UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

MARILYN RAE BASKIN and ESTHER FULLER; BONNIE EVERLY and LINDA JUDKINS; DAWN LYNN CARVER and PAMELA RUTH ELEASE EANES; HENRY GREENE and GLENN FUNKHOUSER, individually and as parents and next friends of C.A.G.; and NIKOLE QUASNEY and AMY SANDLER, individually and as parents and next friends of A.Q.-S. and M.Q.-S., Plaintiffs, v. PENNY BOGAN, in her official capacity as BOONE COUNTY CLERK; KAREN M. MARTIN, in her official capacity as PORTER COUNTY CLERK; MICHAEL A. BROWN, in his official capacity as LAKE COUNTY CLERK; PEGGY BEAVER, in her official capacity as HAMILTON COUNTY CLERK; WILLIAM C. VANNESS II, M.D., in his official capacity as the COMMISSIONER, INDIANA STATE DEPARTMENT OF HEALTH; and GREG ZOELLER, in his official capacity as INDIANA ATTORNEY GENERAL, Defendants.	)	Civil Action No.: 1:14-cv-00355-RLY-TAB

MEMORANDUM IN SUPPORT OF PLAINTIFFS NIKOLE QUASNEY, AMY SANDLER, A.Q.-S., AND M.Q.-S.'S MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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INTRODUCTION

Nikole Rai Quasney, known by her friends as Niki, is a wife and mother of two young girls under the age of three—and she has Stage IV ovarian cancer. Because of this aggressive cancer, Niki measures the rest of her life in weeks, not years. Her soulmate and loving partner of thirteen years, Amy Melissa Sandler, dreads the day Niki will die: not only for the devastating loss to their family, including their children A.Q.-S. and M.Q.-S., but also because she and Niki live in the State of Indiana ("State"), which deems her a legal stranger to Niki. Under Indiana law, the State refuses to recognize Niki's legal marriage to Amy, celebrated in Massachusetts on August 29, 2013. The State's refusal to respect Niki and Amy as married hinders Niki's ability to seek medical treatment in Indiana, causing her to commute to Illinois for chemotherapy and even emergency treatment, and putting Niki's condition in greater jeopardy as her health declines. And when Niki dies, Amy will receive a death certificate from the State that records Niki as unmarried—which will interfere with Amy's ability to take care of Niki's affairs after her death, and to access the safety net generally available to a surviving spouse and a decedent's children. More importantly, though, the State's insistence that Niki is unmarried would constitute a deeply hurtful denial of Amy's pain and loss as a surviving spouse, compounding her grief. It is Niki's wish as she confronts the likelihood of her own imminent death that Amy, A.Q.-S., and M.Q.-S. be recognized as her family, and that she and Amy be afforded the same protections and respect as any other married couple in Indiana. For this reason, Niki, Amy, A.Q.-S., and M.Q.-S. move the Court for emergency relief to order the State of Indiana immediately to recognize their status as a lawfully wedded couple.

The State of Indiana denies respect to Niki's and Amy's marriage because, in addition to prohibiting issuance of marriage licenses to same-sex couples, Indiana also renders void any out-of-state marriage between persons of the same sex. *See* Ind. Code § 31-11-1-1(b) (collectively

with any other provisions of Indiana statutes that could be construed to constitute a statutory ban on marriage for same-sex couples, the "marriage ban"). Indiana's marriage ban deprives Niki and Amy of the dignity of being able to hold themselves out to their children and their community as being married in the eyes of the State, hinders Niki's ability to obtain vital medical care, and will prevent Amy from receiving benefits for surviving spouses that will allow her to care for their children after Niki's passing.

The reason for the State's denial of Niki's and Amy's marriage—life's most sacred and important relationship, and a fundamental right guaranteed to every person—is their sex and sexual orientation. This plainly violates their due process and equal protection rights, as numerous district courts recently have concluded when striking down similar marriage bans in other states. The Indiana marriage ban is unconstitutional. But because of Niki's dire health, Niki, Amy, A.Q.-S., and M.Q.-S. cannot wait for this Court to finally and permanently vindicate their constitutional rights with a final judgment in this case. They ask this Court for a temporary restraining order and preliminary injunction prohibiting Defendants from enforcing Indiana's marriage ban as applied to them, and requiring the State to recognize their valid Massachusetts marriage for all purposes, including when issuing a death certificate.

FACTUAL BACKGROUND

Niki and Amy are a lesbian couple who reside in Munster, Indiana. (First Amended Compl. ("FAC") ¶ 27.) Niki has worked several years as a physical education teacher in Nevada. Currently, Niki is a stay-at home-mom who takes care of Niki and Amy's two minor children, A.Q.-S. (age 1) and M.Q.-S (age 2) (Niki, Amy, A.Q.-S., and M.Q.-S. are collectively referred to herein as "Plaintiffs"). (FAC ¶ 28; Decl. of Amy Sandler ("Sandler Decl.") ¶ 19.) Amy has worked as an adjunct professor, and is currently pursuing a Masters of Arts degree in

Social Service Administration from the University of Chicago, to which she commutes for classes from the family's home in Indiana. (FAC ¶ 29; Sandler Decl. ¶ 5.)

Niki and Amy have been in a long-term, committed relationship for thirteen years. (FAC ¶ 28); (Decl. of Niki Quasney ("Quasney Decl.") ¶ 2; Sandler Decl. ¶ 4.) They met in Washington, D.C. in August of 2000 and their relationship began the next day. (Sandler Decl. ¶ 6.) From the very beginning, Amy knew that she always wanted to be with Niki. (*Id.* ¶ 9.) They moved in together in December 2002. (*Id.*)

At the end of May 2009, Niki was diagnosed with Stage IV ovarian cancer. (*Id.* ¶ 10.) At the time, Niki and Amy were living together in Las Vegas, Nevada, where Amy had recently obtained her Ph.D. from the University of Nevada Las Vegas and Niki was teaching elementary physical education. (*Id.*) After several tests were done, they learned from two oncologists that Niki required surgery as soon as possible. (*Id.* ¶ 11). Amy says that "[t]he next few days were some of the scariest and most difficult days of my entire life." (*Id.*)

Niki traveled to Chicago to have surgery and "was scared that she wouldn't survive to make it to the day of surgery" but Amy "talked her through" it. (*Id.* ¶ 12.) The surgery removed "more than 100 tumors" through Niki's abdomen, including in her liver, kidneys, and bladder. (Quasney Decl. ¶ 11.) Niki lost her entire omentum. (*Id.*) Amy says that "[s]ince the end of May 2009, not a single day has gone by when I have not thought about cancer . . . I fear what will happen to our family if time runs out for Niki despite her and her doctors' best efforts." (Sandler Decl. ¶ 13.)

After a brief remission, Niki and Amy moved forward with their plan to have children together. (Quasney Decl. ¶ 13.) Amy conceived A.Q.-S. through reproductive technology with an anonymous donor. (*Id.*) When A.Q.-S. was born, Niki was feeling weak due to another

surgery in late February 2011 because doctors needed to break down scar tissue and adhesions in her stomach that had developed from her ovarian cancer surgery. (*Id.* ¶¶ 15, 17.) But when Niki held A.Q.-S., she "felt no pain." (*Id.* ¶ 17.) "A.Q.-S's birth was an incredible moment in [their] lives." (*Id.*) [Thye] were both so happy and felt so lucky[.]" (*Id.*) Two years later, in 2013, Amy gave birth to Niki and Amy's second child, M.Q.-S. (*Id.* ¶ 21).

Niki says that "[p]rotecting [her] family is critically important" and that she "need[s] to ensure that [her] family is protected and will be taken care of if [she] run[s] out of time." (*Id.* ¶ 22.) When civil unions became available in Illinois, Niki and Amy became civil union partners to protect their family. (*Id.* ¶ 23.) They obtained second-parent adoptions for both of their daughters to secure Niki's parent-child relationships to the children. (*Id.*)

In 2011, Niki and Amy moved to Munster, Indiana to be close to Niki's family. (Sandler Decl. ¶ 17.) They decided to make Indiana their permanent place of residence because Niki has cancer and Niki's family members are an "important source of love and support for [them] and for A.Q.-S and M.Q.-S." (*Id.* ¶ 20.) In September 2011, Niki's blood work showed an increase in her protein levels, and she needed yet another surgery. (Quasney Decl. ¶ 18.) Seven hours later, Niki woke up to learn that the doctors had taken out more cancer tumors and that because one of the tumors was on her small bowel, a bowel resection was performed. (*Id.*)

Amy's family has a home in Massachusetts where Niki and Amy vacation each summer. (Sandler Decl. ¶ 15.) On August 29, 2013, Niki and Amy married in Massachusetts while on vacation. (*Id.* ¶¶ 15-16; Quasney Decl. ¶ 3.) Amy says that they married in 2013 because she "was afraid that Niki's health was deteriorating and [she] didn't know if that trip was going to be [their] last trip together." (Sandler Decl. ¶ 15.) Massachusetts recognizes marriage for same-sex couples, and Amy "worried that this trip could be [her and Niki's] last opportunity to get legally

married." (*Id.*) "[W]ithout telling her that I was scared about her health," Amy asked Niki to marry her. (*Id.*)

Indiana is where Niki and Amy live and plan to permanently stay because Niki's family provides love and support to Niki, Amy, and their children. (Sandler Decl. ¶¶ 17, 20.) This love and support is critical because Niki's parents assist in the care of their two young children. (*Id.* ¶ 20.) Yet despite their Illinois civil union and valid Massachusetts marriage, Niki and Amy feel like legal strangers in their home state of Indiana because the State denies their marriage respect and "invites and encourages private bias and discrimination against [them]" (Quasney Decl. ¶ 23.) When Niki and Amy first moved to Indiana together they attempted to join a gym, operated by The Community Hospital in Munster, but an employee of The Community Hospital denied them a family membership because the hospital's "definition of spouse matches the state of Indiana's definition of marriage"—and as a result, their family did not "qualify" as a family in Indiana. (*Id.* ¶ 24.)

This refusal by Niki and Amy's local hospital to recognize their family has caused them to fear that Indiana hospitals will not recognize their marriage during the course of Niki's medical care. (Quasney Decl. ¶ 25.) Niki is "terrified that the hospital may not let" her family "be together in an emergency or permit Amy to make medical decisions on [her] behalf." (*Id.*) As a result, Niki travels to Chicago for chemotherapy appointments and even emergency medical care because Illinois recognizes the legal status of their relationship. (*Id.*) Indeed, when Niki experienced chest pain earlier this month, she drove forty minutes to the University of Chicago Medical Center in Illinois for emergency treatment for what turned out to be a pulmonary embolism, and made the same lengthy trip again for a visit at which she was diagnosed with flu and mononucleosis. (Sandler Decl. ¶13.)

Niki's Stage IV ovarian cancer has been relentless. Most recently, Niki completed a six-cycle course of chemotherapy and had eleven infusions. (Quasney Decl. ¶ 7.) There is only a five year median survival rate for someone with Niki's ovarian cancer. (*Id.* ¶ 5.) Amy says that "[t]he need for our marriage to be recognized so that we can safeguard our family has become incredibly urgent." (Sandler Decl. ¶ 14.) "Niki is my wife. It is more hurtful than I can describe that our government refuses to acknowledge that. And there are no words for how I would feel if Niki were to pass away and I received an official record of her death that had the box 'single' checked off, and the space for a surviving spouse left blank. Not only would that be a denial of my love and my grief, but it would be grievously unfair to our children, who deserve to have their mothers respected, in life and in death, as married to each other." (*Id.* ¶ 22.)

LEGAL STANDARD

"The standard for the issuance of a TRO is the same standard applied for the issuance of a preliminary injunction." *Cmty. Pharmacies of Indiana, Inc. v. Indiana Family & Soc. Servs. Admin.*, 801 F. Supp. 2d 802, 803 (S.D. Ind. 2011) (citation omitted). A TRO or a preliminary injunction may be granted if the movant: (1) has "some likelihood of succeeding on the merits"; (2) has no adequate remedy at law; and (3) "will suffer irreparable harm if preliminary relief is denied." *Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 11 (7th Cir. 1992) (preliminary injunction standards); *see also Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 795 (7th Cir. 2013). The Seventh Circuit has recognized that "the threshold" to satisfy the first element "is low. It is enough that the plaintiff's chances are better than negligible[.]" *Brunswick Corp. v. Jones*, 784 F.2d 271, 275 (7th Cir. 1986) (internal quotations and citations omitted); *accord Michigan v. U.S. Army Corps of Eng'rs*, 667 F.3d 765, 782 (7th Cir. 2011) (acknowledging "the often-repeated rule that the threshold for establishing likelihood of success is low"). If these three elements are met, the court will also consider any irreparable harm to the

non-movant and balance it against the harm to the movant, and will also take into account the public interest consequences of granting or denying the injunction. *See Abbott Labs.*, 971 F.2d at 12; *Planned Parenthood*, 738 F.3d at 795.

When considering whether a plaintiff has satisfied her burden, the Seventh Circuit employs a "sliding scale approach," whereby "the more likely it is the plaintiff will succeed on the merits, the less balance of irreparable harms need weigh towards its side; the less likely it is the plaintiff will succeed, the more the balance need weigh towards its side." *Kraft Foods Grp. Brands LLC v. Cracker Barrel Old Country Store, Inc.*, 735 F.3d 735, 740 (7th Cir. 2013) (quotation marks and citations omitted). The irreparable harm the plaintiff will suffer absent an injunction remains the most important equitable factor to consider. *See Reinders Bros., Inc. v. Rain Bird E. Sales Corp.*, 627 F.2d 44, 52-53 (7th Cir. 1980).

ARGUMENT

Plaintiffs are entitled to a temporary restraining order and preliminary injunction. Plaintiffs have a strong likelihood of prevailing on their claim that Indiana's marriage ban is unconstitutional under both the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the U.S. Constitution. Stage IV ovarian cancer patients like Niki face a median five-year survival rate (Quasney Decl. ¶ 5), and as Niki now reaches her fifth year of battling her illness, there is a very high probability that she will pass away before this Court will render a final judgment and vindicate her rights.

Niki is burdened with the uncertainty of whether Amy will be taken care of upon her passing, and, if Niki were to pass away before a final judgment, she will permanently be denied the dignity of being recognized as Amy's wife under Indiana law. (*Id.* ¶ 22.) Amy, in turn, will likewise suffer irreparable harm absent a temporary restraining order, because in the event that

Niki dies, Amy would be denied those rights, protections, and benefits that she as the surviving spouse would be entitled to if she were married to a partner of a different sex. (*See infra* § II.)

Conversely, the State would suffer no harm at all from a TRO being granted at this stage. The as-applied relief Plaintiffs seek is narrow: Niki and Amy ask only that the State recognize ***their*** valid Massachusetts marriage and treat them like any other married couple. Niki and Amy face an imminent and tragic event, and wish only to have Indiana—their home state—recognize their marriage before Niki's death.

In recognizing Niki's and Amy's marriage, the State's burden would be limited to performing minor administrative tasks that are no different from those it routinely performs for different-sex couples originally married in another state. Furthermore, enjoining enforcement of Indiana's unconstitutional marriage ban against Niki and Amy can only promote the public interest, since the public interest is served by vindicating constitutional rights. And since the relief that Plaintiffs seek is extremely narrow and applicable only to them, any conceivable harm to the public interest would in any event be greatly outweighed by the devastating harm to Plaintiffs if their request is denied.

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS THAT THE INDIANA MARRIAGE BAN IS UNCONSTITUTIONAL.

When government relegates same-sex couples to "second tier" status, it violates "basic due process and equal protection principles" by "demean[ing] the couple" and depriving them of equal dignity under the law. *Windsor v. United States*, 133 S. Ct. 2675, 2693-95 (2013). As an ever-increasing number of courts following *Windsor* have already recognized, state-law bans on

marriage by same-sex couples—many of which are functionally indistinguishable from Indiana's ban—violate both the Due Process and Equal Protection Clauses of the U.S. Constitution.[1]

A. By Denying Niki and Amy the Right to Have Their Existing Massachusetts Marriage Recognized, Indiana's Marriage Ban Violates Due Process.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides that no "State [shall] deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV, § 1. The guarantee of due process protects individuals from arbitrary governmental intrusion into fundamental rights. *See*, *e.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 719-20 (1997). Under the Due Process Clause, when legislation burdens the exercise of a fundamental right, 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).

In evaluating whether a law violates the Due Process Clause, courts first determine whether the right infringed is "fundamental," and if so, closely scrutinize the law to determine if it is narrowly tailored to serve a compelling government interest. *Id.* The Indiana marriage ban deprives Niki and Amy of their fundamental right to be married in Indiana, thereby triggering

[1] *See DeBoer v. Snyder*, —F. Supp. 2d—, 2014 WL 1100794 (E.D. Mich. 2014) (invalidating Michigan's marriage ban); *Tanco v. Haslam*, —F. Supp. 2d—, 2014 WL 997525 (M.D. Tenn. 2014) (invalidating Tennessee's marriage ban); *De Leon v. Perry*, No. SA-13-CA-00982, 2014 WL 715741, at *20 (W.D. Tex. Feb. 26, 2014) (striking down Texas' marriage ban); *Lee v. Orr*, No. 1:13-cv-08719, 2014 WL 683680 (N.D. Ill. Feb. 21, 2014) (compelling the Clerk of Cook County, Illinois, to issue marriage licenses to same-sex couples); *Bostic v. Rainey*, No. 2:13-cv-395, 2014 WL 561978 (E.D. Va. Feb. 13, 2014) (invalidating Virginia's marriage ban); *Bourke v. Beshear*, 2014 WL 556729, at *11-12 (W.D. Ky. Feb. 12, 2014) (invalidating Kentucky's ban on recognition of marriages between same-sex couples); 961 F. Supp. 2d 1181 (D. Utah 2013) (invalidating Utah's marriage ban); *Bishop v. United States ex rel. Holder*, No. 04-cv-848, 2014 WL 116013 (N.D. Okla. Jan. 14, 2014) (invalidating Oklahoma's marriage ban); *Griego v. Oliver*, 316 P.3d 865, 889 (N.M. 2013) (invalidating New Mexico's marriage ban); *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968 (S.D. Ohio 2013) (granting permanent injunction and declaratory judgment compelling Ohio to recognize valid out-of-state marriages between same-sex couples on Ohio death certificates); *Darby v. Orr*, No. 12-CH-19718, slip op. at 9-12 (Ill. Cir. Ct., Cook Cnty. Sept. 27, 2013) (citing *Windsor* in denying motion to dismiss state court challenge to state marriage ban); *Garden State Equality v. Dow*, 79 A.3d 1036, 1042-44 (N.J. 2013) (citing *Windsor* in denying stay pending appeal of judgment declaring state marriage ban unconstitutional).

heightened scrutiny. But the Indiana marriage ban does not even survive rational basis review—let alone any heightened scrutiny.

1. The Indiana marriage ban infringes Niki and Amy's fundamental right to remain married.

The right to marry has long been recognized as one of the most important rights of any person—"one of the basic civil rights of man, fundamental to our very existence and survival." *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (citation and internal quotation marks omitted). It is unquestionably a fundamental right protected by Due Process guarantees. *See, e.g.*, *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 564-65 (1989) ("[F]reedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process of the Fourteenth Amendment."); *Turner v. Safley*, 482 U.S. 78, 95-96 (1987) (same); *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (same). Indeed, marriage is "intimate to the degree of being sacred." *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965). The long line of decisions recognizing the significance of—and the protections accorded to—marital relationships would be meaningless if states could unilaterally refuse to recognize the marriages of disfavored groups, thereby depriving these spouses of their constitutional rights.

As the Supreme Court has recently recognized in *Windsor* (and lower courts have since repeatedly reaffirmed), this fundamental right is ***not*** limited to different-sex couples. In ruling that the federal government must provide marital benefits to married same-sex couples, and that married lesbian and gay persons and their children are entitled to equal dignity and equal treatment by their federal government, the Court acknowledged that marriage is not inherently defined by the sex or sexual orientation of the couples. To the contrary, marriage permits same-sex couples "to define themselves by their commitment to each other" and to "live with pride in themselves and their union and in a status of equality with all other married persons." *Windsor*,

133 S. Ct. at 2689. It is thus unconstitutional to "deprive some couples . . . but not other couples, of [the] rights and responsibilities [of marriage]." *Id.* at 2694. The right that Niki and Amy seek to vindicate by moving for this order is "simply ***the same right*** that is currently enjoyed by heterosexual individuals"—namely, their right to marry and to remain married once they return to their home state. *See Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1202-03 (D. Utah 2013) (emphasis added).[2]

There is nothing novel about the principle that couples have fundamental vested rights to have their marriages accorded legal recognition by the State. Indeed, in *Loving v. Virginia*, the Supreme Court struck down not only Virginia's law prohibiting interracial marriages within the state, but also its statutes that denied recognition to and criminally punished such marriages entered into outside the state. 388 U.S. at 4. Significantly, the Court held that Virginia's statutory scheme—including the penalties on out-of-state marriages and its voiding of marriages obtained elsewhere—"deprive[d] the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment." *Id.* at 12; *see also Zablocki*, 434 U.S. at 397 n.1 (1978) ("[T]here is a sphere of privacy or autonomy surrounding *an existing marital relationship* into which the State may not lightly intrude. . . .") (emphasis added) (Powell, J., concurring).[3]

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[2] *Accord, e.g.*, *Bostic v. Rainey*, No. 2:13-cv-395, 2014 WL 561978, at *12 (E.D. Va. Feb. 13, 2014) ("Plaintiffs ask for nothing more than to exercise a right that is enjoyed by the vast majority of [the state's] citizens."); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 993 (N.D. Cal. 2010) ("Plaintiffs do not seek recognition of a new right. [. . .] Rather, plaintiffs ask California to recognize their relationships for what they are: marriages.").

[3] The expectation that a marriage, once entered into, will be respected throughout the land is deeply rooted in "[o]ur Nation's history, legal traditions, and practices." *Glucksberg*, 521 U.S. at 721. As one federal court put it sixty-five years ago, the "policy of the civilized world [] is to sustain marriages, not to upset them." *Madewell v. United States*, 84 F. Supp. 329, 332 (E.D. Tenn. 1949). Historically, certainty that a marital status once obtained will be universally recognized has been understood to be of fundamental importance both to the individual and to society more broadly: "for the peace of the world, for the prosperity of its respective communities, for the well-being of families, for virtue in social life, for good morals, for religion, for everything held dear by the race of man in common, it is necessary there should be one universal rule whereby to determine whether parties are to be regarded

Under Massachusetts law and the laws of sixteen other states and the District of Columbia, Plaintiffs are married.[4] As *Windsor* held, the denial of respect and recognition to same-sex couples' valid marriages deprives these couples of "equal dignity." 133 S. Ct. at 2693. Applying these basic principles of equal dignity, court after court has recently struck down state laws that purport to bar same-sex couples from marrying—reaffirming that whether gay, lesbian, or heterosexual, all persons are guaranteed the fundamental right of marriage.[5] And since the Supreme Court's decision in *Windsor*, not one court to have faced these issues has found marriage bans to withstand constitutional scrutiny.

Indiana's withholding of this fundamental right from Niki and Amy denies them many of the legal, social, and financial benefits enjoyed by different-sex couples. Because Indiana's law "significantly interferes with the exercise of a fundamental right" of marriage, "it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to

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as married or not." 1 Joel Prentiss Bishop, *New Commentaries on Marriage, Divorce, and Separation* § 856, at 369 (1891).

Accordingly, interstate recognition of marriage has been a defining and essential feature of American law. The longstanding, universal rule of marriage recognition dictates that a marriage valid where celebrated is valid everywhere. *See, e.g.*, Joseph Story, *Commentaries on the Conflict of Laws* § 113, at 187 (8th ed. 1883) ("[t]he general principle certainly is . . . that . . . marriage is decided by the law of the place where it is celebrated"); *In re Lenherr Estate*, 314 A.2d 255, 258 (Pa. 1974) ("In an age of widespread travel and ease of mobility, it would create inordinate confusion and defy the reasonable expectations of citizens whose marriage is valid in one state to hold that marriage invalid elsewhere.").

[4] California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New Mexico, New York, Rhode Island, Vermont, Washington, and the District of Columbia all allow same-sex couples to marry.

[5] *See supra* n.1 (collecting cases); *see also Kitchen v. Herbert*, No. 2:13-cv-217, 2013 WL 6697874, at *18 (D. Utah Dec. 20, 2013) (holding that lesbian and gay couples "have a fundamental right to marry that protects their choice of a same-sex partner"); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 991 (N.D. Cal. 2010) (striking down California marriage ban and holding that "[t]he freedom to marry is recognized as a fundamental right protected by the Due Process Clause"); *In re Marriage Cases*, 183 P.3d 384, 433-34 (Cal. 2008) ("the right to marry, as embodied in [the due process clause] of the California Constitution, guarantees same-sex couples the same substantive constitutional rights as opposite-sex couples to choose one's life partner and enter with that person into a committed, officially recognized, and protected family relationship that enjoys all of the constitutionally based incidents of marriage"); *Goodridge v. Dep't of Public Health*, 798 N.E.2d 941, 957 (Mass. 2003) ("Because civil marriage is central to the lives of individuals and the welfare of the community, our laws assiduously protect the individual's right to marry against undue government incursion. Laws may not 'interfere directly and substantially with the right to marry.'" (quoting *Zablocki*, 434 U.S. at 387)).

effectuate only those interests." *Zablocki*, 434 U.S. at 388. But Defendants cannot articulate ***any*** legitimate interest—let alone a substantial one—for denying individuals of the same sex the right to marry. As a result, the Indiana marriage ban violates Niki and Amy's Due Process rights for the same reasons that it violates their Equal Protection rights (described below). *See, e.g.*, *Loving*, 388 U.S. at 12 (striking down anti-miscegenation law on both equal protection and due process grounds). Indeed, far from withstanding the rigorous test of strict scrutiny, Indiana's marriage ban cannot satisfy even rational basis review. (*See infra* § I.B.5.)

2. The Indiana marriage ban deprives Niki and Amy of a protected liberty interest in their existing Massachusetts marriage.

Indiana has long followed the general rule that "[t]he validity of a marriage depends upon the law of the place where it occurs." *Bolkovac v. State*, 98 N.E.2d 250, 304 (Ind. 1951). As a corollary, "Indiana will accept as legitimate a marriage validly contracted in the place where it is celebrated." *Mason v. Mason*, 775 N.E.2d 706, 709 (Ind. Ct. App. 2002). Indiana has therefore honored marriages that were valid in other jurisdictions even if that couple could not meet Indiana's own marriage requirements. *See id.* (affirming trial court recognizing as a matter of comity the marriage of a Tennessee couple who were first cousins, "even though such a marriage could not be validly contracted between residents of Indiana.").

Indiana Code Section 31-11-1-1(b)—under which "[a] marriage between persons of the same gender is void in Indiana even if the marriage is lawful in the place where it is solemnized"—is a marked departure from this long-standing rule, and is constitutionally impermissible. In *Windsor*, the Supreme Court held that same-sex spouses who have entered into valid marriages have a constitutionally-protected interest in their marital status, and that the federal government's categorical refusal to recognize the valid marriages of same-sex couples

was "unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution." 133 S. Ct. at 2695.

Here, Niki and Amy entered into a valid marriage in Massachusetts in 2013. But like Section Three of the federal Defense of Marriage Act ("DOMA")—which the Supreme Court struck down in *Windsor*—Indiana's law treats Niki and Amy's Massachusetts marriage as if it never existed. In doing so, the State denies their marriage recognition for all purposes under state law, just as DOMA did under federal law. And as with DOMA, the injury that the Indiana ban inflicts on Plaintiffs "is a deprivation of an essential part of the liberty protected by the [Constitution's due process guarantee]." *Id.* at 2692.

Like DOMA, Indiana's marriage ban is an "unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage," which here—as in *Windsor*—"operates to deprive same-sex couples of the benefits and responsibilities that come with" legal recognition of their marriage. *Id*. at 2693. Indiana's refusal to recognize Niki and Amy's marriage threatens to imminently and irreparably undermine their union, as Niki may succumb to her Stage IV ovarian cancer in the coming weeks or months. Indiana's refusal exposes Niki and Amy to an alarming array of legal vulnerabilities and harms, "from the mundane to the profound." *Id.* at 2694. As with DOMA, the purpose and effect of the Indiana marriage ban is to treat same-sex relationships unequally by excluding "persons who are in a lawful same-sex marriage," like Niki and Amy, from the same protections afforded heterosexual married persons—in violation of the Due Process guarantee of the United States Constitution. *Id.*

B. By Denying Niki and Amy Recognition of Their Existing Massachusetts Marriage, Indiana's Marriage Ban Violates Equal Protection.

The Equal Protection Clause of the Fourteenth Amendment ensures that similarly situated persons are not treated differently simply because of their membership in a class. *See City of*

Cleburne, 473 U.S. at 439 ("The Equal Protection Clause . . . is essentially a direction that all persons similarly situated should be treated alike."). If similarly situated persons are treated differently, the court determines if the classification that singles them out is "suspect" or "quasi-suspect." *Id.* at 440-41. The court then applies the appropriate level of scrutiny depending on the nature of the classification. *Id.* A classification that singles out a suspect class is reviewed under strict scrutiny; one that singles out a quasi-suspect class is reviewed under heightened scrutiny; and a classification that does not single out a suspect or quasi-suspect class is reviewed for a rational basis. *Id.*

The State's marriage ban is antithetical to the basic principles of the Equal Protection Clause. It creates a permanent "underclass" of hundreds of thousands of gay and lesbian Indiana citizens who are denied the fundamental right of marriage that is available to others simply because of the public disapproval of their constitutionally-protected sexual identities. Indiana's marriage ban relegates lesbians and gay men to stigmatized and second-class status, and cannot be squared with the basic dictates of the Equal Protection Clause.

1. Niki and Amy are similarly situated to heterosexual couples for purposes of marriage.

Gay and lesbian couples are similarly situated to heterosexual couples in every respect that is relevant to the purposes of marriage. *See Griswold*, 381 U.S. at 486 ("Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes: a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects."); *Turner*, 482 U.S. at 95-96 (even where prisoner had no right to conjugal visits and therefore no possibility of consummating marriage or having children, "[m]any important attributes of marriage remain"). Here, Niki and Amy "are in [a] committed and loving relationship . . . just like heterosexual

couples." *Varnum v. Brien*, 763 N.W.2d 862, 883-84 (Iowa 2009). Niki and Amy have been a committed couple for the past thirteen years, have been married for seven months and likely would have married earlier had Indiana allowed them that opportunity.

2. The marriage ban discriminates on the basis of sexual orientation.

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. The Indiana marriage ban directly classifies and prescribes "distinct treatment on the basis of sexual orientation." *See In re Marriage Cases*, 183 P.3d at 440-41. The exclusion is categorical, preventing ***all*** lesbian and gay couples from marrying consistent with their sexual orientation. Where, as here, the statute's discriminatory effect is more than "merely disproportionate in impact," but rather affects everyone in a class and "does not reach anyone outside that class," a showing of discriminatory intent is not required. *See M.L.B. v. S.L.J.*, 519 U.S. 102, 126-28 (1996).

3. Heightened scrutiny applies because the marriage ban discriminates on the basis of sexual orientation.

Because Indiana's marriage ban classifies citizens on the basis of sexual orientation, heightened scrutiny should apply. *See SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471, 483-84 (9th Cir. 2014) (sexual orientation is a suspect classification). In the past, the Seventh Circuit has applied rational basis review to discrimination based on sexual orientation. *See, e.g.*, *Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 950-51 (7th Cir. 2002) (citing cases, including *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by Lawrence*, 539 U.S. 558). But *Lawrence* and *Windsor* have called into question precedent like *Schroeder*. *See SmithKline*, 740 F.3d at 784 (noting that "*Windsor* requires that we reexamine our prior precedents," and concluding that "we are required by *Windsor* to apply heightened scrutiny to classifications

based on sexual orientation").[6] Because the Seventh Circuit's most recent application of the four-factor analysis of whether heightened scrutiny should apply to sexual orientation classifications predates *Lawrence*, *see Ben-Shalom v. Marsh*, 881 F.2d 454, 464-66 (7th Cir. 1989) (relying on *Bowers*), this Court should revisit this question anew.

Lower courts without controlling post-*Lawrence* precedent on the issue must apply the following criteria to determine whether sexual orientation classifications should receive heightened scrutiny: (1) whether the class has been historically "subjected to discrimination"; (2) whether the class has a defining characteristic that "frequently bears [a] relation to ability to perform or contribute to society"; (3) whether the class exhibits "obvious, immutable, or distinguishing characteristics that define them as a discrete group"; and (4) whether the class is "a minority or politically powerless." *Windsor v. United States*, 699 F.3d 169, 181 (2d Cir. 2012) (quotations and citations omitted), *aff'd* 133 S. Ct. 2675 (2013). The first two factors are the most important. *See id*. ("Immutability and lack of political power are not strictly necessary factors to identify a suspect class."); *accord Golinski*, 824 F. Supp. 2d at 987. As a number of federal and state courts have recently 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; *Golinski*, 824 F. Supp. 2d at 985-90; *Pedersen*, 881 F. Supp. 2d at 310-33; *Perry*, 704 F. Supp. 2d at 997; *In re Balas*, 449 B.R. 567, 573-75 (Bankr. C.D. Cal. 2011) (decision of twenty bankruptcy judges); *Varnum*, 763 N.W.2d at 885-96; *In re Marriage Cases*, 183 P.3d at 441-44;

[6] *See also Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 312 (D. Conn. 2012) ("The Supreme Court's holding in *Lawrence* 'remov[ed] the precedential underpinnings of the federal case law supporting the defendants' claim that gay persons are not a [suspect or] quasi-suspect class.'" (citations omitted)); *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 984 (N.D. Cal. 2012) ("[T]he reasoning in [prior circuit court decisions], that laws discriminating against gay men and lesbians are not entitled to heightened scrutiny because homosexual conduct may be legitimately criminalized, cannot stand post-*Lawrence*.").

Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 425-31 (Conn. 2008). This Court should do likewise.

4. Heightened scrutiny applies because the marriage ban discriminates on the basis of sex.

Indiana's marriage ban should also be subject to heightened scrutiny because it classifies Indiana citizens on the basis of sex. Indiana denies respect to Amy's marriage to Niki because Amy is a woman; if Amy were a man, Indiana would recognize them as married. Classifications based on sex can be sustained only where the government demonstrates that they are "substantially related" to an "important governmental objective." *U.S. v. Virginia*, 518 U.S. 515, 533 (1996) (internal quotation marks omitted); *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 9 (1st Cir. 2012) ("Gender-based classifications invoke intermediate scrutiny and must be substantially related to achieving an important governmental objective.").[7]

The ban also discriminates based on sex by impermissibly enforcing conformity with sex stereotypes, requiring men and women to adhere to traditional marital roles as a condition of recognizing their out-of-state marriage as valid. The Supreme Court has found this type of statutory sex stereotyping constitutionally impermissible. *See, e.g.*, *Virginia*, 518 U.S. at 533 (justifications for gender classifications "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females"); *Califano v. Webster*, 430 U.S. 313, 317 (1977); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724-25 (1982).

[7] Indiana's marriage ban is no less invidious because it equally denies men and women the right to marry a same-sex life partner. *Loving* discarded "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." 388 U.S. at 8; *see also McLaughlin v. Florida*, 379 U.S. 184, 191 (1964) (equal protection analysis "does not end with a showing of equal application among the members of the class defined by the legislation"); *J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127 (1994) (government may not strike jurors based on sex, even though such a practice, as a whole, does not favor one sex over the other). Nor was the context of race central to *Loving*'s holding, which expressly found that, even if race discrimination had not been at play and the Court presumed "an even-handed state purpose to protect the integrity of all races," Virginia's anti-miscegenation statute still was "repugnant to the Fourteenth Amendment." 388 U.S. at 12 n.11.

The Equal Protection Clause prohibits such "differential treatment or denial of opportunity" based on a person's sex in the absence of an "exceedingly persuasive" justification. *Virginia*, 518 U.S. at 532-33 (internal quotation marks omitted). The State can offer none.

5. The marriage ban cannot survive rational basis review, let alone heightened scrutiny.

The Indiana marriage ban is unconstitutional even under rational basis review because it irrationally deprives gay and lesbian individuals of the right to marry. Rational basis review does not mean no review at all. Government action that discriminates against a class of citizens must "bear[] a rational relation to some legitimate end." *Romer v. Evans*, 517 U.S. 620, 631 (1996) . And even under rational basis review, the court must "insist on knowing the relation between the classification adopted and the object to be obtained." *Id.* at 632. In addition, even when the government offers an ostensibly legitimate purpose, the court must also examine the statute's connection to that purpose to assess whether it is too "attenuated" to rationally advance the asserted governmental interest. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446 (1985); *see, e.g., United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 535-36 (1973); *Eisenstadt v. Baird*, 405 U.S. 438, 448-49 (1972).

By requiring that classifications be justified by an independent and legitimate purpose, the Equal Protection Clause prohibits classifications from being drawn for "the purpose of disadvantaging the group burdened by the law." *Romer*, 517 U.S. at 633; *see also Windsor*, 133 S. Ct. at 2693; *Cleburne*, 473 U.S. at 450; *Moreno*, 413 U.S. at 534. The Supreme Court invoked this principle most recently in *Windsor* when it held that the principal provision of DOMA violated equal protection principles because the "purpose and practical effect of the law . . . [was] to impose a disadvantage, a separate status, and a stigma upon all who enter into same-sex marriages." 133 S. Ct. at 2693. The Court found that DOMA was not sufficiently

connected to a legitimate governmental purpose because its "interference with the equal dignity of same-sex marriages . . . was more than an incidental effect of the federal statute. It was its essence." *Id.* The Supreme Court has sometimes described this impermissible purpose as "animus" or a "bare . . . desire to harm a politically unpopular group." *Id.*; *see also Romer*, 517 U.S. at 633; *Cleburne*, 473 U.S. at 447; *Moreno*, 413 U.S. at 534. But an impermissible motive does not always require "malicious ill will." *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring). It can also take the form of "negative attitudes," *Cleburne*, 473 U.S. at 448, "fear," *id.*, "irrational prejudice," *id.* at 450, or "some instinctive mechanism to guard against people who appear to be different in some respects from ourselves," *Garrett*, 531 U.S. at 374 (Kennedy, J., concurring).[8]

Indiana's marriage ban shares all the hallmarks of discrimination, and none of the rationales for the marriage ban that Defendants are likely to proffer can withstand constitutional review. For reasons detailed below, even if this Court were inclined to apply rational basis review rather than heightened scrutiny, Plaintiffs are likely to succeed on the merits of their claim that the Indiana marriage ban cannot survive even a rational basis analysis, just as numerous other federal courts recently have concluded. *See De Leon*, 2014 WL 715741, at *17; *Bostic*, 2014 WL 561978, at *22; *DeBoer v. Snyder*, —F. Supp. 2d—, 2014 WL 1100794, at *11 (E.D. Mich. 2014); *Bourke v. Beshear*, 2014 WL 556729, at *8 (W.D. Ky. Feb. 12, 2014);

[8] In determining whether a law is based on such an impermissible purpose, the Court has looked to a variety of direct and circumstantial evidence, including the text of a statute and its obvious practical effects (*see, e.g.*, *Windsor*, 133 S. Ct. at 2693; *Romer*, 517 U.S. at 633; *Village of Arlington Heights v. Metro Housing Dev. Corp.*, 429 U.S. 252, 266-68 (1977)), statements by legislators during floor debates or committee reports (*see, e.g.*, *Windsor*, 133 S. Ct. at 2693; *Moreno*, 413 U.S. at 534-35), the historical background of the challenged statute (*see, e.g.*, *Windsor*, 133 S. Ct. at 2693; *Arlington Heights*, 429 U.S. at 266-68), and a history of discrimination by the relevant governmental entity (*see, e.g.*, *Arlington Heights*, 429 U.S. at 266-68). Finally, even without direct evidence of discriminatory intent, the absence of any logical connection to a legitimate purpose can lead to an inference of an impermissible intent to discriminate. *See Romer*, 517 U.S. at 632; *Cleburne*, 473 U.S. at 448-50.

Bishop v. U.S. ex rel. Holder, 2014 WL 116013, at *33 (N.D. Okla. Jan. 14, 2014); *Kitchen*, 2013 WL 6697874, at *25; *Perry*, 704 F. Supp. 2d at 997.

a. The marriage ban cannot be justified by an asserted interest in maintaining a traditional definition of marriage.

To survive constitutional scrutiny, the marriage ban must be justified by some legitimate state interest other than simply maintaining a "traditional" definition of marriage. "Ancient lineage of a legal concept does not give it immunity from attack for lacking a rational basis." *Heller v. Doe*, 509 U.S. 312, 326-27 (1993); *see also Williams v. Illinois*, 399 U.S. 235, 239 (1970) ("[N]either the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack."). "[T]imes can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress." *Lawrence*, 539 U.S. at 579.

With respect to law prohibiting same-sex couples from marriage, "the justification of 'tradition' does not explain the classification; it merely repeats it. Simply put, a history or tradition of discrimination—no matter how entrenched—does not make the discrimination constitutional." *Kerrigan*, 957 A.2d at 478; *accord Goodridge*, 798 N.E.2d at 961 n.23; *Varnum*, 763 N.W.2d at 898; *see also Golinski*, 824 F. Supp. 2d at 993. 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), which is not a rational basis for perpetuating discrimination. *See Windsor*, 133 S. Ct. at 2692; *Romer*, 517 U.S. at 633; *Cleburne*, 473 U.S. at 450; *Moreno*, 413 U.S. at 534.

b. There is no rational relationship between the marriage ban and any asserted interest related to procreation or the promotion of optimal parenting.

There is no rational connection between Indiana's marriage ban and any asserted state interest in encouraging heterosexual couples to procreate responsibly within marriage, or in encouraging child-rearing by supposedly "optimal" parents. Indiana law does not condition persons' right to marry on their abilities or intentions to have or rear children, but permits those who are "sterile and the elderly," or simply uninterested in childbearing to marry. *See Lawrence*, 539 U.S. at 605 (Scalia, J., dissenting); *De Leon*, 2014 WL 715741, at *15 ("[P]rocreation is not and has never been a qualification for marriage.").

Same-sex couples can no more harm procreative imperatives of marriage "than marriages of couples who cannot 'naturally procreate' or do not ever wish to 'naturally procreate." *Bishop*, 2014 WL 116013, at *29. Nor does denying marriage to same-sex couples increase the number of children raised by married different-sex biological parents; indeed, any asserted connection between the marriage ban and the marital or procreative decisions of heterosexual couples defies logic. *See De Leon*, 2014 WL 715741, at *16; *Kitchen*, 2013 WL 6697874, at *25, *27, *Windsor v. United States*, 699 F.3d 169, 188; *Varnum*, 763 N.W.2d at 901.

The only effect that Indiana's marriage ban has on children's well-being is that it ***harms*** the children of same-sex couples—such as A.Q.-S. and M.Q.-S.—who are denied the protection and legitimacy of having married parents. *DeBoer*, 2014 WL 1100794, at *5; *Bishop*, 2014 WL 116013, at *31; *Kitchen*, 2013 WL 6697874, at *26; *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 378 (D. Mass. 2010). Like the statute invalidated in *Windsor*, Indiana's marriage ban serves only to "humiliate" the "children now being raised by same-sex couples" and "make[] it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Windsor*, 133 S.

Ct. at 2694. "Excluding same-sex couples from civil marriage will not make children of opposite-sex marriages more secure, but it does prevent children of same-sex couples from enjoying the immeasurable advantages that flow from the assurance of a stable family structure in which children will be reared, educated, and socialized." *Goodridge*, 798 N.E.2d at 964 (internal quotation marks and citation omitted).

Lesbian and gay couples have children through assisted reproduction and through adoption, and the government has just as strong an interest in encouraging such procreation and child-rearing in these families to take place in the context of marriage. *See DeBoer*, 2014 WL 1100794, at *12-13; *Kitchen*, 2013 WL 6697874, at *26; *Varnum*, 763 N.W.2d at 902; *In re Marriage Cases*, 183 P.3d at 433. "[T]he argument that allowing same-sex couples to marry will undermine procreation is nothing more than an unsupported 'overbroad generalization' that cannot be a basis for upholding discriminatory legislation." *De Leon*, 2014 WL 715741, at *16.

Opponents of marriage for same-sex couples also sometimes argue that excluding same-sex couples from marriage serves the purpose of promoting the ideal that children will be reared by "optimal parents," which they characterize as married, biological, different-sex parents. *See Kitchen*, 2013 WL 6697874, at *25-26. But there is no link between the marriage ban and encouragement of procreation by anyone. And the overwhelming scientific consensus, based on decades of peer-reviewed scientific research, in any event shows unequivocally that children raised by same-sex couples are just as well-adjusted as those raised by heterosexual couples. *DeBoer*, 2014 WL 1100794 at *12 (finding that testimony adduced at trial overwhelmingly supported finding that there are no differences between the children of same-sex couples and the children of different-sex couples).[9] As court after court has recognized, it is "accepted beyond

[9] This consensus has been recognized in formal policy statements and organizational publications by every major professional organization dedicated to children's health and welfare, including the American Academy of Pediatrics,

serious debate" that children are raised just as "optimally" by same-sex couples as they are by different-sex couples. *See, e.g.*, *De Leon*, 2014 WL 715741, at *20; *Bostic*, 2014 WL 561978, at *12 (E.D. Va. Feb. 13, 2014); *Perry*, 704 F. Supp. 2d at 980.[10]

There is simply no rational connection between the marriage ban and the asserted governmental interest in optimal parenting. Children being raised by different-sex couples are unaffected by whether same-sex couples can marry, and children raised by same-sex couples will not end up being raised by different-sex couples because their current parents cannot marry. *See Golinski*, 824 F. Supp. 2d at 997; *accord Windsor*, 699 F.3d at 188; *Pedersen*, 881 F. Supp. 2d at 340-41; *Varnum*, 763 N.W.2d at 901.

c. No legitimate interest overcomes the primary purpose and practical effect of the marriage ban—which is to disparage and demean same-sex couples and their families.

The Supreme Court in *Windsor* recently reaffirmed that when the primary purpose and effect of a law is to harm an identifiable group, the law is unconstitutional regardless of whether the law may also incidentally serve some other neutral governmental interest. Because "[t]he principal purpose [of DOMA was] to impose inequality, not for other reasons like governmental efficiency," the government could not articulate a legitimate purpose that could "overcome[] the purpose and effect to disparage and injure" same-sex couples and their families. 133 S.Ct. at 2694, 2696.

American Academy of Child and Adolescent Psychiatry, the American Psychiatric Association, the American Psychological Association, the American Psychoanalytic Association, and the Child Welfare League of America. *See United States v. Windsor*, No. 12-307, Brief of the American Psychological Association et al. as Amici Curiae on the Merits in Support of Affirmance, 2013 WL 871958, at *14-26 (Mar. 1, 2013) (discussing this scientific consensus); *Hollingsworth v. Perry*, No. 12-144, and *United States v. Windsor*, No. 12-307, Brief of the American Sociological Ass'n in Support of Respondent Kristin M. Perry and Respondent Edith Schlain Windsor, 2013 WL 840004, at *6-14 (Feb. 28, 2013).

[10] *See also Golinski*, 824 F. Supp. 2d at 991; *Howard v. Child Welfare Agency Rev. Bd.*, Nos. 1999-9881, 2004 WL 3154530, at *9 and 2004 WL 3200916, at *3-4 (Ark. Cir. Ct. Dec. 29, 2004), *In re Adoption of Doe*, 2008 WL 5006172, at *20 (Fla. Cir. Ct. Nov 25, 2008), *Varnum*, 763 N.W.2d at 899 n.26.

The inescapable "practical effect" of Indiana's marriage ban 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. *Id.* at 2693. The ban "diminishes the stability and predictability of basic personal relations" of gay people and "demeans the couple, whose moral and sexual choices the Constitution protects." *Id.* at 2694 (citing *Lawrence*, 539 U.S. 558). Thus, even if there were a rational connection between the ban and a legitimate purpose (and there is not), that connection could not "overcome[] the purpose and effect to disparage and to injure" same-sex couples and their families. *Windsor*, 133 S. Ct. at 2696.

The Indiana General Assembly passed the marriage ban in 1997. Tellingly, that ban mirrored DOMA in its design, purpose, and effect. The marriage ban's sole purpose was to target same-sex couples and exclude them from marriage. The ban's effect is sweepingly broad – touching numerous diverse aspects of everyday life in a single stroke. The legislature enacted the marriage ban for no reason other than "to ensure that homosexual Hoosiers could not wed."[11] The Indiana General Assembly's animus-driven motive—to fence lesbian and gay Indiana residents and their children out of marriage—is impermissible under the Equal Protection Clause.

II. PLAINTIFFS HAVE NO ADEQUATE REMEDY AT LAW AND ARE HIGHLY LIKELY TO SUFFER IRREPARABLE HARM.

Should Niki pass away before this Court can rule on the constitutionality of the marriage ban, Indiana's refusal to recognize their marriage will be irrevocable. Niki will be fully and

[11] David J. Bodenhamer & Randall T. Shepard, The Narratives and Counternarratives of Indiana Legal History, in THE HISTORY OF INDIANA LAW 3, at p. 80 (2006); *available at* http://books.google.com/books?id=7l_50bq5ZJMC&pg=PP8&lpg=PP8&dq=David+J.+Bodenhamer+%26+Randall+T.+Shepard,+The+Narratives+and+Counternarratives+of+Indiana+Legal+History,+in+THE+HISTORY+OF+INDIANA+LAW+3+(David+J.&source=bl&ots=Amhs2muh6V&sig=ksh70PWPh7VZ3xsqJQz9LhE6WNg&hl=en&sa=X&ei=dPI1U8LsKfO02wXljIGAAg&ved=0CDEQ6AEwAg#v=onepage&q=homosexual%20hoosier&f=false. (last visited March 28, 2014).

finally denied the dignity of having her marriage to her loving partner of thirteen years recognized by her home State. Niki would also die burdened by the knowledge that Amy will be treated as a stranger to her in Indiana, and that both Amy and their children will be denied important benefits to which the family is entitled upon her Niki's death.

Indiana's refusal to recognize Niki and Amy's legitimate marriage violates their constitutional rights—which, without more, establishes irreparable harm as a matter of law. *See, e.g.*, *Preston v. Thompson*, 589 F.2d 300, 303 (7th Cir. 1978) ("The existence of a continuing constitutional violation constitutes proof of an irreparable harm[.]"); *Young v. Ballis*, 762 F. Supp. 823, 827 (S.D. Ind. 1990) ("Threat of continued violation of one's constitutional rights is proof of irreparable harm.") (citation omitted); *Does v. City of Indianapolis*, 2006 WL 2927598, at *11 (S.D. Ind. Oct. 5, 2006) (quoting *Cohen v. Cohama County, Miss.*, 805 F. Supp. 398, 406 (N.D. Miss. 1992) for the proposition that "[i]t has repeatedly been recognized by the federal courts at all levels that violation of constitutional rights constitutes irreparable harm as a matter of law.") (Young, J.).

In addition to the presumptive harm that flows from these constitutional deprivations, the harm that Niki and Amy will suffer if a temporary restraining order is not issued will be irreparable and overwhelming. A marriage "is a far-reaching legal acknowledgement of the intimate relationship between two people," and the State inflicts grave dignitary harm when its law announces that Niki and Amy's relationship is not "deemed by the State worthy of dignity in the community equal with all other marriages." *Windsor*, 133 S. Ct. 2675, 2692; *see also Gray v. Orr*, 2013 WL 6355918, at *4 (N.D. Ill. Dec. 5, 2013) (granting a temporary restraining order and declaratory relief to allow a terminally ill woman to wed her longtime partner even though Illinois banned such marriages, and opining "Equally, if not more, compelling is Plaintiffs'

argument that without [injunctive relief], they will be deprived of enjoying the less tangible but nonetheless significant personal and emotional benefits that the dignity of official marriage status confers."). By denying recognition to Amy and Niki's marriage, Indiana "demeans" them and "humiliates" their children—A.Q.-S. and M.Q.-S.—making 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." *See Windsor*, 133 S.Ct. at 2694; *see also Tanco v. Haslam*, 2014 WL 997525, at *7 (M.D. Tenn. Mar. 14, 2014) ("The state's refusal to recognize the plaintiffs' marriages de-legitimizes their relationships, degrades them in their interactions with the state, causes them to suffer public indignity, and invites public and private discrimination and stigmatization.")

The pain and indignity that Amy and Niki feel when contemplating the (current) reality that Niki will die a legal stranger to Amy in the eyes of the State are especially significant in light of the death certificate that the State would issue after Niki's death. As the court in *Obergefell v. Kasich* concluded, a state's refusal to respect the valid out-of-state marriage of a same-sex couple when issuing a death certificate to the surviving spouse causes irreparable harm that warrants preliminary relief. No. 1:13-cv-501, 2013 WL 3814262, at *7 (S.D. Ohio July 22, 2013). The court recognized that without injunctive relief, "the official record of Mr. Arthur's death, and the last official document recording his existence on earth, will incorrectly classify him as unmarried, despite his legal marriage to Mr. Obergefell." *Id.*

The same situation threatens to occur here. Without injunctive relief, Indiana will deny on Niki's death certificate that her marriage to Amy ever existed. Niki will die "incorrectly classif[ied] as unmarried, despite [her] legal marriage" to Amy. *Id.* Amy's and Niki's daughters will be denied an official document reflecting their deceased mother as married to their surviving

parent. *Obergefell* acknowledged the "extreme emotional hardship" that the uncertainty engendered by the marriage ban will have on both partners during this trying time. *Id.* And while a later ruling from this Court may allow the surviving spouse to amend the death certificate, that would not ameliorate the emotional hardship suffered by the decedent. *Id.* (a later decision "cannot remediate the harm to Mr. Arthur, as he will have passed away."). The only way to avoid this irreparable harm is for this Court immediately to provide Niki the peace of mind that can only come with the assurance that her valid marriage to her loving spouse, Amy, will be recognized by the State of their residence after her death, and that Amy will be entitled to all the attendant survivor rights and benefits of their marriage.

Beyond dignitary harms, Indiana's marriage ban is a source of practical and financial hardship for Niki and Amy. Niki and Amy fear that they will not be recognized as a family, together with their children, in medical settings. As Niki's health has declined, and as Niki has grieved the loss of her father, also due to cancer, Niki and Amy have grown increasingly worried that their family will be denied respect, and perhaps even kept apart and denied the ability to support each other in medical settings, including in an emergency. Although they have performed adoptions with respect to both children, they know that their adoptions may not be enough to ensure that they are treated as a family. (Quasney Decl. ¶ 23.) When their second child was born, Niki and Amy felt compelled to drive to Chicago so Amy could give birth in a State that would recognize Niki on the child's birth certificate. Furthermore, Niki travels to Chicago for chemotherapy and even medical emergencies (most recently for what was determined to be a pulmonary embolism, a very serious condition) because her family would not be recognized at the hospital nearest to her, which has a policy of denying recognition to same-

sex couples as families—regardless of whether they are married—in reliance on Indiana's discriminatory marriage ban. (Sandler Decl. ¶¶ 13-14, 17-18.)

Upon Niki's death, Amy will sustain even more hardships due to the marriage ban. When an Indiana resident dies, the death certificate reflects her marital status—and, if married, the identity of her spouse.[12] Amy will face practical challenges because Niki's death certificate will list her as unmarried. A death certificate often is necessary for a surviving spouse to apply for insurance or other benefits, settle claims and access assets, transfer title of real and personal property, and provide legal evidence of the fact of a family member's death.[13] In addition to the pain of having her grief loss denied by her government in the official record that acknowledges her wife's death, Amy thus may have difficulties in settling Niki's affairs and making funeral arrangements. Amy also may face significant challenges when applying for Social Security survivor benefits. First, the Social Security Administration requires proof of death, either from a death certificate or funeral home.[14] That Niki's death certificate will list her as "Never Married" will interfere with Amy's ability to apply for benefits as a surviving spouse. Second, because, under a federal regulation, the Social Security Administration defers to a couple's state of residence (and not the state of celebration of the couple's marriage) when determining whether an individual is a qualified spouse, Amy may be denied benefits altogether even if she is otherwise eligible for them, absent a declaration that Indiana's marriage ban is unconstitutional as applied to them and that their marriage must be respected as valid for all purposes by the State

[12] *See* Indiana State Department of Health, *Certificate of Death*, State Form 10110 (R7/9-07), *available at* http://www.in.gov/isdh/files/Death_Certificate_TEMPLATE_07132009.doc.

[13] National Center for Health Statistics, *Report of the Panel to Evaluate the U.S. Standard Certificates* (April 2000) at 119, *available at* http://www.cdc.gov/nchs/data/dvs/panelreport_acc.pdf.

[14] Social Security Administration, *Survivors Benefits*, SSA Publication No. 05-10084. (July 2013) at p. 7, *available at* http://www.ssa.gov/pubs/EN-05-10084.pdf.

and Defendants. *See* 20 C.F.R. § 404.345.[15] Furthermore, subject to certain exceptions, a couple must be married for "at least 9 months" before death for the widow to be eligible for survivor benefits. 20 C.F.R. § 404.335(a)(1). Without emergency relief, if Niki were to pass away before the marriage ban is struck down, or within nine months after it is struck down, Amy may be denied Social Security benefits on this ground as well.

Social Security survivor benefits are just one of the many "concrete financial benefits" accorded to married couples, and Indiana's failure to recognize Niki and Amy's marriage "will cause irreparable harm by preventing them from realizing those benefits." *Gray*, 2013 WL 6355918, at *4. Moreover, in addition to being denied federal benefits that are due surviving spouses, Amy may also be denied survivor benefits under Indiana law. For example, if Indiana recognized their marriage, upon Niki's death Amy would be entitled to a $25,000 allowance from Niki's estate, Ind. Code § 29-1-4-1, and she would have been entitled to elect to receive "one-half of the net personal and real estate of the testator," regardless of the disposition made in the will. Ind. Code § 29-1-3-1.

III. GRANTING INJUNCTIVE RELIEF WILL NOT HARM DEFENDANTS AND WILL PROMOTE THE PUBLIC INTEREST.

Defendants will not suffer irreparable harm—or any harm at all—if they are required to recognize Niki and Amy's valid marriage. Niki and Ami seek to enjoin Defendants from continuing to infringe their constitutional rights, and "Defendants will not be harmed by having to conform to constitutional standards[.]" *City of Indianapolis*, 2006 WL 2927598, at *11; *see also Video-Home-One, Inc. v. Brizzi*, 2005 WL 3132336, at *6 (S.D. Ind. Nov. 22, 2005) ("the government experiences no harm when prevented from enforcing an unconstitutional statute").

[15] "To decide your relationship as the insured's widow or widower, we look to the laws of the State where the insured had a permanent home when he or she died." 20 C.F.R. § 404.345.

Moreover, the requested relief requires only that the Defendants treat this one couple in the exact manner as they treat any other married person who has recently lost his or her spouse. *See Obergefell*, 2013 WL 3814262, at *7 (finding that the State would not be harmed by issuing a TRO to a single plaintiff couple because "[n]o one beyond Plaintiffs themselves will be affected by such a limited order at all"). Granting certain benefits to this one same-sex couples entails virtually no administrative burden, and only a minor financial burden. *Tanco*, 2014 WL 997525, at *8 ("[T]he administrative burden on [the State] from preliminarily recognizing the marriages of the three couples in this case would be negligible). And in the unlikely event that the marriage ban is later upheld, an injunction would result merely in allowing Niki and Amy to be treated identically to every other different-sex married couple in Indiana. Compared to the severe and grave harms suffered by Plaintiffs in absence of an injunction, the balance of harms tips decidedly and strongly in Plaintiffs' favor.

Moreover, granting injunctive relief will ***promote***—not injure—the public interest. The marriage ban as applied to Niki and Amy is unconstitutional. Enjoinment of constitutional violations always promotes the public interest, because "[t]he public interest is served by protecting the constitutional rights of its citizenry." *City of Indianapolis*, 2006 WL 2927598, at *11; *see also, e.g.*, *Tanford v. Brand*, 883 F. Supp. 1231, 1237 (S.D. Ind. 1995) ("governmental compliance with the Constitution always serves the common good."); *Pratt v. Chicago Hous. Auth.*, 848 F. Supp. 792, 796 (N.D. Ill. 1994) ("The public interest would not be disserved by granting the preliminary injunction" because "[t]he public has a powerful interest in the maintenance of constitutional rights"). Continued enforcement of an unconstitutional statute can never be in the public interest. *Joiner v. Village of Washington Park, Ill.*, 378 F.3d 613, 620 (7th Cir. 2004). That is particularly true, when as here, continued enforcement will cause grave harm

to a loving couple confronted with an impending tragic loss. The public simply has no interest in denying Amy the rights she is entitled to as a surviving spouse upon Niki's death.

CONCLUSION

For the foregoing reasons, the Court should enter a temporary restraining order that: (1) enjoins Defendants and all those acting in concert from enforcing the Indiana laws against recognition of Plaintiffs Niki Quasney and Amy Sandler's legal out-of-state marriage as applied to them; and (2) should Plaintiff Niki Quasney pass away in Indiana, orders William C. VanNess II, M.D., in his official capacity as the Commissioner of the Indiana State Department Of Health, and all those acting in concert, to issue a death certificate that records her marital status as "married" and that lists Plaintiff Amy Sandler as the "surviving spouse;" said order shall require that Defendant VanNess issue directives to local health departments, funeral homes, physicians, coroners, medical examiners, and others who may assist with the completion of said death certificate explaining their duties under the order of this Court.[16]

[16] Plaintiffs request that they be exempted from the Federal Rule of Civil Procedure 65(c) bond requirement. The trial court has discretion over the amount of required security, and the court may elect to require no security at all. *See DiDomenico v. Employers Co-op. Indus. Trust*, 676 F. Supp. 903, 909 (N.D. Ind. 1987) ("Under appropriate circumstances bond may be excused, notwithstanding the literal language of Rule 65(c), such as where the party seeking the injunction is indigent.") (citing *Wayne Chem., Inc. v. Columbus Agency Serv. Corp.*, 567 F.2d 692, 701 (7th Cir. 1977)).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jordan M. Heinz, an attorney, certify that on March 31, 2014, I placed the foregoing document for personal service with a process server and served the foregoing document via overnight Fed Ex on the following counsel:

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The foregoing document was also served via ECF to those counsel of record who have agreed to electronic service of electronically-filed documents, and emailed to the following counsel of record at their above email addresses: Robert V. Clutter, Elizabeth A. Knight, Nancy Moore Tiller, and Thomas M. Fisher.

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