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

WHITEWOOD, *et al.*, Plaintiffs, v. CORBETT, *et al.*, Defendants.	**Civil Action** **No. 13-1861-JEJ**

PLAINTIFFS' BRIEF IN OPPOSITION TO THE MOTION TO DISMISS OF DEFENDANT DONALD PETRILLE, JR.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

TABLE OF EXHIBITS

Plaintiffs respectfully submit this brief in opposition to the Motion to Dismiss the Complaint filed by Defendant Donald Petrille, Jr., Register of Wills and Clerk of Orphans Court of Bucks County.

INTRODUCTION

This case involves a constitutional challenge to Pennsylvania's exclusion of same-sex couples from marriage and its refusal to recognize in Pennsylvania the valid marriages entered into by same-sex couples in other states. Plaintiffs are ten same-sex couples, one widow, and the two children of one of the plaintiff couples. Their Complaint raises claims under the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Defendant Petrille has moved to dismiss on three grounds: (i) that the United States Supreme Court's 1972 summary dismissal of *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed w/o op.*, 409 U.S. 810 (1972), for lack of a substantial federal question controls this case 41 years later; (ii) that even if *Baker* doesn't bar Plaintiffs' claims, they have failed to state a claim upon which relief can be granted, and (iii) that Plaintiffs have failed to join indispensable parties. As discussed below, all of those arguments are without merit and the Motion to Dismiss should be denied.

BACKGROUND

In 1996, the Pennsylvania legislature amended the marriage law expressly to prohibit marriage for same-sex couples. The 1996 amendment had two parts. First, it codified the definition of marriage as "[a] civil contract by which one man and one woman take each other for husband and wife." 23 Pa. C.S. § 1102. Second, it made "void in this Commonwealth" any "marriage between persons of the same sex . . . entered into in another state or foreign jurisdiction, even if valid where entered into." 23 Pa. C.S. § 1704. (Plaintiffs refer to these collectively as the "marriage bans.")

A number of legislators who supported the amendment relied on moral opposition to same-sex marriages. 1996 Pa. Legis. J. (House), at 2017 (citing "moral opposition to same-sex marriages"); *id*. at 2019 ("[T]he large majority [of Pennsylvanians] do not want our traditional marriage institution and our state of morals to be changed."); *id.* at 2022 ("This is a vote about family values and traditional beliefs . . . .").

As Petrille's Brief notes, the 1996 marriage amendment was passed in response to Hawaii raising the issue of marriage for same-sex couples. (Def. Petrille's Br. in Support of Mot. to Dismiss Pls.' Compl. ("Petrille Br."), at 10.) The Pennsylvania legislature made the decision to reaffirm the restriction of marriage to different-sex couples and took the extraordinary step of prohibiting

recognition of valid out-of-state marriages for the purpose of excluding same-sex couples from marriage.

The marriage bans harm Plaintiffs and countless other Pennsylvania couples by denying them the numerous protections and obligations of marriage under state law, as well as important protections that the federal government affords to married couples. (*See* Compl. ¶¶ 115-23.)[1] The marriage bans also "demean[]" them and "tell[] [them,] and all the world," including their children, that their relationships are unworthy of recognition. *United States v. Windsor*, 133 S. Ct. 2674, 2694 (2013). And they "humiliate[]" their children and make it "difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Id.*[2]

---

[1] Some federal marital protections are not available to married same-sex couples if they reside in a state where their marriage is not recognized. *See*, *e.g.*, 42 U.S.C. § 416(h)(1)(A)(i) (marriage for eligibility for social security benefits based on law of state where couple resides at time of application); 29 C.F.R. § 825.122(b) (same for Family Medical Leave Act).

[2] Petrille's Brief suggests that the exclusion from marriage does not harm Plaintiffs because Pennsylvania law "makes available to all couples a host of legal rights and protections to secure their relationships," and points to the tools of joint tenancies, wills, trusts, adoptions, insurance plans, beneficiary designations, advance health-care directives, and powers of attorney. (Petrille Br., at 4, 31.) The suggestion that marriage is nothing more than the protections that these types of documents can provide is a failure to comprehend the scope and significance of marriage to married couples. *See Windsor*, 133 S. Ct. at 2692 ("[M]arriage is more than a routine classification for purposes of certain statutory benefits"; it is "a far-reaching legal acknowledgment of the intimate relationship between two people."); (continued...)

ARGUMENT

I. *BAKER V. NELSON* IS NOT CONTROLLING.

Plaintiffs incorporate by reference their response to this argument in their brief in opposition to the motion to dismiss filed by Defendants Thomas Corbett and Michael Wolf.

II. PLAINTIFFS HAVE STATED CLAIMS FOR CONSTITUTIONAL VIOLATIONS.

To prevail on a motion to dismiss under Rule 12(b)(6), a defendant must establish that plaintiffs have not stated a claim to relief that is "plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). When ruling on a motion to dismiss, a court must "accept all well pleaded factual allegations as true and draw all reasonable inferences from such allegations in favor of the complainant." *Worldcom, Inc. v. Graphnet, Inc.*, 343 F.3d 651, 653 (3d Cir. 2003).

Petrille seeks the dismissal of Plaintiffs' claims, arguing that rational basis review is the appropriate standard for evaluating their claims and asserting a number of state interests that he claims are rationally related to the marriage bans.

(continued...)

id. (marriage confers "a dignity and status of immense import"). No one would seriously contend that heterosexual couples would not be harmed if the Pennsylvania legislature passed a law prohibiting them from marrying. In any case, the tools cited in Petrille's Brief allow couples to access only a fraction of the protections that come with marriage. And marriage protects couples whether or not they have the means to hire an attorney to draft documents for them.

But this is no more than a dispute with the facts pleaded. Plaintiffs have alleged facts that, if accepted as true, require application of heightened scrutiny of government classifications based on sexual orientation (in addition to other grounds for heightened scrutiny). And they have alleged facts sufficient to establish that there is not even a rational relationship between the classification and any of the justifications offered by Petrille's Brief in support of the Commonwealth's unequal treatment, and therefore that the marriage bans violate the Equal Protection and Due Process Clauses of the Constitution under any level of constitutional review.[3] The Motion should therefore be denied and the case should proceed to trial so that the parties can develop a full record.[4]

---

[3] Plaintiffs believe that they would be entitled to summary judgment but, at this time, do not intend to file such a motion because they want the opportunity to present all available arguments at trial – both the purely legal arguments and those that turn on the development of facts – to ensure that this Court and reviewing courts have before them the full range of arguments and evidence relevant to these constitutional claims. This would avoid any delay caused by a remand for further development of the record.

[4] Two trial court judges presiding over marriage cases recently recognized the need to develop a factual record in such cases. *See* Opinion and Order Denying Cross Motions for Summary Judgment in *DeBoer v. Snyder*, No. 12-cv-10285 (E.D. Mich., Oct. 18, 2013) (holding that there were genuine issues of material fact with respect to the asserted justifications for the exclusion of same-sex couples from marriage and setting the case for trial in February 2014), attached hereto as Ex. A; Decision on Motion to Dismiss in *Darby v. Orr*, No. 12 CH 19718 (Cir. Ct. Cook County, Ill., Sept. 27, 2013) (in state constitutional challenge, court denied motion to dismiss equal protection and due process claims, noting that plaintiffs alleged facts that, if proven, establish heightened scrutiny for sexual orientation

(continued...)

Petrille's Brief suggests that the development of a factual record is not necessary for the Court to evaluate these claims. This is wrong. If the Court agrees with Plaintiffs that heightened scrutiny is the appropriate standard, the defendants will have the burden of presenting evidence showing, at a minimum, that the exclusion from marriage is substantially related to the furtherance of an important government interest.[5] But even under rational basis review, the analysis does not take place in a factual vacuum. "Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry . . . ." *U.S. v. Carolene Products, Co.*, 304 U.S. 144, 153 (1938); *see also Plyler v. Doe*, 457 U.S. 202, 228-30 (1982) (rejecting asserted rationale after noting that "[t]here is no evidence in the record" supporting it); *Heller v. Doe*, 509 U.S. 312, 321 (1993) ("[E]ven the standard of rationality. . . must find some footing in the realities of the subject addressed by the legislation.").

(continued...)

classifications and that the fundamental right to marry includes the right to choose to marry a partner of the same sex), attached hereto as Ex. B.

[5] Plaintiffs believe the level of scrutiny should not be determined prior to trial because they will present evidence that will assist the Court in addressing this legal question. And since this case will undoubtedly go up on appeal, Plaintiffs believe that the cause of efficiency is best advanced by permitting both sides to present the evidence they believe is warranted in order to prevail under any level of scrutiny.

And while rational basis review places the burden on the plaintiffs to negate any conceivable government interest, they must be given the opportunity to present evidence to meet that burden. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981) ("[P]arties challenging legislation under the Equal Protection Clause may introduce evidence supporting their claim that it is irrational."); *see, e.g.*, *Phan v. Com. of Va.*, 806 F.2d 516, 521 (4th Cir. 1986) (court reversed dismissal of equal protection claim and remanded for development of fuller factual record to determine if rational basis for differential treatment); *Centifanti v. Nix*, 661 F. Supp. 993, 994-5 (E.D. Pa. 1987) (court held that "it would be premature to grant a motion to dismiss" and allowed plaintiff discovery to gather evidence to rebut the claim that there is a rational basis for the disparate treatment).

Because Plaintiffs have alleged facts showing both that heightened scrutiny applies and that the marriage bans fail under any level of scrutiny, their claims should proceed and the Complaint should not be dismissed. *See, e.g.*, *Children's Seashore House v. Waldman*, 197 F.3d 654, 662 (3d Cir. 1999) (reversing district court's dismissal of rational basis equal protection claim on motion to dismiss because there were "factual questions which we cannot address at this time" and "we are not satisfied from the complaint or even all the pleadings that [plaintiff] will not be able to prove any set of facts that will entitle it to relief"); *Giarratano v. Johnson*, 521 F.3d 298, 304 (4th Cir. 2008) ("To survive a motion to dismiss for

failure to state a claim [under rational basis review], a plaintiff must allege facts sufficient to overcome the presumption of rationality that applies to government classifications."); *Wroblewski v. City of Washburn*, 965 F.2d 452, 460 (7th Cir. 1992) (same).

A. Plaintiffs Have Stated A Claim That Pennsylvania's Marriage Bans Violate The Equal Protection Clause.

Plaintiffs have alleged facts and legal arguments establishing that heightened scrutiny is warranted and that the exclusion fails under any level of constitutional scrutiny.

1. Pennsylvania's marriage bans are subject to heightened scrutiny because they discriminate based on sexual orientation[6] and Plaintiffs have alleged facts establishing that sexual orientation classifications merit heightened scrutiny.

Neither the Supreme Court nor the Third Circuit has addressed the question of whether laws that classify based on sexual orientation are suspect or quasi-suspect and, thus, trigger some form of heightened scrutiny.[7]

In a long line of cases, the Supreme Court has established a framework for determining whether a classification should receive some form of heightened scrutiny.

---

[6] Petrille's Brief baldly states that the marriage bans do not classify based on sexual orientation. (Petrille Br., at 17.) But the Supreme Court has rejected efforts to deny that laws targeting conduct closely associated with being gay or lesbian are laws classifying based on sexual orientation. *Christian Legal Society v. Martinez*, 130 S. Ct. 2971, 2990 (2010) (refusing to distinguish between status and conduct with respect to gay people); *Lawrence v. Texas*, 539 U.S. 558, 583 (2003) (O'Connor, J., concurring) ("While it is true that the [criminal sodomy] law applies only to conduct, the conduct targeted by this law is conduct that is closely associated with being homosexual," so that "[t]hose harmed by this law are people who have a same-sex sexual orientation."); *cf. Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) ("A tax on wearing yarmulkes is a tax on Jews."). *See also In Re Marriage Cases*, 183 P.3d 384, 440-41 (Cal. 2008) (ban on marriage for same-sex couples prescribes "distinct treatment on the basis of sexual orientation").

[7] Petrille's Brief mischaracterizes the Supreme Court's decision in *Romer v. Evans*, 517 U.S. 620 (1996). The Court did not say whether the law at issue in that case burdened a fundamental right or targeted a suspect class. (Petrille Br., at 19-20.) Rather, the Court did not need to answer such questions because the law could not even survive rational basis review.

> The Supreme Court uses certain factors to decide whether a new classification qualifies as a [suspect or] quasi-suspect class. They include: 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) (citations omitted and punctuation adjusted) (quoting *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987)); *Cleburne v. Cleburne Living Ctr., Inc.,* 473 U.S. 432, 440-41 (1985)), *aff'd*, 133 S. Ct. at 2694. Of these considerations, the first two are the most important. *See id.* ("Immutability and lack of political power are not strictly necessary factors to identify a suspect class."); *accord Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 987 (N.D. Cal. 2012).

As the Second Circuit and several federal and state courts have recently recognized, any faithful application of those factors leads to the inescapable conclusion that sexual orientation classifications must be recognized as suspect or quasi-suspect classifications and subjected to heightened scrutiny. *See*, *e.g.*, *Windsor*, 699 F.3d at 181-85; *Golinski*, 824 F. Supp. 2d at 985-90; *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 310-33 (D. Conn. 2012); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010), *aff'd on other grounds sub nom Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *vacated and*

remanded on other grounds sub nom Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) (dismissing appeal); *In re Balas*, 449 B.R. 567, 573-75 (Bankr. C.D. Cal. 2011) (decision of 20 bankruptcy judges); *Varnum v. Brien*, 763 N.W.2d 862, 885-96 (Iowa 2009); *In re Marriage Cases*, 183 P.3d at 441-44; *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 425-31 (Conn. 2008).[8]

At this juncture, Plaintiffs do not seek a legal ruling on the level of scrutiny that applies to government classifications based on sexual orientation. Instead, they have alleged facts establishing the two critical factors – lesbians and gay men have suffered a history of discrimination, and sexual orientation has no relation to an individual's ability to perform in or contribute to society, as well as the two other factors sometimes considered in this analysis – sexual orientation is an

[8] Prior to the Supreme Court's decision in *Lawrence*, 539 U.S. 558, overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986), a number of federal circuits rejected sexual orientation as a suspect classification based on *Bowers*. *See, e.g.*, *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987) ("If the [*Bowers*] Court was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open to a lower court to conclude that state sponsored discrimination against the class is invidious. After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal."). By overruling *Bowers*, the Supreme Court in *Lawrence* necessarily abrogated decisions from other circuit courts that relied on *Bowers* to foreclose the possibility of heightened scrutiny for sexual orientation classifications. *See Pedersen*, 881 F. Supp. 2d at 312 ("The Supreme Court's holding in *Lawrence* 'remov[ed] the precedential underpinnings of the federal case law supporting the defendants' claim that gay persons are not a [suspect or] quasi-suspect class.'") (citations omitted); *accord Golinski*, 824 F. Supp. 2d at 984.

immutable or defining trait, and lesbians and gay men lack sufficient political power to protect themselves against invidious discrimination. (Compl. ¶¶ 146-49.) And they are prepared to present expert testimony to support these allegations.

Because Plaintiffs have alleged facts sufficient to show that sexual orientation classifications trigger heightened scrutiny, and because the burden of meeting heightened scrutiny would be on Defendants should that standard apply, the Complaint cannot be dismissed without allowing Plaintiffs the opportunity to prove their claims with evidence showing that heightened scrutiny applies to sexual orientation classifications.

2. Pennsylvania's marriage bans are subject to heightened scrutiny because they discriminate based on sex and perpetuate sex stereotypes.

Pennsylvania's marriage bans contain explicit gender classifications, which warrant heightened scrutiny. *United States v. Virginia*, 518 U.S. 515, 555 (1996). Each of the Plaintiff couples would be permitted to marry but for their genders. *See Baehr v. Lewin*, 852 P.2d 44, 64 (Haw. 1993) (Hawaii marriage statute regulates access to marriage "on the basis of the applicants' sex."); *Goodridge v. Dep't of Health*, 798 N.E.2d 941, 971 (Mass. 2003) (Greaney, J. concurring) (finding it "self-evident" that marriage ban is a "sex based" classification); *Baker v. Vermont*, 744 A.2d 864, 906 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part). Because heightened scrutiny applies to government

classifications based on sex, defendants will have to show that the exclusion of same-sex couples from marriage is substantially related to an exceedingly persuasive justification, *United States v. Virginia*, 518 U.S. at 552-53, and the Complaint should not be dismissed.

Petrille's Brief argues that the marriage bans do not discriminate based on sex because they do not single out men or women and apply equally to both. (Petrille Br., at 38.) But *Loving v. Virginia*, 388 U.S. 1, 8 (1967), discarded "the notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classification from the Fourteenth Amendment's proscription of all invidious racial discriminations."[9] *See also McLaughlin v. Florida*, 379 U.S. 184, 191 (1964) (striking down law banning interracial cohabitation even though it applied to both black and white people).

One of the asserted justifications in Petrille's Brief for Pennsylvania's marriage bans is the notion that children are best off with two parents of different sexes. Not only did Plaintiffs allege facts showing that this flies in the face of the overwhelming scientific consensus, *see* Part II.A(4)(d)(ii), *infra*, it is also an impermissible sex stereotype. The Supreme Court has made clear that gender

[9] In *Loving*, the Court said that even if race discrimination had not been at play and the Court presumed "an even-handed state purpose to protect the 'integrity' of the races," Virginia's anti-miscegenation statutes still was "repugnant to the Fourteenth Amendment." *Loving*, 388 U.S. at 12, n.11.

classifications cannot be based on or validated by "fixed notions concerning the roles and abilities of males and females." *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724-25 (1982); *see also Virginia*, 518 U.S. at 533 (justifications for gender classifications "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females"). And in the context of parenting responsibilities, the Court has rejected the notion of "any universal difference between maternal and paternal relations." *Caban v. Mohammed*, 441 U.S. 380, 388-89 (1979). Because laws based on the assumption that, for every family, the parental roles are best performed by a man and a woman must be tested under heightened scrutiny, this is another reason the Complaint should not be dismissed.

3. Pennsylvania's marriage bans are subject to heightened scrutiny because Plaintiffs have alleged facts establishing that the bans burden the fundamental right to marry.

As discussed in Part II.B, *infra*, Plaintiffs have alleged facts showing that the marriage bans burden the fundamental right to marry. In equal protection claims, classifications affecting a fundamental right such as the right to marry are subject to heightened scrutiny, placing the burden on the defendants to justify the marriage bans by an important government interest. *See, e.g., Zablocki v. Redhail*, 434 U.S. 374, 383 (1978). This is an additional reason the Complaint should not be dismissed.

4. Plaintiffs have alleged facts showing that Pennsylvania's marriage bans are unconstitutional under any level of scrutiny.

Although the Complaint should not be dismissed because heightened scrutiny is warranted, which places the burden of persuasion on Defendants, the Complaint also should not be dismissed because Plaintiffs have pled facts that, if proven, would establish that Pennsylvania's marriage bans fail even rational basis review.

"[E]ven in the ordinary equal protection case calling for the most deferential of standards, [the Court] insist[s] on knowing the relation between the classification adopted and the object to be attained." *Romer v. Evans*, 517 U.S. 620, 632 (1996). "By requiring that the classification bear a rational relationship to an independent and legitimate legislative end," courts "ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Id.* at 633; *see also Windsor*, 133 S. Ct. at 2693; *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534-35 (1973).

"Some objectives . . . are not legitimate state interests," but even when a law has an ostensibly legitimate purpose, "[t]he State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *Cleburne*, 473 U.S. at 446-47; *see also, e.g.*, *Eisenstadt v. Baird*, 405 U.S. 438, 448-49 (1972) (invalidating contraceptive ban on rational

basis review because "the effect of the ban on distribution of contraceptives to unmarried persons has at best a marginal relation to the" objective of deterring premarital sex).

The Supreme Court has been particularly likely to find an insufficient link between the classification and the asserted government interest when the law imposes a sweeping disadvantage on a group that is grossly out of proportion to accomplishing that purpose. *Windsor*, 133 S. Ct. at 2694 ("a system-wide enactment with no identified connection to any particular area of federal law"); *Romer*, 517 U.S. at 633, 635 (a law that "identifie[d] persons by a single trait and then denie[d] them protection across the board"). In such situations, the law's breadth may "outrun and belie any legitimate justifications that may be claimed for it." *Romer*, 517 U.S. at 635.

Finally, the Supreme Court has applied "careful consideration" when there is reason to suspect that a classification was motivated by animus.[10] *Windsor*, 133 S.

[10] The Supreme Court has sometimes described this impermissible purpose as "animus," *Windsor*, 133 S. Ct. at 2693; *Romer*, 517 U.S. at 633, or a "bare . . . desire to harm a politically unpopular group." *Moreno*, 413 U.S. at 534. But an impermissible purpose does not always reflect "malicious ill will." *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring). It can also take the form of "negative attitudes," *Cleburne*, 473 U.S. at 448, "fear," *id.*, "irrational prejudice," *id.*, at 450, or "some instinctive mechanism to guard against people who appear to be different in some respects from ourselves." *Garrett*, 531 U.S. at 374 (Kennedy, J., concurring).

Ct. at 2693 ("In determining whether the law is motivated by an improper animus or purpose, 'discriminations of an unusual character" especially require careful consideration."); *Lawrence* 539 U.S. at 580 (O'Connor, J., concurring) ("When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause."); *Vance v. Bradley*, 440 U.S. 93, 97 (1979) (rational-basis review is deferential "absent some reason to infer antipathy").

As discussed below, Plaintiffs have alleged facts supporting such "careful consideration" in this case, but they have also alleged facts and legal arguments establishing that none of the justifications offered by Petrille's Brief satisfy even ordinary rational basis review.[11]

(a) The Complaint cannot be dismissed based on an asserted state interest in tradition.

Petrille's Brief appears to be arguing that the fact that the exclusion of same-sex couples from marriage is "centuries-old" justifies continuing this discrimination. (Petrille Br., at 30.) But "[a]ncient lineage of a legal concept does

[11] Petrille's Brief seems to suggest that there must be a finding of animus for a classification to fail rational basis review. (Petrille Br., at 17.) While animus is often found or inferred when the Supreme Court has struck down laws under rational basis review, it is not necessary. If the classification does not rationally further a legitimate government interest, it is unconstitutional whether or not animus was involved. *See, e.g.*, *Hooper v. Bernalillo Cty. Assessor*, 472 U.S. 612 (1985) (no discussion of animus in striking down law providing tax exemption to Vietnam veterans residing in the state since 1976 but not those who arrived later).

not give it immunity from attack for lacking a rational basis." *Heller*, 509 U.S. at 326-27; *see also Lawrence*, 539 U.S. at 577-78 ("[N]either history nor tradition could save a law prohibiting miscegenation from constitutional attack.") (quoting *Bowers,* 478 U.S. at 216 (Stevens, J., dissenting)). As the Supreme Court has explained, "times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress." *Lawrence*, 539 U.S. at 579.

In the context of laws that exclude same-sex couples from marriage, a number of courts have recognized that "the justification of 'tradition' does not explain the classification; it merely repeats it. Simply put, a history or tradition of discrimination – no matter how entrenched – does not make the discrimination constitutional . . . ." *Kerrigan*, 957 A.2d at 478 (citation omitted); *see also Goodridge*, 798 N.E.2d at 961 n.23; *Varnum*, 763 N.W.2d at 898. Ultimately, as Justice Scalia recognized, "'preserving the traditional institution of marriage' is just a kinder way of describing the [s]tate's *moral disapproval* of same-sex couples." *Lawrence*, 539 U.S. at 601 (Scalia, J., dissenting) (emphasis in original). And the Supreme Court has made clear this is not a legitimate basis for government discrimination. *Windsor*, 133 S. Ct. at 2692; *Lawrence*, 539 U.S. at 582 (O'Connor, J., concurring) (noting that Texas attempted to justify its

homosexual sodomy law by a government interest in the "promotion of morality"). The Complaint should not be dismissed on the basis of this asserted rationale.

(b) The Complaint cannot be dismissed based on an assertion of state sovereignty.

Petrille's Brief appears to be taking the position that state sovereignty immunizes the Commonwealth from review of its domestic relations laws for constitutional infirmity. (Petrille Br., at 30-31.) The Supreme Court has made clear that "[s]tate laws defining and regulating marriage, of course, must respect the constitutional rights of persons." *Windsor*, 133 S. Ct. at 2691 (citing *Loving*, 388 U.S. 1 (striking down state marriage law barring interracial marriage)). This is not a basis to dismiss the Complaint.

(c) The Complaint cannot be dismissed based on an asserted state interest in saving government funds.

Petrille's Brief asserts that restricting marriage to heterosexual couples is rationally related to reducing costs to the government. (Petrille Br., at 37.) But this is not a basis to dismiss the Complaint. Saving money is not a justification for excluding a group from a government benefit without an independent rationale for why the cost savings ought to be borne by the particular group being denied the benefit. *Plyler v. Doe*, 457 U.S. 202, 227 (1982) ("Of course, a concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources."); *Lyng v. Int'l Union*, 485 U.S. 360, 376-77 (1988)

(previous cases make "clear that something more than an invocation of the public fisc is necessary to demonstrate the rationality of selecting [one group], rather than some other group, to suffer the burden of cost-cutting legislation").

In addition, the Complaint asserts (*see* Compl. ¶ 127) that there is no factual basis for the notion that allowing same-sex couples to marry will financially burden the Commonwealth. *Heller*, 509 U.S. at 321 (rational basis review must have a "footing in realit[y]"). And Plaintiffs are prepared to present expert testimony on this issue.

This asserted interest is not a basis to dismiss the Complaint.

(d) The Complaint cannot be dismissed based on any asserted state interests related to biological procreation or children's well-being.

Petrille's Brief asserts that the marriage bans are rationally related to an interest in "supporting and sustaining biological families." (Petrille Br., at 17.) It explains this interest as two-fold. First, it points to an interest in promoting family stability for the children who result from heterosexual unions:

> Opposite-sex relationships frequently do result in pregnancies and offspring, and the legal protections of marriage extend to these procreative unions to encourage their longevity, especially where the offspring was not planned. Same-sex relationships do not result in unintentional offspring.

(*Id.* at 32.) Second, it asserts that opposite-sex marriages "promote the raising of a child by both their biological mother and father," which it suggests is the optimal

situation for children. (*Id.* at 32-36.) As discussed below, the Complaint should not be dismissed based on either of these asserted interests because Plaintiffs have alleged facts and legal arguments that show that these rationales fail rational basis review.

(i) *The asserted interest in promoting family stability for the children who result from heterosexual unions.*

Plaintiffs have alleged both legal and factual bases for the Court to conclude that the asserted interest in promoting family stability for children of heterosexual unions does not provide a rational basis for the marriage bans.

First, Plaintiffs have alleged that excluding gay couples from marrying or having their marriages recognized does not rationally affect heterosexuals' choices regarding procreation and marriage. (Compl. ¶ 132.) Plaintiffs are prepared to present expert testimony confirming what logic dictates. The disconnect between this rationale and the exclusion of gay couples from marrying has been recognized by a number of courts. *See Perry v. Brown*, 671 F.3d 1052, 1088 (9th Cir. 2012) ("There is no rational reason to think that taking away the designation of 'marriage' from same-sex couples would advance the goal of encouraging California's opposite-sex couples to procreate more responsibly."); *Varnum*, 763 N.W.2d at 901-02 ("While heterosexual marriage does lead to procreation, the argument by the County fails to address the real issue in our required analysis of

the objective: whether *exclusion* of gay and lesbian individuals from the institution of civil marriage will result in *more* procreation?"). The prohibition of recognition of existing marriages of same-sex couples is even further removed from this asserted justification. *See Windsor*, 699 F.3d at 188 (federal prohibition of recognition of marriages of same-sex couples "does not provide any incremental reason for opposite-sex couples to engage in 'responsible procreation.' Incentives for opposite-sex couples to marry and procreate (or not) were the same after DOMA was enacted as they were before." (footnotes omitted)). Pennsylvania's marriage bans do not provide any incentives to heterosexual couples to procreate within the stable context of marriage.

Moreover, although same-sex couples do not have "unintentional offspring" (Petrille Br., at 32), they do have children through assisted reproduction or adoption, and the government has just as strong an interest in encouraging that such procreation and child-rearing takes place in the stable context of marriage. *In re Marriage Cases*, 183 P.3d at 384 ("[A] stable two-parent family relationship, supported by the state's official recognition and protection, is equally as important for the numerous children . . . who are being raised by same-sex couples as for those children being raised by opposite-sex couples (whether they are biological parents or adoptive parents)."); *Pedersen*, 881 F. Supp. 2d at 339 ("Assuming, as Congress has, that the marital context provides the optimal environment to rear

children as opposed to non-marital circumstances, it is irrational to strive to incentivize the rearing of children within the marital context by affording benefits to one class of marital unions in which children may be reared while denying the very same benefits to another class of marriages in which children may also be reared."); *Varnum*, 763 N.W.2d at 902 ("Conceptually, the promotion of procreation as an objective of marriage is compatible with the inclusion of gays and lesbians within the definition of marriage. Gay and lesbian persons are capable of procreation.").

In any event, Pennsylvania's marriage laws do not classify based on whether or not couples are able to procreate; they classify based on the sex of the partners regardless of their procreative abilities. *See Lawrence*, 539 U.S. at 604 (Scalia, J., dissenting) ("[W]hat justification could there possibly be for denying the benefits of marriage to homosexual couples exercising '[t]he liberty protected by the Constitution'? Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry." (internal citation omitted)). Pennsylvania does not condition the right to marry on procreative ability, so it cannot selectively rely on procreation only when it comes to same-sex couples. *Cf. Cleburne*, 473 U.S. at 450 ("[T]he expressed worry about fire hazards, the serenity of the neighborhood and the avoidance of danger to other residents fail rationally to justify singling out a home [for people with developmental disabilities] for the special use permit, yet

imposing no such restrictions on the many other uses freely permitted in the neighborhood.").

(ii) *The asserted interest in children being raised by their biological mother and father.*

Plaintiffs have alleged both legal and factual bases for the Court to conclude that the asserted interest in ensuring that children are raised by their biological mother and father does not provide a rational basis for the marriage bans.

Petrille's Brief suggests that children are best off when raised by their biological mother and father due to the biological connection and the gender combination of the parents. (Petrille Br., at 32-34.) But even if it were rational for legislators to speculate that children raised by dual gendered, biological parents are better off than children raised by same-sex couples – and Plaintiffs have alleged facts showing that it is not, *see infra* – there is no rational connection between Pennsylvania's marriage bans and this asserted goal.

Pennsylvania's marriage bans do not prevent lesbian and gay couples from having children.[12] Excluding same-sex couples from marrying does not encourage

[12] To the extent that Pennsylvania's marriage bans deny children of same-sex couples the family security that comes with marriage as a way to attempt (albeit irrationally) to deter other same-sex couples from having children, the Supreme Court has invalidated similar attempts to incentivize parents by punishing children as "illogical and unjust." *Plyler v. Doe*, 457 U.S. 202, 220 (1982). And, any law adopted with the purpose of burdening gay people's ability to procreate would also face scrutiny for implicating the fundamental right to decide "'whether

(continued...)

heterosexuals to procreate within marriage, biologically or otherwise. *Windsor*, 699 F.3d at 188; *Perry*, 671 F.3d at 1088; *Pedersen*, 881 F. Supp. 2d at 340-41; *Golinski*, 824 F. Supp. 2d at 997-98; *Varnum*, 763 N.W.2d at 901. (*See* Compl. ¶ 132.) And the marriage bans have no conceivable impact on the decisions of couples (heterosexual or gay) to form families through assisted reproduction or adoption such that one or both parents is not biologically related to the child.[13]

The only conceivable effect that Pennsylvania's marriage bans have on children's well-being is that they *harm* the children of same-sex couples who are denied the protection and stability provided by having parents who are married. Like the "Defense of Marriage Act" ("DOMA") invalidated in *Windsor*, Pennsylvania's marriage bans serve only to "humiliate" the "children now being raised by same-sex couples" and "make[] it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Windsor*, 133 S. Ct. at

---

(continued...)

to bear or beget a child.'" *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 851 (1992) (quoting *Eisenstadt*, 405 U.S. at 453); *see Pedersen*, 881 F. Supp. 2d at 341.

[13] Petrille's Brief suggests that children are only "denied access to the comfort of their creators" in the "extreme circumstances" of termination of parental rights (Petrille Br., at 18), overlooking the use of assisted reproduction involving donor sperm or ova by many couples, heterosexual and gay, and the fact that many birth parents make the voluntary decision to place children for adoption.

2694. "Excluding same-sex couples from civil marriage will not make children of opposite-sex marriages more secure, but it does prevent children of same-sex couples from enjoying the immeasurable advantages that flow from the assurance of a stable family structure in which children will be reared, educated, and socialized." *Goodridge*, 798 N.E.2d at 964 (internal quotation marks omitted). Plaintiffs have alleged such harms in their Complaint. (Compl. ¶¶ 26, 133.) And they are prepared to present expert testimony to this effect.

Not only is there no rational connection between the marriage bans and the asserted goal of children being raised by dual gender biological parents, but Plaintiffs have also alleged facts establishing that the government has no legitimate basis for preferring dual gender[14] biological parents over same-sex parents. Plaintiffs alleged that there is a consensus within the scientific community, based

[14] With respect to the focus on the gender combination of the parents in Petrille's Brief, the Commonwealth itself recognizes that neither sexual orientation nor gender has any bearing on a couple's ability to successfully rear children and, thus, treats gay and lesbian couples the same as heterosexual couples with respect to adoption and recognition as parents through the *in loco parentis* doctrine. (Compl. ¶ 129.) Therefore, a preference for childrearing within heterosexual parent families cannot be credited as the Commonwealth's goal in enacting the marriage bans. The Supreme Court has refused to credit asserted rationales when the circumstances "demonstrate[] that the asserted purpose could not have been a goal of the legislation." *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 n.16 (1975). *See also Romer*, 517 U.S. at 635 ("The breadth of the amendment is so far removed from these particular justifications that we find it impossible to credit them.").

on over thirty years of research, that children raised by same-sex couples fare no differently than children raised by different-sex couples[15] and that this is recognized by every major professional organization dedicated to children's health and welfare including the American Academy of Pediatrics, the American Psychological Association, the American Medical Association, the National Association of Social Workers, and the Child Welfare League of America. (Compl. ¶ 130.) These allegations establish that the well-being of children of same-sex parents is not a "debatable" question. *Clover Leaf*, 449 U.S. at 464. Indeed, this consensus has been recognized by numerous courts after trials involving expert testimony. *See Perry*, 704 F. Supp. 2d at 980 (finding that the research supporting the conclusion that "[c]hildren raised by gay or lesbian parents are as likely as children raised by heterosexual parents to be healthy, successful and well-adjusted" is "accepted beyond serious debate in the field of developmental psychology"); *In re Adoption of Doe*, 2008 WL 5006172, at *20

[15] Petrille's Brief asserts that the research showing equally good outcomes for children of same-sex parents "undercuts a need" for marriage for same-sex couples because, he says, if they are doing well, the absence of their families' access to marriage has yielded no harm at all. (Petrille Br., at 35.) The fact that the research has conclusively rebutted the myth that children are harmed if raised by same-sex parents does not mean that the children in these families, like any children, would not benefit from the social recognition and economic and other supports that come with marriage. (*See, e.g.*, Compl. ¶ 9 (minor plaintiffs A.W. and K.W. feel stigmatized by the fact that their parents cannot be married and feel they should not be deprived of resources available to other families).)

(Fla. Cir. Ct. Nov. 25, 2008) ("[B]ased on the robust nature of the evidence available in the field, this Court is satisfied that the issue is so far beyond dispute that it would be irrational to hold otherwise; the best interests of children are not preserved by prohibiting homosexual adoption."), *aff'd sub nom. Fla. Dep't of Children & Families v. Adoption of X.X.G.*, 45 So.3d 79 (Fla. Dist. Ct. App. 2010); *Howard v. Child Welfare Agency Rev. Bd.*, No. 1999-9881, 2004 WL 3154530, at *9, and 2004 WL 3200916, at *3-4 (Ark. Cir. Ct. Dec. 29, 2004) (holding based on factual findings regarding the well-being of children of gay parents that "there was no rational relationship between the [exclusion of gay people as foster parents] and the health, safety, and welfare of the foster children."), *aff'd sub nom. Dep't of Human Servs. v. Howard*, 238 S.W.3d 1 (Ark. 2006). Plaintiffs will present expert testimony about this body of scientific research. This testimony will show that the Petrille Brief's characterization of the research on same-sex parents and their children as flawed and insufficient and its assertion that the well-being of children of same-sex parents is "unknown" (Petrille Br., at 34-36) have no "footing in realit[y]." *Heller*, 509 U.S. at 321.[16]

[16] The Brief's suggestion that only biological parents are "invested in the welfare of their offspring" (Petrille Br., at 32) is not only insulting and refuted by a scientific consensus as the facts pled by Plaintiffs show, but also fails to explain the exclusion of same-sex couples from marriage given that assisted reproduction and adoption are not the province of gay couples.

If the facts pled by Plaintiffs concerning the scientific consensus about same-sex parents are proven to be true, any assumption that children raised by heterosexual biological parents are better off than children raised by lesbian and gay couples is based not on rational speculation but on baseless negative assumptions about gay parents, *Varnum*, 763 N.W.2d at 899 (concluding, after reviewing "an abundance of evidence and research," that "opinions that dual-gender parenting is the optimal environment for children . . . is based more on stereotype than anything else"), or the type of stereotyped assumptions about gendered parenting roles that demands heightened scrutiny. *Miss. Univ. for Women*, 458 U.S. at 725 (laws may not be based on "fixed notions concerning the roles and abilities of males and females" and "[c]are must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions"). As discussed above, even under rational basis review, the rationale must have a "footing in realit[y]." *Heller*, 509 U.S. at 321; *see also Moreno*, 413 U.S. at 535-36 (rejecting "unsubstantiated assumptions" about hippies). A negative stereotype that flies in the face of scientific consensus is not rational speculation.

* * *

For these reasons, the Complaint should not be dismissed based on the asserted interests related to procreation and child-rearing. Moreover, even if promoting and supporting biological parent-child relationships is considered by

some people to be *one* of the purposes of marriage, it is indisputably not the *only* purpose that marriage serves for Pennsylvania families. Marriage is "a far-reaching legal acknowledgment of the intimate relationship between two people." *Windsor*, 133 S. Ct. at 2692; *see also Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) ("Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects."). Marriage in Pennsylvania is tied to a wide array of governmental protections and obligations that have nothing to do with procreation. This is not a lack of "precise[] tailor[ing]." (Petrille Br., at 37.) As in *Romer*, "[t]he breadth of the [marriage bans] is so far removed from these particular justifications that [it is] impossible to credit them." *Romer*, 517 U.S. at 635; *see also Cleburne*, 473 U.S. at 446-47 ("The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.").[17]

[17] To the extent that Petrille's Brief suggests that government resources to support families should be rationed to promote and support biological parenthood, this rationale is even more disconnected from the classification given that many of the incidents of marriage not only have nothing to do with children but also involve no government expenditure. For example, a spouse has a privilege not to testifying against the other spouse, 42 Pa. C.S. § 5913; a spouse is the default medical decision-maker for an incapacitated spouse, 20 Pa. C.S. § 5461(d)(1)(i); a spouse can purchase an insurance policy on life of the other spouse, 40 P.S.

(continued...)

(e) Plaintiffs have alleged facts showing that the primary purpose and effect of Pennsylvania's marriage bans is to disparage and demean same-sex couples.

As discussed above, the Supreme Court has long made clear that disadvantaging a group for the purpose of making them unequal is not a legitimate government interest. *See, e.g.*, *Romer*, 517 U.S. at 633. In *Windsor*, the Supreme Court struck down DOMA after concluding that "[t]he principal purpose is to impose inequality," and "no legitimate purpose overcomes the purpose and effect to disparage and injure" same-sex couples and their families. *Windsor*, 133 S. Ct at 2694, 2696. The Court found that the "history of DOMA's enactment and its own text" demonstrate that interfering with the equal dignity of same-sex couples "was more than an incidental effect. . . . It was its essence." *Id.* at 2693. Plaintiffs have alleged facts and made legal arguments showing that the same is true here – Pennsylvania's marriage bans were enacted because of, not in spite of, their adverse effect on same-sex couples.

First, Plaintiffs' Complaint cites statements from the legislative record in which supporters of Pennsylvania's 1996 amendment to its marriage law imposing

---

(continued...)

§ 532.1; a spouse of a public employee who is required to be absent from the district for his or her employment may remain registered to vote in district, 25 Pa. C.S. § 1302; and numerous conflict of interest rules apply to spouses, *see, e.g.*, 35 P.S. § 750.8, Pa. R. Crim. P. 531.

the marriage bans cited moral disapproval as a basis to pass the amendment, using language very similar to the statements from Congress the Supreme Court pointed to in *Windsor* in concluding that the purpose and effect of DOMA was to disparage and injure. (Compl. ¶ 125.) *Compare* 1996 Pa. Legis. J. (House), at 2017 (citing "moral opposition to same-sex marriages"); *and id*. at 2019 ("[T]he large majority [of Pennsylvanians] do not want our traditional marriage institution and our state of morals to be changed."), *with Windsor*, 133 S. Ct. at 2693 (noting that the House Report on DOMA said that the law expresses "moral disapproval of homosexuality" and the purpose of the law was to promote an "interest in protecting the traditional moral teachings reflected in heterosexual-only marriage laws").

Moreover, like DOMA, the text of the 1996 amendment and its obvious effect make clear that the intent was to injure and stigmatize same-sex couples. *Windsor*, 133 S. Ct. at 2693. The "practical effect" of Pennsylvania's marriage bans is "to impose a disadvantage, a separate status, and so a stigma upon" same-sex couples in the eyes of the state and the broader community. *Windsor*, 133 S. Ct. at 2693.

In addition, like the federal DOMA struck down in *Windsor*, Pennsylvania's 1996 amendment is a "discrimination[] of an unusual character" that further supports an inference of an illegitimate purpose. *Windsor*, 133 S. Ct. at 2693 ("In

determining whether the law is motivated by an improper animus or purpose, '"discriminations of an unusual character"' especially require careful consideration"); *Romer*, 517 U.S at 633 (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37-38 (1928)) ("[d]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision."). The Pennsylvania legislature's decision to enact a law voiding a class of out-of-state marriages was highly unusual, indeed unprecedented. Moreover, the legislature's decision in 1996 to reaffirm the restriction of marriage to different-sex couples precisely, as Petrille acknowledges (Petrille Br., at 10), to exclude same-sex couples is also unusual. This isn't merely the continued application of Pennsylvania's "centuries-old definition of marriage" as Petrille suggests. (*Id.* at 3.)

Finally, the absence of any logical connection to a legitimate purpose can, itself, lead to an inference of an impermissible intent to discriminate. *See Romer*, 517 U.S. at 632 (reasoning that the law's "sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects"); *Cleburne*, 473 U.S. at 448-50 (reasoning that because a home for developmentally disabled adults did not pose any threat to city's interests that are not also posed by permitted uses, requiring a special zoning permit in this case "appears to us to rest on irrational prejudice"). Plaintiffs have

alleged factual and legal bases to conclude that, as with the Colorado amendment struck down in *Romer*, Pennsylania's marriage bans "classif[y] homosexuals not to further a proper legislative end but to make them unequal to everyone else. This [Pennsylvania] cannot do." *Romer*, 517 U.S. at 635.

Whether or not the Court ultimately finds or infers that an improper purpose was at play, as discussed above, the facts alleged in Complaint show that the law fails rational basis review because the marriage bans do not rationally further any legitimate government interest and, thus, the Motion to Dismiss should be denied.

B. Plaintiffs Have Stated A Claim That Pennsylvania's Marriage Bans Violate Their Fundamental Right To Marry Protected By The Due Process Clause.

As discussed below, Plaintiffs have alleged facts establishing that the marriage bans burden the fundamental right to marry. The arguments in support of dismissal of this claim in Petrille's Brief turn on a misunderstanding of the scope of the fundamental right at issue.

"The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Loving*, 388 U.S. at 12 (citation omitted). Many cases have recognized this right as fundamental. *See, e.g.*, *Turner v. Safley*, 482 U.S. 78, 95 (1987) ("The decision to marry is a fundamental right"); *Zablocki*, 434 U.S. at 383. The freedom to enter into the

marital relationship with one's chosen spouse is fundamental and must be free from discriminatory or unjustifiable interference by the state.

This case is about the fundamental right to marry – not, as the Petrille Brief attempts to reframe the issue, the "right to marry a person of the same sex." (Petrille Br., at 40.) Supreme Court cases addressing "the fundamental right to marry" do not recast the right at issue as "the right to interracial marriage," "the right to inmate marriage," or "the right of people owing child support to marry." *See Golinski*, 824 F. Supp. 2d at 982 n.5 (citing *Loving*, 388 U.S. at 12, *Turner*, 482 U.S. at 94-96, and *Zablocki*, 434 U.S. at 383-86); *accord In re Marriage Cases*, 183 P.3d at 421 n.33 (*Turner* "did not characterize the constitutional right at issue as 'the right to inmate marriage.'"); *Perry*, 704 F. Supp. 2d at 993 ("Plaintiffs do not seek recognition of a new right.").

Indeed, Defendant's framing of the right is exactly what the Supreme Court squarely rejected in *Lawrence* when it overruled *Bowers*. *Lawrence* explained that the *Bowers* decision was flawed from the very outset in characterizing the inquiry as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy." *Lawrence*, 539 U.S. at 566-67 (quoting *Bowers*, 478 U.S. at 191). In doing so, *Bowers* "fail[ed] to appreciate the extent of the liberty at stake." *Id.* at 567.

The fundamental right to marry is unquestionably "deeply rooted in this Nation's history and tradition" for purposes of constitutional protection even though certain individuals, including gay couples, have not historically been allowed to exercise that right. While courts use history and tradition to identify the interests that due process protects, they do not carry forward historical limitations on *which* Americans may exercise a right once that right is recognized as one that due process protects. This critical distinction – that history guides the *what* of due process rights, but not the *who* of which individuals have them – is central to due process jurisprudence. "'Fundamental rights, once recognized, cannot be denied to particular groups on the ground that these groups have historically been denied those rights.'" *In re Marriage Cases*, 183 P.3d at 430 (quoting *Hernandez*, 855 N.E.2d at 23 (Kaye, C.J., dissenting) (brackets omitted)).

For example, when the Court held that anti-miscegenation laws violated the fundamental right to marry in *Loving*, it did so despite a long historical tradition of excluding interracial couples from the institution of marriage. *See Planned Parenthood*, 505 U.S. at 847-48 ("[I]nterracial marriage was illegal in most States in the 19th century,[18] but the Court was no doubt correct in finding it to be an

[18] Petrille's Brief attempts to distinguish *Loving* on the basis that, in English common law, there was no ban on interracial marriage and that such bans did not appear until the 1600s. (Petrille Br., at 42-43.) But surely it is not suggesting that

(continued...)

aspect of liberty protected against state interference by the substantive component of the Due Process Clause in *Loving* . . . ."); *Lawrence*, 539 U.S. at 577 ("[N]either history nor tradition could save a law prohibiting miscegenation from constitutional attack.") (citation omitted).

Because the fundamental right to marry is firmly rooted in our nation's history, that right cannot be denied to interracial couples, prisoners, or same-sex couples simply because they have historically been prevented from exercising that right.

Contrary to the suggestion in Petrille's Brief, the fact that the gender-based eligibility requirement for marriage is "centuries old" does not make it part and parcel of the fundamental right to marry. (Petrille Br., at 5.) Other long-standing laws related to marriage that were widely accepted as inherent elements of marriage such as anti-miscegenation laws and unequal treatment of married women were ultimately struck down by courts or otherwise stripped away without compromising the vitality of marriage.[19] There are no longer any gender-based

---

(continued...)

such laws would be constitutional if only they had been part of English common law hundreds of years ago.

[19] Indeed, some of the centuries-old sources cited in Petrille's Brief to support its assertion that marriage has always been about opposite-sex procreation (*see* Petrille Br., at 5-7) involved some of these long-discarded discriminatory

(continued...)

distinctions in the roles of husbands and wives within marriage. Both have the same obligations and protections. Thus, the gender-based eligibility requirement is no more essential to marriage than the other long discarded discriminatory rules.

Plaintiffs have alleged facts showing that they are no different than heterosexual couples with respect to the characteristics relevant to marriage. (Compl. ¶¶ 108-14.) They make the same commitment to one another, build their lives together, support one another and some raise children together. And they are just as willing and able to assume the obligations of marriage. Moreover, they would benefit no less than heterosexual couples if provided the legal protections and social recognition afforded to married couples. *See Perry*, 704 F. Supp. 2d at 993 ("[S]ame-sex couples are situated identically to opposite-sex couples in terms of their ability to perform the rights and obligations of marriage.").

Petrille's Brief suggests that Plaintiffs are not entitled to access the fundamental right to marry because they cannot biologically reproduce together.

(continued...)

elements of marriage. *See* David Hume*, An Enquiry Concerning the Principles of Morals*, http://www.earlymoderntexts.com/pdf/humemora.pdf, at 22 ("Sexual infidelity in marriage is much more harmful in women than in men. That's why the laws of chastity are much stricter over the female sex than over the male."); *Maynard v. Hill*, 125 U.S. 190, 214, 216 (1888) (enforcing law that gave ownership of land to male settlers only (and only if they were white) with women being able to acquire land only through husbands).

(Petrille Br., at 41.) But the Supreme Court in *Turner v. Safley*, 482 U.S. 78, rejected the notion that the freedom to marry could be denied because the people seeking to marry could not engage in particular activities traditionally associated with a marital relationship. Under the policy struck down in *Turner*, prisoners were permitted to marry only in circumstances involving a pre-existing "pregnancy or the birth of an illegitimate child." *Id.* at 82. But the Court held that prisoners' freedom to marry could not be so restricted. Instead, the Court reviewed the aspects of the marital relationship that remain unaffected by incarceration and determined that the sum total of the other attributes was a marital relationship entitled to constitutional protection. *Id*. at 95-96 (while acknowledging the "substantial restrictions as a result of incarceration, . . . [m]any important attributes of marriage remain, however, after taking into account the limitations imposed by prison life").

In short, "the right to marry never has been limited to those who plan or desire to have children." *In re Marriage Cases*, 183 P.3d at 432. Pennsylvania has never conditioned the right to marry on procreation. Of course, several of the Plaintiff couples and countless other lesbian and gay couples in Pennsylvania are in fact raising children, and they seek the benefits of marriage in large part for their children. But the absence of children, biological or otherwise, does not vitiate the basic liberty and fundamental right to marry all people enjoy.

Plaintiffs have alleged facts showing that the marriage bans burden their fundamental right to marry by denying them the ability to marry their chosen partner or have their marriages recognized by the Commonwealth. They have alleged that this exclusion from marriage denies them and their families countless tangible and intangible benefits and stigmatizes them. (Compl. ¶¶ 115-23.) *See Windsor*, 133 S. Ct. at 2689 (marriage permits couples "to define themselves by their commitment to each other" and "so live with pride in themselves and their union and in a status of equality with all other married persons."). Because Plaintiffs have alleged facts showing that the marriage bans burden fundamental liberty interests, they are subject to heightened scrutiny and Defendants have the burden of justifying the unequal treatment. *See, e.g., Zablocki*, 434 U.S. at 383.

In addition, the Plaintiffs who are already married also have a fundamental liberty interest in the ongoing existence of their marriages. Before the state can sever a legal family relationship, it must demonstrate important justifications for doing so. *See, e.g.*, *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) ("We have little doubt that the Due Process Clause would be offended '[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest.'") (internal citations omitted); *Santosky v. Kramer*, 455 U.S. 745 (1982) (demanding clear and convincing

evidence to support termination of parental rights). In *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996), the Court made clear that the special scrutiny afforded when the government seeks to end a parent-child relationship applies to the state's "usurpation, disregard, or disrespect" of a marriage as well. *Id.* at 116-17 (internal citations omitted) ("Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as 'of basic importance in our society,' rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect. . . . M.L.B.'s case, involving the State's authority to sever permanently a parent-child bond, demands the close consideration the Court has long required when a family association so undeniably important is at stake.").

As discussed in Part II.A(4) above, the facts alleged by Plaintiffs show that the marriage bans can't even survive rational basis review, let alone heightened scrutiny.

III. PETRILLE'S MOTION TO DISMISS PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 19 IS WITHOUT MERIT.

Petrille's Brief incorrectly argues that all 67 Register of Wills and Clerks of the Orphans' Court of Pennsylvania ("Registers of Wills") are necessary parties to

this action. (Petrille Br., at 44.)[20] In doing so, it largely ignores the actual text of Rule 19. Rule 19(a) makes clear that an absent party is "necessary" in only three limited scenarios: where there is (1) an "inability of the court to accord complete relief among the parties" (Rule 19(a)(1)(A)); (2) a "risk of harm to the absentee's ability to protect its interest" (Rule 19(a)(1)(B)(i)); and (3) a "risk of harm to the defendant by subjecting it to double liability or inconsistent obligations" (Rule 19(a)(1)(B)(ii). 4 James Wm. Moore et al., *Moore's Federal Practice* §§ 19.02[1], [2][c] (3d ed. 2013). None of these scenarios fit.

As an initial matter, the Brief misconstrues the Complaint's requested relief. (Petrille Br., at 46-47.) Plaintiffs seek a declaration that 23 Pa. C.S. §§ 1102 and 1704 are unconstitutional and an injunction prohibiting *the named Defendants* from enforcing those statutes. Procedurally, obtaining such relief from this Court would bind the named Defendants only. If ultimately ordered by the Third Circuit, then it would be binding as matter of law upon all government officials in Pennsylvania. This is not a disguised class action. *See* Moore's § 19.03[2][d], n.48.0.4 ("[C]omplete relief may be had even if all those potentially affected by a request for injunctive or declaratory relief are not joined. All that is required in

[20] The Commonwealth defendants do not argue that any necessary parties have not been joined. Neither has, to Plaintiffs' knowledge, any party in *Commonwealth v. Hanes*, No. 379 MD 2013 (Pa. Commw. Ct.), which Petrille cites.

such circumstances is that the court is able to render a meaningful, enforceable injunction or declaration of rights as to those who are parties.").

A. Rule 19(a)(1)(A) Does Not Apply

Determining whether an absent party is "necessary" under Rule 19(a)(1)(A) requires an evaluation of "whether complete relief may be accorded *to those persons named as parties to the action* in the absence of any unjoined parties." *Gen. Refractories Co. v. First State Ins. Co.*, 500 F.3d 306, 312 (2007) (emphasis added); *see also Angst v. Royal Maccabees Life Ins. Co.*, 77 F.3d 701, 705 (3d Cir. 1996) ("Completeness is . . . not as between a party and the absent person whose joinder is sought.").[21]

The Complaint alleges that Petrille's office invoked 23 Pa. C.S. § 1102 and refused the marriage license application of Plaintiffs Angela Gillem and Gail Lloyd on July 1, 2013. (Compl. ¶ 102.)[22] Thus, these Plaintiffs seek an order from this Court declaring the statute to be unconstitutional and prohibiting Petrille from enforcing the statute against them. Such an order would grant to the parties in this

[21] Prior to April 2007, subsection (a)(1)(A) was numbered (a)(1). *See* Fed. R. Civ. P. 19 advisory committee note (2007); *Gen. Refractories Co.*, 500 F.3d at 312.

[22] Plaintiffs dismissed Register of Wills Mary Jo Poknis as a defendant to this action because Plaintiffs Deb and Susan Whitewood, who previously were denied a marriage license by Poknis, have since married out of state and no longer are seeking a Pennsylvania marriage license from her office.

action the "complete relief" contemplated by Rule 19(a)(1)(A) regardless of whether other Registers of Wills also were defendants. There would be nothing "hollow" about such relief between the present parties and there would be no need for "repeated lawsuits" between them.[23]

B. Rule 19(a)(1)(B) Does Not Apply

The other Registers of Wills also are not "necessary" parties under either Rule 19(a)(1)(B)(i) or (ii).

First, the other Registers of Wills do not have "an interest relating to the subject of the action," Fed. R. Civ. P. 19(a)(1)(B), and thus are not necessary parties under either Rule 19(a)(1)(B)(i) or (ii). That other Registers of Wills

---

[23] Rather than the text of Rule 19(a), Petrille's Brief focuses on three factors: (1) the public's interest in avoiding "repeated lawsuits on the same essential subject matter"; (2) "the desirability of joining those persons in whose absence the court would be obliged to grant partial or 'hollow' rather than complete relief to the parties before the court"; and (3) "the interest of the courts and the public in complete, consistent, and efficient settlement of controversies." (Petrille Br., at 45-46.) The first two factors, as *General Refractories* states, relate to Rule 19(a)(1)(A) in the context of whether the absence of a party affects the "completeness" of the relief between the present named parties. Here, it does not. The third factor is irrelevant to whether an absent party is "necessary"; it concerns the Rule 19(b) analysis of whether an action should go forward after the Court has identified a necessary party whose joinder is not feasible. *Field v. Volkswagenwerk AG*, 626 F.2d 293, 300 (3d Cir. 1980) ("Rule 19(b) itself is applicable only if a person who should be joined under the provisions of Rule 19(a) cannot be made a party for some reason."). As there is no absent necessary party here, the Brief's reliance on the discussion of Rule 19(b) in *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 111 (1968), is irrelevant.

enforce 23 Pa. C.S. § 1102 does not give them "necessary" party status. *Cf. Husbands v. Commonwealth of Pa.*, 359 F. Supp. 925, 937 (E.D.Pa. 1973) (holding that absent Pennsylvania school districts do not have "rights cognizable under" Rule 19(a)(1)(B), despite the fact that "[t]here is little doubt that [they] may be affected by the results of" the action seeking to invalidate the district reorganization plan, because "[t]he school district boundaries resulted solely from the plan which the plaintiffs in this action seek to invalidate" and "[t]he districts played no direct role in their formation and they have no proprietary or possessory rights therein").

Second, because the other Registers of Wills do not have an interest in this litigation, there is no interest of theirs that would be impaired or impeded by this action. Therefore, Rule 19(a)(1)(B)(i) does not apply.[24]

Finally, Rule 19(a)(1)(B)(ii) does not apply because there is no risk that "continuation of the action would expose *named parties* to the 'substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the

[24] The argument in Petrille's Brief that the other Registers of Wills are "necessary" because a judgment by this Court against the named Defendants would act as persuasive authority has been expressly rejected by the Third Circuit. *Janney Montgomery Scott v. Shepard Niles, Inc.*, 11 F.3d 399, 407 (3d Cir. 1993) (expressly rejecting the proposition that, where an action may result in "persuasive precedent" detrimental to an absent party, the failure to join that party would impair or impede its ability to protect its interest).

claimed interest.'" *Gen. Refractories*, 500 F.3d at 317 (emphasis added). "Inconsistent obligations occur when a party is unable to comply with one court's order without breaching another court's order concerning the same incident." *Delgado v. Plaza Las Americas, Inc.*, 139 F.3d 1, 3 (1st Cir. 1998) (citing *Micheel v. Haralson*, 586 F. Supp. 169, 171 (E.D. Pa. 1983). There is no such risk here to Petrille or any other named Defendant. If this Court grants the Complaint's requested relief, all Defendants will be prohibited from enforcing Pennsylvania's bans on marriage for same-sex couples. If Defendants prevail, they will not be obligated by this Court to do or refrain from doing anything. Moreover, even if the Defendants are successful here, but another court enjoins them later, that does not pose the risk of "inconsistent obligations" under Rule 19. "[A] risk that a defendant who has successfully defended against a party may be found liable to another party in a subsequent action arising from the same incident – *i.e.*, a risk of inconsistent adjudications or results – does not necessitate joinder of all of the parties into one action pursuant to Fed. R. Civ. P. 19(a)." *Delgado*, 139 F.3d at 3 (citing *Field*, 626 F.2d at 301).

Rule 19(a)(1)(B)(ii) does not require joinder of other Registers of Wills and Clerks of Orphans' Court.

CONCLUSION

For the foregoing reasons, Defendant Petrille's Motion to Dismiss should be denied in its entirety. Alternatively, Plaintiffs should be granted leave to amend their Complaint.

Respectfully submitted,

Dated: October 21, 2013

HANGLEY ARONCHICK SEGAL PUDLIN & SCHILLER

By: /s/ Mark A. Aronchick
Mark A. Aronchick
John S. Stapleton
Dylan J. Steinberg
Rebecca S. Melley
One Logan Square, 27th Floor
Philadelphia, PA 19103
(215) 568-6200

Helen E. Casale
401 DeKalb Street, 4th Floor
Norristown, PA 19401
(610) 313-1670

Counsel for Plaintiffs

ACLU FOUNDATION OF PENNSYLVANIA

By: /s/ Witold J. Walczak
Witold J. Walczak
313 Atwood Street
Pittsburgh, PA 15213
(412) 681-7736

Mary Catherine Roper
Molly Tack-Hooper
P.O. Box 40008
Philadelphia, PA 19106
(215) 592-1513

Counsel for Plaintiffs

James D. Esseks
Leslie Cooper
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2500

Counsel for Plaintiffs

Seth F. Kreimer
3400 Chestnut St.
Philadelphia, Pa. 19104
(215) 898-7447

Counsel for Plaintiffs

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

WHITEWOOD *et al.*, Plaintiffs, v. CORBETT *et al.*, Defendants.	**Civil Action** **No. 13-1861-JEJ**

CERTIFICATE OF WORD COUNT

I, Mark A. Aronchick, hereby certify pursuant to Local Civil Rule 7.8(b)(2) and this Court's October 18, 2013 granting Plaintiffs leave to file a brief of no more than 12,000 words, that the text of the foregoing Plaintiffs' Brief in Opposition to the Motion to Dismiss of Defendant Donald Petrille, Jr. contains 11,507 words as calculated by the word-count function of Microsoft Word.

Dated: October 21, 2013

/s/ Mark A. Aronchick
Mark A. Aronchick

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of October, 2013, I caused the foregoing Plaintiffs' Brief in Opposition to the Motion to Dismiss of Defendant Donald Petrille, Jr. to be filed electronically using the Court's electronic filing system, and that the filing is available to counsel for all parties for downloading and viewing from the electronic filing system.

/s/ Mark A. Aronchick
Mark A. Aronchick