

**COMMONWEALTH OF KENTUCKY  
FRANKLIN COUNTY CIRCUIT COURT  
CIVIL ACTION No. \_\_\_\_\_**

KENTUCKY EQUALITY FEDERATION, )  
LINDSEY BAIN, and )  
DANIEL ROGERS )  
**PLAINTIFFS** )

**JUDGE \_\_\_\_\_**

**vs.**

**COMPLAINT FOR  
DECLARATORY JUDGMENT  
AND INJUNCTIVE RELIEF**

STEVE BESHEAR, in his official )  
capacity as Governor of Kentucky; )  
JACK CONWAY, in his official capacity )  
as Attorney General of Kentucky; )  
and DON BLEVINS, in his official )  
Capacity as Fayette County Clerk )  
**DEFENDANTS** )

\*\*\*\*\*

**INTRODUCTION AND PARTIES**

1. Plaintiffs bring this civil rights action to challenge Kentucky's Constitutional and statutory proscriptions of same-sex marriage and the Commonwealth's voiding of legal marriages of same-sex couples entered into in other jurisdictions.
2. Plaintiffs Lindsey Bain, and Daniel Rogers (Messrs. Rogers and Bain, hereafter), various members of the Kentucky Equality Federation (KEF, hereafter), and many whom KEF represents, have been legally married in other jurisdictions, but the Commonwealth refuses to recognize their marriage.
3. Similarly, many of the above listed individuals have also asked the Commonwealth of Kentucky for marriage licenses and have been refused. This is despite their meeting all other

qualifications of marriage license eligibility except for being "one (1) man and one (1) woman".

4. Plaintiffs are being denied the tangible and intangible benefits of marriage in Kentucky. Each plaintiff, and every citizen who advocates for equal protection under the law, hopes to see the day when the Commonwealth will recognize and support couples who wish to publicly declare their love and commitment to and before their family in a marriage. Instead, at this time, even issuing a license or solemnizing such a union is a criminal offense. KRS §§ 402.990(3) and 402.990(6).

### **Plaintiffs**

5. Plaintiff the Kentucky Equality Federation, the assumed name of the Federation for Kentucky Equality, Inc., is and has been at all times relevant to this claim, a non-profit corporation registered with the Commonwealth. KEF is dedicated to the advocacy of lesbian, gay, bisexual, transgender, and intersex (LGBTI) civil rights. KEF does not have parent companies and is not publicly held.
6. Plaintiffs Lindsey Bain, 61, and Daniel Rogers, 42, have known each other and lived together as in a committed partnership for twenty years, and intend to do so for life. They have never separated. They are currently residents of Lexington-Fayette Urban County.
7. Mr. Bain has been a resident of Kentucky for thirty-six (36) years; Mr. Rogers was born and bred in the Commonwealth and has lived here all of his life as a fourth-generation Kentuckian.
8. Mr. Bain is semi-retired. He was employed by the Commonwealth of Kentucky as a vocational education teacher for twenty-six (26) years. He was Department Chair of Evening Programs for a Community-based Vocational Education school. As an example of the harm that Kentucky's public policy against same-sex couples: despite their 2009 marriage in Connecticut, Kentucky does not recognize Mr. Rogers as his spouse. Therefore Mr. Rogers cannot be listed as a beneficiary on Mr. Bain's teacher retirement; Mr. Rogers is a retired Real Estate Agent who has

also been licensed to sell insurance in the Commonwealth. He has returned to school and is working towards a four-year degree in order to be a grief counselor. Both men have been business owners in Kentucky..

9. The Plaintiff couples, like other committed couples, have made plans for the future with each other, have cared for each other, and have stood with and supported each other through good times and tough times; Mr. Rogers is living with a physical disability. And Mr. Bain has an ongoing heart condition. The couple is concerned whether healthcare providers would share the information with the other spouse in the event of a medical emergency.
10. Both have had powers of attorney and living wills drawn up by an attorney to try and mitigate the negative effects of Kentucky's discriminatory public policy with regard to same-sex spouses.
11. Rogers and Bain were married in the state of Connecticut on November 13th 2009, as same-sex marriages were not legal in Kentucky on that date. Seven months later, when the weather warmed, a public reception was held for the newlyweds here in Kentucky, with over a hundred people in attendance. Several members of their extended family, their friends and co-workers were there to support the happy couple.
12. Both men attend Church, where they have been active members of the congregation for several years. Mr. Rogers sings in the choir, helps with the care ministry, and teaches Sunday school. Both men are also active volunteers in the community.
13. For their part, the plaintiff-members of the KEF come from all walks of life; they are as varied in age, occupation, socio-economic status, personality, and politics as any other group within the Commonwealth. But they are united in their belief that the current discrimination against same-sex marriage is immoral and illegal.

## Defendants

14. Defendant Steve Beshear is the Governor of the Commonwealth of Kentucky. In his official capacity, he is the chief executive officer of Kentucky and is, pursuant to Section 81 of the Kentucky Constitution, ultimately responsible for the faithful execution of the laws of the Commonwealth.
15. Defendant Don Blevins is the County Clerk for Fayette County, and is being sued in his official capacity pursuant to his duties, as chief marriage registrar within Fayette County. KRS § 402.080
16. Defendant Jack Conway, as the Attorney General of the Commonwealth of Kentucky, is named as a party due to his position as the primary law enforcement officer of Kentucky, pursuant to KRS § 15.700, and his position as the state's chief law officer, pursuant to KRS § 15.020.
17. Also, pursuant to KRS § 418.075(1), the Attorney General is petitioned to challenge the constitutionality of all the statutes implicated hereunder with regard to Kentucky's stated "public policy" definition of marriage as between "one (1) man and one (1) woman", to the exclusion of same-sex couples who wish to enjoy the benefits of the "civil status, condition, or relation" of marriage. The Attorney General has been served with a copy of this Complaint.

## **JURISDICTION AND VENUE**

18. An active controversy exists between the parties.
19. Pursuant to KRS 23A.010(1), Jurisdiction is proper in this Court in that the claims are justiciable and are not exclusively vested in another court.
20. Venue is proper in this Court in that two of the Defendants are Constitutional officers of the Commonwealth of Kentucky and are headquartered in the state government seat in Frankfort, located in Franklin County.

## FACTUAL BACKGROUND

### **Kentucky's Absolute Prohibition of Marriage, and Its Benefits, for All Purposes, to Same-Sex Couples**

21. Kentucky's Constitution, Section 223A, as ratified on November 2, 2004, provides that "Only a marriage between one man and one woman shall be valid or recognized as a marriage in Kentucky. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized. Marriage between members of the same sex is prohibited."
22. As detailed below, Kentucky already had same-sex marriage prohibitions on the books at the time Section 233A was ratified. The constitutional amendment was apparently a response to the movement among some of Kentucky's sister states to begin legalizing same-sex marriage. Only months earlier, Massachusetts had become the first of (now thirteen) states, in addition to the District of Columbia, to issue same-sex marriage licenses. In addition, in that same time period, seven other states have provided for some form of civil union for same-sex couples.
23. Since 1998, otherwise legal marriages between same-sex couples solemnized in other jurisdictions have been explicitly void in the eyes of the Commonwealth. "A marriage between members of the same sex is against Kentucky public policy and shall be subject to the prohibitions established in KRS 402.045." KRS 402.040(2). The statutes make no mistake about their intent to single-out and disenfranchise same-sex couples. To wit: "A marriage between members of the same sex which occurs in another jurisdiction shall be void in Kentucky. *Any rights granted by virtue of the [same sex] marriage, or its termination, shall be unenforceable in Kentucky courts.*" KRS § 402.045(2)(emphasis added).

24. Also, the act of assisting in such a same-sex marriage has been criminalized. No county clerk-- or deputy or assistant county clerk or Judge/executive acting their stead-- can legally issue a marriage license to applicants of the same sex. KRS 402.990(6) provides that any clerk who knowingly issues a marriage license to persons prohibited from marrying "shall be guilty of a Class A misdemeanor and removed from office by the judgment of the court in which the clerk is convicted."

### **The Harm to the Plaintiffs**

25. On September 4, 2013, Plaintiffs Lindsey Bain and Daniel Rogers went to their County Clerk and asked for a clarification of whether or not the state would recognize their marriage, or, if not, whether they could then, therefore, be married here in their home state.

26. They were told that the state would not issue a marriage license to them so that they might married in their home state. The person behind the counter said that "there's a statute" that they [the County Clerk's office] had to follow. Further, Messrs Rogers and Bain were also told that they were not being denied a license because of their marriage in Connecticut; and they were further informed that the result would have been no different had they both been female.

27. For the record, the statutes concerning marriage in Kentucky insist, even for couples consisting of one male and one female, that only the female can be issued the marriage license. KRS § 402.080, KRS § 402.100 and KRS § 402.110.

28. The plaintiffs ask this Court to recognize the emotional impact inherent in being discriminated against and treated as a second-class citizen in the above manner.

29. This bar from enjoying matrimony also harms the plaintiffs in countless, more tangible ways. For example, legal benefits such as spousal privilege with regards to testifying in court, or

spousal advantages with regard to adoption rights are denied same-sex spouses.

30. For members of the KEF who have been interested in having children, they are forced to initiate concurrent adoption by one spouse along with a legal appointment of guardianship of the other spouse in order to approximate the protections under the law given spouses.
31. In Kentucky same-sex spouses are legal strangers to one another. Also, the biological children of a same-sex spouse is a legal stranger to their other parent.
32. Such a legal regime causes both economic and psychological hardship to the children, and to each of the same-sex spouses in their family.
33. Further, when any of the plaintiffs dies, because Kentucky will not recognize their marriage, the surviving same-sex partner runs the risk of a larger inheritance tax burden and greater exposure to creditors. Also, in probate, they will lack homestead protection, statutory set-asides of personal property, and widow/er rights such as elective share dower/curtesy. Even the right to sue for wrongful death is affected by Kentucky's current regime.
34. Moreover, when a same-sex spouse passes away, private contractual rights designated for "spouses" or "families" would be denied or require a fee. This could include, *inter alia*, digital estates for online social media accounts, email or other online assets, health insurance, and trusts under Kentucky law where a special power of appointment implicates a spouse. The possible ways in which Kentucky's refusal to recognize their married status could adversely impact plaintiffs is as varied as the number of possible private contracts as they might encounter.
35. The United States Supreme Court, in a recent decision, has strongly affirmed that same-sex couples may not be denied liberty of due process or equal protection under the law by the Federal government. *United States v. Windsor*, 133 S. Ct. 2675 (2013). Since then, the federal government has already assured married same-sex couples that they will enjoy spousal benefits

with regard to all federal income and estate taxes, regardless of which state they live in. The official ruling from the IRS is due to be published on September 16, 2013. Some examples of similar federal rights that could now accrue to same-sex couples would be: gift-splitting, death tax marital deductions, entitlement to deceased spouse's pension, spousal beneficiaries of health insurance for federal employees, simplified basis and contribution with regard to jointly-held property, and select social security, Medicare, and Medicaid spousal benefits.

36. However, even those reforms will not afford same-sex couples *all* the rights associated with federal benefits. Some of the federal protections for married couples are only available to couples if their marriages are legally recognized in the state in which they live. See, e.g., 42 U.S.C. § 416(h)(1)(A)(i) et seq. (marriage for eligibility for social security benefits based on law of state where couple resides at time of application); 29 C.F.R. § 825.122(a) et seq. (the same holds true for the Family Medical Leave Act).
37. Apart from the fact that they are of the same sex, each Plaintiff individually and each Plaintiff couple, is qualified to marry under the laws of Kentucky in that they are not a part of any existing marriage, are competent, are not so closely related as to bar marriage between them, and have attempted to tender the appropriate fee.
38. Other plaintiffs were afraid to come forward in this litigation for fear of violent personal reprisals against themselves and their loved ones. The plaintiffs feel that such a culture of discrimination is encouraged and propagated by the current legal regime.



## CLAIMS FOR RELIEF

### COUNT I

#### **Deprivation of the right to marry based on sexual orientation/gender**

#### **in violation of the Equal Protection Clause of the Fourteenth**

#### **Amendment of the United States Constitution**

39. Plaintiffs incorporate by reference all of the preceding paragraphs of this Complaint as though fully set forth therein.
40. The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides that "no State shall ...deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, Section 1.
41. Sexual orientation is a core, defining trait that is so fundamental to one's identity that a person may not legitimately be required to abandon it-- even if that were possible-- as a condition of equal treatment. Sexual orientation generally is fixed at an early age and highly resistant to change through intervention. Efforts to change a person's sexual orientation through interventions by medical professionals have not been shown to be effective. No mainstream mental health professional organization approves interventions that attempt to change sexual orientation, and many—including the American Psychological Association and the American Psychiatric Association—have adopted policy statements cautioning professionals and the public about these treatments.
42. Sexual orientation bears no relation to an individual's ability to perform or contribute to society or to their family.
43. Lesbians, gay, bisexual, and transgender individuals are members of a discrete and insular

minority that has suffered a history of discrimination in the Commonwealth and across the United States. Indeed, prejudice against lesbians and gay men continues to seriously curtail the operation of the political process preventing this group from obtaining redress through legislative means. Lesbians and gay men lack statutory protection against discrimination in employment, public accommodations, and housing at the federal level and in more than half of the states, including Kentucky. Lesbians and gay men have far fewer civil rights protections at the state and federal level than women and racial minorities had when sex and race classifications-were declared to be suspect or quasi suspect. They have been stripped of the right to marry through thirty state constitutional amendments, including Section 233A in Kentucky's Constitution, and have been targeted through many voter initiative processes.

44. Same-sex couples and opposite-sex couples are similarly situated for purposes of marriage.
45. By denying the Plaintiff couples and other lesbian, gay, bisexual, and transgender couples the ability to marry and to have their out-of-state marriages recognized, the Commonwealth, through Defendants, disadvantages those persons on the basis of their sexual orientation and/or gender. It denies them significant legal protections. And it "degrade[s] [and] demean[s]" them by "instruct[ing] ...all persons with whom same-sex couples interact, including their own children," that their relationship is "less worthy" than the relationships of others. *United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013).
46. Classifications based on sexual orientation demand heightened scrutiny, but when such classifications are solely based on invidious purposes, they cannot survive under any level of constitutional scrutiny. The Commonwealth's exclusion of same-sex couples from marriage is not rationally related to any legitimate governmental interest. All it does it disparage and injure LGBTI couples and their children.

47. The United States Supreme Court has already found discriminatory proscriptions of legal marriages of same-sex couples to be unconstitutional under the Fifth Amendment of the United States Constitution. *Id.*
48. Equal Protection under the law is no less in force in the states as it is with regard to the Federal Government: "While the Fifth Amendment itself withdraws from Government the power to degrade or demean in the way this law [DOMA] does, the equal protection guarantee of the Fourteenth Amendment makes that Fifth Amendment right all the more specific and all the better understood and preserved." *Id.*, at 2695.
49. Thus, the Commonwealth's prohibition of marriage for same-sex couples, and its refusal to recognize the marriages of same-sex couples entered into elsewhere, violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.
50. Sexual orientation and gender are not always consistently opposites. But, even so, laws designed to discriminate against non-typical sexual orientation by using gender as a proxy are also repugnant to concepts of equal protection on their own terms-- as discrimination based on gender. The state has the burden to prove a substantial relationship between the laws and an important government interest. The Supreme Court has made clear that perpetuation of traditional gender roles may not be part of that government interest. *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724-25 (1982).
51. Thus, same-sex marriage proscriptions as law are also a violation of equal protection as invidious discrimination based on gender.

## COUNT II

### **Deprivation of the right to marry in violation of the Due Process Clause of the**

### **Fourteenth Amendment of the United States Constitution**

52. Plaintiffs incorporate by reference all of the preceding paragraphs of this Complaint as though fully set forth therein.
53. The Fourteenth Amendment to the United States Constitution precludes any State from "depriv[ing] any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, Section 1. In Kentucky, governmental interference with a fundamental right may be sustained only upon a showing that the legislation is suitably tailored to serve an compelling governmental interest.
54. The United States Supreme Court has long recognized that marriage, as a part of the privacy rights of all citizens, is a fundamental right; and that choices about marriage, like choices about other aspects of family, are a central part of the liberty protected by the Due Process Clause. *Loving v. Virginia*, 388 U.S. 1, 11 (1967).
55. Kentucky law denies the Plaintiff couple and other same-sex couples this fundamental right by denying them access to the state-recognized institution of marriage and refusing to recognize the marriages they entered into in other states and countries.
56. The Commonwealth's prohibition of marriage between persons of the same sex and its refusal to recognize marriages entered into by same-sex couples in other jurisdictions violates the Due Process Clause.
57. The Commonwealth can demonstrate no important interest to justify denying the Plaintiff couples this fundamental right. Indeed, it cannot demonstrate that the denial is tailored to any legitimate interest at all. Further, even if some the state were to identify a legitimate interest in restricting marriage to opposite sex couples, *which it cannot*, it is still highly unlikely that the facially discriminatory constitutional amendment and statutes in question would survive any level of scrutiny. Indeed, when given the chance, the Supreme Court of Massachusetts found

similar laws failed the rational basis test under any of the three rationales offered by proponents of their same-sex marriage ban. *Goodridge v. Department of Public Health*, 798 N.E.2d 941, 961 (2003). And the United States Supreme Court has said that "no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity." *United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013).

### COUNT III

#### **Denial of Equal Protection under the Law in violation of Sections 1, 3, 59, and 60 of the Kentucky Constitution**

58. Plaintiffs incorporate by reference all of the preceding paragraphs of this Complaint as though fully set forth therein.
59. Kentucky's Constitution, especially Sections 1, 3, 59, and 60, affords citizens of the Commonwealth an even greater level of privacy protection than the United States Constitution. *Commonwealth of Kentucky v. Wasson*, 842 S.W.2d 487, 491 (Ky. 1992).
60. Kentucky's notion of equal protection under the law is analyzed in the context of what is "presently accepted in society" and not "frozen in time to the year 1891 [the year of Kentucky's most recent Constitutional Convention]". *Perkins v. Northeastern Log Homes*, 808 S.W.2d 809, 817 (Ky. 1991), citing the Fourteenth Amendment analysis in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).
61. Thus, among all the States, Kentucky should afford the highest possible level of respect and support with regard to the privacy and fundamental rights to marriage for its GLBTI citizens.

## COUNT IV

**The ballot initiative amendment process to enact a facially unconstitutional provision was a violation of the citizenry's right of freemen to be free from "Absolute and Arbitrary Power" from a majority pursuant to Section 2 of Kentucky's Constitution**

62. Plaintiffs incorporate by reference all of the preceding paragraphs of this Complaint as though fully set forth therein.

63. Kentucky's Constitution, Section 2, provides that: "Absolute and arbitrary power of the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority."

64. Kentucky added a facially unconstitutional amendment to its constitution via a ballot initiative process. Thus, the attempt to abrogate constitutional sensibilities in favor of a ballot initiative, as was done for Section 233A of the Kentucky Constitution in 2004, is against the very notion of equal protection as guaranteed to each and all of Kentucky's population. This should be held as true as a matter of law by the Courts, regardless of the ballot's outcome.

## COUNT V

**In the alternative, even if the Commonwealth finds the prohibitions of Section 233A and similar statutes constitutional with regard to the status of marriage, it should still recognize the benefits conferred by that status once secured by another jurisdiction.**

65. Plaintiffs incorporate by reference all of the preceding paragraphs of this Complaint as though fully set forth therein.

66. Kentucky understands that marriages may be recognized with regard to some purposes and not for others. See Ky. OAG 07-004.

67. The second clause of Section 233A to Kentucky's Constitution provides that: "A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized."
68. Regardless of how Kentucky ultimately decides the matter of whether or not to license same-sex marriages, it is a separate legal consideration as to whether or not to recognize the status of marriage for purposes of letting those so married in other jurisdictions maintain the benefits of those marriages once they enter the commonwealth.
69. Generally courts uphold a state's use of its police power if it is related to the health, safety, general welfare, or morals of its citizenry.
70. Throughout its venerable history, other manifestations of Kentucky's "public policy" have included: prohibitions of marriage between white persons and negroes, denial of legal independence to married women, unmarried cohabitation of men and women, and predetermination of private sexual behavior between consenting adults. Over time Kentucky has discarded those laws, cleaving the thicket of discrimination inherent in such social mores, despite their ancient roots. But the commonwealth has not yet similarly empowered same sex couples to enjoy the benefits of marriage that they would already enjoy in thirty-plus jurisdictions throughout the country and around the world.
71. Kentucky has historically respected comity in the law of marriage under the doctrine of *Lex Loci Contractus*. Consistent analysis now would lead the state to honor the benefits conferred by any legal marriage, once granted by a sister state.

### **PRAYER FOR RELIEF**

WHEREFORE the facts above, Plaintiffs respectfully request that this Court:

1. Enter a declaratory judgment that the exclusion of the plaintiff couples, and of other same-sex

couples, from access to marriage licenses and the legal and social status of civil marriage, as well as the protections, obligations, and benefits of marriage, are a violation of both Kentucky and United States Law.

2. Enter a permanent injunction enjoining defendants from denying all plaintiff and other same-sex couples who are otherwise qualified the right to marry in the Commonwealth of Kentucky and directing defendants to recognize marriages validly entered into by the plaintiff couples and other same-sex couples outside of Kentucky.
3. Award costs of suit, including reasonable attorneys' fees, and
4. Enter all further relief as this Court deems appropriate.

**NOTICE TO REPORTERS:** This is an unofficial copy provided by Kentucky Equality Federation – Office of the President – Legal Department. NOT AN OFFICIAL COPY!

Mark A. Morenz-Harbinger, Esq.  
HARBINGER & ASSOCIATES

- *Committee Member*, Kentucky Equality Federation's Committee on Discrimination, Hate Crimes, and School Bullying

Jillian Hall, Esq.  
*Vice President of Legal*  
KENTUCKY EQUALITY FEDERATION  
Office of the President

