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 OF DEFENDANTS MICHAEL WOLF AND DAN MEUSER IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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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 opposition to Plaintiffs' motion for summary judgment. For the reasons set forth herein, and for those set forth in Defendants' motion for summary judgment, the complaint should be dismissed in its entirety and summary judgment entered in Defendants' favor.

Simply stated, the issue before this Court is *not* whether Pennsylvania's marriage laws constitute sound or unsound policy. The issue rather is whether those laws violate the Constitution. They do not. Plaintiffs ask this Court to overrule the fundamental policy decision of how the Commonwealth of Pennsylvania will define the legal institution of marriage. This is not a proper role for the courts in our federalist system of self-government and separation of powers.

This Court should decline Plaintiffs' invitation. Rather than accede to Plaintiffs' request, this Court should apply long-standing precedent that gives the Commonwealth of Pennsylvania the constitutional right, through its legislative and deliberative processes, to define marriage within its borders as a matter of state law.

In addition to the fact that the right to define marriage is an issue quintessentially reserved to the Commonwealth of Pennsylvania through its legislature, Plaintiffs' claims fail for the following additional reasons.

First, each of Plaintiffs' challenges to 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) ("Marriage Law"), are barred by the Supreme Court's decision in *Baker v. Nelson*, 409 U.S. 810 (1972), by which this Court is bound. *Baker* dealt with the same constitutional challenges to a state law that barred the recognition of same-sex marriage. In reviewing a state court decision rejecting those challenges, the Supreme Court dismissed the plaintiffs' appeal on grounds that the constitutional issue advanced did not present a substantial federal question. This Court must do the same.

Second, Plaintiffs have failed to establish the existence of a specific state action that has caused or is causing them harm. It is clear from Plaintiffs' motion and brief that Plaintiffs have sought no benefit and have suffered no harm as a result of specific governmental action. Thus, to the extent that their claims are predicated entirely on future events (that may or may not occur, and hence are speculative), Plaintiffs have not met the requirements for a section 1983 action. Plaintiffs' request for summary judgment fails for this reason as well.

Third, the Marriage Law, like every duly enacted law, is presumptively constitutional. Thus, this Court must presume that the Pennsylvania General Assembly intended through its 1996 amendments to Pennsylvania's marriage statute to promote or advance legitimate state interests and that the law rationally serves those interests. Plaintiffs' contention that strict scrutiny must be applied is unsupportable. The claims asserted in this case do not implicate a fundamental right, and the law in question does not infringe on the rights of a protected or suspect class. Accordingly, Pennsylvania's Marriage Law, measured by traditional and established principles of constitutional law (including the presumption of constitutionality and the deference owed to the legislature), must be held to be constitutional.

For these reasons, in addition to those addressed in Defendants' motion for summary judgment, Plaintiffs' motion for summary judgment should be denied.

II. STATEMENT OF FACTS

Defendants incorporate by reference the facts set forth in their Statement of Undisputed Material Facts (Doc. 118). 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*

for the Pennsylvania General Assembly relating to its consideration of the bill that became Act 124 sets forth the state interests that various members of the Pennsylvania Legislature identified as the public policy bases 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 those 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 in 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. 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. The U.S. Department of Defense announced that it will grant military spousal benefits to same-sex couples. 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. The U.S. Office of Personnel Management has announced that it will now extend benefits to legally married same-sex spouses of federal employees.

III. QUESTION PRESENTED

Should this Court deny Plaintiffs' motion for summary judgment against Defendants because: (i) under *Baker v. Nelson*, there is no substantial federal question implicated by any of Plaintiffs' claims; (ii) Plaintiffs have failed to carry their burden of proof under 42 U.S.C. § 1983; (iii) no fundamental right is implicated, and Plaintiffs are not in a suspect or quasi-suspect class; (iv) the Pennsylvania General Assembly has determined that sections 1102 and 1704 of the Marriage Law (23 Pa.C.S. §§ 1102, 1704) are rationally related to legitimate state interests (as evidenced by the relevant legislative history)?

Suggested Answer: Yes.

IV. LEGAL 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." *See* 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.*, 475 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).

V. ARGUMENT

A. *Baker v. Nelson* Is a Binding Supreme Court Determination that the Fourteenth Amendment Does Not Require States to Recognize Same-Sex Marriage.

This case does not present a substantial federal question that this Court has the authority to answer consistent with the U.S. Supreme Court's decision in *Baker v. Nelson*, 409 U.S. 810 (1972). As Defendants explained in their motion to dismiss (incorporated by reference into their motion for summary judgment), the Court in *Baker* held that a federal constitutional challenge to a state's ban on same-sex marriage does not present a substantial federal question. This Court is bound by *Baker*. *See* Doc. 42, pp. 19-24. In *Baker*, the Supreme Court summarily rejected the very claims made by Plaintiffs in this case. This binding precedent, in and of itself, mandates denial of Plaintiffs' motion for summary judgment and dismissal of Plaintiffs' claims.

Plaintiffs have argued previously, and this Court already has held, that *Baker* has been overruled. There is, however, recent evidence that the U.S. Supreme Court does not agree.

As Defendants explained in their motion to dismiss, the decision in *Baker* constituted a decision on the merits. Under the *Hicks* doctrine,[1] a conclusion that

[1] The "*Hicks* doctrine" refers to the Supreme Court's decision in *Hicks v. Miranda*, 422 U.S. 332 (1975), and the Supreme Court's holding that until it "instruct[s]

Baker has been overruled would be tantamount to a conclusion that the Minnesota state law at issue in that case likely violated the U.S. Constitution. However, contrary to that supposition, in a decision respecting a constitutional challenge to a Utah law, the U.S. Supreme Court recently signaled that its conclusion in *Baker* retains vitality.

In *Kitchen v. Herbert*, 961 F. Supp. 2d 1181 (D. Utah 2013), *appeal pending*, No. 1304178 (10th Cir.), a district court declared the Utah Constitution's ban on same-sex marriage to be unconstitutional under the Fourteenth Amendment and enjoined its enforcement. However, after both the district court and the U.S. Court of Appeals for the Tenth Circuit denied Utah's motion for stay, *see Kitchen v. Herbert*, No. 2:13-cv-217, 2013 U.S. Dist. LEXIS 180087 (D. Utah Dec. 23, 2013) (denying motion for stay)); *Kitchen v. Herbert*, No. 1304178 (10th Cir. Dec. 22, 2013) (denying motion for stay)), the Supreme Court stayed the district court's order pending final disposition of the appeal by the court of appeals (thereby overruling both the district court and the Tenth Circuit). *See Herbert v. Kitchen*, 134 S. Ct. 893 (2014). The Supreme Court's order speaks volumes about its

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otherwise," summary decisions bind lower courts, "except when doctrinal developments indicate" differently. 422 U.S. at 344. The Court further explained that the phrase, "want of a substantial federal question," describes the insubstantiality of the *merits* – *i.e.*, and explains the Court's justification for deciding the appeal summarily without oral argument. *Id.* at 344 (explaining that dismissing an appeal for want of a substantial federal question reflects the Court's decision "not…to grant the case plenary consideration" because "the constitutional challenge…was not a substantial one").

skepticism of a district court's power to enjoin a state's law defining marriage as a violation of the 14th Amendment.

To grant a stay pending appeal, a moving party must show that he has a "fair prospect" of success on the merits. *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). If the Supreme Court had believed that the plaintiffs in *Kitchen* have presented a substantial federal question under the Fourteenth Amendment as to the constitutionality of the Utah Constitution's definition of marriage as a union between one man and one woman, surely it would have followed the lead of the district court and the court of appeals and denied the State of Utah's application for stay. Thus, the Supreme Court's grant of a stay pending appeal in that case logically must have been grounded (at least in part) on the Court's dubiousness about the viability of the plaintiffs' claims based on the Fourteenth Amendment – and most certainly an expression of substantial doubt about the district court's conclusion that the state law is unconstitutional. Had the Supreme Court thought the plaintiffs' federal constitutional claims in *Kitchen* to have a "fair prospect" for success on appeal despite *Baker*, surely the Court would have acted as the Tenth Circuit had done and summarily denied the request for a stay of the district court's injunction.

Thus, in circumstances where (as here) the precisely same issue is being presented as was before the Supreme Court in *Baker* – *i.e.*, the constitutionality

under the 14th Amendment of a state's ban on same-sex marriage – this Court is bound to reject Plaintiffs' claims by denying their motion for summary judgment and entering judgment for Defendants.

B. Plaintiffs Have Failed to Meet Their Burden of Proof Under 42 U.S.C. § 1983 Because Plaintiffs Have Failed to Prove State Action.

As Defendants previously noted, 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; it 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 plaintiff of a federal constitutional or statutory right. *Id.* By its plain terms, therefore, § 1983 requires that both elements be proven in order to establish a viable claim.

To be liable for a § 1983 violation, an individual defendant must have been personally involved in the deprivation of the plaintiff's rights. *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1294 (3d Cir. 1997); *Rode v. Dellarciprete*, 845 F.2d 1195, 1207 (3d Cir. 1988). Allegations of personal involvement must be demonstrated with particularity. *Rode*, at 1208 (holding that grievances actually filed with the Governor's Office were "insufficient to show that [the Governor]

had actual knowledge of [the plaintiff's] alleged harassment," and noting that "a contrary holding would subject the Governor to potential liability in any case in which an aggrieved employee merely transmitted a complaint to the Governor's [O]ffice").

In this case, Plaintiffs have filed a motion for summary judgment, thereby certifying to the Court that there are no material facts in dispute and that all relevant undisputed facts are set forth for the Court's consideration. However, Plaintiffs have failed to demonstrate action by any Commonwealth official or employee that violates their rights. Specifically, Plaintiffs have offered no facts establishing that any Commonwealth official or employee took an action against them or is likely to be involved in acts or omissions regarding the Marriage Law that caused or is likely to cause Plaintiffs harm.

Plaintiffs make only generalized claims that they are injured as a result of not receiving the protections and responsibilities afforded to other married couples in Pennsylvania. Those Plaintiffs who do not describe or reference a single concrete benefit or right that they have sought in Pennsylvania and been denied as a result of Pennsylvania's Marriage Law,[2] or who have failed to establish the

[2] Plaintiffs' purported harm of having to undergo a second parent adoption is not a consequence of the Marriage Law. Plaintiffs who have had to undergo a second parent adoption still would not receive a presumption of parenthood even if they were permitted to marry or if their marriage performed in another state were recognized. The presumption of paternity stands for the principle that "a child

existence of state action taken by any Commonwealth official, agency or employee that has caused (or is causing) them harm, have failed to carry their burden of proving state action in the alleged violation of Plaintiffs' rights.

For these reasons, Plaintiffs' motion for summary judgment must be denied and Defendants' motion for summary judgment granted.

C. The Fourteenth Amendment Does Not Require a State to Allow or Recognize Marriage Between Persons of the Same Sex.

Even if *Baker* were not binding and Plaintiffs presented this Court with a viable § 1983 claim, Pennsylvania's Marriage Law passes the rational basis test. The General Assembly has determined that the public policy that it has adopted is rationally related to legitimate government interests, including preservation of the traditional institution of marriage. Thus, contrary to Plaintiffs' arguments, Pennsylvania's Marriage Law does not violate the Due Process or Equal Protection Clauses of the United States Constitution.

Notwithstanding Plaintiffs' claims to the contrary, under established due process and equal protection precedent of the U.S. Supreme Court, Pennsylvania's

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conceived or born during the marriage is presumed to be the child of the marriage." *Brinkley v. King*, 701 A.2d 176, 179 (Pa. 1997) (plurality opinion). The presumption is based on marriage; however, it was developed at a time when marriage was strictly the union of a man and a woman. The presumption cannot apply in the case of a marriage between persons of the same sex. A child of a same-sex marriage cannot be presumed to be a child of the marriage because it is genetically impossible.

Marriage Law need pass only rational basis review. Higher levels of scrutiny are reserved for laws that implicate fundamental rights or involve a suspect or quasi-suspect class. Plaintiffs have failed to identify a fundamental right deeply rooted in American tradition and have not satisfied the requirement of establishing the existence of a suspect or quasi-suspect class.

1. Because Pennsylvania's Marriage Law Does Not Implicate a Fundamental Right, Plaintiffs' Due Process Claim Fails.

To prove that Pennsylvania's Marriage Law violates the Due Process Clause, Plaintiffs must identify a fundamental right implicated by this statute. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (under the doctrine of substantive due process, the Constitution's Due Process Clause "provides heightened protection against governmental interference with certain *fundamental* rights."). Because it is clear that Plaintiffs cannot identify a fundamental right at issue here, Plaintiffs' due process claim fails.

It is well-recognized that the United States Supreme Court's "established method of substantive due process analysis" has "two primary features." *Glucksberg, Id*. Protection is provided 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 sacrificed." *Id.* at 720-21. (citations omitted). Moreover, the Supreme Court has emphasized that identification of fundamental rights

"require[s] … a careful description of the asserted fundamental liberty interest." *Id.* at 721.

The Supreme Court also has cautioned against the dangers of establishing new fundamental rights. In so doing, the Court 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 (citations omitted). Finally, the Court cautioned that 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.

Application of *Glucksberg* firmly establishes that Plaintiffs have failed to meet their burden of proving the existence of a fundamental right. In their summary judgment papers, Plaintiffs' imprecisely and broadly describe the interest at issue here at various times as: "It is beyond dispute that the freedom to marry is a fundamental right…," Doc. 114 p. 16; *see also* "marriage 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. 1, ¶ 79; and "Plaintiffs have the same constitutionally protected liberty interest in their family and marital relationships." Doc. 27, p. 28.

Defendants do not dispute that marriage – *as traditionally defined* – is a fundamental right. *See Loving v. Virginia*, 388 U.S. 1, 12 (1967). Defendants and Plaintiffs part ways, however, over the issue of whether the right to *same-sex marriage* is a fundamental right. Plaintiffs assert that their interest is indistinguishable from the Supreme Court's decisions affirming the right to marry, which historically were premised on the underlying right of a man and a woman to marry.

Plaintiffs' analysis, however, is unavailing. To be deemed a fundamental right, the right at issue 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." *Glucksberg*, 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 (citations omitted).

While it is beyond dispute that the traditional understanding of marriage is deeply rooted in this Nation's history, *see Jackson v. Abercrombie*, 884 F. Supp. 2d at 1095, courts across the Nation have stated that the right of same-sex couples to marry clearly is not. *See In re Kandu*, 315 B.R. 123, 140 (Bankr. W.D. Wash. 2004); *Hernandez v. Robles*, 855 N.E.2d 1, 9 (N.Y. 2006).

Even Plaintiffs must acknowledge that same-sex marriage in this country –

which did not become legal in any state until 2003 – is a recently-contemplated concept that, in the words of Justice Alito, is even "newer than cell phones or the Internet." *See Hollingsworth v. Perry*, 2013 U.S. Trans. LEXIS 40, *52 (Mar. 26, 2013). Thus, because same-sex marriage is not deeply rooted in American tradition, Plaintiffs' due process claim must fail and Plaintiffs' request for summary judgment must be denied.

Windsor does not change this fundamental conclusion, and Plaintiffs' reliance on it to establish a fundamental right to same-sex marriage is misplaced. Both majority and dissenting members of the *Windsor* 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").

What *Windsor* does recognize is 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* reaffirmed the long-established authority of each state, including Pennsylvania, to define marriage.

Plaintiffs also can draw no support from *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Loving v. Virginia*, 388 U.S. 1 (1967). The Supreme Court in *Lawrence* expressly declined to render a decision that awarded "formal recognition to any relationship that homosexual persons seek to enter." *Lawrence*, 539 U.S. at 578. Thus, *Lawrence* by its own terms cannot advance Plaintiffs' claim that they have a constitutional right to marry an individual of the same sex.

Though involving the right to marry, *Loving* did nothing to expand the right beyond the traditional context of an opposite-sex relationship. *See Jackson*, 884 F. Supp. 2d at 1095 ("[T]he Supreme Court, in discussing the fundamental right to marry, has had no reason to consider anything other than the traditional and ordinary understanding of marriage as a union between a man and a woman."); *In*

re Kandu, 315 B.R. 123, 140 (Bkrtcy. W.D. Wash. 2004) ("[I]t would be incorrect to suggest that the Supreme Court, in its long line of cases on the subject, conferred the fundamental right to marry on anything other than a traditional, opposite-sex relationship."). Pennsylvania's Marriage Law simply codifies this longstanding, traditional definition of marriage; it does not defy the deeply-rooted institution in the pursuit of a pernicious policy of race-based discrimination, as the statute in *Loving* did.

In essence, Plaintiffs are asking this Court, in place of the legislature, to *extend* the fundamental right to marry, or to create a *new* fundamental right, in direct contravention to the letter and spirit of *Glucksberg*. In so doing, Plaintiffs essentially concede that they cannot meet either element of the *Glucksberg* standard. Thus, Plaintiffs fail to establish a claim under the Due Process Clause.

2. The Pennsylvania Marriage Law Does Not Violate the Equal Protection Clause.

Plaintiffs also claim that Pennsylvania's Marriage Law violates the Equal Protection Clause of the Fourteenth Amendment. Rational basis review is the controlling standard for adjudicating Plaintiffs' equal protection claims.[3]

Because the Pennsylvania General Assembly in 1996 determined that sections 1102 and 1704 of the Marriage Law are rationally related to several

[3] While Plaintiffs argue that strict scrutiny is applicable, Plaintiffs' arguments fail for the reasons set forth in section V(D) of this Brief.

legitimate state interests identified in the legislative history, the statute passes constitutional muster and Plaintiffs' claim to the contrary fails.

Under rational basis review, this Court must determine whether the challenged legislation is rationally related to a legitimate state interest. *Wilson v. Ake*, 354 F. Supp. 2d 1298 (M.D. Fla. 2005) (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, 440 (1985) (citations omitted) ("When social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude.").

Rational basis review "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *FCC v. Beach Commc'ns, Inc*., 508 U.S. 307, 313 (1993). To the contrary, rational basis review 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 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 constitutional. *Heffner v. Murphy*, 745 F.3d 56 (3d Cir. 2014) ("[T]he rationality requirement [is] largely equivalent to a strong presumption of constitutionality." 2014 U.S. App. LEXIS 2970, *55 (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 negate 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).

A defendant seeking to uphold a law pursuant to rational basis review 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 (citations omitted).

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 is 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").

3. 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.

The legislative history establishes that the provisions of the Pennsylvania Marriage Law – specifically, 23 Pa.C.S. §§ 1102 and 1704 – were enacted after due consideration and deliberation. A review of the legislative history, which is attached to Defendants' Statement of Undisputed Facts as Exhibit "B", reflects the following state interests that the General Assembly appears to have 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, 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, 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, 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, e.g.*, Rep. Egolf statement).

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

That is apparently among the thoughts that the Pennsylvania General Assembly had in mind when it amended the Marriage Law in 1996. *See* Exhibit B, p. 2022 (Stern). As Rep. Stern stated in the House debate leading to the

amendments passage:

> [W]hat [the Pennsylvania Marriage Law] does is redefine and clarify our longstanding policy in Pennsylvania. That is all it does. It is that simple. It is designed to benefit the vast majority of Pennsylvanians, because the large majority do [*sic*] not want our traditional marriage institution and our state of morals to be changed. That has been shown in a scientific poll. It is imperative that we in Pennsylvania should stand up for traditional marriage for the benefit of families and children in the Commonwealth and our future.

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*, *supra* ("[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…." 2014 U.S. App. LEXIS 2970, *54 (citation omitted).). 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. Plaintiff's own expert, Dr. Nancy Cott, recognizes that, *inter alia*, economic interests and the well-being of children are interests that have long been recognized in American law. (Cott p. 4) Thus, Plaintiffs'

argument and motion for summary judgment must fail.

4. The Pennsylvania Marriage Law is not Motivated by Animus for Same-Sex Couples.

Citing *Windsor*, Plaintiffs contend that the challenged law fails rational basis review irrespective of whether the General Assembly has a conceivable or rational basis for the law because the law was enacted to have an adverse effect on same-sex couples. *See* Doc. 114, p. 79 (The text of the law "makes clear that the intent was to exclude same-sex couples.").

Plaintiffs' arguments must be rejected for two essential reasons.

First, the Supreme Court has found laws to be motivated by a "bare desire to harm" only when the statutes on their face specifically target and take away existing rights. *See Romer*, *supra*, at 627 (state constitutional amendment that "with[drew] from homosexuals, but no others," specific legal protection from the injuries caused by discrimination, held to be based on animus). The same was true in *Windsor*, where the U.S. Congress, through DOMA, attempted to strip away rights that married same-sex couples had been granted by the State of New York.

Pennsylvania's Marriage Law does not specifically target or take away any rights that same-sex couples had before the law was enacted. Unlike in *Windsor*, a "state law *defining* marriage is not an 'unusual deviation' from the state/federal balance, such that its mere existence provides 'strong evidence' of improper purpose." *Bishop v. United States ex rel. Holder*, 962 F. Supp. 2d 1252, 1279

(N.D. Okla. 2014) (emphasis added). "A state definition must be approached differently, and with more caution, than the Supreme Court approached DOMA." *Id.*

Second, even if a "bare … desire to harm" could be found outside the limited context of a statute that strips existing rights, this is not the case here. Plaintiffs' allegations of animus are simply unfounded and based solely on Plaintiffs' request that this Court review certain comments made by certain legislators in a vacuum. The legislative history of the Pennsylvania Marriage Law demonstrates that some of the supporters of the traditional definition of marriage have deeply felt moral beliefs – as do the opponents, who ask this Court to change that definition. The constitutionality of the Marriage Law, however, does not turn on the beliefs or passions of its individual supporters or opponents. Rather, it turns on whether it is rationally related to legitimate government interests. *See Beach Commc'ns*, 508 U.S. at 315.

As detailed above, through its Marriage Law amendments, the General Assembly appeared to believe that it was advancing several government interests (as discussed above). Thus, judicial "inquiry is at an end." *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980). "Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function." *Beach Commc'ns*,

508 U.S. at 315. It is only when a law is "unrelated to the achievement of any combination of legitimate purposes" that courts will find "that [a lawmaker's] actions were irrational." *Vance v. Bradley*, 440 U.S. 93, 97 (1979).

Courts do not, however, perform an independent, stand-alone inquiry into the motivations of a law's supporters to determine its rationality. *Heffner*, *supra* (Courts "do not second-guess legislative choices or inquire into whether the stated motive actually motivated the legislation." 2014 U.S. App. LEXIS 2970, *54-55.). While "biases" such as "negative attitudes or fear … may often accompany irrational … discrimination, their presence alone does not a constitutional violation make." *Bd. of Trustees v. Garrett*, 531 U.S. 356, 367 (2001). A law "will not be found unconstitutional on the basis that it was motivated by animus unless it … lacks any rational relationship to a legitimate governmental purpose." *Anderson v. King County*, 138 P.3d 963, 981 (Wash. 2006). Plaintiffs have not satisfied this burden of proof.

Plaintiffs' reliance on *Windsor* to support their argument is misplaced. Plaintiffs make a misguided attempt to broaden the *Windsor* holding and mischaracterize the thrust of the decision. It is important to recognize that the Supreme Court in *Windsor* reviewed a law materially different in motivation, authority, operation and consequence from Pennsylvania's Marriage Law.

As the Court stated in *Windsor*, "New York … decided that same-sex

couples should have the right to marry and to live with pride in themselves and their union and in a status of equality with all other married persons." *Windsor*, at 2689. Therefore, the Court held, New York's recognition of same-sex marriage was "without doubt a proper exercise of its sovereign authority within our federal system." *Id.* at 2692. This is a key distinction of *Windsor* from the present case.

The States' reserved power to regulate marriage, as an aspect of federalism, without question played a central role in *Windsor*'s holding that a portion of DOMA is unconstitutional. *Windsor* struck down section 3 of DOMA because the federal government failed to follow New York's definition of marriage *after the Supreme Court recognized the state's sovereign authority over the definition of marriage*. *Id.* at 2691-93. It did not determine that the traditional marriage definition violates the Constitution.

While New York, by its definition of marriage, chose to afford same-sex couples specific protection and to recognize same-sex couples as validly married, Pennsylvania's General Assembly has chosen instead to preserve the traditional meaning of marriage, which consists of a man-woman relationship. As such, Plaintiffs draw an improper comparison to the statute at issue in *Windsor*.

Animus was relevant in *Windsor* simply because there was no other way to explain the sharp departure of the law in that case from long-established legal precedent. Such is not the case here. The legal question is whether the General

Assembly had any conceivable rational basis for the distinction it has drawn. The General Assembly, through the expressions of its members who supported the enactment of the Marriage Law amendments in 1996, described what it believes to be several rational reasons for adopting the traditional definition of marriage. Those reasons are entitled to great deference in the courts.

Because the law at issue in this case survives rational basis review under the Due Process Clause and Equal Protection Clause, Plaintiffs' motion for summary judgment must be denied and their claims dismissed. Summary judgment should be granted in Defendants' favor.

D. Pennsylvania's Marriage Law Is Not Subject to Heightened Scrutiny.

Plaintiffs' argument that this Court should analyze the constitutionality of the Marriage Law pursuant to a heightened scrutiny standard is without support.

1. There Is No Fundamental Right to Same-Sex Marriage.

As set forth above, there simply is no fundamental right to same-sex marriage. Plaintiffs cannot and have not met the required *Glucksberg* two-part test; thus, they have failed to establish same-sex marriage is a fundamental right. Consequently, for the reasons identified in section C.1. of this brief, Plaintiffs cannot claim a right to strict scrutiny on this basis.

2. Sexual Orientation Is Not A Suspect Class.

Plaintiffs' arguments that strict scrutiny should be applied because sexual orientation is at issue are likewise without support.

a. The Supreme Court has never applied heightened scrutiny to sexual orientation.

First, despite ample opportunities to do so, the United States Supreme Court has never applied strict scrutiny to any claim involving "sexual orientation." *See, e.g.*, *Romer v. Evans*, 517 U.S. 620, 631-32 (applying rational basis standard to a sexual orientation classification, recognizing the law at issue "neither burdens a fundamental right nor targets a suspect class."). Moreover, the *Windsor* Court itself declined to apply strict scrutiny, choosing instead to rest its decision on the conclusion that there was "no legitimate purpose" for federal intrusion on a matter so uniquely reserved to the states in finding an improper motive. *Windsor*, 133 S. Ct. at 2696. Thus, *Windsor* clearly applied a rational basis standard. *Windsor* therefore supports Defendants' arguments that rational basis review is the appropriate standard to be applied in this case.

Second, the Third Circuit has never addressed the question of whether laws that classify based upon sexual orientation trigger the protections of heightened scrutiny. Moreover, most of the circuits that have addressed this issue have rejected invitations to subject classifications based on sexual orientation to strict scrutiny. *See, e.g., Price- Cornelison v. Brooks*, 524 F.3d 1103, 1114 n.9 (10th

Cir. 2008) ("[T]his court, like many others, has previously rejected the notion that homosexuality is a suspect classification."); *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 866-67 (8th Cir. 2006) (concluding that Nebraska's constitutional amendment prohibiting same-sex marriages "should receive rational-basis review under the Equal Protection Clause, rather than a heightened level of judicial scrutiny," and noting that "the Supreme Court has never ruled that sexual orientation is a suspect classification for equal protection purposes"); *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004) (applying rational basis review to plaintiff's discrimination claim premised on sexual orientation, observing that "[n]either the Supreme Court nor this court has recognized sexual orientation as a suspect classification or a protected group"); *Lofton v. Sec'y of Dept. of Children & Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2004) ("Because the present case involves neither a fundamental right nor a suspect class, we review the Florida statute [prohibiting adoption by same-sex couples] under the rational-basis standard."); *Veney v. Wyche*, 293 F.3d 726, 731-32 (4th Cir. 2002) (plaintiff's claim that he had been "discriminated against on the basis of sexual preference" was "subject to rational basis review"); *Nabozny v. Podlesny*, 92 F.3d 446, 458 (7th Cir. 1996) ("Our court has already ruled that, in the context of the military, discrimination on the basis of sexual orientation is subject to rational basis review.").

This Court should follow the lead of those other courts and decline to apply strict scrutiny in this case.

b. The Supreme Court's determinative factors demonstrate that heightened scrutiny is inapplicable here.

Notwithstanding the unassailable fact that the U.S. Supreme Court has never applied strict scrutiny in any case involving sexual orientation, Plaintiffs nonetheless argue that gay men and lesbians constitute a suspect class based upon the four factors that the Supreme Court has established for determining whether strict scrutiny applies:

> A) whether the class has been historically subjected to discrimination; B) whether the class has a defining characteristic that frequently bears [a] relation to ability to perform or contribute to society; C) whether the class exhibits obvious, immutable, or distinguishing characteristics that define them as a discrete group; and D) whether the class is a minority or politically powerless.

Windsor v. United States, 699 F.3d 169, 181 (2d Cir. 2012).

Here, because Plaintiffs at the very least have not (and cannot) demonstrate both a history of discrimination against gays and lesbians and political powerlessness, Plaintiffs have failed to carry their burden of proving that they are part of a suspect class.

i. There Is an Absence of Evidence Establishing a History of Discrimination in Pennsylvania.

At the outset, it is important to note that Defendants do not argue that there has never been a history of discrimination against gays and lesbians in this

country. Rather, Defendants' arguments are limited to the narrow issue of whether the specific issue of discrimination in Pennsylvania has been established by the Plaintiffs in this case. Based on the record, Plaintiffs fail to prove this proposition.

While Plaintiffs cite generally – and without citation – to either extinct federal actions or matters relating to other unnamed state and/or local governments, *see* Doc. 114 at 29, the only Pennsylvania-related example Plaintiffs cite is a long-defunct "morals squad" that was in existence in Philadelphia more than 60 years ago. *Id.* In fact, Plaintiffs' own expert, Dr. George Chauncey, acknowledges in his report that "[i]n the 1980s … towns and cities enacted such legislation, including … Philadelphia, which added sexual orientation to the city's Fair Practices Ordinance in 1982." *Chauncey, p. 16.*

Moreover, Plaintiffs candidly admit that many discriminatory laws and policies have ended (Doc. 114 at 29). Dr. Chauncey recognizes that (1) "[t]here has been social and legal progress in the past thirty years toward greater acceptance of homosexuality," *id.* at 2; and (2) in Pennsylvania, as well as in a majority of other states, anti-discrimination protection was given to gay men and lesbians (*id.* at 19) as far back as thirty to forty years ago, when a number of municipalities enacted legislation protecting people from certain forms of discrimination based on sexual orientation. (*Id.* at 16). These efforts mirror what was occurring around the country. As Dr. Chauncey noted, "[i]n recent decades,

and especially in the last twenty years, many (although not all) discriminatory measures were repealed." *Id.* at 4.

While Plaintiffs also make a passing reference to codes that prohibited depiction of gays and lesbians on stage, in movies and on television to support their claims of discrimination, Dr. Chauncey himself acknowledges that events began to change culturally beginning almost twenty years ago. He also recognizes that there has been a significant increase in media coverage of gay issues, as well as a significant increase in the positive depiction of gay characters in both movies and television shows. *Id.* at 21 ("With the decline in movie and television censorship and the growing interest in gay people and issues, there was a significant increase in the coverage of gay issues in the media and in the number of gay characters in movies and on television in the 1990s.").

Stray comments from a handful of Pennsylvania legislators (*see* Doc. 114 pp. 30-31) cannot, as a legal proposition, establish a history of discrimination against gays and lesbians in Pennsylvania. These statements of individual legislators made nearly 20 years ago cannot reasonably be understood as reflective of the current views of the Pennsylvania citizenry as a whole.

Moreover, in describing this legislative history, Plaintiffs conveniently overlook strong evidence presented by Defendants showing, in clear and convincing fashion, that the Commonwealth has been on the forefront of affording

benefits to gay men and lesbians. For example, as early as 1978, the Governor issued an executive order commanding that "there shall be no discrimination by any Commonwealth department, board, commission or other official entity under the Governor's jurisdiction … because of sexual or affectional orientation in any matter of hiring or employment, housing, credit, contracting … or any other matter whatsoever." *See Sec 00021* attached hereto as Exhibit 1. *See also* Executive Order 2003-10, ¶ 1a (*Sec 00039*) attached as Exhibit 2 (No state agency shall discriminate against an employee or applicant for employment because of, *inter alia*, sexual orientation or gender identity or expression).

The Pennsylvania Employees Benefit Trust Fund (PEBTF), which administers health care benefits to approximately 77,000 eligible Commonwealth of Pennsylvania employees and their dependents and 63,000 retirees and their dependents, as well as additional employer groups, more than a decade ago extended to state employees family and sick leave to care for domestic partners and their children.[4] *See Defendants' Response to Plaintiffs' First Set of Request for Production of Documents*.

In addition, Plaintiffs fail to acknowledge adequately that same-sex couples

[4] The covered employees may take sick time to care for domestic partners or children who are ill, as well as bereavement time when a domestic partner or a member of their domestic partner's family died. Workers also may take up to 12 weeks of unpaid family leave to care for their domestic partner. *See Sec 00001-00005, attached hereto as Exhibit* 3 *is a list of unions and the reference to the section of the agreement which include such benefits*.

are free to seek to adopt children in the Commonwealth. Indeed, as Dr. Chauncey himself points out, discriminatory treatment of lesbian and gay parents in custody cases has now been rejected. *Chauncey* at 21.

Plaintiff's own expert report contradicts Plaintiffs' claims of a history discrimination against gay men and lesbians in the Commonwealth of Pennsylvania. Thus, Plaintiffs have not and cannot establish the first requirement necessary to implicate strict scrutiny.

ii. Gay men and lesbians have meaningful political power to protect their interests.

Likewise, Plaintiffs cannot establish a lack of political power. "The assessment of a group's disabilities and its political power to remove them is a critical factor in determining whether heightened scrutiny should apply under the Fourteenth Amendment where a particular prohibition is not textually clear [*i.e.*, the Equal Protection Clause], because political power is the factor that speaks directly to whether a court should take the extreme step of removing from the People the ability to legislate in a given area." *Sevcik v. Sandoval*, 911 F. Supp. 2d 996, 1011 (D. Nev. 2012) (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973), and noting that a suspect class is one that is "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process"). Where the

group complaining of discrimination has a meaningful political power to protect its own interests, it is inappropriate for a court to remove the issue from legislative control. *Id.* at 1012-13.

Many States, including Pennsylvania, are currently in the midst of an intense democratic debate about the national movement toward same-sex marriage, and "homosexuals have meaningful political power to protect their interests." *Id.* at 1013. Given the relatively recent emergence of sexual orientation as a distinct classification, and the current state of attitudes toward homosexuality, it is reasonable to conclude that gays and lesbians have been increasingly successful in advocating and protecting their rights.

The United States District Court for the District of Nevada pointed to public developments in observing less than two years ago:

> At the state level, homosexuals recently prevailed during the 2012 general elections on same-sex marriage ballot measures in the States of Maine, Maryland, and Washington, and they prevailed against a fourth ballot measure that would have prohibited same sex marriage under the Minnesota Constitution. It simply cannot be seriously maintained, in light of these and other recent democratic victories, that homosexuals do not have the ability to protect themselves from discrimination through democratic processes such that extraordinary protection from majoritarian processes is appropriate.

Id. at 1013. "The fact that national attitudes are shifting in favor of acceptance of same-sex marriage and homosexual rights in general only tends to weaken the argument that homosexuals require extraordinary protection from

majoritarian processes via heightened scrutiny under the Equal Protection Clause." *Id.* at 1013 n.5. "Only where a discrete minority group's political power is so weak and ineffective as to make attempts to succeed democratically utterly futile is it even arguably appropriate for a court to remove relevant issues from the democratic process, except where a constitutional prohibition clearly removes the issue from legislative control...." *Id.* at 1013.

Plaintiffs here have not argued that any attempt to work within the democratic process to affect the debate on marriage within the Commonwealth is "utterly futile" or "virtually hopeless." *See id.* at 1009. To the contrary, there are at least 17 bills that have been introduced and referred to either the judiciary committees in the House or Senate and that offer protection and further rights to gay men and lesbians. Four of those bills redefine Pennsylvania's definition of marriage.

Specifically, Senate Bill 719 affords same-sex couples the same rights and responsibilities of marriage. That bill also requires the recognition of same-sex marriages conducted in other states where such marriages are legal.

In the House of Representatives, HB 1647 defines "marriage" as two people entering into matrimony and would allow for same-sex marriages. HB 1686 redefines "marriage" as a civil contract between two people who enter into matrimony and repeals language that prohibits marriage between persons of the

same sex. Marriages performed legally outside Pennsylvania would be recognized by the Commonwealth. Finally, HB 1178 defines "civil union" as a union between two adults of the same sex and provides that all of the rights, protections and duties created by the Commonwealth that are applicable to a marriage shall apply to a civil union, unless the General Assembly expressly states otherwise.

Under these bills, a marriage between persons of the same sex, a civil union, or a substantially similar legal relationship to that of a civil union (other than common law marriage) legally entered into in another jurisdiction would be recognized in Pennsylvania as a civil union. *See Exhibit C to Defendants' Statement of Undisputed Facts*. In fact, Plaintiffs' proffered expert, Dr. Chauncey, affirmed that "[g]ay rights organizations began to influence public policy in the mid-1960s." *Chauncey p. 15*.

E. Pennsylvania's Marriage Law Does Not Discriminate on the Basis of Sex.

Likewise, Plaintiffs have not proven that the Marriage Law creates any impermissible classification based on sex. The reason for this is simple. Men and women enjoy equal rights to marry a person of the opposite sex; neither sex is advantaged or disadvantaged in this consideration. Each sex is equally prohibited from precisely the same conduct, *i.e.*, marriage to a person of the same sex. The Supreme Court has never strayed from the baseline rule that to

constitute sex-based discrimination, a law must subject men and women to disparate treatment. *See Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 718-19 (1982) (law excluded men from attending nursing school); *Craig v. Boren*, 429 U.S. 190, 191-93 (1976) (women allowed to buy beer at lower age than men); *Frontiero v. Richardson*, 411 U.S. 677, 678-79 (1973) (law imposed higher burden on females than males to establish spousal dependency); *Reed v. Reed*, 404 U.S. 71, 72-73 (1971) (law gave automatic preference of men over women to administer estates). Unlike the laws at issue in those cases, Pennsylvania's Marriage Law does not elevate one gender over another.

On a fundamental level, it is well-established that equal protection jurisprudence treats gender classification and sexual orientation classification as distinct categories. *Compare United States v. Virginia*, 518 U.S. 515, 531 (1996) (applying intermediate scrutiny to gender-based classification) *with Romer v. Evans*, 517 U.S. 620, 642 (1996) (applying rational basis standard to a sexual orientation classification); *Jackson*, 884 F. Supp. 2d at 1099 ("[D]iscrimination on the basis of sex, and discrimination on the basis of sexual orientation ..., traditionally have been viewed as distinct phenomena." (Internal quotations omitted).) Applying gender-based scrutiny to Pennsylvania's Marriage Law would render this distinction meaningless.

In fact, courts have rejected attempts to frame challenges to same-sex

marriage restrictions as creating a gender-based class requiring heightened scrutiny. *See, e.g.*, *Sevcik*, 911 F. Supp. 2d at 1005 ("The laws at issue here are not directed toward persons of any particular gender, nor do they affect people of any particular gender disproportionately such that a gender-based animus can reasonably be perceived."); *Jackson*, 884 F. Supp. 2d at 1098 ("The Court [] agrees with the vast majority of courts considering the issue that an opposite-sex definition of marriage does not constitute gender discrimination." (Collecting cases).); *Hernandez v. Robles*, 7 N.Y.3d 338, 364 (2006) ("By limiting marriage to opposite-sex couples, New York is not engaging in sex discrimination. The limitation does not put men and women in different classes, and give one class a benefit not given to the other."). Pennsylvania's Marriage Law does not constitute gender discrimination.

Moreover, Plaintiffs' comparison to the circumstances of *Loving* is misplaced. In *Loving*, the Court held that "equal application" of an anti-miscegenation statute could not save that law from heightened scrutiny. 388 U.S. at 8. The Supreme Court recognized that the statute "rest[ed] solely upon distinctions drawn according to race" and was "designed to maintain White Supremacy." *Id.* at 11. In this case, however, nothing indicates that the laws are designed to negatively affect a specific gender. *See Sandoval*, 911 F. Supp. 2d at 1005 (rejecting gender classification comparison between the *Loving* statute and

same-sex marriage law); *Robles*, 7 N.Y.3d at 364 ("This is not the kind of sham equality that the Supreme Court confronted in *Loving*.... Plaintiffs do not argue here that the legislation they challenge is designed to subordinate either men to women or women to men as a class."). Instead, Plaintiffs claim that Pennsylvania law treats them differently from others based upon their sexual orientation (Doc. 114 at 26-36), not their gender. Their attempt to force their claims into a gender classification framework cannot avoid proper application of the rational basis standard.

Accordingly, because the Marriage Law does not discriminate between men and women, any claim that strict scrutiny should apply based on a claim of sex discrimination must fail.

VI. CONCLUSION

Plaintiffs have failed to explain why the state interests that the Pennsylvania General Assembly has suggested are the bases for Pennsylvania's Marriage Law are not rationally promoted by the Marriage Law.

Because there is no fundamental right to same-sex marriage, because members of the Pennsylvania General Assembly have articulated multiple state interests that they believe are rationally related to the Pennsylvania Marriage Law, and because strict scrutiny is not implicated, Plaintiffs have failed to establish any constitutional violation. Consequently, Plaintiffs' motion for summary judgment should be denied.

Respectfully submitted,

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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 of Defendants Michael Wolf and Dan Meuser in Opposition to Plaintiffs' Motion for Summary Judgment in the above captioned matter was served on the 5th day of May, 2014, to the attorneys/parties of record as follows:

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

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

ORDER

AND NOW, this _____ day of _____, 2014, upon consideration of Plaintiffs' Motion for Summary Judgment and the Response of Defendants Secretary Wolf and Secretary Meuser thereto, it is hereby ORDERED and DECREED that the Motion is DENIED.

BY THE COURT:

_____
J.

Exhibit 1

Commonwealth of Pennsylvania
GOVERNOR'S OFFICE
EXECUTIVE ORDER

SUBJECT		NUMBER
Commitment Toward Equal Rights		1975-5
DATE As Amended September 19, 1978	DISTRIBUTION B	BY DIRECTION OF Milton J. Shapp, Governor

In continuing the Commonwealth's commitment to provide leadership in the effort to obtain equal rights for all persons in Pennsylvania, this Administration is committed to working towards ending discrimination against persons because of their sexual or affectional orientation. There shall be no discrimination by any Commonwealth department, board, commission or other official entity under the Governor's jurisdiction, or any representative thereof, because of sexual or affectional orientation in any matter of hiring or employment, housing, credit, contracting, provisions of services, or any other matter whatsoever. Nothing, however, in this Order shall be construed to require any review or statistical analyses of the composition of the work force or other class of persons affected hereby.

To further this commitment there is hereby established the Pennsylvania Council for Sexual Minorities (Council).

1. Composition of Council.

a. The Council shall be composed of not more than thirty-seven members. The Attorney General, the Secretaries of the Departments of Health, Labor and Industry, Public Welfare, and Education, the State Police Commissioner, the Secretary of Administration, the Commissioner of Corrections, the Executive Directors of the Pennsylvania Human Relations Commission and the Governor's Council for Drug and Alcohol Abuse, and the Director of the Commission for Women, or a representative designated by them, shall serve as ex officio members. The remaining members shall be appointed by the Governor from the general public.

b. The Governor shall designate one member as Chairperson of the Council

c. Members of the Council shall serve for terms of one or two years as the Governor shall designate. The Governor shall fill any vacancies which may occur.

d. Members of the Council from the general public will serve without salary but shall be reimbursed for necessary expenses incurred while attending official Council meetings and performing other official functions as the Chairperson, with the approval of the Governor's Off ice, shall prescribe.

2. Functions.

a. The Council shall study problems of sexual minorities and make recommendations to the Governor as to policy, program, and legislative changes needed to further the goal of obtaining equal rights for all persons.

b. The Council shall work with state agencies to end discrimination against state employes, clients, the general public, and employes of firms which contract with the Commonwealth solely on the basis of their sexual or affectional orientation.

c. The Council shall work to educate state personnel and the public in general concerning problems and issues affecting sexual minorities. The Council shall outline plans for educating state employes concerning the problems of sexual minorities, review these plans with appropriate agency officials, develop timetables for their

implementation, provide qualified speakers for any educational seminars it shall organize, and evaluate the results of its programs.

d. The Council is authorized to receive complaints from persons claiming that they have been the victims of discrimination for their sexual or affectional orientation. Where feasible, such complaints shall be referred to the appropriate agency for resolution. The Council shall compile a record of complaints received and their disposition. Agencies receiving such complaints directly will inform the Council of their nature and disposition.

e. The Council shall adopt rules of procedures consistent with the provisions of this Order. Such rules shall, where appropriate, provide safeguards for the confidentiality of complainants.

f. The Council shall convene for meetings or hearings at the call of its Chairperson. A majority of appointed members shall constitute a quorum for the purpose of conducting the business of the Council. A vote of the majority of members present shall be sufficient for all actions of the Council.

g. The Council shall issue an annual report to the Governor and general public.

3. Duties of Agencies Under the Governor's jurisdiction.

Agencies under the Governor's jurisdiction are hereby directed to cooperate with the Pennsylvania Council for Sexual Minorities, to supply the Council with direct assistance and information requested in order that the goals of this Order may be realized, and to work with the Council to educate agency employes on the problems of sexual minorities. In addition, those agencies and departments not otherwise represented on the Council shall send a representative to Council meetings when so requested by the Chairperson.

Exhibit 2

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
EXECUTIVE ORDER

Subject:	Number:
Equal Employment Opportunity	2003-10
Date: July 28, 2003	**By Direction of:** Edward G. Rendell, Governor

WHEREAS, this Administration believes that the employment practices of the Commonwealth of Pennsylvania should be nondiscriminatory in intent and effect to promote public confidence in the fairness and integrity of government; and

WHEREAS, past governors of the Commonwealth have recognized a constitutional and legislative mandate to take affirmative steps to remedy employment discrimination and have issued *Executive Orders* promoting equal employment opportunity; and

WHEREAS, this Administration is firmly committed to strengthening and developing equal employment opportunity programs in the Commonwealth.

NOW, THEREFORE, I, Edward G. Rendell, Governor of the Commonwealth of Pennsylvania, by virtue of the authority vested in me by the Constitution of the Commonwealth of Pennsylvania and other laws, do hereby order and direct as follows:

1. Prohibition of discrimination and affirmation of equal employment opportunity.

a. No agency under the jurisdiction of the Governor shall discriminate against any employee or applicant for employment because of race, color, religious creed, ancestry, union membership, age, gender, sexual orientation, gender identity or expression, national origin, AIDS or HIV status, or disability.

b. Positive steps shall be taken by each agency under the jurisdiction of the Governor to ensure fair and equal employment opportunity at every level of government.

c. Sexual harassment or harassment based on any of the factors listed in paragraph 1.a. of this order is prohibited.

2. **Responsibility for implementing equal employment opportunity.**

a. **The Secretary of Administration** shall supervise the development, implementation, and enforcement of the Commonwealth's equal employment opportunity programs through the **Bureau of Equal Employment Opportunity**, which shall:

(1) Develop and promote steps designed to ensure a diverse workforce, equal employment opportunity and fair treatment of the protected classes listed in paragraph 1.a. of this order at all levels of state government.

(2) Develop Commonwealth-wide equal employment opportunity policies, procedures, and training to ensure consistency and uniformity.

(3) Conduct or participate in periodic on-site reviews and audits of agency equal employment opportunity programs.

(4) Develop complaint investigation and resolution procedures for implementation by all agencies under the jurisdiction of the Governor.

(5) Review complaint investigation reports at any time during the complaint process.

(6) Develop and implement a standardized equal employment opportunity procedure to monitor personnel transactions in all Commonwealth agencies under the jurisdiction of the Governor.

(7) Develop and issue guidelines for the conduct of agency equal employment opportunity programs and review of equal employment opportunity plans prior to implementation.

(8) Design and implement monitoring and reporting systems to measure effectiveness of agency equal employment opportunity programs.

(9) Consult with agency officials regarding personnel actions affecting agency equal employment opportunity professional staff, including recruitment, hiring, promotion, demotion, separation, transfer, performance standards and evaluation, and rate of pay.

(10) Provide leadership to agencies in the design and implementation of innovative equal employment opportunity strategies which will further the Commonwealth's fulfillment of the commitment to equal employment opportunity.

b. **Heads of departments and agencies** under the jurisdiction of the Governor shall:

(1) Designate an Equal Opportunity Officer with primary responsibility to develop and implement the agency's equal employment opportunity program.

(2) Ensure that the agency Equal Opportunity Officer reports directly to the individual who has overall responsibility for the agency's equal employment opportunity program.

(3) Ensure that the agency's commitment to equal employment opportunity is clearly transmitted to all agency employees and that bureau directors and managers provide adequate support to the Equal Opportunity Manager or Specialist in the development and implementation of program plans designed to achieve the agency's equal employment opportunity objectives.

(4) Seek input from the Director of the Bureau of Equal Employment Opportunity on personnel actions affecting equal employment opportunity professional staff.

(5) Ensure that the agency develops and implements effective equal employment opportunity plans and auditing and reporting mechanisms.

(6) Ensure that all agency supervisory and management employees are rated on equal employment opportunity, diversity, and inclusiveness based in part upon criteria identified in the agency's equal employment opportunity plan.

3. Rescission. *Executive Order 2002-3, Equal Employment Opportunity,* is hereby rescinded.

Exhibit 3

PROVISIONS IN COLLECTIVE BARGAINING AGREEMENTS (CBAs) AND MEMORANDA OF UNDERSTANDING (MOUs) FOR SICK AND BEREAVEMENT LEAVE, FAMILY CARE LEAVE AND LEAVE DONATION

CBA=EMPLOYEES
MOU OR MEMO= 1ST LEVEL SUPERVISORS

CBA-AFSCME 2011-2015

Article 14	Sections 4, 5.e, 6 and 14	Pages 35, 36, 37, 40
Article 41	Sections 1, 6	Pages 149, 152, 153
Article 45	Sections 2, 15	Pages 159, 162

CBA-FOSCEP 2003-2007

Article 9	Sections 4, 5e, 6, 13	Pages 14, 15, 16
Article 40	Sections 1, 6, 9	Pages 59, 60
Article 44	Sections 2b, 5	Pages 63, 65

CBA-FOSCEP 2007-2011

Article 9	Sections 4, 5e, 6, 13	Pages 14, 15, 16
Article 40	Sections 6, 9	Pages 65, 66
Article 44	Sections 2b, 5	Pages 68, 69, 70

CBA-FOSCEP 2011-2015

Article 9	Sections 4, 5e, 6, 13	Pages 16, 17, 19
Article 40	Sections 6, 8	Pages 75
Article 44	Sections 2b, 5	Pages 78, 80

CBA-PDA 2009-2012

Article 8	Sections 3, 4e, 5, 12	Pages 14, 15, 16
Article 28	Sections 6, 8	Pages 60
Article 32	Sections 2.a.a, 5	Pages 63, 65

CBA-PDA 2013-2016

Article 8	Sections 3, 4e, 6, 11	Pages 14, 15, 17
Article 28	Sections 1, 6, 8	Pages 63, 65
Article 32	Sections 2b, 5	Pages 68, 70

CBA PSEAHGA 2007-2011

Article 6	Sections 4, 5e, 6, 11	Pages 7, 8, 10
Article 35	Sections 6, 9	Pages 53
Article 27	Sections 2b, 5	Pages 55, 57

CBA PSEAHGA 2011-2015

Article 6	Sections 4, 5e, 6, 11	Pages 7, 8, 10
Article 35	Sections 6, 9	Pages 56
Article 37	Sections 2b, 5	Pages 57, 60

CBA PSSU 2003-2007

Article 12	Sections 4, 5e, 6, 14	Pages not paginated
Article 47	Sections 1, 7, 10	Pages
Article 49	Sections 2b, 4	Pages

CBA PSSU 2007-2011

Article 12	Sections 4, 5e, 6, 14	Pages 18, 19, 21
Article 47	Sections 1, 7, 9	Pages 98, 100
Article 49	Sections 2b, 5	Pages 103, 105

CBA PSSU 2011-2015

Article 12	Sections 4, 5e, 6, 14	Pages 19, 20, 22
Article 47	Sections 1, 7, 9	Pages 111, 114
Article 49	Sections 2b, 5	Pages 117, 119

CBA SEIU 2007-2011

Article 11	Sections 4, 5e, 6, 13	Pages 19, 20, 22
Article 44	Sections 6, 9	Pages 79
Article 46	Sections 2b, 5	Pages 80, 82

CBA SEIU 2011-2015

Article 11	Sections 4, 5e, 6, 13	Pages 21, 22, 24
Article 44	Sections 6, 18	Pages 90
Article 46	Sections 2b, 5	Pages 91, 93

CBA UFCW 2011-2015

Article 18	Sections D, E5, F, L	Pages 37, 38, 39
Article 32	Sections A, F	Pages 61, 62
Article 33	Sections B2, B9, F	Pages 63, 64, 66

CBA USGOA 2011-2014

Article 13	Sections 4, 5e, 6, 14	Pages 19, 20, 22
Article 40	Sections 6	Pages 79

Article N/A—no reference in Leave Donation Article

HIRAM G ANDREWS 2004-2007

Article 6	Sections 4, 5e, 6, 11	Pages 7, 8, 9
Article 35	Sections 1, 6, 9	Pages 47, 48
Article 37	Sections 2b, 5	Pages 49, 51

MOU-AFSCME 2011-2015		
Rec 14	Sections 4, 5e, 6, 14	Pages 35, 36, 37, 40
Rec 42	Sections 1, 6	Pages 147, 150, 151
Rec 45	Sections 2b, 5	Pages 156, 159
MOU-ALES 2007-2011		
Rec 8	Sections 4, 5e, 6, 11	Pages 12, 13, 14
Rec 24	Sections 1, 6, 9	Pages 46, 48
Rec 27	Sections 2b, 5	Pages 50, 52
MOU-FOSCEP 2003-2007		
Rec 9	Sections 4, 5e, 6, 13	Pages 14, 15, 16
Rec 40	Sections 1, 6, 9	Pages 59, 60
Rec 44	Sections 2b, 5	Pages 63, 65
MOU-FOSCEP 2007-2011		
Rec 9	Sections 4, 5e, 6, 13	Pages 15, 16, 18
Rec 40	Sections 6, 9	Pages 65
Rec 44	Sections 2b, 5	Pages 68, 70
MOU-FOSCEP 2011-2015		
Rec 9	Sections 4, 5e, 6, 13	Pages 16, 17, 19
Rec 40	Sections 6, 8	Pages 73
Rec 44	Sections 2b, 5	Pages 76, 78
MOU-ISSU 2003-2007		
Rec 7	Sections C, D5, E, L	Pages 13, 14, 15
Rec 31	Sections A, F, I	Pages 43, 44
Rec 33	Sections B2, E	Pages 46, 48
MOU-ISSU 2007-2011		
Rec 7	Sections C, D5, E, L	Pages 13, 14, 16
Rec 31	Sections A, F, H	Pages 47, 48
Rec 33	Sections B2, E, G	Pages 49, 52
MOU-ISSU 2011-2015		
Rec 7	Sections C, D5, E, L	Pages 15, 16, 18
Rec 31	Sections A, F, H	Pages 52, 54
Rec 33	Sections B2, E, G	Pages 56, 58
MOU-LLEO3s 2003-2007		
Rec 8	Sections 4, 5e, 6, 11	Pages Not paginated
Rec 24	Sections 1, 6, 9	Pages
Rec 27	Sections 2b, 5	Pages

MOU-OPEIU 2007-2011

Rec 11	Sections 4, 5e, 6, 13	Pages 20, 22
Rec 42	Sections 6, 8	Pages 77, 78
Rec 43	Sections 2b, 5	Pages 78, 80

MOU-OPEIU 2011-2015

Rec 11	Sections 4, 5e, 6, 13	Pages 21, 22, 24
Rec 42	Sections 6, 8	Pages 84, 85
Rec 43	Sections 2b, 5	Pages 85, 87

MOU-PDA 2009-2012

Rec 8	Sections 3, 4e, 5, 11	Pages 15, 16, 17
Rec 28	Sections 1, 6, 8	Pages 58, 60
Rec 30	Sections 2b, 5	Pages 61, 63

MOU-PDA 2012-2016

Rec 8	Sections 3, 4e, 5, 12	Pages 16, 17, 18
Rec 28	Sections 1, 6, 8	Pages 62, 64
Rec 30	Sections 2b, 5	Pages 65, 67

MOU-PSSU 2003-2007

Rec 12	Sections 4, 5e, 7, 13	Pages Not paginated
Rec 43	Sections 1, 6, 9	Pages
Rec 45	Sections 2b, 5	Pages

MOU-PSSU 2007-2011

Rec 12	Sections 4, 5e, 7, 13	Pages 18, 19, 21
Rec 43	Sections 1, 6, 9	Pages 82, 84
Rec 45	Sections 2b, 5	Pages 86, 88

MOU-PSSU 2011-2015

Rec 12	Sections 4, 5e, 7, 13	Pages 18, 19, 21
Rec 43	Sections 1, 6, 8	Pages 91, 93, 94
Rec 46	Sections 2b, 5	Pages 97, 99

MOU-PSSU REFEREES 2003-2007

Rec 11	Sections 4, 5e, 6, 13	Pages 13, 14, 16
Rec 34	Sections 1, 6, 9	Pages 55, 56, 57
Rec 36	Sections 2b, 5	Pages 59, 61

MOU-PSSU REFEREES 2007-2011

Rec 11	Sections 4, 5e, 6, 13	Pages 13, 14, 15
Rec 34	Sections 1, 6, 9	Pages 58, 60
Rec 36	Sections 2b, 5	Pages 62, 64

MOU-PSSU REFEREES 2011-2015

Rec 11	Sections 4, 5e, 6, 13	Pages 13, 14, 15
Rec 34	Sections 1, 6, 9	Pages 64, 66
Rec 36	Sections 2b, 5	Pages 68, 70

MOU-USGOA 2011-2014

Rec 13	Sections 4, 5a, 6, 14	Pages 19, 20, 22

No references in Family Care Recommendation
No references in Leave Donation Recommendation

OPEIU 2003-07

Rec 11	Sections 4, 5e, 6, 13	Pages Not paginated
Rec 42	Sections 1, 6, 9	Pages
Rec 43	Sections 2b, 5	Pages

PDA-AGREE-FINAL 2005

Article 8	Sections 3, 4e, 5, 11	Pages 14, 15, 16
Article 28	Sections 1, 6, 9	Pages 54, 55
Article 32	Sections 2b	Pages 58

PDA-MEMO-FINAL-2005

Rec 8	Sections 3, 4e, 5, 11	Pages 14, 15, 16
Rec 28	Sections 1, 6, 9	Pages 54, 55
Rec 30	Sections 2b	Pages 55