IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

DEB WHITEWOOD, *et al.*,	:	
	:	Civil Action
Plaintiffs,	:	
	:	No. 1:13-cv-1861
v.	:	
	:	Honorable John E. Jones, III
MICHAEL WOLF, in his official capacity as the Pennsylvania Secretary of Health, *et al.*,	:	
	:	
Defendants.	:	

BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OF DEFENDANTS MICHAEL WOLF AND DAN MEUSER

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A	Deposition of Ron Gebhardtsbauer, pp. 28-12 – 29:21
B	Relevant portion of *The Legislative Journal*
C	Summary of the bills currently pending in the General Assembly

[1] All exhibits listed in the Table of Exhibits are attached to Defendants' Statement of Undisputed Facts, filed contemporaneously with this Brief.

I. INTRODUCTION

Defendants Michael Wolf, the Commonwealth of Pennsylvania's Secretary of Health, and Dan Meuser, the Commonwealth's Secretary of Revenue ("Defendants"), through their undersigned counsel, file this Brief in support of their motion for summary judgment. For the reasons set forth below, summary judgment should be granted in favor of Defendants.

Plaintiffs claim that two provisions of Pennsylvania's Marriage Law, 23 Pa.C.S. § 1102 (defining the term "marriage") and 23 Pa.C.S. § 1704 (relating to marriage between persons of the same sex), are unconstitutional because they violate Plaintiffs' rights to due process and equal protection under the 14th Amendment to the U.S. Constitution. The statutory provisions at issue limit marriage in Pennsylvania to couples of the opposite sex.

The Pennsylvania General Assembly, with the approval of then-Governor Thomas Ridge, added the provisions to the Marriage Law in 1996 as part of Act 124 of 1996. The Legislature properly added these provisions to the Marriage Law in accordance with its constitutional powers. No court – federal or state – has declared the Marriage Law to be contrary to the 14th Amendment of the U.S. Constitution. Nor has the U.S. Supreme Court or the U.S. Court of Appeals for the Third Circuit declared any other state statute banning marriage between same-sex couples to be

unconstitutional. Thus, Pennsylvania's Marriage Law is entitled to a presumption of constitutionality and validity.

As state officials, Defendants Wolf and Meuser are obligated to discharge their respective duties in accordance with the law, including the Marriage Law. Plaintiffs complain that Defendants' adherence to sections 1102 and 1704 of the Marriage Law in the administration of their statutory powers and duties harms them in violation of their rights under the Fourteenth Amendment.

Though recent decisions made by federal district courts sitting in other circuits have declared as unconstitutional under the 14th Amendment similar laws enacted in other states, those cases are not dispositive of the constitutionality of Pennsylvania's law.[2] Rather, Pennsylvania's Marriage Law must be measured by the judgment of this Court, reviewing the record in this case and applying applicable principles under the Fourteenth Amendment. On this record, Plaintiffs cannot establish that Pennsylvania's Marriage Law violates their rights to due process or equal protection.

Properly framed, the issue in this case is not *how* marriage is defined in Pennsylvania, but rather *who* has the authority to make that decision. In particular,

[2] For example, *Deboer v. Snyder*, Civ. Action No. 12-cv-10285, 2014 U.S. Dist. LEXIS 37274 (E.D. Mich. Mar. 21, 2014), *appeal pending*, No. 14-1341 (6th Cir.), is a case primarily about the adoption rights of same-sex couples under Michigan law. Although same-sex marriage also was at issue in *Deboer*, that case is distinguishable because this case does not focus on Pennsylvania's adoption laws.

the question before this Court is whether Pennsylvania's legislature has the constitutional right to define marriage in the manner in which it has chosen.

Because the issue before this Court deals with state authority, the Court must accord substantial deference to the General Assembly's judgment and policy preferences and review Pennsylvania's Marriage Law through the prism of the rational basis test. Using this test, this Court must determine whether any of the state interests articulated by members of the General Assembly serve a legitimate purpose and whether the law presents a rational way to preserve or advance those interests.

Though Plaintiffs may disapprove of the interests expressed by members of the Pennsylvania General Assembly when it enacted the amendments to the Marriage Law at issue here, mere disagreement with legislative judgment does not render those interests illegitimate or the law irrational. As set forth below, under established principles of constitutional law, the Marriage Law passes constitutional muster and Defendants' motion for summary judgment should be granted.

II. STATEMENT OF THE CASE

Defendants incorporate by reference the facts set forth in Defendants' Statement of Undisputed Material Facts filed simultaneously herewith. A summary of those facts follows.

On July 9, 2013, Plaintiffs filed a complaint in this Court seeking to invalidate, by declaratory judgment, provisions of Pennsylvania's Marriage Law that (a) define marriage as the union of "one man and one woman," 23 Pa.C.S. § 1102; and (2) declare as void in Pennsylvania same-sex marriages entered into in other jurisdictions, 23 Pa.C.S. § 1704. (Doc. 1).

On November 7, 2013, Plaintiffs filed an amended complaint naming as defendants Michael Wolf in his official capacity as Pennsylvania's Secretary of Health, Dan Meuser in his official capacity as the Commonwealth's Secretary of Revenue, and Donald Petrille, Jr., in his official capacity as the Register of Wills and Clerk of the Orphans' Court of Bucks County. (Doc. 64).

Plaintiffs allege that Pennsylvania's Marriage Law denies Plaintiffs due process and equal protection under the Fourteenth Amendment to the U.S. Constitution. *Id.* In their claim for relief, Plaintiffs seek: (i) a declaratory judgment that 23 Pa.C.S. §§ 1102 and 1704 violate the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution; (ii) a declaratory judgment that 23 Pa.C.S. §§ 1102 and 1704 violate the Equal Protection Clause of the Fourteenth Amendment;

(iii) a permanent injunction enjoining Defendants from denying Plaintiffs and other same-sex couples the right to marry in the Commonwealth of Pennsylvania; and (iv) an injunction requiring Defendants to recognize marriages validly entered into by Plaintiffs and other same-sex couples outside of the Commonwealth of Pennsylvania. (Doc. 64).

The provisions of the Marriage Law that Plaintiffs challenge were passed by the Pennsylvania General Assembly on October 7, 1996, and signed into law by then-Governor Ridge on October 16, 1996, as Act 124. *The Legislative Journal* relating to the Legislature's consideration of the bill that became Act 124 sets forth the state interests that various members of the General Assembly identified as its reasons for amending the Marriage Law. *See Exhibit "B" attached to Defendants' Statement of Relevant Undisputed Facts*.

Plaintiffs Fredia and Lynn Hurdle, Fernando Chang-Muy and Len Rieser, Dawn Plummer and Diana Polson, Angela Gillem and Gail Lloyd, and Sandy Ferlanie and Christine Donato, are lesbian and gay couples who seek to marry in the Commonwealth of Pennsylvania. Plaintiffs Deb and Susan Whitewood, Edwin Hill and David Palmer, Heather and Kath Poehler, Helena Miller and Dara Raspberry, Marla Cattermole and Julia Lobur, Ron Gebhardtsbauer and Greg Wright, and Maureen Hennessey, all were married under the laws of other states and seek to have their marriages recognized within the Commonwealth.

Pennsylvania residents married in other states (including the Plaintiffs who have married in other states) already are entitled to certain benefits under federal law, notwithstanding the fact that their marriages are not recognized under the law of Pennsylvania. For example, the United States government has expanded recognition of same-sex marriages in federal legal matters with regard to issues such as bankruptcy, prison visits, survivor benefits for spouses of police officers and firefighters killed on the job, as well as with regard to the legal right to refuse to testify to incriminate a spouse. Department of Justice, *Attorney General Eric Holder Delivers Remarks at the Human Rights Campaign Greater New York Gala*, February 2014 Press Release (February 10, 2014). The U.S. Treasury Department and the Internal Revenue Service have publicly announced that all legally married gay couples may file joint federal tax returns, even if they reside in states that do not recognize same sex marriage. Internal Revenue Service, *Treasury and IRS Announce That All Legal Same-Sex Marriages Will Be Recognized For Federal Tax Purposes; Ruling Provides Certainty, Benefits and Protections Under Federal Tax Law for Same-Sex Married Couple*, IR-2013-72 (August 29, 2013). The U.S. Department of Defense announced that it will grant military spousal benefits to same-sex couples. Dep't of Defense, *DOD Announces Same-Sex Spousal Benefits*, Press Release No. 581-13 (August 14, 2013); *see e.g.* MarAdmin 432/13; NavAdmin 218/13; AlCoast 357/13; ALARACT 212 2013. The U.S. Department

of Health and Human Services has said that the Defense of Marriage Act is no longer a bar to states recognizing same-sex marriages under state Medicaid and Children's Health Insurance Programs. Dep't of Health and Human Services, Centers for Medicare and Medicaid Services, *United States v. Windsor*, SHO #13-006 (September 27, 2013). The U.S. Office of Personnel Management has announced that it will now extend benefits to legally married same-sex spouses of federal employees. Office of Personnel Management, *Benefits Administration Letter: Cover of Same-Sex Spouses*, No. 13-203 (July 17, 2013).

III. QUESTIONS PRESENTED

Should this Court grant Defendants' motion for summary judgment in circumstances where: (i) Plaintiffs have not met the elements of their claim under 42 U.S.C. § 1983; (ii) in the absence of a fundamental right, rational basis analysis applies; and (iii) Plaintiffs have not proven a violation under the Due Process or Equal Protection Clauses of the Fourteenth Amendment to the U.S. Constitution where 23 Pa.C.S. § 1102 and 1704, as enacted by the General Assembly, are rationally related to various legitimate state interests?

Suggested Answer: Yes.

IV. STANDARD

Summary judgment is proper "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any

material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c)(2). A factual dispute is "material" only if it might affect the outcome of the case. *Morales v. PNC Bank, N.A.*, C.A. No. 10-1368, 2012 U.S. Dist. LEXIS 143605, *15 (E.D. Pa. Oct. 3, 2012) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). For an issue to be "genuine," a reasonable fact-finder must be able to return a verdict in favor of the non-moving party. *Id.*

On summary judgment, the moving party has the initial burden of identifying evidence that it believes shows an absence of a genuine issue of material fact. *Conoshenti v. Pub. Serv. Elec. & Gas Co.*, 364 F.3d 135, 145-46 (3d Cir. 2004). The court must consider the evidence, and all reasonable inferences which may be drawn from it, in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 47bAeh5 U.S. 574, 587 (1986) (citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)); *Tigg Corp. v. Dow Corning Corp.*, 822 F.2d 358, 361 (3d Cir. 1987).

Based on the standards applicable to a motion for summary judgment, this Court should grant Defendants' motion.

V. ARGUMENT

A. Plaintiffs Fail to Meet Their Burden of Proof under 42 U.S.C. § 1983 When They Cannot Prove State Action that Involves a Specific Defendant.

Plaintiffs assert that their constitutional claims are actionable against Defendants through 42 U.S.C. § 1983. Section 1983 is an enabling statute that does not create any substantive rights, but provides a remedy for the violation of federal constitutional or statutory rights. *Gruenke v. Seip*, 225 F.3d 290, 298 (3d Cir. 2000). To state a claim under § 1983, a plaintiff must allege that a defendant, (i) acting under color of state law, (ii) deprived the plaintiff of a federal constitutional or statutory right. *Id.* at 38. By its plain terms, therefore, § 1983 requires that both elements be proven to establish a viable claim.

While Plaintiffs claim generally that they wish to be married in Pennsylvania or that they desire to have Pennsylvania recognize their marriages performed under the laws of another state, with only a few exceptions Plaintiffs cannot demonstrate a connection between their goal to be married (or their request to have their marriages recognized) and any specific conduct undertaken by a particular Commonwealth official. This is not a question of whether Plaintiffs have sued the correct party, but whether they actually have a viable claim.

Plaintiffs have alleged certain harm. If what they identify constitutes cognizable harm (which Defendants dispute), then Plaintiffs have sued the correct parties. However, Plaintiffs have offered no facts establishing action taken against them by a Pennsylvania governmental official and, for the most part, have not

identified any benefit or right they sought in Pennsylvania that a government official or agency denied them. *See Amended Complaint* (Doc. 64).

The complaint is based on individual claims. Consequently, those Plaintiffs who have not sought any benefit, or whose claims are predicated entirely on future events (that may or may not occur, and hence, are speculative), have failed to establish the existence of specific state action that has caused (or is causing) them harm.

For example, most Plaintiffs claim that they have been harmed by the fact that, in preparation of their state income tax returns, they must identify themselves as "single," rather than "married." Single status precludes Plaintiffs from declaring themselves to be married and choosing as a married couple to file a joint income tax return. However, the inability to properly file a joint tax return under Pennsylvania law causes Plaintiffs no significant or substantial economic harm.

As a general proposition, there is no difference in the total income tax liability of two Pennsylvania residents filing jointly (as a married couple) or each such taxpayer filing his or her income tax return separately.[3] That is so because, for

[3] The only possible economic effect that married status might have under the income tax law would occur in the application of the special tax forgiveness provisions for poverty. *See* 72 P.S. § 7304. The poverty income limits for a married claimant are higher than that of a single claimant. However, this higher limit is offset by the fact that a married claimant must use both spouses' incomes to determine if the claimant has exceeded the poverty income limit. As a consequence of the addition of the spouse's income in determining the claimant's poverty income, married status often

personal income tax purposes under Pennsylvania law, an individual is considered a "taxpayer," 72 P.S. § 7301(w), and the tax owed by the individual is imposed only upon his or her own income. Tax is not imposed upon the joint income of those filing jointly as a married couple. *See* 61 Pa. Code § 101.1 (definition of "income" [subparagraph (iv)]). Therefore, "[a] [h]usband and wife filing jointly receive no tax benefits under the Commonwealth income tax law as is the case when filing a joint return for Federal income tax purposes. *The filing of a joint return [is] for the convenience of the taxpayer*." 61 Pa. Code § 121.15(c) (emphasis added). Consequently, Plaintiffs' inability to properly file a joint income tax return can give rise to no claim of significant economic harm.

Where a plaintiff has failed to carry his or her burden of proving there has been state action by a defendant that has caused a violation of the plaintiff's constitutional rights, the plaintiff's claim under § 1983 must fail. Consequently, Defendants' motion for summary judgment must be granted where Plaintiffs have not shown a violation of their constitutional rights caused by Defendants.

B. The Fourteenth Amendment Does Not Require The Commonwealth of Pennsylvania to Allow or Recognize Marriage Between Persons of the Same Sex.

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disqualifies a taxpayer from the special provisions for poverty. Thus, marriage actually can have a negative economic impact on a low-income taxpayer.

Pennsylvania's Marriage Law does not violate either the Due Process or Equal Protection Clauses of the Fourteenth Amendment to the U.S. Constitution because fundamentally there is no legal basis for the claim that Plaintiffs have a constitutional right to marry a person of the same sex and to have that marriage recognized in Pennsylvania.[4] Moreover, members of the Pennsylvania General Assembly have articulated multiple state interests that they have determined are rationally related[5] to the Pennsylvania Marriage Law. Consequently, Defendants' motion for summary judgment should be granted.

[4] As Defendants previously have argued, Plaintiffs' challenges to Pennsylvania's Marriage Law are precluded by *Baker v. Nelson*, 409 U.S. 810 (1972). Defendants hereby incorporate by reference the arguments made in their Memorandum of Law in Support of their Motion to Dismiss (Doc. 42), their Reply Brief in further support of that Motion (Doc. 61), and their Motion for Permission to Appeal (Doc. 76).

[5] To the extent that Plaintiffs in their own motion for summary judgment should argue that the constitutionality of Pennsylvania's marriage statutes is subject to strict scrutiny – either because Plaintiffs are members of a suspect class as a result of their sexual orientation, or because Plaintiffs contend that the classifications at issue in this case are gender-based – Defendants will address those arguments in their response to Plaintiffs' motion.

1. Plaintiffs Cannot Establish A Due Process Violation.

a. Same-Sex Marriage is not a Fundamental Right.

Plaintiffs claim that Pennsylvania's Marriage Law violates the Due Process Clause. However, they have failed to identify a fundamental right implicated by the Law. The United States Supreme Court has never recognized that the fundamental right to marry includes the right *to marry a person of one's choice*, and the Supreme Court declined the invitation to so hold in *United States v. Windsor*, 133 S. Ct. 2675 (2013). Hence, Plaintiffs' challenge under substantive due process is subject to nothing more than the deferential rational basis analysis, which (as explained below) can easily be met here.

It is well-recognized that the Supreme Court's "established method of substantive due process analysis" has "two primary features." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).[6] First, the Due Process Clause provides protection only to "those fundamental rights and liberties which are objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were

[6] In *Kitchen v. Herbert*, No. 2:13-cv-217, 2013 U.S. Dist. LEXIS 179331 (D. Utah Dec. 20, 2013), *appeal pending*, No. 13-4178 (10th Cir.), the district court incorrectly determined that it did not have to follow the controlling fundamental-rights analysis in *Glucksberg*, reasoning that the Supreme Court did not adopt this analysis in *Loving v. Virginia*. *Loving*, however, was decided some 30 years before *Glucksberg*.

sacrificed." *Id.* at 720-21. Second, identification of fundamental rights "require[s] … a careful description of the asserted fundamental liberty interest." *Id.* at 722.

Importantly, the Supreme Court has cautioned against the dangers of establishing new fundamental rights and has carefully limited the standard for identifying fundamental rights protected by the Due Process Clause:

> By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the members of this Court.

Glucksberg, 521 U.S. at 720. "Our Nation's history, legal traditions, and practices thus provide the crucial guideposts for responsible decision making and restrain judicial exposition of the Due Process Clause." *Id*. at 721.

b. The Right to Marry Does Not Include the Right To Marry a Person of the Same Gender.

Plaintiffs have failed to meet their burden of proof under the *Glucksberg* standard. The "careful description" of an asserted fundamental right must be precise, but neither too narrow nor overly broad. *Glucksberg*, 521 U.S. at 722-23.

Here, Plaintiffs' asserted liberty interest is imprecisely and broadly described thus: "[M]arriage is a fundamental right and … choices about marriage, like choices about other aspects of family, are a central part of the liberty protected by the Due Process Clause." Doc. No. 64, ¶ 152.

It is undisputed that marriage – as traditionally defined – is a fundamental right. *See Loving v. Virginia*, 388 U.S. 1, 12 (1967) (marriage is a "fundamental freedom" that may "not be restricted by invidious racial descriptions"); *Glucksberg*, 521 U.S. at 719 (citing *Loving* as establishing a fundamental right to marry). However, Plaintiffs' complaint goes further by alleging that Pennsylvania's exclusion of same-sex couples from marriage violates Plaintiffs' fundamental rights. Doc 64, ¶ 153. So described, Plaintiffs' asserted interest is distinguishable from the Supreme Court's decisions affirming the right to marry, as those decisions were premised on the underlying right of a man and a woman to marry, not on same-sex marriage or to have one's marriage in another state recognized in Pennsylvania where such recognition would violate Pennsylvania law.

In essence, Plaintiffs are asking this Court, in place of the legislature, to expand the fundamental right to marry or create a new fundamental right. In so doing, Plaintiffs blur the line between what ***is*** the law and what they believe the law ***should be***. Thus, Plaintiffs have done nothing more than broadly and erroneously conclude, without foundation, that the right they seek already exists. There is not such fundamental right.

c. Same-Sex Marriage Is Not Deeply Rooted in this Nation's History and Tradition.

To be deemed fundamental, a right must be "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed." *Washington*, 521 U.S. at 720-21. "Our Nation's history, legal traditions, and practices thus provide the crucial guideposts for responsible decision making and restrain judicial exposition of the Due Process Clause." *Id*. at 721.

The right of same-sex couples to marry is not "deeply rooted in this Nation's history and tradition" and, therefore, is not a fundamental right. *Windsor*, 133 S. Ct. at 2689. It is beyond dispute that the right to same-sex marriage is not "objectively, deeply rooted in this Nation's history and tradition." *See In re Kandu*, 315 B.R. 123, 140 (Bankr. W.D. Wash. 2004) ("[U]ntil recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire" to marry.); *Hernandez v. Robles*, 855 N.E.2d 1, 9 (N.Y. 2006) ("The right to marry someone of the same sex, however, is not 'deeply rooted'; it has not even been asserted until relatively recent times."). Furthermore, it was not until 2004 that any state allowed same-sex couples to marry. *Massachusetts v. U.S. HHS*, 698 F. Supp. 2d 234, 239 (D. Mass. 2010).

As a result, numerous courts throughout the country have held that the right to legal recognition of a same-sex marriage is not a fundamental right. *See Jackson v. Abercrombie*, 884 F. Supp. 2d 1065, 1098 (D. Haw. 2012); *Smelt v. County of*

Orange, 374 F. Supp. 2d 861, 879 (C.D. Cal. 2005); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1307 (M.D. Fla. 2005); *Andersen v. King Cnty*., 138 P.3d 963 (Wash. 2006); *Goodridge v. Department of Public Health*, 798 N.E.2d 941, 987 (Mass. 2003) (Cordy, J., dissenting) ("While the institution of marriage is deeply rooted in the history and traditions of our country and our State, the right to marry someone of the same sex is not.").

To the contrary, only the traditional understanding of marriage is deeply rooted in this Nation's history. The Supreme Court has often discussed the importance of marriage in its traditional form. *See Jackson v. Abercrombie*, 884 F. Supp. 2d at 1095 (citing *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978)); *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); *Maynard v. Hill*, 125 U.S. 190, 211 (1888). Therefore, same-sex marriage cannot be considered a fundamental right. *See Glucksberg*, *supra*.

Indeed, a vast majority of states continues to define marriage only as the union between a man and a woman. The very recent developments among a minority of states do not transform same-sex marriage into a "deeply rooted" historical and traditional right. *See Reno v. Flores*, 507 U.S. 292 (1993).

United States v. Windsor, 133 S. Ct. 2675 (2013), does not support Plaintiffs' claim. Both majority and dissenting members of the Court conceded that the recognition of same-sex marriage is a recent development in the law. *Windsor*, 133

S. Ct. at 2689 ("[M]arriage between a man and woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization."); *id.* at 2696 (Roberts, C.J., dissenting) (DOMA "retain[ed] the definition of marriage that, at that point, had been adopted by every State in our Nation, and every nation in the world."); *id.* at 2706-07 (Scalia, J., dissenting) (noting that the majority opinion "does not argue that same-sex marriage is 'deeply rooted in this Nation's history and tradition …, a claim that would of course be quite absurd"); *id.* at 2715 (Alito, J., dissenting) ("It is beyond dispute that the right to same-sex marriage is not deeply rooted in this Nation's history and tradition.").

Windsor does recognize, however, that the "historical and essential authority" of the states "to define the marital relation" is deeply rooted in our constitutional tradition. *Id.* at 2692. The power to define marriage, the Court said, "is the foundation of the state's broader authority to regulate the subject of domestic relations with respect to the protection of offspring, property interests, and the enforcement of marital responsibilities. The states, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce…." *Id.* at 2691 (internal quotation marks and brackets omitted). This power, the Court said, was "of central relevance" to the outcome of *Windsor*. *Id.* at 2692. Accordingly,

Windsor actually reaffirms the long-established authority of each state, including Pennsylvania, to define marriage.

This principle equally applies to the States' authority to refuse to recognize same-sex marriages performed in other States. Specifically, Section 2 of the Federal Defense of Marriage Act, 28 U.S.C. § 1738C, the constitutionality of which was not addressed in *Windsor* and which remains in force, provides that States are not required under the Full Faith and Credit Clause of the U.S. Constitution to recognize same-sex marriages performed in other States.

Plaintiffs cannot meet either element of the *Glucksberg* standard. Consequently, Plaintiffs' asserted right to marry a person of the same sex is not entitled to heightened protection under the Due Process Clause. *Glucksberg*, 521 U.S. at 720-21. Where no fundamental right is at issue, legislation is valid under the Due Process Clause if it is rationally related to legitimate government interests. *Glucksberg*, 521 US at 728. As set forth in detail below, Pennsylvania's Marriage Law is rationally related to several legitimate state interests.

2. Plaintiffs Cannot Establish An Equal Protection Violation.

a. The Pennsylvania Marriage Law Satisfies Rational Basis Review.

Plaintiffs claim that Pennsylvania's Marriage Law violates the Equal Protection Clause of the Fourteenth Amendment because it discriminates against

them on the basis of sexual orientation. In an equal protection case, this Court's first step is to determine whether the challenged statute disadvantages a suspect class or impinges on a fundamental right. *Heller v. Doe*, 509 U.S. 312 (1993). If so, it is subject to strict scrutiny; if not, then it is subject to rational basis review unless intermediate scrutiny applies.

As previously set forth, the right to marry a person of one's choice is not, and has never been, deemed to constitute a fundamental right by the U.S. Supreme Court. Moreover, all of the appellate courts that have addressed the federal question presented here (including the Eighth Circuit in *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 867 (8th Cir. 2006), and the Minnesota Supreme Court in *Baker v. Nelson*, *supra*,) have concluded that the rational basis test is the determination that is to be applied in these circumstances.[7]

[7] Plaintiffs' argument that they are entitled to have the Marriage Law measured under strict scrutiny (because it relates to sexual orientation) finds no support in Third Circuit case law. Thus, rational basis review is the controlling standard for adjudicating Plaintiffs' equal protection and due process claims.

As the United States Supreme Court recognized in *Romer v. Evans*, 517 U.S. 620 (1996), virtually all legislation classifies in some way with resulting disadvantages to some groups and individuals. *Id.* at 631 ("The Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons."). The only question is whether the interests are legitimate and whether the policies chosen advance those interests are rationally related to those interests. A state law may be invalidated only if it does not serve *any* legitimate state interest.

Under rational basis review, this Court must determine whether the challenged legislation is rationally related to a legitimate state interest. *Wilson*, 354 F. Supp. 2d at 1298 (citing *Heller v. Doe*, 509 U.S. 312, 313-14 (1993)). "In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993); *see also City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) ("When social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude.").

Rational basis review[8] is "very deferential to the legislature, and does not permit this Court to interject or substitute its own personal views of … same-sex marriage." *In re Kandu*, at 145. Importantly, this standard of review requires a court to be a "paradigm of judicial restraint." *Beach Commnc'ns*, 508 U.S. at 314. A law reviewed under rational basis "must be upheld against equal protection challenge if

[8] The standard of review for state action is the same for both the Due Process and Equal Protection Clauses. Unless a statute provokes "strict judicial scrutiny" because it interferes with a "fundamental right" or discriminates against a "suspect class," "it will ordinarily survive an equal protection attack so long as the challenged classification is rationally related to a legitimate governmental purpose." *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 458 (1988). The Third Circuit has never held that same-sex marriage is a fundamental right and has never held that sexual orientation is a suspect classification. Hence, it is clear that rational basis review applies.

there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Id.* at 313. This strong presumption of validity remains true "even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous." *Romer v. Evans*, 517 U.S. 620, 632 (1996)).

Under rational basis review, a law is presumed to be constitutional. *Heffner v. Murphy*, No. 12-3591, 2014 U.S. App. LEXIS 2970, at *55 (3d Cir. Feb. 19, 2014) ("[T]he rationality requirement [is] largely equivalent to a strong presumption of constitutionality." (Quoting *Connelly v. Steel Valley Sch. Dist.*, 706 F.3d 209, 213 (3d Cir. 2013)). "The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." *Heller*, 509 U.S. at 320. Rational basis review does not authorize "the judiciary [to] sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." *Id.* at 319 (alteration in original) (internal quotations omitted).

Further, a defendant has "no obligation to produce evidence to sustain the rationality of a statutory classification." *Id.* at 320. "A statutory classification fails rational-basis review only when it 'rests on grounds wholly irrelevant to the achievement of the State's objective.'" *Id.* at 324.

Rational basis review must be applied with a significant and special degree of deference when reviewing matters within the exclusive province of the states. Equal

protection "scrutiny will not be so demanding where [it] deal[s] with matters resting firmly within a State's constitutional prerogatives." *Gregory v. Ashcroft*, 501 U.S. 452, 462 (1991) (quoting *Sugarman v. Dougall*, 413 U.S. 634, 648 (1973)). Because Plaintiffs' constitutional attack on Pennsylvania's definition of marriage targets "an area that has long been regarded as a virtually exclusive province of the States," *Sosna v. Iowa*, 419 U.S. 393, 404 (1975), that definition and statute are entitled to unusual deference. *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 867 (8th Cir. 2006) (stating rational basis review must be particularly deferential to state marriage laws which are "the predominant concern of state government").

b. The records of the Pennsylvania General Assembly reveal several state interests that it presumably considered to be rational reasons to recognize only opposite-sex marriages.

Legislative history establishes that the 1996 amendments to the Pennsylvania Marriage Law were enacted after due consideration and deliberation. A review of the legislative history, which is attached to Defendants' Statement of Undisputed Material Facts as Exhibit "B", reflects the following state interests that members of the General Assembly said that they considered in enacting the legislation:

(i) Some members of the General Assembly appeared to view the promotion of procreation as a state interest and 23 Pa.C.S. §§ 1102 and 1704 to be rationally related to the advancement of that state interest. (*See Exhibit*

"B" to Defendants' Statement of Relevant Undisputed Facts, *e.g.*, Rep. Stern statement).

(ii) Some members of the General Assembly identified child rearing and the well-being of children as a state interest and thought 23 Pa.C.S. §§ 1102 and 1704 to be rationally related to that interest. (*See id.*, *e.g.*, Rep. Stern statement).

(iii) Some members of the General Assembly identified tradition as a state interest, which 23 Pa.C.S. §§ 1102 and 1704 rationally would preserve. (*See id.*, *e.g.*, Rep. Egolf statement and Rep. Stern statement).

(iv) Some members of the General Assembly expressed concern that redefining marriage would detrimentally affect Pennsylvania businesses economically and that 23 Pa.C.S. §§ 1102 and 1704 is rationally related to that interest. (*See id.*, *e.g.*, Rep. Egolf statement).

The Supreme Court has long recognized marriage as "fundamental to our very existence and survival." *Loving v. Virginia*, 388 U.S. 1, 12 (1967). Numerous federal and state courts have agreed that responsible procreation and childrearing are well-recognized as legitimate state interests served by marriage.[9]

[9] *See, e.g.*, *Jackson*, 884 F. Supp. 2d at 1113; *Sevcik v. Sandoval*, 911 F. Supp. 2d 996, 1015-16 (D. Nev. 2012); *Citizens for Equal Prot.*, 455 F.3d at 867; *Smelt v. County of Orange*, 374 F. Supp. 2d 861, 880 (C.D. Cal. 2005); *Wilson*, 354 F. Supp. 2d at 1308 (M.D. Fla. 2005); *In re Kandu*, 315 B.R. at 145; *Standhardt v. Super. Court*, 77 P.3d 451, 461-62 (Ariz. Ct. App. 2003); *Baehr v. Lewin*, 852 P.2d 44, 55-

That concept is apparently among the considerations that the Pennsylvania General Assembly had in mind when it amended the Marriage Law in 1996. *See* Exhibit "B", p. 2022 (Stern).

Under rational basis scrutiny, empirical support is not necessary to sustain a classification. *Beach Commc'ns*, 508 U.S. at 315. "[A] legislative choice is not subject to courtroom fact finding and may be based on rational speculation unsupported by evidence or empirical data." *Id*. It is not a matter of whether the legislature was ultimately correct or whether this Court agrees with its reasoning. *See Heffner*, 2014 U.S. App. LEXIS 2970, at *54 ("[R]ational basis review allows legislative choices considerable latitude. A governmental interest that is asserted to defend against a substantive due process challenge need only be plausible to pass constitutional muster…." (Citation omitted).).

In *Windsor*, the United States Supreme Court reaffirmed the ability of states to define marriage for their citizens.[10] The *Windsor* decision, predicated in part on

56 (Haw. 1993); *Morrison v. Sadler*, 821 N.E.2d 15, 24-25 (Ind. App. 2005); *Adams v. Howerton*, 486 F. Supp. 1119, 1124-25 (C.D. Cal. 1980); *Conaway v. Deane*, 932 A.2d 571, 620 (Md. 2007); *Baker v. Nelson*, 191 N.W.2d 185, 312-13 (Minn. 1971); *Hernandez v. Robles*, 855 N.E.2d at 21; *Matter of Cooper*, 592 N.Y.S.2d 797 (N.Y. App. Div. 1993); *In re Marriage of J.B. and H.B.*, 326 S.W.3d 654, 674-75 (Tx. Ct. App. 2010); *Anderson v. King County*, 138 P.3d 963, 985, 990 (Wash. 2006); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942).

[10] Currently, there are a number of measures pending in the General Assembly that seek to legalize same-sex marriage and/or attempt to protect the rights of gays and lesbians. There are, for example, 18 bills currently pending in the General Assembly

concepts of federalism, recognizes that the states have the almost-exclusive right to define marriage as they see fit. Moreover, the *Windsor* decision *by its express language* is limited to cases where parties have been validly married under a particular state law. There, the Court held that because the State of New York had the right and ability to permit and recognize same sex marriage, this right could not be taken away by the *federal* government through federal statute.

Far from supporting Plaintiffs' position, *Windsor* instead supports the notion that where, as here, a state has defined marriage as between one man and one woman, federal courts allow that definition to stand. The recent federal court cases decided in favor of plaintiffs exceed the scope of *Windsor*'s holding (which was limited to only cases where same sex marriage had been recognized) and, further, inappropriately re-define marriage under the guise of performing constitutional review. In this case, the policy reasons identified by members of the General Assembly have been accepted by courts of law as legitimate state interests to support legislative recognition of opposite sex marriages only.

This analysis equally applies to the Commonwealth's authority to refuse to recognize same-sex marriages performed in other States. Additionally, section 2 of the federal DOMA (28 U.S.C. § 1738C), the constitutionality of which was not

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that seek to afford protection to gays and lesbians in connection with subjects such as taxes and revenue, discrimination, and prevention of intimidation based on sexual orientation, among others. *See* Exhibit "C".

addressed in *Windsor* and which remains in force and effect, allows States to refuse to recognize same-sex marriages performed in other States. The Constitution does not require a state to accept the policy choices of another state. Section 2 of DOMA is Congress's effort to emphasize this point of federalism and states' sovereign policy prerogatives in the context of the Full Faith and Credit Clause.

Though the Full Faith and Credit Clause and section 2 of DOMA by themselves do not directly foreclose an attack upon section 1704 of the Marriage Law under the Due Process and Equal Protection Clauses, they form a foundational premise of the U.S. Constitution's structure of shared and independent sovereignty against which the 14th Amendment must be applied – especially when the result would be that one state (such as Pennsylvania) would be forced through the 14th Amendment to adhere to the policy choices of another state, notwithstanding the legislature's exercise of the state's sovereign prerogative to be governed by a different policy.

For these reasons, Plaintiffs' claim must fail and Defendants' motion for summary judgment granted.

VI. CONCLUSION

Defendants have set forth multiple state interests that members of the General Assembly identified when it enacted 23 Pa.C.S. §§ 1102 and 1704 in 1996. The state interests that the Pennsylvania legislative record reflects are the reasons for 23

Pa.C.S. §§ 1102 and 1704 are rationally promoted by the Marriage Law. Thus, the Marriage Law passes constitutional muster. For this reason and for all of the reasons set forth above, this Court should grant Defendants' motion for summary judgment.

Respectfully submitted,

Date: April 21, 2014

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CERTIFICATE OF WORD COUNT

I, William H. Lamb, hereby certify pursuant to Local Civil Rule 7.8(b)(2) that the text of the foregoing Brief in Support of Motion for Summary Judgment of Defendants Michael Wolf and Dan Mueser contains 6390 words as calculated by the word-count function of Microsoft Word, which is within the limit of 17,500 words stipulated between Plaintiffs and Defendants Wolf and Meuser.

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

DEB WHITEWOOD, *et al.*,	:	
	:	Civil Action
Plaintiffs,	:	
	:	1:13-cv-1861
v.	:	
	:	Honorable John E. Jones, III
MICHAEL WOLF, in his official capacity as the Pennsylvania Secretary of Health, *et al.*,	:	
Defendants.	:	

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Brief in Support of Motion for Summary Judgment of Defendants Michael Wolf and Dan Meuser in the above captioned matter was served on the 21st day of April, 2014, to the attorneys/parties of record as follows:

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