No Rational Basis for Defending Florida's Same-Sex Marriage Bans

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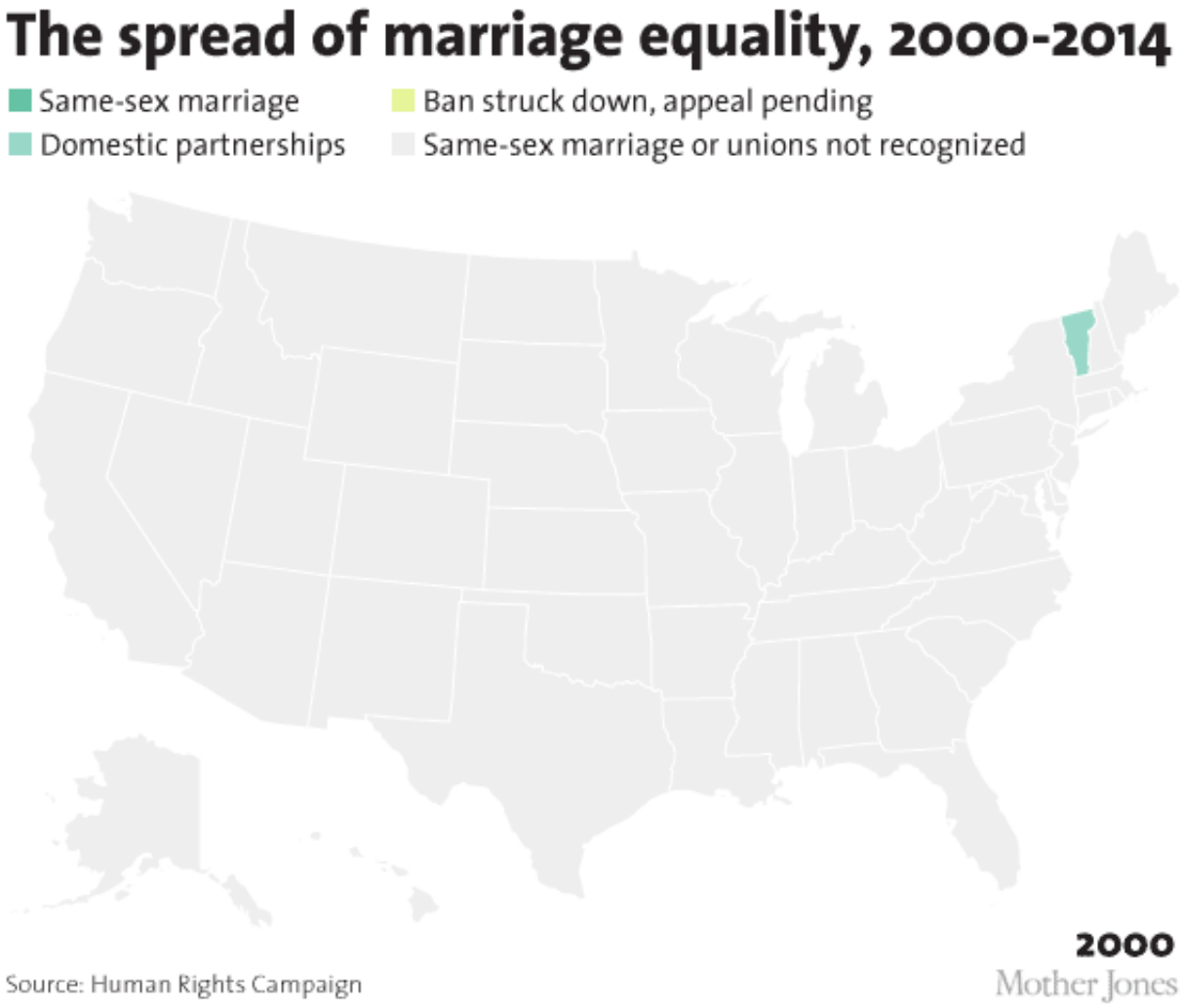
Date : July 2, 2014

Last week marked the one-year anniversary of the Supreme Court's decision in *United States v. Windsor*,[1] [1. 133 S.Ct. 2675 (2013)] the case that invalidated the Defense of Marriage Act. In the past year, every court at every level that has examined state same-sex marriage bans has come to the exact same conclusion: whether effected by statute or Constitutional amendment—regardless of the level of scrutiny—state bans on same-sex marriage are very clearly unconstitutional.

What is particularly impressive about the collection of post-*Windsor* opinions is not simply the uniformity with which all of the judges have spoken, but how emphatically they have spoken. There have been no close calls. There have been no dissents. There has not been the slightest hint that any judge could or would uphold state same-sex marriage bans.



Nevertheless, Florida Attorney General Pam Bondi thinks she can mount a successful defense of Florida's same-sex marriage bans[2] [2. Fla. Stat. § 741.212; Fla. Const. art. I, § 27 ("Inasmuch as marriage is the legal union of only one man and one woman as husband and wife, no other legal union that is treated as marriage or the substantial equivalent thereof shall be valid or recognized.").] using the same arguments that have been laughably dismissed by every state and federal judge that has evaluated the issue. The AG's office recently filed a brief in *Brenner v. Scott* arguing that Florida's marriage laws bear a rational relationship to "responsible procreation and childrearing."[3] [3. State Officials' Motion to Dismiss . . . , Brenner v.Scott, Case No. 4:14-cv-00107-RH-CAS at 20 (N.D. Fla. filed May 12, 2014).] Bondi defended the brief by stating, "Defending the wishes of the voters who enacted Florida's marriage amendment necessarily requires me to make good faith legal arguments."[4] [4. *See* News Release, Att'y Gen. Pam Bondi, Statement on Same-Sex Marriage Lawsuit (June 2, 2014).]

The problem, however, is that the arguments made in the brief are not made in good faith. The brief refuses to acknowledge any of the courts that have interpreted the same arguments post-*Windsor*.[5] [5. Except in the context of issuing stays.] The argument the brief sets forth, stripped of citations and quotations, is:

> Florida's definition of marriage has prevailed throughout the history of the Nation since even before its founding, including during the period of time when the Fourteenth Amendment was framed and adopted.
>
> Historically, there has been a clear and essential connection between marriage and responsible procreation and childrearing.
>
> The promotion of family continuity and stability is a legitimate state interest.
>
> Florida's marriage laws, then, have a close, direct, and rational relationship to society's legitimate interest in increasing the likelihood that children will be born to and raised by the mothers and fathers who produced them in stable and enduring family units.[6] [6. State Officials' Motion to Dismiss . . . , *supra* note 3, at 20–24. This post examines only the constitutional argument. The brief makes arguments on other grounds (e.g. standing, federalism) that have been similarly discredited.]

Rather than try to argue why this position is completely untenable, I have instead compiled quotes from all of the courts that have had heard this same lame excuse and have recognized that such a justification bears no rational relationship to the laws prohibiting same-sex marriage. Below is but a taste of the ever-growing case law pronouncing such bans unambiguously unconstitutional. By reading through the below quotes, it becomes clear that there can be no rational basis for Pam Bondi to defend Florida's soon-to-be-overturned same-sex marriage bans. Bondi should have followed the lead of several other state AGs who refused to defend such laws. By disingenuously putting forth wholly discredited arguments, Bondi is not defending the people of Florida, she is defending a failed ideology. Here is what the courts have had to say on the matter:[7] [7. All of the following are direct quotes from the court decisions. For ease of reading, outside quotation marks and internal citations have been omitted. Any emphasis is from the original source.][8] [8. Although the below quotes are intended to demonstrate the futility of the state's arguments, I also hope that the forceful language validates and inspires those who have struggled for equality and helps to demonstrate that the arc of the moral universe does indeed slowly bend toward justice.]

Case Law Omitted from Bondi's Brief

New Jersey

- [T]he current inequality visited upon same-sex civil union couples offends the New Jersey Constitution, creates an incomplete set of rights . . . , and is not compatible with "a reasonable conception of basic human dignity." Any doctrine urging caution in constitutional adjudication is overcome by such a clear denial of equal treatment. Garden State Equality v. Dow, 82 A.3d 336, 367 (N.J. Super. Ct. 2013).

- The State has advanced a number of arguments, but none of them overcome this reality: same-sex couples who cannot marry are not treated equally under the law today. The harm to them is real, not abstract or speculative. Garden State Equality v. Dow, 79 A.3d 1036, 1039 (N.J. 2013).

New Mexico

- Articulating the governmental interest as maintaining the tradition of excluding same-gender marriages because "the 'historic and cultural understanding of marriage' has been between a man and a woman — cannot in itself provide a [sufficient] basis for the challenged exclusion. To say that the discrimination is 'traditional' is to say only that the discrimination has existed for a long time." Griego v. Oliver, 316 P.3d 865, 886 (N.M. 2013).

- Regarding responsible procreation, we fail to see how *forbidding* same-gender marriages will result in the marriages of *more* opposite-gender couples for the purpose of procreating, or how *authorizing* same-gender marriages will result in the marriages of *fewer* opposite-gender couples for the purpose of procreating. . . . Finally, although it is not clear what the opponents of same-gender marriage mean by "responsible procreation," when childless same-gender couples decide to have children, they necessarily do so after careful thought and considerable expense, because for them to raise a family requires either lengthy and intrusive adoption procedures or assistive reproduction. Id. at 886–87.

Utah

- The State maintains that same-sex couples are distinct from opposite-sex couples because they are not able to naturally reproduce with each other. . . . The court does not find the State's argument compelling because, however persuasive the ability to procreate might be in the context of a particular religious perspective, it is not a defining characteristic of conjugal relationships from a legal and constitutional point of view. The State's position demeans the dignity not just of same-sex couples, but of the many opposite-sex couples who are unable to reproduce or who choose not to have children. Kitchen v. Herbert, 961 F. Supp. 2d 1181, 1201 (D. Utah 2013).

- The Fourteenth Amendment protects the liberty rights of all citizens, and none of the State's arguments presents a compelling reason why the scope of that right should be greater for heterosexual individuals than it is for gay and lesbian individuals. If, as is clear from the Supreme Court cases discussing the right to marry, a heterosexual person's choices about intimate association and family life are protected from unreasonable government interference in the marital context, then a gay or lesbian person also enjoys these same protections. Id. at 1203–04.

Ohio

- Supporters of Ohio's marriage recognition bans have . . . asserted that children are best

off when raised by a mother and father. Even if it were rational for legislators to speculate that children raised by heterosexual couples are better off than children raised by gay or lesbian couples, *which it is not,* there is simply no rational connection between the Ohio marriage recognition bans and the asserted goal, as Ohio's marriage recognition bans do not prevent gay couples from having children. The only effect the bans have on children's well-being is harming the children of same-sex couples who are denied the protection and stability of having parents who are legally married. Obergefell v. Wymyslo, 962 F. Supp. 2d 968, 994–95 (S.D. Ohio 2013).

- Even if it were possible to hypothesize regarding a rational connection between Ohio's marriage recognition bans and some legitimate governmental interest, *no hypothetical justification can overcome the clear primary purpose and practical effect of the marriage bans … to disparage and demean the dignity of same-sex couples in the eyes of the State and the wider community.* When the primary purpose and effect of a law is to harm an identifiable group, the fact that the law may also incidentally serve some other neutral governmental interest cannot save it from unconstitutionality. Id. at 995.

- Of particular relevance to this case, in *Obergefell* this Court analyzed and roundly rejected any claimed government justifications based on a preference for procreation or childrearing by heterosexual couples. This Court further concluded that the overwhelming scientific consensus, based on decades of peer-reviewed scientific research, shows unequivocally that children raised by same-sex couples are just as well adjusted as those raised by heterosexual couples. In fact, the U.S. Supreme Court in *Windsor* (and more recently, numerous lower courts around the nation) similarly rejected a purported government interest in establishing a preference for or encouraging parenting by heterosexual couples as a justification for denying marital rights to same-sex couples and their families. The Supreme Court was offered the same false conjectures about child welfare this Court rejected in *Obergefell,* and the Supreme Court found those arguments so insubstantial that it did not deign to acknowledge them. . . . All of the federal trial court court decisions since *Windsor* have included similar conclusions on this issue, including that child welfare concerns weigh exclusively in favor of recognizing the marital rights of same-sex couples Henry v. Himes, No. 1:14-cv-129 (S.D. Ohio Apr. 14, 2014).

Oklahoma

- [T]here is no rational link between excluding same-sex couples from marriage and the goals of encouraging "responsible procreation" among the "naturally procreative" and/or steering the "naturally procreative" toward marriage. . . . Permitting same-sex couples to receive a marriage license does not harm, erode, or somehow water-down the "procreative" origins of the marriage institution, any more than marriages of couples who cannot "naturally procreate" or do not ever wish to "naturally procreate." Marriage is incentivized for naturally procreative couples to precisely the same extent regardless of whether same-sex couples (or other non-procreative couples) are included. Bishop v. United States ex rel. Holder, 962 F. Supp. 2d 1252, 1291 (N.D. Okla. 2014).

- Applying deferential rationality review, the Court searched for a rational link between exclusion of this class from civil marriage and promotion of a legitimate governmental objective. Finding none, the Court's rationality review reveals Part A as an arbitrary, irrational exclusion of just one class of Oklahoma citizens from a governmental benefit. Id. at 1296.

Kentucky

- The State's sole justification for the challenged provisions is: "the Commonwealth's public policy is rationally related to the legitimate government interest of preserving the state's institution of traditional marriage." Certainly, these laws do further that policy. That Kentucky's laws are rooted in tradition, however, cannot alone justify their infringement on individual liberties. . . . Usually, as here, the tradition behind the challenged law began at a time when most people did not fully appreciate, much less articulate, the individual rights in question. . . . In time, even the most strident supporters of these views understood that they could not enforce their particular moral views to the detriment of another's constitutional rights. Here as well, sometime in the not too distant future, the same understanding will come to pass. Bourke v. Beshear, No. 3:13-CV-750-H (W.D. Ky Feb. 12, 2014).

- The Family Trust Foundation of Kentucky, Inc. submitted a brief as *amicus curiae* which cast a broader net in search of reasons to justify Kentucky's laws. It offered additional purported legitimate interests including: responsible procreation and childrearing, steering naturally procreative relationships into stable unions, promoting the optimal childrearing environment, and proceeding with caution when considering changes in how the state defines marriage. These reasons comprise all those of which the Court might possibly conceive. The State, not surprisingly, declined to offer these justifications, as each has failed rational basis review in every court to consider them post-*Windsor*, and most courts pre-*Windsor*. Id.

Virginia

- The Proponents of Virginia's Marriage Laws contend that "responsible procreation" and "optimal child rearing" are legitimate interests that support the Commonwealth's efforts to prohibit some individuals from marrying. . . . This rationale fails under the applicable strict scrutiny test as well as a rational-basis review. Of course the welfare of our children is a legitimate state interest. However, limiting marriage to opposite-sex couples fails to further this interest. Instead, needlessly stigmatizing and humiliating children who are being raised by the loving couples targeted by Virginia's Marriage Laws betrays that interest. Bostic v. Rainey, No. 2:13cv395 (E.D. Va. Feb. 13, 2014).

- The legitimate purposes proffered by the Proponents for the challenged laws—to promote conformity to the traditions and heritage of a majority of Virginia's citizens, to perpetuate a generally-recognized deference to the state's will pertaining to domestic relations laws, and, finally, to endorse "responsible procreation"—share no rational link with Virginia Marriage Laws being challenged. The goal and the result of this legislation is to

deprive Virginia's gay and lesbian citizens of the opportunity and right to choose to celebrate, *in marriage,* a loving, rewarding, monogamous relationship with a partner to whom they are committed for life. These results occur without furthering any legitimate state purpose. Id.

Illinois

- 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. Indeed, the defendant and intervenor have joined in plaintiffs' motion, with the caveat the defendant David Orr is bound to follow the law in Illinois. Lee v. Orr, No. 13-cv-8719 (N.D. Ill. Feb. 21, 2014).

- This Court has no trepidation that marriage is a fundamental right to be equally enjoyed by all individuals of consenting age regardless of their race, religion, or sexual orientation, and the public policy of this State has been duly amended to reflect that position. Id.

Texas

- For now, the Court finds it is not necessary to apply heightened scrutiny to Plaintiffs' equal protection claim since Texas' ban on same-sex marriage fails even under the most deferential rational basis level of review. De Leon v. Perry, No. SA-13-CA-00982-OLG at 24 (W.D. Tex. Feb. 26, 2014).

- Notably, the rationale provided by Defendants as legitimate interests to support Section 32 (procreation, childrearing, and perhaps tradition), is the same rationale that has been uniformly rejected by district courts in the most recent same-sex marriage cases. Id. at 30.

- Today's Court decision is not made in defiance of the great people of Texas or the Texas Legislature, but in compliance with the United States Constitution and Supreme Court precedent. Without a rational relation to a legitimate governmental purpose, state-imposed inequality can find no refuge in our United States Constitution. Furthermore, Supreme Court precedent prohibits states from passing legislation born out of animosity against homosexuals (*Romer*), has extended constitutional protection to the moral and sexual choices of homosexuals (*Lawrence*), and prohibits the federal government from treating state-sanctioned opposite-sex marriages and same-sex marriages differently (*Windsor*). Id. at 47.

Tennessee

- With respect to the plaintiffs' Equal Protection Clause challenge, the defendants offer arguments that other federal courts have already considered and have consistently rejected, such as the argument that notions of federalism permit Tennessee to

> discriminate against same-sex marriages consummated in other states, that *Windsor* does not bind the states the same way that it binds the federal government, and that Anti-Recognition Laws have a rational basis because they further a state's interest in procreation, which is essentially the only "rational basis" advanced by the defendants here. . . . The anti-recognition laws at issue here and in other cases are substantially similar and are subject to the same constitutional framework. The defendants have not persuaded the court that Tennessee's Anti-Recognition Laws will likely suffer a different fate than the anti-recognition laws struck down and/or enjoined in *Bourke, Obergefell,* and *De Leon.* Tanco v. Haslam, No. 3:13-cv-01159 (M.D. Tenn. Mar. 14, 2014).

Michigan

- The Court finds that the [Michigan Marriage Amendment] impermissibly discriminates against same-sex couples in violation of the Equal Protection Clause because the provision does not advance any conceivable legitimate state interest. DeBoer v. Snyder, No. 12-CV-10285 (E.D. Mich. Mar. 21, 2014).

- [T]he Court rejects the contention that Michigan's traditional definition of marriage possesses a heightened air of legitimacy because it was approved by voter referendum. The popular origin of the MMA does nothing to insulate the provision from constitutional scrutiny. . . . The Court is not aware of any legal authority that entitles a ballot-approved measure to special deference in the event it raises a constitutional question. Id.

Indiana

- In the wake of the Supreme Court's decision in *United States v. Windsor*, district courts from around the country have rejected the idea that a state's non-recognition statute bears a rational relation to the state's interest in traditional marriage as a means to foster responsible procreation and rear those children in a stable male-female household. Baskin v. Bogan, No. 1:14-cv-00355-RLY-TAB (S.D. Ind. May 8, 2014).

Arkansas

- Regardless of the level of review required, Arkansas's marriage laws discriminate because they do not advance any conceivable legitimate state interest necessary to support even a rational basis review. Wright v. Arkansas, No. 60CV-13-2662 at 4 (Cir. Ct. Pulaski County May 9, 2014).

- The defendants offer several rationalizations for the disparate treatment of same-sex couples such as the basic premise of the referendum process, procreation, that denying marriage protections to same-sex couples and their families is justified in the name of protecting children, and continuity of the laws and tradition. None of these reasons provide a rational basis for adopting the amendment. Id. at 7.

Bonus Cases (Post-Brief)[9] [9. Bondi's Brief was filed on May 12, 2014. Therefore, none of the following cases could have been included. Nevertheless, all of the decisions filed after the brief come to the same conclusion.]

Idaho

- [T]he dispositive principle in this case is that "fundamental rights may not be submitted to vote; they depend on the outcome of no elections." . . . This principle resonates today, as 10 federal courts across the country have in recent months reached similar conclusions on the very issues present in this case. Considering many of the same arguments and much of the same law, each of these courts concluded that state laws prohibiting or refusing to recognize same-sex marriage fail to rationally advance legitimate state interests. This judicial consensus was forged from each court's independent analysis of Supreme Court cases extending from *Loving* through *Romer, Lawrence,* and *Windsor.* The logic of these precedents virtually compels the conclusion that same-sex and opposite-sex couples deserve equal dignity when they seek the benefits and responsibilities of civil marriage. Latta v. Otter, No. 1:13-cv-00482-CWD (D. Idaho May 13, 2014).

Oregon

- Although protecting children and promoting stable families is a legitimate governmental purpose, prohibiting same-gender couples from marrying is not rationally related to that interest. To justify classifications singling out a particular class of persons, the law must, at a minimum, contain some "factual context" tying the classification to the purpose sought to be achieved. There is no such factual context here. In fact, the relationship between prohibiting same-gender couples from marrying and protecting children and promoting stable families is utterly arbitrary and completely irrational. The state's marriage laws fly in the face of the state's "strong interest in promoting stable and lasting families, including the families of same-sex couples and their children." Geiger v. Kitzhaber, Nos. 6:13-cv-01834-MC; 6:13-cv-02256-MC (D. Or. May 19, 2014).

Pennsylvania

- In terms of state interests served by Pennsylvania's Marriage Laws, Defendants advance the following: the promotion of procreation, child-rearing and the well-being of children, tradition, and economic protection of Pennsylvania businesses. Defendants appear to defend only the first two aims, stating that numerous federal and state courts have agreed that responsible procreation and child-rearing are legitimate state interests and providing extensive authority for that proposition. Significantly, Defendants claim only that the objectives are "legitimate," advancing no argument that the interests are "important" state interests as required to withstand heightened scrutiny. Also, Defendants do not explain the relationship between the classification and the governmental objectives served; much less do they provide an exceedingly persuasive justification. In essence, Defendants argue within the framework of deferential review and go no further. Indeed, it is unsurprising that Defendants muster no argument

engaging the strictures of heightened scrutiny, as we, too, are unable to fathom an ingenuous defense saving the Marriage Laws from being invalidated under this more-searching standard. Whitewood v. Wolf, No. 1:13-cv-1861 (M.D. Pa. May 20, 2014).

Wisconsin

- Defendants and amici defend the marriage ban on various grounds, such as preserving tradition and wanting to proceed with caution, but if the state is going to deprive an entire class of citizens of a right as fundamental as marriage, then it must do more than say "this is the way it has always been" or "we're not ready yet." At the very least it must make a showing that the deprivation furthers a legitimate interest separate from a wish to maintain the status quo. Defendants attempt to do this by arguing that allowing same-sex couples to marry may harm children or the institution of marriage itself. Those concerns may be genuine, but they are not substantiated by defendants or by amici. Wolf v. Walker, No. 14-cv-64-bbc (W.D. Wisc. June 6, 2014).

- [R]egardless whether I apply strict scrutiny, intermediate scrutiny or some "more searching" form of rational basis review under the equal protection clause, I conclude that the marriage amendment and related statutes cannot survive constitutional review. *Id.*

Tenth Circuit

- We emphatically agree with the numerous cases decided since *Windsor* that it is wholly illogical to believe that state recognition of the love and commitment between same-sex couples will alter the most intimate and personal decisions of opposite-sex couples. Kitchen v. Herbert, No. 13-4178 (10th Cir. June 25, 2014).

- A state's interest in developing and sustaining committed relationships between childbearing couples is simply not connected to its recognition of same-sex marriages. *Id.*

- In summary, we hold that under the Due Process and Equal Protection Clauses of the United States Constitution, those who wish to marry a person of the same sex are entitled to exercise the same fundamental right as is recognized for persons who wish to marry a person of the opposite sex, and that Amendment 3 and similar statutory enactments do not withstand constitutional scrutiny. *Id.*

Kentucky (again)

- The Court will begin with Defendant's only asserted justification for Kentucky's laws prohibiting same-sex marriage: "encouraging, promoting, and supporting the formation of relationships that have the natural ability to procreate." Perhaps recognizing that procreation- based arguments have not succeeded in this Court, nor any other court post-*Windsor*, Defendant adds a disingenuous twist to the argument: traditional marriages contribute to a stable birth rate which, in turn, ensures the state's long-term

economic stability. These arguments are not those of serious people. Love v. Beshear, No. 3:13-CV-750-H at 15 (W.D. Ky. July 1, 2014).

- Even assuming the state has a legitimate interest in promoting procreation, the Court fails to see, and Defendant never explains, how the exclusion of same-sex couples from marriage has any effect whatsoever on procreation among heterosexual spouses. . . . The Court finds no rational relation between the exclusion of same-sex couples from marriage and the Commonwealth's asserted interest in promoting naturally procreative marriages. . . . Numerous courts have repeatedly debunked all other reasons for enacting such laws. The Court can think of no other conceivable legitimate reason for Kentucky's laws excluding same-sex couples from marriage. *Id.* at 15–16.

Governor Rick Scott has stated, "I can't imagine that a court would overturn the will of the people."[10] [10. It is worth noting that the will of Floridians has shifted—surely in part to the invalidated arguments against same-sex marriage—and Floridians now support same-sex marriage by a measure of 56% for and 39% against.] However, reviewing the case law, it is hard to imagine *any other result*. The writing is on the wall. Scott and Bondi are merely trying to ignore it.