# History and Recent Developments in Same-Sex Marriage Litigation

*By Austin R. Nimocks*

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## ABOUT THE AUTHOR

Austin R. Nimocks serves as senior counsel for Alliance Defending Freedom at its Washington, D.C., Regional Service Center. Nimocks earned his J.D. from the Baylor University School of Law in Waco, Texas. He is admitted to the bars of the District of Columbia, Texas, Mississippi, Alabama, Arizona, the U.S. Supreme Court, and the U.S Courts of Appeal for the 1st, 3rd, 4th, 5th, 6th, 9th, 10th, and D.C. Circuits, and he has also appeared before various federal and state courts around the country.

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## Introduction

In 2013, the nationwide legal debate over same-sex marriage reached a temporary crescendo at the U.S. Supreme Court. The Court heard two cases—one regarding a state marriage law, and one regarding the federal marriage law (DOMA—Defense of Marriage Act).[1] Each case presented distinct, though similar questions regarding the constitutionality of laws defining marriage as the union of one man and one woman. Scholars on both sides speculated that the Supreme Court could attempt to conclusively decide many of the questions surrounding the debate once and for all. And because of the potential gravity of the rulings, the public interest reached immense levels. Virtually every domestic and international media outlet was focused on the cases and their potential outcomes. Within the Court, over 170 total amicus briefs were filed in both cases.

The Supreme Court's rulings in June 2013 did anything but settle the issue. In the "state" case, *Hollingsworth v. Perry*, the Court never reached the merits of whether Proposition 8—California's constitutional amendment defining marriage as the union of one man and one woman—passed constitutional muster. Instead, the Court dismissed the case on standing grounds,[2] vacating the opinion of the Ninth Circuit Court of Appeals,[3] and leaving only the opinion of the district court intact.[4]

The "federal" case, *United States v. Windsor*,[5] struck down as unconstitutional section 3 of DOMA, which defined the terms "marriage" and "spouse" as referring to unions of one man and one woman for all purposes under federal law.[6] In its opinion, the Court criticized Congress for defining marriage itself, and not deferring to the definitions of the states.[7] However, it stopped short of passing constitutional judgment on state laws defining marriage in the traditional sense. Indeed, the Court expressly limited *Windsor*'s impact, stating that "[t]his opinion and its holding are confined to those lawful marriages" recognized by the states.[8]

Nevertheless, as one might expect, the absence of a merits-based resolution on *Hollingsworth*, coupled with language from the Supreme Court's decision in *Windsor*, unleashed a new wave of marriage litigation across the country. Judge Bernard Friedman of the Eastern District of Michigan, in a case challenging the constitutionality of Michigan's marriage laws, recently described the post-*Windsor* legal environment this way:

> The United States Supreme Court's recent decision in *United States v. Windsor*, No. 12-307 (U.S. Jun. 26, 2013), has provided the requisite precedential fodder for both parties to this litigation. [Marriage law defenders] will no doubt cite to the relevant paragraphs of the majority opinion espousing the state's "historic and essential authority to define the marital relation." They will couch the popular referendum that resulted in the passage of the [state marriage law] as "a proper exercise of the state's sovereign authority within our federal system, all in the way that the Framers of the Constitution intended." After all, what could more accurately embody "the dynamics of state government in the federal system . . . to allow the formation of consensus respecting the way the members of a discrete community treat each other in their daily contact and constant interaction with each other," than a legitimate vote of the people . . . to preserve their chosen definition of marriage in the fabric of the state constitution.
>
> On the other hand, [same-sex marriage advocates] are prepared to claim *Windsor* as their own; their briefs sure to be replete with references to the newly enthroned triumvirate of *Romer v. Evans*, 517 U.S. 620 (1996), *Lawrence v. Texas*, 539 U.S. 558 (2003) and now *Windsor*. And why shouldn't they? The Supreme Court has just invalidated a federal statute on equal protection grounds because it "placed same-sex couples in

1 Pub. L. No. 104-199, 110 Stat. 2419 (1996).

2 Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).

3 Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012).

4 Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

5 United States v. Windsor, 133 S. Ct. 2675 (2013).

6 Pub. L. No. 104-199, § 3, 110 Stat. 2419 (1996).

7 *Windsor*, 133 S. Ct. at 2691-92.

8 *Windsor*, 133 S. Ct. at 2696.

> an unstable position of being in a second-tier marriage." Moreover, and of particular importance to this case, the justices expressed concern that the natural consequence of such discriminatory legislation would not only lead to the relegation of same-sex relationships to a form of second-tier status, but impair the rights of "tens of thousands of children now being raised by same-sex couples" as well.[9]

The case filed in Judge Friedman's court is just one of several dozen ongoing marriage or marriage-related cases in this post-*Windsor* era. These cases span over half the states and are being litigated in both federal and state courts.

Not every lawsuit focuses on the constitutional due process and equal protection questions raised by same-sex marriage advocates in the *Hollingsworth* and *Windsor* cases. For example, several cases in state courts involve same-sex couples asking the state courts to grant them a divorce from their same-sex marriage acquired in another jurisdiction. One of the cases in federal court in Utah involves polygamy, where the stars from the reality show "Sister Wives" are challenging Utah and Congress's prohibition of the practice of polygamy as a condition of Utah's statehood.[10] And in Pennsylvania, nearly ten pending cases, spread between state and federal court, raise questions involving same-sex couples ranging from state tax liability, to the recognition of marriage licenses from other jurisdictions, to even a loss of consortium claim in a medical malpractice action. However, the vast majority of these pending cases in state and federal courts regard the essence of the post-*Windsor* struggle articulated by Judge Friedman. Additionally, many of the post-*Windsor* state and federal cases raise full faith and credit questions, asking whether states are constitutionally required to recognize the same-sex marriage licenses issued by other states.

## I. *Romer*, *Lawrence*, and *Windsor*

Judge Friedman predicted that the arguments of same-sex marriage advocates would "be replete with references to the newly enthroned triumvirate of *Romer v. Evans*, 517 U.S. 620 (1996), *Lawrence v. Texas*, 539 U.S. 558 (2003) and now *Windsor*." The arguments and briefs challenging traditional marriage laws across the country frequently reference these cases and assert that their combined force requires the constitutional embrace of same-sex marriage. But what exactly is this "triumvirate"? And for what collective proposition do these cases stand?

To many, these three cases have a topical congruence aside from the fact that they are all authored by the same man—Associate Justice Anthony Kennedy. One newspaper said that "[t]he *Windsor* opinion caps a trilogy of historic Kennedy opinions affirming gay equality."[11] Another commented that "*Windsor* marks the third time Justice Kennedy has authored a majority opinion in a groundbreaking gay rights case, and his reasoning makes clear that the prior two cases were not aberrations, as some had speculated."[12]

In *Romer v. Evans*, the Supreme Court invalidated a Colorado law that named a solitary class of persons—those who identify as gay, lesbian, or bisexual—either by "orientation, conduct, practices or relationships," and excluded them from state antidiscrimination laws.[13] The Court concluded that the statute "impos[ed] a broad and undifferentiated disability on a single named group," and that it was "born of animosity toward the class of persons affected."[14] And because "a bare . . . desire to harm a politically unpopular group," is not a rational basis,[15] the law was declared unconstitutional.

Seven years later, in *Lawrence v. Texas*, the Supreme

9 Opinion and Order Denying Defendants' Motion to Dismiss Amended Complaint, DeBoer v. Snyder, 2013 WL 3466719, at *2 (E.D. Mich. July 1, 2013) (internal brackets and citations omitted).

10 Brown v. Buhman, 947 F. Supp. 2d 1170 (D. Utah 2013).

11 *See* Garrett Epps, *Kennedy's Marriage Ruling is About Gay Rights, Not States' Rights*, The Atlantic, June 26, 2013, http://www.theatlantic.com/national/archive/2013/06/kennedys-marriage-ruling-is-about-gay-rights-not-states-rights/277251/.

12 *See* Julie A. Nice, *And Marriage Makes Three: A Gay Rights Trilogy Secures a Legacy*, Huffington Post, July 3, 2013, http://www.huffingtonpost.com/julie-a-nice/and-marriage-makes-three-_b_3537739.html.

13 Romer v. Evans, 517 U.S. 620, 624 (1996) (internal quotation marks omitted).

14 *Id.* at 632, 634.

15 *See*, *e.g.*, U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973).

Court struck down Texas' sodomy law, enacted in the 1970's,[16] which punished as a crime "the most private human conduct, sexual behavior, and in the most private of places, the home."[17] *Lawrence* overruled *Bowers v. Hardwick*, which held that a similar law in Georgia was *not* constitutionally infirm.[18] Justice Kennedy wrote that the *Bowers* court "misapprehended the claim of liberty there presented," finding rather that the "right to liberty under the Due Process Clause gives [citizens] the full right to engage in their conduct without intervention of the government."[19]

Justice Kennedy's opinion in *United States v. Windsor* spent several introductory pages establishing 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," and that section 3 of DOMA was unconstitutional because the federal government invaded the "virtually exclusive province of the States."[20] The primacy of "[t]he State's power in defining the marital relation is of central relevance in this case."[21] Some States have elected to "use[ their] historic and essential authority to define the marital relation" to include same-sex couples, while others have not.[22] The federal government thus erred, the Court held, in its "unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage" by passing a law whose "avowed purpose and practical effect . . . are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States."[23]

*Romer*, *Lawrence*, and *Windsor* are thus extensively cited and studied to see how the Court may rule on same-sex marriage in the future. To that end, when you factor in Justice Kennedy's express reservation in *Lawrence* (that the case "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter"), and the limited holding in *Windsor* ("This opinion and its holding are confined to those lawful marriages [created or recognized by the states]."), it might be difficult to contend that the "triumvirate" stands for the proposition that same-sex marriage is a fundamental right, or that same-sex marriage must be constitutionally imposed nationwide. However, Justice Scalia (and others that join his skepticism) isn't so convinced that the "triumvirate" will not lead to the imposition of nationwide same-sex marriage, by one path or another.[24]

Nonetheless, the legal footing upon which the "triumvirate" may stand is this: that a law or classification is unconstitutional if it is motivated solely by animus and lacks any rational explanation for its existence. The "triumvirate" reveals that to make this determination, the Supreme Court has focused on two queries: (1) whether a law creates and/or imposes an unusual or novel disability upon the group, and (2) whether the law intrudes into states' or localities' traditional sovereign sphere.[25]

In *Romer*, the Court stressed both factors as

16 Lawrence v. Texas, 539 U.S. 558, 570 (2003).

17 *Id*. at 567.

18 Bowers v. Hardwick, 478 U.S. 186 (1986).

19 *Lawrence*, 539 U.S. at 567, 578. Proponents of same-sex marriage contend that the decision of whom to marry is at the core of individual autonomy and personal liberty protected by *Lawrence*. *See*, *e.g.*, Brief for Respondents at 13-14, Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) (No. 12-144), 2013 WL 648742. Conversely, advocates of traditional marriage rely heavily upon Justice Kennedy's closing note from *Lawrence* that the case "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." *Lawrence*, 539 U.S. at 578.

20 *Windsor*, 133 S. Ct. at 2689-90, 2691 (internal quotation marks omitted).

21 *Id.* at 2692.

22 *Id.*

23 *Id.* at 2693.

24 "The penultimate sentence of the majority's opinion is a naked declaration that '[t]his opinion and its holding are confined' to those couples 'joined in same-sex marriages made lawful by the State.' Ante, at 2696, 2695. I have heard such 'bald, unreasoned disclaimer[s]' before. *Lawrence*, 539 U.S., at 604, 123 S. Ct. 2472." *Windsor*, 133 S. Ct. at 2709 (Scalia, J., dissenting).

25 This second factor is not overtly present in *Lawrence*, as the criminal law has historically operated at a state level. In like vein, it can be argued that this factor is irrelevant to marriage laws—the "virtually exclusive province of the States." Nonetheless, because of this factor's overt presence in both *Romer* and most recently *Windsor*, analyzing the "triumvirate" necessitates its inclusion.

indicating impermissible animus. There, the law's lack of precedent (a.k.a., unusual novelty) and breadth (intruding upon the prerogative of local governments) signaled its unconstitutional motive.[26] *Lawrence*, though decided on due process grounds, emphasized the unique novelty of Texas's sodomy law, as there was "no longstanding history in this country of laws directed at homosexual conduct as a distinct matter," and "laws prohibiting sodomy do not seem to have been enforced against consenting adults acting in private."[27] "It was not until the 1970's that any State singled out same-sex relations for criminal prosecution, and only nine States have done so."[28]

Similarly, in *Windsor*, Justice Kennedy referenced the novelty of DOMA, as well as its intrusion into the "virtually exclusive province of the States."[29] DOMA "creat[ed] two contradictory marriage regimes within the same State,"[30] and "undermine[d] both the public and private significance of state-sanctioned same-sex marriages."[31] The Court concluded that Congress impermissibly enacted DOMA to "interfere with state sovereign choices about who may be married."[32]

Thus, the post-*Windsor* era of cases may be viewed through this lens—whether state marriage laws emanate exclusively from animus, as determined by the two relevant queries.

## II. *Baker v. Nelson*

Apart from the "triumvirate," traditional marriage advocates counter with precedent of their own—*Baker v. Nelson*.[33] In *Baker*, a Minnesota clerk denied the issuance of a marriage license to two men. The men challenged the denial, but the Minnesota Supreme Court found that no fundamental right to marry someone of the same sex exists and that the state's marriage laws easily survive rational-basis review.[34]

The men's appeal to the U.S. Supreme Court presented three questions: (1) whether they were deprived of the right to marry under the Due Process Clause of the Fourteenth Amendment; (2) whether they were deprived of equal protection under the Fourteenth Amendment; and (3) whether they were deprived of privacy under the Ninth and Fourteenth Amendments.[35] The Supreme Court summarily dismissed the appeal, stating: "The appeal is dismissed for want of a substantial federal question."[36]

Though the summary dismissal in *Baker* is brief, it has important legal implications. Summary dismissals for want of a substantial federal question are rulings on the merits, and lower courts are "not free to disregard th[ese] pronouncement[s]."[37] "[T]he lower courts are bound by summary decisions by [the Supreme] Court until such time as the Court informs them that they are not."[38] And summary dismissals "prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by" the dismissal.[39]

Traditional marriage defenders contend that *Baker* forecloses current federal challenges since the questions presented in both *Baker* and post-*Windsor* challenges are identical.[40] But same-sex marriage proponents note that "if the [Supreme] Court has branded a question as unsubstantial, it remains so *except when doctrinal*

26 Romer v. Evans, 517 U.S. 620, 632-33 (1996).

27 *Lawrence*, 539 U.S. at 568, 569.

28 *Id.* at 570.

29 *Windsor*, 133 S. Ct. at 2691.

30 *Id.* at 2694.

31 *Id.*

32 *Id.* at 2693.

33 Baker v. Nelson, 409 U.S. 810 (1972).

34 Baker v. Nelson, 191 N.W.2d 185, 186-87 (Minn. 1971) (en banc).

35 Jurisdictional Statement at 3, Baker v. Nelson, 409 U.S. 810 (1972) (No. 71-1027).

36 *Baker*, 409 U.S. at 810.

37 Hicks v. Miranda, 422 U.S. 332, 343-45 (1975).

38 *Id.* at 344-45 (internal quotation marks omitted) (internal alterations omitted).

39 Mandel v. Bradley, 432 U.S. 173, 176 (1977) (per curiam).

40 *See*, *e.g.*, Bostic v. Rainey, 2014 WL 561978, at *9 (E.D. Va. Feb. 13, 2014) ("There is also no dispute asserted that questions presented in *Baker* are similar to the questions presented here."); McGee v. Cole, 2014 WL 321122, at *9 (S.D. W. Va. Jan. 29, 2014) ("the Court declines to find that differences in the facts of each case or the issues presented warrant nonapplication of *Baker* to this case.").

*developments indicate otherwise.*"[41] The Supreme Court never defined what exactly constituted a "doctrinal development."

In *Windsor*, the Second Circuit stated that "[i]n the forty years after *Baker*, there have been manifold changes to the Supreme Court's equal protection jurisprudence."[42] As that Court explained:

> When *Baker* was decided in 1971, "intermediate scrutiny" was not yet in the Court's vernacular. Classifications based on illegitimacy and sex were not yet deemed quasi-suspect. The Court had not yet ruled that "a classification of [homosexuals] undertaken for its own sake" actually lacked a rational basis. And, in 1971, the government could lawfully "demean [homosexuals'] existence or control their destiny by making their private sexual conduct a crime."[43]

But the First Circuit concluded in 2012 that, notwithstanding *Romer* and *Lawrence*, *Baker* definitively forecloses arguments that "presume or rest on a constitutional right to same-sex marriage."[44] Four district courts reached the same conclusion.[45]

But even if "doctrinal developments" exist, the Supreme Court said in *Hicks* "that the lower courts are bound by summary decisions by this Court '*until such time as the [Supreme] Court informs them that they are not*.'"[46] In other words, lower courts don't get to make the "doctrinal developments" determination themselves. Marriage defenders thus maintain that since the Supreme Court has yet to expressly overruled *Baker*, it remains applicable.

But apart from what hasn't been said by the Supreme Court, does the "triumvirate" represent the type of "doctrinal development" that dismisses *Baker*'s impact? The District Court of Nevada recently sought to balance developments against *Baker* in addressing the pending constitutional challenge to Nevada's marriage laws:

> The equal protection claim is the same in this case as it was in *Baker*, i.e., whether the Equal Protection Clause prevents a state from refusing to permit same-sex marriages. There is an additional line of argument potentially applicable in this case based upon *Romer v. Evans,* 517 U.S. 620, 116 S. Ct. 1620, 134 L.Ed.2d 855 (1996), concerning the withdrawal of existing rights or a broad, sweeping change to a minority group's legal status. A *Romer*-type analysis is not precluded by *Baker*, because the *Romer* doctrine was not created until after *Baker* was decided. But the traditional equal protection claim is precluded . . . .[47]

Thus, the District Court of Nevada concluded that *Baker*, on the one hand, and *Romer*, on the other hand, establish two different equal protection methodologies. And while the First Circuit and district courts in Nevada, Hawaii, Florida, and Washington acknowledge *Baker* as controlling same-sex marriage challenges

41 *Hicks*, 422 U.S. at 344 (quotation omitted) (emphasis added).

42 Windsor v. United States, 699 F.3d 169, 178-79 (2d Cir. 2012), *aff'd*, 133 S. Ct. 2675 (2013).

43 *Id.* (internal citations omitted). The federal courts, including the Second Circuit in *Windsor*, did not equate the questions presented regarding the challenges to the *federal* definition of marriage to be controlled by *Baker*. "*Baker* does not resolve our own case but it does limit the arguments to ones that do not presume or rest on a constitutional right to same-sex marriage." Massachusetts v. U.S. Dep't of Health & Human Servs., 682 F.3d 1, 8 (1st Cir. 2012). "The question [regarding . . .] Section 3 of DOMA is sufficiently distinct from the question in *Baker*: whether same-sex marriage may be constitutionally restricted by the *states*." *Windsor*, 699 F.3d at 178. *See also* Pedersen v. Office of Pers. Mgmt., 881 F. Supp. 2d 294, 308-09 (D. Conn. 2012); Dragovich v. U.S. Dep't of Treasury, 872 F. Supp. 2d 944, 952 (N.D. Cal. 2012); Golinski v. U.S. Office of Pers. Mgmt., 824 F. Supp. 2d 968, 982 n.5 (N.D. Cal. 2012); Smelt v. Cnty. of Orange, 374 F. Supp. 2d 861, 872-73 (C.D. Cal. 2005), *aff'd in part, vacated in part on other grounds, and remanded*, 447 F.3d 673 (9th Cir. 2006).

44 *Massachusetts*, 682 F.3d at 8.

45 *See* Sevcik v. Sandoval, 911 F. Supp. 2d 996, 1003 (D. Nev. 2012), *appeal docketed*, No. 12-17668 (9th Cir. Dec. 4, 2012); Jackson v. Abercrombie, 884 F. Supp. 2d 1065, 1087 (D. Haw. 2012); Wilson v. Ake, 354 F. Supp. 2d 1298, 1304-05 (M.D. Fla. 2005); *In re* Kandu, 315 B.R. 123, 137 (Bankr. W.D. Wash. 2004).

46 *Hicks*, 422 U.S. at 344-45 (quoting Doe v. Hodgson, 478 F.2d 537, 539, cert. denied sub nom (1973)). Doe v. Brennan, 414 U.S. 1096 (1973) (emphasis added) (internal alterations omitted)).

47 *Sevcik*, 911 F. Supp. 2d at 1003.

to state marriage laws, district courts in Michigan,[48] Oklahoma,[49] Texas,[50] Utah,[51] Virginia,[52] and West Virginia[53] found that "doctrinal developments" make *Baker* no longer applicable. The 10th Circuit may soon be the first court of appeal to opine on *Baker*'s applicability.

## III. *Loving v. Virginia*

Another case that factors into the post-*Windsor* world is *Loving v. Virginia*, 388 U.S. 1 (1967). In *Loving*, the Supreme Court struck down Virginia's miscegenation law that precluded whites from marrying anyone of color. Though about 37 states once had these laws, many were repealed and Virginia's law was one of just 16 remaining at the time. And to the extent that *Loving* may have furthered the cause of same-sex marriage at the time, the *Baker* decision in 1972 (just five years later) seemed to negate it.

Nevertheless, in *Windsor*, the Supreme Court affirmed that the States' regulation of domestic relations was its virtually exclusive province "[s]ubject to certain constitutional guarantees."[54] Thus, same-sex marriage advocates include *Loving* in their repertoire of authority as supporting their right to marry the one they choose.[55] Thus far, some federal courts have embraced this view of *Loving*.[56] However, the *Loving* court stated that marriage is "fundamental to our very existence and survival," affirming its gendered nature and historical procreative purpose.[57] Thus, while *Loving* appears to stand for a limited right to marry the opposite-sex partner of your choice, whether its ultimate import is broader remains to be seen.

## IV. The Post-*Windsor* Era

With the Supreme Court failing to reach the merits in *Hollingsworth* last year, there remains no federal appellate court ruling on the constitutionality of state marriage laws. In an effort to get one, however, and seemingly put the constitutionality of state marriage laws back before the Supreme Court as soon as possible, two things are happening.

First, same-sex marriage proponents filed lawsuits everywhere—not just in federal circuits thought most friendly to their cause. Of the thirteen federal circuits, ten are available for same-sex marriage challenges,[58] and cases have been filed in all of them.

Second, advocates for same-sex marriage are moving with great speed and seeking quick trial court dispositions. As examples, one case instituted a trial on February 25, 2014—a mere 8 months after *Windsor* was decided.[59] Another case completed summary judgment briefing just over 3 months after it was filed.[60] Appealable rulings by federal district courts were made in ten cases,[61] oral arguments have been held or

48 DeBoer v. Snyder, 2014 WL 1100794, at *15 n.6 (E.D. Mich. Mar. 21, 2014).

49 Bishop v. U.S. *ex rel.* Holder, 962 F. Supp. 2d 1252, 1277 (N.D. Okla. 2014).

50 De Leon v. Perry, 2014 WL 715741, at *10 (W.D. Tex. Feb. 26, 2014).

51 Kitchen v. Herbert, 961 F. Supp. 2d 1181, 1195 (D. Utah 2013).

52 Bostic v. Rainey, 2014 WL 561978, at *10 (E.D. Va. Feb. 13, 2014).

53 McGee v. Cole, 2014 WL 321122, at *10 (S.D. W. Va. Jan. 29, 2014).

54 *Windsor*, 133 S. Ct. 2675, 2680 (2013) (citing Loving v. Virginia, 388 U.S. 1 (1967)).

55 *See*, *e.g.*, Brief for Appellees at 27, Bostic v. Rainey, Nos. 14-1167(L), 14-1169, 14-1173 (4th Cir. Apr. 11, 2014), ECF No. 129.

56 *See*, *e.g.*, De Leon v. Perry, 2014 WL 715741, at *19 (W.D. Tex. Feb. 26, 2014).

57 *Loving*, 388 U.S. at 12.

58 I exclude the Second and D.C. Circuits since all of the jurisdictions within them embrace same-sex marriage. The Federal Circuit is excluded for subject matter jurisdiction. Puerto Rico is part of the First Circuit and has a pending case. *See* Complaint, Conde-Vidal v. Rius-Armendariz, No. 3:14-cv-01253 (D. P.R. Mar. 25, 2014), ECF No. 1.

59 Notice to Appear, DeBoer v. Snyder, No. 12-cv-10285 (E.D. Mich. July 1, 2013), ECF No. 90. Advocates in another case requested a trial on February 17, 2014. *See* Joint Case Management Plan at 17, Whitewood v. Corbett, No. 13-cv-01861 (M.D. Pa. Oct. 4, 2013), ECF No. 38.

60 Docket Report, Harris v. McDonnell, No.13-cv-00077 (W.D. Va. 2013) (showing Summary and Complaint issued on Aug. 1, 2013 and Reply to Response to Motion for Summary Judgment filed on Nov. 7, 2013).

61 *See* Obergefell v. Wymyslo, 962 F. Supp. 2d 968 (S.D. Ohio 2013); *Kitchen*, 961 F. Supp. 2d at 1181; Bishop v. U.S. *ex rel.* Holder, 962 F. Supp. 2d 1252, 1252 (N.D. Okla. 2014); Bourke v. Beshear, 2014 WL 556729 (W.D. Ky. Feb. 12, 2014); Bostic v.

scheduled in the 4th, 9th, and 10th Circuits, and many other cases are soon expected to produce appealable rulings on a variety of dispositive motions, meaning that several appeals will be docketed yet in 2014.

And although the litigation is voluminous and geographically diverse, the nature of the various cases, and the arguments presented in each one, do not vary significantly. The arguments made in the post-*Windsor* federal challenges are primarily threefold: (1) substantive due process; (2) equal protection; and (3) full faith and credit.

*A. Substantive Due Process*

*Harris v. McDonnell* is a class action lawsuit filed on behalf of two same-sex couples and "all others similarly situated."[62] The suit contends that "[e]ach member of the Plaintiff Class either has been unable to marry his or her same-sex partner in Virginia because of the marriage ban or validly married a partner of the same sex in another jurisdiction but is treated as a legal stranger to his or her spouse under Virginia law."[63] Until recently, the class action approach to marriage litigation has not been significantly utilized. However, a couple of other class action cases have been filed in other jurisdictions.[64]

The *Harris* plaintiffs have since intervened and joined the appeal in the Fourth Circuit in *Bostic v. Rainey*, a similar non-class action case from the Eastern District of Virginia involving two same-sex couples. The plaintiffs in both of these Virginia cases claim that their inability to marry someone of the same sex deprives them of substantive due process under the Fourteenth Amendment.[65] Advocates of traditional marriage contend that there exists no fundamental right to same-sex marriage, and that one should not be recognized since same-sex marriage is not deeply rooted within the history and traditions of our nation.[66] And the Supreme Court said as much in *Windsor*, acknowledging that "[i]t seems fair to conclude that, until recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage."[67]

However, plaintiffs in *Harris* and *Bostic* contend that they are not advocating for the creation or recognition of a new fundamental right, but to exercise the *existing* fundamental right to marry, to wit:

> The right to marry the unique person of one's choice and to direct the course of one's life in this intimate realm without undue government restriction is one of the fundamental liberty interests protected by the Due Process Clause of the Fourteenth Amendment. Defendants' actions to enforce the marriage ban directly and impermissibly infringe Plaintiffs' choice of whom to marry, interfering with a core, life-altering, and intimate personal choice.[68]

And this claim for a fundamental right to marry the person of one's choosing is not unique to Virginia. The claims to a fundamental right to marry a person of the same sex are prolific, as they have been made in almost every single pending federal lawsuit. For example, in the Western District of Wisconsin, plaintiffs claim that the marriage laws deprive them of "the fundamental right to marry the person of one's choice and related constitutional rights to liberty, dignity, autonomy, family integrity, and association."[69] In the Eastern

Rainey, 2014 WL 561978 (E.D. Va. Feb. 13, 2014); Lee v. Orr, 2014 WL 683680 (N.D. Ill. Feb. 21, 2014) (unpublished); *De Leon*, 2014 WL 715741; Tanco v. Haslam, 2014 WL 997525 (M.D. Tenn. Mar. 14, 2014); *DeBoer*, 2014 WL 1100794; Henry v. Himes, 1:14-cv-00129 (S.D. Ohio Apr. 14, 2014).

62 Complaint for Declaratory and Injunctive Relief at 1, Harris v. McDonnell, No. 13-cv-00077 (W.D. Va. Aug. 1, 2013), ECF No. 1.

63 *Id.* at 17.

64 *See*, *e.g.*, De Leon v. Perry, 13-cv-00982 (W.D. Tex.).

65 *Id.* at 29-31; Plaintiffs' First Amended Complaint for Declaratory, Injunctive, and Other Relief at 16, Bostic v. Rainey, 2:13-cv-00395 (E.D. Va. Sept. 3, 2013), ECF No. 18.

66 *See, e.g.*, Memorandum of State Defendants in Opposition to Plaintiffs' Motion for Summary Judgment, Harris v. McDonnell, No.13-cv-00077 (W.D. Va. Oct. 24, 2013), ECF No. 73; Appellant McQuigg's Opening Brief, Bostic v. Rainey, Nos. 14-1167(L), 14-1169, 14-1173 (4th Cir. Mar. 28, 2014), ECF No. 75.

67 United States v. Windsor, 133 S. Ct. 2675, 2689 (2013).

68 Complaint for Declaratory and Injunctive Relief at 30, Harris v. McDonnell, No.13-cv-00077 (W.D. Va. Aug. 1, 2013), ECF No. 1.

69 *See* Complaint for Declaratory and Injunctive Relief at 25,

District of Michigan, plaintiffs claim:

> If marriage is a fundamental right, then logic and emerging Supreme Court precedent dictate that the legitimacy of two adults' love for one another is the same in the eyes of the law regardless of sexual orientation and that the rights of consenting adults to marry and to form a family, should they choose to do so, do not depend on sexual orientation.[70]

Thus, plaintiffs argue that the martial desires of same-sex couples are encompassed *within* the existing fundamental right to marry, and do not encompass a new fundamental right.

Potentially obstructing the recognition of a fundamental right for same-sex couples to be issued marriage licenses, however, lays several obstacles. First, in identifying fundamental rights, the Due Process Clause of the Fourteenth Amendment "specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition."[71] "The right to marry the unique person of one's choice," in those express terms, has never been deeply rooted within our country's history and tradition, even within the realm of opposite-sex couples. Restrictions on who one may marry have always included, *e.g.*, age and consanguinity, so any right to marry *per se* the "person of one's choice" is arguably non-existent, much less deeply rooted.

Second, the right to marry cannot seemingly survive in this broad, abstract manner, but requires "careful description" resting on "concrete examples" of how the right has been instantiated.[72] Even in *Lawrence*, where the right to sexual intimacy was arguably broadened, it was nonetheless restricted by age to consenting adults.[73] To date, every Supreme Court case involving the fundamental right to marry regarded opposite-sex couples, and none of those cases even present dictum that expressly relates to same-sex couples.[74]

Third, whether same-sex relationships fit within the fundamental right to marry is at odds with *Baker*.

Finally, scholars contend that it has been 40 years since the Supreme Court last recognized a new fundamental right.[75] Reversing the gravity of this trend may be difficult to do. Nonetheless, whether same-sex marriage is enveloped within the fundamental right to marry is an active question, as the most recent federal district courts to opine on the matter have been unable to reach a consensus.[76]

*B. Equal Protection*

In the cases making equal protection challenges, same-sex couples claim that the state's enforcement and defense of its laws defining marriage as the union of one man and one woman violate the Equal Protection

Wolf v. Walker, No. 3:14-cv-00064 (W.D. Wis. Feb. 3, 2014), ECF No. 1.

70 Plaintiffs' Brief in Opposition to State Defendants' Motion for Summary Judgment at 1-2, DeBoer v. Snyder, No. 12-cv-10285 (E.D. Mich. Sep. 9, 2013), ECF No. 76. *See also* Complaint for Declaratory and Injunctive Relief at 27, Forum for Equality Louisiana, Inc. v. Barfield, No. 2:14-cv-00327 (E.D. La. Feb. 12, 2014) ("Defendants' actions infringe Plaintiffs' fundamental right to marry by penalizing Plaintiffs based on their exercise of their constitutionally protected choice to marry the person they love."), ECF No. 1.

71 Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997) (internal quotation marks omitted).

72 *Id.* at 721-22.

73 Lawrence v. Texas, 539 U.S. 558, 578 (2003).

74 *See*, *e.g.*, Zablocki v. Redhail, 434 U.S. 374 (1978); Turner v. Safley, 482 U.S. 78 (1987).

75 *See*, *e.g.*, Erwin Chemerinsky, *In Defense of Roe and Professor Tribe*, 42 Tulsa L. Rev. 833, 833 (2007) ("*Roe* was the last time the Court recognized a new fundamental right.").

76 *Compare* Sevcik v. Sandoval, 911 F. Supp. 2d 996, 1002-03 (D. Nev. 2012), *with* Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 991-93 (N.D. Cal. 2010). *See also* Kitchen v. Herbert, 961 F. Supp. 2d 1181, 1204 (D. Utah 2013) ("The court therefore finds that the Plaintiffs have a fundamental right to marry that protects their choice of a same-sex partner."); De Leon v. Perry, 2014 WL 715741, at *20 (W.D. Tex. Feb. 26, 2014) ("By denying Plaintiffs . . . the fundamental right to marry, Texas denies their relationship the same status and dignity afforded to citizens who are permitted to marry."); Obergefell v. Wymyslo, 962 F. Supp. 2d 968, 978-82 (S.D. Ohio 2013) (recognizing a fundamental right to "marriage recognition" or to "remain married"); Lee v. Orr, 2014 WL 683680, at *1 ("There is no dispute here that the ban on same-sex marriage violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and infringes on the plaintiffs' fundamental right to marry.").

Clause of the Fourteenth Amendment.[77]

In most of the post-*Windsor* cases, the equal protection claims regard the categories of both sex (or gender) and sexual orientation.[78] But before March 26, 2013, the argument that marriage laws discriminated unconstitutionally based on sex or gender was virtually dead. As stated in 1999 by the Vermont Supreme Court, "the marriage laws are facially neutral; they do not single out men or women as a class for disparate treatment, but rather prohibit men and women equally from marrying a person of the same sex."[79] The Vermont Supreme Court also concluded that "there is no discrete class subject to differential treatment solely on the basis of sex; each sex is equally prohibited from precisely the same conduct."[80] The only contrary authority, *from any appellate court*, came from the Hawaii Supreme Court in 1993.[81] Prior to *Windsor*, all other federal and state courts rejected the proposition that marriage laws discriminate on the basis of gender or sex.[82]

On March 26, 2013, Justice Anthony Kennedy, during the oral argument in *Hollingsworth v. Perry*, reignited the discussion by asking whether marriage laws implicate "gender-based classification[s]," and noting that it is "a difficult question that I've been trying to wrestle with."[83]

And if Justice Kennedy is still wrestling with that question, then notwithstanding the authorities against the proposition that marriage laws discriminate on the basis of sex, same-sex marriage advocates will continue to make that argument.[84] However, only the District Court of Utah, in its post-*Windsor* challenge, has determined that "the [marriage] law differentiates on the basis of sex" and "discriminates on the basis of sexual identity without a rational reason to do so."[85] Thus, apart from this single conclusion, the real equal protection struggle in these cases seems to regard sexual orientation and determining if marriage laws unconstitutionally discriminate on the basis of sexual orientation.

In virtually every case, same-sex marriage advocates contend that sexual orientation should be analyzed under heightened scrutiny.[86] However, strict scrutiny has been applied only to laws regarding race, alienage, or national origin classifications.[87] And only classifications based on sex or illegitimacy have received intermediate scrutiny.[88]

Moreover, the Supreme Court has used only rational basis review with sexual orientation classifications.[89] In *Windsor*, though the Second Circuit applied

77 *See*, *e.g.*, Amended Complaint for Declaratory and Injunctive Relief at 7-10, DeBoer v. Snyder, No. 12-cv-10285 (E.D. Mich. Oct. 3, 2013), ECF No. 38. Michigan, like most states, recognizes marriage only between one man and one woman. Mich. Const. art. I, § 25.

78 *See*, *e.g.*, Complaint for Declaratory and Injunctive Relief at 18-23, Kitchen v. Herbert, No. 2:13-cv-00217 (D. Utah Mar. 25, 2013), ECF No. 2.

79 Baker v. Vermont, 744 A.2d 864, 880 n.13 (Vt. 1999).

80 *Id.*

81 Baehr v. Lewin, 852 P.2d 44 (Haw. 1993), *reconsideration granted in part*, 875 P.2d 225 (Haw. 1993). In *Baehr*, a two judge plurality expressed the view that marriage laws constituted sex discrimination under the *state* constitution. *Id.* at 59-63. That view was later superseded by an amendment to the Hawaii Constitution. *See* Haw. Const. art. I, § 23.

82 *See* Wilson v. Ake, 354 F. Supp. 2d 1298, 1307-08 (M.D. Fla. 2005); Smelt v. Cnty. of Orange, 374 F. Supp. 2d 861, 876-77 (C.D. Cal. 2005); *In re* Kandu, 315 B.R. 123, 143 (Bankr. W.D. Wash. 2004); *In re* Marriage Cases, 183 P.3d 384, 436-40 (Cal. 2008); Dean v. Dist. of Columbia, 653 A.2d 307, 363 n.2 (D.C. 1995) (Steadman, J., concurring); Jones v. Hallahan, 501 S.W.2d 588, 590 (Ky. 1973); Conaway v. Deane, 932 A.2d 571, 585-602 (Md. 2007); Hernandez v. Robles, 855 N.E.2d 1, 10-11 (N.Y. 2006) (plurality); *id.* at 20 (Graffeo, J., concurring); Andersen v. King Cnty., 138 P.3d 963, 988 (Wash. 2006) (plurality opinion); Singer v Hara, 522 P.2d 1187, 1191-92 (Wash. Ct. App. 1974).

83 Transcript of Oral Argument at 13-14, Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) (No. 12-144).

84 *See*, *e.g.*, Complaint for Declaratory and Injunctive Relief at 33-35, Majors v. Horne, 2:14-cv-00518 (D. Ariz. Mar. 12, 2014), ECF No. 1.

85 Kitchen v. Herbert, 961 F. Supp. 2d 1181, 1215 (D. Utah 2013).

86 *See*, *e.g.*, First Amended Complaint, Fisher-Borne v. Smith, 1:12-cv-589 (M.D.N.C. Jul. 19, 2013), ECF No. 40.

87 *See*, *e.g.*, City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985). *But see* SmithKline Beecham Corp. v. Abbott Laboratories, 740 F.3d 471, 481 (9th Cir. 2014) (finding that "*Windsor* requires that heightened scrutiny be applied to equal protection claims involving sexual orientation.").

88 *See*, *e.g.*, Clark v. Jeter, 486 U.S. 456, 461 (1988).

89 *See*, *e.g.*, Romer v. Evans 517 U.S. 620 (1996); Lawrence v. Texas, 539 U.S. 558 (2013).

intermediate scrutiny for sexual orientation, the Supreme Court did not.[90] The First Circuit also rejected the application of intermediate scrutiny for sexual orientation in its DOMA case.[91] Indeed, before the Second Circuit's decision in *Windsor*, every federal circuit that addressed sexual orientation classifications applied rational basis review.[92]

Nevertheless, even assuming the application of rational basis review, it is unclear what analysis should be deployed: a traditional or classic equal protection analysis, vs. courts looking only at the animus-based approach grounded within *Romer*, vs. applying both.[93]

For advocates of same-sex marriage, the "triumvirate" approach appears to be the most popular to this point. As an example, in one brief, same-sex marriage advocates contend that in light of *Romer*, *Lawrence,* and *Windsor*, there is no principled or rational basis for arguing that gays and lesbians do not have the same rights as heterosexuals.[94]

Predictably, the arguments of marriage defenders focus on the fact that marriage laws between one man and one woman, created long ago, cannot be said to have been enacted with an animosity towards same-sex couples. The Virginia Attorney General argued that:

> The common law definition of marriage as between a man and a woman, husband and wife,—which the 1975 legislation did not change—in turn is too old to have been the product of bare animus because, as the *Windsor* majority noted, no one would have thought same-sex marriage possible at the time the definition was adopted.[95]

This argument, of course, accompanies a plethora of arguments defending the importance, necessity, or rational basis of laws defining marriage as between one man and one woman.[96] Many of these arguments are captured in resources cited by Justice Alito in his *Windsor* dissent,[97] as well as many of the briefs filed by

90 *See* United States v. Windsor, 133 S. Ct. 2675, 2693 (2013) (quoting United States Dep't of Agric. v. Moreno, 413 U.S. 528, 533 (1973)).

91 Massachusetts v. U.S. Dep't of Health & Human Servs., 682 F.3d 1, 9 (1st Cir. 2012) ("[n]othing indicates that the Supreme Court is about to adopt this new suspect classification when it conspicuously failed to do so in *Romer*—a case that could readily have been disposed by such a demarche.").

92 *See, e.g.*, *id.*; Cook v. Gates, 528 F.3d 42, 61 (1st Cir. 2008); Thomasson v. Perry, 80 F.3d 915, 928 (4th Cir. 1996) (en banc); Johnson v. Johnson, 385 F.3d 503, 532 (5th Cir. 2004); Scarbrough v. Morgan Cnty. Bd. of Educ., 470 F.3d 250, 261 (6th Cir. 2006); Schroeder v. Hamilton Sch. Dist., 282 F.3d 946, 950–51 (7th Cir. 2002); Citizens for Equal Protection v. Bruning, 455 F.3d 859, 866-67 (8th Cir. 2006); Holmes v. Cal. Army Nat'l Guard, 124 F.3d 1126, 1132 (9th Cir. 1997); Price-Cornelison v. Brooks, 524 F.3d 1103, 1114 (10th Cir. 2008); Rich v. Sec'y of the Army, 735 F.2d 1220, 1229 (10th Cir. 1984); Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804, 818 (11th Cir. 2004); Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989).

93 *See* Sevcik v. Sandoval, 911 F. Supp. 2d 996, 1003 (D. Nev. 2012), *appeal docketed*, No. 12-17668 (9th Cir. Dec. 4, 2012).

94 *See, e.g.*, Plaintiffs' Brief in Opposition to the Motion to Dismiss of Defendant Donald Petrille, Jr. at 15-17, Whitewood v. Corbett, No. 13-cv-01861-JEJ (M.D. Pa. Oct. 21, 2013), ECF No. 56; *see also* Plaintiffs' Motion for Declaratory Judgment and Permanent Injunction at 37-41, Obergefell v. Wymyslo, No. 13-cv-00501 (S.D. Ohio Oct. 29, 2013), ECF No. 53.

95 Memorandum of State Defendants Robert F. McDonnell and Janet M. Rainey in Opposition to Plaintiffs' Motion for Summary Judgment at 29, Harris v. McDonnell, No. 13-cv-00077 (W.D. Va. Oct. 24, 2013) (citation omitted), ECF No. 73. *See also* Defendant Petrille's Brief in Support of Motion to Dismiss Plaintiffs' Complaint for Failure to State a Claim Under Fed. R. Civ. P. 12(b)(6), and Failure to Join Parties Under Fed. R. Civ. P. 12(b)(7) and 19 at 30, Whitewood v. Corbett, No. 13-cv-01861 (M.D. Pa. Oct. 7, 2013), ECF No. 41 ("The two factors at the heart of *Romer*, *Lawrence*, and *Windsor* strongly support the Commonwealth's power to retain its traditional definition of marriage. First, the traditional definition of marriage is hardly a novel disability, but a centuries-old institution. . . . Far from an aberrant, novel disability, Pennsylvania's definition of marriage, like so many other provisions of Pennsylvania law, is consistent.").

96 For example, marriage laws promote raising children by their biological parents. Biological parents are uniquely linked to their offspring and can help them understand their genetic traits and lineages. Blood lines matter and are celebrated throughout domestic relations laws. Additionally, traditional marriages guarantee that one of the parents will be the same sex of all children born to that union, thus giving each child a role model of both the same sex and opposite sex.

97 United States v. Windsor, 133 S. Ct. 2675, 2715 (2013) (Alito, J., dissenting) (citing S. Girgis, R. Anderson, & R. George, What is Marriage? Man and Woman: A Defense 53–58 (2012); John Finnis, *Marriage: A Basic and Exigent Good*, 91 The Monist 388, 398 (2008)).

traditional marriage defenders in pending cases.[98]

But same-sex marriage advocates are sure to note that unconstitutional animus may not necessarily contain "malicious ill will."[99] Instead of a "bare . . . desire to harm a politically unpopular group,"[100] "negative attitudes" may suffice,[101] as well as an "instinctive mechanism to guard against people who appear to be different in some respects from ourselves."[102]

Traditional marriage advocates would also suggest that while nobody disputes that prevailing attitudes have been negative towards certain groups over the course of our country's history (religious, racial, or otherwise), to prevail in their claims, advocates of same-sex marriage would seemingly need to demonstrate that, as to marriage, *both* the incepting and continuing purposes behind *all* marriage laws, and not just recent amendments, possess no legitimate reason (rational basis) beyond a "bare . . . desire to harm a politically unpopular group." However, most of the recent district court opinions on the constitutionality of state marriage laws have not found them to survive rational basis review. Whether the courts of appeal will view matters the same way remains to be seen.

*C. Full Faith and Credit & Section 2 of DOMA*

*Palladino v. Corbett*, pending in the Eastern District of Pennsylvania, is demonstrative of the full faith and credit issues raised in many of the pending cases across the country. Filed on Sept. 26, 2013, the plaintiffs are a same-sex couple with a marriage license from Massachusetts. They challenge the constitutionality of Pennsylvania's refusal to recognize their legal relationship.[103] Similar claims are pending in a variety of other cases across the country.[104] *Palladino* and a handful of other cases, like *Bradacs v. Haley*, No. 13-cv-02351 (D. S.C.), present only the exclusive question of whether one state must recognize the same-sex marriage of another state. However, most of the post-*Windsor* lawsuits already referenced are hybrid cases, presenting both (1) a claim for the issuance of marriage licenses to some plaintiffs, and (2) a claim that the existing marriage licenses of other plaintiffs from different jurisdictions be recognized by the state at issue.

As to the claims that existing same-sex marriages be recognized, two unique issues are presented in these challenges. First regards whether section 2 of DOMA was a valid exercise of Congress's Article IV authority. Section 2, unaddressed by *Windsor*, reads:

98 *See*, *e.g.*, Appellant's Principal Brief, Smith v. Bishop, Nos. 14-5003, 14-5006 (10th Cir. Feb. 24, 2014), ECF No. 01019207411; Appellant McQuigg's Opening Brief, Bostic v. Rainey, Nos. 14-1167(L), 14-1169, 14-1173 (4th Cir. Mar. 28, 2014), ECF No. 75; Brief of Appellants Gary R. Herbert and Sean D. Reyes, Kitchen v. Herbert, No. 13-4178 (10th Cir. Feb. 3, 2014).

99 Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 375 (2001) (Kennedy, J., concurring).

100 *Windsor*, 133 S. Ct. at 2693 (citation and quotation marks omitted); *Romer*, 517 U.S. 620, 634 (1996) (citation and quotation marks omitted).

101 City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 448 (1985).

102 *Garrett*, 531 U.S. at 374 (Kennedy, J., concurring).

103 Complaint for Declaratory and Injunctive Relief at 16-17, Palladino v. Corbett, No. 13-cv-05641 (E.D. Pa. Sept. 26, 2013), ECF No. 1.

104 *See*, *e.g.*, Plaintiffs' First Amended Complaint at 8-11, Bishop v. United States, No. 04-cv-848-TCK-TLW (Okla. Aug. 10, 2009); Class Action Complaint for Declaratory and Injunctive Relief at 38, Harris v. McDonnell, No. 13-cv-00077 (W.D. Va. Aug. 1, 2013), ECF No. 1; Verified Complaint for Declaratory, Injunctive, and Other Relief at 15-17, Bradacs v. Haley, No. 13-cv-02351 (D. S.C. Aug. 28, 2013), ECF No. 1; Complaint for Declaratory and Injunctive Relief at 26-27, Tanco v. Haslam, No. 13-cv-01159 (M.D. Tenn. Oct. 21, 2013), ECF No. 1; Plaintiffs' Original Complaint for Declaratory and Injunctive Relief at 13, De Leon v. Perry, No. 13-cv-00982 (W.D. Tex. Oct. 28, 2013), ECF No. 1; Complaint for Declaratory and Injunctive Relief at 3, 12, Jernigan v. Crane, No. 13-cv-00410 (E.D. Ark. July 15, 2013), ECF No. 1-2; Amended Complaint for Declaratory and Injunctive Relief at 2, 22, Bourke v. Beshear, No. 13-cv-00750 (W.D. Ky. Aug. 16, 2013), ECF No. 5; Complaint for Declaratory and Injunctive Relief at 2, 15-16, Franklin v. Beshear, No. 13-cv-00946 (W.D. Ky. Aug. 16, 2013), ECF No. 1; Amended Complaint for Declaratory and Injunctive Relief at 15-16, Robicheaux v. Caldwell, No. 13-cv-05090 (E.D. La. Aug. 9, 2013), ECF No. 10; Complaint for Declaratory and Injunctive or Other Relief at 4, 8, Geiger v. Kitzhaber, No. 13-cv-01834 (D. Or. Oct. 15, 2013), ECF No. 1; Complaint for Declaratory and Injunctive Relief at 16-17, 22-24, Latta v. Otter, No. 13-cv-00482 (D. Idaho Nov. 8, 2013), ECF No. 1; Complaint for Declaratory and Injunctive Relief at 11-12, Hard v. Bentley, 2:13-cv-922 (M.D. Ala. Dec. 16, 2013), ECF No. 1; Complaint for Declaratory and Injunctive Relief at 38-40, Majors v. Horne, 2:14-cv-00518 (D. Ariz. Mar. 12, 2014), ECF No. 1.

**Section 2. Powers reserved to the states**

> No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

The Full Faith and Credit Clause of the U.S. Constitution provides as follows:

> Full faith and credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. *And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.*[105]

The second sentence provides the basis for section 2 of DOMA. When passed, some scholars believed that section 2 was a valid exercise of Congress's power, though ultimately unnecessary as it merely affirmed the status quo—that states did not need to recognize same-sex marriages from other states.[106] Others believed that section 2 of DOMA was an unconstitutional exercise of Congress's power.[107]

If section 2 of DOMA is upheld as constitutional, then the efforts to force states to recognize the same-sex marriages of other states may be short-lived. But if section 2 of DOMA is declared unconstitutional, that does not settle the ultimate question of whether states must recognize every marriage license of every other state. For within the realm of legal statuses affirmed by licenses, there has never been a quid pro quo. Lawyers do not expect an automatic right to practice law in one state with a license from another. The same is true even when addressing a fundamental right, like the right to bear arms. Within Virginia, for example, a resident that obtains a concealed handgun permit may carry such a weapon about the person and hidden from common observation.[108] If one crosses into Maryland, however, their Virginia license means nothing and carrying a concealed handgun without a Maryland concealed carry license is a jailable offense.[109] Thus, whether section 2 of DOMA is an unconstitutional exercise of Congress's authority, or whether a pure application of the Full Faith and Credit Clause of the U.S. Constitution requires states to recognize other states' marriage licenses remains to be seen.

On April 14, 2014, the Southern District of Ohio ruled that Ohio was required to recognize same-sex marriage licenses issued by California, Massachusetts, and New York.[110] That same court reached a similar ruling about a same-sex marriage license from Maryland.[111] However, neither of those decisions addressed the ongoing validity of section 2 of DOMA, nor the pure questions of full faith & credit regarding interstate licensure recognition, as the court concluded in both cases that "Section 2 of DOMA is not specifically before [the] Court." Similarly, though a recognition question was presented to it, the Western District of Kentucky did not address the constitutionality of section 2 of DOMA in issuing its decision.[112] However, the Northern District of Oklahoma concluded that its plaintiffs lacked standing to challenge section 2 of DOMA because it was state law, and not federal law, that caused the plaintiffs' alleged injuries. In *Bishop*, the court concluded that

105 U.S. Const. art. IV, § 1 (emphasis added).

106 *See*, *e.g.*, Lynn D. Wardle, *DOMA: Protecting Federalism in Family Law*, 45 Fed. Law. 30, 33 (1998) ("Section 2 merely *does* clarify that the federal full faith and credit rules *do not require* other states to recognize or enforce same-sex marriages legalized or recognized in one state.").

107 *See*, *e.g.*, Letter from Professor Laurence H. Tribe to Senator Edward Kennedy (May 24, 1996), *reprinted in* 142 Cong. Rec. S5931-33 (daily ed. June 6, 1996) (statement of Sen. Kennedy, "Unconstitutionality of S. 1740, The So-Called Defense of Marriage Act") (questioning constitutionality of DOMA under full faith and credit).

108 Va. Code Ann. § 18.2-308.01(a).

109 Md. Code Ann., Crim. Law § 4-101(d)(1).

110 *See* Order Granting Plaintiffs' Motion for Declaratory Judgment and Permanent Injunction, Henry v. Himes, 1:14-cv-00129 (S.D. Ohio Apr. 14, 2014).

111 *See* Obergefell v. Wymyslo, 962 F. Supp. 2d 968, 968 (S.D. Ohio 2013).

112 Bourke v. Beshear, 2014 WL 556729, at *3 (W.D. Ky. Feb. 12, 2014).

"Section 2 is an entirely permissive federal law," and that "[i]t does not mandate that states take any particular action, does not remove any discretion from states, does not confer benefits upon non-recognizing states, and does not punish recognizing states."[113]

Complicating these questions are the grey areas of full faith and credit applied to judgments, on the one hand, and public acts, on the other hand. The Supreme Court long ago recognized and explained the necessary distinction between judgments and acts (or statutes) with respect to the Full Faith and Credit Clause. Indeed, the Court has recognized "that there are some limitations upon the extent to which a state will be required by the full faith and credit clause to enforce even the judgment of another state, in contravention of its own statutes or policy."[114]

But with respect to statutes or acts, the consideration for sovereignty is even greater, because "[a] rigid and literal enforcement of the full faith and credit clause, without regard to the statute of the forum, would lead to the absurd result that, wherever the conflict arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own."[115] And the Court has reaffirmed that while the purpose of the Full Faith and Credit Clause:

> [W]as to preserve rights acquired or confirmed under the public acts and judicial proceedings of one state by requiring recognition of their validity in other states, the very nature of the federal union of states, to which are reserved some of the attributes of sovereignty, precludes resort to the full faith and credit clause as the means for compelling a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate."[116]

Thus statutes, as opposed to judgments, historically receive radically different treatment under the Full Faith and Credit Clause.[117]

As the appeals of the many recognition cases progress, the opinions of the courts of appeal should address more substantively these important questions and better define the shades of grey that presently define them. On the other hand, if same-sex marriage is declared to be a fundamental right under the U.S. Constitution, then recognition questions could become moot.

*D. State Court Cases*

State court cases demanding a right to same-sex marriage, or some form of recognition of a same-sex relationship, exist in several states across the country. While some of these cases have the potential to be significant, their importance is presently overshadowed by the concurrent federal litigation.

Several of the pending state cases are same-sex divorce cases. Same-sex divorce cases are nothing new and were an expected legal phenomenon once Ontario began issuing marriage licenses to same-sex couples from the U.S. in 2002. Prior to the *Windsor* decision, many states had same-sex dissolution claims filed in their courts, to wit: Connecticut (*Rosengarten v. Downes*), Indiana (*Ranzy v. Chism*), Iowa (*Brown v. Perez*), Maryland (*Port v. Cowan*), Michigan (*Dubey v. Rose*), Missouri (*Sparks v. Sparks*), Nebraska (*Mueller v. Pry*), New Jersey (*Hammond v. Hammond*), New Mexico (*Haught v. Carrejo*), New York (*Sharma v. Agrawal*), Oklahoma (*O'Darling v. O'Darling*), Rhode Island (*Chambers v. Ormiston*), and Wyoming (*Christiansen v. Christiansen*).

However, these cases continue to be filed as more and more same-sex couples acquire marriage licenses but later, like many couples, see their relationships sour. The arguably leading same-sex divorce cases are pending currently before the Texas Supreme Court—*In the Matter of J.B. and H.B.* (No. 11-0024) and *Texas v. Naylor & Daly* (No. 11-0114). Both same-sex couples acquired marriage licenses in Massachusetts. Naylor and Daly successfully obtained a divorce in

113 Bishop v. U.S. *ex rel.* Holder, 962 F. Supp. 2d 1252, 1266 (N.D. Okla. 2014).

114 Ala. Packers Ass'n v. Indus. Accident Comm'n of Cal., 294 U.S. 532, 546 (1935).

115 *Id.* at 547.

116 Pac. Emp'rs. Ins. Co. v. Indus. Accident Comm'n of Cal., 306 U.S. 493, 501 (1939).

117 Myriad cases, decided by the court up to the present day, establish and confirm this proposition. *See*, *e.g.*, Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981); Baker v. General Motors Corp., 522 U.S. 222 (1998); Sun Oil Co. v. Wortman, 486 U.S. 717 (1988).

Texas state court, while J.B. and H.B. did not. The central question in these cases is whether the Texas state courts can exercise subject matter jurisdiction over a legal relationship that state law expressly does not recognize. This same question is also pending in Alabama (*Richmond v. Richmond*), Indiana (*Wetli v. Shaffer*), Kentucky (*Romero v. Romero*), Mississippi (*Czekala-Chatham v. Melancon*), Nebraska (*Nichols v. Nichols*), Tennessee (*Dayandante v. Dayandante*), and perhaps other jurisdictions.

Of course, not all same-sex couples that have marriage licenses from other jurisdictions are looking to divorce. Many are asking their home states to recognize that license. For example, in the Orphans Court of Northhampton County, Pennsylvania, the surviving partner of a same-sex couple with a marriage license from Connecticut is challenging the Commonwealth's imposition of an estate tax in *In re Estate of Catherine Burgi-Rios* (No. 2012-1310). In *Nelson v. Kansas Department of Revenue* (13-c-001465), same-sex couples are seeking the right to file joint tax returns. And in Kentucky, the existence of a Vermont civil union is being used as the basis for asserting the spousal privilege in a murder case in *Kentucky v. Cleary* (No. 11CR3329). And though brought in federal court under diversity jurisdiction, *Lohr v. Zehner*, 2:12-cv-00533 (M.D. Al.), is a state law wrongful death claim seeking the recognition of a same-sex survivor as a spouse under Alabama law.

Beyond the recognition of existing marriage licenses from other jurisdictions, other lawsuits are demanding some form of state recognition of unlicensed same-sex relationships. In the Alaska Supreme Court, a relationship recognition question is pending in a workers' compensation context. In *Harris v. Millennium Hotel* (No. S15230), a surviving same-sex partner of a deceased employee is challenging the state's reservation of death benefits in workers' compensation matters to only opposite-sex spouses in accordance with state law. A similar claim is pending in the District Court of Lewis and Clark County, Montana, in *Donaldson v. Montana* (Cause No. BDV-2010-702), where several same-sex couples seek not only the right to be included in the state's workers' compensation laws, but several other statutory schemes.

In Pennsylvania, a host of same-sex relationship recognition cases are pending in state court. In *Ankey v. Alleghany* (No. GD-13-005851), the Court of Common Pleas of Alleghany County is considering a claim that employment benefits be extended to same-sex partners. In *Wolf v. Association of Podiatric Medicine and Surgery* (No. 130301079), a cohabiting same-sex couple submitted a claim for loss of consortium regarding a foot surgery. In the Pennsylvania Court of Appeals, a common law same-sex marriage is being asserted in a claim objecting to the imposition of estate taxes in *Nixon v. Pennsylvania Department of Revenue*.

Finally, several of the cases pending in state courts are virtually identical to many of the cases pending in federal court. Same-sex couples are claiming rights, under their state and/or federal constitutions, to have marriage licenses issued to them. These cases are pending in Arkansas (*Wright v. Arkansas*, Cir. Ct. of Pulaski Co., 60CV-13-2662), Colorado (*Brinkman v. Long*, Dist. Ct., Adams Co., No. 2013CV032572; *McDaniel-Miccio v. Hickenlooper*, Dist. Ct., City and Co. of Denver, 2014CV030731), Florida (*Paretov. Ruvin*, Cir. Ct., Eleventh Jud. Cir. for Miami-Dade Co., 2014-1661-CA-01), and Wyoming (*Courage v. Wyoming*, First Jud. Dist. Ct., Co. of Laramie, Docket 182, No. 262).

The cases referenced above are not an exhaustive list of the cases pending in state courts across the country. All-in-all, however, though not receiving the same level of media and public attention as the plethora of pending federal cases, the state courts across the country are brewing with litigation over the recognition and validity of same-sex relationships.

**Conclusion**

Shortly after the publication of this article, rulings from many federal courts of appeal are expected to further change and define the legal landscape of the arguments and legal issues articulated herein. The 10th Circuit will rule on cases from Utah and Oklahoma, the 9th Circuit will rule on a case from Nevada, the 4th Circuit will rule on cases from Virginia, the 5th Circuit will rule on a case from Texas, and the 6th Circuit will rule on cases from Ohio, Kentucky, Tennessee, and Michigan. Appeals have not been docketed in the 1st, 3rd, 7th, 8th, and 11th Circuits, but they should be in

the near future.

Clearly, marriage will remain a hot topic of federal and state litigation in the foreseeable future. These cases, and others, may determine important issues, such as if *Baker* forecloses marriage law opinions by lower courts and if the "triumvirate" of *Romer*, *Lawrence*, and *Windsor* requires the result that same-sex marriage advocates are demanding. Perhaps the next Supreme Court term will see another marriage case.

## APPENDIX: POST-*WINDSOR* LITIGATION IN STATES THAT DO NOT RECOGNIZE SAME-SEX MARRIAGE

| STATE | CONTEMPORARY CASE(S) RE: MARRIAGE (NON-ACTIVE CASES IN *ITALICS*) | CURRENT COURT | WHO IS DEFENDING STATE MARRIAGE LAWS | WHO IS OPPOSING STATE MARRIAGE LAWS/ADVOCATING SAME-SEX MARRIAGE (SSM) | DESCRIPTION/STATUS |
|---|---|---|---|---|---|
| Alabama | **Hard v. Bentley** | U.S. District Court for the Middle District of Alabama | Alabama Attorney General | Southern Poverty Law Center | Plaintiff, whose same-sex spouse was killed in a car accident (the couple was married in Massachusetts), challenges the constitutionality of Alabama's Marriage Protection Act and the Alabama Marriage Amendment, alleging that these laws violate due process and equal protection under the Fourteenth Amendment to the extent that they deny recognition to his marriage and prevent him from collecting wrongful death proceeds. Plaintiff seeks a declaration that these laws are indeed unconstitutional and an injunction requiring the State to recognize his marriage to his deceased spouse, which would permit him to receive the wrongful death proceeds. Scheduling order requires Plaintiffs' motion for summary judgment to be filed by 8/29/14. |
| | **Searcy v. Bentley** | U.S. District Court for the Southern District of Alabama | State of Alabama/ Attorney General | Private Attorneys | Plaintiffs are a female same-sex couple raising one partner's biological daughter. Plaintiffs received a marriage license from California in 2008. The lawsuit challenges the constitutionality of Alabama's Marriage Protection Act and the Alabama Marriage Amendment, alleging that these laws violate due process and equal protection under the Fourteenth Amendment to the extent that they deny recognition of their California marriage license and prevent the non-biological parent from adopting the child. Lawsuit filed on 5/7/14. |
| | **Richmond v. Richmond** | Alabama Court of Civil Appeals | Uncontested | | An uncontested petition for divorce from a SSM was filed in Madison County, Alabama Circuit Court in March 2013. The female couple received a marriage license in Iowa in 2012. The case was dismissed on 3/12/13 and is now on appeal. |

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|---|---|---|---|---|---|
| Alaska | **Harris v. Millennium Hotel** | Alaska Supreme Court | Private Attorneys | Lambda Legal | Appeal from the Alaska Workers' Compensation Appeals Commission regarding denial of death benefits to surviving same-sex partner. The issue presented for review, as described by the Plaintiff-Appellant, is: Does the absolute exclusion of same-sex partners from eligibility for death benefits under the Alaska Workers' Compensation Act violate the right to equal protection on the basis of sexual orientation or sex, and the rights to liberty, due process, and privacy under the Alaska and U.S. Constitutions? Oral argument heard on 5/13/14. |
| | **Hamby v. Parnell** | U.S. District Court for the District of Alaska | TBD | Private Attorneys | Plaintiffs seek declaratory and injunctive relief pursuant to 42 U.S.C. § 1983. They allege that Alaska's marriage laws violate equal protection and due process under the Fourteenth Amendment, and seek the right to obtain marriage licenses in-state and have SSM from out-of-state recognized in Alaska. |
| Arizona | **Connolly v. Roche** | U.S. District Court for the District of Arizona | Arizona Governor/ Attorney General | Private Attorneys | Plaintiffs filed a class action § 1983 complaint on 1/6/14 seeking a declaration that Arizona's marriage laws are unconstitutional, and seeking a permanent injunction against their enforcement. More specifically, Plaintiffs contend that those laws violate the due process and equal protection guarantees of the Fourteenth Amendment to the U.S. Constitution. Plaintiffs also allege that to the extent that Arizona seeks to justify its marriage laws under section 2 of DOMA, the court should find that that provision exceeds the congressional authority granted by the Full Faith and Credit Clause of the U.S Constitution. The complaint has since been amended and is no longer a class action. |

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|---|---|---|---|---|---|
| | **Majors v. Horne** | U.S. District Court for the District of Arizona | Arizona Attorney General | Lambda Legal | Plaintiffs challenge Arizona's marriage laws, which prohibit SSM and the recognition of SSMs legally entered into in other jurisdictions. Plaintiffs allege the laws violate the guarantees of due process and equal protection in the Fourteenth Amendment to the U.S. Constitution. They seek declaratory and injunctive relief. |
| Arkansas | **Jernigan v. Crane** | U.S. District Court for the Eastern District of Arkansas | Arkansas Attorney General | Private Attorneys | Equal protection and due process challenge to Arkansas's marriage laws. The State filed a motion to dismiss on 1/31/14. Awaiting ruling. |
| | **Wright v. State of Arkansas** | Circuit Court of Pulaski County Second Division (Little Rock) | Arkansas Attorney General/ Faulkner County Attorney | Private Attorneys | Equal protection and due process challenge to Arkansas's marriage laws. On 5/9/14 Judge Chris Piazza held that the marriage laws were unconstitutional under both the state and federal constitutions. Appeals are pending. On 5/14/14 the Arkansas Supreme Court stayed the trial court's ruling pending appeal. |
| Colorado | **Brinkman v. Long** | Adams County District Court | Colorado Attorney General/ Adams County Attorney | Private Attorneys | Equal protection (on the basis of sex) and due process challenge to Colorado's marriage laws. |
| | **McDaniel-Miccio v. Colorado** | Denver County District Court | | Private Attorneys | Plaintiffs, unmarried same-sex couples and same-sex couples legally married in other jurisdictions, challenge Colorado's marriage laws (statutory and constitutional amendment) which prohibit SSM and the recognition of SSMs legally entered into in other jurisdictions. Plaintiffs allege the laws violate the guarantees of due process and equal protection in the Fourteenth Amendment to the U.S. Constitution. They seek declaratory and injunctive relief. |

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|---|---|---|---|---|---|
| Florida | **Pareto v. Ruvin** | Eleventh Judicial Circuit of Florida (Miami-Dade County) | Clerk of Court | Private Attorneys/ National Center for Lesbian Rights | Suit filed by six same-sex couples in Miami-Dade County Circuit Court alleging that Florida's opposite-sex definition of marriage violates the Due Process and Equal Protection Clauses of the U.S. Constitution. They also contend that Florida's marriage laws discriminate based on sex and sexual orientation, and argue further that sexual orientation warrants heightened judicial scrutiny. They seek declaratory relief and a permanent injunction. |
| | **Brenner v. Scott** | U.S. District Court for the Northern District of Florida | Florida Governor/ Attorney General | ACLU/Private Attorneys | Plaintiffs challenge Florida's marriage laws and allege that, because they do not recognize SSMs entered into in other jurisdictions, they violate the Fourteenth Amendment's guarantee of equal protection and due process. |
| | **Grimsley v. Scott (consolidated with Brenner)** | U.S. District Court for the Northern District of Florida | Florida Governor/ Attorney General | ACLU/Private Attorneys | Plaintiffs challenge Florida's marriage laws and allege that, because they do not recognize SSMs entered into in other jurisdictions, they violate the Fourteenth Amendment's guarantee of equal protection and due process. |
| Georgia | **Inniss v. Aderhold** | U.S. District Court for the Northern District of Georgia | Georgia Attorney General | Private Attorneys/ Lambda Legal | Plaintiffs seek declaratory and injunctive relief pursuant to 42 U.S.C. § 1983. They allege that Georgia's marriage laws violate equal protection and due process under the Fourteenth Amendment, and seek the right to obtain marriage licenses in-state and have SSM from out-of-state recognized in Georgia. |
| Idaho | **Latta v. Otter** | U.S. District Court for the District of Idaho | Idaho Governor/ Private Attorneys/ Attorney General/ Ada County Prosecutor | Private Attorneys/ National Center for Lesbian Rights | Equal protection (on the basis of sex and sexual orientation) and due process challenge to state's marriage laws. On 5/13/14 Magistrate Judge Dale found Idaho's marriage laws unconstitutional. She further declined the State's motion for a stay. An appeal is pending. On 5/15/14 the Ninth Circuit issued a temporary stay of the ruling pending its resolution of Appellants' emergency motion for a stay pending appeal. |

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|---|---|---|---|---|---|
| Indiana | **Brennon v. Milby Productions** | Indiana Court of Appeals | Private Attorneys | Private Attorneys | Plaintiffs filed a claim in Marion County Superior Court alleging that Indiana's definition of marriage, which provides that marriage may only be between one man and one woman, caused damage to their marital relationships. The court found that a claim for damage to the marital relationship after the death of one of the same-sex spouses is prohibited under Indiana law, and cited *Morrison v. Sadler* in support of its holding. On that claim the court granted summary judgment to defendants on 12/12/13. Plaintiffs appealed to the Indiana Court of Appeals on 1/10/14. |
| | **Center for Inquiry, Inc. v. Clerk, Marion Circuit Court** | U.S. Court of Appeals for the Seventh Circuit | Indiana Attorney General/ Indianapolis Corporation Counsel | ACLU/Center for Inquiry (CFI) | Center for Inquiry's complaint seeks injunctive relief to bar Indiana from enforcing § 31-11-6-1 of the Indiana Code (re: state marriage solemnization requirements) on Establishment Clause grounds. The district court denied injunctive relief. CFI appealed to the Seventh Circuit. The case is fully briefed and arguments were heard on 4/19/13. Awaiting decision. |
| | **Wetli v. Shaffer** | Allen Circuit Court | Uncontested | | Plaintiff seeks a same-sex divorce in Indiana from the spouse he married in Iowa. |

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|---|---|---|---|---|---|
| | **Love v. Pence** | U.S. District Court for the Southern District of Indiana | Indiana Governor/ Attorney General | Private Attorneys | Plaintiffs, Indiana residents comprising both same-sex couples legally married outside Indiana, and couples who wish to marry in Indiana, allege that Indiana's marriage laws and DOMA section 2 violate due process and equal protection under the Fourteenth Amendment, and seek declaratory and injunctive relief. Their claims also purport to implicate the Full Faith and Credit Clause and the right to travel. |
| | **Baskin v. Bogan** | U.S. District Court for the Southern District of Indiana | Indiana Governor/ Attorney General | Lambda Legal | Plaintiffs challenge Indiana's statutory definition of marriage which prohibits SSM and the recognition of SSMs legally entered into in other jurisdictions. Plaintiffs allege the law violates the guarantees of due process and equal protection in the Fourteenth Amendment to the U.S. Constitution. They seek declaratory and injunctive relief. |
| | **Fuji v. Governor, State of Indiana** | U.S. District Court for the Southern District of Indiana | Indiana Governor/ Attorney General | ACLU | Plaintiffs challenge Indiana's statutory definition of marriage which prohibits SSM and the recognition of SSMs legally entered into in other jurisdictions. Plaintiffs allege the law violates the guarantees of due process and equal protection in the Fourteenth Amendment to the U.S. Constitution. They seek declaratory and injunctive relief. |

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|---|---|---|---|---|---|
| | **Bowling v. Pence** | U.S. District Court for the Southern District of Indiana | Indiana Governor/ Attorney General | Private Attorneys | Plaintiffs challenge Indiana's statutory definition of marriage which prohibits SSM and the recognition of SSMs legally entered into in other jurisdictions. Plaintiffs allege the law violates the guarantees of due process and equal protection in the Fourteenth Amendment to the U.S. Constitution. They seek declaratory and injunctive relief. Plaintiffs also seek a declaration that the state's laws violate the Full Faith and Credit Clause, the Establishment Clause, and the right to travel. |
| | **Lee v. Pence** | U.S. District Court for the Southern District of Indiana | Indiana Governor/ Attorney General | Private Attorneys | Plaintiffs challenge Indiana's statutory definition of marriage which prohibits SSM and the recognition of SSMs legally entered into in other jurisdictions. Plaintiffs allege the law violates the guarantees of due process and equal protection in the Fourteenth Amendment to the U.S. Constitution. They seek declaratory and injunctive relief. Plaintiffs also seek a declaration that the state's laws violate the Full Faith and Credit Clause. |
| Kansas | **Nelson v. Kansas Department of Revenue** | Shawnee County District Court | | | On 12/30/13 Plaintiffs, legally married same-sex couples residing in Kansas, filed a petition in Shawnee County District Court seeking a writ of mandamus compelling the Kansas Department of Revenue to permit Plaintiffs to file joint income tax returns as married persons. Plaintiffs allege that the due process and equal protection guarantees under the federal and state constitutions compel this result. |
| Kentucky | **Bourke v. Beshear** | U.S. Court of Appeals for the Sixth Circuit | Kentucky Governor (retained private attorneys) | Private Attorneys | Equal protection (on the basis of sex and sexual orientation) and due process challenge to Kentucky's Marriage Amendment and marriage statutes declining to recognize SSM from other jurisdictions. The Plaintiffs specifically complain about the effect the marriage statutes have on their ability to adopt one another's |

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|---|---|---|---|---|---|
| | | | | | children. Court ruled for Plaintiff on 2/12/14. Appeal currently being briefed. |
| | **Love v. Beshear** | U.S. District Court for the Western District of Kentucky | Kentucky Governor (retained private attorneys) | Private Attorneys | Plaintiffs intervened in *Bourke v. Beshear* and seek the right to marry in Kentucky. They claim that Kentucky's marriage laws violate equal protection and due process. |
| | **Franklin v. Beshear (transferred to W.D. Ky and consolidated with Bourke v. Beshear)** | U.S. Court of Appeals for the Sixth Circuit | Kentucky Governor (retained private attorneys) | Private Attorneys | Equal protection (on the basis of sex and sexual orientation) and due process challenge to Kentucky's Marriage Amendment and marriage statutes declining to recognize SSM from other jurisdictions. Filed by same attorneys as the *Bourke* case, no adoption issues included in this complaint. On 10/2/13, case transferred to U.S. District Court for the Western District of Kentucky and consolidated with *Bourke v. Beshear* for convenience. |
| | **Commonwealth of Kentucky v. Clary** | Kentucky Circuit Court, Jefferson County | Commonwealth Attorney representing the Commonwealth of Kentucky | Louisville Metro Public Defender | Defendant charged with first degree murder seeks to invoke spousal privilege to prevent a woman with whom Clary had previously obtained a civil union in Vermont from testifying against her on behalf of the Commonwealth in the murder trial. They allege that there is no distinction between Vermont civil unions and Vermont SSMs. They also allege Kentucky's policy not recognizing SSM licenses from other jurisdictions violates the U.S. and Kentucky Constitutions' due process provisions and the Full Faith and Credit Clause of the U.S. Constitution. They also allege that not recognizing the spousal privilege violates the Equal Protection Clauses of both the U.S. and the Kentucky Constitutions. On 9/23/13, the Court denied Clary's motion to invoke spousal privilege. Clay pled guilty in January 2014. |

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|---|---|---|---|---|---|
| | **Romero v. Romero** | Jefferson Family Court | Unknown | Private Attorneys | Kentucky woman seeks to divorce her same-sex partner, whom she married in Massachusetts. Case challenges Kentucky's Marriage Amendment, which does not permit the recognition of SSMs from out-of-state. |
| | **Kentucky Equality Federation v. Beshear** | Franklin Circuit Court | Kentucky Attorney General | Private Attorneys | News reports indicate lawsuit filed 9/12/2013. |
| Louisiana | **Robicheaux v. Caldwell** | U.S. District Court for the Eastern District of Louisiana | Special Attorney General | Private Attorneys | A same-sex couple with a marriage license from Iowa has brought a due process, equal protection (on the basis of sex and sexual orientation), and full faith and credit challenge to Louisiana's Marriage Amendment and marriage laws, which decline to recognize SSM. |
| | **Robicheaux v. George (consolidated with Robicheaux)** | U.S. District Court for the Eastern District of Louisiana | Special Attorney General | | Equal protection and due process challenge to the state's marriage laws. |
| | **Forum for Equality v. Barfield (consolidated with Robicheaux)** | U.S. District Court for the Eastern District of Louisiana | Special Attorney General | Private Attorneys | Plaintiffs, same-sex couples married in other jurisdictions, and an LGBT group, challenge Louisiana's marriage laws (code and constitutional amendment) to the extent that they deny recognition to out-of-state SSMs, and allege that they violate due process and equal protection under the Fourteenth Amendment. They seek declaratory and injunctive relief as to plaintiffs and other couples validly married in other jurisdictions. |

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|---|---|---|---|---|---|
| | **In re Angela Costanza and Chastity Brewer** | 3rd Circuit Louisiana Court of Appeals | Special Attorney General | Private Attorneys | Equal Protection, Due Process, and Full Faith and Credit Clause challenges to the state's marriage laws. Plaintiffs seek recognition of their California marriage along with a joint adoption. |
| | **In re Nicholas Ashton Costanza Brewer** | 3rd Circuit Louisiana Court of Appeals | Louisiana Attorney General | Private Attorneys | Plaintiffs filed a petition in Fifteenth Judicial District Court seeking a stepparent adoption for a same-sex spouse of the child's biological mother, alleging that any Louisiana law denying a same-sex couple the right to adopt violates the federal Equal Protection, Due Process, and Full Faith and Credit Clauses. On 2/5/14 the judge entered an order permitting the two women to adopt the child. The State appealed on 3/6/14. |
| Michigan | **DeBoer v. Snyder** | U.S. Court of Appeals for the Sixth Circuit | Michigan Attorney General | Private Attorneys | Equal protection and due process challenge to state adoption and marriage laws. After a trial the judge found Michigan's marriage laws unconstitutional. An appeal is underway. |
| Mississippi | **Lauren Beth Czekala-Chatham v. Dana Ann Melancon** | DeSoto County Chancery Court | Mississippi Attorney General | Private Attorneys | Plaintiff filed a divorce petition asking the court to recognize their California marriage license for the purpose of granting a divorce. On 12/2/13 the judge refused to grant the parties a divorce. On 12/23/13 Plaintiff appealed. Appellant's brief is due by 6/9/14. |
| Missouri | **Barrier v. Vasterling** | 16th Judicial District of Jackson County | Missouri Attorney General | ACLU/Private Attorneys | Plaintiffs, same-sex couples married in other jurisdictions, challenge pursuant to § 1983 Missouri's marriage laws (code and constitutional amendment) to the extent that they deny recognition to out-of-state SSMs, and allege that the laws violate due process and equal protection under the Fourteenth Amendment. They seek declaratory and injunctive relief as to plaintiffs and other same-sex couples validly married in other |

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|---|---|---|---|---|---|
| | | | | | jurisdictions. Oral argument on summary judgment motions scheduled for 9/25/14. |
| | *Glossip v. Missouri Department of Transportation and Highway Patrol Employees' Retirement System* | *Missouri Supreme Court* | *Missouri Attorney General* | *ACLU* | *Plaintiff is seeking survivor benefits from his same-sex partner who was killed in the line of duty. Plaintiff acknowledges in his complaint that marriage is not available in Missouri to same-sex couples, but alleges equal protection and due process violations due to the denial of these benefits. The court ordered additional briefing after* Windsor. *On 10/29/13 the Missouri Supreme Court upheld Missouri's marriage law 5-2. The court decided the case on narrow grounds and upheld the two challenged laws concerning death benefits as constitutional under rational basis review. The court said that the laws distinguished between individuals solely based on marital status.* |
| Montana | **Donaldson v. State of Montana** | Montana First Judicial District Court Lewis and Clark County | Montana Attorney General | ACLU/Private Attorneys | Plaintiffs challenge under equal protection Montana's marriage laws, which effectively prohibit same-sex couples from receiving the statutory benefits that are given to opposite-sex couples but not to those in same-sex relationships. Plaintiffs expressly disclaim that they seek the right to marry. |
| Nebraska | **Nichols v. Nichols** | Nebraska Court of Appeals | Nebraska Attorney General is *amicus curiae* | Private Attorneys | Plaintiff seeks a divorce from her same-sex partner, whom she married in Iowa in 2009. The district court dismissed for lack of jurisdiction because Nebraska recognizes only opposite-sex marriages, meaning that it could not render a decree of dissolution for a foreign SSM. The Nebraska Supreme Court granted Plaintiff's Petition for Bypass and the case is currently pending there. |

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|---|---|---|---|---|---|
| Nevada | **Sevcik v. Sandoval** | U.S. Court of Appeals for the Ninth Circuit | Coalition for the Protection of Marriage | Lambda Legal | On 4/10/12, eight same-sex couples filed a federal lawsuit in the U.S. District Court for Nevada, challenging Nevada's laws affirming marriage as a man-woman union. These couples sought declaratory and injunctive relief under the Fourteenth Amendment to the U. S. Constitution because they claimed that they were denied the right to marry in the State of Nevada, and that they are denied recognition of SSM licenses that they received in other states. The trial court ultimately rejected the plaintiffs' challenge to state's marriage laws. On appeal, the opening brief was filed with the Ninth Circuit in late 2013. The appellees' briefs were filed on 1/21/14. As of 5/15/14, the parties are still waiting for the court to set oral argument. |
| North Carolina | **Fisher-Borne v. Smith** | U.S. District Court for the Middle District of North Carolina | North Carolina Attorney General | ACLU /Private attorneys | Equal protection and due process challenge to state adoption and marriage laws, which limit marriage to opposite-sex couples. Motions to dismiss, for preliminary injunction, and for a stay are currently pending. |
| | **Gerber v. Cooper** | U.S. District Court for the Middle District of North Carolina | North Carolina Attorney General | ACLU/Private Attorneys | Plaintiff same-sex couples seek the recognition of their out-of-state marriages and seek a preliminary injunction predicated upon asserted "serious, life-threatening medical issues that make it likely that [Plaintiffs] and their families will suffer irreparable harm unless the State recognizes their legal out-of-state marriages. There is also an imminent risk of potential harm to child plaintiff J.G.-M." Plaintiffs allege the state's marriage laws violate their right to due process and equal protection under the Fourteenth Amendment, and seek recognition and adoption rights as well. Motions to dismiss, for preliminary injunction, and for a stay are currently pending. |

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|---|---|---|---|---|---|
| Ohio | **Obergefell v. Himes** | U.S. Court of Appeals for the Sixth Circuit | Ohio Attorney General | Private Attorneys | Plaintiffs are a same-sex couple who are residents of Ohio, but who received a marriage license in Maryland. They allege that Ohio's refusal to recognize their SSM constitutes a due process and equal protection violation, as well as a violation of their right to free association. On 7/22/13, the court granted a temporary restraining order directing the local registrar of death certificates not to accept for recording a 2013 death certificate for John Arthur that did not identify his status as married and/or does not record James Obergefell as his surviving spouse. On 12/23/13 Judge Black declared that Ohio's marriage laws, as applied to Plaintiffs, were unconstitutional, and held that the state "must recognize valid out-of-state marriages between same-sex couples on Ohio death certificates, just as Ohio recognizes all other out-of-state marriages, if valid in the state performed, and even if not authorized nor validly performed under Ohio law." The State appealed and briefing due to conclude at the 6th Circuit by 5/30/14. |
| | **Henry v. Ohio Department of Health** | U.S. Court of Appeals for the Sixth Circuit | Ohio Department of Health | Private Attorneys/ Lambda Legal | Plaintiffs filed a § 1983 suit in which they seek an order requiring Ohio to recognize their SSM with respect to their requests for birth certificates, by permitting both partners to be listed on the birth certificate regardless of biological parentage. Plaintiffs claim that the holding in *Obergefell* compels this result, and claim that the "right to remain married" is a fundamental constitutional right (Plaintiffs were married in jurisdictions that permit SSM). Plaintiffs also claim that their right to travel is being violated by Defendants. Plaintiffs further assert that Ohio's marriage laws violate the First and Fourteenth Amendments to the U.S. Constitution, and that the State's refusal to recognize an adoption decree from another state violates the Full Faith and Credit Clause. Plaintiffs seek a temporary and permanent injunction with respect to Ohio's marriage laws as to the issuance of birth certificates to Plaintiffs. On 4/14/14 Judge Black ruled that Ohio must recognize marriages legally performed in other states. The State appealed the case to the 6th Circuit. Appellant's opening brief is due 6/30/2014. Appellees' 7/31/2014. |

## APPENDIX: POST-*WINDSOR* LITIGATION IN STATES THAT DO NOT RECOGNIZE SAME-SEX MARRIAGE

| STATE | CONTEMPORARY CASE(S) RE: MARRIAGE (NON-ACTIVE CASES IN *ITALICS*) | CURRENT COURT | WHO IS DEFENDING STATE MARRIAGE LAWS | WHO IS OPPOSING STATE MARRIAGE LAWS/ADVOCATING SAME-SEX MARRIAGE (SSM) | DESCRIPTION/STATUS |
|---|---|---|---|---|---|
| Oklahoma | **Bishop v. Oklahoma** | U.S. Court of Appeals for the Tenth Circuit | Alliance Defending Freedom/ Tulsa District Attorney | Private Attorneys | Oklahoma residents sued the Governor of Oklahoma, the United States, and the County of Tulsa challenging Oklahoma's constitutional provision limiting marriage to one man and one woman. An opinion and judgment terminating the case was issued on 1/14/14, in which the court declared unconstitutional Oklahoma's voter-approved constitutional amendment defining marriage as one man and one woman. An appeal to the Tenth Circuit was then filed, and oral argument was heard on 4/17/14. Awaiting decision. |
| Oregon | **Geiger v. Kitzhaber & Rummell v. Kitzhaber (consolidated)** | U.S. District Court for the District of Oregon | The Oregon Attorney General has refused to defend the marriage laws. The National Organization for Marriage (NOM) has been denied intervention. | Private Attorneys | Same-sex couples filed a lawsuit to declare unconstitutional and to enjoin state officers from enforcing the Oregon Constitution limiting marriage to a man and a woman. The suit is against the Governor and the Attorney General and other officials. Two of the Plaintiffs want to marry in Oregon. The other two Plaintiffs want Oregon to recognize their foreign marriage from British Columbia. Oregon Attorney General Rosenblum announced, on 2/20/14, that she would not defend the Marriage Amendment because she says it cannot survive any level of constitutional scrutiny. NOM attempted to intervene but that request was denied; NOM appealed the intervention denial to the Ninth Circuit. On 5/19/14 the court ruled that Oregon's marriage laws were unconstitutional. Proposed Intervenor NOM filed an emergency motion for a stay with the Ninth Circuit that same day, but that request was denied. |
| Pennsylvania | **Whitewood v. Corbett** | U.S. District Court for the Middle District of Pennsylvania | Pennsylvania Governor/ Private Attorneys | ACLU/Private Attorneys | The ACLU of Pennsylvania, the ACLU, and volunteer counsel from the law firm of Hangley Aronchick Segal Pudlin & Schiller have filed a federal lawsuit on behalf of 21 Pennsylvanians who wish to marry in Pennsylvania or want the Commonwealth to recognize their out-of-state marriages. The lawsuit alleges that Pennsylvania's Defense of Marriage Act and refusal to marry lesbian and gay couples or recognize their out-of-state marriages violates the fundamental right to marry as well as the Equal Protection Clause of the Fourteenth Amendment. The case has been briefed on summary judgment and is awaiting decision. |

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| STATE | CONTEMPORARY CASE(S) RE: MARRIAGE (NON-ACTIVE CASES IN *ITALICS*) | CURRENT COURT | WHO IS DEFENDING STATE MARRIAGE LAWS | WHO IS OPPOSING STATE MARRIAGE LAWS/ADVOCATING SAME-SEX MARRIAGE (SSM) | DESCRIPTION/STATUS |
|---|---|---|---|---|---|
| | **Palladino v. Corbett** | U.S. District Court for the Eastern District of Pennsylvania | Pennsylvania Treasury Department | Private Attorneys | Plaintiffs are a same-sex couple who are residents of Pennsylvania, but received a SSM license when they resided in Massachusetts. They complain that Pennsylvania does not recognize them as married and that this is a violation of the Equal Protection, Due Process, and Full Faith and Credit Clauses, as well as a violation of the fundamental right to travel. Dispositive motions hearing held on 5/15/14. Awaiting decision. |
| | *Cozen O'Conor v. Tobits* | U.S. District Court for the Eastern District of Pennsylvania | *Thomas More/ Independence Law Center* | *N/A - case concluded* | *Interpleader action concerning benefits of deceased and whether they should go to the deceased's same-sex partner or parents. The court issued an order determining that if the place of celebration would have considered the partners married, they should be considered married under the plan. An appeal was filed, but then withdrawn.* |
| | **Wolf v. Associates of Podiatric Medicine and Surgery** | Court of Common Pleas Philadelphia County | Private Attorneys | Private Attorneys | The Plaintiff has filed a malpractice action due to a piece of metal left in her foot during a surgery, but she has added a claim for loss of consortium for her same-sex partner. They have a domestic partnership, have cohabitated for ten years, and "hold themselves out as a married couple," having exchanged bands in or around 2004. Judge ruled that since Plaintiffs were not married at the relevant time, and a marriage between persons of the same sex is not recognized in Pennsylvania, Plaintiff's loss of consortium claim must be dismissed. |
| | **Cucinotta v. Commonwealth of Pennsylvania** | Commonwealth Court of Pennsylvania | Private Attorneys | Private Attorneys | The Plaintiffs are a female same-sex couple that indicate that they "have chosen to be married to one another" but they argue that state law impedes their ability to do so because of their sex. Plaintiffs challenge Pennsylvania marriage laws under the Pennsylvania Constitution. Oral argument scheduled for 6/18/14. |
| | **Ballen v. Corbett (listed as related to Cucinotta)** | Commonwealth Court of Pennsylvania | Private Attorneys | Private Attorneys | Plaintiffs are same-sex couples who received marriage licenses in other jurisdictions, but who reside in Pennsylvania. They allege the refusal to recognize their marriage license constitutes a denial of equal protection and due process and violates article I of the Pennsylvania Constitution. |

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|---|---|---|---|---|---|
| | **Commonwealth of Pennsylvania v. Hanes** | Supreme Court of Pennsylvania | Pennsylvania Governor | Montgomery County Solicitor's Office | The Pennsylvania Governor filed a petition for writ of mandamus to stop the Montgomery County Clerk from issuing marriage licenses to same-sex couples. An order requiring the clerk to issue marriage licenses in accordance with state marriage laws, which prohibit SSM, was issued 9/12/13. An appeal to the Supreme Court was docketed 10/4/13. Briefing appears to have been completed on 2/4/14. |
| | **In re estate of Catherine Burgi-Rios** | Northhampton County's Orphans Court | Unknown | Private Attorneys | Surviving same-sex partner of Catherine Burgi-Rios filed a petition in Northampton County's Orphan's Court saying she married Catherine Burgi-Rios in Connecticut and should not have to pay the 15% levy on Burgi-Rios' estate. Equal protection (on the basis of sex and sexual orientation) and due process challenge of state's marriage laws. Oral argument held 4/29/14-awaiting decision. |
| | **Nixon v. Pennsylvania Department of Revenue** | Pennsylvania Department of Revenue Board of Appeals | Pennsylvania Department of Revenue | Private Attorney | Surviving same-sex partner is seeking to have the State waive a $21,000 inheritance tax on the estate of her partner. Plaintiff is seeking to have the relationship recognized as a common law marriage. |
| | **Ankney v. Allegheny Intermediate Unit** | Allegheny County Court of Common Pleas | Private Attorneys | ACLU-PA and Women's Law Project | Teacher is suing the Allegheny Intermediate Unit (AIU) because AIU refuses to provide health insurance and other benefits to the same-sex partners of its employees, while providing those benefits to employees' opposite-sex spouses. |
| Puerto Rico | **Conde v. Rius** | U.S. District Court for the District of Puerto Rico | Secretary of the Puerto Rico Health Department | Plaintiffs proceeding pro se (but appears to be an attorney) | Plaintiffs, a same-sex couple legally married in Massachusetts, challenge Puerto Rico's marriage laws, which provide for only opposite-sex marriage. They allege these laws violate their due process and equal protection rights under the Fourteenth Amendment, and seek declaratory and injunctive relief. Case appears to have been dormant since 3/27/14. |

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| South Carolina | **Bradacs v. Haley** | U.S. District Court for the District of South Carolina | South Carolina Attorney General | Private Attorneys | Equal protection (on the basis of sex & sexual orientation), due process, and full faith & credit challenge to constitutional amendment and statutes defining marriage as the union of one man and one woman. The same-sex couple seeks recognition of their marriage license from the District of Columbia. The case has been stayed pending the Fourth Circuit's resolution of *Bostic v. Schaefer*. |
| Tennessee | **Tanco v. Haslam** | U.S. Court of Appeals for the Sixth Circuit | Tennessee Attorney General | National Center for Lesbian Rights | Plaintiffs assert violation of due process as a deprivation of liberty and property interest in their SSM validly entered into in other jurisdictions, denial of due process rooted in the fundamental right to marry, denial of due process based on denial of family privacy, autonomy and association. Plaintiffs also allege denial of equal protection of the laws on the basis of sexual orientation discrimination and sex discrimination, as well as discrimination based on exercise of fundamental rights and liberties. Plaintiffs also allege deprivation of the right to travel. On 3/14/14 the court issued a preliminary injunction prohibiting the State from enforcing its marriage laws. The State moved for a stay at the district court but was denied. The State then moved for a stay before the Sixth Circuit which granted it pending the appeal. Briefing is due to be completed 6/26/14. |
| Texas | **In the Matter of J.B and H.B** | Supreme Court of Texas | Texas Attorney General | Private Attorneys | Parties to a SSM out-of-state reside in Texas and are seeking a divorce. The court has requested supplemental briefing on the subject of the effect of *Windsor* on this same-sex divorce challenge. Supplemental briefing re: *Windsor* was completed on August 6. Appellate Court held no jurisdiction to grant divorce, but the case is on review at the Texas Supreme Court. Oral argument took place 11/5/13. Decision pending. |

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|---|---|---|---|---|---|
| | **State of Texas v. Angelique S. Naylor and Sabina Daly** | Supreme Court of Texas | Texas Attorney General | Private Attorneys | Same-sex couples seek divorce in Texas. Petition filed on 3/21/11, and oral argument took place 11/5/13. Decision pending. |
| | **DeLeon v. Perry** | U.S. Court of Appeals for the Fifth Circuit | Texas Solicitor General and Attorney General | Private Attorneys | Equal protection (on the basis of sexual orientation) and due process challenge to Texas's marriage laws. Plaintiffs seek declaratory and injunctive relief barring defendants from enforcing Texas's Marriage Amendment and marriage laws. Court issued order granting Plaintiffs' motion for preliminary injunction on 2/26/14. The State filed an appeal on 3/1/14. Awaiting court scheduling order. |
| | **Pidgeon v. Parker** | U.S. District Court for the Southern District of Texas (removed from Harris County District Court (2013-75301, Court:310) | Houston City Attorney (Texas Attorney General is *amicus curiae*) | Private Attorneys | Suit originally filed by the Harris County GOP seeking to enjoin the City of Houston from extending same-sex spousal benefits to its employees. After the state court granted an ex parte preliminary injunction, Defendants removed the matter to federal court, where they allege that the matter implicates federal questions, most notably whether due process and equal protection principles under the U.S. Constitution require the provision of spousal benefits to those employees legally married in jurisdictions that recognize SSM. |
| | **Freeman v. Parker** | U.S. District Court for the Southern District of Texas | Houston City Attorney | Lambda Legal | Suit filed by three employees of the City of Houston, alleging that Defendants' denial of same-sex spousal benefits, in the wake of a state court decision preliminarily enjoining that practice, constitutes a violation of due process and equal protection under the U.S. Constitution. Awaiting scheduling order from court. |

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| | **Zahrn v. Perry** | U.S. District Court for the Western District of Texas | Texas Attorney General is *amicus curiae* | Private Attorneys | Class action § 1983 complaint alleging that Texas's denial of marriage licenses to same-sex couples violates the Fourteenth Amendment's equal protection and due process guarantees. Plaintiffs seek a declaration that Texas laws against SSM are unconstitutional and also seek a permanent injunction against the enforcement of those laws. |
| | **McNosky v. Perry** | U.S. District Court for the Western District of Texas | Texas Attorney General | Pro se | Plaintiffs are challenging under § 1983 Texas laws (both statutory and constitutional) against SSM as violative of the Fourteenth Amendment's guarantee of due process and equal protection. Plaintiffs allege that Texas laws outlawing SSM are a form of sex discrimination, and seek to enjoin Texas from enforcing those laws. Plaintiffs filed a motion for summary judgment to this effect on 12/23/13. Defendants filed a motion to stay the case on 3/12/14, which was opposed by Plaintiffs. That motion remains pending. |
| Utah | **Kitchen v. Herbert** | U.S. Court of Appeals for the Tenth Circuit | Utah Attorney General/ Private Attorneys | National Center for Lesbian Rights/Private Attorneys | Plaintiffs challenge Utah's marriage laws as violative of the U.S Constitution and seek to seek to legalize SSM in the state. On 12/20/13 Judge Robert Shelby held that Utah's marriage laws violated both due process and equal protection under the Fourteenth Amendment. On 1/6/13 after both Judge Shelby and the motions panel of the Tenth Circuit denied the State's request for a stay, the Supreme Court granted a stay pending Tenth Circuit review on the merits. Oral argument was heard on 4/10/14. Awaiting decision. |
| | **Brown v. Buhman (polygamy)** | U.S. District Court for the District of Utah | Utah Attorney General | Private Attorneys | Equal protection challenge to state's laws criminalizing polygamy. The U.S. DOJ declined involvement in this case to defend Congress' condition of statehood that Utah (and all other states) not permit the practice of polygamy. On 12/13/13, the court issued a ruling concluding that *Reynolds v. U.S.* has been overruled by *Lawrence v. Texas* and other recent legal developments. While keeping in place the Utah law against issuing multiple marriage certificates for polygamous marriage, the court invalidated the criminal law against multiple adults cohabiting together as a family. Judgment filed 12/17/2013, but vacated three days later while a pending issue is |

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|---|---|---|---|---|---|
| | | | | | resolved. As of 5/8/14, the parties were waiting for the district court to rule on a motion to reconsider. (This is the "Sister Wives" case.) |
| | **Evans v. Utah** | U.S. District Court for the District of Utah (removed to federal court on January 28, 2014 from 3rd Judicial District, Salt Lake County, case # 140400673) | Utah Attorney General | Private Attorneys/ACLU | Plaintiffs, Utah same-sex couples married in the time between the district court's *Kitchen* decision and the Utah Supreme Court's stay of that decision, challenged Utah's decision not to recognize those marriages and allege that that decision violates due process under the Utah and U.S. Constitutions. Plaintiffs seek declaratory and injunctive relief, including immediately recognizing their marriages, regardless of whether the marriage laws are eventually reinstated. On 5/19/14 the court ruled that Utah must recognize as legally valid those marriages entered between the decision and the eventual stay granted by the Utah Supreme Court. |
| Virginia | **Bostic v. Schaefer** | U.S. Court of Appeals for the Fourth Circuit | Alliance Defending Freedom (for Prince William County Clerk); Private Attorneys for Clerk Schaefer | Private Attorneys | Plaintiffs are a same-sex couple that were denied a marriage license by the Clerk for the Circuit Court of the City of Norfolk, and another couple seeking recognition of their California marriage license. They present equal protection and due process challenges to Virginia's Marriage Amendment and marriage laws. The district court ruled for Plaintiffs on 2/13/14. Defendants appealed and oral argument was heard on 5/13/14. Awaiting decision. |
| | **Harris v. Rainey** | U.S. District Court for the Western District of Virginia (intervened in 4th Circuit: Bostic v. Schaefer) | Staunton County Clerk (retained private attorneys) | ACLU/ Lambda Legal | On 8/2/13, the ACLU and Lamba Legal filed a class action lawsuit seeking injunctive and declaratory relief from the state's constitutional amendment and marriage statutes on the basis of equal protection and due process violations. The court granted class certification on 1/31/14, but stayed the case on 3/31/14 after the class successfully intervened in *Bostic v. Schaefer* at the Fourth Circuit. |

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| | **Tucker v. State Farm Mutual Auto Insurance Company** | U.S. District Court for the Western District of Virginia | Private Attorneys | Private Attorneys | Plaintiff sought disability insurance under her same-sex partner's insurance, but State Farm only covers spouses recognized under state law. Since Virginia does not recognize SSM, State Farm has declined to cover Plaintiff. Bench trial set for 8/11/14, but the parties filed a joint motion for a stay in light of *Bostic* on 5/15/14. |
| West Virginia | **McGee v. Cole** | U.S. District Court for the Southern District of West Virginia | West Virginia Attorney General/ Private Attorneys | Lambda Legal/ Private Attorneys | Plaintiffs are three same-sex couples and one minor child; they are challenging the constitutionality of § 48-2-104, § 48-2-401, and § 48-2-603 of the West Virginia Code. Plaintiffs allege a due process violation (under the U.S. Constitution) based on deprivation of the right to marry and privacy related to family integrity and association. Plaintiffs also allege denial of equal protection under the U.S. Constitution on the basis of sex and sexual orientation. They also allege discrimination based on parental status. Defendants are two county clerks. The State of West Virginia successfully intervened on 12/2/13. Cross motions for summary judgment have been filed. Awaiting decision. |
| Wisconsin | **Wolf v. Walker** | U.S. District Court for the Western District of Wisconsin | Wisconsin Governor/ Attorney General | ACLU | Plaintiff same-sex couples filed this § 1983 suit alleging that Wisconsin's Marriage Amendment, codified as art. XIII, § 13 of the Wisconsin Constitution, and all relevant Wisconsin marriage statutes, violate the federal constitutional guarantees of due process and equal protection. |
| | **Appling v. Walker** | Wisconsin Supreme Court | Alliance Defending Freedom | Private Attorneys | Plaintiffs are taxpayers challenging the state domestic partnership law as an unconstitutional violation of the Marriage Protection Amendment, which expressly prohibits the creation of any status "substantially similar to marriage." Oral argument was held 10/23/13. Awaiting Decision. |
| Wyoming | **Courage v. State of Wyoming** | First Judicial District Court, Laramie County, Wyoming | State of Wyoming | Private Attorneys/ National Center for Lesbian Rights | Unmarried same-sex couples and same-sex couples legally married in other jurisdictions are challenging state's marriage laws, defining marriage as the union of one man and one woman, as violative of the due process and equal protection clauses of the Wyoming Constitution. Plaintiffs seek declaratory and injunctive relief. |

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