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' MOTION FOR SUMMARY JUDGMENT

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Plaintiffs include five same-sex couples who have been in loving, committed relationships for periods ranging from 13 to 24 years. Plaintiffs Marilyn Rae ("Rae") Baskin, Esther Fuller, Bonnie Everly, Linda Judkins, Dawn Lynn Carver, Pamela Ruth Elease Eanes, Henry Greene, and Glenn Funkhouser are unmarried and wish to marry in Indiana ("unmarried Plaintiffs"). Plaintiffs Nikole ("Niki") Quasney and Amy Sandler married in Massachusetts last year, and wish to have this valid marriage recognized in their home state of Indiana. These adult Plaintiffs are joined by Plaintiffs Greene and Funkhouser's minor child C.A.G., and Plaintiffs Quasney and Sandler's minor children A.Q.-S. and M.Q.-S.

Indiana statutes deny the adult Plaintiffs these most basic freedoms by barring them from civil marriage and refusing to recognize their valid out-of-state marriages. Indiana Code states that "[o]nly a female may marry a male" and "[o]nly a male may marry a female," I.C. § 31-11-1-1(a), and that "[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," I.C. § 31-11-1-1(b). 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 and Indiana's refusal to recognize valid out-of-state marriages has caused them and their children both tangible and dignitary harms—injuries that cannot be justified under the Due Process and Equal Protection Clauses of our federal Constitution. In the Motion for Temporary Restraining Order on behalf of Plaintiffs Niki, Amy, and their children, and in the remaining Plaintiffs' Motion for Preliminary Injunction, Plaintiffs previously demonstrated why their claims are warranted under well-established 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, and to have their existing out-of-state marriage recognized in Indiana.

STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

A. Rae Baskin and Esther Fuller

Plaintiffs Rae Baskin and Esther Fuller reside in Boone County, Indiana. (Declaration of Rae Baskin ("Baskin Decl.") ¶ 3; Declaration of Esther Fuller ("Fuller Decl.") ¶ 3.) Rae and Ester have been in a loving and committed relationship for over two decades. (Baskin Decl. ¶ 3; Fuller Decl. ¶ 3.) They wish to marry each other in Indiana, where Rae has lived for over 20 years and where Esther has lived her entire life. (Baskin Decl. ¶¶ 3, 7; Fuller Decl. ¶¶ 3, 4, 11).

Rae and Esther met each other in April 1990. (Baskin Decl. ¶ 5.) After 7 months of long-distance dating, Rae moved from New York to Indianapolis so that she could live with Esther, and they have rarely left each other's side since then. (*Id.* ¶¶ 5-7.)

Esther is now 78 years old; she has survived breast cancer, a broken a hip, and numerous other health issues. (Fuller Decl. ¶¶ 4, 7-8.) Although Rae and Esther took legal steps to protect their ability to make medical decisions and access assets in the event of one of their deaths, they fear that these steps provide inadequate protection. (Fuller Decl. ¶¶ 8-9; Baskin Decl. ¶ 10.) Being able to lawfully marry one another in Indiana would offer them the financial and medical protections that are automatically given to married couples and ease their minds as they continue to age. (*Id.*)

B. Bonnie Everly and Lyn Judkins

Plaintiffs Bonnie Everly and Lyn Judkins reside in Chesterton, Indiana. (Declaration of Bonnie Everly ("Everly Decl.") ¶ 3; Declaration of Lyn Judkins ("Judkins Decl.") ¶ 2.). Bonnie and Lyn have been in a loving and committed relationship for over a decade. (Everly Decl. ¶ 3; Judkins Decl. ¶ 2.) They wish to marry in Indiana because they love each other and because they

seek the legal protections afforded to married couples. (Everly Decl. ¶¶ 4, 15-17, 19; Judkins Decl. ¶¶ 6-7, 8-17.)

When Bonnie and Lyn met during the summer of 2000, they were immediately drawn to each other. (Judkins Decl. ¶¶ 6-7; Everly Decl. ¶¶ 7-8.) They are best friends and lovers, and they cannot imagine life without one another. (Everly Decl. ¶ 17; Judkins Decl. ¶¶ 7, 15.) Unfortunately, Bonnie faces many medical issues, and a recent medical scare caused Bonnie to require care in an Intensive Care Unit ("ICU"). (Judkins Decl. ¶¶ 12-13, 16; Everly Decl. ¶ 19.) Because Bonnie and Lyn are not married, a nurse blocked Lyn from entering the ICU, preventing Lyn from being by Bonnie's side when she was most vulnerable. (Judkins Decl. ¶¶ 12-14.) It was only after Bonnie cried out that another nurse finally allowed Lyn to enter the ICU. (*Id.* ¶¶ 12-13.) This experience was devastating. (*Id.* ¶ 14.) If Bonnie and Lyn were allowed to marry, they would take great comfort in knowing that they have the same protections afforded to all married couples. (Judkins Decl. ¶¶ 15-16; Everly Decl. ¶ 19.)

C. Dawn Carver and Pam Eanes

Plaintiffs Dawn Carver and Pam Eanes reside in Munster, Indiana. (Declaration of Pam Eanes ("Eanes Decl.") ¶ 3; Declaration of Dawn Carver ("Carver Decl.") ¶ 3.) Dawn and Pam have been in a loving and committed relationship for almost two decades. (Eanes Decl. ¶ 3; Carver Decl. ¶ 3.) They wish to marry each other in Indiana, where Dawn was born and raised and where Pam has lived for almost ten years. (Eanes Decl. ¶ 7; Carver Decl. ¶ 5.)

Dawn works as a police officer in Illinois and Pam as a firefighter in Illinois. (Carver Decl. ¶ 4; Eanes Decl. ¶ 4.) Given the inherent danger involved in their professions, Dawn and Pam wish to marry so that they are protected in the event that one of them is injured or killed in the line of duty. (Carver Decl. ¶ 10.) Although they entered into a civil union in Illinois to protect their employment pensions and gain spousal benefits as civil servants in Illinois, they

understand that Indiana does not give them spousal protections in probate, and they are particularly fearful that a surviving partner could lose her house. (*Id.*) In addition to offering practical and financial benefits, Dawn and Pam wish to marry because it validates their lifelong commitment to one another. (*Id.* ¶ 11.) They are one another's best friend and they are fully committed to one another. (Eanes Decl. ¶¶ 9, 12; Carver Decl. ¶¶ 8, 11.)

D. Henry Greene and Glenn Funkhouser

Plaintiffs Henry Greene and Glenn Funkhouser reside in Carmel, Indiana. (Declaration of Henry Greene ("Greene Decl.") ¶ 3; Declaration of Glenn Funkhouser ("Funkhouser Decl.") ¶ 3.) Henry and Glenn have been in a loving and committed relationship for more than two decades, and they have a 12-year-old son, C.A.G., who is the center of their lives. (Greene Decl. ¶¶ 3, 13-15; Funkhouser Decl. ¶¶ 3, 13-17.) Henry and Glenn love each other and wish to marry not only to express their commitment to each other, but also in order to secure their son's future, obtain the protections afforded to married couples, and present themselves—both to the public and to their son—as a committed, loving family. (Greene Decl. ¶¶ 16-20; Funkhouser Decl. ¶¶ 9-10, 14-17.)

Henry and Glenn met each other nearly 23 years ago, and they immediately knew that they wanted to spend the rest of their lives together. (Funkhouser Decl. ¶¶ 6-7.) They are each other's best friends and cannot imagine life without one another. (Greene Decl. ¶ 19; Funkhouser Decl. ¶ 9.) They worry, however, that the marriage ban sends a message to their son that their family is not worthy of the same respect given to marriages of different-sex couples. (Greene Decl. ¶ 20.) And they worry that Indiana's refusal to let them marry interferes with their son's ability to feel pride in himself and his family. (*Id.* ¶ 20.) Being able to marry would accord their 23-year relationship the respect it deserves, demonstrate to their son the legitimacy

and strength of their family union, and protect their family financially should tragedy ever strike. (Greene Decl. ¶¶ 16-20; Funkhouser Decl. ¶¶ 10, 15.)

Indiana is Glenn's home state, and they eagerly want to marry here. (Greene Decl. ¶ 19; Funkhouser Decl. ¶ 10.) Although Henry and Glenn celebrated their commitment to one another at a ceremony in Georgia approximately 20 years ago, that ceremony had no legal significance, and continues to have no legal significance, in any state. (Greene Decl. ¶ 9; Funkhouser Decl. ¶¶ 7, 9.)

E. Niki Quasney and Amy Sandler

Plaintiffs Niki and Amy are a lesbian couple who reside in Munster, Indiana. (Decl. of Amy Sandler ("Sandler Decl.") ¶ 2, 4; Decl. of Niki Quasney ("Quasney Decl.") ¶ 2.) 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). (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. (*Id.* ¶ 5.)

Niki and Amy have been in a long-term, committed relationship for thirteen years. (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. (Sandler Decl. ¶13.)

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.)

F. Indiana Law Frustrates Plaintiffs' Desire To Marry In Their Home State Of Indiana.

Indiana law currently excludes lesbian and gay couples from marriage. Indiana Code states that "[o]nly a female may marry a male" and "[o]nly a male may marry a female." I.C. § 31-11-1-1(a). "If it appears that two (2) individuals do not have a right to a marriage license, the clerk of the circuit court shall refuse to issue the license." I.C. § 31-11-4-12. Each of the unmarried Plaintiff couples wishes to marry in Indiana; accordingly, each couple applied for a marriage license with the County Clerk of their respective counties, and each of their applications was refused because Plaintiff couples are same-sex couples. (*See* Baskin Decl. ¶ 11; Fuller Decl. ¶ 12; Everly Decl. ¶ 20; Judkins Decl. ¶ 19; Carver Decl. ¶ 14; Eanes Decl. ¶ 13; Greene Decl. ¶ 21; Funkhouser Decl. ¶ 18.) Indiana Code Section 31-11-1-1(b) states that "[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." The provisions of the Indiana Code that individually and collectively exclude lesbian and gay couples from marriage and refuse to recognize valid out-of-state same-sex marriages are referred to herein as the "marriage ban."

The marriage ban deprives adult Plaintiffs and other same-sex couples and their children of numerous protections, benefits, rights, and responsibilities available under state and federal law. Such protections, benefits, rights, and responsibilities include, but not limited to, the right to make health care decisions for an incapacitated spouse, I.C. § 16-36-1-5; the protection of the marital privilege, I.C. § 34-46-3-1.c; the duty of support and rights regarding child custody and parenting time with respect to children of the marriage, I.C. § 31-9-2-13; statutory protections granted to spouses upon death, including rights to inheritance when spouse dies without a will, I.C. § 29-1-2-1; the right to claim an elective share of the estate of a deceased spouse who died with a will, I.C. § 29-1-3-1; various survivor benefits for the spouse of a public safety officer or

state police officer killed in the line of duty, I.C. §§ 5-10-10-6, 5-10-10-6.5, 5-10-14-3; 10-12-2-6; various state retirement fund survivor benefits for spouses, I.C. §§ 5-10.2-3-7.6, 5-10.2-3-8, 5-10.3-12-27; the legal protections granted to spouses and their children through mandatory waiting periods prior to marriage dissolution, I.C. § 31-15-2-10, and by the requirements of fair division of marital property whether owned or acquired by one or both parties to the marriage, I.C. § 31-15-7-4; preference given to spouses in being appointed legal guardian for an incapacitated spouse, I.C. § 29-3-5-5.g; protection of the criminal code that makes it a crime to fail to support a needy spouse, I.C. § 35-46-1-6; the right to file joint state income tax returns, I.C. § 6-3-4-2. The unmarried Plaintiffs and their children are also harmed by the denial of numerous tangible benefits and protections under state law, and more than 1,000 federal benefits to married same-sex couples that were made available to married same-sex couples in the wake of the June 2013 *Windsor* decision. *See Windsor v. United States*, 133 S. Ct. 2675, 2683 (2013).

The marriage ban prevents same-sex couples who live in Indiana and have married in other states, together with their children, from accessing certain federal benefits available to spouses and their children because certain federal statutes and regulations (including provisions pertaining to Social Security benefits, family medical leave, copyright, and veterans' benefits) defer to a couple's state of residence (rather than the state of celebration of a couple's marriage) when determining whether a marriage is valid and eligibility for marital benefits.[1]

[1] *See, e.g.*, 38 U.S.C. § 103 (federal spousal veterans benefits determined "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"); 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."); 17 U.S.C. § 101 (spousal benefits under copyright statute defined by "the law of the author's domicile at the time of his or her death…."; 20 C.F.R. § 404.345 (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).

LEGAL STANDARD

Summary judgment shall be rendered when the pleadings and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-25 (1986); FED. R. CIV. P. 56(c). Federal Rule of Civil Procedure 56 "allows a party to move for summary judgment at any time, even as early as the commencement of the action." Fed. R. Civ. P. 56 Advisory Committee Notes for 2009 Amendments. Here, there are no material facts in dispute, and application of the controlling law to the facts shows that summary judgment should be granted to Plaintiffs.

ARGUMENT

The Supreme Court recently observed in *Windsor*, when government relegates same-sex couples' relationships to a "second-tier" status, the government "demeans the couple," "humiliates…children being raised by same-sex couples,'" deprives these families of equal dignity, and "degrade[s]" them, in addition to causing them countless tangible harms, all in violation of "basic due process and equal protection principles." 133 S. Ct. at 2693-95. The Indiana marriage ban conflicts with these pronouncements. The marriage ban deprives Plaintiffs and their children of equal dignity and autonomy in the most intimate sphere of their lives and brands them as inferior to other Indiana families, inviting ongoing discrimination in numerous daily interactions in hospital settings, in workplaces, and elsewhere. There is no conceivable governmental interest served by continuing to exclude the unmarried Plaintiffs from marriage, and recognizing Amy and Niki's valid out-of-state marriage. Plaintiffs are harmed by the marriage ban because it denies them the symbolic imprimatur and dignity that the label "marriage" uniquely confers. It is the only term in our society that, without further explanation, conveys that a relationship is deep and abiding, and is the only term that commands instant

respect for a relationship. As numerous courts have recently ruled,[2] state marriage bans violate same-sex couples' right to due process and equal protection under the law, as guaranteed by the United States Constitution, and the Indiana ban should likewise be struck down.

I. BY DENYING THE UNMARRIED PLAINTIFFS THEIR FUNDAMENTAL RIGHT TO MARRY, REFUSING TO RECOGNIZE NIKI AND AMY'S VALID MASSACHUSETTS MARRIAGE, AND VIOLATING ALL PLAINTIFFS' LIBERTY INTERESTS IN FAMILY INTEGRITY AND ASSOCIATION, 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). 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

[2] *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 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); *Kitchen v. Herbert*, 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*, No. 13-cv-501, 2013 WL 6726688 (S.D. Ohio Dec. 23, 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).

deprives the Plaintiffs and other same-sex couples of their fundamental right to marry and to have valid out-of-state marriages recognized, thereby triggering strict scrutiny.

A. The Indiana Marriage Ban Infringes Unmarried Same-Sex Couples' Right To Marry.

The right to marry is unquestionably a fundamental right protected by the due process guarantee, because deciding whether and whom to marry is exactly the kind of personal matter about which government should have little say. *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); *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (same); *Loving v. Virginia*, 388 U.S. 1, 12 (1967). Indeed, marriage is "intimate to the degree of being sacred." *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965). This fundamental right has always been defined by the constitutional liberty to select the partner of one's choice, and courts have thus placed special emphasis on protecting the free choice of one's spouse. *See, e.g.*, *Roberts v. U.S. Jaycees*, 468 U.S. 609, 620 (1984) (our federal Constitution "undoubtedly imposes constraints on the state's power to control the selection of one's spouse").[3] Further, 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

[3] *See also Kitchen*, 961 F. Supp. 2d at 1202-03; *In re Marriage Cases*, 183 P.3d 384, 420 (Cal. 2008) (explaining that "the right to marry represents the right of an individual to establish a legally recognized family with the person of one's choice"); *Goodridge v. Dep't of Public Health*, 798 N.E.2d 941, 958 (Mass. 2003) (noting that the "right to marry means little if it does not include the right to marry the person of one's choice").

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.

Thus, the unmarried Plaintiffs and other same-sex couples wishing to marry do not seek the recognition of some *new* right to "same-sex marriage." Rather, like any fundamental right, the freedom to marry is defined by the attributes of the right itself and not the identity of the people seeking to exercise it. The Supreme Court has rejected attempts to reframe claimed fundamental rights and liberty interests by re-defining them narrowly to include only those who have exercised them in the past.[4] In *Loving v. Virginia*, for example, the Supreme Court did not describe the right asserted as a "new" right to "interracial marriage." Nor did the Supreme Court describe a right to "prisoner marriage" in *Turner v. Safley*, 482 U.S. 78 (1987), or a right to "deadbeat parent marriage" in *Zablocki v. Redhail*, 434 U.S. 374 (1978). The right that the unmarried Plaintiffs seek to vindicate is "simply ***the same right*** that is currently enjoyed by heterosexual individuals: the right to make a public commitment to form an exclusive relationship and create a family with a partner with whom the person shares an intimate and

[4] The argument that same-sex couples seek a "new" right rather than the same right exercised by others makes the same mistake that the U.S. Supreme Court made in *Bowers v. Hardwick*, 478 U.S. 186 (1986), and corrected in *Lawrence v. Texas*. In a challenge by a gay man to Georgia's sodomy statute, the *Bowers* Court recast the right at stake from a right, shared by all adults, to consensual intimacy with the person of one's choice, to a claimed "fundamental right" of "homosexuals to engage in sodomy." *Lawrence*, 539 U.S. at 566-67 (quoting *Bowers*, 478 U.S. at 190). In overturning *Bowers*, the *Lawrence* Court held that its constricted framing of the issue in *Bowers* "fail[ed] to appreciate the extent of the liberty at stake," *Lawrence*, 539 U.S. at 567.

sustaining emotional bond." *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1202-03 (D. Utah 2013) (emphasis added). Because the choice of whom to marry is the quintessential type of personal decision protected by the Due Process Clause, court after court recently has 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 to marry.[5]

B. The Marriage Ban Violates The Fundamental Right Of Same-Sex Couples Married In Other States To Remain Married In Indiana.

In addition to violating the fundamental right to marry of those unmarried same-sex couples who wish to marry in their home state of Indiana, the marriage ban also violates due process by denying same-sex couples who have married out-of-state (such as Plaintiffs Niki and Amy) recognition of their valid marriages. 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-

[5] *See, e.g.*, *De Leon v. Perry*, No. SA-13-CA-00982, 2014 WL 715741, at *20 (W.D. Tex. Feb. 26, 2014) (prohibiting Texas from "defin[ing] marriage in a way that denies its citizens the 'freedom of personal choice' in deciding whom to marry" (quoting *Windsor*, 133 S. Ct. at 2689)); *Bostic v. Rainey*, No. 2:13-cv-395, 2014 WL 561978, at *12 (E.D. Va. Feb. 13, 2014) (finding that "Virginia's Marriage Laws impose[d]" an impermissible condition on the exercise of the fundamental right to marry by limiting it "to only those Virginia citizens willing to choose a member of the opposite gender for a spouse"); *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"); *see also In re Marriage Cases*, 183 P.3d 384, 433-34 (Cal. 2008) (holding that "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)).

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).[6]

Under Massachusetts law and the laws of sixteen other states and the District of Columbia, Plaintiffs Niki and Amy and other Hoosier same-sex couples are validly married.[7] 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.

C. The Indiana Marriage Ban Deprives Same-Sex Couples Who Married Out-Of-State Of A Protected Liberty Interest In Their Existing Marriages.

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

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[6] 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 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.").

[7] 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.

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, Plaintiffs 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, in addition to other same-sex couples in Indiana who married in other states, exposes them 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.*

D. The Marriage Ban Impermissibly Impairs Constitutionally Protected Liberty Interests In Association, Integrity, Autonomy, And Self-Definition.

By denying the adult Plaintiffs access to marriage, the marriage ban infringes not only their fundamental right to marry or have their out-of-state marriage recognized, but also a host of other related fundamental liberty interests. Indiana's marriage ban burdens the adult Plaintiffs' protected interest in autonomy over "personal decisions relating to . . . family relationships," *Lawrence*, 539 U.S. at 573, and additionally impairs the adult Plaintiffs' ability to identify themselves and to participate fully in society as married couples, thus burdening their fundamental liberty interests in intimate association and self-definition. *See Griswold*, 381 U.S. at 482-83; *Windsor*, 133 S. Ct. at 2689. For example, the marriage ban interferes with constitutionally-protected interests in family integrity and association by precluding Plaintiffs Greene, Funkhouser, Sandler, Quansey, and other parents of same-sex couples from securing legal recognition of their parent-child relationships through established legal mechanisms available to married parents (*e.g.*, the spousal presumption of parenthood, stepparent adoption, and other marital parentage protections), thus infringing their fundamental liberty interest in "direct[ing] the upbringing and education" of their child. *See Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534-35 (1925). Such infringements on the bonds

between children and their parents, including Plaintiffs C.A.G., A.Q.-S., M.Q.-S., and their parents, violate the core of the substantive guarantees of the Due Process Clause as recognized by the Supreme Court. *See Moore*, 431 U.S. at 503.

E. Indiana's Marriage Ban Cannot Withstand Any Level Of Review, Let Alone Strict Scrutiny.

Indiana's withholding of the fundamental right to marry and to have out-of-state marriages recognized, and other protected liberty interests from Plaintiffs denies them many of the legal, social, and financial benefits enjoyed by different-sex couples and their children. Because Indiana's law "significantly interferes with the exercise of a fundamental right," "it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." *Zablocki*, 434 U.S. at 388. But Defendants cannot articulate ***any*** legitimate interest—let alone a compelling one—for denying individuals of the same sex the right to marry and to have their valid out-of-state marriages recognized in Indiana. As a result, the Indiana marriage ban violates Plaintiffs' due process rights for the same reasons that it violates Plaintiffs' 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* § II.E.), and therefore must be struck down as unconstitutional.

II. BY DENYING PLAINTIFFS THE RIGHT TO MARRY AND 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 provides that "[n]o State… [shall] deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 1. Equal protection ensures that similarly situated persons are not treated

differently simply because of their membership in a class. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) ("The Equal Protection Clause . . . is essentially a direction that all persons similarly situated should be treated alike.").[8]

The State's marriage ban is antithetical to the basic principles of the Equal Protection Clause. It creates a permanent "underclass" of lesbian and gay 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.

A. 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).

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[8] Gay and lesbian couples are similarly situated to heterosexual couples in every respect that is relevant to the purposes of marriage. *See Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) ("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, Plaintiffs "are in committed and loving relationship[s] . . . just like heterosexual couples." *Varnum v. Brien*, 763 N.W.2d 862, 883-84 (Iowa 2009).

B. 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 in cases of 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 the precedent supporting rational basis review for sexual orientation classifications, including *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").[9] 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

[9] *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*.").

distinguishing characteristics that define them as a discrete group"; and (4) whether the class is "a minority or politically powerless." *Windsor v. U.S.*, 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 those 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 v. Brien*, 763 N.W.2d 862, 885-96 (Iowa 2009); *In re Marriage Cases*, 183 P.3d at 441-44; *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 425-31 (Conn. 2008). This Court should do likewise.

C. The Marriage Ban Discriminates On The Basis Of Sex And With Respect To The Exercise Of A Fundamental Right And Therefore Warrants Heightened Scrutiny On This Basis As Well.

Indiana's marriage ban should also be subject to heightened scrutiny because it classifies Indiana citizens on the basis of sex. Because of these sex-based classifications, Rae Baskin, for example, is precluded from marrying Esther Fuller because Rae is a woman and not a man; were Rae a man, she could marry Esther. Likewise, because of the sex-based classifications, Niki Quasney is prevented from having her marriage to Amy Sandler recognized by the State because Amy is a woman and not a man; were Amy a man, Indiana would recognize Niki's marriage to Amy. 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.").[10]

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). The Equal Protection Clause prohibits "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).

Finally, because the marriage ban discriminates against all Plaintiffs in their exercise of their fundamental rights and liberty interests, the ban therefore is subject to strict scrutiny for this reason as well. *See Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); Chemerinsky, Const. Law Principles and Policies, § 10.1.

[10] 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.

D. The Ban Violates Constitutional Rights of C.A.G., A.Q.-S, M.Q.-S., And Other Children of Same-Sex Couples, And Warrants Heightened Scrutiny For This Reason As Well.

The marriage ban injures C.A.G., A.Q.-S, M. Q.-S., and other children of same-sex couples in both tangible and intangible ways. The ban denies them legitimacy and an economic safety net and other protections and government benefits automatically given to children of married parents, causing these families to have less money to spend on child-related expenses. *See Brock v. State*, 85 Ind. 397 (1882) (children born outside marriage will be legitimized by subsequent marriage of parents); I.C. § 31-14-7-1 (children born within marriage are given presumptive parentage); *Turner*, 482 U.S. at 96 (a benefit of marriage is "legitimation of children born out of wedlock"); Funkhouser Decl. ¶ 15; Greene Decl. ¶¶ 16-17. The ban also instructs "all persons with whom same-sex couples interact, *including their own children*," that their relationship is "less worthy." *Windsor*, 133 S. Ct. at 2696 (emphasis added); *see also Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 494 (1954) (noting dignitary injury caused by segregating children "solely because of their race [which] generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone," and "the impact is greater when it has the sanction of the law"). Disparate treatment of children of unmarried parents based on the conduct or status of their parents warrants heightened scrutiny and violates the Equal Protection Clause. *See Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972); *Gomez v. Perez*, 409 U.S. 535, 538 (1973); *Mathews v. Lucas*, 427 U.S. 495, 505 (1976); *Clark v. Jeter*, 486 U.S. 456 (1988); *Levy v. Louisiana*, 391 U.S. 68 (1968). States have not even a "legitimate state interest" in depriving children of equal protection solely because of the circumstances of their birth. *See Weber*, 406 U.S. at 175; *Gomez*, 409 U.S. at 538; *Mathews*, 427 U.S. at 505. By preventing children of same-sex couples ever from having married parents

based on the sex and sexual orientation of their parents, over which these children have no control, Indiana has violated these children's right to equal protection.

E. 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 targets gay and lesbians for exclusion from the right to marry and to have valid out-of-state marriages recognized in Indiana. 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*, 517 U.S. at 631. 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. *See 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).[11]

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, the Indiana marriage ban cannot survive even rational basis analysis, as numerous other federal courts recently have concluded. *See DeBoer v. Snyder*, —F. Supp. 2d—, 2014 WL 1100794, at *11 (E.D. Mich. 2014), *De Leon*, 2014 WL 715741, at *17; *Bostic*, 2014 WL 561978, at *22; *Bourke v. Beshear*, 2014 WL 556729, at *8 (W.D. Ky.

[11] 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 v. Evans*, 517 U.S. 620 (1996), 517 U.S. at 632; *Cleburne*, 473 U.S. at 448-50.

Feb. 12, 2014); *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.

1. 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 v. Comm'r of Pub. Health*, 957 A.2d 407, 478 (Conn. 2008); *accord Goodridge*, 798 N.E.2d at 961 n.23; *Varnum*, 763 N.W.2d at 898; *see also Golinski v. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 993 (N.D. Cal. 2012).[12] Ultimately, "'preserving the

[12] To uphold Indiana's marriage ban in service of a tradition of excluding lesbian and gay couples would commit the same error and absence of real analysis evidenced in the past when courts cited such "tradition" or "natural law" justifications for upholding anti-miscegenation bans. These decisions are anathema to us today. In one such example, in *State v. Gibson*, 1871 WL 5021, 36 Ind. 389 (1871), the court upheld a felony conviction for violating Indiana's anti-miscegenation ban against constitutional challenge, opining:

> Why the Creator made one black and the other white, we do not know, but the fact is apparent, and the races are distinct, each producing its own kind, and following the peculiar law of its constitution. Conceding equality, with natures as perfect, and rights as sacred, yet God has made them dissimilar, with those natural instincts and feelings which He always imparts to His creatures, when He intends that they shall not overstep the natural boundaries He has assigned to them. The natural law which forbids their intermarriage and that social amalgamation which leads to a corruption of races, is as clearly divine as that which imparted to them different natures. The tendency of intimate social

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.

2. 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 for having or rearing 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.").[13]

Same-sex couples can no more harm procreative rationales for marriage "any more 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

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> intermixture is to amalgamation, contrary to the law of races. The separation of the white and black races upon the surface of the globe is a fact equally apparent. Why this is so, it is not necessary to speculate; but the fact of a distribution of men by race and color is as visible in the providential arrangement of the earth as that of heat and cold. The natural separation of the races is therefore an undeniable fact, and all social organizations which lead to their amalgamation are repugnant to the law of nature.

Id. at *10.

[13] *See also* I.C. § 31-11-1 ("Who May Marry") (laying out requirements for eligibility to marry, but without requiring any intention or capacity to procreate). Indeed, Indiana permits certain couples to marry ***only on condition that they not procreate***. *See* I.C. § 31-11-1-2 (permitting first cousins to marry only when both parties are at least 65 years old).

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 C.A.G., A.Q.-S., and M.Q.-S.—who are denied the protection and legitimacy of having married parents. *See 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 (such as Plaintiffs A.Q.-S. and M.Q.-S.) and through adoption (such as Plaintiff C.A.G.), 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).[14] As court after court has recognized, it is "accepted beyond 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.[15]

There is simply no rational connection between the marriage ban and any asserted governmental interest in optimal parenting. Children being raised by different-sex couples are

[14] 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, 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).

[15] *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.

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 v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 340-41 (D. Conn. 2012); *Varnum*, 763 N.W.2d at 901.

3. 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. *Windsor*, 133 S. Ct. at 2694, 2696.

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. *Windsor*, 133 S. Ct. 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. The marriage ban's sole purpose was to target same-sex couples and exclude them from marriage. The legislature enacted the marriage ban for no reason other than "to ensure that homosexual Hoosiers could not

wed."[16] 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.

CONCLUSION

For the foregoing reasons, this Court should enter summary judgment in favor of Plaintiffs and declare that excluding same-sex couples from marriage violates the United States Constitution's guarantees of due process and equal protection.

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[16] 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).

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Respectfully submitted,

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The foregoing document was also served on April 3, 2014 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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