted aspect of the due process protections long accorded to "*existing* marital, family, and intimate relationships." *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 978 (S.D. Ohio 2013)[8]; *see also Glucksberg*, 521 U.S. at 720.

Affordable Care Act's individual mandate "implicate[s] the fundamental liberty right . . . to refuse unwanted medical care," and instead recognizing the plaintiffs' fiscally-focused request as "protection of economic rights through substantive due process"). Here, Defendant can offer nothing to justify characterizing the right at issue as a new "right to same-sex marriage," except that overwhelming discrimination prevented lesbian and gay couples from laying claim to their right to marry until recent years. Louisiana's asserted justifications for differential treatment, proceeding cautiously and preserving the tradition of "man-woman marriage," merely presuppose rather than justify the legitimacy of the historical limitation in the first place.

[8] *See also Henry*, 2014 U.S. Dist. LEXIS 51211, at *29-30; *De Leon v. Perry*, No. SA-13-CA-00982-OLG, 2014 U.S. Dist. LEXIS 26236, at *62 (W.D. Tex. Feb. 26, 2014) (noting

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, once entered, of disfavored groups, thereby depriving these spouses of their constitutionally-protected liberty.

As the Supreme Court noted in *Glucksberg*, our "[n]ation's history, legal traditions, and practices" provide guideposts to discern the contours of constitutionally-protected fundamental liberties. 521 U.S. at 721; *see also Lawrence*, 539 U.S. at 571-72 ("[O]ur laws and traditions in the past half century are of most relevance here."). The Due Process Clause protects rights "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Glucksberg*, 521 U.S. at 720-21 (internal quotations and citation omitted). Throughout our nation's "history, legal traditions, and practices," marriages, once entered, have been cloaked with a wide swath of protections. These range from rights in matters of sexual intimacy and reproduction, *Griswold*, 381 U.S. 479; to marital presumptions protecting the legal rights of both spouses as parents from intrusions even by a child's genetic parent, *Michael H. v. Gerald D.*, 491 U.S. 110, 124 (1989); to access to "government benefits (*e.g.* Social Security benefits), property rights (*e.g.*, tenancy by the entirety, inheritance rights), and other, less tangible benefits." *Turner*, 482 U.S. at 96. *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)).

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 couples' marriages, in violation of due process); *Bourke v. Beshear*, No. 3:13-CV-750-H, 2014 U.S. Dist. LEXIS 17457, at *22 (W.D. Ky. Feb. 12, 2014) (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 marriages of same-sex couples are unconstitutional).

Notably, the Supreme Court has made emphatically clear that couples have fundamental vested rights to have their marriages accorded legal recognition and protection not just in the jurisdiction where entered, but also across state lines. In *Loving*, the Supreme Court struck down not only Virginia's law prohibiting interracial marriages within the state, but also its statutes denying recognition to and criminally punishing such marriages entered outside the state. 388 U.S. at 4, 12. It did so in a case involving a couple *already* married, who had celebrated their nuptials in the District of Columbia and then been prosecuted for marrying out of state on return to their Virginia home. *Id.* at 2-3. Moreover, the couple had purposely evaded their domicile state's law in order to enter into a marriage expressly prohibited and denied recognition there. Significantly, the Court held that Virginia's statutory scheme, including its penalties on out-of-state marriages and 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.

The expectation that one's marriage, once entered, will be respected throughout the land is indisputably deeply rooted in "[o]ur Nation's history, legal traditions, and practices." *Glucksberg*, 521 U.S. at 721. It is so elemental as to be "implicit in the concept of ordered liberty." *Id*. 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, 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). 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).

Accordingly, interstate recognition of marriage has been a defining and essential feature of American law, enshrined in common law and legislation as a pillar of domestic relations jurisprudence. 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) ("The 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").

Enforcement of this universal rule has long served "public policy, common morality, and the comity of nations." James Schouler, *A Treatise on the Law of Domestic Relations* 47 (2d ed. 1874). To this day, the place-of-celebration rule advances critical functions in a nation where a married couple may live in, move through, and interact with multiple state sovereigns whose marriage laws may vary. *See Williams v. North Carolina*, 317 U.S. 287, 299 (1942) (the prospect of being married in one state and unmarried in another is one of "the most perplexing and distressing complication[s] in the domestic relations of . . . citizens." (internal quotations and citation omitted));[9] *In re Lenherr Estate*, 314 A.2d 255, 258 (Pa. 1974) ("In an age of

[9] *Williams*, requiring North Carolina to give full faith and credit to a Nevada divorce decree in conflict with North Carolina public policy, emphasized the crucial reasons a single state's laws must dictate an ongoing status of such personal significance. *See* 317 U.S. at 300-01. The Supreme Court in *Williams* recognized the importance to the couple of a single clear answer as to their marital status that would apply both in Nevada and North Carolina, and

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 rule of recognition protects from the serious harm, disruption, and instability that results if those who are legally married cannot rely upon their marital status. Under the rule, the couple can plan a future together in which their family’s legal status will remain intact and permanent, regardless of the local government with which they may interact. It also dissuades married couples from disavowing their own obligations to each other and to third parties. A couple knits their lives together through marriage, making promises of support and care “for better or for worse.” *Griswold*, 381 U.S. at 486. The place-of-celebration principle ensures that married spouses cannot repudiate their marital status and their obligations based on where they are located. It prevents such “perverse results” as allowing a person who is legally married in one state to be treated as single and enter into a new marriage with a second spouse in another state. Joanna Grossman, *Resurrecting Comity: Revising the Problem of Non-Uniform Marriage Laws*, 84 Or. L. Rev. 433, 472 (2005). This venerable rule “confirms the parties’ expectations, it provides stability in an area where stability (because of children and property) is very important, and it avoids the potentially hideous problems that would arise if the legality of a marriage varied from state to state.” William M. Richman & William L. Reynolds, *Understanding Conflict of Laws* § 119[c] (3d ed. 2002); *see also* Joseph William Singer, *Same Sex Marriage, Full Faith and Credit, and the Evasion of Obligation*, 1 Stan. J. C.R. & C.L. 1, 4-6 (2005) (summarizing interests underlying place-of-celebration rule).

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throughout the nation. The guarantee of due process likewise prohibits subjecting spouses to the discriminatory refusal of some states to honor their lawfully obtained marital statuses.

This principle is so strong that it has commonly been applied by domicile states to validate marriages even when couples purposely left the home state to evade its marriage prohibition and marry in a more favorable jurisdiction. These couples nevertheless returned home entitled to recognition of their marriages. "Amid the confusion of state nuptial policies, the courts constructed a series of rules that sanctioned the evasion of most statutory controls on matrimony…. [J]udges gave their blessing to couples who shopped for a forum that would accept their match." Michael Grossberg, *Governing the Hearth: Law and the Family in Nineteenth-Century America* 295-96 (1985).

To be sure, there is a stated exception to the place-of-celebration rule where the out-of-state marriage would violate strong public policies of the domicile state. Yet in practice, the public policy exception has been infrequently invoked to invalidate a marriage valid where entered. "Instead, courts repeatedly indicate that they have the discretion to use such a public policy exception but then validate the out-of-state marriage following the general rule in favor of recognition." Barbara J. Cox, *Same-Sex Marriage and the Public Policy Exception in Choice-of-Law: Does It Really Exist?*, 16 Quinnipiac L. Rev. 61, 66 (1996). Although cases invalidating out-of-state marriages exist, by widespread practice in this country, "[courts] have been quite reluctant to use the exception and quite liberal in recognizing marriages celebrated in other states." *Id.* at 68. "The mere fact that a marriage is absolutely null when contracted in Louisiana does not mean that such a marriage validly performed elsewhere is automatically invalid as violative of a strong public policy." *Ghassemi v. Ghassemi*, 998 So. 2d 731, 743 (La. Ct. App. 2008). [10]

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[10] Louisiana's Supreme Court did decline to validate a Mississippi common law marriage, the status of which it questioned initially under Mississippi's law, after finding the marriage was contracted in bad faith. *Brinson v. Brinson*, 233 La. 417, 96 So. 2d 653 (1957).

Indeed, invalidation has generally been reserved for marriages that violate such strong principles of state public policy that the parties to the marriage are subject to criminal prosecution. *See, e.g.*, *Rhodes v. McAfee*, 457 S.W.2d 522, 523-24 (Tenn. 1970) (out-of-state marriage between ex-stepfather and stepdaughter was void where such marriage could be prosecuted as felony in Tennessee); *State v. Bell*, 66 Tenn. 9 (1872) (refusing to recognize out-of-state interracial marriage, then criminalized in Tennessee, as defense to violation of Tennessee fornication law).

The bans at issue in this case are analogous to the ignoble state bans on recognition of interracial marriages, struck down in 1967 in *Loving*. State anti-miscegenation laws were the other historically noteworthy national departure from the prevailing place-of-celebration standard and the constitutional due process principles it advances. "Only in those states with anti-miscegenation statutes can one find consistent and repeated use of public policy exceptions to refuse to recognize otherwise valid out-of-state marriages. Once the Supreme Court outlawed such refusals as unconstitutional, the public policy exception fell into disuse."[11] Cox, 16 Quinnipiac L. Rev. at 67 (footnotes omitted). Indeed, until marriage for same-sex couples entered the national stage, the "public policy" exception had grown nearly "obsolete." Singer, 1 Stan. J. C.R. & C.L. at 40; *see also* Andrew Koppelman, Symposium, *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").

Thus in historical and contemporary times, our nation has followed a universal standard of honoring marriages wherever entered, even when the marriage was contrary to the domicile

[11] Notwithstanding bans on recognition of interracial marriages, the force of the principle of universal recognition led some state courts nonetheless to accord recognition to such marriages entered out of state. *See, e.g.*, *Miller v. Lucks*, 36 So. 2d 140 (Miss. 1948).

state's public policy and express law. This legal tradition has nurtured and protected validly-entered marriages, consistent with the constitutional protections due to the "enduring" and "intimate" status of marriage. Louisiana's marriage recognition bans, categorically withholding recognition to one class of marriages, dramatically break from this tradition, with only our nation's unconstitutional legacy of interracial marriage bans for precedent. They represent "[d]iscriminations of an unusual character," departing from Louisiana's – and the nation's – "history and tradition" of affording legal respect to marriages validly entered in other jurisdictions. *Windsor*, 133 S. Ct. at 2692 (citation omitted); *see also Lawrence*, 539 U.S. at 568-73 (relying on historical lack of enforcement of sodomy bans and absence of laws singling out same-sex couples for punishment, as well as growing obsolescence of bans on sexual intimacy, as guideposts in finding state sodomy prohibitions unconstitutional).[12]

III. Neither The Full Faith And Credit Clause Nor Section 2 Of DOMA Excuses Louisiana's Violation Of Plaintiffs' Due Process Rights.

Contrary to Defendants' contentions, neither the Full Faith and Credit Clause nor Section 2 of DOMA, promulgated under that Clause, is a defense to Louisiana's denial of recognition to married same-sex couples. *See* Defendants' Memorandum at 8-9.

The Full Faith and Credit Clause does not authorize Congress to enact discriminatory provisions violating independent constitutional rights. "The power the Constitution grants it also restrains. And though Congress has great authority to design laws to fit its own conception of sound national policy, it cannot deny the liberty protected by the Due Process Clause of the Fifth

[12] Louisiana's bans also infringe on other related fundamental liberty interests in autonomy over "personal decisions relating to . . . family relationships," *Lawrence*, 539 U.S. at 573; *see also Santosky v. Kramer*, 455 U.S. 745, 753 (1982), as well as parenting rights, by precluding same-sex married couples with children from securing legal recognition of their parent-child relationships through established legal mechanisms available to married parents, *see Henry*, 2014 U.S. Dist. LEXIS 51211, at *30-31.

Amendment." *Windsor*, 133 S. Ct. at 2695. The Supreme Court has long maintained that "[i]f there be any conflict between" constitutional provisions, "the one[s] found in the amendments must control, under the well-understood rule that the last expression of the will of the lawmaker prevails over an earlier one." *Schick v. United States*, 195 U.S. 65, 68-69 (1904).

Congress thus could no more have used its powers under the Full Faith and Credit Clause to insulate the marriage recognition ban in *Loving* from due process and equal protection requirements than it can insulate these marriage recognition bans through Section 2 of DOMA. "Congress has no affirmative power to authorize the States to violate the Fourteenth Amendment and is implicitly prohibited from passing legislation that purports to validate any such violation." *Saenz v. Roe*, 526 U.S. 489, 508 (1999); *see also Graham v. Richardson*, 403 U.S. 365, 382 (1971) ("Congress does not have the power to authorize the individual States to violate the Equal Protection Clause."); *De Leon*, 2014 U.S. Dist. LEXIS 26236, at *64-65 (rejecting claim that Section 2 of DOMA permits Texas to refuse to recognize out-of-state marriages between persons of the same sex).

Neither the Full Faith and Credit Clause nor Section 2 of DOMA justifies the denial of married same-sex spouses' fundamental right to recognition of their marriages.

IV. Louisiana's Marriage Recognition Bans Are Subject To Strict Scrutiny.

The marriage recognition bans cannot survive any level of scrutiny and so violate the guarantee of due process, however in that the rights infringed are fundamental marriage rights, strict scrutiny should be applied to determine whether the prohibition on recognition is "necessary to promote a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 302 (1993) (law restricting fundamental rights must be "narrowly tailored to serve a compelling state interest").

CONCLUSION

This court should find unconstitutional Louisiana's bans on recognition of marriages validly entered in another jurisdiction, and permanently enjoin their enforcement.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Justin P. Harrison, hereby certify that on May 12, 2014, the foregoing document was filed with the Clerk of Court using the CM/ECF system, which will automatically send a copy to the following:

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