No. 14-2526

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

VIRGINIA WOLF, et al.,

Plaintiffs-Appellees,

v.

SCOTT WALKER, et al.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WISCONSIN, CASE NO. 14-C-64,
THE HONORABLE BARBARA B. CRABB, PRESIDING

WISCONSIN STATE DEFENDANTS' REPLY BRIEF

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INTRODUCTION

The district court erred when it found Wisconsin's traditional marriage laws unconstitutional, striking down laws that were both statutorily enacted and adopted into the Wisconsin Constitution by the voters in a statewide referendum. The district court's ruling effects a judicial re-write of Wisconsin's marriage laws, while providing no specificity as to which laws are unconstitutional or how they should be re-written. In so doing, the district

court affirmatively ordered Wisconsin to confer positive rights on individuals, vastly expanding the scope of substantive due process jurisprudence into an area of traditional state authority that the Constitution leaves to the democratic political process. This Court should reverse the district court's judgment and vacate its permanent injunction and declaration.

ARGUMENT

I. The Due Process Clause Does Not Require Wisconsin To Affirmatively Confer Marriage Upon Same-Sex Couples.

Plaintiffs advance two primary arguments[1] in support of their substantive due process claims. Both lack merit.

First, plaintiffs suggest they are not seeking a "*new* right," but an existing right (ECF 84:8) (emphasis in original). This is so despite the "obvious" fact that the Supreme Court has not "decided previously that the Constitution protect[s] marriage between same-sex couples" (Dkt. 118:27, A-Ap. 127). If plaintiffs' claim was correct, as the district court noted, "this case would not be here" (*Id.*).

Second, plaintiffs argue that nothing in Supreme Court jurisprudence suggests that marriage is a positive right (ECF 84:15-20). However, all of the cases cited by plaintiffs—*Loving v. Virginia*, 388 U.S. 1 (1967),

[1]Plaintiffs do not meaningfully discuss State Defendants' federalism arguments or argument that the State may grant or withhold positive rights based on policy choices made through the democratic process.

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 *U.S. v. Windsor*, 133 S. Ct. 2675 (2013)—recognize only the negative right requiring government to refrain from infringing the freedom of individuals to decide for themselves how to arrange their own private and domestic affairs. They do not conversely stand for the principle that government must affirmatively license or endorse those arrangements.

A. The fundamental right to marry has not historically extended to same-sex couples.

Plaintiffs claim they are not seeking a "*new* right" and the fundamental right to marriage[2] has always extended to same-sex couples, or has at least existed since *Loving* (ECF 84:8) (emphasis in original). Plaintiffs attempt to frame the right to marriage as access to an existing fundamental right rather than a "new" right to avoid the constraints of *Washington v. Glucksberg*, 521 U.S. 702 (1997). Indeed, they cannot credibly maintain that same-sex marriage is "objectively, 'deeply rooted in this Nation's history and tradition,' . . . and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [it] were sacrificed.'" *Id.* at 720-21. Regardless, plaintiffs' purported existing rights argument fails for at least two reasons.

[2]State Defendants agree, as they did before the district court, that the right to marriage is a fundamental right.

First, the existing rights argument is inconsistent with *Windsor's* observation that same-sex marriage is a new social construct. 133 S. Ct. at 2689 (observing "until recent years, many citizens had not even considered the possibility" of same-sex marriage and that "a new perspective, a new insight" on marriage had emerged in "some States"); *id.* at 2715 (Alito, J., dissenting) ("It is beyond dispute that the right to same-sex marriage is not deeply rooted in this Nation's history and tradition."). Plaintiffs cannot, as a result, get beyond *Glucksberg*.

Second, no Supreme Court or Seventh Circuit decision has ever held that the fundamental right to marry "has been defined by *the right to make the choice*" of partner, irrespective of gender (ECF 84:9) (emphasis in original). Neither *Loving* nor *Lawrence* support this. To the contrary, the right to marriage at issue in *Loving* was traditional, opposite-sex marriage that was described as "fundamental to our very existence and survival," implying a procreative purpose. 388 U.S. at 12 (citing *Skinner v. State of Oklahoma*, 316 U.S. 535, 541 (1942); *Maynard v. Hill*, 125 U.S. 190 (1888)). *Lawrence*, on the other hand, recognized that the *private* expression of liberty it vindicated did "not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." 539 U.S. at 578. Any suggestion that the rights plaintiffs are seeking are

longstanding, existing rights is flatly inconsistent with American marriage jurisprudence.

B. The Due Process Clause does not require Wisconsin to confer the positive right to civil marriage on same-sex couples.

The Due Process Clause does not require Wisconsin to confer the positive right to civil marriage on same-sex couples. Under any other reading, a state would be constitutionally prohibited from deciding to simply get out of the marriage business altogether and to instead regulate domestic relations through other means.

Plaintiffs claim State Defendants' negative/positive rights argument fails because marriage is more than mere "government benefit" and this argument purportedly "conflicts with controlling Supreme Court cases" (ECF 84:15). This, however, is inconsistent with plaintiffs' broad claims for relief (*see, e.g.,* Dkt. 26:34, ¶ 114(a)-(j)) and the Supreme Court's marriage jurisprudence.

1. Civil marriage is a government-run licensing system.

Civil marriage is effectively a regulatory scheme providing licensees with both tangible and intangible benefits. Plaintiffs implicitly admit as much by claiming Wisconsin's marriage laws deny them the "full complement" of state and federal law benefits (ECF 84:3). In asking the Court for this full complement of benefits incident to marriage, plaintiffs do not implicate the constitutional "negative" right to be left alone from unwarranted government

interference. Instead, they are asking this Court to order the State of Wisconsin to affirmatively entitle them to civil marriage and confer upon them certain rights, benefits, and obligations incident to it, both tangible and intangible. This was confirmed by plaintiffs' counsel at the district court's injunction hearing:

> So we're really -- you know, it's really essential to make sure that we characterize the case correctly. It's not just about the right to marry, but the right to all the rights and benefits that come from marriage[.]

(Dkt. 151, Tr. 17:11-14).

The Due Process Clause does not require government to subsidize the exercise of other personal constitutional rights, nor does it obligate states to affirmatively confer those benefits upon anyone. It is phrased in the negative; a state shall not deprive persons of life, liberty or property without due process of law. By asking this Court to hold that the Due Process Clause affirmatively obligates Wisconsin to confer positive rights upon plaintiffs, they seek an unprecedented expansion of substantive due process law.

As discussed below, the Supreme Court's marriage jurisprudence does not support plaintiffs' broad request for affirmative, positive endorsement of their private and domestic relationships. Instead, the Supreme Court's marriage cases establish that there are certain spheres of personal, domestic privacy into which the government may not interfere. It is the right to be left alone

that has been recognized by the Supreme Court, not the entitlement to tangible and intangible government benefits.

2. The Supreme Court's marriage jurisprudence establishes the right to be left alone from unwarranted government interference into an individual's personal and domestic affairs.

The five Supreme Court cases plaintiffs cite—*Loving, Zablocki, Turner, Windsor,* and *Lawrence*—do not establish a positive right requiring government to affirmatively license or endorse domestic relationships or affirmatively support them with the benefits incident to marriage. This is not a case where Wisconsin has taken away a person's right to get married (*e.g.*, *Zablocki*, *Turner*), taken away a person's right to receive benefits incident to marriage (*i.e., Windsor*), criminalized interracial marriage (*i.e., Loving*), or criminalized certain private consensual sexual conduct (*i.e.*, *Lawrence*). This is, instead, a case where persons who have never had the legal right to marry each other in Wisconsin claim that traditional marriage laws unconstitutionally exclude them. Plaintiffs ultimately fail to explain how Wisconsin's marriage laws constitute unwarranted government intrusion upon their due process right to privacy.

Loving stands for the principle that government may not intrude upon persons' private domestic relationships by imposing criminal sanctions upon interracial marriages. The criminal statutes in *Loving* were overtly racist,

"designed to maintain White Supremacy," by "'preserv[ing] the racial integrity'" of Caucasian persons by "prevent[ing] 'the corruption of the blood,' [and] 'a mongrel breed of citizens.'" 388 U.S. at 11, 7. Violations were penalized as felonies subject to five years imprisonment. *Id.* at 4.

Loving is primarily an equal protection decision, holding that Virginia's anti-miscegenation statutes embodied an invidious racial classification that violated the Equal Protection Clause. *Id.* at 8-12. It discussed freedom to marry under the Due Process Clause only in a short section at the end of the opinion. That section, however, remained closely focused on the impermissible racial classification in the challenged anti-miscegenation statutes. *Id.* The Court's discussion of the constitutional freedom to marry thus operated to supplement and support the basic equal protection rationale of the decision, but did not amount to a developed articulation of the nature, scope, and limits of a constitutional marriage right.

By finding Virginia's statutory scheme violated the Due Process Clause, the *Loving* Court did not confer any positive rights on the Lovings. The Court's discussion was instead framed in terms of negative rights, stating that the State "cannot [] infringe[]" upon the right to remain free from "invidious racial discrimination," which was the "clear and central purpose of the Fourteenth Amendment." *Id.* at 12, 10. "*Loving* simply held that race, which is completely unrelated to the institution of marriage, could not be the

basis of marital restrictions." *Bostic v. Schaefer*, 2014 WL 3702493, at *25 (4th Cir. July 28, 2014) (Niemeyer, J., dissenting).

Zablocki stands for the principle that government cannot limit the privacy right of sexual intimacy to married persons. The factual and legal context of *Zablocki* is significant. In 1974, when Roger Redhail sought a marriage license, Wisconsin punished fornication and non-marital cohabitation as criminal acts subject to imprisonment. *See* Wis. Stat. §§ 944.15 (1973) and 944.20 (1973). Only marriage provided a defense against these criminal charges. Thus, under Wisconsin law as it existed at the time, the exclusive legal avenue for Redhail and another person to engage in private, consensual sexual intimacy without government interference was through civil marriage.

The denial of his marriage license application effectively prevented Redhail from engaging in sexual intimacy with another consenting adult—including with his fiancé—because the right to sexual intimacy, and other similar privacy rights, was exclusive to married persons. This governmental interference with Redhail's right to marry was unconstitutional.

Any positive right to marriage under *Zablocki*, therefore, is inextricably intertwined with the vindication of Redhail's negative right to be free from unwarranted governmental intrusion upon his privacy rights. Here, in contrast, Wisconsin's limitation of the legal status of civil marriage to opposite-sex couples does not involve any governmental intrusion upon their

privacy rights. *Zablocki*, therefore, does not support the conclusion that there is a positive right to marriage under the circumstances of this case.

This is confirmed by Justice Stewart's concurring opinion that explained the Court's concern with overly intrusive government interference with fundamental privacy rights:

> The problem in this case is not one of discriminatory classifications, but of unwarranted encroachment upon a constitutionally protected freedom. I think that the Wisconsin statute is unconstitutional because it exceeds the bounds of permissible state regulation of marriage, and invades the sphere of liberty protected by the Due Process Clause of the Fourteenth Amendment.

434 U.S. at 391-92 (Stewart, J., concurring).

Turner stands for the principle that the marital relationship is constitutionally protected, even for inmates whose liberty has been restricted, and therefore government restrictions for marriage must be narrowly tailored. 482 U.S. at 96-97. *Turner* struck a statute making difficult[3] marriage by prison inmates by conditioning their marriage on the subjective permission of a prison superintendent. A prisoner's—or non-prisoner who wished to marry a prisoner—right to marriage was thus conditioned on the

[3]Although *Turner* "note[s] initially that the regulation *prohibits* marriages between inmates and civilians, as well as marriages between inmates," this is a mischaracterization of the statute at issue that "generally" limited marriages among prison inmates unless there were "compelling reasons" for the prison superintendent to approve them. 482 U.S. at 96-97 (emphasis added). Although the statute at issue in *Turner* unquestionably restricted and "burden[ed] the right to marry" for prison inmates, it should not be considered an absolute prohibition on that right. *Id.* at 97.

whims of a prison superintendent. *Id.* The Court reasoned that these restrictions on marriage were problematic because they "sweep[] much more broadly than can be explained by petitioners' penological objectives" that were unsupported by the record and defied common sense. *Id.* at 98.

Turner lacks meaningful discussion of substantive due process principles as applied to marriage. As applied to a negative/positive rights analysis, *Turner* establishes a general rule that there are limits to government intrusion upon individual rights, even for prison inmates whose liberty has already been severely restricted by the state. *Turner* offers nothing about a state's affirmative obligation to confer positive rights on individuals, nor does it suggest that the right to marriage includes the right to marry the person of one's choice irrespective of gender.[4]

Windsor stands for the principle that the federal government cannot take away rights that have been granted to individuals by the states. *Windsor* analyzed Section 3 of DOMA, the essence of which was to interfere with certain states' extension, in the exercise of their sovereign power, of the right to marriage to include same-sex couples. 133 S. Ct. at 2693. Where some

[4]Although *Turner* does describe, as plaintiffs point out, that marriage is an "expression[] of emotional support and public commitment" (482 U.S. at 95), nothing in the decision suggests that it contemplates anything other than traditional opposite-sex marriage. *Id.* at 95, 97 (referring to the "expectation that [marriages] ultimately will be fully consummated," that a "tangible benefit" of marriage is the "legitimation of children born out of wedlock," and that a "compelling reason" the prison approved marriages was "generally only pregnancy or birth of a child").

states had conferred marriage rights and benefits upon same-sex couples, DOMA was designed to take away those rights. It was this federal intrusion upon rights that had previously been conferred by the state that infringed the constitutional liberty interests of same-sex couples. *Id.* at 2692. *Windsor* simply does not stand for a rule that individual states must confer civil marriage rights upon same-sex couples. *See id.* at 2697 (Roberts, dissenting).

Lawrence stands for the principle that "liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex," thereby allowing adult homosexual persons to choose to enter intimate relationships "in the confines of their homes and their own private lives and still retain their dignity as free persons." 539 U.S. at 567, 572.

From its first sentence, the *Lawrence* Court expressed concern with governmental intrusion on individual freedoms:

> Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.

Id. at 562. Thus, the anti-sodomy laws at issue were problematic because the state sought "to control a personal relationship that . . . is within the liberty of persons to choose without being punished as criminals." *Id.* at 566.

Lawrence does not suggest that the Due Process Clause imposes affirmative obligations on the states to confer positive rights on individuals. In fact, it says the opposite. *Id.* at 578 ("The present case . . . does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.").

Nothing in Supreme Court's marriage jurisprudence is inconsistent with State Defendants' negative/positive rights argument directed against plaintiffs' substantive due process claims. Instead, the Court's marriage cases consistently address the limits to which the government may interfere with personal choices of individuals and governmental restrictions upon those personal choices.

II. Heightened Scrutiny Does Not Apply To Plaintiffs' Equal Protection Claims.

The district court did not find that Wisconsin's traditional marriage laws were motivated by animus. Plaintiffs' response brief does not advance any argument to the contrary.

Plaintiffs advance two equal protection arguments: that Wisconsin's marriage laws discriminate on the basis of sexual orientation (Dkt. 118:21-25) and gender (Dkt. 118:25-29). Both fail, albeit for different reasons. First, plaintiffs' sexual orientation discrimination claim fails because sexual orientation is not a suspect class and is therefore subject to

rational basis scrutiny. Since Wisconsin's marriage laws have several rational bases, plaintiffs' sexual orientation discrimination claims fail. Second, plaintiffs' gender discrimination claim fails because it lacks authority, as evidenced by its near universal rejection by courts.

A. Sexual orientation is not a suspect class.

The Seventh Circuit applies rational basis review in cases of discrimination based on sexual orientation because sexual orientation is not a suspect class. *Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 950-51 (7th Cir. 2002). Plaintiffs argue that since *Schroeder* cited *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986), and since *Bowers* has been overruled, that *Schroeder* can no longer be valid (ECF 84:21). *Schroeder*, however, also relied upon *Romer v. Evans*, 517 U.S. 620 (1996). A cite to *Bowers* does not vitiate *Schroeder*. Regardless, the Supreme Court has never held that sexual orientation is a suspect class. Nor has the Seventh Circuit.

Plaintiffs next claim that *Schroeder* "is abrogated by" *Lawrence* (ECF 84:21). Saying it is so does not make it so. In the twelve years since it was decided—eleven of which are post- *Lawrence*—the Seventh Circuit has never found *Schroeder* was abrogated by *Lawrence*. Moreover, nothing in *Lawrence's* suggests that laws like those at issue here—that were *not* "'born of animosity toward the class of persons affected,'" 539 U.S. at 574 (citing *Romer*, 517 U.S. at 634)—are subject to heightened scrutiny.

Like the district court, plaintiffs erroneously rely on the Second Circuit's *Windsor* decision to suggest this Court should employ a four-point test to determine whether it should apply heightened scrutiny (ECF 84:21-22) (citing *Windsor v. U.S.*, 699 F.3d 169 (2d Cir. 2012). First, neither the Supreme Court nor the Seventh Circuit requires this test. Second, this test was absent from the Supreme Court's *Windsor* decision, despite having been applied by the lower court. *See* 133 S. Ct. 2675. Third, although the Second Circuit applied this test, it did not establish the rule that sexual orientation is always a suspect class. *Windsor*, 669 F.3d at 181. Even though this test is inapplicable, a brief discussion of several of the criteria sheds light.

Plaintiffs' claim that gays and lesbians are unable to protect themselves in the political process is unsupported by the record and inconsistent with current politics (ECF 84:23). In Wisconsin, for example, in recent months, both the Assembly and Senate introduced bills to eliminate constitutional restrictions on marriage (Dkt. 103:5, ¶¶ 20-21). President Obama recently signed an executive order protecting gay and lesbian employees from discrimination by federal contractors (*see* David Hudson, "President Obama Signs a New Executive Order to Protect LGBT Workers," The White House Blog, July 21, 2014, available at *http://www.whitehouse.gov/blog/2014/07/21/president-obama-signs-new-executive-order-protect-lgbt-workers*, last checked 8/11/14). Polling data

shows rapidly increasing support for gay rights issues (Dkt. 103:6-7, ¶¶ 22-26). Plaintiffs' claim lacks support in the record, is belied by current events, and is no basis for applying heightened scrutiny.

Plaintiffs' also claim sexual orientation is immutable based on an unidentified "broad medical and scientific consensus" (ECF 84:24-25). The record is devoid of any actual medical or scientific facts or opinion establishing this. Below, the parties identified no experts and submitted no opinions, and the district court made no relevant findings of fact. Whether sexual orientation is immutable is unknown; the record does not clarify. Moreover, plaintiffs' authority is questionable: the comment in *Cece v. Holder*, 733 F.3d 662, 669 (7th Cir. 2013), regarding sexual orientation is dicta and runs contrary to other courts. *See, e.g., High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990) ("[h]omosexuality is not an immutable characteristic[.]"), *abrogated on other grounds by SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 484 (9th Cir. 2014). This complicated issue should not be decided as a matter of law on the basis of plaintiffs' unsupported assertion.

B. Wisconsin's traditional marriage laws do not discriminate on the basis of gender.

The district court rejected both of plaintiffs' theories of gender-based discrimination (Dkt. 118:44-48, A-Ap. 144-48). This Court should affirm.

Plaintiffs' first theory is "straightforward: if each plaintiff was to choose a marriage partner of the opposite-sex, he or she would be permitted to marry in Wisconsin. Therefore, plaintiffs say, it is because of their sex that they cannot marry." (Dkt. 118:44, A-Ap. 144). The district court, like "most courts to consider it," rejected this (Dkt. 118:45, A-Ap. 145) (collecting cases).

Plaintiffs rely on *Loving* and *McLaughlin v. Florida*, 379 U.S. 184 (1964), concluding that they "cannot be cabined on a theory that those cases addressed race" (ECF 84:27). The district court rejected this "counterintuitive and legalistc" extrapolation, noting that "courts view this theory as, . . . an attempt to 'bootstrap' sexual orientation discrimination into a claim for sex discrimination" (Dkt. 46, A-Ap. 146). This Court should affirm because plaintiffs' *Loving* analogy is off the mark.[5]

Nothing in *Loving* even speaks to gender-based discrimination. The Virginia criminal laws at issue in *Loving* imposed fines and incarceration where a Caucasian person married a person of another race. Even if the Virginia anti-miscegenation laws had applied equally to persons of all races, the purpose of those laws was "designed to maintain White Supremacy" and

[5]*McLaughlin*, too, is unavailing. Like *Loving*, *McLaughlin* involved a criminal statute—and overturned a criminal conviction—that hinged upon the races of the actors. The statute punished Caucasians and African-Americans—and those races only—for cohabitation and was "a racial classification embodied in a criminal statute" designed "to punish promiscuity of one racial group and not that of another." 379 U.S. at 192, 193. Here, Wisconsin's laws do not involve racial line-drawing nor do they penalize conduct. *McLaughlin* does not support plaintiffs' gender-based discrimination theory.

was "invidious racial discrimination." 388 U.S. at 11. Unlike those segregationist laws, Wisconsin's marriage laws are not intended to, nor do they, benefit one gender over another like Virginia's laws were intended to "preserve the racial integrity" of Caucasians. *Id*. at 11, n.11.

Plaintiffs' second theory is based on "the concept of sex stereotyping" (Dkt. 118:44, A-Ap. 144). As noted by the district court, plaintiffs cite no authority finding traditional marriage laws to be unconstitutional gender-based discrimination (Dkt. 118:47, A-Ap. 147). State Defendants, too, cannot find authority supporting this novel theory.

Wisconsin's marriage laws do not single out either men or women as a class. Nor do they differentiate between male same-sex couples and female same-sex couples. Nor do they place any additional burdens on only men or women. As the Judge Kelly put it in his Tenth Circuit dissenting opinion, "[p]laintiffs cannot show that either gender *as a class* is disadvantaged by the Utah provisions defining marriage." *Kitchen v. Herbert*, 2014 WL 2868044 (10th Cir. June 25, 2014) (Kelly, J., dissenting) (emphasis in original).

This is significant because Supreme Court authority finding unconstitutional sex discrimination has typically invalidated statutes that singled out men or women *as a discrete class* for unequal treatment. For example, in *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998), the Court held that discrimination based on sex means that "members of one

sex are exposed to disadvantageous terms or conditions . . . to which members of the other sex are not exposed." *Accord, e.g., Reed v. Reed*, 404 U.S. 71 (1971) (preference for men over women when administering estates); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (different burdens for men and women to establish spousal dependency); *Craig v. Boren*, 429 U.S. 190 (1976) (different drinking ages for men and women); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (men barred from nursing school); *U.S. v. Virginia*, 518 U.S. 515 (1996) (women barred from military college). In other words, with respect to marriage laws, "[w]omen, as members of one class, are not being treated differently from men, as members of a different class." *In re Kandu*, 315 B.R. 123, 143 (Bankr. W.D. Wash. 2004).

Plaintiffs' gender discrimination argument is an attempt to secure heightened scrutiny. It should be rejected by this Court.

III. Wisconsin's Marriage Laws Satisfy Rational Basis Review.

A. *Windsor* does not suggest traditional marriage laws are unconstitutional.

Plaintiffs claim *Windsor* implies Wisconsin's marriage laws are unconstitutional (ECF 84:30). *Windsor's* holding, however, was expressly limited to New York's "lawful marriages." 133 S. Ct. at 2696. As Justice Scalia wrote in dissent, "State and lower federal courts should take the Court at its word[.]" *Id.* at 2710 (Scalia, J., dissenting).

Although Plaintiffs note *Windsor's* finding that DOMA was "[d]iscrimination[] of an unusual character[,]" 133 S. Ct. at 2692 (initial quotations omitted), they fail to explain *why* it was unusual. *Windsor* turned on DOMA's intrusion into and rejection of a state's definition of marriage, departing from the long tradition of federal deference to state definitions of marriage. *Id.* at 2694. Plaintiffs suggest that since the Marriage Amendment is the "only part of Wisconsin's marriage law that appears in the state constitution," it is therefore similarly unusual (ECF 84:31). *Windsor* does not support this.

Plaintiffs next imply that the "intent behind the [Marriage Amendment] and its effect" suggest an improper motive (ECF 84:31). First, the district court made no such finding. Second, the Wisconsin Supreme Court has not made any such finding. *See McConkey v. Van Hollen*, 2010 WI 57, ¶ 53, 326 Wis. 2d 1, 783 N.W.2d 855 (the Amendment was "an effort to preserve and constitutionalize the status quo, not to alter the existing character or legal status of marriage"). This was recently confirmed, in the context of finding domestic partnership for same-sex couples constitutional. *See Appling v. Walker*, 2014 WI 96, ¶ 29, 2014 WL 3744232 (July 31, 2014). In short, no judicial review—neither the district court nor the two Wisconsin Supreme Court decisions—has found that the Marriage Amendment was based upon any improper motivation.

B. Rational bases support traditional marriage laws.

Indiana State Appellants' opening brief discussed many rational bases supporting traditional marriage laws. State Defendants agreed and, pursuant to Fed. R. App. P. 28(i), adopted by reference and joined many of their arguments.

State Defendants again, pursuant to Fed. R. App. P. 28(i), adopt by reference and join §§ I-IV of Indiana State Appellants' reply.

1. Tradition is a rational basis.

In claiming that tradition is not a rational basis for Wisconsin's marriage laws, plaintiffs' present two arguments. First, since tradition has been used to support gender and racial discrimination, tradition cannot possibly be a valid basis here. This does not follow.

Second, plaintiffs claim State Defendants' authority is invalid. In *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859 (8th Cir. 2006), the Eighth Circuit discussed tradition as a basis for supporting Nebraska's marriage laws. Plaintiffs' suggest *Bruning* "relied instead on procreation," not tradition, as its basis for upholding Nebraska's laws (ECF 84:35). This misstates *Bruning*. There, the court began its discussion "with an historical fact—the institution of marriage has always been, in our federal system, the predominant concern of state government." *Bruning*, 455 F.3d at 867. Although it discussed procreation and child-rearing, the *Bruning* court ultimately set aside its

"personal views regarding this political and sociological debate" regarding procreation and child-rearing. *Id.* It instead found that under rational basis, where "laws defining marriage as the union between one man and one woman [are] afforded a 'strong presumption of validity,'" *any* of the state's identified bases, including tradition, would be enough to uphold the laws. *Id.* (citing *F.C.C. v. Beach Commc'ns, Inc.,* 508 U.S. 307, 313 (1993); *Heller v. Doe,* 509 U.S. 312, 319 (1993)).

Plaintiffs also incorrectly claim that *Windsor* superseded *Bruning* and *Sevcik v. Sandoval*, 911 F. Supp. 2d 996 (D. Nev. 2012). Although *Windsor* found that DOMA improperly and unusually restricted the freedom of same-sex couples who were validly married in states permitting same-sex marriage, it expressly limited its opinion and holding to those marriages authorized by state law. 133 S. Ct. at 2696. It did not supersede *Bruning*, *Sevcik*, or invalidate other states' marriage laws. *Windsor*, 133 S. Ct. at 2696 (Roberts, C.J., dissenting) ("The Court does not have before it, and the logic of its opinion does not decide, the distinct question whether the States, in the exercise of their 'historic and essential authority to define the marital relation,' may continue to utilize the traditional definition of marriage.") (citation omitted). Although decided before *Windsor*, both *Bruning* and *Sevcik* remain persuasive.

2. Proceeding cautiously and protecting the democratic process are rational bases.

Plaintiffs briefly respond to argument that Wisconsin may prudently choose to proceed with caution when confronted with rapidly transitioning social norms, suggesting that "cautionary delay is not a rational basis for denying a constitutional right" (ECF 84:44). This argument is premised on two faulty assumptions.

First, plaintiffs claim they are not seeking a "new" right. The fallacy of this argument is discussed above. *See* § I.A., *supra*.

Second, plaintiffs presuppose the existence of a broad consensus of opinion that immediate, court-ordered transformation of civil marriage will not adversely affect the institution of marriage itself. No such consensus exists. *See Windsor*, 133 S. Ct. at 2716 (Alito, J., dissenting) ("At present, no one—including social scientists, philosophers, and historians—can predict with any certainty what the long-term ramifications of widespread acceptance of same-sex marriage will be. And judges are certainly not equipped to make such an assessment.") Nor is any proof of such a consensus reflected in the record. Even social scientists can only estimate the effects. *See, e.g.*, Am. Pyschological Ass'n Amicus Br. at 10–11 (ECF 173, footnote omitted) ("extrapolat[ing] from the empirical research literature for heterosexual couples—with qualifications as necessary—to anticipate the likely effects of

marriage for same-sex couples"). Since reasonable scientists, legislators, and jurists may differ in their opinions regarding any effects, plaintiffs cannot possibly eliminate all reasonably conceivable bases supporting Wisconsin's marriage laws. *See Beach Commc'ns*, 508 U.S. at 315.

When confronted with rapidly changing social norms regarding civil marriage, courts "must defer to the predictive judgments of the electorate and the legislature and those judgments need not be based upon complete, empirical evidence." *Kitchen*, 2014 WL 2868044, at *40 (Kelly, J. dissenting) (citing *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 665–66 (1994)). *See also Marshall v. U.S.*, 414 U.S. 417, 427 (1974) (where a Legislature "undertakes to act in areas fraught with medical and scientific uncertainties . . . legislative options must be especially broad and courts should be cautious not to rewrite legislation").

The Supreme Court in *Schuette* reaffirmed the importance of letting democracy and the legislative process set policy. Writing for the plurality, Justice Kennedy recognized that the "voters [had] exercised their privilege to enact laws as a basic exercise of their democratic power." *Schuette v. Coal. To Defend Affirmative Action*, 134 S. Ct. 1623, 1636 (2014). He concluded by

focusing on the importance of settling policy disputes through public debate and the ballot box:

> This case is not about how the debate about racial preferences should be resolved. It is about who may resolve it. There is no authority in the Constitution of the United States or in this Court's precedents for the Judiciary to set aside [state] laws that commit this policy determination to the voters. . . . Deliberative debate on sensitive issues such as racial preferences all too often may shade into rancor. But that does not justify removing certain court-determined issues from the voters' reach. Democracy does not presume that some subjects are either too divisive or too profound for public debate.

Id. at 1638 (citation omitted). This is particularly so where, as here, the Supreme Court has also recognized that "[b]y history and tradition the definition and regulation of marriage . . . has been treated as being within the authority and realm of the separate States." *Windsor*, 133 S. Ct. at 2689-90.

IV. The District Court's Injunction Effects An Improper Judicial Re-Write Of Wisconsin's Marriage Laws And Fails To Identify Which Statutes Must Be Re-Written.

Plaintiffs argue that the district court did not abuse its discretion in entering injunctive relief because its injunction was "detailed, specific, and self-contained" (ECF 84:48). But this view of the injunction ignores the realities of the order, and misses the point. The district court's injunction effects a judicial re-write of dozens of state statutes, while providing no specificity as to which statutory provisions it applies or how they should be re-written; and remains punishable by contempt.

The district court entered the following injunctive relief against Governor Walker:

> Defendant Scott Walker, in his official capacity, is permanently enjoined to direct all department heads, independent agency heads, or other executive officers appointed by the Governor under Wis. Stat. ch. 15 and their officers, agents, servants, employees and attorneys, and all those acting in concert with them, to treat same-sex couples the same as different sex couples in the context of processing a marriage license or determining the rights, protections, obligations or benefits of marriage.

(Dkt. 134:13, ¶ 4).

First, the injunction is problematic because it does not specify the rights subject to it. As discussed in State Defendants' opening brief, this is illustrated by the presumption of paternity statute. Wisconsin Stat. § 891.41 addresses only the presumption of *paternity,* not parenthood as suggested by plaintiffs.[6] Under the district court's injunction, it is unclear whether Governor Walker would be required to direct state agencies and departments to disregard the plain language of the statute in favor of a gender-neutral presumption. But such a change dramatically alters the effect and meaning of the statute. In effect, the district court is requiring a re-write of individual laws relating to marriage without providing Governor Walker sufficient insight as to which laws should be rewritten or how they should be rewritten.

[6]Plaintiffs briefly discuss this purported "presumption of parenthood for children born to married couples," citing Wis. Stat. § 891.40(1) (ECF 84:4). In so doing, plaintiffs misstate the statute and misconstrue its effect.

Second, the injunctive relief is problematic because it does not specify what actions Governor Walker must take to comply or be subject to contempt. Rather than ordering him to instruct specific departments or agencies to take particular action with respect to enumerated statutes, it merely requires him "to treat same-sex couples the same as different sex couples in the context of processing a marriage license or determining the rights, protections, obligations or benefits of marriage." (Dkt. 134:13, ¶ 4). But this direction does not help Governor Walker determine how to apply the numerous statutes conferring benefits to married couples, or which benefits are actually benefits of marriage.

Notably, before granting its injunction against Governor Walker, the district court expressed its reservations with the vague language suggested by plaintiffs and ultimately entered by it:

> And I know that you think that it's important to have the governor on board. But everybody, every single person that's affected by an injunction, has a right to know exactly what he should do and should not do; what he can do, what he cannot do; without violating the law.
>
> And I don't think that this provides enough guidance to the governor, whoever that governor might be in the future, as to what that person should do and is allowed to do under the terms of the order that I intend to issue.

(Dkt. 151, Tr. 13:1-10).

The district court further alluded to the distinction between negative and positive rights raised by State Defendants:

> Well, one of the problems, it seems to me, is the concept of asking the governor and the attorney general to use the full extent of their authority to ensure the treatment of same-sex couples. But if I accept the idea that those two officials do not have any personal, specific authority to ensure that same-sex couples are treated the same, *what if I worded it in terms of not taking any action to interfere with state law rights, protections, obligations*, the extent -- interfere with the extension of state law, rights, protections, obligations, benefits of marriage that are provided to same-sex couples?

(*Id.* at 20:5-16) (emphasis added). Unfortunately, the district court disregarded its concern by affirmatively granting the positive right of civil marriage to same-sex couples by entering injunctive relief against Governor Walker. The result is that the injunction is impermissibly vague and broad.

Next, the remedy in this case is also improper because the district court's declaration effectively invalidates, as to same sex couples, all laws that limit marriage to a "husband" and "wife" (Dkt. 118:87, ¶ 3).

The court's order states: "Any Wisconsin statutory provisions, including those in Wisconsin Statutes chapter 765, that limit marriages to a 'husband' and a 'wife,' are unconstitutional as applied to same-sex couples." (*Id.*). The district court did not identify *any* of the "Wisconsin statutory provisions" subject to its order, other than they "includ[e] those in Wisconsin Statutes chapter 765" (*Id.*). This has left many of the state laws relating to marriage benefits completely unavailable to same sex

couples because the laws are invalid as applied to them. The resulting status of these laws is therefore uncertain.

The district court's vague injunction provides no real direction to Governor Walker regarding the rights or statutes that are subject to it, what he must direct departments and agencies to do, and relief that invalidates many state laws as applied to same-sex couples. The district court has effectively ordered that Wisconsin's statutory scheme be re-written, although it has not said how this must be done. Regardless, defining and regulating civil marriage is a task best left to the Legislature, not the courts.

When faced with a similarly controversial, emotionally charged constitutional issue, this Court has stayed its mandate to allow the Legislature to address the particulars. *See Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012) ("[W]e order our mandate stayed for 180 days to allow the Illinois legislature to craft a new gun law that will impose reasonable limitations, consistent with the public safety and the Second Amendment as interpreted in this opinion, on the carrying of guns in public."). Significantly, the Court did not order the Illinois Legislature to do anything. It instead stayed the Court's mandate to allow the Legislature to act if it chose to do so.

Here, if the Court determines that Wisconsin's traditional marriage laws violate plaintiffs' constitutional rights, a more appropriate remedy would be to clearly identify which Wisconsin statutes are unconstitutional as written—by striking particular terms via blue pencil rather than re-writing them to provide entirely new meanings—with instruction to the Wisconsin Legislature that it has a choice: amend its marriage laws to permit same-sex and opposite-sex marriages (or some other constitutionally permissible scheme) or risk having the entire civil marriage regulatory scheme invalidated. This is precisely what was done in both Vermont and Massachusetts. *See Baker v. Vermont*, 744 A.2d 864, 889 (Vt. 1999) ("The effect of the Court's decision is suspended, and jurisdiction is retained in this Court, to permit the Legislature to consider and enact legislation consistent with the constitutional mandate described herein."); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 970 (Mass. 2003) ("Entry of judgment shall be stayed for 180 days to permit the Legislature to take such action as it may deem appropriate in light of this opinion."). If this Court affirms in whole or in part, a proper remedy would not be to affirmatively grant new civil marriage rights to same-sex couples, but instead to afford the Wisconsin Legislature an opportunity to craft new laws to comply with its holding.

Finally, plaintiffs argue that State Defendants have waived their objection to the breadth of the injunction because they did not suggest alternative language (ECF 84:48) (citing *In re Aimster Copyright Litig.*, 334 F.3d 643 (7th Cir. 2003)). This misses the point. *Aimster* based its finding of waiver on the general principle that arguments made but not developed do not preserve issues for appellate review. *Id.* at 656. Here, State Defendants repeatedly and consistently argued that the amended complaint, declaration, and injunction are vague because neither plaintiffs, nor the district court, identified which laws were claimed unconstitutional (*see* Dkt. 57-58, 96, 102, 128). State Defendants' problems with the injunction and declaration are the same objections they have been raising throughout this litigation, namely, that they do not identify the specific laws or rights concerned, or provide direction how to re-write them in accordance with the district court's rulings.

CONCLUSION

For the reasons argued in this and State Defendants' opening brief, this Court should reverse the district court's judgment and vacate its permanent injunction and declaration.

Dated this 11th day of August, 2014.

Respectfully submitted,

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CERTIFICATION

I certify that this reply brief conforms to Circuit Rule 32 for a reply brief produced using the following font:

> Proportional Century Schoolbook: Minimum printing resolution of 300 dots per inch, 13 point body text, 12 point for quotes and footnotes, lead of min. 2 points, maximum of 60 characters per full line of body text. Microsoft Word 2007 was used. The length of this reply brief is 6,789 words.

Dated this 11th day of August, 2014.

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No. 14-2526

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

VIRGINIA WOLF, et al.,

Plaintiffs-Appellees,

v.

SCOTT WALKER, et al.,

Defendants-Appellants.

CERTIFICATE OF SERVICE RULE 25

I hereby certify that on August 11, 2014, I electronically filed the Wisconsin State Defendants' Reply Brief with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system.

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