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

JAMES DARBY and PATRICK BOVA, *et al.*, *Plaintiffs*, v. DAVID ORR, in his official capacity as Cook County Clerk, *Defendant*.	Case No. 12 CH 19718 The Honorable Judge Sophia Hall
TANYA LAZARO and ELIZABETH "LIZ" MATOS, *et al.*, *Plaintiffs*, v. DAVID ORR, in his official capacity as Cook County Clerk, *Defendant*.	Case No. 12 CH 19719 The Honorable Judge Sophia Hall
STATE OF ILLINOIS, *ex rel.* Lisa Madigan, Attorney General of the State of Illinois, *Intervenor*, CHRISTIE WEBB, in her official capacity as Tazewell County Clerk, and KERRY HIRTZEL, in his official capacity as Effingham County Clerk, DANIEL S. KUHN, in his official capacity as Putnam County Clerk, PATRICIA LYCAN, in her official capacity as Crawford County Clerk, BRENDA BRITTON, in her official capacity as Clay County Clerk, *Intervenors*.	

MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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Plaintiffs comprise twenty-three same-sex couples who have been in loving committed relationships for periods ranging from 7 to 49 years, and who seek to marry in their home state of Illinois, in addition to two same-sex couples who seek legal recognition of the marriages they entered into in Canada. Illinois statutes deny all Plaintiffs these most basic freedoms by barring them from civil marriage. *See* 750 ILCS 5/201 (authorizing marriages only "between a man and a woman"); 750 ILCS 5/212(a)(5) (prohibiting marriages "between 2 individuals of the same sex"); 750 ILCS 5/213.1 (marriages of same-sex couples are "contrary to the public policy of this State"); 750 ILCS 5/216(a) (denying recognition of marriages of same-sex couples entered into in other jurisdictions) (collectively, the "marriage ban").

As Plaintiffs allege in their respective Complaints, the marriage ban violates the Illinois Constitution's Due Process Clause (Art. I § 2) and Privacy Clause (Art. I § 6) (Count I in the *Darby* Complaint and Counts I and IV, respectively in the *Lazaro* Complaint); the Equal Protection Clauses (Art. I §§ 2, 18) (Count II of the *Darby* Complaint, and Counts II and III of the *Lazaro* Complaint); and the Guarantee Against Special Legislation (Art. I § 13) (Count III in the *Darby* Complaint).

Plaintiffs ask this Court to grant summary judgment on all of Plaintiffs' claims and declare the marriage ban to be unconstitutional — a declaration that will permit Plaintiffs the freedom to marry. Much of the legal argument and precedent that supports this motion was presented to this Court in Plaintiffs' Memorandum in Opposition to Intervenor-Defendants' Motion to Dismiss ("Pls.' Br."). To avoid duplication and facilitate the Court's consideration of Plaintiffs' claims, Plaintiffs incorporate those arguments and precedent here, by reference to the relevant pages of that prior filing. In this brief, and in Plaintiffs' accompanying Statement of Material Facts, Plaintiffs expand upon those previously submitted legal arguments by introducing and discussing evidence — including affidavits from the Plaintiffs themselves and from ten experts — to support all of the

counts in their respective Complaints. This evidence, in combination with the legal argument and precedent previously presented to the Court, and in light of the fact that Intervenor-Defendants cannot produce any contrary evidence sufficient to create a dispute with respect to any material fact, conclusively demonstrates that Plaintiffs prevail as a matter of law with respect to all of their claims. The summary judgment motion therefore should be granted.

PRELIMINARY STATEMENT

For two adults who have found joy and comfort in one another's company, fallen in love, and pledged to support and sustain one another as they spend their lives together, being denied the freedom to marry by their government creates a deep and pervasive sense of loss. Plaintiffs' exclusion from marriage has caused them and their children both tangible and dignitary harms — injuries that cannot be justified under the Illinois guarantees of liberty, privacy, and equality. In opposing Intervenor-Defendants' Motion to Dismiss, Plaintiffs previously demonstrated why their claims are warranted under well-established Illinois constitutional jurisprudence. This motion now demonstrates why the undisputed facts compel the relief Plaintiffs seek: the freedom of each to marry the unique person he or she loves.

STANDARD GOVERNING SUMMARY JUDGMENT

Summary judgment is proper and should be granted when the pleadings, depositions, affidavits, and other matters on file show that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c); *Elliott v. Williams*, 347 Ill. App. 3d 109, 112 (1st Dist. 2004).

ARGUMENT

I. THE MARRIAGE BAN VIOLATES PLAINTIFFS' FUNDAMENTAL RIGHT TO MARRY.

Plaintiffs should be granted summary judgment on Count I of the *Darby* Complaint and Counts I and IV of the *Lazaro* Complaint because the marriage ban unconstitutionally infringes

upon Plaintiffs' fundamental right to marry guaranteed by the Due Process and Privacy Clauses of the Illinois Constitution. (Pls.' Br. at 5-18.) Plaintiffs previously explained that Intervenor-Defendants mischaracterize the liberty interest at stake by describing it in an artificially narrow way as a "new" right to marry someone of the same sex rather than as the freedom we all share to marry the person we choose, which is how the liberty interest always has been understood. (*Id.* at 5-13.) Indeed, the scope of a fundamental right is defined by attributes of the right itself, and not by the identity of the people who seek to exercise it or who have been excluded from doing so in the past. (*Id.*) Illinois courts repeatedly have held that the essence of the fundamental right to marry is "[f]reedom of personal choice" in selecting one's spouse. *See, e.g., In re Roger B.*, 85 Ill. App. 3d 1064, 1068 (1st Dist. 1980); Pls.' Br. at 7-8.

Plaintiffs' affidavits and expert testimony submitted herewith further demonstrate that Plaintiffs' liberty interests in marrying the one unique and irreplaceable person each Plaintiff loves are no different from anyone else's interests in marital autonomy, fulfillment, self-definition, and in security for their children. *See generally United States v. Windsor*, 570 U.S. __, No. 12-307, slip op. (June 26, 2013) ("*Windsor*") (attached as Ex. A) at 14 (marriage permits same-sex couples "to define themselves by their commitment to each other" and "so live with pride in themselves and their union and in a status of equality with all other married persons").[1] Plaintiffs wish to express

[1] As Plaintiffs previously stated to the Court, while marriage-related cases that have been pending before the United States Supreme Court are not dispositive of the state law claims serving as the basis of this lawsuit, the Court's ruling in *Windsor,* which struck down as unconstitutional the so-called Defense of Marriage Act ("DOMA"), is instructive as to some of the same considerations applicable to the claims presented here. For example, the Supreme Court noted that while states enjoy wide latitude in defining the contours of marriage, that power is not without limitation: "State laws defining and regulating marriage, of course, must respect the constitutional rights of persons . . . but, ***subject to those guarantees***, regulation of domestic relations is an area that has long been regarded as a virtually exclusive province of the States." *Windsor*, 570 U.S. __, at 16 (Ex. A) (emphasis supplied). And of particular interest is the constitutional infirmity of the exclusion imposed by the federal DOMA and the similarities the Illinois marriage exclusion may share:

> [The exclusion] tells those couples, and all the world, that their otherwise valid marriages are unworthy of . . . recognition. This places same-sex couples in an ***unstable position of being in a second-tier marriage. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects*** [citing *Lawrence v. Texas*] . . . . And it humiliates

the depth and quality of their lifelong commitment to each other in the way that they, their family, friends, and society at large best understand. (*See* Statement of Undisputed Material Facts in Support of Plaintiffs' Motion for Summary Judgment ("Pls.' SOF") ¶ 28; *see also* Affidavit of Patrick Bova ("Bova Aff."), Ex. 2[2], ¶ 12 ("Marriage alone can encompass the depth of what Jim and I mean to each other, and our lifelong commitment").) They wish to protect each other and their children in myriad tangible ways through marriage (Pls.' SOF ¶ 53), and so that their children do not grow up feeling as though their family is "less legitimate than other families" (*id.* ¶ 52). Most fundamentally, they wish to marry because they love each other, and because they wish to spend the rest of their lives committed to each other. (*Id.* ¶ 27.) Indeed, there is something timeless and universal about Plaintiffs' descriptions of their love for each other. For example, Brian Fletcher writes:

> There is so much to love about Robert. I love that he is passionate about everything that he does; whether our relationship, kids, friendships . . . he puts all of himself into it. I love his boundless spirit; he is eternally happy and lights up any gathering. I am always humbled to watch the attraction to him when we enter a room. I try hard to remember what it was about him before children, but my love for him has grown beyond that now. It expands every time I see him with the kids, every time he walks by and touches my hand or when we share a glance at a party across the room.

(Affidavit of Brian Fletcher ("Fletcher Aff."), Ex. 11, ¶ 8.) "We have learned over time that we share the capacity for profound love for one another and our love has only deepened after 40 years of companionship and shared experiences. We have known heartaches as wells as joys, and we intend to spend the rest of our lives together." (Affidavit of Edwin Hamilton ("Hamilton Aff."),

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> tens of thousands of children now being raised by same-sex couples. The law in question 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.

Id. at 22-23. Relegating same-sex couples to the "second-tier" status of civil unions suffers from a similar constitutional infirmity as did DOMA.

[2] Exhibits 1-60 are attached to Plaintiffs' contemporaneously-filed Statement of Undisputed Material Facts in Support of Plaintiffs' Motion for Summary Judgment.

Ex. 49, ¶ 8.) Indeed, some Plaintiffs already have been together in loving and committed relationships for almost 50 years. (Pls.' SOF ¶¶ 2, 56.)

Plaintiffs' experiences and frustrations with their inability to marry are consistent with empirical research on gay and non-gay relationships, which demonstrates that gay and non-gay couples seek to marry for the same reasons, and that marriage benefits spouses and their children in both tangible and intangible ways that are equally important to gay and non-gay families alike. Just as non-gay persons do, lesbian and gay individuals form loving and lasting committed relationships, which serve basic human needs for love, attachment, and intimacy. (Pls.' SOF ¶ 71.) The same factors that contribute to commitment and stability in same-sex relationships apply to different-sex couples. (*Id.*) Just as is true for non-gay individuals, lesbian and gay people benefit not only from close intimate relationships but from social, emotional, and material support for their relationships. (*Id.*) Marriage provides material benefits to spouses, fostering psychological well-being, physical health, and longevity. (*Id.* ¶ 66.) And as is true of non-gay Americans, a majority of lesbians and gay men in this country would like to marry. (*Id.* ¶ 59.) Marriage would provide Plaintiffs and other same-sex couples with a well-understood social network of in-laws, friends, and others who can provide emotional support and tangible assistance, and allow them to draw upon shared cultural expectations and respect. (*Id.* ¶ 65.) Thus, a wealth of evidence — both scientific and in Plaintiffs' own words — supports the legal analysis Plaintiffs previously provided establishing that Plaintiffs' liberty interests in marrying the person each Plaintiff loves are the same as any other Illinoisan's liberty interests.

Additionally, Plaintiffs here provide expert testimony from a prominent scholar on the history of marriage showing that marriage is not a static institution, forever foreclosed to those who were barred from it at the time of Illinois's statehood. (*Id.* ¶ 87.) Instead, it has changed over time to meet changing social and ethical needs, including by the elimination of many requirements we

now recognize as discriminatory or otherwise impermissible — such as race-based entry requirements, and gendered restrictions that historically were considered signal aspects of marriage. (*Id.*; *see also* Pls.' Br. at 13-18.) In the most infamous example, Illinois denied any recognition to marriages between slaves, and even after slavery had been eradicated, Illinois courts persisted in denying slaves' marriages validity, holding them to be "null from the beginning," and of "substantially the binding force as, and no more than, marriages between infants at common law . . . or between lunatics or insane persons." *Butler v. Butler,* 161 Ill. 451, 455-59 (1896); *see also* Pls.' SOF ¶ 94. Like the vast majority of other states, Illinois also prohibited marriages between persons of different races. (Pls.' SOF ¶ 94.) However, as a result of state court decisions such as *Perez v. Sharp*, 32 Cal. 2d 711, 714 (1948), and the United States Supreme Court's decision in *Loving v. Virginia*, 388 U.S. 1 (1967), the country eliminated these racial restrictions in recognition that these laws were inconsistent with the fundamental right to marry. (Pls.' SOF ¶ 95). "Today virtually no one in the United States questions the legal right of individuals to choose a marriage partner without government interference based on race," even though racial restrictions were "long embedded in our laws and concepts of marriage" and "often defended as 'natural' and 'in accord with God's plan.'" (*Id.*)

Illinois's traditional understanding of marriage also subordinated women in many ways that we reject today. (*Id.* ¶ 91.) A married woman could not own property, represent herself in court, sign a contract, or keep any money she earned. (*Id.*; Pls.' Br. at 13-15.) Illinois law also granted a husband access to his wife's body, exempting him from prosecution for rape and other criminal sexual conduct. (Pls.' SOF ¶ 91.) Indeed, the Illinois legislature did not remove all distinctions in the criminal law for commission of criminal sexual conduct against a spouse until 2004. (*Id.*) "[T]oday, marriage has been transformed from an institution rooted in gender inequality and gender-based prescribed roles to one in which the contracting parties decide on appropriate behavior

toward one another, and the sex of the spouses is immaterial to their legal obligations and benefits." (*Id.* ¶ 92.) As a result of changes by courts and legislatures to laws governing the meaning and structure of marriage, "[t]he gender equality of marriage today would profoundly shock any American from the era of the American Revolution, or the Civil War. But they would recognize in contemporary marriage the institution's foundation in two consenting parties freely choosing one another." (*Id.*)

Thus, marriage today is a vastly different institution from marriage decades ago, but the profound liberty interests at stake have not changed for each individual who has fallen in love and wishes to marry. As the United States Supreme Court recently opined in discussing the State of New York's elimination of its marriage ban, that state's embrace of the freedom to marry "reflect[s] both the community's considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality." *Windsor*, at 20. Marriage remains a cherished value and the sole universally understood and respected way in our society of communicating that two people love each other, have made a lifetime commitment, and that they are a family together with any children they may have. Because the marriage ban infringes upon the fundamental right to marry, it is presumptively unconstitutional and subject to strict scrutiny. (Pls.' Br. at 18-19, 40-54). As previously discussed (*see id.* at 40-54), and as discussed further below, the ban cannot survive even the lowest level of review, let alone strict scrutiny, and therefore violates Article I §§ 2 and 6 of the Illinois Constitution. Accordingly, Plaintiffs are entitled to summary judgment on their Due Process and Privacy claims (Count I of the *Darby* Complaint and Counts I and IV of the *Lazaro* Complaint).

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

Plaintiffs also are entitled to summary judgment on their claims under the Equal Protection and Special Legislation Clauses (Counts II and III of the *Darby* Complaint and Counts II and III of the *Lazaro* Complaint). The marriage ban prevents each Plaintiff from marrying the person he or she loves solely because of each Plaintiff's sex or sexual orientation in violation of the Illinois Constitution, Art. I §§ 2, 18, 13. (Pls.' Br. at 19-54.) As previously explained, courts interpret Illinois' equality guarantee in limited lockstep with its federal counterpart so that unique provisions of the Illinois Constitution, such as the gender equality, privacy, and special legislation clauses are evaluated independently of federal constitutional decisions. (*Id.* at 20-21.) Moreover, even with claims based on state constitutional provisions that have a federal parallel, such as Plaintiffs' sexual orientation equality claims, Illinois courts do not mechanically adhere to federal results.[3] Instead, when federal law does not favor the party invoking its protection, Illinois courts determine whether justification exists to find broader protections in the state constitution based on language, debates, and committee reports from the constitutional convention, a unique state history, experience, tradition, or value, or pre-existing law. *Id.* Here, through testimony of expert historians, social scientists, and affidavits from Plaintiffs themselves, Plaintiffs provide support for their claims that they are entitled to summary judgment under federal equal protection precedent, and that — regardless of federal precedent — they are entitled to judgment as a matter of law under an analysis warranted by Illinois' unique political, social, and legislative history, values, tradition, and equality precedent.

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[3] In any event, only decisions from the U.S. Supreme Court are relevant for purposes of lockstep, *People v. Caballes*, 221 Ill. 2d 282, 307 (2006), and that Court has not yet decided a case regarding the constitutionality of banning marriage for same-sex couples. The closest analogue is *Windsor*, which strongly supports Plaintiffs' arguments under the Illinois Constitution.

A. The Marriage Ban Discriminates On The Basis Of Sexual Orientation In Violation Of Art. I § 2 And Art. IV § 13 Of The Illinois Constitution.

Plaintiffs' claim that the marriage ban impermissibly discriminates on the basis of sexual orientation rests on two simple propositions: that same-sex couples are similarly situated to different-sex couples in every relevant respect, and that the marriage ban impermissibly denies lesbians and gay men the freedom to marry based on their sexual orientation.

Plaintiffs have already established the first proposition: that they are similarly situated to different-sex couples who wish to marry. (*See* Pls.' Br. at 21-22 (discussing precedent establishing that Plaintiffs are similarly situated as a matter of law); *see also supra* at Argument Section I (detailing evidentiary support for allegations that Plaintiffs are similarly situated to different-sex couples, including affidavits from Plaintiffs demonstrating that they wish to marry for the same reasons that non-gay couples wish to marry, and expert testimony demonstrating that same-sex couples' relationships are similar in all material ways to different-sex couples' relationships, and that marriage would benefit both categories of couples equally).)

With respect to the second proposition — that the marriage ban discriminates against Plaintiffs based on their sexual orientation — Plaintiffs have previously presented this Court with the relevant legal argument and precedent that the marriage ban constitutes a sexual orientation-based classification as a matter of law. (Pls.' Br. at 22-24.) That precedent is now supplemented with expert evidence supporting the conclusion that the act of falling in love with a person of the same sex, and the decision to marry and build a life with that person, are expressions of sexual orientation. (*See* Pls.' SOF ¶ 67 (one's sexual orientation, whether gay or non-gay, is expressed through relationships, including marriage).) Denying lesbians and gay men the ability to marry the person they love targets them based on sexual orientation by denying lesbians and gay men, and only them, a fundamental aspect of personal identity expression.

Classifications based on sexual orientation warrant heightened scrutiny as a matter of law. (Pls.' Br. at 24-33.) As previously explained, courts consistently consider two factors to determine whether a classification should be reviewed with heightened scrutiny: 1) whether the classified group has suffered a history of invidious discrimination; and 2) whether the classification is unrelated to an individual's ability to contribute to society. (*Id.* at 25-28.) Two additional factors are sometimes, but not always, considered by courts: 3) whether the classification reflects an immutable or otherwise integral part of a person's identity; and 4) whether members of the group singled out by the classification lack sufficient power to protect themselves in the political process. (*Id.* at 25, 28-33.) Plaintiffs now provide evidence — in addition to the legal authority previously cited — addressing each of these factors.

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

Plaintiffs provide the testimony of five experts demonstrating a shameful and consistent history of invidious discrimination against lesbians and gay men both in Illinois and throughout the nation. (Pls.' SOF ¶¶ 98-106; *see generally* Affidavits of George Chauncey ("Chauncey Aff."), Ex. 54; Ramona Faith Oswald ("Oswald Aff."), Ex. 58; Arthur Johnston ("Johnston Aff."), Ex. 56; David M. Bentlin ("Bentlin Aff."), Ex. 52; and Jerry Bowman ("Bowman Aff."), Ex. 53; *see also* Pls.' Br. at 25-27 (discussing legal authority demonstrating a history of discrimination against lesbian and gay people).)

George Chauncey, a nationally acclaimed historian and the Chair of the Department of History at Yale University, reports that lesbian and gay people have been subject to widespread and significant discrimination and hostility in the United States. (Pls.' SOF ¶ 98.) Through much of the last century, in particular, lesbians and gay men were delegitimized and even institutionalized against their will as a result of medical theories labeling them as diseased, disordered, defective, and degenerate — just as medical science previously had legitimized widely held and subsequently

discarded beliefs about female inferiority and non-white racial inferiority. (*Id.* ¶ 99.) Penal laws condemned lesbian and gay relationships as crimes, and police practices prevented lesbians and gay men from associating and socializing publicly. (*Id.*) Censorship codes prohibited depictions of lesbians or gay men on stage, in movies, or on television. (*Id.*) Federal and state laws and policies excluded lesbians and gay men from employment, foster care, adoption, and other arenas, and fail to protect lesbians and gay men from private discrimination in most states. (*Id.*) These laws, policies, and ideological messages worked together to create and reinforce the belief that lesbians and gay men comprised an inferior class to be shunned by other Americans. (*Id.*) Today, the legacy of antigay discrimination continues: lesbians and gay men continue to lack any express federal legislative protection in housing, public accommodations, or employment; numerous state statutes and constitutional amendments brand lesbians and gay men as second class citizens by denying them the right to marry the person they love; public officials and anti-gay organizations continue to use demeaning stereotypes and inflammatory rhetoric to enact anti-gay laws and oppose nondiscrimination protections, anti-bullying laws, and other measures. (*Id.* ¶ 106.) Anti-gay violence and brutal hate crimes against lesbian and gay people continues to be a pervasive problem. (*Id.* ¶ 102.)

Several witnesses confirm that the history of discrimination, hostility, and violence throughout the country described by Professor Chauncey also reflect the specific experiences of lesbian and gay Illinoisans. (*Id.* ¶ 101; *see also* Johnston Aff., Ex. 56, ¶ 8 (unwarranted police raids of gay bars in Chicago area), ¶¶ 7, 31 (efforts made by lesbians and gay men to preserve their anonymity to avoid discriminatory repercussions), ¶ 21 (Chicago City Council debate in which lesbians and gay men were referred to as "animals" and "sodomites" who "eat human waste"); Bentlin Aff., Ex. 52, ¶ 7 (gay man beat with hammer in McLean County because of supposed "gay overtures"), ¶ 11 (letter published in Bloomington-Normal newspaper compared lesbians and

gay men to "rapists and child molesters"), ¶ 12 (homosexuality described during Normal City Council debate on human rights ordinance as "self-destructive lifestyle," questions raised whether landlords would be forced to "host sex orgies with animals"); Bowman Aff., Ex. 53, ¶¶ 9, 12-16, 18 (challenges of publishing LGBT newspaper, including a printer who insisted Bowman arrive at 5 a.m. and depart before the work day began to avoid any public association with the paper, advertisers and distribution locations who refused to display the paper openly, and the spray-painting of crosses on the windows of the newspaper's office).)

Dr. Ramona Oswald substantiates that discrimination against lesbians and gay men continues to the present day. In a survey she conducted in 2011 of lesbian, gay, and bisexual people living in 36 downstate Illinois counties, 87% of the respondents reported experiencing acts of sexual orientation-related prejudice, discrimination, and/or violence within the last year. (Pls.' SOF ¶ 100.) This history of discrimination and anti-gay animus is reflected in the testimony of the Plaintiffs themselves. (*Id.* ¶ 101.) For example, Gary Magruder states:

> Ed and I were forced to hide our relationship while working for decades in public schools. And we were victims of various anti-gay-motivated crimes: "queers" written on our house, car tires slashed, eggs thrown at the house, and even a bullet shot through a window. Today we have less fear of anti-gay violence and discrimination, but Illinois' refusal to recognize our marriage continues the discrimination we experienced in our earlier years together.

(Affadavit of Gary Magruder ("Magruder Aff."), Ex. 50, ¶ 11; *see also* Pls.' SOF ¶ 101.) There simply is no evidence that the Intervenor-Defendants can offer that will erase the long, shameful history of discrimination directed at lesbians and gay men. This history strongly supports applying heightened scrutiny to the discriminatory marriage ban.

ii. *Sexual orientation has no bearing on ability to contribute to society.*

Plaintiffs also easily establish that sexual orientation has no bearing on the ability to contribute to society. Plaintiffs have previously directed this Court's attention to cases in which courts have so held. (Pls.' Br. at 27.) Plaintiffs have also previously explained that the Illinois

Legislature has reached the same conclusion by barring discrimination based on sexual orientation in employment, housing, access to financial services, and the issuance of professional licenses in numerous occupational fields, and by attempting to provide same-sex couples with all of the tangible rights, benefits, and responsibilities of marriage in the Illinois Civil Union Act. (*Id.* at 27-28.) Plaintiffs now present expert testimony in further support of this point. Dr. Peplau states:

> [B]eing gay or lesbian had no inherent association with a person's ability to participate in or contribute to society. Lesbians and gay men are as capable as heterosexuals of leading a happy, healthy, and productive life. They are also as capable as heterosexuals of doing well in their jobs and of excelling in school.

(Affidavit of Letitia Anne Peplau ("Peplau Aff."), Ex. 59, ¶ 29; *see also* Pls.' SOF ¶ 70.) Intervenor-Defendants cannot offer any credible evidence to suggest that a person's sexual orientation has any bearing on his or her ability to contribute to society. Thus, this second consideration weighs in favor of heightened scrutiny.

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

Plaintiffs already have described legal authority demonstrating that sexual orientation is such an integral part of a person's identity that it should be considered immutable for the purposes of equal protection analysis. (Pls.' Br. at 28-29.) Once again, this conclusion is supported by expert testimony. (Pls.' SOF ¶ 68, 69.) Dr. Peplau states that "[t]he significant majority of adults exhibit a consistent and enduring sexual orientation" that remains stable over time. (*Id.* ¶ 68.) Most gay men and lesbian women report experiencing "no choice at all" or "very little choice" about their sexual orientation. (*Id.*) Sexual orientation has proven to be "highly resistant to change through psychological or religious interventions." (*Id.* ¶ 69; *see also* Peplau Aff., Ex. 59, ¶ 26 (citing task force report of American Psychological Association concluding that "efforts to change sexual orientation are unlikely to be successful and involve some risk of harm").) Because

Intervenor-Defendants can offer no credible, contrary evidence, the "immutability" consideration also supports the application of heightened scrutiny.

iv. ***Lesbians and gay men are a minority without sufficient power to protect themselves against their discriminatory exclusion from marriage.***

Plaintiffs previously provided the Court with ample legal precedent in support of the conclusion that lesbians and gay men lack sufficient political power to protect their interests in the political process. (Pls.' Br. at 30-33.) Now, Plaintiffs offer expert evidence in support of this conclusion. (Pls.' SOF ¶¶ 107-116.) In his comprehensive affidavit, Professor Segura describes the myriad manifestations of the relative lack of political power of lesbians and gay men. (*Id.* ¶¶ 107, 108, 112, 114, 115, 116.) Dr. Segura concludes:

> Gay men and lesbians do not possess a meaningful degree of political power and are politically vulnerable, relying almost exclusively on allies who are regularly shown to be insufficiently strong or reliable to achieve their goals or protect their interests. [G]ay men and lesbians . . . are subject to political exclusion and suffer political disabilities greater than other groups that have received suspect classification protection from the courts.

(Affidavit of Gary M. Segura ("Segura Aff."), Ex. 60, ¶ 10; Pls.' SOF ¶ 107.) Similarly, Arthur Johnston, one of the founders of the statewide group Equality Illinois, concludes based on his experience in the decades-long struggle for basic anti-discrimination protections for the LGBT community on a state and local level:

> [F]or many years, it was enormously difficult for members of our community to exercise influence in the political process. Even supportive politicians have often been reluctant to support us because of fear of political retribution. The belief that a pro-gay position was politically toxic often persisted long after polling indicated that it was not. Furthermore, it was often almost impossible to organize sufficient numbers in our community to speak out because they were closeted and fearful of repercussions. Developing effective coalitions with other groups often proved difficult because we often had little to offer in terms of influence.

(Johnston Aff., Ex. 56, ¶ 35; Pls.' SOF ¶ 110; *see also* Pls.' SOF ¶ 116; Bowman Aff., Ex. 53, ¶¶ 20-23 (describing difficulties in passing Springfield non-discrimination ordinance and vicious anti-gay rhetoric that accompanied that decades-long struggle); Bentlin Aff., Ex. 52, ¶¶ 7-27

(describing similar difficulties in passing Bloomington non-discrimination ordinance and similar anti-gay rhetoric in a similarly lengthy struggle).) The continued existence of the marriage ban shows that lesbians and gays continue to have insufficient political power to protect themselves from discrimination. Based on this evidence, this Court must conclude that the "relative lack of political power" factor weighs decidedly in favor of applying heightened scrutiny to classifications based on sexual orientation.

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

Plaintiffs have explained that the marriage ban discriminates on the basis of sex in violation of Art. I, § 18 both because (1) the law facially discriminates on the basis of sex; and (2) the law subjects Plaintiffs to sex stereotyping. (Pls.' Br. at 33-40.)

i. *The marriage ban constitutes a facial sex-based classification.*

If Plaintiff Jim Darby were a woman, he could marry his partner of almost 50 years, Patrick Bova. Simply because he is a man, the marriage ban denies him this right. Such facial classifications based on sex are subject to strict scrutiny without regard to whether they apply equally to members of both sexes. (Pls.' Br. at 34-37 (*citing, e.g., Loving,* 388 U.S. at 1; *Wheeler v. City of Rockford,* 69 Ill. App. 3d 220 (2d Dist. 1979).)

ii. *The marriage ban relies upon and impermissibly mandates compliance with sex stereotypes.*

As Plaintiffs have explained, the marriage ban impermissibly enforces compliance with sex stereotypes mandating traditional roles for men and women. (Pls.' Br. at 37-40.) Although Illinois' marriage laws historically assigned rigid sex roles to men and women in marriage, Illinois has since rejected such discrimination — with the exception of the marriage ban, which is out of step with the gender-neutral approach of contemporary marriage law. (Pls.' SOF ¶ 92.)

Plaintiffs do not advocate that traditional roles for men and women within marriage be discarded, as many married men and women find happiness framing marriage around such roles at

least to some degree; women may take pride in culinary or childrearing skills, and men may enjoy breadwinning. However, most spouses also deviate from sex stereotypes to some degree; husbands may play some role in childrearing, for example. What is important is that government cannot enforce conformity with traditional sex stereotypes and that spouses are free to shape their roles within marriage as they choose. When government restricts men and women from participation in civil society based on sex stereotypes, it is a form of unlawful sex discrimination and subject to strict scrutiny. (Pls.' Br. at 38-40.) As described in Plaintiffs' Opposition to Intervenor-Defendants' Motion to Dismiss (*id.* at 40-54), and below at Argument Section III, the marriage ban cannot survive even the lowest level of review, let alone strict scrutiny.

III. THE MARRIAGE BAN FAILS ANY LEVEL OF SCRUTINY.

Plaintiffs have explained that the marriage ban fails any level of scrutiny as a matter of law. (Pls.' Br. at 40-54.) First, the marriage ban cannot survive heightened scrutiny because Intervenor-Defendants cannot meet their burden of demonstrating that the ban is necessary to serve a compelling governmental state interest, let alone that the ban is narrowly tailored so as to use the least restrictive means consistent with the attainment of that interest. (*Id.* at 40-41.)

Moreover, even under the lowest level of review, courts must engage in sufficient review to determine whether "the statutory classification is rationally related to a legitimate State interest." *Best* v. *Taylor Mach. Works*, 179 Ill. 2d 367, 393 (1997). Rational basis review: (1) looks to whether there is a rational relationship between a governmental interest and a classification that excludes some persons from access to a benefit that is granted others, *id.* at 406-07; and (2) determines whether the asserted governmental interests and their alleged connection to the classification have any basis in reality, *People v. McCabe*, 49 Ill. 2d 338, 341-42 (1971). Additionally, courts apply more searching rational basis review "[w]hen a law exhibits such a desire to harm a politically unpopular group" or where "the challenged legislation inhibits personal

relationships." *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring) (collecting cases). The marriage ban cannot survive even the lowest level of review because it bears no rational relationship to even a legitimate interest, and because it was motivated by an improper purpose.

The primary justification offered by Intervenor-Defendants for the marriage ban is that it channels procreation into different-sex households — a factual allegation which they argue is a legitimate state interest because they hypothesize that children do better when raised by married different-sex biological parents than when raised by same-sex parents. As Plaintiffs previously pointed out, this state interest is insufficient as a matter of law. (Pls.' Br. at 44-50.)

First, there is no connection whatsoever between the marriage ban and any state interest related to parenting or child welfare because: a) many people procreate without marrying; b) many married people choose not to or are unable to procreate; and c) different-sex couples' procreative decisions do not depend in any way on whether lesbian and gay couples can marry. (*Id.* at 44-45.)[4]

Second, the State disavowed any purported interest related to procreation or child rearing by enacting the Civil Union Act, which provides same-sex couples in civil unions all procreative and child welfare-related responsibilities, protections, rights, and obligations available to married different-sex couples under Illinois law. (*Id.* at 49-50.) Thus, even while relegating same-sex couples to the lesser status of civil union, the State acknowledges that no governmental interest

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[4] The absence of any link between the marriage ban and state law or policy concerning procreation or child welfare becomes particularly evident in light of the exclusion from marriage of lesbian and gay parents who:

- procreate via assisted reproduction and have children born into their relationship, such as Plaintiffs Theresa Volpe and Mercedes Santos (Pls.' SOF ¶ 74);
- have children from a previous different-sex relationship, such as Plaintiffs Daphne Scott-Henderson and Suzie Hutton (*id.*);
- have adopted children, such as Brian Fletcher and Robert Hickock, Michelle Mascaro and Corynne Romine, and Carlos Briones and Richard Rykhus (*id.*); or
- have parented foster children after being licensed by the State, such as Plaintiffs Daryl Rizzo and Jaime Garcia (*id.*).

exists to support treating same-sex couples differently with respect to the rights and responsibilities of spouses. Because Illinois recognizes same-sex couples as identical to different-sex couples with respect to the legal incidents of marriage and parenting, the state *has disclaimed* any interest in treating lesbians and gay men differently with respect to procreation and child-rearing.

Moreover, Intervenor-Defendants' assertions that children do better with different-sex parents than with same-sex parents is a *factual* assertion that is false and has been disproved by a vast body of empirical research on child development. Plaintiffs here provide expert testimony summarizing the scientific consensus that has developed after 50 years of research into the impact of non-traditional family structure and parental gender on child development, and 25 years of scholarship on developmental outcomes specifically for children of same-sex couples: children of same-sex couples are as likely to be well-adjusted as children raised by their heterosexual parents, including biological parents, and neither parental sex nor sexual orientation affects the capacity to be a good parent or a child's healthy development. (Pls.' SOF ¶¶ 76, 77.)[5] In fact, "the social science literature overwhelmingly rejects the notion that there is an optimal gender mix of parents or that children and adolescents with same-sex parents suffer any developmental disadvantages compared with those with two different-sex parents." (*Id.* ¶ 81.)[6] Consistent with this evidence, numerous courts have concluded after hearing testimony or surveying the scientific literature, that lesbian and gay parents are just as capable and effective, and that their children fare just as well, as different-sex parents and their children. *See, e.g., Varnum v. Brien,* 763 N.W.2d 862, 899 (Iowa

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[5] Psychologists use the term "adjustment" to refer to psychological well-being and successful functioning in everyday life. (Pls.' SOF ¶ 75.)

[6] Based on this scientific consensus, numerous organizations representing mental health and child welfare professionals have issued statements confirming that same-sex parents are as effective as different-sex parents in rearing well-adjusted children and adolescents, and should not face discrimination. (Lamb Aff., Ex. 57, Ex. C thereto (containing statements from organizations including the American Academy of Pediatrics, the American Academy of Child and Adolescent Psychiatry, the American Psychiatric Association, the American Psychological Association, the American Psychoanalytic Association, the National Association of Social Workers, the Child Welfare League of America, and the North American Council on Adoptable Children).)

2009); *Golinksi v. U.S. Office of Personnel Mgmt.*, 824 F. Supp. 2d 968, 991-92 (N.D. Cal. 2012) (concluding after reviewing evidence that it is "beyond scientific dispute" that same-sex parents are equally capable as different-sex parents); *Gill v. U.S. Office of Personnel Mgmt.*, 699 F. Supp. 2d 374, 388 (D. Mass. 2010) (accord); *In re Marriage Cases*, 183 P.3d 384, 400 (Cal. 2008); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010), *aff'd sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *vacated and remanded with instructions to dismiss appeal for lack of standing, and leaving in place the district court opinion*, __ U.S. __, No. 12-144 (June 26, 2013) (attached as Ex. B); *Dep't of Human Servs. and Child Welfare Agency Review Bd. v. Howard*, 238 S.W.3d 1 (Ark. 2006); *Florida Dep't of Children and Families v. Adoption of X.X.G.*, 45 So.3d 79 (Fl. App. 2010). There is simply no basis in reality for the notion that children do better in homes with a biological mother and father than in homes with same-sex parents.

Moreover, the ban causes significant tangible and dignitary harm to children of same-sex couples. (Pls.' SOF ¶¶ 44, 50.) Plaintiffs' inability to marry drains their families of financial resources that otherwise could go toward child-centered things, such as educational expenses. (*Id.* ¶ 44.) The marriage ban also stigmatizes these families and brands them as worth less than other families, inviting disrespect for parent-child relationships. (*Id.* ¶ 51; *see also* Affidavit of Janean Watkins ("Watkins Aff."), Ex. 5, ¶ 10 (by police); Affidavit of Claudia Mercado ("Mercado Aff."), Ex. 16, ¶ 8 (by county clerk employee); Affidavit of Daryl Rizzo ("Rizzo Aff."), Ex. 32, ¶¶ 9-11 (by hospital); Affidavit of Theresa Volpe ("Volpe Aff."), Ex. 8, ¶ 14 (by staff in pediatric ICU); Affidavit of Lakeesha Harris ("Harris Aff."), Ex. 6, ¶ 11 (by school); Affidavit of Daphne Scott-Henderson ("Scott-Henderson Aff."), Ex. 14, ¶ 6 (by school); Affidavit of Lynn Sprout ("Sprout Aff."), Ex. 35, ¶ 9 (by funeral home).) The marriage ban pains Plaintiffs' children, sending them a message that there is something wrong with their families of which they should feel ashamed. (Pls.' SOF ¶ 52; *see also Windsor*, 570 U.S. at 23 (noting that federal DOMA "humiliates

tens of thousands of children" of same-sex couples by making it more difficult to understand "the closeness and integrity of their own family").)

As Plaintiffs have previously pointed out, even the rational basis test requires that a purported justification for a challenged statute have some footing in reality. (Pls.' Br. at 51-52 (*citing, e.g., Romer v. Evans*, 517 U.S. 620, 632-33 (1996) (relationship between classification and government interest must be rational viewed in its "factual context"); *Heller v. Doe ex rel. Doe*, 509 U.S. 312, 321 (1993) (even rational basis review requires governmental interests to have "some footing in the realities of the subject addressed by the legislation."); *McCabe*, 49 Ill. 2d at 341-42; *Best*, 179 Ill. 2d at 386-89. Here, because there is neither a logical connection nor any basis in scientific fact between the marriage ban and any state interest in procreation or child welfare, and because the ban actually *impairs* state interests in child welfare by harming Plaintiffs' children and the children of thousands of other Illinois same-sex couples, these interests cannot justify the ban even under rational basis analysis.

The remaining justification for the marriage ban offered by Intervenor-Defendants is characterized, generally, as "preserving the traditional institution of marriage." As Plaintiffs have previously explained, this interest is deficient as a matter of law because it does not express an interest independent of the State's desire to discriminate. (Pls.' Br. 42-44.) Additionally, Plaintiffs here provide evidence, also summarized above in Section I, demonstrating that marriage in Illinois has never been a static institution, but has changed dramatically since statehood to become more inclusive and reflect maturing social values. (Pls.' SOF ¶¶ 87-96.) Evidence also demonstrates that allowing same-sex couples to marry affects neither the quality nor stability of different-sex relationships. (*Id.* ¶ 73.)

Finally, as Plaintiffs previously have explained, the marriage ban is unconstitutional because it was enacted for an illegitimate purpose — to discriminate against lesbian and gay Illinoisans.

(Pls.' Br. at 52-54.) Plaintiffs provided evidence from the legislative record reflecting discriminatory motivation for the ban, including the impermissible purpose of demonstrating moral disapproval of gay and lesbian people. (*Id.* at 53; *see also* Memorandum of the State of Illinois in Opp. to Intervenors' Mot. to Dismiss at 2-5, 21-23; *Windsor*, 570 U.S. at 25; *Lawrence*, 539 U.S. at 571 (laws founded on "moral" disapproval of homosexuality unconstitutional).) The ban's improper purpose is reason not only to review its constitutionality in a more searching manner, but justification in and of itself to strike it down as illegitimate as a matter of law. *Windsor*, 570 U.S. at 24; *Romer*, 517 U.S. at 633, 634; *see also United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) ("[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare [governmental] desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.").

The United States Supreme Court's recent decision in *Windsor* is particularly instructive here. In striking down the federal so-called Defense of Marriage Act ("DOMA"), the Court held impermissible and unconstitutional DOMA's "avowed purpose" and "practical effect . . . [of] impos[ing] a disadvantage, a separate status, and so a stigma" on same-sex couples' relationships by denying federal recognition to their marriages, and ensuring that "those unions will be treated as second-class." *Windsor* 570 U.S. at 3, 21-22 (Ex. A). Specifically, the Court reviewed the purposes cited by members of Congress for passing DOMA, including to: 1) "defend the institution of traditional heterosexual marriage"; 2) prevent states from redefining marriage; and 3) express moral disapproval of homosexuality.[7] *Id.* at 25. The Court concluded that these statements reflected

[7] The *Windsor* Court also rejected additional justifications offered for DOMA that are the same ones offered by Intervenor Defendants. *See United States v. Windsor*, Brief on the Merits for Respondent the Bipartisan Legal Advisory Group ("BLAG") of the U.S. House of Representatives, 12-307, filed Jan. 22, 2013, 44-49, *available at*: http://sblog.s3.amazonaws.com/wp-content/uploads/2013/01/BLAG-merits-brief-1-22-131.pdf (arguing that "providing a stable structure to raise unintended and unplanned offspring," "encouraging the rearing of children by their biological parents," and "promoting childrearing by both a mother and a father" were legitimate government purposes sufficient to justify the act under rational basis).

merely the illegitimate "purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity," and constituted nothing more than the improper purpose "to demean those persons who are in a lawful same-sex marriage. This requires the Court to hold, as it now does, that DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution." *Id.* at 25-26. Because the Illinois legislative record reveals precisely the same discriminatory and illegitimate purposes motivated passage of Illinois's marriage ban, the ban is similarly unconstitutional for this reason alone.

Accordingly, the Court should grant judgment as a matter of law on Plaintiffs' Equal Protection and Special Legislation claims (Counts II and III, respectively, of the *Darby* Complaint, and Counts II and III of the *Lazaro* Complaint).

IV. PLAINTIFFS' EXCLUSION FROM MARRIAGE HAS CAUSED THEM AND THEIR CHILDREN BOTH TANGIBLE AND DIGNITARY HARMS.

The constitutional deprivation visited on these families, and others like them, subjects them to continuing harms, both tangible and dignitary, that cry out for urgent relief. *See generally Windsor*, 570 U.S. at 14 (noting that New York and other states permit same-sex couples the freedom to marry "to acknowledge the urgency of this issue for same-sex couples who [want] to affirm their commitment to one another before their children, their family, their friends, and their community"). Indeed, equity now demands it.

Plaintiffs who obtained civil unions by license from Illinois county clerks currently are denied a number of federal benefits and protections that would be available to them and their families if they could marry now that DOMA has been struck down. For example, Plaintiff Jim Darby is a Korean War veteran entitled to the honor of burial in Abraham Lincoln National Cemetery, and wishes his partner of almost 50 years, Patrick Bova, to be buried by his side, which is a privilege afforded by statute to married veterans under federal law. (Pls.' SOF ¶ 39;

38 U.S.C. § 2402(a)(5).) Because this federal law says nothing about civil unions, but refers only to "spouse[s]," Jim and Patrick cannot be certain that they will receive this honor. (Pls.' SOF ¶ 39.) Further, even if Jim and Patrick were to marry in Iowa or another state that permits same-sex couples the freedom to marry, it would make no difference to their ability to receive this benefit, which turns upon whether a veteran's marriage is valid "according to the law of the place where the parties resided at the time of the marriage or the law of the place where the parties resided when the right to benefits accrued [here, the death of Jim and Patrick]." 38 U.S.C. § 103. Plaintiff Randy Carey-Walden is an army veteran whose civil union partner Bob is also denied access to spousal veterans benefits because they are unable to marry, including the special mortgage rates available for veterans and their spouses and access to the VA healthcare system. (Pls.' SOF ¶ 40.) Illinois downgrades the marriages of Plaintiffs Gary Magruder and Ed Hamilton (*id.* ¶ 26) and Richard Rykhus and Carlos Briones (*id.* ¶ 24) to civil unions, leaving them similarly uncertain of receiving the full panoply of federal spousal benefits, rights, and responsibilities because of Illinois's discriminatory refusal to recognize them as married. *See, e.g.*, Family Medical Leave Act ("FMLA"), 29 U.S.C. § 2601, *et seq*; 29 C.F.R. § 825.012 (defining "spouse" for FMLA leave based on whether the marriage is "recognized under State law for purposes of marriage in the State where the employee resides.").

Many Plaintiffs have encountered discrimination from public officials who refused to recognize their familial relationships. (Pls.' SOF ¶ 41.) For example, when Janean Watkins and Lakeesha Harris sought medical and food subsidies from a state agency after a job loss, a state employee refused to recognize them as a "real" family even though Janean and Lakeesha "went into the office together, put everyone in [their] family on the application forms, and explained [their] situation as having a civil union in the state of Illinois." (*Id.*; *see also* Watkins Aff., Ex. 5, ¶ 10 (police officers refused to speak to Janean or recognize that she was part of the family when she and

Lakeesha went to a police station for a restraining order against a stalker who was threatening one of their teenaged daughters); Affidavit of Michelle Franke ("Franke Aff."), Ex. 18, ¶ 10 (exclusion of partner from court mediation because partner not considered a "spouse"); Affidavit of Jacqueline Michelle Chappell ("Chappell Aff."), Ex. 17, ¶ 13 (state employee denied opportunity to add civil union partner to health insurance policy); Rizzo Aff., Ex. 32, ¶ 7 (discrimination by foster care agencies who refused to place a child with them because of their sexual orientation); Mercado Aff., Ex. 16, ¶ 8 (official at county clerk's office prohibited parent from approaching the counter to seek her son's birth certificate even though she was a legal parent both by virtue of an adoption order, and because her son was born during her civil union to the gestational mother, and the birth certificate listed her as a parent).)[8]

The marriage ban also invites private actors to discriminate in myriad ways. (Pls.' SOF ¶ 42.) Some Plaintiffs have been scarred by discrimination when a previous life partner died. (*Id.*; *see also* Sprout Aff., Ex. 35, ¶¶ 9-10 (funeral director told her that she was not her deceased partner's family member, and told three of their children that deceased partner was not their mother, and newspaper refused to print obituary that referred to deceased partner as family); Affidavit of Ross Carey-Walden ("Carey-Walden Aff."), Ex. 38, ¶ 5 (hospital refused to respect long-term relationship with former partner or permit him to make medical decisions in disregard of power of attorney and living will, and prevented him from spending the night in partner's hospital room when partner was dying, which was a privilege freely allowed spouses).) Private employers have denied

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[8] Plaintiff Claudia Mercado writes of this incident:

> I found this humiliating. That was a big blow. . . . [B]y telling me in front of [my children] that I alone was not permitted to approach the counter, the administrator sent a message to the children that my parental relationship to each of them is less secure and worthy of respect than Angelica's, which undermines the values that we are rearing our children to understand — namely, that Indigo and Isabel have two equal parents who will always love and protect them as a family. I believe that we would have been treated differently if we could have said, "We are married."

(Mercado Aff. ¶ 9.)

civil-unionized Plaintiffs spousal health insurance despite offering such insurance to different-sex spouses. (Pls.' SOF ¶ 42) Family members do not treat Plaintiffs as married, or their civil union ceremonies as marriages. (*Id.*)

Additionally, many Plaintiffs are terrified that they will not be able to be by each other's side during future health emergencies, often as a result of past experiences of discrimination, and especially in light of serious medical conditions. (*Id.* ¶ 43; *see also* Franke Aff., Ex. 18, ¶ 13 (disabled with Spinal Muscular Atrophy); Affidavit of Angelica Lopez ("Lopez Aff."), Ex. 15, ¶ 10 (during recent emergency room visit for sick child, couple concerned that Mercado's parent-child relationship would go unrecognized despite adoption and civil union).)

Indeed, the marriage ban has caused many Plaintiffs to experience discrimination in hospitals and other medical settings.[9] Mercedes Santos and Theresa Volpe faced every parent's worst fear when their son Jaidon collapsed with kidney failure. Near death, he was taken by ambulance to a pediatric intensive care unit. Hospital staff barred Theresa from the room unless she could identify herself as a "stepmother," telling Theresa that a child could have only one "real" mother, that Mercedes was already inside, and that admission to the hospital ward was for "parents only." (Pls.' SOF ¶ 43.) It made no difference to the administrator when Theresa told her that both she and Mercedes were Jaidon's legal parents. (*Id.*) Eventually, Theresa was forced to call

[9] *See* Pls.' SOF ¶ 43; *see also* Affidavit of Ryan Cannon ("Cannon Aff."), Ex. 13, ¶ 6 (after childbirth, hospital prevented her partner's daughters from visiting her and meeting the baby, the girls' half-brother, on the theory that they were not related); Watkins Aff., Ex. 5, ¶ 10 (hospital initially refused to permit civil union partner to authorize treatment for autistic son); Affidavit of Lynne Burnett ("Burnett Aff."), Ex. 30, ¶ 11 (hospital staff permitted her blood relatives to visit her when she was in intensive care, but barred her partner despite a health care power of attorney document designating her as the person authorized to make medical decisions, and despite Burnett's mother's insistence that partner be allowed in); Robert Carey-Walden Aff., Ex. 37, ¶ 7 (refusal to permit overnight stay with dying partner in hospital); Affidavit of Bert Morton ("Morton Aff."), Ex. 10, ¶ 8 (exclusion of partner from hospital room after heart attack and treatment of patient as single despite 24-year relationship); Affidavit of Jaime Garcia ("J. Garcia Aff."), Ex. 31, ¶ 7 (refusal to recognize partner as family causing delay in treatment for emergency appendectomy); Rizzo Aff., Ex. 32, ¶¶ 8, 9 (hospital refused to recognize both Plaintiffs as the parents of their daughter even though they produced her birth certificate, their driver's licenses, adoption papers, and court order); Scott-Henderson Aff., Ex. 14, ¶ 6 (child's doctor does not recognize her as a parent); O'Mara Aff., Ex. 29, ¶¶ 7-9 (hospital's refusal to recognize partner as next of kin despite civil union, and while she was suffering with suspected heart attack, was "one of the worst moments of my life"); Chappell Aff., Ex. 17, ¶ 9 (humiliated at a hospital after the birth of their daughter).

Mercedes on her cell phone, and Mercedes had to leave their son's side, despite his condition, to argue with the hospital administrator:

> As this story shows, sometimes being a legal parent is not enough. All the administrator wanted to know was whether we were married. I would have been allowed in if I could have described myself as a "stepmother" — even though many stepmoms aren't even legal parents. Eventually I was given a limited "guest pass" but not a pass for a parent. We worry that we will have to fight for respect as a family in future emergencies.

(Volpe Aff. ¶ 14; Pls.' SOF ¶ 43.) Thus, the marriage ban interferes with Plaintiffs' ability to take care of their children in tangible ways. (Pls.' SOF ¶ 44; *see also*, *e.g*, Harris Aff., Ex. 6, ¶ 11 (couple often humiliated when school officials ask, "'which one of you is the real mother,' as if we must prove our parentage."); Scott-Henderson Aff., Ex. 14, ¶ 6 (civil union partner not recognized at their son's school).) Indeed, many Plaintiffs wish to marry for the sake of their children:

> Anne and I wish to marry for our son, who has already asked us if we are married. We wish to marry so that he fully understands — in the language of marriage, which is comprehended even by a child — the permanence and commitment of our family, and so that as he gets older, he can express at school that his parents are as married as other children's parents, and that his family is worth as much in the eyes of his government as any other family.

(Affidavit of Laura Hartman ("Hartman Aff."), Ex. 25, ¶ 7; Pls.' SOF ¶ 53; *see also* Affidavit of Carlos Briones ("Briones Aff."), Ex. 45, ¶ 12 ("We have explained to our son that while we are legally married in Canada, Illinois does not recognize our marriage. We are concerned about how this lack of recognition may hurt him, especially when comparing his family to the families of others."); Scott-Henderson Aff., Ex. 14, ¶¶ 7-8 (marriage would help the children be "legitimized and equal," and "help the kids talk about their family").) Plaintiffs with older children report that it pains their children deeply to know that their family is excluded from marriage and branded as inferior, and these Plaintiffs yearn to have their children grow up feeling that their family is worthy of equal dignity and respect. (Pls.' SOF ¶ 53.) Kevin Bowersox-Johnson states:

> Even at the age of 5, Garrett already has had to defend his family structure to people who don't understand how he could have two dads. I want Garrett's own state

> government to stop treating his family as different and worth less than other families, because it invites discrimination and unequal treatment, and means that Garrett will have to struggle more as he grows older when he has to describe and defend his family structure to other people.

(Affidavit of Kevin Bowersox-Johnson ("K. Bowersox-Johnson Aff."), Ex. 28, ¶ 9; *see also* Pls.' SOF ¶ 53; Scott-Henderson Aff., Ex. 14, ¶ 6 (couple's son, Sebastian, "is made to feel as though we aren't a real family" when school refuses to respect parent-child relationship).) Just as the Supreme Court noted with respect to DOMA in *Windsor,* Illinois's marriage ban "brings financial harm to children of same-sex couples," *Windsor*, 570 U.S. at 24, and "humiliates . . . thousands of children now being raised by same-sex couples. The law in question 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." *Id.* at 23.

For those Plaintiffs who have entered civil unions or who are deemed members of civil unions by virtue of an out-of-state marriage to someone of the same sex, their civil union status brands them as members of inferior families. *See id.* (treatment of same-sex couples as members of "second-tier marriage[s]" "demeans the couple"). Civil unions are confusing and not well understood. (Pls.' SOF ¶ 57, 58; *see, e.g.*, Affidavit of James Darby ("Darby Aff."), Ex. 1, at ¶ 14 (some people think "civil union" means that he is in a labor union); Affidavit of Robyne O'Mara ("O'Mara Aff."), Ex. 29, ¶ 7 (civil union partner not recognized as next of kin); Mascaro Aff., Ex. 39, ¶ 7 (frequently has to explain a civil union to people).) More importantly, civil unions send the message that these couples' family relationships are worth less than the relationships of married couples, and deserve less respect. (Pls.' SOF ¶ 56; Peplau Aff., Ex. 59, ¶¶ 54-56 (barring same-sex couples from marriage reflects and perpetuates pervasive social stigma against lesbians and gay men).)

Indeed, some Plaintiffs report that when they describe themselves as having entered a civil union, it prompts questions or laughter rather than mutual understanding, respect, and congratulations. (Pls.' SOF ¶ 58.) Theresa Volpe's daughter, Ava:

> . . . was excited to share the news of her parents' civil union was with her class. However, some of her classmates did not know what a civil union meant, and Ava was forced to explain that a civil union is like a marriage, but not the same. We felt pained to think that our separate status and inability to marry has marked Ava's family as different and forced her to defend her family structure to her peers and teachers.

(Volpe Aff., Ex. 8, ¶ 11; *see also* Pls.' SOF ¶ 58; Affidavit of Danielle Cook ("Cook Aff."), Ex. 44, ¶ 9 (laughter when Cook's employer announced that she had become "civilized," as there was no appropriate word comparable to "married"); Burnett Aff., Ex. 30, ¶ 13 (after being told that patient was in a civil union with partner of 32 years, healthcare provider checked off the "single" box).) Frequent forced explanations about civil unions and about Plaintiffs' inability to marry is stigmatizing and makes Plaintiffs feel a sense of shame. (Pls.' SOF ¶ 57; *see also* Harris Aff., Ex. 6, ¶ 9 (pain when forced to explain to their six children that they remain unmarried despite civil union); Volpe Aff., Ex. 8, ¶ 7 (after civil union ceremony, a friend "said, 'Welcome to the middle of the bus,' and that really struck home for me"); Affidavit of Robert Proctor ("Proctor Aff."), Ex. 20, ¶ 9 (the phrase "civil union" diminishes their relationship); Affidavit of Lee Korty ("Korty Aff."), Ex. 9, ¶ 8 (found himself weeping at the hospital after his partner's heart attack as he was unable to describe himself as married despite a 24-year relationship).)[10]

[10] This is consistent with social science concerning stigmatized minority groups, including lesbians and gay men as well as ethnic/racial minorities, which confirms that these groups may experience additional stress caused by prejudice and discrimination, and that this stress, termed "minority stress," is associated with an increased risk of anxiety and depression. (Pls.' SOF ¶ 49.) Research on Illinois lesbian and gay residents, in particular, documents numerous manifestations of stigma and discrimination, including physical violence, threats of violence, vandalized property, being followed, and pervasive exposure to anti-gay speech. (*Id.* ¶ 100.) The extent to which lesbian and gay Illinoisans experience stigma is directly related to the establishment of statewide legal protections based on sexual orientation. (*Id.* ¶ 46.) The language of civil unions sets same-sex couples apart in relation to married families and perpetuates stigma even as it affords certain rights. (*Id.* ¶ 56.)

The marriage ban also interferes with Plaintiffs' life dreams and self-fulfillment. A state's "decision to give this class of persons the right to marry confer[s] upon them a dignity and status of immense import," and "enhance[s] the recognition, dignity, and protection of the class in their own community." *Windsor*, 570 U.S. at 18. For some Plaintiffs, marriage is part of their values. (Pls.' SOF ¶ 62; *see also* Affidavit of Tim Kee ("Kee Aff."), Ex. 42, ¶ 9) ("I did not grow up with hopes of being 'civil unionized."); Lopez Aff., Ex. 15, ¶¶ 11, 12 (couple cherishes their rich Mexican-American culture, values, and traditions, wants to pass these on to their children, and "Getting married is part of that"); Volpe Aff., Ex. 8, ¶ 6 ("Marriage" is "the only language we knew," and "Our parents were our role models").) Others feel pain and frustration at their inability to express to each other and their friends and family members, through the language of marriage, the depth of their love and commitment.[11] Writes Jim Darby of his relationship of almost 50 years with Patrick Bova:

> I feel a deep sense of personal loss over my inability to marry. I've been going to weddings for 60 years, and so many times I just sit there and say "I wish I could do that. I wish Patrick and I could be publicly acknowledged for our love and commitment to each other, too." Patrick is the best thing that has ever happened to me and marriage alone can encompass the depth of what he and I mean to each other.

(Darby Aff., Ex. 1, ¶ 13.) As Robyne O'Mara puts it:

> Marriage is what people do. It is the natural end to a commitment. When you fall in love, you don't run out and have a civil union. A civil union sounds like a contract or an administrative 'fix' somehow. You know, 'Oh well, there's a hole in your legal issues so we'll plug it with a civil union.' . . . It's been more than 30 wonderful years with Lynne and I'd like to have the next 30 of them as a married couple.

(O'Mara Aff., Ex. 29, ¶¶ 12-14.) Ryan Cannon writes:

> Daphne and I go through everything together; the ups, the downs, the hurts. For us, there is no walking away. That's not an option for us so we're just in. Whatever

[11] *See* Pls.' SOF ¶¶ 28, 64; *see also* Lopez Aff., Ex. 15, ¶ 8 (marriage evokes "a legal, cultural, and symbolic meaning that is not encompassed in any other term"); Affidavit of Ann Dickey ("Dickey Aff."), Ex. 26, ¶ 8 ("the civil union felt more administrative than joyful"); Affidavit of Julie Barton ("Barton Aff."), Ex. 21, ¶¶ 19-20 (civil union felt "administrative, incomplete, and hollow to us all, and not celebratory, as a marriage would be"); Burnett Aff., Ex. 30, ¶ 12 (in our society, marriage "validates who we are, who we are in relationship to each other and it gives us value).

> happens, we're just in it together; we're a family. That's what marriage means to us, and why we want to marry.

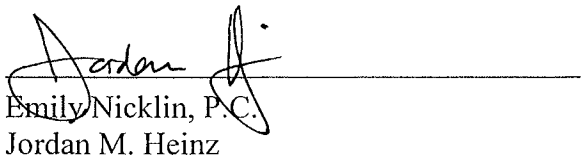
(Cannon Aff., Ex. 13, ¶ 12.) Illinois's marriage ban crushes Plaintiffs' dreams, frustrates their longing and the desire of their children to belong to married families, and deprives Plaintiffs and thousands of other lesbian and gay Illinois couples of equal dignity.[12] Permitting same-sex couples the freedom to marry would deem Plaintiffs' lifetime commitments and loving relationships "worthy of dignity in the community equal with all other marriages," *Windsor*, 570 U.S. at 20, as the Illinois Constitution requires.

CONCLUSION

For the reasons stated above, Plaintiffs' motion for summary judgment should be granted, and this Court should declare that excluding Plaintiffs from marriage violates the Illinois Constitution's guarantees of Due Process (Art. I § 2), Privacy (Art. I § 6), Equal Protection (Art. I §§ 2, 18), and its protection against Special Legislation (Art. I § 13). Alternatively, the Court should identify any remaining disputes of fact and thus narrow the scope of evidence the Court wishes to receive at trial.

[12] Professor Badgett estimates that between 6,053 and 11,525 same-sex couples living in Illinois would marry within three years of the removal of the marriage ban. (Pls.' SOF ¶ 71.)

Respectfully submitted,



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