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

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

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The term "partner" does not adequately convey our love for each other or the level of commitment we have made to each other.
Plaintiff Greg Wright, Wright ¶ 4.

[I]t's difficult . . . to explain to our five-year-old why . . . his parents can't get married. That's a hardship on us, and, you know, I believe an injustice for him.
Plaintiff Diana Polson, Polson Dep. 23:14-18.

There's a lot of times where I have to check a box that says "single"; that bothers me because I'm not single, I'm married, and that hurts. There's a lot of those hurts that happen.
Plaintiff Deb Whitewood, D. Whitewood Dep. 53:10-14.

[T]he fact is, Lynn and I are in an interracial relationship; the fact is, all this is making me think back to Virginia, coming up as a child, having to deal with these issues. . . . I want my family to be recognized just like anybody else's, that's a fact.
Plaintiff Fredia Hurdle, F. Hurdle Dep. 74:1-16.

[Marriage equality] would mean everything. It would [mean] the freedom to know that you would be taken care of. . . . And that's something that I worry about every single day. And I wish I didn't have that worry. Because you don't deserve that.
Mary Beth McIntyre, wife of Plaintiff Maureen Hennessey, speaking to Maureen three weeks before succumbing to cancer. PX-29-G.

Plaintiffs are eleven lesbian and gay couples, one widow, and two teenage children of one of the Plaintiff couples. They challenge the constitutionality of Pennsylvania's laws excluding same-sex couples from marriage and voiding within

Pennsylvania the marriages of same-sex couples entered into in other states (collectively, the "Marriage Exclusion").[2]

Plaintiffs Fredia and Lynn Hurdle, Fernando Chang-Muy and Len Rieser, Dawn Plummer and Diana Polson, and Sandy Ferlanie and Christine Donato are lesbian and gay couples in committed relationships who wish to marry for the same reasons so many other couples get married—to declare their love and commitment before their family, friends and community, and to give one another the security and protections that only marriage provides. Plaintiffs Deb and Susan Whitewood, Edwin Hill and David Palmer, Heather and Kath Poehler, Angela Gillem and Gail Lloyd, Helena Miller and Dara Raspberry, Ron Gebhardtsbauer and Greg Wright, and Marla Cattermole and Julie Lobur are already married, having wed in other states, but are treated as legal strangers in their home state, the Commonwealth of Pennsylvania. Plaintiff Maureen Hennessey is a widow who lost her spouse, Mary Beth McIntyre, after 29 years together. Because Mary Beth was a woman, their marriage is not recognized by Pennsylvania and she is not provided the legal protections afforded to widows; she is also denied the dignity and respect of being recognized as the widow of her late spouse. Plaintiffs A.W. and K.W. are the

[2] The term "Marriage Exclusion" refers to 23 Pa. C.S. §§ 1102 and 1704 and all other laws and practices of Pennsylvania prohibiting same-sex couples from marrying in Pennsylvania or having their marriages from being recognized in Pennsylvania.

children of plaintiffs Deb and Susan Whitewood. They seek recognition in Pennsylvania of their parents' marriage so that their family is afforded the same respect and protections as other families.

As all eight federal courts that have ruled on this issue since *United States v. Windsor*, 133 S. Ct. 2675 (2013), have agreed, excluding same-sex couples from marriage is unconstitutional.[3] Denying same-sex couples the ability to marry and treating as void their existing marriages violates both the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. Pennsylvania's Marriage Exclusion is subject to heightened scrutiny because it

[3] *DeBoer v. Snyder*, No. 12-10285, 2014 WL 1100794 (E.D. Mich. Mar 21, 2014), *appeal docketed*, No. 14-1341 (6th Cir. Mar. 21, 2014); *Tanco v. Haslam*, No. 13-1159, 2014 WL 997525 (M.D. Tenn. Mar 14, 2014) (preliminary injunction), *appeal docketed*, No. 14-5297 (6th Cir. Mar. 19, 2014); *De Leon v. Perry*, No. 13-982, 2014 WL 715741 (W.D. Tex. Feb. 26, 2014) (preliminary injunction); *Bostic v. Rainey*, No. 13-395, 2014 WL 561978 (E.D. Va. Feb. 13, 2014), *appeal docketed*, No. 14-1167 (4th Cir. Feb. 25, 2014); *Bourke v. Beshear*, No. 13-750, 2014 WL 556729 (W.D. Ky. Feb 12, 2014), *appeal docketed*, No. 14-5291 (6th Cir. Mar. 19, 2014); *Bishop v. U.S. ex rel. Holder*, 962 F. Supp. 2d 1252 (N.D. Okla. 2014), *appeal docketed*, Nos. 14-5003, 14-5006 (10th Cir. Jan. 17, 2014); *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968 (S.D. Ohio 2013), *appeal docketed*, No. 14-3057 (6th Cir. Jan. 22, 2014); *Kitchen v. Herbert*, 961 F. Supp. 2d 1181 (D. Utah 2013), *appeal docketed*, 13-4178 (10th Cir. Dec. 20, 2013).

In addition, six state high courts, including two in the past year, have held that marriage bans violate their state constitutions. *Griego v. Oliver*, 316 P.3d 865 (N.M. 2013); *Garden State Equality v. Dow*, 79 A.3d 1036 (N.J. 2013); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

burdens the fundamental right to marry and discriminates based on sexual orientation and sex. But it cannot stand under any level of scrutiny because the exclusion does not rationally further any legitimate government interest; it serves only to disparage and injure lesbian and gay couples and their families. Plaintiffs therefore ask this Court to grant their motion for summary judgment and declare that Pennsylvania's Marriage Exclusion is unconstitutional and enjoin its enforcement.

PROCEDURAL HISTORY

Plaintiffs commenced this action on July 9, 2013 against Defendants Governor Thomas Corbett; Secretary of the Pennsylvania Department of Public Health Michael Wolf; Attorney General Kathleen Kane; Register of Wills of Washington County Mary Jo Poknis; and Register of Wills and Clerk of Orphans Court of Bucks County Donald Petrille, Jr.

On September 30, 2013, Defendants filed motions to dismiss. During the pendency of these motions, Plaintiffs voluntarily dismissed Defendant Poknis on October 21, 2013, and Defendants Kane and Corbett on November 1, 2013, and they filed an amended complaint on November 7, 2013 against Defendants Wolf, Petrille, and Secretary of the Pennsylvania Department of Revenue Dan Meuser.

On November 15, 2013, the Court denied the motions to dismiss of Defendants Wolf and Petrille.

By this motion, Plaintiffs seek summary judgment on all counts of their First Amended Complaint.

STATEMENT OF FACTS[4]

In 1996, the Pennsylvania legislature amended Pennsylvania's marriage laws expressly to prohibit marriage for same-sex couples. The 1996 amendment had two parts. First, it codified the definition of marriage as "[a] civil contract by which one man and one woman take each other for husband and wife." 23 Pa. C.S. § 1102. Second, in stark departure from Pennsylvania's usual recognition of marriages validly entered into in other states, it made "void in this Commonwealth" any "marriage between persons of the same sex . . . entered into in another state or foreign jurisdiction, even if valid where entered into." 23 Pa. C.S. § 1704. The sponsor of the 1996 amendment made clear that it was a reaction to the prospect of marriage for same-sex couples coming to the United States as a result of a decision from a Hawaii court. 1996 Pa. Legis. J. (House) (June 28, 1996), at 2017 ("Do you want a group of judges in Hawaii determining Pennsylvania's laws and policies?"), PX-45. Pennsylvania was one of fourteen states to amend their marriage laws in 1996 in response to the Hawaii case. (Chauncey ¶¶ 97-98.)

[4] A more extensive discussion of relevant facts is contained in Plaintiffs' Statement of Uncontested Material Facts, filed contemporaneously with this Brief.

Same-sex couples are excluded from marriage in Pennsylvania despite the fact that they make the same commitments to one another as opposite-sex couples. (Peplau ¶¶ 33-37.) Like opposite-sex couples, same-sex couples build their lives together; some, like Edwin Hill and David Palmer, Fernando Chang-Muy and Len Reiser, Marla Cattermole and Julia Lobur, and Maureen Hennessey and her late spouse, have done so for more than a quarter century. (Hill ¶ 3; Chang-Muy ¶ 3; Lobur ¶ 4; Hennessey ¶ 4.) Like opposite-sex couples, same-sex couples support one another emotionally and financially, and they take care of one another when faced with illness or injury. (Badgett ¶¶ 32-33.) For example, when Maureen Hennessey's spouse Mary Beth McIntyre was in end-stage cancer and unable to take basic care of herself, Maureen left her job as a substitute teacher to be home with her and feed, bathe and otherwise care for her until she passed away. (Hennessey ¶ 6.) Like opposite sex-couples, same-sex couples become part of one another's extended families and support one another's relatives in times of need. For example, Marla Cattermole and Julia Lobur together supported and cared for Julia's mother in their home during the last years of her life when it became difficult for her physically and financially to live on her own. (Lobur ¶ 7.) Like some opposite-sex couples, some same-sex couples like Deb and Susan Whitewood, Fernando Chang-Muy and Len Reiser, Dawn Plummer and Diana Polson, Helena Miller and Dara Raspberrry, and Sandy Ferlanie and Christine

Donato are parents raising children together. (D. Whitewood ¶¶ 7-8; Chang-Muy ¶ 5; Plummer ¶ 7; Raspberry ¶ 11; C. Donato ¶¶ 5, 8-11.) The Plaintiff couples are spouses in every sense except that Pennsylvania law says they cannot marry and, for those who are married under the laws of another state, their marriages are not honored here.

The Marriage Exclusion harms Plaintiffs and countless other Pennsylvania families by denying them the numerous protections and obligations of marriage under state law, as well as important protections that the federal government affords to married couples. For example because of the Marriage Exclusion:

- When Fredia Hurdle was taken into surgery, hospital staff would not provide any information to Lynn about what was happening with Fredia because she was not considered family, leaving her feeling frightened and helpless. (L. Hurdle ¶ 7.)
- Edwin Hill and David Palmer, retired seniors on a fixed income, worry about the fact that when one of them passes away, the widower will have to pay a 15% inheritance tax on half of all of their joint property,[5] a tax from which he would be exempt if their marriage were recognized by the Commonwealth. (Hill ¶ 9); 72 P.S. § 9116(a).

[5] To give an idea of the impact of this tax, for a same-sex couple who jointly owns a home valued at $147,100 (the median home price in Pennsylvania), when one spouse or partner dies, the survivor would inherit $73,550 in value. Applying the 15% tax rate, the surviving spouse or partner would owe the Commonwealth $11,032.50 (or $10,480.87 with the early payment discount). If their common home were held solely in the name of the deceased spouse or partner, the inheritance tax owed by the surviving spouse or partner would be $22,065. (Badgett ¶¶ 41-42.) This does not include the tax that would be owed for half the value of all other shared property of the couple.

- Dawn Plummer and Diana Polson's younger son, J.P., does not have a legal parent-child relationship with one of his parents because the family is denied the presumption that a child born to a married couple is the child of both spouses (*see* Carpenter ¶¶ 59-62), and his parents need to save money to pay the more than $2,500 they were told it will cost to do a second parent adoption. (Plummer ¶ 9.)

- In her final days before succumbing to cancer, Maureen Hennessey's spouse Mary Beth McIntyre had the additional burden of worrying about how Maureen would manage financially after she was gone since Mary Beth's social security survivor benefits would be unavailable to her. *See* Video of Mary Beth McIntyre and Maureen Hennessey, PX-29-G.[6]

- Angela Gillem and Gail Lloyd similarly worry about Gail's financial security should Angela, the primary breadwinner, pass away first:

> Gail is an artist, so she does not draw a steady paycheck to contribute to social security. . . Pennsylvania's refusal to recognize our marriage might mean that Gail cannot collect my social security benefits if I die first. I live every day with the fear that the steps I have taken will not be enough to protect Gail if something should happen to me.

(Gillem ¶¶ 8-9.)

Other examples of the numerous protections afforded to married couples by Pennsylvania law but denied to same-sex couples include the automatic right to

[6] On the death of a retired spouse, the surviving spouse receives the deceased spouse's Social Security retirement benefit if it is greater than the survivor's own Social Security retirement benefit. The Census Bureau data show that the average difference between the two benefits is $5,700 a year for same-sex couples in the U.S. (Badgett ¶ 58.) But eligibility for social security benefits is based on the marriage law of state where the couple resides at time of application. 42 U.S.C. § 416(h)(1)(A)(i).

make health-care decisions for an incapacitated spouse; exemption from the realty transfer tax; the right to seek damages under workers' compensation laws if a spouse dies or is injured; the right to inherit a spouse's property automatically if a spouse dies without a will; and access to assistance and support programs for widows and widowers of veterans, firefighters and other first responders. (*See* Pls.' Statement of Uncontested Facts ("Facts") ¶¶ 75-94.) Federal protections available to legally married spouses, in addition to social security survivor benefits, include veterans' benefits; the ability to jointly file federal income taxes; no tax on spousal employee health insurance benefits;[7] and the right provided by the Family Medical Leave Act to take time off of work to care for a spouse without losing your job. Some of these federal protections are not even available to married same-sex couples if they move to or reside in a state like Pennsylvania where their marriage is not recognized. *See*, *e.g.*, 42 U.S.C. § 416(h)(1)(A)(i) (basing eligibility for social security benefits on the marriage law of state where couple resides at time of application); 29 C.F.R. § 825.122(b) (same for Family Medical Leave Act). (*See* Facts ¶¶ 98-100; Carpenter ¶¶ 94-95; Badgett ¶¶ 52, 56, 60, 62.)

[7] A 2007 study shows that the average person receiving domestic partner benefits (as opposed to spousal health insurance benefits) is taxed $1,069 in additional federal income and payroll taxes. (Badgett ¶ 54.)

Perhaps even more important than the tangible harms, the Marriage Exclusion injures lesbian and gay couples by denying them "a dignity and status of immense import." *Windsor*, 133 S. Ct. at 2692. Marriage is an esteemed institution and has profound social significance both for the couple that gets married and the family, friends and community that surround them. The terms "married" and "spouse" have universally understood meanings that command respect for a couple's relationship and the commitment they have made. (Peplau ¶ 42.) As Greg Wright put it when talking about his twenty-year relationship with Ron Gebhardtsbauer, "[t]he term 'partner' does not adequately convey our love for each other or the level of commitment we have made to each other." (Wright ¶ 4.) Christine Donato's mother, Veronica Donato, "dream[s] of seeing Christine and Sandy married one day" because she understands marriage to be "a foundation for family." (V. Donato ¶¶ 5-6.) She worries that unless the law in Pennsylvania changes soon, she "will not be able to share Christine and Sandy's wedding day with them." (*Id.* ¶ 6.) She is 76 years old and in fragile health and confined to a wheelchair due to multiple sclerosis and, thus, traveling to another state for a wedding would be very difficult. (*Id.* ¶¶ 7, 9.)

The Marriage Exclusion also "demeans" Plaintiffs and other committed lesbian and gay couples across the Commonwealth by "tell[ing] those couples, and all the world" that their relationships are unworthy of recognition. *Windsor*, 133 S.

Ct. at 2694. (Peplau ¶ 56 (excluding same-sex couples from marriage perpetuates stigma against same-sex couples and lesbian and gay individuals).) When Maureen Hennessey lost her spouse Mary Beth after nearly three decades together, in her time of grief she had to suffer the additional pain of her marriage being treated as meaningless on Mary Beth's death certificate. As Maureen described this experience:

> Before Mary Beth passed away, we made arrangements for her funeral and burial. Mary Beth told the undertaker that she wanted it noted on her death certificate that we were married, and wanted me listed as her surviving spouse. He explained to us that we wouldn't be able to do that because Pennsylvania doesn't recognize me as Mary Beth's wife.
>
> This upset Mary Beth a lot. But I'm not sure she was as upset as I was after she passed when I got to hold that death certificate and see that there was a space for me, but I can't go in it.

(Hennessey ¶¶ 12-13.) Instead, Maureen was listed on the death certificate as the "informant." (*Id.* ¶ 13.) As Maureen put it, "[t]hat sounds like a person who made a telephone call. I want to be recognized as Mary Beth's surviving spouse. And I want—just as she wanted—her death certificate to acknowledge that, at the time she passed, she was married." (*Id.*)

The Marriage Exclusion also "humiliates" the children of lesbian and gay couples and makes it difficult for them "to understand the integrity and closeness of their own family and its concord with other families in their community and in

their daily lives." *Windsor*, 133 S. Ct. at 2694. Fernando Chang-Muy described the challenges he and his partner Len Rieser experienced in trying to give their daughter Isabel, now 22, a sense of security of being part of a family:

> When Isabel was growing up, it was important to Len and me that Isabel have the same sense of security that any other child gets from being part of a loving family. Len and I made a point, when Isabel was in elementary and secondary school, of making sure that her teachers understood that we were a family and that we wanted to be active in the school community just like any other parents. Fortunately, we found school personnel who supported us, as well as supportive health care providers, neighbors, and a supportive religious community.
>
> Len and I recognize that, even if we had been able to be married while we were raising Isabel, the process of establishing us as a family still would have had its challenges because there are people who disapprove of relationships like ours. But we feel that if marriage had been available to us, a major barrier to our acceptance and well-being as a family would have been removed. Even now, the availability of marriage would make a significant, positive difference to our life as a family.

(Chang-Muy ¶¶ 9-10.) A.W., the teenage daughter of Deb and Susan Whitewood, feels that if her parents' marriage were recognized by the Commonwealth, "it would help to prove what we already know: that we, a family with two moms, are just like any other family," and "[i]t would encourage others to accept my family and treat us with the same respect that my friends' families receive." (A.W. ¶ 8.) Dawn Plummer and Diana Polson and Sandy Ferlanie and Christine Donato have young children who are beginning to ask why their parents are not married, and

these parents struggle to answer their children's questions. (Plummer ¶ 16; Polson ¶ 5; C. Donato ¶ 5.) Dara Raspberry and Helena Miller want their marriage to be recognized in Pennsylvania before their infant daughter is old enough to be aware that the Commonwealth does not consider her family deserving of the same respect given to other families. (Raspberry ¶ 18; Miller ¶ 5.)

These harms experienced by the Plaintiff families and numerous other families in Pennsylvania would end if same-sex couples could marry and have their marriages recognized in Pennsylvania. Other discriminatory aspects of marriage that were once considered essential to the institution, such as the prohibition against interracial marriage and the loss of legal independence for married women, have been discarded one by one by courts and legislatures. Moreover, all of the gender-based distinctions that once existed with respect to the rights and duties within the marital relationship have been removed, and the legal rights and duties of husbands and wives are now identical. History has taught us that the vitality of marriage does not depend on maintaining such discriminatory laws. To the contrary, eliminating these unconstitutional aspects of marriage has enhanced the institution. (Cott ¶¶ 16, 17, 21, 63-84, 96, 97, 99.)

STATEMENT OF QUESTIONS INVOLVED

1. Whether Pennsylvania law prohibiting same-sex couples from marrying and treating as void the marriages of same-sex couples validly entered into in other jurisdictions violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution?

2. Whether Pennsylvania law prohibiting same-sex couples from marrying and treating as void the marriages of same-sex couples validly entered into in other jurisdictions violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution?

LEGAL STANDARD

Rule 56 provides that "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "An issue is genuine only if there is a sufficient evidentiary basis on which a reasonable [fact-finder] could find for the non-moving party, and a factual dispute is material only if it might affect the outcome of the suit under governing law." *Kaucher v. Cnty. of Bucks*, 455 F.3d 418, 423 (3d Cir. 2006). Thus, "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

ARGUMENT

Plaintiffs challenge the Marriage Exclusion under both the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Heightened scrutiny is warranted for three reasons. First, the Marriage Exclusion burdens the fundamental right to marry protected by the Due Process Clause. Second, the Marriage Exclusion discriminates based on sexual orientation, which is a

classification that has all the indicia of suspectness that the Supreme Court has said warrant heightened equal-protection scrutiny. Third, the Marriage Exclusion discriminates based on sex, which triggers heightened equal-protection scrutiny. The Marriage Exclusion cannot survive heightened scrutiny and, indeed, is unconstitutional under any level of scrutiny because it is not even rationally related to the furtherance of any legitimate government interest. Moreover, the Marriage Exclusion cannot stand under any level of scrutiny because no legitimate interest overcomes its purpose and effect to disparage and injure same-sex couples and their families.

I. Pennsylvania's Marriage Exclusion Is Subject To Heightened Scrutiny Because It Burdens The Fundamental Right To Marry Protected By The Due Process Clause

The guarantee of due process protects individuals from arbitrary governmental intrusion into fundamental rights. *See, e.g., Troxel v. Granville*, 530 U.S. 57, 64 (2000). Under the Due Process Clause, when legislation burdens the exercise of a right deemed to be fundamental, the government must show that the intrusion "is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978). As every federal court to address the question since *Windsor* has agreed, denying same-sex couples the fundamental right to marry does not comport with these requirements. *Bostic*, 2014 WL 561978; *De Leon*, 2014 WL 715741;

Kitchen, 961 F. Supp. 2d 1181; *Obergefell*, 962 F. Supp. 2d 968; *see also Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 995 (N.D. Cal. 2010), *aff'd on other grounds sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *vacated and remanded on other grounds sub nom. Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (dismissing appeal); *In re Marriage Cases*, 183 P.3d at 429; *Goodridge*, 798 N.E.2d at 968.

A. The freedom to marry is a fundamental right.

It is beyond dispute that the freedom to marry is a fundamental right protected by the Due Process Clause. *See, e.g.*, *Turner v. Safley*, 482 U.S. 78, 95 (1987) ("[T]he decision to marry is a fundamental right"); *Zablocki*, 434 U.S. at 384 ("The right to marry is of fundamental importance for all individuals."); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974) ("This Court has long recognized that 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."); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.").

The fundamental right to marry belongs to the individual and protects each individual's choice of whom to marry. *Loving*, 388 U.S. at 12 ("Under 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."); *Carey v. Population Servs.*, 431 U.S. 678, 684-85 (1977) ("[A]mong the decisions that an individual may make without unjustified government interference are 'personal decisions relating to marriage . . . .'"); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 620 (1984) ("[T]he Constitution undoubtedly imposes constraints on the State's power to control the selection of one's spouse. . . .").

B. The scope of a fundamental right under the Due Process Clause does not depend on who has been permitted to exercise that right in the past.

The fact that same-sex couples have long been excluded from marrying is neither a reason to continue that discrimination nor a basis for concluding that same-sex couples do not fall within the right to marry. The Supreme Court has never defined the right to marry by reference to those permitted to exercise that right. Its decisions refer to "the fundamental right to marry," *see Loving*, 388 U.S. at 12; *Turner*, 482 U.S. at 94-96; *Zablocki*, 434 U.S. at 383-86; not "the right to interracial marriage," "the right to inmate marriage," or "the right of people owing child support to marry." *See In re Marriage Cases*, 183 P.3d at 421 n.33 (*Turner* "did not characterize the constitutional right at issue as 'the right to inmate marriage.'"); *Kitchen*, 961 F. Supp. 2d at 1202 (the Court in *Loving* did not "declar[e] a new right to interracial marriage").

Similarly, in *Lawrence v. Texas*, 539 U.S. 558 (2003), the Court held that the "liberty of persons" (including same-sex couples) to form personal and intimate relationships falls within the Fourteenth Amendment's protection of liberty, notwithstanding the historical existence of sodomy laws prohibiting same-sex intimacy. The Court explained that the error of its decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), was that, in *Bowers*, it failed to appreciate the "extent of the liberty at stake" by erroneously focusing on "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy." *Lawrence*, 539 U.S at 566-67. The Court explained that "[o]ur laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education" and "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do." *Id.* at 574.

The same principle applies here. Plaintiffs do not seek a new right to "same-sex marriage," but rather seek to exercise the same right to marry enjoyed by other couples. *See Kitchen*, 961 F. Supp. 2d at 1203 (plaintiffs challenging exclusion of same-sex couples from marriage "are seeking access to an existing right, not declaration of a new right"). The fundamental right to marry is unquestionably "deeply rooted in this Nation's history and tradition" for purposes of constitutional protection even though certain individuals, including gay couples, have historically

been refused access to that right. While courts use history and tradition to identify the interests that due process protects, history does not define *which* Americans may exercise a right once that right is recognized. This critical distinction—that history guides *what* fundamental rights due process protects, not *who* may exercise those rights—is central to due process jurisprudence. "'[F]undamental rights, once recognized, cannot be denied to particular groups on the ground that these groups have historically been denied those rights.'" *In re Marriage Cases*, 183 P.3d at 430 (quoting *Hernandez v. Robles*, 855 N.E.2d 1, 23 (N.Y. 2006) (Kaye, C.J., dissenting)). When the Court held in *Loving* that anti-miscegenation laws violated the fundamental right to marry, it did so despite a long historical tradition of excluding interracial couples from the institution of marriage. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847-48 (1992) ("[I]nterracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause in *Loving* . . . ."). As the Court later observed, "neither history nor tradition could save a law prohibiting miscegenation from constitutional attack." *Lawrence*, 539 U.S. at 577-78.

C. Same-sex couples, like opposite-sex couples, bring to marriage the commitment that the fundamental right of marriage protects.

It is undisputed that same-sex couples make the same commitment to one another as opposite-sex couples and are as willing and able to assume the obligations of marriage. (Peplau ¶¶ 33-37; *see also, e.g.*, D. Whitewood ¶ 9; S. Whitewood ¶ 5; L. Hurdle ¶ 4; Plummer ¶ 9; Gillem ¶¶ 8-9; Lobur ¶¶ 6, 7; Wright ¶ 5; Hennessey ¶¶ 10-11.) *See Kitchen*, 961 F. Supp. 2d at 1200 (same-sex couples are like other couples with respect to "the inner attributes of marriage that form the core justifications for why the Constitution protects this fundamental human right"); *Perry*, 704 F. Supp. 2d at 993 ("[S]ame-sex couples are situated identically to opposite-sex couples in terms of their ability to perform the rights and obligations of marriage."). While there was a time when there were gender-based distinctions in the legal relationships of husbands and wives within marriage, it is undisputed that these distinctions have all been removed such that husbands and wives now have the same legal obligations and protections. (Cott ¶¶ 63-79.) The gender-based eligibility requirement maintained by Pennsylvania is no more essential to marriage than the other long discarded gender-based rules. (*Id.* ¶¶ 96, 97.)

Some opponents of marriage for same-sex couples have argued that same-sex couples are not entitled to access the fundamental right to marry because they cannot biologically procreate together. But the notion that biological procreation is

essential to the constitutionally protected marital relationship is inconsistent with the Supreme Court's decision in *Turner*, 482 U.S. at 78, striking down prison regulations restricting marriage by prisoners. Rather than dismissing the claim in that case because the union between an inmate and an unincarcerated person would lack sexual intimacy and, thus, potential for biological procreation, the Court unanimously found that "incidents of marriage, like the religious and personal aspects of the marriage commitment, are unaffected" by incarceration and "are sufficient to form a constitutionally protected marital relationship in the prison context." *Id*. at 96. *Turner* thus makes clear that the fundamental right to marry does not vanish if the relationship cannot lead to biological procreation.

Moreover, in striking down restrictions on the use of contraception by married couples, the Supreme Court recognized that marriage does not exist merely for the purpose of procreation; rather, "[m]arriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred." *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965); *see also Lawrence*, 539 U.S. at 567 ("[I]t would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse."). The "ability to procreate . . . is not a defining characteristic of conjugal relationships from a legal and constitutional point of view." *Kitchen*, 961 F. Supp. 2d at 1201. A contrary view of marriage "demeans the dignity not just of same-sex couples, but of the many

opposite-sex couples who are unable to reproduce or who choose not to have children." *Id.*

Any argument seeking to attach the fundamental right to marry to an ability of a couple to procreate is also contrary to Pennsylvania's historical and present laws governing eligibility for marriage. Neither Pennsylvania nor any other state has ever conditioned the right to marry on the ability to procreate. (Cott ¶¶ 41, 42.) *See In re Marriage Cases*, 183 P.3d at 432 ("[T]he right to marry never has been limited to those who plan or desire to have children."). Of course, several of the Plaintiff couples and thousands of other lesbian and gay couples in Pennsylvania are in fact raising children, and they seek the benefits of marriage in large part for their children. (*E.g.*, Plummer ¶ 16; D. Whitewood ¶ 14; Raspberry ¶ 18; C. Donato ¶ 5; *see also* Lamb ¶ 48.) *See Kitchen*, 961 F. Supp. 2d at 1202 (in rejecting argument that the inability to procreate excludes same-sex couples from the right to marry, observing that "[l]ike opposite-sex couples, same-sex couples may decide to marry partly or primarily for the benefits and support that marriage can provide to the children the couple is raising or plans to raise."). But the absence of children, biological or otherwise, does not vitiate the basic liberty and fundamental right to marry all people enjoy.

D. The Marriage Exclusion burdens Plaintiffs' fundamental right to marry by prohibiting them from marrying in Pennsylvania and treating as void the marriages of those who married in other states.

The exclusion of same-sex couples from marrying clearly burdens the fundamental right to marry protected by the Due Process Clause. *See Bostic*, 2014 WL 561978, at *11; *De Leon*, 2014 WL 715741, at * 19; *Kitchen*, 961 F. Supp. 2d at 1200; *Perry*, 704 F. Supp. 2d at 995; *In re Marriage Cases*, 183 P.3d at 429; *Goodridge*, 798 N.E.2d at 968.

In addition, the Plaintiffs who are already married have a fundamental liberty interest in the legal recognition of their marriages in Pennsylvania. *See DeLeon*, 2014 WL 715741, at *23 ("[B]y declaring existing, lawful same-sex marriages void and denying married couples the rights, responsibilities, and benefits of marriage, Texas denies same-sex couples who have been married in other states their due process."); *Obergefell*, 962 F. Supp. 2d at 978 (recognizing a same-sex couple's right to remain married as "a fundamental liberty interest appropriately protected by the Due Process Clause").[8]

[8] Section 2 of the federal Defense of Marriage Act ("DOMA"), 28 U.S.C.A. § 1738C, which provides that no state "shall be required to give effect to" marriages from other states between persons of the same sex, does not affect the analysis of Plaintiffs' claims regarding marriage recognition because "Section 2 is an entirely permissive federal law" that does not mandate any action by the states; "[t]he injury of non-recognition stems exclusively from state law," not the federal DOMA. *Bishop*, 962 F. Supp. 2d at 12.

Kath and Heather Poehler are among the plaintiffs who are already married. (H. Poehler ¶ 4; K. Poehler ¶ 5.) They were recognized and respected as the married couple that they are when they lived in Massachusetts, but when they moved to Pennsylvania for a job opportunity, they were effectively unmarried against their wishes. (H. Poehler ¶ 5.) As Heather Poehler described this experience:

> It's stressful that our marital status changes when we cross state lines. Recently, we went to Baltimore for a weekend and while we were waiting for our table at dinner, we realized we didn't know whether we were considered married in Maryland. We Googled it, and were happy to learn that Maryland does recognize our marriage. But this just underscored that Pennsylvania doesn't, and that we have to leave our home state to be recognized again as the married couple that we are.

(*Id.* ¶ 6.)

The Commonwealth cannot sever this legal family relationship and those of Edwin Hill and David Palmer, Helena Miller and Dara Raspberry, Marla Cattermole and Julie Lobur, Deb and Susan Whitewood, Angela Gillem and Gail Lloyd, and Ron Gebhardtsbauer and Greg Wright, without demonstrating an important justification for doing so. *See*, *e.g.*, *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) ("We have little doubt that the Due Process Clause would be offended '[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and

for the sole reason that to do so was thought to be in the children's best interest.'") (internal citations omitted); *Santosky v. Kramer*, 455 U.S. 745 (1982) (demanding clear and convincing evidence to support termination of parental rights). In *M.L.B. v. S.L.J.*, the Supreme Court made clear that the special scrutiny afforded when the government seeks to end a parent-child relationship applies to the state's "usurpation, disregard, or disrespect" of a marriage as well. 519 U.S. 102, 116-17 (1996) (internal citations omitted) ("Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as 'of basic importance in our society,' rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect. . . . M.L.B.'s case, involving the State's authority to sever permanently a parent-child bond, demands the close consideration the Court has long required when a family association so undeniably important is at stake."); *see Obergefell*, 962 F. Supp. 2d at 979 (noting that a "legal familial relationship is unilaterally terminated by Ohio's marriage recognition bans, without *any* due process") (emphasis in original).

As discussed in Section IV, *infra*, the Marriage Exclusion cannot even survive rational basis review, let alone the heightened scrutiny required when laws burden fundamental rights protected by the Due Process Clause.

II. Pennsylvania's Marriage Exclusion Is Subject To Heightened Scrutiny Because It Discriminates Based On Sexual Orientation.

The Supreme Court has treated government classifications as "suspect" or "quasi-suspect" when they "generally provide[] no sensible ground for differential treatment," *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985), and are likely "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). Such classifications must be approached with skepticism and subjected to heightened scrutiny in order to "smoke out" whether they are being used improperly. *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003). Thus, when the government engages in such classification, it bears the burden of proving the statute's constitutionality, and must show, at a minimum, that the classification is substantially related to an important governmental interest. *Cf. United States v. Virginia*, 518 U.S. 515, 532-33 (1996).

Neither the Supreme Court nor the Third Circuit has addressed the question of whether laws that classify based on sexual orientation[9] are suspect or quasi-

[9] The exclusion of same-sex couples from marriage clearly classifies based on sexual orientation. The Supreme Court has rejected efforts to deny that laws targeting conduct closely associated with being gay or lesbian are laws classifying based on sexual orientation. *Christian Legal Society v. Martinez*, 130 S. Ct. 2971, 2990 (2010) (refusing to distinguish between status and conduct with respect to gay people); *Lawrence*, 539 U.S. at 583 (O'Connor, J., concurring) ("While it is true that the [criminal sodomy] law applies only to conduct, the conduct targeted

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suspect and, thus, trigger some form of heightened equal protection scrutiny. But analysis of the factors that the Supreme Court considers in determining whether heightened equal protection scrutiny is warranted mandates the application of such scrutiny to laws that disadvantage people based on their sexual orientation.

In a long line of cases, the Supreme Court has identified the following criteria to determine whether laws that discriminate against a particular class of people trigger heightened scrutiny:

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

Windsor v. United States, 699 F.3d 169, 181 (2d Cir. 2012) (internal quotation marks and citations omitted). Of these considerations, the first two are the most important. *See id.* ("Immutability and lack of political power are not strictly necessary factors to identify a suspect class.").

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by this law is conduct that is closely associated with being homosexual," so that "[t]hose harmed by this law are people who have a same-sex sexual orientation."); *see also In Re Marriage Cases*, 183 P.3d 384, 440-41 (Cal. 2008) (ban on marriage for same-sex couples prescribes "distinct treatment on the basis of sexual orientation"); *cf. Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) ("A tax on wearing yarmulkes is a tax on Jews.").

As federal and state courts have recognized, faithful application of these factors leads to the inescapable conclusion that sexual orientation classifications must be recognized as suspect or quasi-suspect and subjected to heightened scrutiny. *See, e.g.*, *Windsor*, 699 F.3d at 181-85; *De Leon*, 2014 WL 715741, at *14; *Obergefell*, 962 F. Supp. 2d at 987-91; *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 310-33 (D. Conn. 2012); *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 985-90 (N.D. Cal. 2012); *Perry*, 704 F. Supp. 2d at 997; *Griego*, 316 P.3d at 880-84; *Varnum*, 763 N.W.2d at 885-96; *In re Marriage Cases*, 183 P.3d at 441-44; *Kerrigan*, 957 A.2d at 425-31; *see also SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 480-84 (9th Cir. 2014) (finding heightened scrutiny applicable to sexual orientation classification without examining the four factors).[10]

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

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History of discrimination. Lesbian and gay people have suffered a long and painful history of discrimination. The uncontested expert testimony shows that through much of the twentieth century, in particular, lesbians and gay men were subjected to penal laws that condemned their intimate relationships as a crime; police raids that exposed them to risk of arrest if they socialized in public; censorship codes that prohibited their depiction on the stage, in the movies, and on television; federal and state policies prohibiting their employment in government jobs; their exclusion from military service; demonization in the media as perverts and predators of children; and brutal violence. (*See generally* Chauncey ¶¶ 21-104.) These forms of discrimination took place across the United States, including in Pennsylvania. For example, by 1950, the Philadelphia police had a "morals squad" that arrested about 200 gay men per month. The Philadelphia police also raided bars, coffee shops, and other meeting places where gay people gathered. (*Id.* ¶ 56.)

Many of these expressly discriminatory laws and policies have ended, but lesbian and gay people continue to live with the legacy of this discrimination, which created and reinforced the belief that they are an inferior class to be shunned

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law supporting the defendants' claim that gay persons are not a [suspect or] quasi-suspect class.'") (citations omitted); *accord Golinski*, 824 F. Supp. 2d at 984.

by other Americans. (*Id.* ¶ 7; *see also* Peplau ¶ 55 ("In American society today, gay men, lesbians, and bisexuals continue to be a highly stigmatized minority group.").) Indeed, public officials in Pennsylvania have continued to demonize and express their antipathy towards lesbian and gay citizens of the Commonwealth. During the 1990 floor debate in the Pennsylvania House of Representatives over a bill that would have extended hate crime protection to include sexual orientation, state legislators condemned homosexuality as a "perversion" and a danger to society. (Chauncey ¶ 89.) *See* 1990 Pa. Legis. J. (House), at 1202, 1206, 1209, 1210 (June 26, 1990), PX-49. As one legislator put it:

> These people whom we are going to give this privileged minority status to are not simply the gentlemen who like to walk around holding hands. They do have an agenda. Their agenda is to turn our society upside down. . . . This bill will turn our society upside down. This bill will require us to remove the slogan "America Starts Here" to "America Ends Here," because sodomy has always resulted in the collapse of a civilization.

Id. at 1206. Another legislator said that the bill promoted "sexual perversion" and would lead to the "further deterioration of the traditional family and its values." *Id.* at 1209.

During the 2006 debates over a proposed amendment to the state constitution to prohibit marriage for same-sex couples, several Pennsylvania legislators warned that failing to exclude same-sex couples from marriage would lead to the legalization of incest and bestiality. (Chauncey ¶ 103.) In 2009, a state

senator called same-sex relationships "dysfunctional" and equated marriage for same-sex couples with pedophilia. (*Id.*) During his 2010 gubernatorial campaign, then Attorney General Thomas W. Corbett stated that a "Constitutional amendment would help safeguard marriage against an alternative agenda." (*Id.*) *See Pennsylvania Primary Election*, 25 Viewpoint Newsletter of the Pa. Catholic Conference 1, at 5 (May 18, 2010), PX-59.

In June 2013, several state lawmakers prevented Representative Brian K. Sims, an openly gay lawmaker from Philadelphia, from speaking on the House floor about the U.S. Supreme Court's decision in *Windsor v. United States*. (Chauncey ¶ 103.) *See* Mollie Reilly, *Brian Sims, Pennsylvania Lawmaker, Silenced on DOMA by Colleagues Citing "God's Law,"* Huffington Post (June 27, 2013), PX-60. One of the lawmakers later explained that he did so because "I did not believe that as a member of that body that I should allow someone to make comments such as he was preparing to make that ultimately were just open rebellion against what the word of God has said, what God has said, and just open rebellion against God's law." (*Id.*) And just last October, when Governor Corbett was asked about arguments his lawyers had made in opposing a lawsuit by same-sex couples seeking the right to marry, he justified the Marriage Exclusion by equating the marriage of a gay couple to the marriage of a brother and sister. (Chauncey ¶ 104.) *See* Interview with Governor Thomas Corbett, WHP-TV (Oct.

4, 2013), PX-62; John L. Micek, *Corbett Apologizes For Remarks About Same-Sex Couples*, PennLive (Oct. 4, 2013), PX-63.

As the Second Circuit concluded in *Windsor*, 699 F.3d at 182, "[i]t is easy to conclude that homosexuals have suffered a history of discrimination"; this fact "is not much in debate."

Ability to perform in or contribute to society. A person's sexual orientation does not bear any relationship to his or her ability to perform in or contribute to society. The uncontested expert testimony shows that it is well-established that homosexuality is a normal expression of human sexuality, it is not a mental illness, and being gay or lesbian has no inherent association with a person's ability to lead a happy, healthy, and productive life or to contribute to society. (Peplau ¶¶ 29-32.) *See, e.g.*, *Windsor*, 699 F.3d at 182 ("There are some distinguishing characteristics, such as age or mental handicap, that may arguably inhibit an individual's ability to contribute to society, at least in some respect. But homosexuality is not one of them."); *Varnum*, 763 N.W.2d at 890 ("Not surprisingly, 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.").

Immutable or distinguishing characteristic. Sexual orientation is an "obvious, immutable, or distinguishing" aspect of personal identity. *See Windsor*,

699 F.3d at 181. As the Second Circuit observed, there is no doubt that sexual orientation is a distinguishing characteristic that "calls down discrimination when it is manifest." *Id.* at 183. There is no requirement that a characteristic be immutable in a literal sense in order to trigger heightened scrutiny. Heightened scrutiny applies to classifications based on alienage and "illegitimacy" even though "[a]lienage and illegitimacy are actually subject to change." *Id.* at 183 n.4; *see Nyquist v. Mauclet*, 432 U.S. 1, 9 n.11 (1977) (rejecting the argument that alienage did not deserve strict scrutiny because it was mutable). But even if literal immutability were required, the uncontested expert testimony shows that sexual orientation is not something that can be changed through religious or psychotherapy interventions. Indeed, no major mental health professional organization has approved interventions to attempt to change sexual orientation and organizations including the American Psychiatric Association, the American Psychological Association, the American Counseling Association, the National Association of Social Workers and the American Academy of Pediatrics, have adopted policy statements cautioning against such treatments. (Peplau ¶¶ 26-28.) *See, e.g.*, *Golinski*, 824 F. Supp. 2d at 986 ("[T]he consensus in the scientific community is that sexual orientation is an immutable characteristic."); *Perry*, 704 F. Supp. 2d at 966 ("No credible evidence supports a finding that an individual

may, through conscious decision, therapeutic intervention or any other method, change his or her sexual orientation.").

Moreover, as numerous courts have recognized, sexual orientation is so fundamental to a person's identity that one ought not be forced to choose between one's sexual orientation and one's rights as an individual—even if such a choice could be made. *See Pedersen*, 881 F. Supp. 2d at 325; *Golinski*, 824 F. Supp. 2d at 987; *In re Marriage Cases*, 183 P.3d at 442; *Kerrigan*, 957 A.2d at 438; *Varnum*, 763 N.W.2d at 892-93; *Griego*, 316 P.3d at 884.

Insufficient political power to protect against discrimination. Gay people are a minority (Peplau ¶¶ 22, 55) and lack sufficient political power "to adequately protect themselves from the discriminatory wishes of the majoritarian public." *Windsor*, 699 F.3d at 185. Gay people remain a highly stigmatized minority group. (Peplau ¶ 55.) A legacy of the long history of discrimination against lesbians and gay men has been the inability to enact legislative protections against discrimination and prevent the passage of discriminatory laws. (Chauncey ¶ 9.) Moreover, gay people have been particularly vulnerable to discriminatory ballot initiatives to roll back protections they have secured in the legislature or to prevent such protections from ever being extended. (*Id.* ¶¶ 74, 76, 97, 100-101.) *See Griego*, 316 P.3d at 883.

In analyzing this factor, "[t]he question is not whether homosexuals have achieved political successes over the years; they clearly have. The question is whether they have the strength to politically protect themselves from wrongful discrimination." *Windsor*, 699 F.3d at 184. Recent advances for gay people pale in comparison to the political progress of women at the time that classifications based on sex were first recognized as quasi-suspect. By that time, the Nineteenth Amendment had been the law for two generations, and Congress had already passed Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963, both of which protect women from discrimination in the workplace. *Frontiero v. Richardson*, 411 U.S. 677, 687-88 (1973) (plurality). In contrast, there is still no express federal ban on sexual orientation discrimination in employment, housing, or public accommodations (Chauncey ¶ 80), and more than half of the states, including Pennsylvania, have no laws providing such protections either (*id.* ¶ 77). *See Pedersen*, 881 F. Supp. 2d at 326-27; *Golinski*, 824 F. Supp. 2d at 988-89; *Griego*, 316 P.3d at 883. "As political power has been defined by the Supreme Court for purposes of heightened scrutiny analysis, gay people do not have it." *Obergefell*, 962 F. Supp. 2d at 990.

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In short, sexual orientation classifications demand heightened scrutiny under not just the two required factors but under all four factors that the Supreme Court

has used to identify suspect or quasi-suspect classifications. This Court should apply at least the intermediate scrutiny applied to quasi-suspect classifications and make clear that it will no longer presume that government discrimination based on sexual orientation is constitutional. Continuing to do so would perpetuate historical patterns of discrimination and demean the dignity and worth of gay people to be judged according to their individual merits and not according to their sexual orientation. *Cf. Rice v. Cayetano*, 528 U.S. 495, 517 (2000).

III. Pennsylvania's Marriage Exclusion Is Subject To Heightened Scrutiny Because It Discriminates Based On Sex.

"'[A]ll gender-based classifications today' warrant 'heightened scrutiny.'" *United States v. Virginia*, 518 U.S. at 555 (quoting *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136 (1994)). Pennsylvania's Marriage Exclusion contains explicit sex-based classifications: a person may marry only if the person's sex is different from that of the person's intended spouse. Like any other sex-based classification, the Marriage Exclusion must be tested through the framework of heightened scrutiny. *See Kitchen*, 961 F. Supp. 2d at 1206; *Golinski*, 824 F. Supp. 2d at 982 n. 4; *Baehr v. Lewin*, 852 P.2d 44, 64 (Haw. 1993).

The fact that Pennsylvania's restriction on marriage equally denies men and women the right to marry a person of the same sex does not make the restriction any less invidious. In *Loving*, the Supreme Court rejected "the notion that the mere 'equal application' of a statute containing racial classifications is enough to

remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations." *Loving*, 388 U.S. at 8. "Applying the same logic" used in *Loving*, "the fact of equal application to both men and women does not immunize [Pennsylvania's Marriage Exclusion] from the heightened burden of justification that the Fourteenth Amendment requires of state laws drawn according to sex." *Kitchen*, 961 F. Supp. 2d. at 1206.[11]

Because Pennsylvania's Marriage Exclusion explicitly classifies based on sex, it cannot survive unless the Commonwealth can demonstrate an "exceedingly persuasive justification." *United States v. Virginia*, 518 U.S. at 531. This means that "[t]he State must show 'at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are 'substantially related to the achievement of those objectives.'" *Id.* at 533.

IV. Pennsylvania's Marriage Exclusion Is Unconstitutional Under Any Level Of Scrutiny.

When the requisite heightened scrutiny is applied, it is clear that Defendants cannot carry their burden to demonstrate that excluding same-sex couples from

[11] The anti-miscegenation law in *Loving* also applied unequally to protect the racial "integrity" of white people but not other racial groups. But the Court made clear that the racial classifications were unconstitutional "even assuming an even-handed state purpose to protect the 'integrity' of all races." *Loving*, 388 U.S. at 11 n.11; *see also J.E.B.*, 511 U.S. at 140-42 (holding that both male and female jurors have right to nondiscriminatory juror selection even though such discrimination does not favor either men or women as a group).

marriage is at least substantially related to an important governmental interest. Moreover, in an unbroken line of cases since *Windsor*, several federal courts have now concluded that even under the most deferential standard of review, the exclusion of same-sex couples from marriage violates the Equal Protection Clause. *See DeBoer*, 2014 WL 1100794, at *11-15; *De Leon*, 2014 WL 715741, at *14-18; *Bostic*, 2014 WL 561978, at *14-22; *Bourke*, 2014 WL 556729, at *7-8; *Bishop*, 961 F. Supp. 2d 1252; *Obergefell*, 962 F. Supp. 2d at 983-86; *Kitchen*, 961 F. Supp. 2d at 1205-06; *see also Perry*, 704 F. Supp. 2d at 997-1003.

In their defense of the Marriage Exclusion, Defendants have offered four rationales:

(a) the promotion of procreation

(b) child rearing and the well-being of children

(c) adverse economic impacts for the Commonwealth and Pennsylvania businesses

(d) tradition

(Defs.' Resp. to Pls.' First Set of Interrogs., PX-35.) In support of these rationales, they have offered only the statements contained in the legislative record when the Marriage Exclusion was enacted by the legislature. (*Id.*) They have not offered any fact or expert witnesses to support these rationales. None of these rationales can withstand even rational basis review.

Some of the asserted rationales are not even legitimate purposes for disadvantaging a group of people. Others are legitimate purposes, but the Marriage Exclusion has no rational relationship to their furtherance. "[E]ven in the ordinary equal protection case calling for the most deferential of standards, [the Court] insist[s] on knowing the relation between the classification adopted and the object to be attained." *Romer v. Evans*, 517 U.S. 620, 632 (1996); *see also Cleburne*, 473 U.S. at 446 ("The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational."). It is this "search for the link between classification and objective" that "gives substance to the Equal Protection Clause." *Romer*, 517 U.S. at 632. "[R]equiring that the classification bear a rational relationship to an independent and legitimate legislative end . . . ensure[s] that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Id.* at 633; *accord Windsor*, 133 S. Ct. at 2693; *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534-35 (1973).

A. The Marriage Exclusion does not rationally further any government interest related to procreation or children's well-being.

The Defendants assert government interests both in "the promotion of procreation" and "child rearing and the well-being of children." The only

statements contained in the legislative record arguably related in any way to these asserted interests are the following:

- The amendment is "an expression of Pennsylvania's . . . support of the traditional family unit." 1996 Pa. Legis. J. (House), at 2017, PX-45.

- "In 1885, the Supreme Court felt so strongly that marriage was to be protected that it declared it as a requirement for admission of new states to the Union. Any prospective state, the court said, had to have law resting 'on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony . . . .'" *Id.* at 2022.

- "I believe that it is imperative that we in Pennsylvania should stand up for traditional marriage for the benefit of families and children in the Commonwealth and our future." *Id.*

- "This is a vote about family values . . . ." *Id.*

None of these statements offers any explanation of how the exclusion of same-sex couples from marriage advances the government's interest in procreation or child-rearing and the well-being of children. However, a written statement by the Hawaii Catholic Conference, which was submitted for the record by Representative Stern, makes the following assertions:

- "[C]hildren enter society through the union of a man and a woman, not just a sperm and an egg. This is obvious! A sperm bank is not the equivalent of a real father. The people of Hawaii know that our children are our future. If children are not a 'compelling interest' of the State, what is?" *Id.* at 2023.

- "[A] committed, faithful and lifelong relationship between a woman and a man is the best environment for children. Every child deserves a stable home with her real mother and father." *Id.*

- "[A] formal commitment between a man and a woman encourages them to take joint responsibility for their children and for each other. . . . The law of marriage connects sex, commitment, and children. It holds parents responsible for supporting and educating their children, both within marriage and even if a marriage breaks down. If the law redefines marriage and sends a message that marriage has no relationship to sex, commitment, or children, it will only add to our current troubles, and undermine what health still remains." *Id*.

These statements offered by Representative Stern boil down to the following two ideas: (i) only heterosexual unions result in procreation and marriage causes heterosexuals to be responsible for supporting the children who result from their sexual relationships; and (ii) the best environment for children is to be raised by their biological mother and father.[12]

Such rationales, often referred to in other cases as the "responsible procreation" and "optimal childrearing" rationales, respectively, have "failed rational basis review in every court to consider them post-*Windsor*." *Bourke*, 2014 WL 556729, at *8; *see DeBoer*, 2014 WL 1100794, at *12-13; *DeLeon*, 2014 WL 715741, at *14-16; *Bostic*, 2014 WL 561978, at *17-20; *Bishop*, 962 F. Supp. 2d at 1290-92; *Obergefell*, 962 F. Supp. 2d at 982; *Kitchen*, 961 F. Supp. 2d at 1201-02;

[12] Plaintiffs infer from the context that "real mother and father" was intended to be a reference to biological parents, as distinguished from adoptive parents and other non-biological parents.

see also Perry, 704 F. Supp. 2d at 999-1000 (rejecting these rationales).[13] This is because the exclusion of same-sex couples from marriage does not conceivably further these interests in any way.

Responsible procreation. The exclusion of same-sex couples from marriage does not rationally further the asserted interest in "promoting procreation," responsible or otherwise. There is no logical basis to think that excluding same-sex couples from marriage will affect procreative activity of heterosexual couples. *See DeLeon*, 2014 WL 715741, at *16 ("Same-sex marriage does not make it more or less likely that heterosexuals will marry and engage in activities that can lead to procreation."); *accord Bishop*, 962 F. Supp. 2d at 1291; *Pedersen*, 881 F. Supp. 2d at 340-41; *Golinski*, 824 F. Supp. 2d at 997-98. It is even more farfetched to imagine that voiding marriages performed in states outside of Pennsylvania will have any such effects. And of course same-sex couples also have children through assisted reproduction or adoption. (Lamb ¶ 47.) There is

[13] The Bipartisan Legal Advisory Group defending the federal Defense of Marriage Act ("DOMA") in *Windsor* asserted these same purported governmental interests related to procreation and children's well-being. Merits Br. of Bipartisan Legal Advisory Group, *United States v. Windsor*, 2013 WL 267026, at *21 (2013) (asserting the "unique relationship between marriage and procreation" and "foster[ing] relationships in which children are raised by both of their biological parents"). The Supreme Court necessarily rejected those arguments when it held that "no legitimate purpose" could justify the inequality that DOMA imposed on same-sex couples and their families. *Windsor*, 133 S. Ct. at 2696.

simply no rational relationship between the exclusion of same-sex couples from marriage and an interest in promoting procreation.

To the extent the Defendants are asserting an interest in promoting responsible procreation by heterosexual couples (*i.e.*, procreation within the context of the commitment and stability of marriage), there is still no logical connection between the Marriage Exclusion and this interest. The exclusion of same-sex couples from marriage does nothing to incentivize heterosexual couples to marry. All of the benefits of marriage for heterosexual couples under Pennsylvania law exist independent of the Marriage Exclusion and will remain if it is struck down. *See Bishop*, 962 F. Supp. 2d at 1291 ("Marriage is incentivized for naturally procreative couples to precisely the same extent regardless of whether same-sex couples (or other non-procreative couples) are included."); *Perry v. Brown*, 671 F.3d 1052, 1088 (9th Cir. 2012) ("There is no rational reason to think that taking away the designation of 'marriage' from same-sex couples would advance the goal of encouraging California's opposite-sex couples to procreate more responsibly."), *vacated and remanded on other grounds sub nom. Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (dismissing appeal); *accord De Leon*, 2014 WL 715741, at *16; *Bourke*, 2014 WL 556729, at *10; *Kitchen*, 961 F. Supp. 2d at 1201; *Golinski*, 824 F. Supp. 2d at 998.

Moreover, same-sex couples have children too, and the government has just as strong an interest in encouraging that such procreation and child-rearing take place in the stable context of marriage. "The reality is that same-sex couples, while not able to 'naturally procreate,' can and do have children by other means," and, "[i]f a same-sex couple is capable of having a child with or without a marriage relationship, and the articulated state goal is to reduce children born outside of a marital relationship, the challenged exclusion hinders rather than promotes that goal." *Bishop*, 962 F. Supp. 2d at 1292; *In re Marriage Cases*, 183 P.3d at 433 ("[A] stable two-parent family relationship, supported by the state's official recognition and protection, is equally as important for the numerous children . . . who are being raised by same-sex couples as for those children being raised by opposite-sex couples (whether they are biological parents or adoptive parents)."); *accord De Leon*, 2014 WL 715741, at *16.

In any event, Pennsylvania's marriage laws do not classify based on whether or not couples are able to or choose to procreate (biologically or otherwise); they classify based on the sex of the partners regardless of their procreative abilities and interests. (Cott ¶¶ 41-42.) *See Lawrence*, 539 U.S. at 605 (Scalia, J., dissenting) ("[W]hat justification could there possibly be for denying the benefits of marriage to homosexual couples exercising '[t]he liberty protected by the Constitution'? Surely not the encouragement of procreation, since the sterile and the elderly are

allowed to marry." (internal citation omitted)); *Bourke*, 2014 WL 556729, at *8 ("Kentucky does not require proof of procreative ability to have an out of state marriage recognized. The exclusion of same-sex couples on procreation grounds makes just as little sense as excluding post-menopausal couples or infertile couples on procreation grounds."); *DeBoer*, 2014 WL 1100794, at *13 ("The prerequisites for obtaining a marriage license under Michigan law do not include the ability to have children . . . ."); *Bishop*, 962 F. Supp. 2d at 1293 (noting that "the infertile, the elderly, and those who simply do not wish to ever procreate" are permitted to marry in Oklahoma).

Pennsylvania does not condition the right to marry on procreative ability. It cannot selectively rely on procreation only when it comes to same-sex couples. *See Cleburne*, 473 U.S. at 450 (asserted concern about avoiding traffic congestion did not constitute rational basis for requirement of a special use permit for home for developmentally disabled adults because this concern "fail[s] to explain why apartment houses, fraternity and sorority houses, hospitals and the like, may freely locate in the area without a permit"); *see also Ry. Express Agency v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring) ("[T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally."); *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 300

(1990) (Scalia, J., concurring) (the Equal Protection Clause "requires the democratic majority to accept for themselves and their loved ones what they impose on" others).

Optimal child-rearing. Even if there were any factual basis for the belief that children are best off if raised in families headed by a biological mother and father (and as discussed below, there is not), there is no rational connection between the exclusion of same-sex couples from marrying and an interest in children being raised in such families.[14] Pennsylvania's Marriage Exclusion does not prevent lesbian and gay couples from having children. According to the U.S. Census, there are 3,500 same-sex couples raising children in Pennsylvania. (Lamb

[14] Moreover, the assertion that children are best off with a male and a female parent, far from constituting a valid defense, reflects "'the very stereotype the law condemns.'" *J.E.B.*, 511 U.S. at 138 (quoting *Powers v. Ohio*, 499 U.S. 400, 410 (1991)). The Supreme Court has made clear that gender classifications cannot be based on or validated by "fixed notions concerning the roles and abilities of males and females." *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724-25 (1982); *see also United States v. Virginia*, 518 U.S. at 533. And in the context of parenting responsibilities, the Court has rejected the notion of "any universal difference between maternal and paternal relations." *Caban v. Mohammed*, 441 U.S. 380, 388-89 (1979); *see also Califano v. Westcott*, 443 U.S. 76, 89 (1979) (finding unconstitutional a federal statute providing for support in event of father's unemployment, but not mother's unemployment; describing measure as based on stereotypes that father is principal provider "while the mother is the 'center of home and family life'"). Because such a rationale rests on sex stereotypes regarding parental roles of men and women, this is an additional reason heightened scrutiny is warranted.

¶ 47.)[15] And as discussed above, excluding same-sex couples from marrying does not cause more children to be born into families headed by heterosexual couples. *DeBoer*, 2014 WL 1100794, at *13 ("Prohibiting gays and lesbians from marrying does not stop them from forming families and raising children. Nor does prohibiting same-sex marriage increase the number of heterosexual marriages or the number of children raised by heterosexual parents."). Thus, "even if it were rational for legislators to speculate that children raised by heterosexual couples are better off than children raised by gay or lesbian couples, *which it is not*, there is simply no rational connection between the [exclusion of same-sex couples from marriage] and the asserted goal." *Obergefell*, 962 F. Supp. 2d at 994 (emphasis in original); *accord DeBoer*, 2014 WL 1100794, at *13; *De Leon*, 2014 WL 715741, at *16; *Bostic*, 2014 WL 561978, at * 17-20; *Bourke*, 2014 WL 556729, at *8; *Bishop*, 962 F. Supp. 2d at 1291; *Kitchen*, 961 F. Supp. 2d at 1205.

[15] To the extent that Pennsylvania's Marriage Exclusion denies children of same-sex couples the family security that comes with marriage as a way to attempt (albeit irrationally) to deter other same-sex couples from having children, the Supreme Court has invalidated similar attempts to incentivize parents by punishing children as "illogical and unjust." *Plyler*, 457 U.S. at 220. And, any law adopted with the purpose of burdening gay people's ability to procreate would also face heightened scrutiny for implicating the fundamental right to decide "whether to bear or beget a child." *Casey*, 505 U.S. at 851 (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)); *see Pedersen*, 881 F. Supp. 2d at 341.

The "only effect the [Marriage Exclusion has] on children's well-being is harming the children of same-sex couples who are denied the protection and stability of having parents who are legally married." *Obergefell*, 962 F. Supp. 2d at 994-95; *see also Goodridge*, 798 N.E.2d at 964 ("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.") (internal quotation marks omitted). (*See* Lamb ¶ 48 ("Marriage can yield important benefits for children and families" and "[a]llowing same-sex couples to have equal access to those benefits afforded through marriage is in the best interests of the children in these families.").) "Indeed, Justice Kennedy explained [in *Windsor*] that it was the government's failure to recognize same-sex marriages that harmed children, not having married parents who happened to be of the same sex." *Bourke*, 2014 WL 556729, at *8; *see also Kitchen*, 961 F. Supp. 2d at 1212-13 ("If anything, [Utah's marriage ban] detracts from the State's goal of promoting optimal environments for children," in part by "den[ying] the families of [children of same-sex couples] a panoply of benefits that the State and the federal government offer to families who are legally wed."); *accord Bostic*, 2014 WL 561978, at *18.

Moreover, like the federal DOMA invalidated in *Windsor*, Pennsylvania's Marriage Exclusion "humiliates" the "children now being raised by same-sex couples" and "makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Windsor*, 133 S. Ct. at 2694; *see also Bostic*, 2014 WL 561978, at *18 (the marriage exclusion has the effect of "needlessly stigmatizing and humiliating children who are being raised" by same-sex couples, which "betrays" rather than serves an interest in child welfare). As Deb and Susan Whitewood's daughter A.W. has explained it, if her parents' marriage were recognized by the Commonwealth, "it would help to prove what we already know: that we, a family with two moms, are just like any other family," and "[i]t would encourage others to accept my family and treat us with the same respect that my friends' families receive." (A.W. ¶ 8.) *See also* pages 11-13, *supra* (discussing parents' concerns about impact of the Marriage Exclusion on their children).

The asserted interest in the well-being of children thus fails rational-basis review as a matter of logic because the Marriage Exclusion does not plausibly affect the procreative and child-rearing plans of heterosexual or same-sex couples and serves only to harm children of same-sex couples. In addition, it is undisputed that the premise of this asserted rationale—that same-sex couples are less optimal

parents than opposite-sex couples—has no factual basis. *See Heller v. Doe ex rel. Doe*, 509 U.S. 312, 321 (1993) (under rational basis review, the rationale must have a "footing in . . . realit[y]."); *Romer*, 517 U.S. at 632-33 (under rational basis review, there must be "a sufficient factual context for [the court] to ascertain some relation between the classification and the purpose it serve[s]."). The Commonwealth itself recognizes this through its laws and policies concerning adoption by lesbian and gay couples. Same-sex couples are permitted to adopt children in Pennsylvania. *Adoption of R.B.F.*, 803 A.2d 1195 (Pa. 2002). The Pennsylvania Department of Public Welfare, the administrative agency of the Commonwealth government that is responsible by law to oversee the child welfare system in Pennsylvania, has no policy that requires an agency to prefer placement with a heterosexual couple over a same-sex couple, and the Department prescribes forms for prospective adoptive and foster parents that are gender neutral, identifying applicants as "Partner # 1" and "Partner # 2." (Stip. of Facts Between Pls. and Defs. Meuser and Wolf ¶ 22, PX-64.) The agencies that are licensed and regulated by the Department place children in foster and adoptive placements with same-sex couples. (*Id.*)

Moreover, it is undisputed that there is a consensus within the scientific community, based on over thirty years of research, that children raised by same-sex couples fare no differently than children raised by opposite-sex couples and

this consensus is recognized by every major professional organization dedicated to children's health and welfare including the American Academy of Pediatrics, the American Psychological Association, the National Association of Social Workers, and the Child Welfare League of America. (Lamb ¶¶ 32-35.) The well-being of children of same-sex parents is not a "debatable" question. *Minnesota v. Clover Leaf Creamery*, 449 U.S. 456, 464 (1981). Indeed, this consensus has been recognized by numerous courts after trials involving expert testimony. *See DeBoer*, 2014 WL 1100794, at *12 ("[T]here is simply no scientific basis to conclude that children raised in same-sex households fare worse than those raised in heterosexual households."); *Perry*, 704 F. Supp. 2d at 980 (finding that the research supporting the conclusion that "[c]hildren raised by gay or lesbian parents are as likely as children raised by heterosexual parents to be healthy, successful and well-adjusted" is "accepted beyond serious debate in the field of developmental psychology"); *In re Adoption of Doe*, 2008 WL 5006172, at *20 (Fla. Cir. Ct. Nov. 25, 2008) ("[B]ased on the robust nature of the evidence available in the field, this Court is satisfied that the issue is so far beyond dispute that it would be irrational to hold otherwise; the best interests of children are not preserved by prohibiting homosexual adoption."), *aff'd sub nom. Fla. Dep't of Children & Families v. Adoption of X.X.G.*, 45 So.3d 79 (Fla. Dist. Ct. App. 2010); *Howard v. Child Welfare Agency Rev. Bd.*, No. 1999-9881, 2004 WL 3154530, at

*9, and 2004 WL 3200916, at *3-4 (Ark. Cir. Ct. Dec. 29, 2004) (holding based on factual findings regarding the well-being of children of gay parents that "there was no rational relationship between the [exclusion of gay people as foster parents] and the health, safety, and welfare of the foster children."), *aff'd sub nom. Dep't of Human Servs. v. Howard*, 238 S.W.3d 1 (Ark. 2006).[16] In this case, Plaintiffs' expert evidence conclusively refutes any claim that the Marriage Exclusion furthers the interests of children, and defendants have not introduced any contradictory evidence.

To the extent that the Defendants' asserted rationale reflects a belief (as suggested in the statement introduced by Representative Stern) that children are best off if raised by two biological parents, that rationale does not explain why same-sex couples are singled out. Lesbian and gay couples are hardly the only couples who create families in which children are not related biologically to one or

[16] Opponents of marriage for same-sex couples—but not the Defendants here—often claim that a 2012 study by a sociologist named Mark Regnerus shows that children raised by same-sex parents fare worse than children raised by different-sex parents. But this study allows for no such conclusion because it did not actually assess individuals *raised* by same-sex parents *See DeBoer*, 2014 WL 1100794, at *7 (finding Dr. Regnerus's testimony "entirely unbelievable and not worthy of serious consideration" in part because his study "failed to measure the adult outcomes of children who were actually raised in same-sex households"). Rather, the Regnerus study assessed a group of individuals who were the product of heterosexual unions that broke up—which is a known correlate of poorer child outcomes—and a parent subsequently had a same-sex relationship. (Lamb ¶ 36.)

both parents. In fact, the majority of couples who create families through assisted reproduction involving donor sperm are opposite-sex couples. (Lamb ¶ 43.) Moreover, the Marriage Exclusion has no conceivable impact on the decisions of couples (heterosexual or gay) to form families through adoption or assisted reproduction. In any case, the research on same-sex parent families, as well as research on children of heterosexual couples conceived by donor insemination and children adopted as infants, establishes that there is no relationship between how well children fare and whether or not they are biologically related to their parents. (Lamb ¶¶ 44-46.)

These uncontested facts show that the asserted optimality of opposite-sex parents is based on nothing but disproven negative assumptions about gay parents. As discussed above, even under rational basis review, the rationale must have a "footing in . . . realit[y]." *Heller*, 509 U.S. at 321; *see also Moreno*, 413 U.S. at 535-36 (rejecting negative "unsubstantiated assumptions" about hippies). A negative stereotype that flies in the face of scientific consensus does not satisfy the rational basis test; if it could, rational basis review would be no review at all.

Finally, even if there were, in fact, poorer outcomes among children raised by same-sex couples—and there are not—that would not explain the exclusion of same-sex couples from marriage. Research shows that there are groups whose children on average are more likely to have poorer child development outcomes

(*e.g.*, children of low income couples, children of low educated couples, and children in some ethnic groups). (Lamb ¶ 49.) But these groups are not excluded from marriage. (*Id.*) Indeed, the *DeBoer* court noted that Michigan "does not similarly exclude certain classes of heterosexual couples from marrying whose children persistently have had 'sub-optimal' developmental outcomes" in scientific studies, and that "[t]aking the state defendants' position to its logical conclusion" would require that marriage be restricted to only rich, educated, suburban-dwelling Asians. *DeBoer*, 2014 WL 1100794, at *13; *see also Bishop*, 962 F. Supp. 2d at 1294 (the state "does not condition any other couple's receipt of a marriage license on their willingness or ability to provide an 'optimal' child-rearing environment for any potential or existing children."); *Cleburne*, 473 U.S. at 449-50 (an asserted interest that applies equally to non-excluded groups fails rational basis review). In fact, not only are groups whose children tend to have poorer outcomes permitted to marry, but marriage is promoted among these groups as a means of helping to ameliorate the disparities in outcomes. (Lamb ¶ 49.) Thus, if there were problematic child development outcomes for children of same-sex couples, that would only be a reason to encourage—not bar—marriage by same-sex couples. (*Id.*)

* * *

For all of these reasons, the asserted interests related to procreation and the well-being of children fail rational basis review. Moreover, even if procreation is considered by some people to be *one* of the purposes of marriage, it is indisputably not the *only* purpose that marriage serves for Pennsylvania families. Marriage is "a far-reaching legal acknowledgment of the intimate relationship between two people." *Windsor*, 133 S. Ct. at 2692; *see also Griswold*, 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."). Marriage in Pennsylvania is tied to a wide array of governmental protections and obligations that have nothing to do with procreation or children. Just like the constitutional amendment struck down in *Romer*, the Marriage Exclusion is a law that "identifies persons by a single trait and then denies them protection across the board." *Romer*, 517 U.S. at 633. The law's breadth "outrun[s] and belie[s]" a claimed interest related to procreation or child-rearing. *Id.* at 635.

B. An asserted interest in preventing adverse economic impacts on the Commonwealth and businesses does not satisfy rational basis review.

Defendants also offer as a rationale for the Marriage Exclusion preventing adverse economic impacts on the Commonwealth and private businesses. The statements contained in the legislative record related to this interest are the following:

- "[L]egalizing same-sex marriages would place another unfunded mandate on our business community. Any existing pension or insurance program providing benefits to a spouse would now have to include an entirely new supply of so-called spouses. The providers of these benefits would have to assume a liability they never conceived when the promise was made. To avoid these new liabilities, providers would have to cancel and rewrite the agreements, and future agreements might even delete the coverage of spouse and family that Pennsylvania workers have come to depend on." 1996 Pa. Legis. J. (House), at 2017, PX-45.

- "The burden on the public sector could be great as well. In recognizing same-sex marriages, courts would also have to hear all same-sex divorce suits. This will only compound the backlog of cases in our judicial system. Social Security, tax, and other benefits presently conferred on spouses would have to be expanded to include married partners of the same sex. The financial costs imposed on society by the forced recognition of same-sex marriage cannot even be calculated at this time." *Id.*

- "The fact of the matter is that the issue turns . . . on economics, pure and simple. . . . [S]ome people have begun to realize that permitting same-gender or gender-neutral marriages can cause significant economic dislocations. Marriage has longstanding been considered a civil contract. The fact that it is now defined that way in this bill does not change the way it has been for the last hundreds of years, and that civil contract confers obligations, responsibilities, and benefits upon two individuals who fulfill that legal contract. I daresay that if we begin to redefine marriage as same gender, there will be many people who will suddenly realize that they can achieve the benefits of a married couple, whether it is in taxes, inheritances, property ownership, whatever it may be, that will be a clear economic advantage that is in fact enjoyed by married people of different genders. It has nothing to do with gender preference or sexual preference; it has everything to do with economic gain or loss. I think there will be economic dislocations that would occur if we were to permit same-gender marriages that we have not even begun to conceive at this point, and until we are able to ascertain what those dislocations will be and who in fact will be picking up the costs of those dislocations, we need to move forward with legislation such as

> this. I am not so certain that we need to do it as precipitously as this bill has been done, but certainly we need to establish a base from which to work and from which to conduct a study. This bill permits us the opportunity to do that by settling the issue until such time as such a study may be completed." 1996 Legis. J. (Senate), at 2454 (Oct. 1, 1996), PX-46.

As a matter of law, saving money or resources is not a legitimate justification for excluding a group from a government benefit without an independent rationale for why the cost savings ought to be borne by the particular group being denied the benefit. *Plyler*, 457 U.S. at 227 ("Of course, a concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources.").

In any case, there is no factual basis for the suggestion that allowing same-sex couples to marry will financially burden the Commonwealth or Pennsylvania businesses. *Heller*, 509 U.S. at 321 (rational basis review must have a "footing in . . . realit[y]"). In fact, the financial impact is the opposite.

The uncontested expert testimony shows that the Marriage Exclusion actually costs the Commonwealth money in (i) increased Medicaid expenditures due to more Pennsylvanians lacking health insurance because they are unable to procure employee spousal health benefits; (ii) increased expenditures on Temporary Assistance to Needy Families because same-sex spouses or partners' income is not taken into account when determining eligibility; and (iii) loss of state sales tax on wedding-related revenue, which for the next three years alone is

estimated to be a loss of $65 to $92 million in taxable spending to Pennsylvania's businesses and communities. (Badgett ¶¶ 64-78.) These costs outweigh the savings to the Commonwealth that result from the discriminatory imposition of taxes on same-sex couples. (*Id.* ¶¶ 86-92.)[17] Moreover, there are additional significant, unquantifiable costs to the Commonwealth such as difficulty attracting highly skilled workers who are important for economic growth. (*Id.* ¶¶ 81-84.)[18]

In addition, the undisputed expert testimony establishes that the Marriage Exclusion causes—not prevents—adverse economic impacts to Pennsylvania's businesses. Allowing same-sex couples to marry would not require any additional expenses on the part of Pennsylvania businesses (*id.* ¶ 97), but barring marriage

[17] The asserted concern about same-sex divorce cases backlogging the court system is particularly illogical and lacking in factual basis. Denying same-sex couples access to the mechanism of divorce actually utilizes more court resources, not less, because these couples are unable to address all disputes arising out of their separation in a single court the way married couples are able to do so. For example, a same-sex couple that has both child custody and property division issues could use the family court for resolving the custody issue, but the family court would not be able to address the property division issue. That would have to be addressed separately by a civil court of general jurisdiction. (Carpenter ¶¶ 81-82; Badgett ¶¶ 98-100.)

[18] Although the legislative record includes a statement by a senator that the Marriage Exclusion was needed to give time to conduct a study on the economic impact of allowing same-sex couples to marry, there is no evidence any such study was ever conducted by the Commonwealth. Indeed, Plaintiffs sought discovery of any studies conducted by the Commonwealth on this issue, and no studies were produced or even acknowledged to exist. (*See generally* Defs.' Resp. to Pls.' First Set of Reqs. for Produc. of Docs., PX-36; Defs.' Resp. to Pls.' Second Set of Reqs. for Produc. of Docs., PX- 38.)

costs businesses substantially (*id.* ¶¶ 79-85). As countless businesses recognize, providing equal family benefits to lesbian and gay employees is good for business, and state laws prohibiting marriage for same-sex couples hurt those very efforts. (*Id.* ¶ 79 (citing positions of Google, Apple, Verizon, Walt Disney, Viacom, Nike, Morgan Stanley, Microsoft and hundreds of other employers).) In addition to impeding critical recruitment and retention efforts, the exclusion of same-sex couples from marriage makes the provision of equal family benefits more expensive to businesses in terms of payroll taxes and administrative inefficiencies that would not exist if those benefits could be provided as spousal benefits. (*Id.* ¶¶ 85, 97.)

The Commonwealth's own conduct as an employer is directly contrary to any notion that the Marriage Exclusion protects business or the economy. The Commonwealth provides domestic partner benefits to its own employees specifically so it can be competitive in attracting employees. (*Id.* ¶ 80.) In the spring of 2009, the Pennsylvania Employee Benefits Trust Fund ("PEBTF"), which administers the benefits to the approximately 77,000 eligible state employees and their dependents and 63,000 retirees and their dependents, stated that a "majority of Fortune 500 companies" offered benefits to domestic partners. PEBTF, *Benefit News for Active Members*, at 1 (Spring 2009), PX-54. PEBTF's communications director explained that PEBTF decided to extend health care

benefits to same-sex partners because, among other reasons: "We basically want to become competitive with other employers." Marc Levy, *It's Just the Right Thing to Do*, NBC10.com (May 15, 2009), PX-55; *see also* Marc Levy and Karen Araiza, *Same Sex Partners Can Celebrate*, NBC10.com (July 1, 2009), PX-57.

C. An asserted interest in tradition does not satisfy rational basis review.

Finally, the Defendants cite to tradition as a justification for the Marriage Exclusion. The statements contained in the legislative record related to this interest are the following:

- The amendment "is simply an expression of Pennsylvania's traditional and longstanding moral opposition to same-sex marriages . . . and support of the traditional family unit." 1996 Pa. Legis. J. (House), at 2017, PX-45.
- The amendment "is designed to benefit the vast majority of Pennsylvanians, because the large majority do not want our traditional marriage institution and our state of morals to be changed." *Id.* at 2019.
- "I believe it is imperative that we in Pennsylvania should stand up for traditional marriage for the benefit of families and children in the Commonwealth and our future." *Id.* at 2022.
- "This is a vote about family values and traditional beliefs . . . ." *Id.*

Tradition, by itself, does not constitute "an independent and legitimate legislative end" for purposes of rational-basis review. *Romer*, 517 U.S. at 633. "[T]he government must have an interest separate and apart from the fact of tradition itself," *Golinski*, 824 F. Supp. 2d at 993, because the "justification of

'tradition' does not explain the classification; it merely repeats it." *Kerrigan*, 957 A.2d at 478; *accord Varnum*, 763 N.W.2d at 898 (asking "whether restricting marriage to opposite-sex couples accomplishes the governmental objective of maintaining opposite-sex marriage" results in "empty analysis").

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

The Supreme Court has on many occasions struck down discriminatory practices that had existed for years without raising any constitutional concerns. "Long after the adoption of the Fourteenth Amendment, and well into [the twentieth century], legal distinctions between men and women were thought to raise no question under the Equal Protection Clause." *United States v. Virginia*, 518 U.S. at 560 (Rehnquist, J., concurring); *see also J.E.B.*, 511 U.S. at 142 n.15 ("We do not dispute that this Court long has tolerated the discriminatory use of

peremptory challenges, but this is not a reason to continue to do so."). "A prime part of the history of our Constitution . . . is the story of the extension of constitutional rights and protections to people once ignored or excluded." *United States v. Virginia*, 518 U.S. at 557.

Ultimately, "'preserving the traditional institution of marriage' is just a kinder way of describing the [s]tate's *moral disapproval* of same-sex couples." *Lawrence*, 539 U.S. at 601 (Scalia, J., dissenting) (emphasis in original). *See Bishop*, 962 F. Supp. 2d at 1295 (rejecting argument based on tradition because it "is impermissibly tied to moral disapproval of same-sex couples as a class."). Indeed, statements in the legislative record in support of the Marriage Exclusion in Pennsylvania directly link tradition and moral disapproval of same-sex marriages. *See* 1996 Pa. Legis. J. (House), at 2019 (the majority "do not want our traditional marriage institution and our state of morals to be changed."), PX-45. The Supreme Court has made clear that moral disapproval is not a legitimate basis for government discrimination. *Windsor*, 133 S. Ct. at 2692; *Lawrence*, 539 U.S. at 582 (O'Connor, J., concurring) (noting that Texas attempted to justify its homosexual sodomy law by a government interest in the "promotion of morality").

For these reasons, "tradition" has been resoundingly rejected by federal district courts as a justification for excluding same-sex couples from marriage. *DeBoer*, 2014 WL 1100794, at *15; *De Leon*, 2014 WL 715741, at *16; *Bostic*,

2014 WL 561978, at *15; *Bourke*, 2014 WL 556729, at *7; *Bishop*, 962 F. Supp. 2d at 1295; *Kitchen*, 961 F. Supp. 2d at 1203.[19]

V. No Legitimate Interest Overcomes The Purpose And Effect Of Pennsylvania's Marriage Exclusion To Disparage And Injure Same-Sex Couples And Their Families.

Because there is no rational connection between Pennsylvania's Marriage Exclusion and any of the asserted state interests, this Court can conclude that the Marriage Exclusion violates equal protection even without considering whether it is motivated by an impermissible purpose.

In this case, however, the lack of any connection between Pennsylvania's Marriage Exclusion and any legitimate state interest also confirms the inescapable conclusion that it was passed because of, not in spite of, the harm it would inflict on same-sex couples. *Windsor* is the latest in a long line of cases holding that statutes whose primary purpose is to disadvantage a politically unpopular group

[19] An argument made by some opponents of marriage for same-sex couples—but not the Defendants here—is that allowing same-sex couples to marry would harm the institution of marriage or affect the marriages of heterosexual couples. This argument fails rational basis review because there is no plausible basis to believe that allowing same-sex couples to marry will affect the marital decisions of heterosexual couples. (Peplau ¶¶ 57-64.) Indeed, in states that allow same-sex couples to marry, there has been no reduction in the marriage rate or increase in divorce. (*Id.* ¶ 62.) *See Kitchen*, 961 F. Supp. 2d at 1213 (citing amicus brief submitted by fourteen states and the District of Columbia stating that the implementation of same-sex marriage in their jurisdictions had not resulted in any decrease in opposite-sex marriage rates, increase in divorce rates, or increase in the number of non-marital births).

violate equal protection. *See Windsor*, 133 S. Ct. at 2693; *Romer*, 517 U.S. at 635; *Cleburne*, 473 U.S. at 446; *Moreno*, 413 U.S. at 534; *see also Vance v. Bradley*, 440 U.S. 93, 97 (1979) (rational-basis review is deferential "absent some reason to infer antipathy"); *N.Y.C. Transit Auth. v. Beazer*, 440 U.S. 568, 593 n.40 (1979) (noting that the Court's equal protection cases have long "recognized a distinction between 'invidious discrimination,'" which it described as "classifications drawn 'with an evil eye and an unequal hand' or motivated by 'a feeling of antipathy' against, a specific group" and "those special rules that 'are often necessary for general benefits"). These cases have sometimes been described as a form of "second order" or "more searching" form of rational-basis review, *see Cleburne*, 473 U.S. at 458 (Marshall, J., concurring in part); *Lawrence*, 539 U.S. at 580 (O'Connor, J., concurring), or "careful consideration," *Romer*, 517 U.S. at 633; *Windsor*, 133 S. Ct. at 2693. But regardless of how these cases are labeled, they establish that laws based on "the unstated premise that 'some citizens are more equal than others,'" *Zobel v. Williams*, 457 U.S. 55, 71 (1982) (Brennan, J., concurring), or passed for the purpose of "impos[ing] inequality", *Windsor*, 133 S. Ct. at 2694, cannot stand. *See id.* at 2706 (Scalia, J., dissenting) (noting that because of its central holding the *Windsor* majority opinion did not "need [to] get into the strict-vs.-rational-basis scrutiny question").

The Supreme Court has sometimes described this impermissible purpose as "animus" or a "bare . . . desire to harm a politically unpopular group." *Windsor*, 133 S. Ct. at 2693. But this impermissible purpose does not have to reflect "malicious ill will." *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 375 (2001) (Kennedy, J., concurring). It can also take the form of "moral disapproval," *Lawrence*, 539 U.S. at 582 (O'Connor, J., concurring), "negative attitudes," *Cleburne*, 473 U.S. at 448, "fear," *id.*, "irrational prejudice," *id.* at 450, "simple want of careful rational reflection," *Garrett*, 531 U.S. at 374 (Kennedy, J., concurring), or "some instinctive mechanism to guard against people who appear to be different in some respects from ourselves," *id.*

The Supreme Court in *Windsor* found that the "history of DOMA's enactment and its own text" demonstrate that interfering with the equal dignity of same-sex couples "was more than an incidental effect of the federal statute. It was its essence." *Windsor*, 133 S. Ct. at 2693. The same is true here: Pennsylvania's Marriage Exclusion was enacted because of, not in spite of, its adverse effect on same-sex couples.

First, like the federal DOMA, the text of Pennsylvania's Marriage Exclusion makes clear that the intent was to exclude same-sex couples. *Windsor*, 133 S. Ct. at 2693. The law specifically includes the provision that any "marriage between persons of the same sex . . . entered into in another state or foreign jurisdiction,

even if valid where entered into" is void for state law purposes. 23 Pa. C.S. § 1704. This is not a law that incidentally affects same-sex couples.

In addition, the historical background of the Marriage Exclusion reflects a purpose to exclude same-sex couples, and belies the suggestion that the exclusion of same-sex couples is a mere side-effect of some broader public policy. *Cf. Windsor*, 133 S. Ct. at 2693 (examining historical context of DOMA); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-67 (1977) ("historical background of the decision" is relevant when determining legislative intent). The Marriage Exclusion was not enacted long ago at a time when "many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage." *Windsor*, 133 S. Ct. at 2689. It was enacted as a specific response to developments in other jurisdictions where same-sex couples sought the freedom to marry. (Chauncey ¶ 97.) *See* 1996 Pa. Legis. J. (House), at 2017, PX-45. The fact that people in colonial times may not have passed marriage laws based on antipathy toward same-sex couples does not mean that Pennsylvania's decision in 1996 to reaffirm that exclusion and void the marriages of same-sex couples entered into in other states is similarly benign. The Equal Protection Clause is violated when government has "selected *or reaffirmed* a particular course

of action" because of its negative effects on an identifiable group. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (emphasis added).

Moreover, statements in the legislative record belie any suggestion that this law only incidentally impacted same-sex couples. The record shows that making them unequal was its aim. In introducing the amendment, Representative Egolf stated that the "so-called marriages" of same-sex couples "are contrary to our public policy" and the amendment "is simply an expression of Pennsylvania's longstanding policy of moral opposition to same-sex marriages." 1996 Pa. Legis. J. (House), at 2017, PX-45. He went on to say that the exclusion of same-sex couples from marriage is "designed to benefit the vast majority of Pennsylvanians, because the large majority do not want our traditional marriage institution and our state of morals to be changed." *Id.* at 2019. Representative Gamble, after stating his support for the Marriage Exclusion, "summed up" by expressing his contempt for same-sex relationships, saying "I just thank God I'm going back to Oakdale where men are men and women are women and believe me boys and girls there is one heck of a difference." *Id.* at 2022. Representative Stern then rose in support of the amendment, stating that "it is imperative that we in Pennsylvania should stand up for traditional marriage," and "this is a vote about family values and traditional beliefs." *Id.* He also submitted for the record a statement from a group advocating against same-sex marriage in Hawaii that compared the decision of the

Hawaii Supreme Court regarding same-sex marriage to the attack on Pearl Harbor. *Id.* at 2023. The statement submitted by Representative Stern stated, *inter alia*, that "[n]o same sex relationship can mimic the genuine potential of a relationship between a woman and a man." *Id.*[20]

Many of these statements from Pennsylvania legislators echo the statements of members of Congress that the Supreme Court pointed to in *Windsor* in concluding that the purpose of the federal DOMA was to disparage and injure. *See*

[20] Representative Egolf and several other co-sponsors of the legislation filed a lawsuit in 2004 against two gay men who had sought a marriage license in Pennsylvania but had been denied. *See* Complaint, *Egolf v. Seneca*, No. 2004-03160 (C.P. Bucks County, Pa., May 13, 2004), PX-52-A. In that litigation, these legislators further expressed their antagonism towards same-sex relationships:

> Marriage should be restricted to opposite-sex couples in order to promote prosperity. . . . Societies that restricted sexual relationships to one man and one woman in marriage have prospered. Societies that relax those restrictions have suffered decline within three generations.

Id. ¶ 27.

> Marriage should be restricted to opposite-sex couples in order to promote relationships where there is physical complementarity in order to reduce health problems and the spread of disease . . . Anal sex can cause tearing, bleeding, and other complications. Anal sex also promotes the spreading of disease. Even a woman who has sex with another woman is at substantial risk for sexually transmitted diseases.

Id. ¶ 28.

Windsor, 133 S. Ct. at 2693 (noting that the House Report on DOMA said "it is both appropriate and necessary for Congress to do what it can to defend the institution of traditional heterosexual marriage," the law expresses "moral disapproval of homosexuality," and the purpose of the law was to promote an "interest in protecting the traditional moral teachings reflected in heterosexual-only marriage laws").

Finally, like the federal DOMA, the "practical effect" of Pennsylvania's Marriage Exclusion is "to impose a disadvantage, a separate status, and so a stigma upon" same-sex couples in the eyes of the state and the broader community. *Windsor*, 133 S. Ct. at 2693; *see* pages 7-13, *supra*.

All of these facts lead to the inescapable conclusion that Pennsylvania's Marriage Exclusion "classifies [same-sex couples] not to further a proper legislative end but to make them unequal to everyone else. This [Pennsylvania] cannot do." *Romer*, 517 U.S. at 635.

Even if it were possible to hypothesize a rational connection between Pennsylvania's Marriage Exclusion and some legitimate governmental interest—and it is not—no hypothetical justification can "overcome[] the purpose and effect to disparage and to injure" same-sex couples. *Windsor*, 133 S. Ct. at 2696.

CONCLUSION

As Plaintiff Lynn Hurdle explained, in words that ring true for all Plaintiffs: "Fredia and I love each other, have lived our lives as if we were married, like any other American couple, and we want the Commonwealth of Pennsylvania to acknowledge that our relationship counts and is respected by the law." (L. Hurdle ¶ 8.) For the foregoing reasons, Plaintiffs' Motion for Summary Judgment should be granted.

Respectfully submitted,

Dated: April 21, 2014

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CERTIFICATE OF WORD COUNT

I, Mark A. Aronchick, hereby certify pursuant to Local Civil Rule 7.8(b)(2) that the text of the foregoing Plaintiffs' Brief in Support of Motion for Summary Judgment contains 17,474 words as calculated by the word-count function of Microsoft Word, which is within the limit of 17,500 words stipulated between Plaintiffs and Defendants Wolf and Meuser.

Dated: April 21, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of April, 2014, that I caused the foregoing Plaintiffs' Brief in Support of Motion for Summary Judgment to be filed electronically using the Court's electronic filing system, and that the filing is available to counsel for all parties for downloading and viewing from the electronic filing system.

On the same date, a copy of the foregoing Brief was also served via Federal Express on the following:

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