IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

JAMES DARBY, *et al.*, Plaintiffs, v. DAVID ORR, Cook County Clerk, Defendant.	Case No. 2012 CH 19718
	consolidated with
TANYA LAZARO, *et al.*, Plaintiffs, v. DAVID ORR, Cook County Clerk, Defendant.	Case No. 2012 CH 19719
STATE OF ILLINOIS, *ex rel.* LISA MADIGAN, Attorney General of the State of Illinois, Intervenor,	The Honorable Judge Sophia Hall
CHRISTIE WEBB, Tazewell County Clerk, *et al.* Intervenors.	

NOTICE OF FILING

You are hereby notified that, on behalf of the State of Illinois, *ex rel.* Lisa Madigan, Attorney General of the State of Illinois, we filed with the Clerk of the Circuit Court, on March 29, 2013, the **Memorandum of the State of Illinois in Opposition to Intervenors' Motion to Dismiss Complaint**, a copy of which is hereby served upon you.

TO: SEE SERVICE LIST

Respectfully submitted,

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MEMORANDUM OF THE STATE OF ILLINOIS IN OPPOSITION TO INTERVENORS' MOTION TO DISMISS COMPLAINT

The State of Illinois, *ex rel.* Lisa Madigan, Attorney General of Illinois (the "State"), respectfully submits this memorandum in opposition to the motion by intervenors Christie Webb, *et al.* ("Intervenors"), to dismiss pursuant to Section 2-615 of the Code of Civil Procedure, 735 ILCS 5/2-615 (2010), the claims in Plaintiffs' complaints that challenge, as a violation of their rights under the Equal Protection Clause of the Illinois Constitution, Ill. Const. art. I, § 2, the provisions of the Illinois Marriage and Dissolution of Marriage Act (the "Act") that limit marriage to opposite-sex couples and deny same-sex couples the right to marry.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court should deny Intervenors' motion to dismiss Plaintiffs' consolidated complaints because Plaintiffs have sufficiently alleged well-pled facts to sustain their claims that the Act's provisions that discriminate against same-sex couples, including the provisions added in 1996 ("the 1996 Amendments"), violate the Illinois Constitution's guarantee of equal protection of the law. Plaintiffs are 25 same-sex couples, all of whom are in long-term relationships and wish to publicly and officially express their commitment in civil marriage. Illinois law permits same-sex couples to adopt and raise children and to form "civil unions" that confer essentially all of the same state-law rights and privileges as marriage. See 750 ILCS 75/20 (2010). Yet Illinois law withholds from these couples, and reserves exclusively to opposite-sex couples, the official status of "marriage." Plaintiffs claim that this distinction violates their right to equal protection under the Illinois Constitution by relegating them to an inherently inferior, second-class status that is rooted in historic prejudice based on their sexual orientation and is not justified by an sufficient governmental interest. As discussed below, the allegations in Plaintiffs' complaints in support of that claim are sufficient to defeat a motion to dismiss.

In support of their motion to dismiss, Intervenors and the *amici* supporting them repeatedly, and improperly, urge the court *not* to accept the truth of the allegations in Plaintiffs' pleadings. See *Khan v. Deutsche Bank AG*, 2012 IL 112219, ¶ 47 (2012). Intervenors and their supporters likewise impermissibly refer to and rely on external "evidence," which not only violates the rules governing Section 2-615 motions, *id.*, ¶ 49, but underscores the essentially factual nature of their challenge to Plaintiffs' claims, which the Court may not resolve in the present posture of the case. If Intervenors wish to dispute the truth of Plaintiffs' allegations, a motion for summary judgment or a trial — not a motion to dismiss — is the proper means to do so.

At this stage of the case, the Court must accept as true Plaintiffs' factual allegations in support of their assertions that gays and lesbians are a quasi-suspect class entitled to heightened scrutiny of laws that overtly or purposefully discriminate against them, and that the challenged provisions of the Act are not justified by an important nondiscriminatory purpose, or even by a legitimate purpose. Thus, Intervenors' motion to dismiss should be denied.

FACTUAL BACKGROUND

History of the Act and Its Challenged Provisions

The Act, as adopted in 1977, provided in Section 201 that a marriage could be entered into in Illinois between a man and a woman. See Public Act 80-923, codified at Ill. Rev. Stats. Chap. 40 par. 201 (1977), now 750 ILCS 5/201 (2010). The Act was based on the Uniform Marriage and Divorce Act, drafted by the National Conference on Uniform State Laws. The commentary accompanying the model bill explained that Section 201 was drafted "in accordance with established usage," requiring marriage "to be between a man and a woman." Unif. Marriage and Divorce Act § 201, 9A U.L.A. 175 (1998). During the legislative debates preceding the General Assembly's adoption of the Act in 1977, the bill's Senate sponsor confirmed, in response to a specific inquiry, that the bill could not be "considered a Gay Bill" under which the General Assembly "would be, in fact, supporting that type of . . . accepting that kind of marriages to exist." 80th Ill. Gen. Assem., Senate, Transcript of May 19, 1977 at 286-87.

Before 1996, the Act listed various types of marriages that were expressly "prohibited" (e.g., between close relatives, or before the divorce of one of the parties was concluded), but this list did not include marriages between same-sex couples. See 750 ILCS 5/212, 213 (1994). Sections 212(a)(5) and 213.1 of the Act, added by the 1996 Amendments, (1) included same-sex marriages in the list of "prohibited" marriages, and (2) formally declared a same-sex marriage to be "contrary to the public policy of this State," thereby preventing Illinois from recognizing such

a marriage validly entered into in another State. Public Act 89-459, codified at 750 ILCS 5/212(a)(5), 213.1 (1996); see also 750 ILCS 5/213 (1996).

In 1993, the Hawaii State Supreme Court held in *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993), that limiting marriage to opposite-sex couples violated the Equal Protection Clause of that State's Constitution. *Baehr* triggered concern that even if a State prohibited same-sex marriages, that State might be required to recognize such marriages legally entered into in another State. Senate Bill 1173 was introduced in Illinois in response to this concern. Explaining the bill, Senator Fitzgerald stated:

> Right now it appears that the State of Hawaii may be on the verge of recognizing marriages between two people of the same sex. . . . If Illinois law is not changed, Illinois will wind up giving recognition to same-sex marriages granted in the State of Hawaii. I've brought this bill in order to keep marriage in Illinois the same as it's always been and to stick to the one man-one woman definition of marriage that we have all known in this State. . . .

89th Ill. Gen. Assem., Senate, Transcript of Mar. 28, 1996, at 95. Senator Sieben, speaking in support of the bill, declared that "no civilization has ever survived by accepting homosexual marriages . . . , yet that is what homosexual members of society are asking of us." *Id.* at 97.

Senator Petra, stating that he strongly supported the bill, commented that he had seen leaders of the recent "infamous homosexual march in Washington, D.C." who continued to insist on the "right to have a marriage [and] to have the same benefits that have been traditionally enjoyed by heterosexual couples." *Id.* at 100-01. He stated: "All laws that we pass in this General Assembly have a moral tone to them . . . . Our criminal justice system is basically founded upon the Ten Commandments. The real question that we must ask ourself is, whose morality are we going to impose on the public." *Id.* at 101.

In his closing remarks, Senator Fitzgerald described a third-grade boy in Denver who was "adopted by a gay couple[,] two gay men," and stated that "every day this boy is dropped off at

school by his parents, and the other kids make fun of him. And he's constantly crying; he's in the principal's office; he's constantly fighting." *Id.* at 105. He then stated:

> I think that we need to promote our existing concept of marriage. I think it's healthy for a kid to grow up with a mom and a dad. . . . Every society that I know of has long enjoyed that concept. And it's one thing to say that homosexuals should be treated with dignity and compassion; it's quite another to say that State law must affirm the lifestyle.

Id. The bill was passed in the Senate by a vote of 42 to 9 (with 2 abstentions). *Id.*

In the House, Representative Schakowsky read a letter signed by clergy from multiple faiths and denominations declaring that "[t]he real and immediate impact of [Senate Bill] 1773 is to foster a climate of intolerance and hatred against lesbian and gay people." 89th Ill. Gen. Assem., House, Transcript of April 25, 1996, at 58. She continued:

> We spend a lot of time here talking about family values. And today we are aiming a piece of Legislation at people who's [sic] only crime . . . is that they want to create a family. They want to make a long-term commitment to one another. They want to take responsibility for each other in sickness or in health. They want to declare openly and with the sanction of our society, their love for each other. . . . I urge a "no" vote.

Id. at 59. The bill passed in the House by a vote of 87 to 13, with 6 abstentions. *Id.* at 60. (While the substantive discussion regarding the 1996 Amendments concerned Senate Bill 1173, it did not include an immediate effective date, and the 1996 Amendments actually became law by enactment of Senate Bill 1140, which supplied one. See Public Act 89-459; 89th Ill. Gen. Assem., House, Transcript of May 16, 1996, at 152, 155.)

Allegations and Claims in Plaintiffs' Complaints

Plaintiffs are 25 same-sex gay and lesbian couples who are in committed relationships. (Darby, ¶¶ 2-17; Lazaro, ¶¶ 23-93.) Many of these couples have entered into civil unions or marriages outside of Illinois. Several are parenting biological or adopted children legally. (Darby, ¶¶ 4-5; Lazaro, ¶¶ 55, 80.) Their complaints allege, among other things, that the Act's

provisions denying them the right to marry violate their rights under the Equal Protection Clause of the Illinois Constitution. (Darby, ¶¶ 74-88; Lazaro, ¶¶ 116-22.)

In support of that claim, the *Darby* complaint alleges that the State's ban on same-sex marriage "brands lesbians and gay men and their children as members of less worthy families through a message of government-imposed stigma" (Darby, ¶ 81), "causes private bias and discrimination" (*id.*), and "reflect[s] animus, moral disapproval and antipathy toward lesbians and gay men" (*id.* ¶ 82). The *Darby* complaint further alleges that there is "no compelling, important, or otherwise sufficient justification" for this discrimination against gay and lesbian couples (*id.*, ¶ 88) and that such discrimination "warrants at least heightened scrutiny," but is "invalid under any form of constitutional scrutiny" (*id.* ¶ 84).

The *Lazaro* complaint, which also asserts a violation of the Illinois Constitution's Equal Protection Clause, contains similar allegations. It specifically alleges that Plaintiffs' sexual orientation "bears no relation to their ability to contribute to society and is immutable, in that it is central to their core identity." Lazaro, ¶ 120. Plaintiffs also document the years of discrimination they have faced due to their sexual orientation (e.g., *id.*, ¶ 102); their various contributions to society (e.g., *id.*, ¶ 63); the unchanging nature of their sexual orientation (*id.*, ¶ 85); and their political powerlessness to achieve equal rights through legislative means (*id.*, ¶ 120). Plaintiffs further allege that the Act's "[d]iscrimination on the basis of sexual orientation is suspect and demands a heightened level of scrutiny" because it "purposefully single[s] out a minority group (lesbians and gay men) that historically has suffered discriminatory treatment and [has] been relegated to a position of political powerlessness solely on the basis of stereotypes and myths regarding their sexual orientation." (*Id.*)

As discussed below, Plaintiffs claim that, assuming these facts to be true, they are entitled to heightened scrutiny of the Act's challenged provisions, imposing on Intervenors the burden of

demonstrating with admissible evidence that these provisions are substantially related to an important government objective. Plaintiffs claim, in the alternative, that at the very least these allegations are sufficient to state a claim that these provisions fail even rational basis scrutiny — both due to demonstrated animus against them based on their sexual orientation, and because the supposed justifications for those provisions are constitutionally insufficient to sustain them.

Intervention by the State

The State, by Lisa Madigan, Attorney General of Illinois, intervened in this matter and supports Plaintiffs' claims that the Act's challenged provisions violate the rights of gay and lesbian individuals to equal protection of the law, as guaranteed by the Illinois Constitution.

Intervenors' Arguments in Support of Dismissal

Intervenors' motion to dismiss asserts that the Court must conclude as a matter of law — at the pleading stage of these actions — that the Act's discrimination against same-sex couples does not deny them the right to equal protection guaranteed by the Illinois Constitution. (Intervenors' Mem. at 16.) Intervenors first dispute Plaintiffs' allegations that the Act's challenged provisions are subject to heightened scrutiny, urging the Court to hold that "[c]lassifications based on sexual orientation are not suspect or quasi-suspect." (*id.* at 20); that these provisions of the Act denying the status of marriage to same-sex couples are not "facially" discriminatory against gays and lesbians based on their sexual orientation (*id.* at 16-17); and that the Court cannot conclude that these provisions were adopted "with the *intent* or *purpose* to discriminate against homosexuals" (*id.* at 17, emphasis in original). Intervenors next maintain that, under rational basis scrutiny, the Act's discrimination against same-sex couples validly advances several legitimate governmental interests, including promoting procreation and responsible parenting. (*Id.* at 22-24.)

As discussed more fully below, Intervenors' motion to dismiss and supporting

memorandum, as well as memoranda submitted by *amici* in support of dismissal, are not limited to contesting the legal sufficiency of Plaintiffs' factual allegations to support their claims. Instead, without filing an answer, they dispute the truth of those allegations and rely on the supposed accuracy of external "facts" that are neither alleged in the complaints nor subject to judicial notice. For example, several *amici* reference research papers and law journal articles purporting to establish that traditionally defined marriage between a man and a woman is necessary to promote "responsible procreation and childrearing," and thus is in the best interests of children and society as a whole. Amicus Mem. of Illinois Family Institute ("IFI") at 4; see also *id.* at 3-13; Amicus Mem. of Moody Church & Fourteen Other Churches ("Moody") at 2-15; Amicus Mem. of Illinois Legislators Kirk Dillard, *et al.* ("Legislators") at 8-13. Other *amici* rely on external sources to support their argument that permitting same-sex marriage will infringe on their constitutionally guaranteed freedom of religion. Amicus Mem. of Catholic Conference of Ill. & Lutheran Church-Missouri Synod ("Catholic Conference") at 11-12; Amicus Mem. of Church of Christian Liberty & Grace Gospel Fellowship of Bensenville ("CCL/GGF") at 6-18; Legislators Mem. at 11-13.

ARGUMENT

Plaintiffs have alleged sufficient facts to establish that the challenged provisions of the Act denying the official status of marriage to same-sex couples violate their rights under the Illinois Constitution's Equal Protection Clause. Intervenors' motion to dismiss should be denied.

I. Standard of Decision for a Section 2-615 Motion to Dismiss

A motion to dismiss pursuant to Section 2-615 of the Illinois Code of Civil Procedure challenges only the legal sufficiency of the complaint. *Turner v. Mem'l Medical Ctr.*, 233 Ill. 2d 494, 499 (2009); *Rajterowski v. City of Sycamore*, 405 Ill. App. 3d 1086, 1092 (2nd Dist. 2010); see also *Khan*, 2012 IL 112219, ¶ 47. The Court must accept all well-pled factual allegations as

true, viewing them in the light most favorable to the plaintiff and drawing all reasonable inferences in the plaintiff's favor. *Khan*, 2012 IL 112219, ¶ 47. The Court may consider only the allegations of the complaint, attached exhibits, and matters subject to judicial notice, and it may not consider any extraneous materials or other claimed facts outside the complaint. *Id.*, ¶¶ 47, 49; *Napleton v. Village of Hinsdale*, 229 Ill. 2d 296, 305 (2008).

A complaint should not be dismissed unless no set of facts could be proven that would entitle the plaintiff to recover. *Khan*, 2012 IL 112219, ¶ 47; *Lozman v. Putnam*, 328 Ill. App. 3d 761, 769 (1st Dist. 2002). A complaint must contain only "a plain and concise statement" of the plaintiff's cause of action. 735 ILCS 5/2-603 (2010). "[I]t is unnecessary for the complaint to set forth evidence that plaintiff intends to introduce at trial." *Lozman*, 328 Ill. App. 3d at 769. If the allegations of a complaint are insufficient to state a valid claim, the court should grant leave to amend the pleading where that might cure the deficiency. *Roy v. Coyne*, 259 Ill. App. 3d 269, 274 (1st Dist. 1994); *Hensler v. Busey Bank*, 231 Ill. App. 3d 920, 924 (4th Dist. 1992).

II. Standards Governing Equal Protection Claims

The Illinois Constitution states that no person "shall be . . . denied the equal protection of the laws." Ill. Const. art. I, § 2. This provision protects against invidious discrimination. *People v. DiGuida*, 152 Ill. 2d 104, 127 (1992). In applying this provision, Illinois courts are guided by decisions under the similar provision of the U.S. Constitution. *In re Jonathon C.B.*, 2011 IL 107750, ¶ 116.

A. Levels of Scrutiny

Equal protection analysis recognizes several levels of scrutiny. Strict scrutiny, which requires that laws be narrowly tailored to achieve a compelling governmental interest, applies to laws that impinge on a fundamental constitutional right or adopt a classification based on race, alienage, or national origin. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985);

see also *People v. R.L.*, 158 Ill.2d 432, 438 (1994). Intermediate scrutiny, which demands that a statutory classification be "substantially related to an important governmental objective," applies to quasi-suspect classifications, including sex and illegitimacy. *Clark v. Jeter*, 486 U.S. 456, 461 (1988); see also *In re Detention of Samuelson*, 189 Ill. 2d 548, 561-62 (2000). Other classifications, including those in most economic legislation, trigger only rational basis scrutiny, which requires that the law be "rationally related to a legitimate governmental purpose." *Clark*, 486 U.S. at 461; see also *Romer v. Evans*, 517 U.S. 620, 631 (1996); *City of Cleburne*, 473 U.S. at 446; *People v. Reed*, 148 Ill. 2d 1, 7-8 (1992). This level of scrutiny is applied with greater rigor, however, to laws, like the Act, that are not subject to strict or intermediate scrutiny but nonetheless impose unfavorable treatment on politically disfavored groups. See *Romer*, 517 U.S. at 633-34; *Lawrence v. Texas*, 539 U.S. 558, 579-82 (2003) (O'Connor, J., concurring); *U. S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534-35 (1973); *Diaz v. Brewer*, 656 F.3d 1008, 1012 (9th Cir. 2011); *United States v. Then*, 56 F.3d 464, 468 (2d Cir. 1995) (Calabresi, J., concurring).

In this case, Plaintiffs' complaints assert that the challenged provisions of the Act are subject to heightened constitutional scrutiny, but that they fail even under less exacting review. Darby, ¶ 84; Lazaro, ¶¶ 104-07, 120, 122. The State accordingly describes both levels of scrutiny more fully.

B. Heightened Scrutiny

Courts have identified four factors that bear on whether a class is deemed suspect or quasi-suspect, thereby triggering heightened scrutiny: (1) whether the class suffers from a history of discrimination; (2) whether the distinguishing characteristic of class members affects their ability to contribute to society; (3) whether that characteristic is obvious, immutable or distinguishing; and (4) whether the group lacks the ability to protect itself in the political process.

See *Bowen v. Gilliard*, 483 U.S. 587, 602-03 (1987); *City of Cleburne*, 473 U.S. at 441-42; (1985); see also *Windsor v. United States*, 699 F.3d 169, 181 (2d Cir. 2012), *cert. granted* 133 S. Ct. 786 (2012). The first two factors are the most significant. See *City of Cleburne*, 473 U.S. at 442, 472; see also *Windsor*, 699 F.3d at 181; *Kerrigan v. Comm'r of Public Health*, 957 A.2d 404, 427 (Conn. 2008); *Pedersen v Office of Personnel Mgmt.*, 2012 WL 3113883, at *13 (D. Conn. 2012); *Varnum v. Brien*, 763 N.W.2d 862, 889 n.16 (Iowa 2009).

Not every law that has a disparate impact on a suspect or quasi-suspect class is subject to heightened scrutiny. *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979); *People v. Wegielnik*, 152 Ill. 2d 418, 429 (1992). Such scrutiny applies where the suspect classification appears on the face of the law, the law was adopted because of a discriminatory purpose, or it is unexplainable on any basis other than the suspect classification. *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999); *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 266 (1977). In those situations, the party defending the law has the burden of establishing that it is substantially related to an important governmental objective. *Clark*, 486 U.S. at 461. "Substantially related" means that the offered justifications are "exceedingly persuasive," and the justifications advanced "must be genuine, not hypothesized or invented *post hoc* in response to litigation." *United States v. Virginia*, 518 U.S. 515, 533 (1996).

C. Rational Basis Scrutiny

Generally, rational basis review does not impose on the proponent of the law the burden to establish its validity, and courts may sustain the law if there is a rational justification for it, even if that justification is not articulated by the legislative body. See *Heller v. Doe*, 509 U.S. 312, 320 (1993); *Commonwealth of Mass. v. United States Dep't of Health & Human Servs.*, 682 F.3d 1, 9 (1st Cir. 2012). But "some objectives — such as a bare . . . desire to harm a politically unpopular group — are not legitimate state interests." *Id.* at 446-47 (citations and internal

quotation marks omitted); see also *Romer*, 517 U.S. at 633-34. Thus, when a minority or unpopular group is at issue, a more searching form of rational basis review is employed to ensure that the classification is not used to disadvantage that group. *Diaz v. Brewer*, 656 F.3d 1008, 1012 (9th Cir. 2011); see also *Romer*, 517 U.S. at 633-34; *Lawrence*, 539 U.S. at 579-82 (O'Connor, J., concurring). In such a case, even under rational basis review, "mere negative attitudes, or fear" are insufficient to sustain a law. *City of Cleburne*, 473 U.S. at 448-49; see also *Lawrence*, 539 U.S. at 582 (O'Connor, J., concurring) ("Moral disapproval of [homosexuals], like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause."); *Palmore v. Sidotti*, 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.").

III. Plaintiffs Raise Valid Claims that the Act's Provisions Limiting the Official Status of Marriage to Opposite-Sex Couples Violates the Equal Protection Clause of the Illinois Constitution.

Plaintiffs' complaints allege sufficient facts to establish that the Act's provisions denying marriage rights to same-sex couples violate the constitutional guarantee of equal protection. Specifically, Plaintiffs' allegations support the conclusion that gays and lesbians are a quasi-suspect class and that the Act subjects them to overt and purposeful discrimination that is not justified by an important governmental purpose. Plaintiffs further sufficiently allege, in the alternative, that the Act's discrimination against gay and lesbian couples is not even related to a legitimate governmental purpose. Intervenors' motion to dismiss should be denied.

A. The Act's Prohibition of Same-Sex Marriage Does Not Withstand Heightened Scrutiny.

1. Plaintiffs Adequately Allege that Sexual Orientation Is a Quasi-Suspect Classification.

Plaintiffs' pleadings specifically allege that sexual orientation is a quasi-suspect classify-

cation and, therefore, that a law based on that classification is subject to heightened scrutiny. In particular, the Lazaro complaint alleges:

> Discrimination on the basis of sexual orientation is suspect and demands a heightened level of scrutiny . . . since the [Act] . . . purposefully single[s] out a minority group (lesbians and gay men) that historically has suffered discriminatory treatment and been relegated to a position of political powerlessness solely on the basis of stereotypes and myths regarding their sexual orientation — a characteristic that bears no relation to their ability to contribute to society and is immutable, in that it is central to their core identity.

Lazaro, ¶ 120. Each relevant factor is amply supported by additional, specific allegations.[1]

a. Plaintiffs have Suffered a Lengthy History of Discrimination Due to their Sexual Orientation.

Plaintiffs allege that gay and lesbian individuals as a class, and Plaintiffs personally, have suffered from explicit prejudice and implied discrimination and stigmatization. Specifically, Plaintiffs allege that the Act's original provisions and the 1996 Amendments "purposefully single out a minority group (lesbians and gay men) that historically has suffered discriminatory treatment and been relegated to a position of political powerlessness solely on the basis of stereotypes and myths regarding their sexual orientation." Lazaro, ¶ 120. Plaintiffs further allege a lifetime of invidious discrimination against themselves, their partners, and their children due to their sexual orientation. Plaintiffs have been refused or delayed entrance into police stations as the parent of a child (Darby, ¶ 4), hospitals as the spouse or parent of a patient (Darby, ¶¶ 5, 6, 8, 16), and funerals as the partner of the deceased (Lazaro, ¶ 36) — all because their sexual orientation prohibits them from marrying the partner of their choice. None of this is surprising. As the court recently noted in *Windsor*:

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[1] In support of their assertion that homosexuality is not a quasi-suspect classification, Intervenors ignore the factual allegations in Plaintiffs' pleadings and rely exclusively on precedent that is not controlling in this jurisdiction (see *State Bank of Cherry v. CGB Enterprises, Inc.*, 2013 IL 113836, ¶ 35); that is outdated because it predates the Supreme Court's landmark ruling in *Lawrence* (see *Golinski*, 824 F. Supp. 2d at 983-85); and that is contrary to more recent decisions by other courts (see, e.g., *Windsor*, 699 F.3d at 181-85). None of this forecloses an independent determination of the issue by this Court based on a relevant factual record consistent with Plaintiffs' allegations.

> It is easy to conclude that homosexuals have suffered a history of discrimination. [Plaintiff] and several *amici* labor to establish and document this history, but we think it is not much in debate. . . . [The intervenor-defendant] concedes that homosexuals have endured discrimination in this country since at least the 1920s. Ninety years of discrimination is entirely sufficient to document a "history of discrimination."

699 F.3d at 182; see also *Commonwealth of Mass.*, 682 F.3d at 11 (citing *Lawrence*, 539 U.S. at 571); *In re Marriage Cases*, 183 P.3d at 442 ("Outside of racial and religious minorities, we can think of no group which has suffered such pernicious and sustained hostility, and such immediate and severe opprobrium, as homosexuals") (internal brackets and quotations omitted).

The General Assembly has recognized the existence of intolerable discrimination based on sexual orientation, having passed laws to protect gay and lesbian individuals from hate crimes (720 ILCS 5/12-7.1), discrimination in housing, finance, and employment (775 ILCS 5/1-102), and bullying (105 ILCS 5/27-23.7(a)). These laws, adopted over the last two decades, respond to the undeniable reality that gays and lesbians have long suffered, and continue to suffer, discrimination due solely to their sexual orientation.

b. Plaintiffs Contribute Meaningfully to Society Without Regard to their Sexual Orientation.

Plaintiffs' complaints allege that the sexual orientation of gays and lesbians generally, and Plaintiffs specifically, does not prevent them from making a meaningful contribution to society. Those allegations are more than sufficient to establish this factor. Cf. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (discussing lack of relation between gender and ability to perform in society). Plaintiffs include nurses, military veterans, teachers and professors, managers, students, small business owners, and licensed professionals. Darby, ¶¶ 2, 9; Lazaro, ¶¶53, 69. In addition, several Plaintiff couples are parenting either biological or adopted children, providing each of these children with a loving home and nurturing parents. Darby, ¶¶ 4, 5; Lazaro, ¶¶ 55, 80. Such contributions to society reflect the widely recognized

contributions of gay and lesbian individuals.

c. Plaintiffs' Sexual Orientation is an Obvious, Immutable, or Distinguishing Characteristic.

Plaintiffs sufficiently allege that their sexual orientation is a defining characteristic that is "obvious, immutable, or distinguishing . . . that define[s] them as a discrete group." *Lyng*, 477 U.S. at 638; see also *Windsor*, 699 F.3d at 183, *quoting Bowen v. Gilliard*, 483 U.S. 587, 602 (1987). Intervenors do not even attempt to dispute this allegation, which Plaintiffs' complaints amply support. Plaintiffs are all in long-term, committed relationships — many for decades — and none wishes to marry an individual of the opposite sex and sexual orientation. Darby, ¶¶ 2, 5, 6, 13, 16; Lazaro, ¶ 20. These allegations are sufficient to show that sexual orientation is an obvious, immutable, or distinguishing characteristic.

d. Plaintiffs Lack Sufficient Political Power to Prevent Governmental Discrimination Against Them.

Finally, Plaintiffs' complaints adequately allege that Plaintiffs lack the political power to prevent, through traditional legislative means, official discrimination against them. This is the only factor Intervenors specifically dispute — and then only in a footnote of their memorandum (at 20 n.15). Yet political powerlessness is only one of the four relevant factors to consider, and not one of the most important ones. Even so, Plaintiffs' allegations are sufficient at this stage to support this aspect of their equal protection claims. Indeed, if the court could take judicial notice of anything on this issue, it is that the undisputed absence of equal treatment under Illinois law demonstrates the continuing inability of gay and lesbian members of our society to overcome the long history of pervasive discrimination against them. See *Windsor*, 699 F.3d at 184 ("Without political power, minorities may be unable to protect themselves from discrimination at the hands of the majoritarian political process."); *Golinski*, 824 F. Supp. 2d at 989. Thus far, Illinois has granted gay and lesbian individuals only the right to form civil unions (750 ILCS 75/1, *et seq.*),

but that second-class status clearly implies less social recognition and approval than marriage and causes pain and confusion for Plaintiffs and their children. Darby, ¶¶ 40-41.

2. Plaintiffs Sufficiently Allege that the Act Is Based on Unlawful, Invidious Discrimination Against Gays and Lesbians.

In an attempt to avoid application of heightened scrutiny to the Act's provisions denying the official status of marriage to same-sex couples, Intervenors contend that even if sexual orientation is a quasi-suspect classification, the Act's provisions limiting marriage to opposite-sex couples are not subject to heightened scrutiny because those provisions are neither *facially* discriminatory against individuals based on their sexual orientation nor motivated by a *purpose* to discriminate against gay and lesbian individuals. At the pleading stage, both aspects of that argument must be rejected.

There is no merit to Intervenors' contention that the Act, which limits marriage to a man and a woman, does not facially discriminate against individuals based on their sexual orientation. Intervenors maintain, in essence, that all women — heterosexual and lesbian — have an equal right under the law to marry a man, and that all men — heterosexual and gay — have an equal right under the law to marry a woman. (Intervenors' Mem. at 16.) This contention is singularly unpersuasive. Even when a law that imposes less favorable treatment on members of a suspect or quasi-suspect class does not do so explicitly, heightened scrutiny will apply where the legislative distinction is "unexplainable" on other grounds. *Arlington Heights*, 429 U.S. at 266; see also *Hunt*, 526 U.S. at 546; *Golden Rule Life Ins. Co. v. Mathias*, 86 Ill. App. 3d 323, 334 (4th Dist. 1980) ("What a legislature or any official entity is 'up to' may be plain from the results its actions achieve, or the results they avoid."). That is the case here.

Indeed, Intervenors' arguments that gay and lesbian individuals are equally free to marry, just not someone of the same sex (Mem. at 16), devalue the fundamental nature of the very

institution they describe as essential to society and to individuals joined in marriage. Marriage is not a technical legal arrangement; rather, it embodies "a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family." *Goodridge,* 440 Mass. at 954. "[T]he decision whether and whom to marry is among life's momentous acts of self-definition," *id.* at 955, and it is not credible to suggest, as Intervenors do, that allowing homosexual individuals the right to marry any person of their choosing, provided it is someone with an incompatible sexual orientation, amounts to anything more than discrimination based on their sexual orientation. See *Varnum,* 763 N.W.2d at 885.

Plaintiffs allege that they are identical in all material respects to couples allowed to marry but are denied that right because of their sexual orientation. Plaintiffs are in committed, loving, and stable relationships, and many of them are parents or caregivers. *See, e.g.,* Darby, ¶¶ 2-17; Lazaro, ¶¶ 23-93. State recognition of their status would give them an official, "institutional basis for defining their fundamental relational rights and responsibilities," *Varnum,* 763 N.W.2d at 883, just as it does for opposite-sex couples entering into marriage. See Darby, ¶¶ 38-40, 43; Lazaro, ¶ 100. Marriage would also promote the stability of their families, extending to them the same societal approval already given to opposite-sex couples. (See Darby, ¶¶ 38, 42-43.) The only characteristic preventing gay and lesbian couples from being able to obtain these benefits is their sexual orientation, and the Act's discrimination against them therefore is "unexplainable" on any other ground. *Arlington Heights,* 429 U.S. at 266; see also *M.L.B. v. S.L.J.,* 519 U.S. 102, 126-27 (1996); cf. *Bray v. Alexandria Women's Health Clinic,* 506 U.S. 263, 270 (1993) ("A tax on wearing yarmulkes is a tax on Jews."). Accordingly, the Act's challenged provisions should be treated no different than if they explicitly limited eligibility for marriage in Illinois to heterosexuals.

Plaintiffs' complaints alternatively support heightened scrutiny on the basis of their allegations that the Act's prohibition against same-sex marriage was motivated by a discriminatory purpose. (Darby, ¶¶ 81-83; Lazaro, ¶ 120.) As noted above, the Act's legislative history reflects a clear prejudice against homosexuals. Intervenors argue that the Court may simply disregard these allegations and this history because adoption of the Act's challenged provisions may also have been motivated by other nondiscriminatory purposes, and that the Court should attach no significance to the remarks of individual legislators. (Intervenors' Mem. at 17-19.) These contentions misapprehend the relevant law.

A party asserting a discriminatory purpose for a law need not disprove the absence of any lawful purpose — an almost impossible task. See *Arlington Heights*, 429 U.S. at 265. To the contrary, the party need only show that a discriminatory purpose was a "motivating factor" for the law, *id.* at 265-66, in which event the burden shifts to the party defending the law to prove that this purpose made no difference in the law's passage, *id.* at 271 n.21; see also *Hunter v. Underwood*, 471 U.S. 222, 228 (1985).

A "legislature's motive is itself a factual question." *Hunt*, 526 U.S. at 549. Determining the existence of a discriminatory purpose "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights*, 429 U.S. at 266; see also *Rogers v. Lodge*, 458 U.S. 613, 618 (1982) ("discriminatory intent need not be proved by direct evidence"); *Pryor v. National Collegiate Athletic Ass'n*, 288 F.3d 548, 563 (3d Cir. 2002). While a law's effect on a particular group is generally insufficient by itself to establish purposeful discrimination, it is often quite relevant to that inquiry. See *Rogers*, 458 U.S. at 618; *Arlington Heights*, 429 U.S. at 265.Consistent with these principles, a court may consider statements by individual legislators, as well as historical circumstances surrounding the law's passage. See *Arlington Heights*, 429 U.S. at 267-68; *Hunter*, 471 U.S. at 228-29 (noting, *inter*

alia, admission of expert testimony on historical prejudice surrounding adoption of disputed state law); *Pryor*, 288 F.3d at 563.

Given the fact-sensitive nature of this inquiry, it is often resolved only after a trial. See, e.g., *Rogers*, 458 U.S. at 618 ("None of the District Court's findings underlying its ultimate finding of intentional discrimination appears to us to be clearly erroneous"); *Arlington Heights*, 429 U.S. at 268-70 (affirming factual finding on discriminatory intent issue after bench trial); *Hunter*, 471 U.S. at 224-25, 229-32; see also *Hunt*, 526 U.S. at 546-51 (finding genuine issue of fact on question of racially discriminatory purpose for redistricting law). For similar reasons, the issue is particularly unsuited to resolution on a motion to dismiss. *Pryor*, 288 F.3d at 562-64 (surveying cases); see also *Shaw v. Reno*, 509 U.S. 630, 658 (1993) (vacating district court's dismissal where complaint alleged that State engaged in deliberate discrimination without compelling justification); *Golden Rule Life Ins. Co.*, 86 Ill. App. 3d at 334 (holding that complaint adequately alleged discriminatory purpose, and observing that this practical inquiry necessary to resolve that issue "obviously takes place at trial, not during the oratory sessions held at motion hearings in trial courts").

In light of these principles, the Court must reject Intervenors' argument that — notwithstanding the Act's unmistakable discrimination based on sexual orientation and corresponding legislative history, as well as Plaintiffs' affirmative allegations of the Act's discriminatory purpose — the Court must find as a matter of law, at the pleading stage, that anti-gay prejudice was not a motivating purpose for the Act's challenged provisions. Heightened scrutiny of these provisions is therefore warranted.

3. Plaintiffs Sufficiently Allege that the Act Fails Heightened Scrutiny.

As noted above, under heightened scrutiny a law must be defended by reference to the actual purposes behind it, not "rationalizations for actions in fact differently grounded," *Virginia*,

518 U.S. at 535-36, and those defending the law bear the burden of demonstrating that it is "substantially related to an important governmental objective," *Clark*, 486 U.S. at 461. Here, Plaintiffs' allegations are clearly sufficient to state a claim that the Act's challenged provisions fail such scrutiny, notwithstanding the various justifications offered by Intervenors and the *amici* supporting them.

It is important to emphasize the posture of the case, in which Intervenors seek dismissal of Plaintiffs' equal protection claims on the pleadings. In this posture, Intervenors may neither assume the falsity of Plaintiffs' factual allegations nor invite the Court to consider extrinsic facts of which it cannot properly take judicial notice. *Khan*, 2012 IL 112219, ¶¶ 47, 49. Likewise, Intervenors may not ask that the Court simply accept at face value their contentions that the Act's discrimination against same-sex marriage is constitutionally supported by justifications that are substantially related to important governmental interests. (Intervenors' Mem. at 22-24.) To the extent that Intervenors could offer evidence in support of those contentions, it is premature for them to do so by way of a Section 2-615 motion to dismiss.

a. Procreation and Child-Rearing

Foremost among Intervenors' defenses of the Act's discrimination against same-sex couples is the proposition that limiting the state-sanctioned institution of marriage to opposite-sex spouses promotes "responsible" procreation and child-rearing. (Intervenors' Mem. at 22-23.) While those are undoubtedly valid social objectives, Intervenors' contention that they are substantially advanced by denying the status of marriage to same-sex couples is not beyond factual dispute. Indeed, Illinois laws giving lesbians and gay men equal rights to bear and raise children, both biological and adopted, highlight the illogic of the position Intervenors would have the Court assume to be factually unassailable.

Neither as a general matter, nor as defined by Illinois law, is marriage merely an arrangement designed to provide a structure for conceiving and raising children. Plaintiffs have entered into their relationships (civil unions or foreign marriages) because of the personal bond they have with their partner, irrespective of whether they were or eventually became parents. See, e.g., Darby, ¶¶ 2, 10; Lazaro, ¶¶ 54, 62. And marriage is widely recognized as embodying and promoting many tangible and intangible aspects, including, among others, the formation of stable households in which individuals care for one another, divide responsibilities, and share income and property. See *Turner v. Safley*, 482 U.S. 78, 95-96 (1987) (recognizing that marriage constitutes an "expression[] of emotional support and public commitment" and that "[t]hese elements are an important and significant aspect of the marital relationship"); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (recognizing marriage as a "vital personal right[] essential to the orderly pursuit of happiness"); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

Even if procreation were considered an essential purpose for state recognition of marriage, denying the status of marriage to same-sex couples cannot be deemed substantially related to promoting that purpose. Illinois does not deny marriage licenses to heterosexual couples who are unable, or have no intention, to have biological children. Denying such licenses to gay or lesbian couples therefore is essentially arbitrary, not substantially related to advancing a defining aspect of marriage. Similarly, unless "responsible" procreation is intended simply as a synonym for any procreation by heterosexual couples, it must be understood to consist of conscious decisions to have children made by responsible adults in stable, committed relationships. Again, however, Plaintiffs' allegations make it impossible to conclude that same-sex partners inherently lack those qualities. (Darby, ¶ 7; Lazaro, ¶ 35.) Illinois' marriage laws do not regulate who may become a parent or deny that right to gay or lesbian adults. Yet despite this, Illinois law inflicts an unnecessary stigma and corresponding social and psychological

injury on the children of gay and lesbian couples, including Plaintiffs' own children, by telling them their parents do not qualify for the preferred status of marriage, and instead deserve only an inferior category of legal relationship. (See Darby, ¶ 15; Lazaro, ¶ 83.)

Intervenors' related contention that opposite-sex marriages are uniquely capable of responsible child-rearing likewise is not beyond factual dispute. Illinois law, which encourages adoptions by adults with no biological relation to the adopted child, including parties in a same-sex civil union, see 750 ILCS 50/2 (2010), clearly recognizes that it is in the public interest for same-sex couples to assume the significant responsibilities of parenthood. This case illustrates the point. Many Plaintiffs are parents of their biological or adopted children and provide them with loving, stable homes. (Darby, ¶¶ 4-5, 7, 15; Lazaro, ¶¶ 24, 35, 55, 80.) Moreover, Plaintiffs affirmatively allege there is a "consensus among child welfare experts, reflecting over thirty years of research, that children raised by same-sex couples are just as well-adjusted as are children raised by different-sex couples." (Lazaro, ¶ 105.)

Again, therefore, the Court cannot assume that the anomalous exclusion of same-sex couples from the official status of marriage is substantially related to the goal of promoting responsible child-rearing. Indeed, Plaintiffs' complaints describe how the Act's challenged provisions harm children by denying their gay and lesbian parents the added stability and social acceptance provided by marriage. Darby, ¶¶ 36-47; see also *Windsor*, 699 F.3d at 188; *Baker v. Vermont*, 744 A.2d 864, 882 (Vt. 1999) ("If anything, the exclusion of same sex couples from the legal protections incident to marriage exposes *their* children to the precise risks . . . the marriage laws are designed to secure against.") (emphasis in original).

In response to these allegations by Plaintiffs, Intervenors and *amici* rely upon external sources asserting that children of same-sex parents fare worse than the children of opposite-sex parents. See, e.g., IFI Mem., "Table of Authorities, Other Authorities," pp. v-vi. But, as noted

above, the Court's analysis in connection with Intervenors' Section 2-615 motion must exclude any reference to such outside materials (the validity of which the State does not concede).

b. Preserving Traditional Marriage

Intervenors alternatively argue that the Act's ban on same-sex marriage is justified because it furthers the purpose of preserving the traditional definition of marriage. Intervenors' Mem. at 22. Tradition is not self-validating, however, and it accordingly cannot sustain the constitutionality of a law that discriminates against a historically disadvantaged minority. See *Romer*, 517 U.S. at 635; *Virginia*, 518 U.S. at 535-36 (invalidating longstanding tradition of single-sex education at Virginia Military Institute); see also *Lawrence*, 539 U.S. at 577-78 ("[N]either history nor tradition could save a law prohibiting miscegenation from constitutional attack."); *J.E.B. v. Alabama*, ex rel. *T.B.*, 511 U.S. 127, 143 n.15 (1994) ("Many of 'our people's traditions' such as *de jure* segregation and the total exclusion of women from juries, are now unconstitutional even though they once coexisted with the Equal Protection Clause.") (internal citation omitted). Thus, tradition does not qualify as an important governmental objective "when the tradition is nothing more than the historical classification currently expressed in the statute being challenged." *Varnum*, 763 N.W.2d at 898; see also *Kerrigan*, 957 A.2d at 478 ("Because the tradition of excluding gay [persons] from civil marriage is no different from the classification itself, the exclusion cannot be justified on the basis of history.") (internal quotation marks omitted).

The invidious discrimination at issue here, against individuals based on their sexual orientation, has particularly deep roots, but that is all the more reason to exercise skepticism, not deference, toward it. As discussed earlier, Plaintiffs' complaints discuss in detail the minority status of gay and lesbian individuals and the significant, long-lasting discrimination they have suffered based on their sexual orientation alone. See, e.g., Darby, ¶ 81; Lazaro, ¶ 120. Solely

due to their sexual orientation, Plaintiffs have suffered a long and ugly history of discrimination, both explicit and implicit. This history, highlighted and reinforced by the 1996 Amendments, cannot supply a valid justification for relegating their relationships with their same-sex partners to a second-class status.

Plaintiffs allege that except for their sexual orientation, they are advocating for traditional marriage: they seek public recognition of their commitment to one another (e.g., Darby, ¶ 2; Lazaro, ¶ 2), they run households together (e.g., Darby, ¶ 9; Lazaro, ¶ 58), and many of them share the responsibility of raising children (e.g., Darby, ¶ 9; Lazaro, ¶ 55). These allegations reinforce the conclusion that making opposite-sex marriage exclusive is not substantially related to a government interest in promoting traditional two-person households and stable relationships.

If, alternatively, Intervenors contend that the traditional institution of marriage between opposite-sex couples would be threatened by granting same-sex couples the same legal right to marry, their argument is no more persuasive. Plaintiffs' complaints affirmatively allege that excluding same-sex partners from the right to marry causes them significant tangible and intangible harms. See, e.g., Darby, ¶¶ 13, 16; Lazaro, ¶¶ 67, 84. By contrast, the Court cannot simply assume, in connection with Intervenors' motion to dismiss, that the institution of marriage, as traditionally defined, must be preserved for opposite-sex couples only to protect it from a hypothetical erosion.

Intervenors eschew any express reliance on public morality as a justification for the Act's discrimination against same-sex couples, but some of the *amici* supporting them are not reluctant to advance that claim. See, e.g., Moody Mem. at. 4-5; Legislators Mem. at. 7. It fares no better. Moreover, basing legislation on a moral disapproval of homosexuality does not pass any level of scrutiny. *Lawrence*, 539 U.S at 582 (O'Connor, J., concurring) ("Moral disapproval of [homosexuals] . . . is an interest that is insufficient to satisfy rational basis review under the

Equal Protection Clause."); *Golinski*, 824 F. Supp. 2d at 994. As *Romer* teaches, "a bare desire to harm a politically unpopular group," including gays and lesbians, is not a legitimate government interest. 517 U.S. at 634-35. "The obligation of the Court is 'to define the liberty of all, not to mandate our own moral code.'" *Golinski*, 824 F. Supp. 2d at 994 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850 (1992)). Plaintiffs' complaints allege that, but for their sexual orientation, they meet the requirements for a legal marriage and yearn for that recognition for both themselves and their families. (Darby, ¶ 1; Lazaro, ¶¶ 8-9, 22.) Thus, the allegations in Plaintiffs' complaints overcome any argument that an appeal to morality is sufficient to uphold the Act's discrimination against individuals based on their sexual orientation.

B. Alternatively, Plaintiffs Have Sufficiently Alleged that the Act's Challenged Provisions Lack a Rational Basis Under the Circumstances.

Even if the Court concludes that the Act's challenged provisions are not subject to heightened scrutiny, Plaintiffs' complaints still allege cognizable claims that these provisions — which deny same-sex couples the official status of marriage that is available to opposite-sex couples — lack a rational basis connected to a legitimate governmental purpose. And the supposed justifications for this discrimination advanced by Intervenors cannot, by themselves, foreclose any examination here into whether they rationally relate to valid governmental objectives.

The State recognizes that to prevail on a claim that a disputed law lacks a rational basis, a plaintiff must overcome the legal presumption that the law is constitutional. But this presumption is not conclusive, nor does it operate at the pleading stage to deny a plaintiff any ability to allege a valid claim. And as described above, that scrutiny is applied in a more exacting manner where, as here, a law obviously targets disfavored minorities for disadvantageous treatment, for

"a bare . . . desire to harm a politically unpopular group" is not a "legitimate state interest[]." *City of Cleburne*, 473 U.S. at 446; see also *Romer*, 517 U.S. at 633-34; *Lawrence*, 539 U.S. at 579-82 (2003) (O'Connor, J., concurring); *Moreno*, 413 U.S. at 534-35; *Diaz*, 656 F.3d at 1012; *Then*, 56 F.3d at 468 (Calabresi, J., concurring). And under that standard of scrutiny, Plaintiffs' allegations are sufficient to state a claim that the Act violates Plaintiffs' constitutional right to equal protection where its discriminatory provisions were motivated by irrational prejudice and the desire to disadvantage gay and lesbian couples. Thus, the Could should reject Intervenors' suggestion that it must disregard the animus toward gay men and lesbians that motivated the Act's discrimination against them.

For example, the legislative history for the 1996 Amendments, described above, is replete with evidence of prejudice against gays and lesbians and a desire to deny them the same access to the institution of marriage in Illinois as heterosexuals. The text and structure of the Act confirm its clear intent to discriminate against otherwise eligible adults based solely on their sexual orientation. That prejudice and discriminatory purpose are not legitimate governmental interests that can sustain the Act, but instead serve to demonstrate its irrationality. See, e.g., *Romer*, 517 U.S. at 633; *City of Cleburne*, 473 U.S. at 450. For this reason alone, therefore, the Court should hold that Plaintiffs have stated valid equal protection claims.

Even without regard to this unmistakable evidence of prejudice, the Plaintiffs' pleadings contain sufficient allegations to state valid claims that the Act's discrimination against same-sex couples lacks a rational relationship to a legitimate governmental interest. Indeed, an examination of the postulated reasons for limiting marriage to opposite-sex couples merely highlights the arbitrary way in which the Act excludes only same-sex couples, but not other similarly situated couples. See *City of Cleburne*, 473 U.S. at 449-50 (relying, in support of holding that land use ordinance subjecting developmentally disabled individuals to disadvan-

tageous treatment was arbitrary and irrational, on fact that municipality's offered reasons for ordinance applied equally to other groups not subject to similar treatment).

If procreation and child-rearing by both biological parents were the objective, the law would deny marriage rights to infertile heterosexual couples and deny adoption rights to gay men and lesbians. Neither is true, however, making sexual orientation the unique, and arbitrary, criterion for exclusion from the right of marriage.

In similar circumstances, other courts have concluded that preventing same-sex marriages based on a desire to promote procreation and dual-gendered parenting lacks a rational basis. See *Goodridge*, 798 N.E.2d at 962 ("The 'marriage is procreation' argument singles out the one unbridgeable difference between same-sex and opposite-sex couples, and transforms that difference into the essence of a legal marriage."); see also *Windsor*, 833 F.Supp. 2d at 404-05; *Pedersen*, 2012 WL 3113883, at *40-43. Such a focus on sexual orientation alone in a law serves to negate any claim that it truly advances some other purpose. See *City of Cleburne*, 473 U.S. at 449-50. In short, even under a rational basis standard the sufficiency of Plaintiffs' allegations is not overcome by Intervenors' invocation of the governmental interest in procreation and parenting.

Arguments that the Act's discrimination against same-sex marriages is rationally related to promoting the traditional definition of marriage are even less convincing. As explained above, tradition for its own sake has no constitutional weight, and perpetuating a conception of morality built on irrational prejudice serves to establish a law's invalidity, not the contrary. See *Heller*, 509 U.S. at 326 ("Ancient lineage of a legal concept does not give [a law] immunity from attack for lacking a rational basis."); see also *Golinski*, 824 F. Supp. 2d at 999.

Significantly, Plaintiffs are seeking to *enter into* the historic institution of marriage, not to undermine it. See *Goodridge*, 798 N.E.2d at 965. They have sufficiently alleged that the

unavail-ability of marriage affects their status in society (see, e.g., Darby, ¶ 11), the public recognition of their union (*see, e.g.*, Lazaro, ¶ 100), the mental well-being of their children (*see, e.g.*, Darby, ¶ 12), and, if Section 3 of the federal Defense of Marriage Act is overturned, their entitlement to federal benefits (see, e.g., Lazaro, ¶ 101). Spouses in a traditionally defined marriage are not harmed in any constitutional sense by denying these benefits on an equal basis to same-sex partners, yet the harm to those partners and their children from this discrimination is both significant and arbitrary.

IV. Additional Issues Raised by Intervenors and *Amici*

Finally, Intervenors and *amici* raise two concerns that are easily addressed and do not prevent the Court from denying the motion to dismiss.

A. Concerns about Same-Sex Marriage Impinging on Freedoms of Religion and Expression Are Misplaced.

Several *amici* argue that striking the challenged provisions will infringe on their religious liberty, potentially subjecting them to liability under laws prohibiting discrimination in housing and places of public accommodation; to lost government privileges and benefits for excluding same-sex couples from their facilities and institutions; to accusations of hate crimes for preaching against homosexuality; and to exposure to public school education about homosexuality. Catholic Conference Mem. at 11; CCL/GGF Mem. at 14-15[2]; Moody Mem. at 13-14; Legislators Mem. at 11-13. These concerns are exaggerated and, to the extent they have a basis, would not warrant nullifying Plaintiffs' constitutional right to equal protection, including in circumstances where these *amici*'s interests are entirely absent.

[2] The Church of Christian Liberty and Grace Gospel Fellowship of Bensenville further complain that a decision in favor of Plaintiffs, by elevating one religious belief over another, would make the public accommodation clauses of the Illinois Human Rights Act unconstitutional. CCL/GGF Mem. at 15. Virtually every premise of this argument is incorrect. But even if the entire argument were valid, the consequence of a *statute* being found unconstitutional in some application would not support refusing to recognize Plaintiffs' *constitutional* rights generally.

Plaintiffs are seeking to establish their right to *civil* marriage and do not challenge a religious institution's right to define or celebrate marriage as it sees fit. Lazaro, ¶ 93. See also Darby, ¶¶ 37, 43. To the extent that recognizing Plaintiffs' constitutional rights would implicate other parties' constitutional and statutory rights to freedom of religion and speech, the judiciary can determine the lawful boundary between those interests in a particular, concrete case. See also 775 ILCS 35/1, *et seq.* (2010).

B. The Court is Acting Within Its Constitutional Authority to Determine the Constitutionality of the Challenged Provisions of the Act.

Finally, several *amici* argue that under the separation of powers among the three branches of government established by the Illinois Constitution, Ill. Const. art II, § 1, it is the responsibility of the legislature, not the judiciary, to analyze policy and make law, and that this Court accordingly may not redefine the State's marriage laws by declaring unconstitutional the Act's challenged provisions. Legislators Mem. at 2; Catholic Conference Mem. at 14. It is true that the General Assembly is generally responsible for passing legislation, including legislation relating to the regulation of marriage. But that responsibility cannot exclude the courts' ultimate authority to determine whether specific laws are consistent with constitutional limits on the legislative power. See *People v. Gersch*, 135 Ill. 2d 384, 397-98 (1990); also *Donovan v. Holzman*, 8 Ill. 2d 87, 93 (1956); see generally *People v. Lawton*, 212 Ill. 2d 285, 300-02 (2004). Illinois courts have the long-acknowledged "duty to interpret the law and to protect the rights of individuals against acts beyond the scope of the legislative power." *People* ex rel. *Huempfner v. Benson*, 294 Ill. 236, 239 (1920). The duty to declare statutes unconstitutional cannot be avoided, no matter how desirable or beneficial the legislation may appear to be. *Wilson v. Dept. of Rev.*, 169 Ill. 2d 306, 310 (1996). In short, the Court has a constitutional authority and responsibility to decide the merits of Plaintiffs' claims, not to avoid doing so because those

claims question the validity of legislative action.

CONCLUSION

For the foregoing reasons, Intervenors' motion to dismiss the equal protection claims in Plaintiffs' complaints should be denied.

Dated: March 29, 2013

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that she caused a true and correct copy of the foregoing **Memorandum of the State of Illinois in Opposition to Intervenors' Motion to Dismiss Complaint** to be served on the persons listed below by U.S. Mail, postage prepaid, at the James R. Thompson Center, 100 West Randolph Street, Chicago, Illinois 60601, on March 29, 2013 before 5:00 p.m.

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