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

JAMES DARBY and PATRICK BOVA, *et al.*,
Plaintiffs,

v.

DAVID ORR, in his official capacity as Cook County Clerk,
Defendant.

Case No. 12 CH 19718
The Honorable Judge Sophia Hall

TANYA LAZARO and ELIZABETH "LIZ" MATOS, *et al.*,
Plaintiffs,

v.

DAVID ORR, in his official capacity as Cook County Clerk,
Defendant.

Case No. 12 CH 19719
The Honorable Judge Sophia Hall

STATE OF ILLINOIS, *ex rel.* Lisa Madigan, Attorney General of the State of Illinois,
Intervenor,

CHRISTIE WEBB, in her official capacity as Tazewell County Clerk, and KERRY HIRTZEL, in his official capacity as Effingham County Clerk, DANIEL S. KUHN, in his official capacity as Putnam County Clerk, PATRICIA LYCAN, in her official capacity as Crawford County Clerk, BRENDA BRITTON, in her official capacity as Clay County Clerk,
Intervenors.

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Plaintiffs James Darby and Patrick Bova, *et al.* ("Darby Plaintiffs"), by their attorneys Kirkland & Ellis LLP and Lambda Legal Defense and Education Fund, Inc., and Plaintiffs Tanya Lazaro and Liz Matos, *et al.* ("Lazaro Plaintiffs," and collectively with Darby Plaintiffs, "Plaintiffs" or "Plaintiff Couples"), by their attorneys Mayer Brown LLP and the Roger Baldwin Foundation of ACLU, Inc., respectfully submit this Memorandum in Opposition to the Motion to Dismiss Plaintiffs' Complaints Under 735 ILCS 5/2-615(a) filed by Intervenor-Defendants Christie Webb, Kerry Hirtzel, Daniel Kuhn, Patricia Lycan, and Brenda Britton ("Intervenor-Defendants").

INTRODUCTION

This case is a constitutional challenge to the various state statutes that prohibit same-sex couples from marrying. *See* 750 ILCS 5/201 (authorizing marriages "between a man and a woman"); 750 ILCS 5/212(a)(5) (prohibiting marriages "between 2 individuals of the same sex"); 750 ILCS 5/213.1 (marriages of same-sex couples are "contrary to the public policy of this State"); 750 ILCS 5/216 (denying respect to marriages of same-sex couples entered into in other jurisdictions) (collectively, the "Marriage Ban"). In their Complaints, Plaintiff Couples assert that the Marriage Ban violates several provisions of the Illinois Constitution, including the Due Process Clause (Art. I § 2), the Privacy Clause (Art. I § 6), the Equal Protection Clauses (Art. I §§ 2, 18) and the Guarantee Against Special Legislation (Art. I § 13). Plaintiffs ask this Court to declare the Marriage Ban to be unconstitutional — a declaration that will permit Plaintiffs the freedom to marry.

A motion to dismiss brought under 735 ILCS 5/2-615 should be denied if the allegations of the complaint, when construed in the light most favorable to the plaintiff, and taking all well-pleaded facts and all reasonable inferences that may be drawn from those facts as true, are sufficient to establish a cause of action upon which relief may be granted. *See Hanna v. City of*

Chicago, 388 Ill. App. 3d 909, 914 (1st Dist. 2009) (reversing dismissal under 2-615 on constitutional claim) (*citing Napleton v. Village of Hinsdale,* 229 Ill. 2d 296, 305 (2008)). A claim should not be dismissed pursuant to section 2-615 unless "no set of facts can be proved which would entitle the plaintiff to recover." *Id.*

The Motion to Dismiss must be denied for several reasons. First, Intervenor-Defendants' attempt to dismiss Plaintiffs' due process and privacy claims fails because it is based on a mischaracterization of the liberty interest asserted by Plaintiffs. Contrary to Intervenor-Defendants' arguments, Plaintiffs do not ask this Court to recognize a "new" right to "same-sex marriage." Rather, Plaintiffs seek the freedom to exercise the right to marry the person of one's choice, which the Illinois Supreme Court and the United States Supreme Court have recognized as a fundamental constitutional right more than a dozen times. Because Plaintiffs' due process and privacy claims are based on well-established legal precedent, they are not subject to dismissal under 735 ILCS 5/2-615.

Second, Intervenor-Defendants' Motion with respect to Plaintiffs' claims under the equal protection and special legislation clauses must be denied because there is ample legal precedent for this Court to conclude that the Marriage Ban discriminates based on both sex and sexual orientation.

Third, Intervenor-Defendants' argument that discrimination based on sexual orientation does not warrant heightened scrutiny ignores the allegations showing otherwise in Plaintiffs' Complaints, as well as the underlying fact-based inquiries that courts use to determine whether heightened scrutiny of a particular classification is appropriate.[1]

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[1] These factors and the evidence that supports them will be addressed in greater detail in Plaintiffs' Motion for Summary Judgment, which Plaintiffs intend to file within the coming weeks.

Fourth, Plaintiffs' claims should be reviewed under a higher level of scrutiny than the diluted form of rational basis review proposed by Intervenor-Defendants.

Finally, the two hypothesized state justifications for the Marriage Ban that Intervenor-Defendants offer are inadequate even under rational basis analysis, let alone the heightened scrutiny that Plaintiffs allege is warranted. The primary justification offered by Intervenor-Defendants for the Marriage Ban is that it channels procreation into different-sex households — a fact which they argue is a legitimate state interest because they hypothesize that children do better when raised by married different-sex biological parents than when raised by same-sex parents. This is a ***factual*** assertion that is false, capable of disproof through scientific evidence, and directly contradicts allegations in Plaintiffs' Complaints. Plaintiffs have pled, and are prepared to introduce evidence, that the children of same-sex couples fare just as well as the children of different-sex parents, and that same-sex parents are equally capable and worthy of respect. *See, e.g.,* Lazaro Compl. ¶ 105 ("there is 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"). Intervenor-Defendants' attempt to challenge the veracity of Plaintiffs' allegations cannot serve as the basis for a dismissal on a 2-615 motion. *Weinberger v. Bell Fed. Sav. & Loan Ass'n,* 262 Ill. App. 3d 1047, 1049-50 (1st Dist. 1994) (2-615 motion admits not only the facts alleged in a complaint, but all reasonable inferences that can be drawn therefrom)[2] This Court should deny Intervenor-Defendants'

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[2] Plaintiffs intend to move for summary judgment in the coming weeks with evidence to support the allegations in their respective Complaints, including expert testimony, just as plaintiffs have done successfully in marriage lawsuits elsewhere, to show that children raised by lesbian and gay parents are as likely to be well-adjusted as children raised by heterosexual parents, and that it is the uniform opinion of all mainstream psychological, pediatric, and child welfare professional organizations that sexual orientation is irrelevant to parenting ability and child development, and that no credible evidence suggests otherwise. *See generally Varnum v. Brien,* 763 N.W.2d 862, 899 (Iowa 2009) (reviewing "an abundance of evidence and research" presented by plaintiffs before concluding that

Motion to Dismiss to permit Plaintiffs an opportunity to put on evidence in support of the well-pleaded allegations in their Complaints.

The second justification for the Marriage Ban offered by Intervenor-Defendants is characterized, generally, as "preserving the traditional institution of marriage," which is legally deficient because it does not express an interest independent of the State's desire to discriminate. *Romer v. Evans,* 517 U.S. 620, 634-35 (1996).

Furthermore, none of the hypothesized interests offered by the Intervenor-Defendants, nor any other conceivable interest, could constitute a legitimate State interest in Illinois, where the legislature has enacted a separate status designated as civil unions, which provides all of the rights, privileges, benefits, and responsibilities that married couples enjoy under the law, but withholds the designation of "marriage." The existence of civil unions makes clear that the Marriage Ban operates only to deny status and dignity to same-sex couples' relationships, and thus is a "status-based enactment." *Romer*, 517 U.S. at 635. It classifies these couples "not to further a proper legislative end" but only to brand them as unequal. *Id.* Whatever differences Intervenors-Defendants or their *amici* claim exist between same-sex couples and different-sex couples as a justification for this differential treatment have already been disavowed by Illinois as irrelevant to its legislative ends. Because Illinois recognizes same-sex couples as identical to different-sex couples with respect to the legal incidents of marriage and parenting, it can claim no rational justification to exclude them from the status and dignity of marriage.

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proffered child welfare justifications for Iowa's marriage ban had no factual basis and therefore should be rejected); *see also Golinksi v. U.S. Office of Personnel Mgmt.*, 824 F. Supp.2d 968, 991-92 (N.D. Cal. 2012) (reviewing similar evidence demonstrating that it is "beyond scientific dispute" that same-sex parents are as capable as different-sex parents); *Gill v. U.S. Office of Personnel Mgmt*, 699 F. Supp.2d 374, 388 (D. Mass. 2010) (accord); *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

ARGUMENT

I. THE MOTION TO DISMISS PLAINTIFFS' DUE PROCESS AND PRIVACY CLAIMS MUST BE DENIED BECAUSE THE MARRIAGE BAN VIOLATES PLAINTIFFS' FUNDAMENTAL RIGHT TO MARRY.

Count One in the *Darby* Complaint and Counts One and Four in the *Lazaro* Complaint allege that the Marriage Ban constitutes impermissible governmental interference with the fundamental right to marry and to family integrity that is guaranteed by both the Due Process and Privacy Clauses of the Illinois Constitution. Although Intervenor-Defendants acknowledge the due process foundations of a recognized fundamental right to marry, they reject the notion that there is a fundamental right to marry the person of one's choice. (Intervenors' Mem. in Supp. of Mot. to Dismiss Plaintiffs' Complaints Under 735 ILCS 5/2-615(a) ("Def. Br.") at 4.) Instead, they argue that the right to marry is limited to different-sex couples and that Plaintiff Couples, therefore, are urging the Court to recognize a "new" right — a right to enter into a "same-sex" marriage. (*Id.* at 4-5.)

The scope of a fundamental right is defined by attributes of the right itself, and not by the identity of the people who seek to exercise it or who have been excluded from doing so in the past. Plaintiffs' liberty interests in marrying the person each one loves are no different from other people's interests in marital autonomy. Indeed, Plaintiff Couples' relationships share the most celebrated hallmarks of relationships sanctioned with marriage. They wish to marry because "marriage is central to their values and concept of family" (Darby Compl. ¶ 9), to "provide security to [their] children" (Darby Compl. ¶ 5), and because they "love each other and are committed for life" (Lazaro Compl. ¶ 62). The choice of whom to marry is the quintessential type of personal decision protected by the due process and privacy guarantees of the Illinois Constitution, article 1, sections 2 and 6.

A. The Illinois Constitution Protects The Autonomy Of Exercising Personal Choice In Marriage As A Fundamental Right, Free Of Governmental Interference.

The Illinois Constitution safeguards the liberty of each person equally. The State's due process clause provides that "[n]o person shall be deprived of life, liberty or property without due process of law," Ill. Const. 1970, Art. I § 2, and contains a substantive component guarding against unwarranted invasions of personal liberty by the State. *Dafoe v. Dafoe*, 324 Ill. App. 3d 254, 257 (5th Dist. 2001); *People v. R.G.*, 131 Ill. 2d 328, 343-44 (1989).

Although Illinois courts look to federal substantive due process analyses as "useful as a guide in interpreting the Illinois provision," *see Lewis v. Spagnolo*, 186 Ill. 2d 198, 227 (1999) (citing *People v. McCauley*, 163 Ill. 2d 414, 436 (1994); *Rollins v. Ellwood*, 141 Ill. 2d 244, 275 (1990)), courts construe independently "the scope of [Illinois'] state constitution's due process guarantee," finding it to "provide greater protections than its federal counterpart where [they] found an appropriate basis to do so." *Lewis*, 186 Ill. 2d at 227 (citing *Rollins*, 141 Ill. 2d at 275; *People v. Washington*, 171 Ill. 2d 475, 485-86 (1996); *McCauley*, 163 Ill. 2d at 440).

Furthermore, the conclusion that the Illinois Constitution provides even more protections for personal autonomy and decision-making than the federal Constitution is strengthened by the state constitution's explicit privacy provision that protects its citizens against "unreasonable . . . invasions of privacy." Ill. Const. 1970, art I § 6. As a result, Illinois courts have concluded that the state constitutional guarantee against unwarranted governmental interference is broader than the federal guarantee. *Best v. Taylor Mach. Works*, 179 Ill. 2d 367, 451 (1997); *People v. Porter*, 122 Ill. 2d 64, 77 (1988)[3] And Illinois' "right to privacy protects substantive fundamental

[3] Intervenor-Defendants incorrectly suggest that the privacy clause of the Illinois Constitution is limited to information privacy and privacy with respect to the gathering of physical evidence. In fact, the State right of privacy protects "substantive fundamental rights, such as the right to reproductive autonomy." *See In re Baby Doe*, 260 Ill. App. 3d 392, 331 (1st Dist. 1994), *citing Family Life*

rights," *In re Baby Doe*, 260 Ill. App. 3d 392, 399 (1st Dist. 1994), which includes the right to marry. *People v. Malchow*, 193 Ill. 2d 413, 425 (2000) (noting that federal right to privacy includes "personal decisions involving marriage," and that Illinois privacy right "goes beyond federal constitutional guarantees . . . and is stated broadly and without restrictions"). The due process and privacy guarantees must be "construed together" since "the whole [of the Illinois Constitution] must be construed so that the general intent will prevail." *People v. Richardson*, 196 Ill. 2d 225, 230 (2001).

The right to marry has long been recognized as a fundamental right protected under the state and federal due process guarantees, because deciding whether and whom to marry is exactly the kind of personal matter about which the government should have little say. *Webster v. Reproductive Health Services*, 492 U.S. 490, 564-65 (1989) ("freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment") (citing *Loving v. Virginia*, 388 U.S. 1, 12 (1967)); *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977); *Boynton v. Kusper*, 112 Ill. 2d 356, 368-69 (1986). Indeed, the heart of the fundamental right to marry is the ability to decide whom to marry without governmental interference. *Boynton,* 112 Ill. 2d 356 (tax on marriage licenses violated Illinois due process clause because "some people will be forced by the tax imposed to alter their marriage plans and will have 'suffer[ed] a serious intrusion into their *freedom of choice* in an area in which we have held such freedom to be fundamental'") (emphasis added) (citing *Zablocki v. Redhail*, 434 U.S. 374, 387 (1978) and *Loving*, 388 U.S. at 12); *see also, e.g., People v. R.G.* 131 Ill. 2d 328, 343 (1989) ("an individual's *freedom of choice* concerning procreation, marriage and family life is a fundamental right") (emphasis added); *In the matter of Roger B.*, 85

League v. Dept. of Pub. Aid, 112 Ill. 2d. 449, 454 (1986). *See also Stallman v. Youngquist*, 125 Ill. 2d 267, 275 (1988)(conceptually linking the right of privacy with the right of bodily integrity).

Ill. App. 3d 1064, 1068 (1st Dist. 1980) ("*Freedom of personal choice* in matters of family life is one of the liberties protected by the due process clause of the fourteenth amendment") (emphasis added); *Illinois Norml, Inc. v. Scott*, 66 Ill. App. 3d 633, 635 (1st Dist. 1978) (as is true of procreative decisions, "the marriage relationship [is] an area found to be within the zone of privacy created by fundamental constitutional guarantees, including the right of association").

Because the right to make personal decisions central to marriage would be meaningless if government dictated one's marriage partner, courts have placed special emphasis on protecting one's free choice of spouse. *E.g., In re Marriage* Cases, 183 P.3d 384, 420 (Cal. 2008) ("the right to marry represents the right of an individual to establish a legally recognized family with the person of one's choice"); *Goodridge v. Dep't of Public Health,* 798 N.E.2d 941, 958 (Mass. 2003) (the "right to marry means little if it does not include the right to marry the person of one's choice"); *Perez v. Lippold,* 198 P.2d 17, 25 (Cal. 1948) (striking down anti-miscegenation ban in first ruling of its kind, and affirming right to choose marriage with one person who is "irreplaceable"); *Varnum v. Brien*, No. CV5965, 2007 WL 2468667 (Iowa Dist. Ct. August 30, 2007), *aff'd on other grounds*, 763 N.W.2d 862 (Iowa 2009). Indeed, there can be no greater "government intrusion into private affairs" (Def. Br. 8) than government's interference in an individual's choice of the person with whom he or she will build a life and start a family.

B. In Keeping With The Right To Autonomy In Deciding Whether And Whom To Marry, Illinois Imposes Very Few Restrictions On Different-Sex Adults Who Wish To Marry.

Consistent with the autonomy protected by the due process guarantee and right of privacy, Illinois all but stays out of each individual's decision whether and whom to marry — provided that he or she chooses someone of a different sex. A person may marry someone of a different sex who is of a different religion, despised by his or her parents, has a criminal record, or a history of abuse. Whether choosing to marry a scoundrel or a saint, the Illinois

Constitution's liberty and privacy guarantees allow all adults to choose for ourselves. *See also Lawrence*, 539 U.S. 558, 562 (2003) ("[T]here are . . . spheres of our lives and existence . . . where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions.").

Illinois also permits spouses to determine for themselves the ***purposes*** marriage serves and the form it takes. *See Dralle v. Ruder*, 124 Ill. 2d 61, 72 (1988); *see also Kubian v. Alexian Bros. Medical Ctr.*, 272 Ill. App. 3d 246, 252 (2d Dist. 1995) (noting in context of discussion of spousal consortium claims that Illinois law values spouses' material services to each other in addition to "elements of companionship, felicity and sexual intercourse, all welded into a conceptualistic unity"). A couple *may* have children, but they need not and often do not. Spouses need not pass a fertility test, intend to procreate, be of childbearing age, have any parenting skills, or account for any history of childrearing or child support. Indeed, that the right to marry is not conditioned on procreation was recognized expressly in *Turner v. Safley,* 482 U.S. 78, 95-96 (1987) (marriage is a fundamental right for prisoners even though some may never have an opportunity to "consummate" the marriage; "important attributes" of marriage include that it is an "expression . . . of emotional support and public commitment," and for some, an "exercise of religious faith as well as an expression of personal dedication," "a precondition to the receipt of government benefits . . . [including] less tangible benefits," such as "legitimization of children born out of wedlock").

Thus, in deference to personal autonomy, Illinois minimally regulates entry into marriage and the shape it takes for any two persons. Indeed, in speaking about marriage simply and universally, focusing on the adults' relationship at its heart, the U.S. Supreme Court stated that:

> 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. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Zablocki v. Redhail, 434 U.S. 374, 384 (1978) (quoting *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965)). Lesbian and gay Illinoisans share the same birthright to liberty and autonomy as any other Illinoisan in exercising the right to marry.[4]

C. The Right At Issue Here Is The Fundamental Right To Marry And Not, As Intervenor-Defendants Would Reframe It, A "New" Right To "Same-Sex Marriage."

Intervenor-Defendants and their *amici* play a shell game of reframing the fundamental right to marry as a "new" right of "same-sex marriage." (Def. Br. 4-6.) Their game invokes tradition to label as "new" any minority's claim to fundamental rights long exercised by others. However, the scope of a fundamental right is defined by the *attributes of the right itself*, and not by the identity of the people who seek to exercise it or who have been excluded from doing so in

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[4] *Amici Curiae* Moody Church *et al.* (at 10) and Illinois Family Institute (at 12) raise a slippery slope argument about polygamy, just as others did in opposition to ending interracial marriage bans. *E.g.*, *Perez v. Lippold,* 198 P.2d 17, 41 (Cal. 1948) (Shenk, J., dissenting) (comparing ban on interracial marriage to bans on incest, bigamy and polygamy). Polygamy raises concerns not raised in a challenge solely to the gendered entry requirement for marriage. In a challenge to a polygamy ban, the government would have distinct interests to assert in justifying the burden, such as with respect to how consent to marry would be determined between multiple partners, intestacy, and how spousal and parental rights and presumptions should operate. *E.g.*, *Potter v. Murray City*, 760 F.2d 1065, 1070 (10th Cir. 1985) (government justified in prohibiting polygamy in part because it "has established a vast and convoluted network of other laws clearly establishing its compelling state interest in and commitment to a system of domestic relations based exclusively upon the practice of monogamy as opposed to plural marriage"). By contrast, ending the ban for same-sex couples would require eliminating only the discriminatory gendered entry requirement, just as other gendered marital restrictions have been removed from marriage laws, as discussed below.

the past. Illinois courts have rejected attempts to reframe claimed fundamental rights and liberty interests by re-defining them narrowly to include only those who have exercised them in the past. Laws are not insulated from judicial review because they reflect historically common definitions in which discrimination against persons is embedded. *See Wickham v. Byrne,* 199 Ill. 2d 309, 318 (2002) (fundamental right to parental autonomy not diminished in contexts involving single parents, citing the changing demographics of the average American family, even though right previously only applied to *joint* parenting decisions); *Lulay v. Lulay*, 193 Ill. 2d 455, 479 (2000)).

Illinois courts do not define the liberty interest at stake by reference to the class of people seeking to exercise that liberty interest. *See, e.g., In re D.W.,* 214 Ill. 2d 289, 311 (2005) (the liberty interest of parents in the care, custody and management of their child does not evaporate simply because they have not been model parents); *In re R.C.,* 195 Ill. 2d 291, 303-04 (2001) (in substantive due process challenge brought by mentally impaired parent to a statute's constitutionality, court declined to define the fundamental right in an actor-based way as a "mentally-impaired parent's right to autonomy," but instead considered whether the statute infringed upon the more general liberty interest in parental autonomy); *Helvey v. Rednour*, 86 Ill. App. 3d 154, 158 (5th Dist. 1980) (fundamental right to "engage in family relationships and rear and educate children . . . are conferred upon *all persons*, including the [mentally] retarded"). Similarly, in federal law, the fundamental right to marry could no more be a right to "same-sex marriage" than the right in *Loving,* 388 U.S. 1, was the right to "interracial marriage," or the right in *Zablocki,* 434 U.S. 374, was to "deadbeat parent marriage," or the right in *Turner,* 482 U.S. 78, was to "prisoner marriage."

Intervenor-Defendants' proposed framing makes the same mistake as the U.S. Supreme Court did in *Bowers v. Hardwick,* 478 U.S. 186 (1986), corrected in *Lawrence v. Texas,* 539 U.S. 558 (2003). In a challenge by a gay man to Georgia's sodomy statute, the *Bowers* Court recast the right at stake from a right, shared by all adults, to consensual intimacy with the person of one's choice, to a claimed "fundamental right" of "homosexual sodomy." *Bowers,* 478 U.S. at 191. The Court rejected as "facetious" the idea that such a right is "deeply rooted in this Nation's history and tradition." *Id.* at 194. In overturning this ruling in *Lawrence,* the Supreme Court held that its constricted framing of the issue in *Bowers* "disclose[d] the Court's own failure to appreciate the extent of the liberty at stake." *Lawrence,* 539 U.S. at 567 ("To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it said that marriage is just about the right to have sexual intercourse."). Intervenor-Defendants' attempted distinction between marriage and "same-sex marriage" is likewise a false dichotomy that is no more legally substantial than attempted ones between sodomy and "homosexual sodomy;" marriage and "miscegenation;" a parent and an "unwed parent." This familiar ploy again must be rejected.

Intervenor-Defendants' reliance on *Washington v. Glucksberg,* 521 U.S. 702 (1997) (no fundamental right to assisted suicide) (Def. Br. 3-4) is misplaced. The *Glucksberg* Court focused on liberty interests shared by *all* individuals, rather than just individuals in the majority, and found that the liberty interest advanced for assisted suicide was not grounded sufficiently in history. It is entirely different, and contrary to Illinois and federal law concerning the proper framing of fundamental rights, to describe the liberty interest so narrowly that it excludes a *group of individuals* from sharing a liberty interest. Fundamental rights are by their essence

protective of liberty interests shared by all, and to define them to exclude a class of people subverts the nature of fundamental rights.

In ruling on marriage bans in cases brought by same-sex couples, a few state courts have made the same mistake *Bowers* made (Def. Br. 4, fn. 4); *but see In re Marriage Cases,* 183 P.3d 384, 421 (Cal. 2008); *Varnum v. Brien*, No. CV5965, 2007 WL 2468667 (Iowa Dist. Ct. Aug. 30 2007), *aff'd on other grounds*, 763 N.W.2d 862. These mistakes will end up in the same legal dustbin of history.

Plaintiffs' liberty interests in marital autonomy are no different from other people's interests. Plaintiffs desire deeply that their lifetime commitment be understood fully by others, in a way that only the word "married" conveys, and especially at those moments in life that give many of us the most meaning, or when we are in greatest need. For instance, they fear being considered legal strangers in hospitals (Darby Compl. ¶¶ 5-7, 16-17; Lazaro Compl. ¶¶ 50, 57, 65). They wish their children to understand that they value commitment through marriage (Darby Compl. ¶¶ 5, 7, 8; Lazaro Compl. ¶¶ 25, 36). Plaintiffs' liberty interests in deciding whom to marry without government interference are as profound as for other individuals, and they wish only to exercise the same fundamental right to marry the one person with whom they have fallen in love and built a life.

D. Marriage Is Not A Static Institution, But Has Transformed Over Time To Reflect Society's Evolving Needs And Values.

History and case law do not support Intervenor-Defendants' argument that the meaning of marriage is static or incapable of becoming more inclusive, or that the "essence" of marriage consists of its exclusion of same-sex couples. (Def. Br. 3.) Through court decisions and legislation, marriage laws have undergone significant changes over time and are virtually

unrecognizable from their common law counterparts. *See, generally,* NANCY F. COTT, A HISTORY OF MARRIAGE AND THE NATION (Harvard Univ. Press 2000).

Indeed, marriage has changed so dramatically that an Illinoisan from the time of statehood in 1818 would not recognize the institution today. People who have struggled to make the marriage institution more inclusive have confronted fears voiced by others that a more inclusive version of the institution would diminish its worth, and tarnish it. As with many earlier institutional exclusions, those with access to marriage sometimes feel abstractly that the traditional rules for entry are only natural and without them the institution would lose its essence, adherence, and luster. But no constitutionally-sufficient justifications exist to support these intuitions.

For example, not long ago, a married woman "was regarded as a chattel with neither property nor other rights against anyone, for her husband owned all her property and asserted all her legal and equitable rights." *Brandt v. Keller,* 413 Ill. 503, 505 (Ill. 1952). She had a duty to live with her husband, and had no legal domicile apart from where he lived. *See Babbitt v. Babbitt,* 69 Ill. 277 (1873) (husband "not required to ask [wife's] consent to remove to Michigan" because "he was the master of his own actions, and it was her duty as a faithful and obedient wife to accompany him there"). She could neither enter into contracts nor sue or be sued. *Snell v. Snell,* 123 Ill. 403 (1888); *Love v. Moynehan,* 16 Ill. 277, 280 (1855). She "could not hold separate property in her own right, and her personal-property held at the time of marriage, as well as her future acquisitions, vested absolutely in her husband, [and] also the use of her real estate." *Swift v. Castle,* 23 Ill. 209, *10 (1859).[5] Illinois marriage law also gave

[5] Courts cited a married woman's legal disabilities in denying her a license to practice law. *In re Bradwell,* 1869 WL 5503 (Ill. 1869), *aff'd, Bradwell v. People of State of Illniois*, 83 U.S. 130 (1872) (opining that under English common law, "God designed the sexes to occupy different spheres of action, and that it belonged to men to make, apply and execute the laws, was regarded as an almost

bodily possession of the wife to her husband, exempting him from prosecution for rape.[6] Marriage today is a partnership of equals, and the law's prior insistence on rigid gender roles and subordination of wives has been swept aside. *See Blackston v. Blackston*, 258 Ill. App. 3d 401, 405 (5th Dist. 1994) (noting that as a result of social and legal trends, "the traditional view of marriage is being replaced by the concept that marriage is a partnership between coequals").

Marriage law has seen at least as great a transformation in the context of race. Consistent with most other states at the time, Illinois law denied recognition to marriages of former slaves. In *Butler v. Butler,* 161 Ill. 451, 455-59 (Ill. 1896), which held a slave's marriage to be "null from the beginning," the Illinois Supreme Court noted the consensus of courts around the country that slave marriages "gave rise to no civil rights, and were not binding upon the parties," and that they had "substantially the binding force as, and no more than, marriages between infants at common law . . . or between lunatics or insane persons." By legislation enacted in 1845, Illinois also prohibited marriages between members of different races, declaring void all marriages between whites and blacks, and providing for a criminal penalty that included whipping (not exceeding thirty-nine lashes) and imprisonment of no less than a year. Ill. R.S. Ch. LXIX § 2 (1845).

These racial restrictions on marriage are revolting to us today. But as was true for mandated sex roles, they were widely accepted elements of marriage. In case after case in other states, courts upheld such racial restrictions in reliance on "tradition" rooted in conceptions of

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axiomatic truth," and expressing concern that if a woman were permitted to practice law, it would "tend to destroy the deference and delicacy with which it is the pride of our ruder sex to treat her").

[6] Although the Illinois legislature eliminated some spousal rape exemptions in the 1980's, the spousal exemption continued for some forms of criminal sexual conduct in Illinois until 2004. Ill. P.A. 93-958 (eff. Aug. 2004).

"nature."[7] Long into the twentieth century, the sheer weight of cases accepting the constitutionality of bans on interracial marriage was deemed justification in and of itself to perpetuate these discriminatory laws. *See, e.g., Jones v. Lorenzen*, 441 P.2d 986, 989 (Okla. 1965) (upholding Oklahoma anti-miscegenation law since the "great weight of authority holds such statutes constitutional").[8]

Not until 1948 did a state high court critically examine these traditions, and strike down an anti-miscegenation law as violating rights of due process and equal protection. *Perez*, 198 P.2d 17. In *Perez*, the California Supreme Court acknowledged that these laws were based on the historically "assumed" view that such marriages were "unnatural." *Id.* at 22. But rather than accept this view as sheltering such laws from meaningful constitutional review, the court fulfilled its responsibility to ensure that legislation infringing the fundamental right to marry "must be based upon more than prejudice." *Id.* at 19. In doing so, the court rejected the dissent's assertion, *Perez*, 198 P.2d at 33, 37, 42 (Schenk, J., dissenting), that the legislature's authority to regulate the institution of marriage conferred unchecked power to define who freely may marry one another and who may not. The court understood as well that the long duration of a wrong cannot justify its perpetuation. *Id.* at 26. It was not that the Constitution had changed;

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[7] For example, the Indiana Supreme Court relied on the "undeniable fact" that the "'distribution of men by race and color is as visible in the providential arrangement of the earth as that of heat and cold,'" and that segregation derived not from "'prejudice, nor caste, nor injustice of any kind, but simply to suffer men to follow the law of races established by the Creator himself, and not to compel them to intermix contrary to their instincts.'" *State v. Gibson*, 1871 WL 5021 at *10, 36 Ind. 389, 10 Am. Rep. 42 (1871) (quoting *Philadelphia & West Chester R.R. Co. v. Miles,* 2 Am. L. Rev. 358 (Pa. Sup. Ct. 1867)); *see also Scott v. State*, 1869 WL 1667 at *5, 39 Ga. 321 (1869) ("moral or social equality between the different races . . . does not in fact exist, and never can").

[8] *See, also, Jackson v. City & County of Denver*, 109 Colo. 196, 197, 124 P.2d 240, 241 (1942) ("[i]t has generally been held that such acts are impregnable to the [constitutional] attack here made."); *Naim v. Naim*, 197 Va. 80, 85, 87 S.E.2d 749, 753 (1955) (anti-miscegenation statutes "have been upheld in an unbroken line of decisions in every State [except one] in which it has been charged that they violate" constitutional guarantees), *judgment vacated*, 350 U.S. 891 (1955), *adhered to on remand*, 197 Va. 734, 90 S.E.2d 849 (1956).

rather, its mandates had become more clearly recognized. *Id.* at 19-21, 32 (Carter, J., concurring) ("the statutes now before us never were constitutional"); *see also Lawrence*, 539 U.S. 558, 579 (2003) ("[T]imes can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.").

Two decades after *Perez*, the trial court in *Loving v. Virginia* again expressed the widely held view that different-race marriages were unnatural, socially destructive and against God's will. Nevertheless, the Supreme Court struck down all statutes criminalizing marriage to a person of a different race with strong holdings under both the equal protection and due process guarantees of the Fourteenth Amendment. *Loving*, 388 U.S. at 12. Emphasizing that the choice of ***whom*** to marry is at the heart of this fundamental right and liberty interest, the Court in *Loving* held that "[u]nder our Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State." *Loving*, 388 U.S. at 12.[9]

Marriage today is a vastly changed institution from what it historically was, and yet it remains both a cherished value and the sole universally-understood and respected way in our society of communicating that two people are family, love each other, and have made a lifetime

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[9] Thus, *Loving* cannot be cabined simply as a race discrimination case, as some other courts incorrectly have done in declining to follow its teachings on liberty, *see Lewis v. Harris,* 908 A.2d 196, 210 (N.J. 2006); *Hernandez v. Robles,* 855 N.E.2d 1, 8 (N.Y. 2006); *Andersen v. King County,* 138 P.3d 963, 989 (Wash. 2006). To the contrary, *Loving* was also a "freedom to marry" case, as the Illinois Supreme Court expressly has recognized. *In re B.*, 84 Ill. 2d 323, 327 (1981); *see also McCluskey v. Clark Oil & Refining Corp.*, 147 Ill. App. 3d 822, 825 (Ill. App. Ct. 1986) (characterizing *Loving* as about protection of "personal decisions relating to marriage and family life"). The U.S. Supreme Court itself has emphasized that "[a]lthough *Loving* arose in the context of racial discrimination, prior and subsequent decisions confirm that the right to marry is of fundamental importance for all individuals." *Zablocki,* 434 U.S. at 384.

commitment of mutual responsibility. Thus, as much as marriage has changed, the profound liberty interests in marriage have *not* changed, and are shared by all individuals. Where such liberty interests are at stake, "history and tradition are the starting point but not in all cases the ending point" of the analysis. *Lawrence,* 539 U.S. at 572; *People v. M.D.,* 231 Ill. App. 3d 176, 193 (2nd Dist. 1992) (marital exemption to prosecution for certain sexual offenses violates equal protection and due process guarantees, quoting Oliver Wendell Holmes: "'It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past'").

Here, as with many previous deeply ingrained assumptions about the nature and effects of marriage that have given way over time, the Court is asked to consider the exclusion of same-sex couples and their children from marriage in light of refined understandings of the values at the foundation of our constitutional order and corresponding precedents. Those values, precedents, and the text of the Illinois Constitution similarly compel the Court to end the exclusion of same-sex couples, including the Plaintiff Couples before the Court and their children, from membership in married families.

E. The Marriage Ban Is Subject To Strict Scrutiny.

Because the Marriage Ban infringes upon a fundamental right, it is presumptively unconstitutional and subject to strict scrutiny. *Boynton v. Kusper*, 112 Ill. 2d 356, 368-69 (1986) (tax on marriage licenses was an unconstitutional infringement of fundamental right to marry because it failed to meet strict scrutiny).[10] As discussed in Section III, *infra*, the ban cannot

[10] Plaintiffs' exclusion from marriage violates their fundamental right to privacy and due process protected by Art. I, §§ 2 and 6 of the Illinois Constitution and should be reviewed under strict scrutiny as shown in Section I. However, if this Court considers their privacy claim separately, the inquiry still requires the State to meet a substantial burden to justify an absolute ban on access to marriage. In

survive even the lowest level of review, let alone strict scrutiny, and therefore violates Article I, §§ 2 and 6 of Illinois' Constitution.

II. THE MARRIAGE BAN DENIES SAME-SEX COUPLES EQUAL PROTECTION ON ACCOUNT OF THEIR SEXUAL ORIENTATION AND SEX AND MUST BE REVIEWED UNDER HEIGHTENED SCRUTINY.

The Marriage Ban prevents each of the Plaintiffs from marrying the person they love solely because of their sexual orientation and sex in violation of the Illinois Constitution: Art. I, § 2, which guarantees that no person "shall be denied equal protection of the law"; Art. I, § 18, which guarantees that the "equal protection of the laws shall not be denied or abridged on account of sex"; and Art. IV, § 13, which provides that the "General Assembly shall pass no special or local law when a general law is or can be made applicable." A special legislation challenge is "judged under the same standards applicable to an equal protection challenge," *Crusius v. Illinois Gaming Board*, 216 Ill. 2d 315, 325 (2005), except that this clause expressly prohibits the legislature from conferring a special benefit or privilege upon one person or group while excluding others that are similarly situated. *Allen v. Woodfield Chevrolet, Inc.*, 208 Ill. 2d 12, 22 (2003).

Whether a ban on marriage for lesbian and gay couples is compatible with equal protection is an issue of first impression in Illinois. To date, however, the highest courts in four states have held that statutes barring marriage for same-sex couples violate the equal protection provisions of their state constitutions. *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008); *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008); *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941 (Mass. 2003). Although

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deciding privacy claims, the Illinois Supreme Court assesses the "need for official intrusion" against the weight of the constitutionally protected interest. *In re May 1991 Will Cnty. Grand Jury*, 152 Ill. 2d 381, 392 (1992). Consequently, the fundamental nature of the right to marry must weigh heavily in defining where on the continuum of privacy protections this interest lies. *Caballes*, 221 Ill. 2d at 322.

decisions from other states and federal courts other than the U.S. Supreme Court are not binding on Illinois courts, they are properly examined for their persuasive value. *Kroger v. Dept. of Rev.*, 284 Ill. App.3d 473, 481 (1st Dist. 1996) (state decisions); *International Profit Assocs. v. Linus Alarm Corp.*, 2012 IL App (2d) 110958 (2nd Dist. 2012) (federal decisions). Plaintiffs urge the Court to review those opinions for that purpose (and in particular the careful, comprehensive, and unanimous *Varnum* opinion from the high court of a neighboring State).

This Court should follow the Illinois Supreme Court's direction to not only "assume the dominance of federal law" but also "focus directly on the gap-filling potential of the state constitution." *People v. Caballes*, 221 Ill. 2d 282, 309 (2006); *see, also, e.g., People v. Levin*, 157 Ill. 2d 138, 159 (1993) (independently interpreting Illinois Constitution's Double Jeopardy Clause to apply in non-capital sentencing despite absence of U.S. Supreme Court precedent, because "[t]he question . . . is simply whether our constitution *may be interpreted* to apply" as broadly protective in that context). Here, as demonstrated below, the Illinois Constitution's equal protection, special legislation, and gender discrimination clauses not only "may" — but "must" — be interpreted to bar the blanket exclusion of gay men and lesbians from civil marriage.

Thus, Illinois' equality guarantee is interpreted in ***limited lockstep*** with the federal guarantee of Equal Protection. *People v. Caballes,* 221 Ill. 2d 282 (2006). The limited lockstep analysis considers first whether the federal constitution provides relief. *Caballes*, 221 Ill. 2d at 309. If federal law does not favor the party seeking to invoke its protection, Illinois courts determine whether justification exists to depart from federal interpretation based on the language of the Illinois constitution, debates and committee reports from the constitutional convention, a unique state history, experience, tradition or value, or pre-existing law justifying an independent

interpretation under state constitutional guarantees. *Id.* at 309-10. The Illinois Supreme Court has repeatedly asserted that it is free to interpret the state constitution more broadly than the federal constitution. *See, e.g., id.* at 314; *People v. Emerson*, 189 Ill. 2d 436, 468 (2000); *People v. Krueger*, 175 Ill. 2d 60, 74 (1997); *People v. McCauley*, 163 Ill. 2d 414, 426 (1994).

Under limited lockstep interpretation, unique provisions of the Illinois Constitution such as the gender equality, privacy and special legislation clauses are evaluated independently of federal constitutional decisions. *See Caballes,* 221 Ill. 2d at 289. Even where provisions have federal constitutional parallels, as in the case of equal protection and due process, Illinois courts do not mechanically adhere to federal results and do not abdicate their responsibility to evaluate the evidence and the claims in the case presented for review. *See, e.g., Comm. For Educ. Rights v. Edgar,* 174 Ill. 2d 1, 32-40 (1996). The limited lockstep doctrine does not demand rote application of the results in federal cases to claims under the Illinois Constitution. *See Caballes,* 221 Ill. 2d at 314 ("Th[e] limited lockstep approach is not a surrender of state sovereignty or an abandonment of the judicial function."); *id* at 289-314 (discussing circumstances under which Illinois courts depart from federal results); *McCauley,* 163 Ill. 2d at 436 (1994) ("in the context of deciding State guarantees, Federal authorities are not precedentially controlling; they merely guide the interpretation of State law").

A. Lesbian And Gay Couples Are Similarly Situated To Non-Gay Couples With Respect To The Purposes Of Marriage.

Equal protection "prohibit[s] the government from according different treatment to persons who have been placed by a statute into different classes *on the basis of criteria wholly unrelated to the purpose of the legislation.*" *Jacobson v. Dep't of Public Aid*, 171 Ill. 2d 314, 322 (1996) (emphasis added). A "determination that individuals are similarly situated . . . can only be made by considering the end or purpose of the particular legislation." *People v. Warren*, 173

Ill. 2d 348, 363 (1996). "[T]he similarly situated requirement cannot possibly be interpreted to require plaintiffs to be identical in every way to people treated more favorably by the law[,]" without "hollow[ing] out the constitution's promise of equal protection." *Varnum*, 763 N.W.2d at 883.

Gay and lesbian couples are similarly situated to heterosexual couples in every respect that is relevant to the purposes of marriage. *In re Marriage of Reynard*, 344 Ill. App. 3d 785, 792 (4th Dist. 2003) ("Marriage is a moral and financial partnership of coequals."); *Griswold*, 381 U.S. at 486 ("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"); *Turner*, 482 U.S. at 95-96 (even where prisoner had no right to conjugal visits and therefore no possibility of consummating marriage or having children, "[m]any important attributes of marriage remain"). "Plaintiffs are in committed and loving relationships, many raising families, just like heterosexual couples." *Varnum*, 763 N.W.2d at 883-84; *accord Marriage Cases*, 183 P.3d 384, 435 n.54 (Cal. 2008); *Kerrigan*, 957 A.2d at 423-24 & n.19.

B. The Marriage Ban Discriminates On The Basis Of Sexual Orientation In Violation Of Art. I, § 2 And Art. IV, § 13 Of The Illinois Constitution And Must Be Reviewed Under Heightened Scrutiny.

1. The Marriage Ban discriminates based on sexual orientation.

According to Intervenor-Defendants, the Marriage Ban does not discriminate based on sexual orientation because a lesbian or gay person could choose to marry someone of a different sex. (Def. Br. 16.) Intervenor-Defendants ignore the core, ordinary meaning of sexual orientation, and that the act of falling in love with a person of the same sex, and the decision to marry and build a life with that person, are expressions of sexual orientation. As a matter of law, courts have rejected such efforts to deny that laws targeting conduct closely associated with

being gay or lesbian are laws classifying persons based on their sexual orientation. *Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez,* 130 S.Ct. 2971, 2990 (2010) ("*CLS*"), quoting *Lawrence,* 539 U.S. at 575 ("When homosexual *conduct* is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual *persons* to discrimination" (emphasis added)).

As Justice O'Connor explained in *Lawrence* (concurring in the judgment on equal protection grounds), "[w]hile it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual," so that "[t]hose harmed by this law are people who have a same-sex sexual orientation." *Id.* at 581, 583. And more recently, the Supreme Court reiterated that a prohibition on same-sex intimate conduct is no different from discrimination against gay people, refusing "to distinguish between status and conduct in this context." *Christian Legal Society Chapter v. Martinez*, 130 S. Ct. 2971, 2990 (2010). *Cf. Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) ("A tax on wearing yarmulkes is a tax on Jews.").

The Marriage Ban does not have "merely a disparate impact" on gay persons as Intervenor-Defendants contend (Def. Br. 16), but instead directly classifies and prescribes "distinct treatment on the basis of sexual orientation." *Marriage Cases*, 183 P.3d at 440-41. The exclusion is categorical, preventing *all* lesbian and gay couples from marrying consistent with their sexual orientation, while not preventing *any* heterosexual couples from marrying consistent with their sexual orientation. Thus, the discrimination does not need to "be traced back to a discriminatory purpose or intent" in the legislative history, as Intervenor-Defendants contend. (Def. Br. 17.) Where, as here, the statute's discriminatory effect is more than "merely disproportionate in impact," but rather affects everyone in a class and "does not reach anyone

outside that class," a showing of discriminatory intent is not required. *See M.L.B. v. S.L.J.*, 519 U.S. 102, 126-128 (1996).

2. Classifications based on sexual orientation warrant heightened scrutiny.

The proper level of scrutiny depends "on the nature of the statutory classification involved." *Jacobson*, 171 Ill. 2d at 322-23. Certain classifications carry a particularly high risk of being employed illegitimately and are therefore treated as "suspect" or "quasi-suspect." *See United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938). The U.S. Supreme Court and Illinois Supreme Court have "***so far*** . . . given the protection of heightened equal protection scrutiny" to classifications based on race, sex, illegitimacy, religion, alienage, and national origin. *Romer*, 517 U.S. at 629 (emphasis added); *see also Jacobson*, 171 Ill. 2d at 322-23.

Classifications based on sexual orientation also warrant heightened equal protection scrutiny. Neither the U.S. Supreme Court nor any Illinois appellate court has decided which level of scrutiny is applicable to classifications based on sexual orientation.[11] Like the courts in *Varnum*, *Kerrigan*, *Marriage Cases*, *Windsor v. United States*, 699 F.3d 169, 185 (2d Cir. 2012), *petition for cert. granted*, 81 U.S.L.W. 3116 (Dec. 7, 2012); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010); *Golinski v. U.S. Office of Personnel Mgmt.*, 824 F. Supp. 2d 968, 989-990 (N.D. Cal. 2012), *petition for cert. filed* (July 3, 2012) (No. 12-16); and *Pedersen v. Office of Personnel Mgmt.*, 2012 WL 3113883 (D. Conn. July 31, 2012), *petition for cert. filed* (Sept. 11, 2012) (No. 12-302), this Court should conclude that "legislative classifications based

[11] In *Romer*, 517 U.S. at 631-32, holding that an anti-gay initiative violated the Equal Protection Clause, the Court did not decide whether heightened scrutiny should apply because the discrimination lacked even "a rational relationship to legitimate state interests" and thus was "inexplicable by anything but animus towards the class it affects."

on sexual orientation must be examined under a heightened level of scrutiny." *Varnum*, 763 N.W.2d at 896.

Although there is no rigid formula, the U.S. Supreme Court consistently considers two factors to determine whether a classification warrants heightened scrutiny — (1) whether a classified group has suffered a history of invidious discrimination, and (2) whether the classification reflects the ability to contribute to society. The Court also has sometimes considered two additional factors — (3) whether the characteristic is immutable or an integral part of a person's identity, and (4) whether the group is a minority or lacks sufficient power to protect itself in the political process. *See Windsor*, 699 F.3d at 182-85; *Varnum*, 763 N.W.2d at 887-88 (analyzing federal precedent while interpreting state constitution); *Kerrigan*, 957 A.2d at 426 (same); *Marriage Cases*, 183 P.3d at 442-43 (analyzing parallel factors to the federal test).

These factors are applied flexibly. While the Court "has placed far greater weight" on the first two factors (*Kerrigan*, 957 A.2d at 426), no single factor is dispositive, and each can serve as a warning sign that a particular classification "provides no sensible ground for differential treatment" (*Varnum*, 763 N.W.2d at 888), or is "more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective." *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982). Intervenor-Defendants have generally disregarded these factors, which Plaintiffs now address in turn.

a. There is a long history of invidious discrimination against gay men and lesbians.

Suspect classifications are characterized by "a history of the relegation of the class to an inferior status." *In re Roger B.*, 84 Ill. 2d 323, 334 (1981). That is certainly true of gay men and lesbians in this country. *See Lawrence*, 539 U.S. at 570-71 (detailing history of proscriptions against same-sex intimacy); *Windsor,* 699 F.3d at 181-85; *Marriage Cases*, 183 P.3d at 442

(describing "history of legal and social disabilities" associated with sexual orientation); *Varnum*, 763 N.W.2d at 889 (same); *Kerrigan*, 957 A.2d at 432-33 (same).

Lesbian and gay people have been barred from public employment[12] and subjected to violence.[13] Congress's "Don't Ask, Don't Tell" policy resulted in the discharge of more than 13,000 service men and women from the military[14] and was rescinded less than two years ago.[15] State laws have served to "demean" gay and lesbian people "by making their private sexual conduct a crime," with such conduct being decriminalized only recently in many States. *Lawrence*, 539 U.S. at 578-79. As Judge Posner has described, the prevailing attitude for centuries toward gay people has been "one of strong disapproval, frequent ostracism, social and legal discrimination, and at times ferocious punishment." R. Posner, SEX AND REASON 291 (1992).

Illinois' recognition of civil unions does not represent an end to this history of discrimination but perpetuates it. *See, e.g.*, *Kerrigan*, 957 A.2d at 418 ("there is no doubt that civil unions enjoy a lesser status in our society than marriage"); *Perry*, 704 F. Supp. 2d at 993-

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[12] *See, e.g.*, Brad Sears *et al.*, The Williams Institute, *Documenting Discrimination on the Basis of Sexual Orientation and Gender Identity in State Employment*, ch. 5 at 2-5 (federal employment), 18-34 (state and local government), September 2009, available at http://williamsinstitute.law.ucla.edu/research/workplace/documenting-discrimination-on-the-basis-of-sexual-orientation-and-gender-identity-in-state-employment; Williams Institute, *Illinois — Sexual Orientation and Gender Identity Law Documentation of Discrimination*, September 2009.

[13] Over 20% of all hate crimes reported to the FBI in 2011 resulted from "sexual orientation bias," the second highest category nationally, FBI, *Hate Crime Statistics 2011*, available at http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2011/tables/table-1, and in Illinois. FBI, *Hate Crime Statistics 2011, Table 13, Illinois,* available at http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2011/tables/table-13-1/table-13-illinois.

[14] *See* Dep't of Defense, *Report of the Comprehensive Review of the Issues Associated with a Repeal of "Don't Ask, Don't Tell,"* at 23 (Nov. 30, 2010), available at http://tinyurl.com/3by3olg

[15] The Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3516 (2010), triggered a process that culminated on September 20, 2011, with the official end of Don't Ask, Don't Tell.

94. The civil union status tells the world that couples so designated are "second class units unworthy of the term 'marriage' [and thus] less important family relationships." Michael Wald, *Same Sex Couple Marriage: A Family Policy Perspective*, 9 Va. J. Soc. Pol'y & L. 291, 338 (2001); see *Brown v. Board of Educ.*, 347 U.S. 483, 494 (1954) ("separate but equal" laws denote "inferiority"). Heightened scrutiny should apply where "members of an identifiable victim group reasonably understand [civil union] laws as branding them and their relationships as second-class." Michael C. Dorf, *Same-Sex Marriage, Second-Class Citizenship, and Law's Social Meanings*, 97 Va. L. Rev. 1267, 1344 (2011).

b. Sexual orientation has no bearing on ability to contribute to society.

Heightened scrutiny is generally warranted when the classification at issue "bears no relation to ability to perform or contribute to society." *See, e.g., Frontiero v. Richardson*, 411 U.S. 677, 686 (1973); *Varnum*, 763 N.W.2d at 890. The presence of this factor "indicates the classification is likely based on irrelevant stereotypes and prejudice." *Id.* Classifications based on sexual orientation similarly provide "no sensible ground for differential treatment." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985). The defining characteristic of gay men and lesbians — attraction to persons of the same sex — "bears no logical relationship to their ability to perform in society, either in familial relations or otherwise as productive citizens." *Kerrigan*, 957 A.2d at 432. It is not surprising, then, that "none of the same-sex marriage decisions from other state courts around the nation have found a person's sexual orientation to be indicative of the person's general ability to contribute to society." *Varnum*, 763 N.W.2d at 890; *see also Golinski*, 824 F. Supp. 2d at 983.

The Illinois Legislature has made clear that sexual orientation is not relevant to a person's ability to contribute to society by, for example, barring discrimination based on sexual

orientation in employment, housing, access to financial services, and the issuance of professional licenses in numerous occupational fields. *E.g.*, 775 ILCS §§ 5/2-102, 5/3-102; 5/4-101; 225 ILCS §§ 55/30, 106/65, 745/50, 37/27, 20/7, 20/11, 443/30, 107/50. Indeed, Illinois's Civil Union Act, while not granting same sex unions the full dignity accorded to marriage, nonetheless recognizes that gay couples are as capable of forming permanent family relationships that are worthy of the State's protection as different-sex couples. *See* 750 ILCS § 75/20.

c. Sexual orientation is an immutable or integral part of a person's identity.

The presence of "an immutable characteristic determined solely by the accident of birth" often supports heightened scrutiny of discriminatory classifications. *Roger B.*, 84 Ill. 2d at 334, quoting *Frontiero v. Richardson*, 411 U.S. 677, 684-86 (1973). "[W]hen a characteristic is immutable, different treatment based on this characteristic seems 'all the more invidious and unfair.'" *Varnum*, 763 N.W.2d at 892, quoting Nan D. Hunter, *The Sex Discrimination Argument in Gay Rights Cases*, 9 J. L. & Pol'y 397, 403 (2001).

Immutability is, however, neither a necessary nor a sufficient factor. The Supreme Court has rejected claims of heightened scrutiny for groups that are defined by immutable characteristics and granted it for classifications that are not. *See Cleburne*, 473 U.S. at 442 n.10 (classifications based on disability are not subject to heightened scrutiny even though some disabilities are immutable); *Nyquist v. Mauclet*, 432 U.S. 1, 9 n.11 (1977) (alienage classifications are subject to heightened scrutiny although aliens may be able to naturalize); *Kerrigan*, 957 A.2d at 427 n.20 (the U.S. Supreme Court has frequently omitted any reference to "immutability" when describing the heightened-scrutiny test).

But assuming that immutability is a relevant factor, it certainly supports heightened scrutiny of classifications based on sexual orientation. As the U.S. Attorney General told

Congress, "a growing scientific consensus accepts that sexual orientation is a characteristic that is immutable." *Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act*, Feb. 23, 2011,[16] citing Posner, SEX AND REASON, *supra*, at 101; *see also* Brief for the United States on the Merits Question, at 31-32, filed in *United States v. Windsor*, No. 12-307 (S. Ct.), Feb. 27, 2013[17] ("the broad consensus in the scientific community is that, for the vast majority of people (gay and straight alike), sexual orientation is not a voluntary choice . . . and that efforts to change an individual's sexual orientation are generally futile and potentially dangerous to an individual's well-being").

Moreover, regardless of whether sexual orientation is biologically determined, it is "immutable" for purposes here. The fundamental question is not whether a characteristic is theoretically alterable, but whether, as courts have held, "sexual orientation is so integral an aspect of one's identity [that] it is not appropriate to require a person to repudiate or change his or her sexual orientation in order to avoid discriminatory treatment." *Kerrigan*, 957 A.2d at 384, 442; *accord Marriage Cases*, 183 P.3d at 384, 442; *Varnum*, 763 N.W.2d at 893. The U.S. Supreme Court has made clear that gay men and lesbians cannot be required — any more than heterosexuals — to sacrifice this central part of their identity. *See Lawrence*, 539 U.S. at 574 ("Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.").

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[16] Available at http://www.justice.gov/opa/pr/2011/February/11-ag-223.html.

[17] Available at http://www.aclu.org/files/assets/12-307tsunitedstates1.pdf

d. Gay men and lesbians are a minority without sufficient power to protect themselves against their discriminatory exclusion from marriage.

In determining whether heightened scrutiny is appropriate, the U.S. Supreme Court has sometimes but not always considered whether the classification relates to "minorities who are relatively powerless to protect their interests in the political process." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 105 (1973); *see Carolene Prods.*, 304 U.S. at 153 n.4 (heightened scrutiny is warranted when majority prejudice "curtail[s] the operation of those political processes ordinarily to be relied upon to protect minorities").

This test is applied disjunctively, and "is satisfied upon a showing *either* that the group is a minority *or* that it lacks political power." *Kerrigan*, 957 A.2d at 439 (emphasis in original). For example, heightened scrutiny applies to classifications based on sex even though women are not a minority, and to classifications based on national origin without any inquiry into whether a particular nationality lacks political power. *See Frontiero*, 411 U.S. at 686 n.17 (although women are not a minority, they are "vastly underrepresented in this Nation's decisionmaking councils"). And "heightened scrutiny is applied to statutes that discriminate against men and against Caucasians," even though men as a group do not lack political power, and Caucasians are not a minority. *Kerrigan*, 957 A.2d at 441; *see Adarand Constructors v. Pena*, 515 U.S. 200 (1995).

Gay men and lesbians unquestionably represent a distinct minority of the population,[18] and they experience more than enough political disadvantages to merit the protection of heightened scrutiny. *See Kerrigan*, 957 A.2d at 432. Intervenor-Defendants assert that "[t]he

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[18] See Gary J. Gates, *How Many People Are Lesbian, Gay, Bisexual, and Transgender?* (April 2011), available at http://williamsinstitute.law.ucla.edu/research/census-lgbt-demographics-studies/how-many-people-are-lesbian-gay-bisexual-and-transgender.

notion that Illinois gay men and lesbians are 'politically powerless' is risible" in light of the widespread enactment of human rights and hate crimes statutes. (Def. Br. 20 n.15.)[19] But the U.S. Supreme Court has never deemed the political powerlessness factor to mean that a group cannot secure *any* protections for itself through the normal political process. "Rather, the touchstone of the analysis should be 'whether the group lacks sufficient political strength to bring a prompt end to the prejudice and discrimination through traditional political means.'" *Varnum*, 763 N.W.2d at 894, quoting *Kerrigan*, 957 A.2d at 444.

If the passage of protective legislation sufficed to show that gay men and lesbians are not politically powerless, courts could not have found sex to be a suspect classifications. Women had achieved significantly more through the political process when the Supreme Court first heightened its scrutiny of gender classifications than have lesbians and gay men today. *Windsor*, 699 F.3d at 184; *Kerrigan*, 957 A.2d at 452-53. Furthermore, race and gender continue to be suspect classifications even though the political power of racial minorities and women has advanced (as evidenced by the current President and the just-departed Secretary of State). *Windsor*, 699 F.3d at 209-211. Notwithstanding advances, "gay and lesbian people are not so politically powerful as to overcome the unfair and severe prejudice that history suggests produces discrimination based on sexual orientation." *Varnum*, 763 N.W.2d at 895; *accord Kerrigan*, 957 A.2d at 461.

Moreover, in addition to the laws that benefit the gay and lesbian community, many laws demonstrate continuing antipathy toward lesbians and gay men, particularly in the realm of family rights — *e.g.*, the Illinois Marriage Ban and the federal Defense of Marriage Act, 28 U.S.C. § 1738C. And even where gay men and lesbians have secured basic protections in state

[19] This is the only mention by Intervenor-Defendants of any of the factors relevant to the applicability of heightened scrutiny.

courts and legislatures, opponents have aggressively turned to state ballot initiatives and referenda to repeal laws or even amend state constitutions. Thus, although a majority of Americans (59%) now support marriage for same-sex couples,[20] 39 states have passed statutes or constitutional amendments restricting marriage to different-sex couples.[21] Further, efforts to obtain protection on the federal level from discrimination in such critical areas as housing, employment, public accommodation, and education have failed repeatedly. For example, Congress has not adopted proposed legislation aimed at protecting gay men and lesbians from employment discrimination, even though 89% of Americans favor such protection.[22]

Intervenor-Defendants point to federal decisions rejecting heightened scrutiny. (Def. Br. 19-20.) But those decisions either did not analyze whether gay men and lesbians constitute a suspect or quasi-suspect class or they reflect the U.S. Supreme Court's erroneous decision in *Bowers*, which for over a quarter-century weighed heavily against the recognition that gay men and lesbians are entitled to judicial protection against discrimination.[23] Since *Lawrence* overruled

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[20] *See* Gary Langer, *Poll Tracks Dramatic Rise In Support for Gay Marriage* (Mar. 18, 2013), available at http://abcnews.go.com/blogs/politics/2013/03/poll-tracks-dramatic-rise-in-support-for-gay-marriage/.

[21] See National Conference Of State Legislatures, *Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws*, (March 2013), available at http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx. Nine states and the District of Columbia currently allow same-sex couples to marry, either by court decree or legislation. *Id.*

[22] Gallup, *Gay and Lesbian Rights*, available at http:// http://www.gallup.com/poll/1651/gay-lesbian-rights.aspx.

[23] The federal appellate cases cited by Intervenor-Defendants in support of the claim that sexual orientation should not be afforded heightened scrutiny are not persuasive. Most of the cases cited rely directly or indirectly on *Bowers*, 478 U.S. at 196, *overruled by Lawrence*, 539 U.S. at 578, for the proposition that sexual orientation could not constitute a suspect classification because intimate same-sex activity could itself be criminalized. *See, e.g., Equality Found. of Greater Cincinnati Inc. v. Cincinnati*, 54 F.3d 261, 265-67 & n.2 (6th Cir. 1995), *vacated and remanded*, 518 U.S. 1001 (1996); *Steffan v. Perry*, 41 F.3d 677, 685 n.3 (D.C. Cir. 1994) (en banc) (citing *Padula v. Webster*, 822 F.2d 97, 103-04 (D.C. Cir. 1987)); *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989). Some of the post-

Bowers in 2003, the highest courts of Iowa, Connecticut, and California, as well as one federal circuit and three federal district courts, all have found that lesbians and gay men constitute a suspect or quasi-suspect class. Illinois courts likewise should recognize that discrimination based on sexual orientation is suspect or quasi-suspect and should be closely scrutinized.

C. The Marriage Ban Discriminates On The Basis Of Sex.

The Marriage Ban discriminates on the basis of sex both because (1) the law facially discriminates on the basis of sex; and (2) the law impermissibly requires Plaintiffs to conform to sex stereotypes. Plaintiffs' sex discrimination claim under Art. I, sec. 18, "must be interpreted without reference to a federal counterpart," *Caballes*, 231 Ill. 2d at 289, because Illinois' gender discrimination clause has no analogue in the U.S. Constitution. *Ellis*, 57 Ill. 2d 127, 133 (1974).

1. The Marriage Ban is a discriminatory sex-based classification.

The Marriage Ban, on its face and as applied, discriminates on the basis of sex. Each Plaintiff would be able to marry his or her partner if the Plaintiff were of a different sex. Consequently, Plaintiffs' own sex precludes them from marrying an individual of their choosing. A law that restricts marriage based on a person's sex is facially discriminatory. *See Baehr v. Lewin*, 852 P.2d 44, 64 (Haw. 1993) (Hawaii marriage statute "on its face and as applied, regulates access to the marital status and its concomitant rights and benefits on the basis of the applicants' sex.").[24] *See also Perry*, 704 F. Supp.2d at 996; *Goodridge*, 798 N.E.2d at 971

Lawrence cases follow pre-*Lawrence* precedent without questioning its authority. *See, e.g., Price-Cornelison v. Brooks*, 524 F.3d 1103, 1113-14 & n.9 (10th Cir. 2008); *Scarborough v. Morgan Cnty. Bd. of Educ.*, 470 F.3d 250, 261 (6th Cir. 2006); *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 818 & n.16 (11th Cir. 2004). The remaining cases offer no analysis of whether gay men and lesbians constitute a suspect class under the four-factor analysis. *See, e.g., Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004); *Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 950-51 (7th Cir. 2002).

[24] Initially, *Baehr* was a plurality decision of two of the five judges, with a third judge concurring on different grounds, and the case was ordered remanded for trial to determine whether the state had a compelling justification for the exclusion. Before the case was remanded, however, one of the two

(Greaney, J. concurring) ("self-evident" that marriage ban was a "sex based" classification); *Baker v. Vermont*, 744 A.2d 864, 906 (Vt. 1999) (Johnson, J, concurring in part and dissenting in part); *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743, at *6 (Alaska Super. Ct. Feb. 27, 1998), *superseded by* Alaska Const. Art. I. § 25.[25]

Intervenor-Defendants nonetheless contend that the Marriage Ban treats "men and women equally" because it denies the right to marry both to men (who wish to marry men) and women (who wish to marry women). (Def. Br. 14.) The Illinois Appellate Court rejected this "equal application" theory over thirty years ago in *Wheeler v. City of Rockford*, 69 Ill. App. 3d 220 (2d. Dist. 1979), upholding a Section 18 equal protection challenge to an ordinance that made it "unlawful for any person holding a permit under this section to [massage] a person of the opposite sex." *Id.* at 222. Although the ordinance applied "equally" to men (who were prohibited from massaging women) and women (who were prohibited from massaging men), the ordinance created an impermissible gender-based classification:

> The basis on which [the ordinance] operates is through a consideration of sex. Under the terms of the ordinance men are forbidden to massage women and women are forbidden to massage men. The sole consideration in determining whether a massage may be given is whether the person massaging is of a class of persons allowed to massage a specific customer; that is to say, the basis for allowing or refusing the right to give a massage is determined solely on whether the person massaging and the customer are of the same gender. We conclude that [the ordinance] creates a classification based on sex the same as it would create a

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dissenting judges was replaced, and the Court then ruled that on remand the trial would be conducted "consistently with the plurality opinion," which thereby became the opinion of the court. 852 P.2d at 74. Intervenor-Defendants' assertion that "a majority of the court . . . did *not* hold that the state law reserving marriage to opposite-sex couples was subject to the strict scrutiny standard of review," (Def. Br. at 11) (emphasis in the original), is wrong.

[25] Intervenor-Defendants state that federal courts reviewing Defense of Marriage Act ("DOMA") challenges have rejected sex discrimination arguments, (Def. Br. at 10, but at least one court did not. *See In re Brad Levenson*, 560 F.3d 1145, 1147 (9th Cir. 2009) (holding that DOMA discriminates on the basis of sex).

> classification based on race if it prohibited members of one race from massaging members of another race.

Id. (citing *Loving v. Virginia*, 388 U.S. 1, 2 (1967)); *see, also, People v. Rivera*, 348 Ill.App.3d 168, 178-79 (1st Dist. 2004) (court treated counsel's explanation that he was attempting to bring "gender balance" to the jury as evidence of sex discrimination in jury selection); *but see Steffa v. Stanley,* 39 Ill. App. 3d 915 (2nd Dist. 1976), *abrogated by Cates v. Cates*, 156 Ill. 2d 76 (1993), *disapproved by Moran v. Beyer*, 734 F.2d 1245 (7th Cir. 1983). The Marriage Ban likewise "creates a classification based on sex."

Moreover, well before *Wheeler*, the U.S. Supreme Court rejected on multiple occasions Intervenor-Defendants' "equal application" argument. For example, in *McLaughlin v. Florida*, 379 U.S. 184 (1964), the U.S. Supreme Court overruled *Pace v. Alabama*, 106 U.S. (16 Otto) 583, 585 (1883) (holding that enhanced penalties for sex by interracial couple not race discrimination because "all who committed it, white and Negro, were treated alike") to hold that a race-related anti-cohabitation law was an unconstitutional racial classification even though the law applied equally to white and black persons. *McLaughlin* 379 U.S. at 192-93.

In overruling *Pace*, the Court recognized the longstanding principle that constitutional rights are *individual* rights, not class rights. *See id.* at 190 n.8 (noting the "manifest inadequacy of any approach requiring only equal application to the class defined in the statute"); *see also Shelley v. Kraemer*, 334 U.S. 1 (1948) (rejecting defense of equal enforcement of racially restrictive covenants against white persons as well as "colored persons"). Recognizing that "[t]he rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual" and "are personal rights," the Court concluded that "[i]t is . . . no answer to these petitioners to say that the courts may also be expected to deny white persons rights of ownership and occupancy on grounds of race or color. Equal protection of the law is

not achieved through indiscriminate imposition of inequalities." *Id.* at 22. Similarly, in *Loving*, the Court overturned a penalty on interracial marriage by again rejecting the "equal application" argument and recognizing that the right to equal protection is an individual, rather than class-based right. 388 U.S. at 8; *see also Bob Jones Univ. v. United States*, 461 U.S. 574, 605 (1983) (prohibition on men and women of different races associating or marrying unconstitutional despite equal application).[26]

Intervenor-Defendants cannot cabin *McLaughlin* and *Loving* on the theory that those cases addressed race, not sex. (Def. Br. 12.) *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (striking down peremptory challenges based on gender-based assumptions as to *both* sexes, despite equal application of the rule as to men and women: "All persons, when granted the opportunity to serve on a jury, have the right not to be excluded summarily because of discriminatory and stereotypical presumptions that reflect and reinforce patterns of historical discrimination."); *see also Califano v. Westcott*, 443 U.S. 76, 83-85 (1979) (classification can be sex-based even if the effects of its application are felt equally by men and women).[27]

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[26] Intervenor-Defendants' attempt to distinguish anti-miscegenation statutes, which "were intended to keep persons of *different* races *separate*," from marriage statutes, which "are intended to bring persons of the *opposite* sex *together*," (Def. Br. 13), creates a false distinction, and ignores that laws are racial classifications regardless of whether they integrate or segregate on the basis of race, *e.g., Parents Involved in Community Schools v. Seattle School Dist. No.* 1, 551 U.S. 701 (2007), even though there are often compelling governmental interests served laws intended to racially integrate.

[27] To argue that sex classifications are treated differently from racial classifications, Intervenor-Defendants cite cases involving sex-segregated schools and sports teams. (Def. Br. 12.) These cases support plaintiffs, however, since the courts recognize the discrimination involved in the segregation, even though two of them found that governmental interests justified the discrimination, *Vorchheimer v. School Dist. Of Philadelphia*, 532 F.2d 880 (3d Cir. 1976), *aff'd by equally divided Court*, 430 U.S. 703 (1977) (discrimination justified because "adolescents may study more effectively in single-sex schools"); *O'Connor v. Board of Educ. of Sch. Dist. No. 23*, 645 F.2d 578, 582 (7th Cir. 1981) (discrimination justified to prevent male domination of sports and maximize participation in sports). The court in *Force by Force v. Pierce City R-VI School Dist.*, 570 F. Supp. 1020, 1026, 1031-32 (W.D. Mo. 1983), recognized that other courts had relied on these justifications, but rejected them and ordered a school district to allow a girl to try out for her school's boys football team. The sex segregation in Philadelphia public schools was subsequently struck down as a violation of

Intervenor Defendants further argue that the Marriage Ban was not enacted with "an intent to discriminate against either men or women." (Def. Br. 13.) But the U.S. Supreme Court in *Loving* found the challenged Virginia marriage provision to be unconstitutional "even assuming an even-handed state purpose to protect the 'integrity' of all races." *Loving*, 388 U.S. at 12 n.11. Here, too, where the Marriage Ban bars persons from exercising their right to marry based solely on the sex of each Plaintiff the provision discriminates on account of sex, even assuming an "even-handed state purpose." Similarly, in *Johnson v. California*, 543 U.S. 499, 506 (2005), the Court found that California's "racially neutral" practice of segregating inmates by race when first incarcerated to avoid racial violence was a race classification that had to be reviewed under strict scrutiny, notwithstanding the fact that prison officials were not singling out one race for differential treatment.[28]

2. The Marriage Ban discriminates on the basis of gender stereotypes.

The Marriage Ban perpetuates and enforces stereotypes regarding the expected and traditional roles of men and women: men marry and create families with women; women marry and create families with men. With discrimination obvious on the face of the statute and in application, there is no need to search for discriminatory purpose. Nevertheless, the

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Pennsylvania's gender equality Constitutional provision. *See Newberg v. Bd. Of Pub. Educ.*, 26 Pa. D. & C.3d 682, 710 (Pa. Com. Pl. 1983).

[28] Intervening-Defendants argue, based on a comment from the sponsor of Article I, § 18, that this provision is solely "guarantee[ing] rights for females equal to those of males[,]"(Def. Br. at 14) (quoting *People v. Ellis*, 57 Ill. 2d 125, 130 (1974)), and does not include the gender-based exclusion in the Marriage Ban. This cramped understanding of Section 18 ignores its plain language, which makes clear that "[t]he equal protection of the laws" — all laws, including marriage laws — "shall not be denied or abridged on account of sex." *See Maddux v. Blagojevich*, 233 Ill. 2d 508, 523 (2009) ("Where the words of the constitution are clear, explicit, and unambiguous, there is no need for a court to engage in construction."). Moreover, the Illinois Supreme Court has repeatedly extended to protections of Section 18 to men, notwithstanding the sponsor's statement that the provision was intended to protect women. *See, e.g., Estate of Hicks*, 174 Ill. 2d 433 (1996); *Phelps v. Bing*, 58 Ill. 2d 32, 35 (1974); *People v. Ellis*, 57 Ill. 2d 127, 133 (1974).

impermissible purpose of blocking departures from sex stereotypes is evident from briefs submitted by Intervenor-Defendants and their *amici*. *See, e.g.*, Def. Br. 23 (proposed rationale for Marriage Ban — to encourage "dual-gender parenting" — assumes that men and women parent differently, and is premised on the expected roles of men as providers and women as nurturers).[29]

Under established Illinois law, when the government imposes restrictions on participation by men and women in civil society based on sex stereotypes, it is a form of unlawful sex discrimination. *See, e.g., Estate of Hicks*, 174 Ill. 2d 433, 442 (1996) (striking section of Probate Act favoring mothers of illegitimate children who died intestate, finding that the law was impermissibly "based on upon the presumption that a particular parent will be involved or uninvolved in his illegitimate child's life simply because that parent happens to be a man or woman"); *People v. Hudson,* 195 Ill. 2d 117, 130-31 (2001) (the law condemns invidious sex stereotypes about men and women); *People v. Blackwell,* 171 Ill. 2d 338, 355 (1996) (rejecting stereotyped justifications behind gender exclusions "that men . . . might be more sympathetic and receptive to the arguments of a man alleged in a paternity action to be the father of an out-of-wedlock child, while women . . . might be more sympathetic and receptive to the arguments of the complaining witness who bore the child").

The U.S. Supreme Court has reached the same conclusion. *See, e.g., J.E.B.*, 511 U.S. at 128 ("equal protection right to jury selection procedures that are free from state-sponsored group

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[29] *See, also,* Memorandum *Amicus Curiae* of the Catholic Conference of Illinois *et al.* at 1, 3 (referring to the "complementary nature of men and women," and roles of men and women as "helpmates"); *Amicus* Brief of Illinois Family Institute, at 6, 9 (advocating for "gender-differentiated parenting," and theorizing that marriage is necessary to make parents — but "particularly fathers" take responsibility for their children); Brief of *Amici Curiae* The Moody Church *et al.,* at 5, 11 ("mothers and fathers contribute in gender specific and gender complementary ways," and marriage provides "social pressures and incentives for husbands [but not wives] to remain with their wives and children"

stereotypes rooted in, and reflective of, historical prejudice"); *Westcott*, 443 U.S. at 89 (program that provided benefits to children of unemployed fathers but not unemployed mothers was "part of the 'baggage of sexual stereotypes'" and violated equal protection); *Stanley v. Illinois*, 405 U.S. 645 (1972) (presumption that unmarried father was unfit violated due process and equal protection); *see also Knussman v. Maryland*, 272 F.3d 625, 629-30, 642-43 (4th Cir. 2001) (rejecting employer's rationale for denying FMLA leave as a "primary care giver" to a man — that "God made women to have babies and, unless [employee] could have a baby, there is no way he could be primary care giver.").[30]

Illinois has taken steps over the years to change its marriage laws to overcome the sex stereotypes on which some aspects of those laws have been based. *See* Section I.D., *supra.* Despite these and other changes to Illinois marriage laws over the years, the Marriage Ban's classification on the basis of sex is founded on and continues to reinforce "overbroad generalizations about the different talents, capacities, or preferences of males and females," *VMI*, 518 U.S. at 533, and should, therefore, be stricken.

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[30] Courts have recognized that lesbians and gay men often face sex discrimination from the enforcement of sex-role stereotypes in schools and workplaces. *See, e.g.*, *Doe v. Brimfield Grade Sch.*, 552 F. Supp. 2d 816, 823 (C.D. Ill. 2008) (school responded to boy's complaints after being repeatedly struck in the testicles by other children, telling him to "toughen up and stop acting like a little girl"); *Prowel v Wise Bus. Forms, Inc.*, 579 F.3d 285, 291 (3d Cir. 2009) (gay male employee harassed because his appearance, behavior, and demeanor were not stereotypical of males); *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1068 (9th Cir. 2002) (male coworkers would caress, fondle and blow kisses at the male harassment victim 'the way . . . a man would treat a woman"); *Koren v. Ohio Bell Tel. Co.*, 2012 WL 3484825, at *5 (N.D. Ohio Aug. 14, 2012) (boss "harbored ill-will" towards male employee causing his termination because employee failed to conform to gender stereotypes by taking his husband's last name upon marriage); *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002) (in suit by gay employee whose co-workers mocked him as effeminate and implied he was gay, court recognized that "stereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women" and "the gender stereotype at work here is that 'real' mean should date women, and not other men").

3. Gender-based classifications are reviewed under strict scrutiny.

Under the Illinois Constitution, gender-based classifications such as the Marriage Ban's exclusion of same-sex couples from marriage are reviewed under strict scrutiny, rather than the intermediate level of scrutiny they received under the U.S. Constitution. *See People v. Lann*, 261 Ill. App. 3d 456, 475 (1st Dist. 1994); *see also People v. Ellis*, 57 Ill. 2d 127, 132-33 (1974). As demonstrated in Section III.A, the Marriage Ban cannot survive strict scrutiny.

III. INTERVENOR-DEFENDANTS ARE NOT ENTITLED TO DISMISSAL BECAUSE THE MARRIAGE BAN FAILS ANY LEVEL OF SCRUTINY.

Plaintiffs demonstrate below that offering lesbian and gay couples and their children only the second-class and poorly understood status of civil unions, while denying them the dignity and commonly-shared societal understanding of marriage, fails any level of constitutional review.[31]

A. The Marriage Ban Fails Heightened Scrutiny Review.

If the Court determines that strict scrutiny is warranted, the ban on marriage for same-sex couples must be invalidated unless it is "necessary to serve a compelling state interest" and is "narrowly tailored so as to use the least restrictive means consistent with the attainment of the government's goal." *In re D.W.*, 214 Ill. 2d 289, 311 (2005); accord *R.G.*, 131 Ill. 2d at 362-63. If the Court instead determines that intermediate scrutiny is the proper standard, the Marriage Ban must be invalidated unless it is "substantially related to a sufficiently important

[31] The adverse decisions from other jurisdiction on which Intervenor-Defendants rely (Def. Br. 22-24), as well as the decisions in *Jackson v. Abercrombie,* 884 F. Supp. 2d 1065 (D. Haw. 2012), *appeal docketed,* No. 12-6998 (9th Cir. Sept. 7, 2012), and *Sevcik v. Sandoval,* Case No. 2:12 — cv — 00578, 2012 WL 5989662 (D. Nev. Nov. 26, 2012), *appeal docketed,* No. 12-17668 (9th Cir. Dec. 4, 2012) are inapposite for several reasons, including their erroneous refusal to apply strict scrutiny or intermediate scrutiny and their application of a deeply flawed form of deferential rational basis review as judged against Illinois Supreme Court and the U.S. Supreme Court precedent. The flaws in those courts' application of rational review include their failure to offer a rational basis for *excluding* same-sex couples from the benefits of marriage, their reliance on imaginary "interests" that have no factual basis, and/or no rational connection to the Marriage Ban.

governmental interest. *See Dept. of Public Aid ex rel. Cox v. Miller*, 146 Ill. 2d 399, 408-10 (1992); *Clark v. Jeter*, 486 U.S. 456, 461 (1988). Under either form of heightened scrutiny, Intervenor-Defendants must show that classification supports actual, rather than hypothetical, "invented *post hoc*" state interests. *See United States v. Virginia*, 518 U.S. 515, 533 (1996). Additionally, Intervenor-Defendants bear the "burden of justification" for the differential treatment. *See People v. Ellis*, 57 Ill. 2d 127, 131 (1974) (burden on State where class is suspect); *Virginia*, 518 U.S. at 533 (even under intermediate scrutiny, the government has a "demanding" burden of proving that its justification for the classification is "exceedingly persuasive"). Since it is Intervenor-Defendants' burden to justify the challenged discrimination in this case, Plaintiffs' claims are not subject to dismissal under 735 ILCS 5/2-615. The Intervenor-Defendants have not met this burden and cannot do so because there is no rational — much less substantial or necessary — link between a legitimate governmental interest and a ban on same-sex marriage. Indeed, the Marriage Ban fails even the lowest level of scrutiny — rational basis review.

B. The Marriage Ban Also Fails Rational Basis Review.

Intervenor-Defendants argue that the exclusion of lesbian and gay couples from marriage is rationally related to: (a) maintaining the "traditional institution of marriage" and/or (b) channeling procreation into dual-sex households. (Def. Br. 22.) There is no rational connection between the Marriage Ban and either of these asserted interests or any other conceivable interest.

1. Under rational basis review, Illinois courts scrutinize the connection between the classification and government purposes to ensure that there is a viable factual basis for denying a benefit to one group that is provided to another.

Even under the lowest level of review, courts must engage in sufficient review to determine whether "the statutory classification is rationally related to a legitimate State interest."

Best v. Taylor Mach. Works, 179 Ill. 2d 367, 393 (1997). A court "must determine whether the classification[ ] . . . [is] based upon reasonable differences in kind or situation, and whether the basis for the classification[ ] is sufficiently related to the evil to be obviated by the statute." *Id.* at 394. The rational basis test is "not a toothless one." *See, e.g.*, *People v. Lindner*, 127 Ill. 2d 174, 184 (1989), quoting *Mathews v. de Castro*, 429 U.S. 181, 185 (1976).

Rational basis review: (1) looks to whether there is a rational relationship between a governmental interest and a classification that excludes some persons from access to a benefit that is granted others, *Best*, 171 Ill. 2d at 406-07; and (2) determines whether the asserted governmental interests and their alleged connection to the classification have any basis in reality, *McCabe*, 49 Ill. 2d at 341-42. The U.S. Supreme Court has applied more searching rational basis review "[w]hen a law exhibits such a desire to harm a politically unpopular group" or where "the challenged legislation inhibits personal relationships." *Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring) (collecting cases). *See also Jacobson*, 171 Ill. 2d at 327-28 (striking down law burdening parents whose 18- to 20-year-old children live at home by requiring them to reimburse the State for welfare payments to their children while not requiring reimbursement for payments to children living elsewhere).

2. Preserving tradition is not a legitimate basis for the Marriage Ban.

Intervenor-Defendants' purported State interest of preserving "traditional marriage" is legally deficient because it does not express an interest independent of the State's desire to discriminate. *See Romer v. Evans*, 517 U.S 620, 635 (1996); *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 881-82 (1985). A desire to promote marriage in its traditional form merely restates a desire to prefer heterosexual relationships, rather than offering an "independent . . . legislative end" for the line drawn by the legislature. *Romer*, 517 U.S. at 633. Illinois courts reject such a circular explanation, which is nothing more than a classification undertaken for its

own sake. *See, e.g., Grasse v. Dealer's Transport Co.*, 412 Ill. 179, 193-94 (Ill. 1952) (it is insufficient under rational basis analysis merely to reiterate that a classification has been made, such as between those bound by legislation, and those not bound).

Using tradition as both the governmental objective and the classification to further that objective is nothing more than a tautology, since it asks "whether restricting marriage to opposite-sex couples accomplishes the objective of maintaining opposite-sex marriage[,]" resulting in "empty analysis." *Varnum*, 763 N.W.2d at 898. "[T]he 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). "[I]t is circular reasoning, not analysis, to maintain that marriage must remain a heterosexual institution because that is what it historically has been." *Goodridge*, 798 N.E.2d at 961 n.23.

Further, Illinois may not maintain its discriminatory marriage classification simply because it has done so in the past. *See People v. M.D.*, 231 Ill. App. 3d 176, 189 (2d Dist. 1996) (rejecting traditional rationales for marital rape exemption); *Lawrence,* 539 U.S. at 577 (that governing majority has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice). "[N]either the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack"); *Williams v. Illinois*, 399 U.S. 235, 239 (1970). Rather, the justification for a classification must be independent of the fact that the classification currently exists. *Romer*, 517 U.S. at 633; *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 881-82 (1985).

Moreover, as shown in Section I.D., Illinois' history of ending past discriminatory practices regarding marriage shows that the State has no interest in maintaining traditional

practices once they have been recognized as discriminatory. Additionally, "[t]here is no legitimate notion that a more inclusive definition of marriage [to include lesbian and gay couples] will transform civil marriage into something less than it presently is for heterosexuals." *Varnum*, 763 N.W.2d at 899 n.25.

3. There is no rational relationship between any asserted interest related to procreation and the Marriage Ban.

Intervenor-Defendants contend that excluding same-sex couples from marriage furthers interests in procreation, including: promoting dual-gender parenting, parenting by couples who are both biologically related to their children, and stability for children born through accidental procreation. (Def. Br. 22-24.) First, Intervenor-Defendants' assertion of State purposes in promoting parenting by different-sex married biological parents assumes that children are better off if raised by such parents as compared to children raised by lesbian, gay, and non-biological parents. This is a ***false factual*** assertion that is capable of disproof, and that directly contradicts Plaintiffs' allegations in the Complaints. See Lazaro Compl. ¶ 105 ("there is 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"); Darby Compl. ¶ 79 (Plaintiffs and their children are as worthy of respect, dignity, social acceptance, and legitimacy as other parents and their children). An attempt to challenge the veracity of Plaintiffs' allegations cannot serve as the basis for a dismissal. See *Weinberger v. Bell Fed. Sav. & Loan Ass'n,* 262 Ill. App. 3d 1047, 1049-50 (1st Dist. 1994) (2-615 motion admits not only the facts alleged in a complaint, but all reasonable inferences that can be drawn therefrom). Second, as described below, there is no logical connection between any of the child welfare interests proposed by Intervenor-Defendants, and excluding same-sex couples and their children from being part of married families. In fact, as Plaintiffs have pled in their Complaints and can prove

with evidence, the ban serves only to harm Plaintiffs' children and the children of thousands of other Illinois same-sex couples.

a. The alleged interests related to procreation have no rational connection to the exclusion of same-sex couples from marriage.

Even if Illinois had an interest in favoring parenting by different-sex biological parents, there is no logical connection between promotion of any such interest and the Marriage Ban. Indeed, all the ban does is harm children of same-sex couples. *See Varnum*, 763 N.W.2d at 901-02. "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 and citation omitted). *Compare* 750 ILCS 102(2) (one of the stated purposes for marriage is to "strengthen and preserve the integrity of marriage and safeguard family relationships") *with Jacobson*, 171 Ill. 2d at 327 (a statute that is "directly at odds with [its] stated purpose" fails rational basis review).

Denying marriage to same-sex couples does not increase the number of children raised by different-sex biological parents; any asserted connection between the Marriage Ban and the marital or procreative decisions of heterosexual couples defies logic. *See Goodridge*, 798 N.E.2d at 963 (state "offered no evidence that forbidding marriage to people of the same sex will increase the number of couples choosing to enter into opposite-sex marriage in order to have and raise children"). And of course the Marriage Ban does not cause gay people to enter different-sex marriages. *See Varnum*, 763 N.W.2d at 902 ("common sense" does not suggest that the Marriage Ban would cause gay people to "'become' heterosexual in order to procreate within the present traditional institution of marriage."). Nor does it prevent same-sex couples from raising

children. And any supposed government interesting in discouraging a group of people from procreating would be illegitimate, since all Illinoisans possess a fundamental right to decide "whether to bear or beget a child." *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972). It is inconceivable to think that denying marriage to same-sex couples will steer more children into married, heterosexual, biological parent families. The exclusion of same-sex couples from marriage is "a classification whose relationship to [the asserted procreation-related goals] is so attenuated as to render the distinction arbitrary or irrational." *Cleburne*, 473 U.S. at 446.[32]

Intervenor-Defendants erroneously assert that this Court need not consider whether there is any relationship between the exclusion of same-sex couples and the decisions of different-sex couples "to procreate or raise children within the institution of marriage[,]" but instead must decide whether allowing same-sex couples to marry "would promote all of the same State interests that opposite-sex marriage does, including marital procreation." (Def. Br. 23.)[33] This framing turns rational basis review on its head, and abdicates any meaningful analysis at all.

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[32] Courts routinely strike down statutes containing classifications exhibiting such a gross degree of over- and under-inclusion with respect to the purpose of the statute. *See Maddux v. Blagojevich,* 233 Ill. 2d 508, 520-26 (2009)(law imposing mandatory retirement age of 75 for judges struck down under rational basis analysis as underinclusive in relation to goal of ensuring a more vigorous judiciary because, among other things, the law failed to impose a mandatory retirement age on people who first become judges at age 76); *Jacobson v. Dept. of Public Aid,* 171 Ill. 2d 314, 325-26 (1996) (striking down statute under rational basis analysis because classification was underinclusive with respect to its purpose of requiring parents of sufficient means to reimburse the state for aid payments made to their children); *Grasse v. Dealer's Transport Co.*, 412 Ill. at 195-99 (workers compensation statute unconstitutional under rational basis analysis because statutory classification was both under- and over-inclusive with respect to achieving its purpose; "a statute cannot be sustained where it appears that the classification applies in some instances and does not apply in other cases not essentially different").

[33] Intervenor-Defendants cite *Johnson v. Robison*, 415 U.S. 361, 378-82 (1974), in support of this argument, but *Johnson* is consistent with the basic concept that equal protection requires a rational connection between a discriminatory classification and governmental interests, since the Court finds "quantitative and qualitative distinctions" between military service veterans and conscientious objectors with respect to the governmental interests in easing readjustment to civil life in the different years of service (six for those in the service; two for objectors) as well as the "far greater loss of personal freedom" for service members.

Illinois and federal rational review standards require that the law's classification ***excluding*** same-sex couples and their children from marriage have some reasonable fit with the purported government objective. Rational basis review requires a rational connection between a legitimate governmental interest and the *denial* of a benefit to one group of people that is provided to another. In *Best*, for example, the Illinois Supreme Court found that a tort litigation cap on the recovery of noneconomic compensatory damages failed rational basis review, since there was no rational connection between the goal of controlling insurance and health-care costs and the *exclusion* of one class of injured plaintiffs — those with high-value injuries — from the benefit of full recovery. 179 Ill. 2d at 384-85, 406-07. Similarly, in *Jacobson*, 171 Ill. 2d at 327-28, the law requiring parents whose children lived at home to reimburse the state for public aid failed rational basis review because the legislative goals of family responsibility for their own support and cost savings were "equally well served by requiring reimbursement from parents whose children do not live with them." *See also People v. McCabe*, 49 Ill. 2d 338, 341 (1971) (even under rational basis review, there must "be a reasonable basis for distinguishing the class to which the law is applicable from the class to which it is not"). Illinois and federal standards do ***not*** merely examine whether allowing different-sex couples to marry is rationally related to a ***preference*** for different-sex couples in Illinois; the State cannot justify adverse treatment of some simply by recasting it as a preference for everyone else. [34]

Even if the Court were to accept Intervenor-Defendants' invitation to invert rational basis analysis by examining solely whether a rational justification exists to prefer non-gay couples in Illinois marriage laws, the Marriage Ban fails this analysis, too, by violating the Illinois

[34] Illinois courts have rejected the argument that the legislature can achieve a goal "one step at a time" to justify an arbitrary classification. *See Best*, 179 Ill. 2d at 406 (citing *Grace v. Howlett*, 51 Ill. 2d 478, 485 (1972)).

Constitution's prohibition on special legislation. "A special legislation challenge generally is judged under the same standards applicable to an equal protection challenge," *Best v. Taylor Mach. Works,* 179 Ill. 2d 367, 393 (1997), except that this clause expressly prohibits the legislature from conferring a special benefit or privilege upon one person or group while excluding others that are similarly situated. *See Allen v. Woodfield Chevrolet, Inc.,* 208 Ill. 2d 12, 22 (2003) *Ill. Polygraph Soc'y v. Pellicano,* 83 Ill.2d 130, 137-38 (1980). Claims brought under this clause necessitate a dual inquiry. A court first must determine whether the challenged classification discriminates *in favor* of a select group and, if so, whether the classification is arbitrary. *Allen,* 208 Ill. 2d at 22, 29-30 (invalidating a law as unconstitutional special legislation that favored car dealerships relative to other potential defendants in consumer fraud actions, because the law's effect was not sufficiently related to its stated purpose (at 29), and because the classification was both under- and over-inclusive (at 30)). That the analysis required to scrutinize special legislation claims mirrors the inverted rational basis analysis sought by Intervenor-Defendants further demonstrates the error of the framing sought by Intervenor-Defendants with respect to Plaintiffs' equal protection claims. Whether framed as a benefit for a favored class (different-sex couples), or as an exclusion of a disfavored class (same-sex couples), it bears no relation to Intervenor-Defendants' hypothesized justifications.

In any case, it is impossible to credit the procreation-related rationales given that Illinois does not condition persons' right to marry on their abilities or intentions regarding having or raising children, but permits those who are sterile, infertile, elderly, or uninterested in childbearing to marry. *See Lawrence*, 539 U.S. at 605 (Scalia, J., dissenting) (encouraging procreation is not a justification for the denial of marriage to lesbian and gay couples since "the sterile and the elderly are allowed to marry"); *see also Garrett*, 531 U.S. 356, 366 n. 4

(explaining that "purported justifications for the [statute] ma[k]e no sense in light of how the [government] treat[s] other groups similarly situated in relevant respects"); *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.").

b. Given Illinois law regarding civil unions and parenting, any State interest in favoring heterosexual parenting or parenting by couples who both have biological connections to their children cannot be credited.

Illinois law regarding civil unions and parenting shows that there is no State preference for different-sex parenting, including parenting of children resulting from "natural" procreation, intended or accidental, that could conceivably justify the Marriage Ban. Illinois rejects any preference for heterosexual couples as parents over gay couples. Sexual orientation is, for example, irrelevant to determinations regarding custody, *In re Marriage of R.S.*, 286 Ill. App. 3d 1046 (3d Dist. 1996), and visitation, *Pleasant v. Pleasant*, 256 Ill. App. 3d 742 (1st Dist. 1995). Second-parent adoptions are available for same-sex couples, *Petition of K.M.*, 274 Ill. App. 3d 189 (1st Dist. 1995), and civil unions secure for lesbian and gay couples all the same benefits and protections available under Illinois law to married couples, including parenting protections. 750 ILCS 75/20. Persons in civil unions, for example, are jointly licensed as foster parents, as are married couples. *See* IL Admin. Code tit. 89, Ch. IIIe, § 402.12. In addition, Illinois law draws no distinction between children whose parents are biologically related to them rather than adopted, 750 ILCS 45/2, married or unmarried, *id.* at 45/3, or make use of artificial insemination or gestational surrogacy to have children, 750 ILCS 40/2; 750 ILCS 47/25, 35. According to the Complaints, which must be taken as true, Illinois already has determined that those who build families by adoption or foster care, including 13 of the Plaintiff couples, can and do provide an optimal environment for childrearing.

c. *Intervenor-Defendants' assertion of child welfare interests in favoring parenting by heterosexual couples or parents who are both biologically connected to their children lacks any basis in real world facts and is contrary to the allegations in the Complaints.*

Plaintiffs can and will provide significant evidence to support the allegations of their Complaints, just as plaintiffs have done successfully in marriage lawsuits elsewhere, showing that Intervenor-Defendants' factual assertions about the purported superiority of parenting by married different-sex biological parents have no basis in reality.[35] For example, in *Varnum*, 763 N.W.2d at 899, after reviewing "an abundance of evidence and research" presented by plaintiffs that children of same-sex parents do just as well as children of different-sex parents, the Iowa Supreme Court concluded that contrary "opinions that dual-gender parenting is the optimal environment for children," while "thoughtful and sincere, were largely unsupported by reliable scientific studies," and that the research "strongly support[s] the conclusion that same-sex couples foster the same wholesome environment as opposite-sex couples and suggests that the traditional notion that children need a mother and a father to be raised into healthy, well-adjusted adults is based more on stereotype than anything else"); *see also Golinksi,* 824 F. Supp. 2d at 991-92 (reviewing the evidence presented by plaintiffs to conclude that it is "beyond scientific dispute" that same-sex parents are equally capable parents as different-sex parents); *Gill*, 699 F.

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[35] Notably, by preventing the children of same-sex couples from being part of married families, the State also violates the constitutional rights of these children to equal protection, since children may not be denied benefits because of unmarried status of their parents. *See Dept. of Pub. Aid ex rel. Cox v. Miller*, 146 Ill. 2d 399, 410 (1992) (equal protection violated by denying non-marital children benefits available to marital children); *Trimble v. Gordon*, 430 U.S. 762 (1977) (same); *see also Plyler v. Doe*, 457 U.S. 202, 220 (1982) ("[I]mposing disabilities on the child is contrary to the basic concept of our system that legal burdens should bear some relationship to the individual responsibility or wrongdoing. Obviously no child is responsible for this birth, and penalizing the child is an ineffectual — as well as unjust — way of deterring the parent.") (quotation omitted). The differential treatment of children based on the status or conduct of their parents must be reviewed under heightened scrutiny, *Dept. of Pub. Aid*, 146 Ill. 2d at 408 (citing *Clark v. Jeter*, 486 U.S. 456, 461 (1988)), a standard Intervenor-Defendants cannot meet. *See* Section III.A., *supra.*

Supp. 2d at 388 (accord); *In re Marriage Cases,* 43 Cal. 4th at 782. Indeed, based on the evidence, all major child welfare and medical organizations agree that same-sex couples are as qualified to parent as different-sex couples.[36]

Even under rational basis review, the purported justifications must have some basis in reality. *Romer*, 517 U.S. at 632-33 (relationship between classification and government interest must be rational viewed in its "factual context"); *Heller v. Doe ex rel. Doe*, 509 U.S. 312, 321 (1993) (even rational basis review requires governmental interests to have "some footing in the realities of the subject addressed by the legislation."); *see also People v. McCabe,* 49 Ill. 2d at 341-42 (rational basis review "will require an assessment of the relevant scientific, medical and social data found . . . which are pertinent to support and to defeat the classification" of convictions for marijuana sales with convictions for highly addictive opiate drug sales, rather than with sales of less addictive drugs that result in much lower penalties); Best, 179 Ill. 2d at 386-89 (lack of rational basis may be shown by mismatch between the State's "anecdotal" evidence of speculative connection between damages cap and the control of health-care and insurance costs, and the plaintiffs' reputable empirical studies to the contrary); See also Petition of *Village of Vernon Hills*, 168 Ill. 2d 117, 129-30 (1995) (considering facts showing similarity of municipalities).. Intervenor-Defendants' Motion to Dismiss should be denied, because even under rational basis review, "parties challenging legislation . . . may introduce evidence to

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[36] *See, e.g.*, Am. Acad. of Pediatrics, *Coparent or Second-Parent Adoption by Same-Sex Parents*, Feb. 2002, http://aappolicy.aappublications.org/cgi/content/full/pediatrics;109/2/339; Am. Psychological Ass'n, *Sexual Orientation, Parents, & Children*, July 2004, http://www.apa.org/about/governance/council/policy/parenting.aspx; Am. Acad. of Child & Adolescent Psychiatry, *Gay, Lesbian, Bisexual, or Transgender Parents Policy Statement*, 2009, http://www.aacap.org/cs/root/policy_statements/gay_lesbian_transgender_and_bisexual_parents_policy_statement; Am. Med. Ass'n, *AMA Policies on GLBT Issues*, http://www.ama-assn.org/ama/pub/about-ama/our-people/member-groups-sections/glbt-advisory-committee/ama-policy-regarding-sexual-orientation.shtml; Child Welfare League of Am., *Position Statement on Parenting of Children by Lesbian, Gay, and Bisexual Adults*, http://www.cwla.org/programs/culture/glbtqposition.htm.

support their claim that it is irrational," *Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456, 464 (1981), and the law must be struck down if the challenger is able to "convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker," *Vance v. Bradley,* 440 U.S. 93, 111 (1979).

4. This Court should strike down the Marriage Ban because it was enacted for an illegitimate purpose.

Since there is no rational connection between excluding same-sex couples from marriage and any legitimate governmental interest, "the inevitable inference" is that Section 212(a)(5) was born of animosity — that it was passed simply "for the purpose of disadvantaging" lesbian and gay couples, which is an illegitimate purpose. *Romer*, 517 U.S. at 633, 634; *see also United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) ("[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare [governmental] desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."). Although the court need not conclude that animus was at play to hold that a law fails rational basis review, that conclusion is inescapable here. Prejudice against gay men and lesbians does not necessarily arise from bigotry or malice. Rather, laws intended to disadvantage may be based on "insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respect from ourselves." *Bd. Of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring). *Cf. Cleburne,* 473 U.S. at 448, 450 (striking down law based in part on what Court characterized as "negative attitudes", "fear", and "irrational prejudice" towards persons with intellectual disabilities). Moreover, laws founded on "moral" disapproval of

homosexuality cannot be reconciled with constitutional principles. *Lawrence v. Texas*, 539 U.S. 558, 571 (2003); accord *Romer v. Evans*, 517 U.S. 620, 629 (1996).

Not only is animus the "inevitable inference" given the absence of a rational basis, there is also evidence from the legislative record that supports this conclusion. Supporters of Senate Bill 1773, the bill that created the exclusion from marriage for lesbians and gay men, made clear their intention to disadvantage this group based for some on their particular view of the morality of same-sex and different-sex relationships. For example, legislative proponents of the ban characterized it as responsive to the question of "whose morality are we going to impose on the public" (Senate Debate of S.B. 1773, 89th General Assembly, Mar. 28, 1996, attached hereto as Exhibit A, at 97, 101), compared marriage for gay people to incest and polygamy (*id.* at 97), and sought support of the ban in order to reject "affirm[ing] the [gay] lifestyle." *Id.* at 104-05 (remarks of Sen. Fitzgerald). Opponents of the ban immediately recognized its discriminatory purpose, stating that "by singling out gay[ ] and lesbian marriages," the bill would "fuel[] the flames of hatred, ignorance and intolerance in this state." (House Debate of S.B. 1773, 89th General Assembly, Apr. 25, 1996, attached hereto as Exhibit B, at 54-55 (remarks of Rep. Feigenholtz)); *see also id.* at 56-58 (remarks of Rep. Ronen) (calling the legislation a "Bill of hatred"); *id.* at 53-54 (remarks of Rep. Currie) (bill sends message that "it's okay to bash people [whose] preferences and proclivities are different [from] the majority").

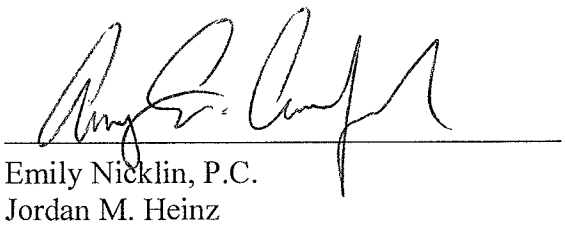
Senate Bill 1773 was enacted "not to further a proper legislative end but to make [same-sex couples] unequal to everyone else. This [Illinois] can't do." *Romer*, 517 U.S. at 635. "It is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit." *Id.* At the very least, its purpose

to disadvantage a politically unpopular group and burden their personal relationships requires that the law be given a more searching form of rationality review. *See Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring). However, the illegitimacy of the law is, by itself, a sufficient reason to strike it down.

CONCLUSION

For the reasons stated above, Intervenor-Defendants' Motion to Dismiss should be denied.

Respectfully submitted,



Emily Nicklin, P.C.
Jordan M. Heinz
Amy E. Crawford
Kristina Alexander
Kate Guilfoyle
KIRKLAND & ELLIS LLP
(Attorney No. 90443)
300 North LaSalle
Chicago, IL 60654
Tel: (312) 862-2000
Fax: (312) 862-2200

Camilla B. Taylor (Atty No. 6281589)
Christopher R. Clark (Atty No. 6236859)
Kenneth D. Upton, Jr. (pro hac vice)
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.
Midwest Regional Office
105 West Adams, Suite 2600
Chicago, IL 60603
Tel: (312) 663-4413
Fax: (312) 663-4307

Attorneys for *Darby* Plaintiffs

John A. Knight (Attorney No. 45404)
Karen Sheley (Attorney No. 48845)
Harvey Grossman (Attorney No. 48844)
ROGER BALDWIN FOUNDATION
OF ACLU, INC.
180 North Michigan Avenue, Suite 2300
Chicago, IL 60601
Tel: (312) 201-9740
Fax: (312) 288-5225

Jeffrey W. Sarles
Richard F. Bulger
Aaron S. Chait
Gretchen E. Helfrich
Kristin W. Silverman
MAYER BROWN LLP (Attorney No. 43948)
71 South Wacker Drive
Chicago, IL 60606-4637
Tel: (312) 782-0600
Fax: (312) 706-8681

Attorneys for *Lazaro* Plaintiffs

Dated: March 29, 2013

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing document was served on March 29, 2013, on the following via First Class U.S. Mail:

Patrick T. Driscoll, Jr.
Paul A. Castiglione
Jeffrey S. McCutchen
Assistant State's Attorneys
500 Richard J. Daley Center
50 West Washington Street
Chicago, Illinois 60602

Counsel for Defendant David Orr

Thomas Brejcha
Paul Benjamin Linton
Peter Breen
Thomas More Society
29 South LaSalle Street, Suite 440
Chicago, Illinois 60603

Counsel for County Clerk Intervenors

Edward C. Deters
Effingham County State's Attorney
120 W. Jefferson St., Suite 201
Effingham, IL 62401

Counsel for Intervenor Kerry Hirtzel, Effingham County Clerk

Steve Unholtz
Tazewell County State's Attorney
Tazewell County Courthouse
342 Court Street, Suite 6
Pekin, IL 61554

Counsel for Intervenor Christie Webb, Tazewell County Clerk

Malini Rao
Christopher Kim
Office of the Illinois Attorney General
100 West Randolph Street
Chicago, Illinois 60601

Counsel for Intervenor State of Illinois

Thomas R. Wiseman
Crawford County State's Attorney
Crawford County Courthouse
105 Douglas Street
Robinson, Illinois 62454

Counsel for Intervenor Patricia Lycan, Crawford County Clerk

Marilyn Brant
Clay County State's Attorney
Clay County Courthouse
P.O. Box 190
Louisville, Illinois 62858

Counsel for Intervenor Brenda Britton, Clay County Clerk

James Mack
Putnam County State's Attorney
Putnam County Courthouse
120 N. 4th Street
Hennepin, Illinois 61327

Counsel for Intervenor Daniel Kuhn, Putnam County Clerk

Amici Curiae

John W. Mauck
L. Shawn Sullivan
MAUCK & BAKER, LLC
One North LaSalle Street, Suite 600
Chicago, IL 60602

Counsel for The Moody Church

Robert V. Boharic
Attorney at Law
348 Eastgrove Road
Riverside, IL 60546

Counsel for Senator Kirk Dillard, et al.

James A. Serritella
James C. Geoly
BURKE, WARREN, MACKAY & SERRITELLA, P.C.
330 N. Wabash Avenue, 22nd Floor
Chicago, IL 60611-3607

Counsel for Lutheran Church - Missouri Synod

Austin R. Nimocks
ALLIANCE DEFENDING FREEDOM
801 G St. NW, Suite 509
Washington, DC 20001

Counsel for Illinois Family Institute

Dale Schowengerdt
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260

Counsel for Illinois Family Institute

Bryan H. Beauman
ALLIANCE DEFENDING FREEDOM
P.O. Box 779
Paris, KY 40362

Counsel for Illinois Family Institute

Jason R. Craddock
Attorney at Law
29 S. LaSalle, Suite 440
Chicago, Illinois 60603

Counsel for Church of Christian Liberty and Grace-Gospel Fellowship