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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Nelda Majors; Karen Bailey; David Larance; Kevin Patterson; George Martinez; Fred McQuire; Michelle Teichner; Barbara Morrissey; Kathy Young; Jessica Young; Kelli Olson; Jennifer Hoefle Olson; Kent Burbank; Vicente Talanquer; C.J. Castro-Byrd; Jesús Castro-Byrd; Patrick Ralph; and Josefina Ahumada; and Equality Arizona Plaintiffs, v. Michael K. Jeanes, in his official capacity as Clerk of the Superior Court of Maricopa	No. 2:14-cv-00518-JWS **LODGED: Proposed** **PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT attached**

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Plaintiffs,

v.

Michael K. Jeanes, in his official capacity as Clerk of the Superior Court of Maricopa

No. 2:14-cv-00518-JWS

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT

County, Arizona; Will Humble, in his official capacity as Director of the Department of Health Services; and David Raber, in his official capacity as Director of the Department of Revenue,

Defendants.

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I think it's sad that they had to hide their relationship for so long because society was not accepting. Their relationship is such an important part of who they are. It must have been so hard for them. They couldn't just tell the people they knew, "Yo, we're gay." But they kept their cool and made it through all those years when they had to keep it a secret. I'm proud of them.

- M.D., fifteen year old daughter of Plaintiffs Karen Bailey and Nelda Majors

It seemed as if the State had erased an entire lifetime of my mom and Fina being together. People who pass these laws have no clue about the impact it will have on actual lives. Anyone can pretend that these two people were never together even though they were. But why? It makes no sense. And it causes so much unnecessary hurt.

- Jack Battiste, son of Helen Battiste, deceased wife of Plaintiff Josefina Ahumada

I. INTRODUCTION

Plaintiffs are eight loving, committed same-sex couples who reside in Arizona; one widow and one widower, both Arizona residents, each of whom had a same-sex spouse; and an organization that represents same-sex couples and their families in Arizona. Plaintiffs range in age from twenty-three to seventy-five, and their mutually devoted relationships span between two and fifty-six years.

Plaintiffs contribute to their communities through work in diverse fields—teaching and law, social work and health advocacy, business and court administration. Some are just beginning their careers; others are retired. Five are raising children whose ages range from two to twenty-two. Three are coping generally with illness and aging. For one couple, both disabled veterans with significant impairments, being recognized as married under Arizona law became an urgent need just weeks ago when one received a terminal cancer diagnosis and prediction of just months to live.

Two plaintiffs already have endured the shock and magnified grief of having nursed their spouses through health crises and incapacity, and endured their spouse's sudden, unexpected death, only to encounter their lack of any relevance at all in the state's official process; that lack of a proper role manifested in an ineligibility to be identified

accurately and respectfully as the surviving spouse on their loved one's death certificate.

Two plaintiff couples have not married and wish to do so in Arizona, surrounded by family and friends, but have been denied licenses because they are of the same sex. The other plaintiffs all traveled to other states to marry and now suffer practical problems, denial of marital benefits, and daily indignities because their home state does not honor their marriages as it does the out-of-state marriages of their heterosexual friends, neighbors, and co-workers.

Arizona denies Plaintiffs these most basic freedoms, protections and recognition by barring them from civil marriage and refusing to respect their valid out-of-state marriages. The Arizona Legislature, in 1996, enacted A.R.S. § 25-101(C), which states: "Marriage between persons of the same sex is void and prohibited." And whereas the State's marriage recognition statute provides as a general matter that "[m]arriages valid by the laws of the place where contracted are valid in this state," A.R.S. § 25-112(A), the Legislature in 1996 also explicitly excluded the marriages of same-sex couples from that rule. *Id.* A decade later, in 2008, Arizona voters reinforced that exclusion by inscribing into the Arizona Constitution: "Only a union of one man and one woman shall be valid or recognized as a marriage in this state." Ariz. Const., art. XXX.

For two adults who have fallen in love, found joy and comfort in each other's company, and pledged to support and sustain each other through years of entwined lives, being denied the freedom to marry creates a deep and abiding sense of loss. Arizona's exclusion of Plaintiffs from marriage, and refusal to honor the true marital status of those who have married elsewhere, has caused all of them and their children myriad tangible as well as dignitary harms—injuries that cannot be justified under the Due Process and Equal Protection Clauses of our federal Constitution. In this motion, Plaintiffs demonstrate why, on the undisputed facts presented here, their claims are valid under well-established constitutional jurisprudence entitling them to the relief each Plaintiff seeks: the freedom of each to marry the unique person he or she loves, and to have their existing, lawful marriages recognized and respected by the state they call home.

II. MATERIAL FACTS NOT IN DISPUTE

A. Plaintiffs Have Formed Loving Same-Sex Relationships Of Mutual Commitment And Caring And Want To Be Married Under Arizona Law To Protect And Honor Each Other And, For Some, To Protect Their Children.

Plaintiffs are eight loving, committed same-sex couples, two individual Arizona residents who were married to a same-sex spouse, and an organization with members who are same-sex couples in Arizona—all of whom either want to marry or to have their out-of-state marriages recognized under Arizona law to protect and honor each other, and for some, to protect their children or honor their deceased spouses. [Plaintiffs' Statement of Undisputed Material Facts in Support of Motion for Summary Judgment ("PSUMF") ¶ 1] Plaintiffs Nelda Majors, age 75, and Karen Bailey, age 74, are a lesbian couple who have been in a loving, committed relationship for 56 years. [PSUMF ¶ 2] They are parents to Karen's great grand-nieces, Sharla Curtis, age 21, and M.D., age 15. [*Id.*]

As women in their mid-70s, Nelda and Karen worry that one or the other of them will be prevented by hospital staff from being at the other's side and making any necessary decisions if either is hospitalized. [PSUMF ¶ 3] Based on many life experiences, both believe it would make a difference if they could tell hospital staff that they are married. [*Id.*] They also want to marry as further evidence of the family ties between Nelda and M.D. Karen is a court-appointed legal guardian for both Sharla and M.D., but Nelda has no legal relationship to either of them in part due to the State's marriage ban. [*Id.*] Nelda and Karen fear that if anything were to happen to Karen, other relatives might be seek appointment as M.D.'s guardian. [*Id.*] If they were married, Nelda and Karen's status would help confirm for the court that M.D. would have greater stability and support with Nelda as her guardian. [*Id.*]

Nelda and Karen both are recipients of Social Security. [PSUMF ¶ 3] If they were married as a matter of Arizona law, both would be eligible for Social Security surviving spouse benefits. [*Id.*] On March 4, 2014, Nelda and Karen applied for a marriage license at the Maricopa County Superior Court Clerk's Office. [PSUMF ¶ 4] They were denied

because they are both women. [*Id.*]

Plaintiffs David Larance, age 35, and Kevin Patterson, age 30, are a gay male couple who have been in a loving, committed relationship for seven years. [PSUMF ¶ 5] They pledged their love and commitment to each other in a commitment ceremony in 2009. [*Id.*] In May 2013, David and Kevin opened their home and their hearts to two girls, biological siblings ages four and seven, who had been removed from their parents' custody due to neglect. [*Id.*] Although David and Kevin are a couple, they were not both able to become adoptive fathers to their girls because Arizona law only permits married couples to adopt jointly. Kevin became the girls' legal father. [*Id.*] David has no legal parental rights or responsibilities with respect to either of his daughters. [*Id.*]

David fears that if anything happens to Kevin, his own role as the girls' other father would be vulnerable to challenges by others. [PSUMF ¶ 6] David also cannot make medical and other decisions for the girls. [*Id.*] If David and Kevin were married under Arizona law, David could petition to adopt the girls as a stepparent. [*Id.*] On March 10, 2014, David and Kevin applied for a marriage license from the Maricopa County Superior Court Clerk's Office; they were denied because they both are men. [*Id.*]

Plaintiffs George Martinez, age 62, and Fred McQuire, age 69, are a gay male couple who have been in a committed relationship for 45 years. [PSUMF ¶ 7] Both men are disabled veterans. [*Id.*] They met in 1969, when Fred returned from military service in Guam. [Declaration of Carmina Ocampo ("Ocampo Decl.") Ex. D ¶ 5.] He served in both the Air Force and the Army. [Ocampo Decl., Ex. E ¶ 2] George was in the Army and served in Vietnam, where he was exposed to Agent Orange. [Ocampo Decl., Ex. D ¶ 11] In 1980, George and Fred had a joyous commitment ceremony attended by roughly one hundred guests to celebrate ten years of being together. [*Id.* ¶ 6]

In more recent years, both men have battled life-threatening illnesses. Fred suffers with chronic obstructive pulmonary disease, vascular problems and Parkinson's disease; he has been hospitalized several times in recent years. [PSUMF ¶ 7] George was diagnosed with Stage IV prostate cancer three years ago, from which he largely recovered

1 after extensive medical care. [*Id.*] The cancer has been attributed to Agent Orange
2 exposure and he receives veteran's disability benefits. [*Id.*] In June 2014, George was
3 diagnosed with Stage IV pancreatic cancer that has metastasized to his liver; his doctors
4 predict that he has only months to live. [*Id.*]

5 When George and Fred learned that George has terminal cancer, they decided it
6 was urgent that they marry. [Ocampo Decl., Ex. D ¶ 14] They traveled to California and
7 married on July 19, 2014. [PSUMF ¶ 8] Both men feel it is unfair and demeaning that
8 their marriage is not recognized in their home state of Arizona. [*Id.*] Arizona's refusal to
9 respect George's status as married prevents him from receiving additional disabled
10 veteran's compensation that the Veterans Administration provides to veterans with a
11 spouse. [*Id.*]

12 Both men fear being prevented from being at the other's side when either is next
13 hospitalized. [PSUMF ¶ 9] George also worries about how Fred will survive financially
14 after George dies because Fred has been dependent upon George. [*Id.*] If Fred is denied
15 benefits as George's surviving spouse, Fred will suffer considerable, immediate financial
16 hardship and probably will not be able to remain in the couple's home. [*Id.*] Both men
17 fear that, when George dies, Fred will be prevented from obtaining a death certificate for
18 him or will receive a certificate that records George as having been unmarried, which
19 would block Fred's access to an increase in Social Security benefits as George's surviving
20 spouse. [*Id.*]

21 Michelle "Mish" Teichner, age 49, and Barbara "Barb" Morrissey, age 59, are a
22 lesbian couple who have been in a committed relationship for more than 10 years.
23 [PSUMF ¶ 10] In 2006, they had a religious commitment ceremony and they married in
24 New York on July 23, 2013. [Ocampo Decl., Ex. F ¶2; PSUMF ¶ 10] Both women have
25 ongoing health problems and their life partnership involves significant caretaking of each
26 other. [PSUMF ¶ 10] Mish has experienced kidney failure, has had two kidney
27 transplants including one in January 2014; she has been hospitalized multiple times over
28 the years, including in recent months. [*Id.*] Mish and Barb's greatest fear is being kept

1 from each other if one of them is hospitalized. [*Id.*] Mish and Barb want their marriage to
2 be recognized in Arizona at least in part to reduce the confusion, disrespect, and hostility
3 they repeatedly have experienced from medical professionals. [*Id.*]

4 Since getting married, Mish and Barb have found it confusing and stressful to
5 prepare their federal income tax returns as a married couple and then prepare separate
6 state income tax returns as unmarried individuals. [PSUMF ¶ 11] If their marriage were
7 recognized by the Arizona, the couple would simply file a joint state tax return. [*Id.*]

8 Plaintiffs Kathy Young, age 41, and Jessica "Jess" Young, age 29, are a lesbian
9 couple who have been in a loving, committed relationship for almost 10 years. [PSUMF ¶
10 12] In 2005 they joined their lives together through a commitment ceremony. [Ocampo
11 Decl., Ex. G ¶ 2] On June 11, 2013, they married in New York. [PSUMF ¶ 12] Kathy
12 and Jess feel that it is urgent to have their marriage recognized for the sake of their seven
13 year-old-son, I.Y. [*Id.*] Jess and Kathy planned for their son together and Jess gave birth
14 to him. [*Id.*] Kathy's relationship with I.Y. has no legal recognition or support under
15 Arizona law. [*Id.*] The fact that Arizona does not recognize Jess and Kathy's New York
16 marriage precludes Kathy from securing her parent-child relationship with I.Y. through
17 Arizona's streamlined stepparent adoption process. [*Id.*] Kathy and Jess both experience
18 stress, confusion and other practical difficulties making clear to others that they both are
19 parents of their son because school forms and other documents only recognize different-
20 sex married parents. [*Id.*]

21 Jess has been hospitalized for mental health issues in the past. [PSUMF ¶ 13] The
22 couple worries that if Jess requires hospital care in the future, Kathy will be kept from
23 Jess' side and also will lack legal authority to make educational and medical decisions for
24 their son. [PSUMF ¶¶ 13, 42] If the State recognized Kathy and Jess's marriage as it
25 does marriages of different-sex couples, parentage presumptions would apply and also
26 Kathy could secure her parental role through adoption as Jess's spouse. [PSUMF ¶ 13]
27 Now that they are married, Kathy and Jess have found it confusing and frustrating that
28 they finally can file their federal income tax returns as a married couple, but still must file

separate state income tax returns as unmarried individuals. [*Id.*] Like Barb and Mish, if their marriage were recognized by the state of Arizona, Kathy and Jess would simply file a joint state tax return consistent with their joint federal return. [*Id.*]

Plaintiffs Kelli Olson, age 36, and Jennifer "Jen" Hoefle Olson, age 38, are a lesbian couple who have been in a relationship for 10 years. [PSUMF ¶ 14] On December 31, 2009, they pledged their love and commitment to each other in a ceremony. [Ocampo Decl., Ex. H ¶ 4] In 2012, they became the proud parents of two fraternal twin girls, E. and S., to whom Jen gave birth. [PSUMF ¶ 14] On August 7, 2013, Kelli and Jen married in Minnesota in a ceremony attended by their two daughters, family members and friends. [*Id.*]

Kelli and Jen believe their daughters are legally vulnerable because their marriage is not recognized in Arizona and only Jen has a legal bond with them. [PSUMF ¶ 15] Although both women planned for their daughters together, Kelli has no parental rights. [*Id.*] She carries power of attorney forms confirming her right to take certain actions for the girls, but she fears what could happen in an emergency if she does not have the documents or they are not honored. [*Id.*] Without parental rights, Kelli's ability to make medical and educational decisions for the girls is limited and, if something were to happen to Jen, she would lack the right to protect the couple's children. [PSUMF ¶¶ 15, 44] If Kelli and Jen's marriage were recognized in Arizona, Kelli could claim rights based on state law parentage presumptions. [PSUMF ¶ 15] She also could formalize her relationship with each of the girls through stepparent adoption. [*Id.*] Like Mish and Barb, and Kathy and Jess, Kelli and Jen have found it confusing, stressful and time consuming that, while they finally can file their federal income tax return jointly as a married couple, they still must file separate state income tax returns as unmarried individuals. [*Id.*]

Plaintiffs Kent Burbank, age 46, and Vicente Talanquer, age 51, are a gay male couple who have been together in a committed relationship for almost 20 years. [PSUMF ¶ 16] They are loving fathers to two boys, D.B-T., age 12, and M.B.-T., age 14, blood siblings who came to Vicente and Kent through the foster care system. [*Id.*] Kent and

Vicente tried but were not permitted to adopt their sons jointly because Arizona only permits one member of an unmarried couple to adopt a child or children. [*Id.*] As a result, Vicente is the only parent with legal rights and Kent has neither legal rights nor binding legal responsibilities with respect to the couple's sons. [*Id.*]

Vicente and Kent married in Iowa in 2013. [PSUMF ¶ 17] They were disappointed to learn that their marriage would not be respected by Arizona and that Kent remains ineligible to establish a legal relationship with his sons through the stepparent adoption procedure. [*Id.*] Kent feels chronic stress and vulnerability because he has no legal ties to his children. [*Id.*] He constantly fears that his parental status will be questioned by school and medical professionals. [*Id.*] Both men know their children are only partially protected because they lack a legal bond with Kent, and because Arizona refuses to honor their parents' marriage. [*Id.*] Like the other married Plaintiffs, Kent and Vicente similarly have found it confusing, frustrating and burdensome to be required to file their federal and state income tax returns with discordant filing statuses. [*Id.*] If Arizona honored their valid Iowa marriage, they simply would file both returns jointly as the married couple they are under federal law. [*Id.*]

Plaintiffs Clayton John "C.J." Castro-Byrd, age 23, and Jesús Castro-Byrd, age 27, are a gay male couple who have been in a loving, committed relationship for two years. [PSUMF ¶ 18] C.J. and Jesús married in Seattle, Washington, C.J.'s home state, on December 14, 2012. [*Id.*] They would like to bring children into their family within the next two to three years, even though they worry about raising children in a state that does not respect their marriage. [*Id.*] They are concerned that Arizona's refusal to honor their marriage will prevent them both from being recognized as parents to their future children and providing their children and each other the full range of legal protections and supports. [*Id.*] Since getting married, like the other married Plaintiffs, C.J. and Jesús have found it confusing, stressful and frustrating to be required to file their federal and state income tax returns using two different filing statuses; and, if Arizona treated them as married, as federal law does, they would simply file both returns jointly. [*Id.*]

Plaintiff Patrick Ralph, age 59, was in a loving committed relationship with his late-husband Gary Hurst for 39 years. [PSUMF ¶ 19] The couple resided in Phoenix together, where Patrick currently resides. [*Id.*] Gary would have turned 73 earlier this month had he not died suddenly one year ago. [*Id.*]

Patrick and Gary married in California on October 31, 2008. [PSUMF ¶ 20] Gary passed away on August 8, 2013. [PSUMF ¶¶ 19, 20] Thereafter, Patrick applied for Gary's death certificate as Gary's surviving spouse, but his application was rejected by the Maricopa County Office of Vital Records. [PSUMF ¶ 20] The Arizona Department of Health Services informed Patrick that Arizona's law precluding recognition of same-sex couples' marriages prevented the State from honoring his request to be listed as Gary's husband on the death certificate. [*Id.*] To Patrick, this rejection expresses the State's official disrespect of his and Gary's love and shared life together; it has significantly exacerbated his grief. [*Id.*] Moreover, because Arizona refuses to recognize Gary and Patrick's marriage on Gary's death certificate and in other records, Patrick is not eligible to receive Social Security surviving spouse's benefits because eligibility depends on whether a couple was considered married under the law of the decedent's domicile. [PSUMF ¶ 21] Patrick received a letter from the Social Security Administration on August 6, 2014 informing him that he is not entitled to surviving spouse benefits because he does not meet that requirement. [*Id.*]

Plaintiff Josefina Ahumada, age 68, was in a loving committed relationship with her wife Helen Battiste, who would be 77, for 20 years. [PSUMF ¶ 22] Josefina and Helen pledged their lifelong commitment to each other in a religious commitment ceremony in July 1994. [Ocampo Decl. Ex. L ¶ 5] On October 22, 2013, they were legally married in Albuquerque, New Mexico. [PSUMF ¶ 22]

Helen had heart surgery and passed away from unexpected complications on January 31, 2014. [PSUMF ¶ 23] Josefina applied for a death certificate for Helen and her application was rejected because the State does not recognize the couple's marriage. [*Id.*] It was incredibly painful for Josefina to learn that her application was rejected. [*Id.*]

She describes the rejection as "an official negation" of what was most important to her, her relationship with her wife. [*Id.*] Moreover, because Arizona refuses to acknowledge Josefina and Helen's marriage on Helen's death certificate and in other records, Josefina is ineligible to pursue surviving spouse's Social Security benefits. [*Id.*]

Organizational Plaintiff Equality Arizona is the leading statewide organization advocating for LGBT people and their families in Arizona, with members throughout the state. [PSUMF ¶ 24] Many Equality Arizona members desire and intend to marry a same-sex life partner in Arizona, but have been prevented from doing so by Arizona law. [*Id.*] Similarly, many Equality Arizona members have married a same-sex spouse in states outside of Arizona, but State law precludes recognition of their actual marital status in Arizona. [*Id.*]

B. Arizona Law Thwarts Some Plaintiffs' Desire To Marry In Their Home State Of Arizona and Denies Other Plaintiffs Legal Protections and Recognition As Married Based On Their Valid Out-Of-State Marriages.

Arizona excludes lesbian and gay couples from marriage with both statutory and constitutional barriers. Article 30, §1, of the Arizona Constitution, approved by the voters in 2008 as Proposition 102, provides: "Only a union of one man and one woman shall be valid or recognized as a marriage in this state." [PSUMF ¶ 30] This amendment buttressed multiple statutes adopted 12 years earlier. A.R.S. § 25-101(C) states that "[m]arriage between persons of the same sex is void and prohibited." A.R.S. § 25-112(A) states that "[m]arriages valid by the laws of the place where contracted are valid in this state, except marriages that are void and prohibited by section 25-101."[1] [PSUMF ¶ 26] The Arizona Legislature enacted these explicit statutory exclusions of same-sex couples from marriage and approved the constitutional amendment text in response to marriage equality litigation in Hawaii, Massachusetts and other states and the possibility that same-

[1] Similarly, A.R.S. § 25-112(B) states that "[m]arriages solemnized in another state or country by parties intending at the time to reside in this state shall have the same legal consequences and effect as if solemnized in this state, except marriages that are void and prohibited by section 25-101."

sex couples would seek similar, equal treatment here in Arizona. [PSUMF ¶¶ 26-29] [2]

The arguments "for" Proposition 102 in the 2008 Ballot Proposition Guide included assertions that the Arizona Constitution should be amended to prevent same-sex couples from "attacking" marriage by invoking state constitutional protections, as couples did successfully in Massachusetts and California. [PSUMF ¶ 30]

For example, the chair of "Arizona for Marriage in favor of SCR 1042," Peter Gentala, urged voter approval of Proposition 102 as follows:

> Judges should not distort the meaning of marriage. But that is just what is happening in California. On May 15, 2008, the California Supreme Court . . . voted to redefine marriage. This extreme decision . . . shows why the Arizona Constitution needs to reaffirm marriage. . . . **The California decision means more legal attacks on marriage in Arizona**. It's only a matter of time before redefined marriages from California are used as **legal weapons** to change the law here in Arizona.

[PSUMF ¶ 31, (emphasis added)]. Others argued for passage of Proposition 102 by claiming that permitting same-sex couples to marry and be treated as married would have grave consequences for Arizona, especially for the State's children. For example, the ballot statement of Mesa's Shauna Smith states:

> "Do not let what happened in California repeat itself in Arizona. **Same-sex marriages are detrimental to families**, which are vital to any community. Families provide stabile [sic] environments for children and every child has the right to a mother and a father. **Join us in protecting marriages** in Arizona and Vote yes on Prop 102."

[PSUMF ¶ 31, (emphasis added)]

Some proponents of the measure used stronger language. [PSUMF ¶ 32] For

[2] Opponents of marriage for same-sex couples first proposed amending the Arizona Constitution in 2006 with ballot language that went beyond the text restricting marriage to different-sex couples approved in 2008. The 2006 additional proposed language provided, "[t]he State of Arizona and its cities, towns, counties or districts shall not create or recognize a legal status for unmarried persons that is similar to marriage." It was widely understood to forbid domestic partner benefits and other protections offered to heterosexual unmarried couples as well as lesbian and gay couples. Arizona voters rejected the proposal. [PSUMF ¶ 29; *see also Arizona Protect Marriage, Proposition* 107, BALLOTPEDIA.ORG, http://ballotpedia.org/Arizona_Protect_Marriage, _Proposition _107_(2006) (last visited August 14, 2014)]

example, State Senator Sylvia Allen led the ballot presentations "for" the proposition, saying:

> Society has set up our laws to protect the children and to provide in the case of a spouse dying. **All of that would change if same sex marriage gets its foot hold** and demands are then placed upon government and businesses for benefits . . . same sex marriage is about forcing all within our society regardless of religious or traditional beliefs to accept radical changes which will have far reaching consequences. **Consequences that change the very core of our society and how it functions. The loser will be the children who must endure the selfish desires of adults.**

[PSUMF ¶ 32, emphasis added] And, speaking for "Arizona for Marriage in favor of SCR 1042," Pastor Frank Macias added, "[a]ltering the meaning of marriage affects all of us. We certainly do not want the public schools to teach our elementary school children that gay 'marriage' is okay." [PSUMF ¶ 32] Finally, Representative Cecil Ash, then a candidate for the Arizona House seat he now holds, called for "yes" votes as follows:

> If society's definition of marriage is changed to allow same sex couples, then what is next? Why not three people who all love each other? Or four? Why not allow polygamy? Or a whole community to marry if everyone agrees? **Or a person to marry a pet? . . .** In our culture, people cohabit and enter into various sexual relationships without government interference. While these relationships may offer a certain amount of personal fulfillment, **they do not benefit our society, nor do they receive the protection of the law.** That is reserved for marriage between a man and a woman.

[*Id.* (emphasis added)]

The provisions of Arizona constitutional and statutory law approved by majority votes at the ballot and by the legislature to exclude lesbian and gay couples from marriage, and selectively to deny recognition to the marriages they celebrate lawfully in other jurisdictions, are referred to here as the "marriage ban." The marriage ban disqualifies Plaintiffs and other same-sex couples from the simple, direct route through which different-sex couples access critically important rights and responsibilities that would allow them to secure their commitment to each other and to safeguard their families. As to many of these rights and responsibilities, marriage is the only access route; as to others, marriage is far simpler and less expensive than other options. By way

of example only, Arizona's marriage ban denies same-sex couples the ability offered to different-sex couples through marriage:

(i) to solemnize their relationships through a state-sanctioned ceremony, *see* A.R.S. § 25-111;

(ii) to safeguard family resources under an array of laws that protect spousal finances, including, for example, the exemption of taxes on the property of widows and widowers, *see id.* § 42-11111; Ariz. Const. art. 9, §§ 2-2.3;

(iii) to pay their fair share of taxes as legally married couples by filing Arizona income tax returns based on a marital status that is consistent with the marital status reported on their federal income tax returns, *see* A.R.S. §§ 43-102(A)(1); 43-301; 43-309;

(iv) to secure legal recognition for parent-child bonds through the mechanisms afforded to spouses, including joint adoption, *id.* § 8-103(A); adoption of a spouse's child as a stepparent, *see, e.g.*, *id.* § 8-105(N)(1); the more streamlined procedures for the social study required for stepparent adoptions used when the prospective adoptive stepparent has been married to the legal parent for at least one year and has resided with the child for at least six months, *id.* § 8-112(D)(1); and the presumption of parentage for children born into a marriage, *id.* § 25-814(A)(1);

(v) to receive benefits, including educational benefits, for families of veterans of the armed forces who have made some of the greatest sacrifices for our country, *id.* § 15-1808;

(vi) to make caretaking decisions in times of death or disaster, including priority to make medical decisions for an incapacitated spouse, *id.* § 36-3231; and the automatic right and priority to make anatomical gifts of a decedent's body, *id.* § 36-848(A)(2);

(vii) to inherit under the laws of intestacy, *id.* § 14-2102; and rights in the family residence pending final determination of the estate, *id.* § 14-2402;

(viii) in the event that a couple separates, to access an orderly dissolution process for terminating the relationship and assuring an equitable division of the couple's assets and debts, *see id.* §§ 25-301 - 381.01;

(ix) to assume a range of important responsibilities that, like rights, enhance the dignity and integrity of the person. As one example, same-sex couples are denied the ability to be made formally accountable to each other through obligations of spousal support, *id.* § 25-319, and child support, *id.* § 25-320;

(x) to assert the privilege not to testify against one another as to matters protected by spousal privilege, *see id.* § 13-4062(1).

Those who are recognized as married, or as having been married, also may access a host of federal rights and responsibilities that span the entire United States Code and the whole realm of federal regulations. These include laws and regulations pertaining to

Social Security, housing, immigration, taxes, criminal sanctions, copyright, family medical leave, and veterans' benefits. Same-sex couples validly married in another jurisdiction and now living in Arizona are likely to qualify for many federal benefits and protections due to the June 2013 *Windsor* decision. *See Windsor v. United States*, 133 S. Ct. 2675, 2683 (2013). But, other benefits and protections—such as Social Security survivor benefits and certain veterans' benefits—defer to the marriage rule of a couple's state of residence (rather than the state of celebration of their marriage); current state law places these out of reach for Arizona residents.[3]

C. By Denying Plaintiffs The Opportunity To Marry In Arizona And Denying Legal Recognition To Their Valid Out-Of-State Marriages, Arizona Law Injures Plaintiffs In Tangible And Intangible Ways.

The deprivations and denials listed above can consume family economic resources, causing financial harm not only to same-sex couples but to their children and other dependents as well. [PSUMF ¶ 40] They also can create emotional insecurity, anxiety and a sense of social exclusion and stigma that take an emotional toll. [PSUMF ¶¶ 3, 6, 9, 10, 12, 13, 15, 17, 18, 20, 21, 23, 40, 42, 43, 44, 46, 47] Although some couples—including six Plaintiff couples here—have lessened these impacts by traveling outside Arizona to marry, doing so can be difficult, and even impossible, for some same-sex couples because of illness or other physical limitations, child care or other family responsibilities, or cost. [PSUMF ¶ 39]

Moreover, many same-sex couples wish to marry at home in Arizona, in the company of family and friends, who may not be able to travel out of state to attend a wedding for financial or other reasons. Plaintiffs Nelda Majors and Karen Bailey wish to marry to celebrate the love and mutual delight they have shared during half a century

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[3] *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"); 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, rather than the state of celebration of the couple's marriage, when determining whether an individual is a qualified spouse).

together—surmounting challenges, raising their daughters, and witnessing a sea change in public attitudes about lesbian and gay people. [PSUMF ¶ 39] Nelda says, "I'm blessed to have Karen in my life. Even though we kept our relationship a secret for so many years, that difficult experience only strengthened our bond. . . . My love, respect, and admiration of Karen continuously grows. I look forward to the day that I can finally call her my wife." [Ocampo Decl., Ex. B ¶ 17]

David Larance and Kevin Patterson wish to marry so David can use the stepparent adoption process to establish legal relationships with both of the couple's daughters to lessen the frustrations and uncertainties of parenting, to provide additional security for their children and each other, and to allow him to take leave under the Family Medical Leave Act should one of his daughters falls ill. [PSUMF ¶¶ 6, 36] Like David and Kevin, three of the married Plaintiff couples similarly wish to formalize the ties between their children and the parent who currently lacks a legal bond, using the streamlined process available to stepparents. [PSUMF ¶¶ 6, 12, 15, 17, 43]

For Kathy Young, in-state respect for her New York marriage to Jess Young also would provide additional security in case Jessica has further health problems. [PSUMF ¶ 43] For Kent Burbank, in-state recognition of the marriage he and Vicente Talanquer celebrated in Iowa also would reinforce to the couple's sons that they finally are in a "forever" family. [*Id.*] For Kelli Olson and Jennifer Hoefle Olson, recognition in Arizona of their Minnesota marriage similarly would facilitate Kelli's securing of parental ties to the couple's two-year-old daughters, which would allow Kelli to provide health insurance for them, while simplifying her day-to-day parenting tasks, such as pediatric medical visits. [*Id.*]

Although Jesús and C.J. Castro-Byrd have not yet started their family, they want their future children to have the additional security, legal supports and affirmation that will come when Arizona honors the marriage they celebrated last year in Washington, surrounded by C.J.'s relatives. [PSUMF ¶ 45] Having spent his teenage years as an undocumented immigrant, Jesús knows too well the anxiety and vulnerability of living

1 with an uncertain legal status. [Ocampo Decl., Ex. J ¶ 7] He wants his and C.J.'s children
2 to feel included and respected as equals by their community and government. [PSUMF ¶
3 45]
4 While C.J. and Jesús plan for a family and lifetime together, George Martinez and
5 Fred McQuire struggle to prepare for their concluding chapter, with George's end-of-life
6 planning made agonizingly harder by the likelihood that Fred will lack sufficient
7 resources to remain in their home and function adequately. [PSUMF ¶ 9] The couple
8 survived the military's aggressively antigay policies, society's homophobia, and the AIDS
9 crisis, thrilled to realize what, in the early years, had seemed an impossible dream—being
10 legally married. [Ocampo Decl. Ex. D ¶¶ 6, 7, 8; Ex. E. ¶ 6] And yet, the legal system in
11 which George has served proudly for decades as Deputy Clerk of the Court of Appeals is
12 required by state law to deny him the peace of mind of knowing his husband will be
13 recognized and provided for after his death. [PSUMF ¶ 9]
14 Barb Morrissey and Mish Teichner also have lived with anxiety about their legal
15 status in Arizona. [PSUMF ¶ 10] Both have cared for each other through years of health
16 challenges, and both have felt the vulnerability and humiliation of hospital staff and others
17 disrespecting their relationship despite their medical powers of attorney and their New
18 York marriage. [*Id.*] They and all the married Plaintiff couples also now labor under
19 frustrating burdens of additionally complicated, discordant income tax rules because the
20 Internal Revenue Service respects them as married, while Arizona does not. [PSUMF ¶
21 11]
22 Patrick Ralph and Josefina Ahumada both cherish their memories of the years they
23 shared with their respective spouses, Gary Hurst and Helen Battiste. [PSUMF ¶¶ 19, 22]
24 Although both were thrust unexpectedly into an intensive caregiving role, both derived
25 deep satisfaction from providing comfort to the life partner with whom each had shared
26 such closeness. [Ocampo Decl., Ex. K ¶¶ 5, 8; Ex. L¶¶ 6,7] Any extra complications in
27 the administrative tasks required after a loved one's death are an unwelcome burden. For
28 Josefina and Patrick, the practical burdens paled next to the demeaning shock of the State

erasing their relationship with their just-deceased spouse for purposes of the document officially recording the end of their beloved's life. [PSUMF ¶¶ 20, 23, 47]

III. LEGAL STANDARD

Summary judgment shall be rendered when the pleadings and declarations 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). Here, there are no material facts in dispute, and application of the law to the facts shows that summary judgment should be granted to Plaintiffs.

IV. ARGUMENT

The Supreme Court observed in *Windsor* that, when government relegates same-sex couples' relationships to a "second-tier" status, it "demeans the couple," "humiliates . . . children being raised by same-sex couples," deprives these families of equal dignity, and "degrade[s]" them, while also causing countless tangible harms, all in violation of "basic due process and equal protection principles." 133 S. Ct. at 2693-95. Plaintiffs' experiences living under Arizona's marriage ban starkly confirm the truth of these observations. The 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 Arizona families, inviting discrimination in innumerable daily interactions in medical settings, on the job, at school, and in the benefits and family recognition designed to compensate for work, military service and a lifetime of mutual caring. There is no conceivable—let alone important—governmental interest served by excluding Nelda and Karen, and Kevin and David, from marriage. Likewise, denying recognition and legal protections to married Plaintiffs—essentially pretending that George and Fred and the other married Plaintiffs are "single"—accomplishes nothing legitimate, let alone important. Doing so only harms these honorable Arizonans and their family members.

The marriage ban harms Plaintiffs 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 between two adults is deep

and abiding, worthy of respect, and has an official stature, with full legal obligations and entitlements. An ever-lengthening and unbroken list of federal court decisions affirm that there is no "gay exception" to our United States Constitution's guarantees of liberty and equality for all, including the freedom to celebrate love, commitment and family with the person of one's choice in marriage.[4] This Court should do the same and strike down Arizona's same-sex marriage ban.

A. Arizona's Marriage Ban Violates Due Process By Denying The Unmarried Plaintiffs Their Fundamental Right To Marry, By Refusing to Honor The Valid Out-Of-State Marriages Of The Married Plaintiffs, And By Violating All Plaintiffs' Liberty Interests In Family Integrity And Association.

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 limitation of 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 restriction "is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." *Zablocki v. Redhail*, 434 U.S. 374, 388

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[4] *See, e.g., Bostic v. Schaefer*, -- F.3d --, 2014 WL 3702493, at *16 (4th Cir. July 28, 2014) (invalidating Virginia's marriage ban); *Bishop v. Smith*, -- F.3d --, 2014 WL 3537847, at *18-21 (10th Cir. July 18, 2014) (invalidating Oklahoma's marriage ban); *Kitchen v. Herbert,* 2014 WL 2868044, at *32 (10th Cir. June 25, 2014) (invalidating Utah's marriage ban); *Baskin v. Bogan,* Nos. 1:14-cv-00355-RLY-TAB, 1:14-cv-00404-RLY-TAB, 2014 WL 2884868, at *4-6 (S.D. Ind. June 25, 2014) (invalidating Indiana's marriage ban); *Geiger v. Kitzhaber,* Nos. 6:13-cv-01834-MC, 6:13-cv-02256-MC, 2014 WL 2054264, at *14-16 (D. Or. May 19, 2014) (invalidating Oregon's marriage ban); *Latta v. Otter,* No. 1:13-cv-00482-CWD, 2014 WL 1909999, at *28-29 (D. Idaho May 13, 2014) (invalidating Idaho's marriage ban); *DeBoer v. Snyder,* -- F. Supp. 2d --, 2014 WL 1100794, at *1 (E.D. Mich. March 21, 2014); (invalidating Michigan's marriage ban); *Tanco v. Haslam,* -- F. Supp. 2d --, 2014 WL 997525, at *2 (M.D. Tenn. March 14, 2014) (granting preliminary injunction requiring recognition of marriage of three same-sex plaintiff couples); *De Leon v. Perry*, 975 F. Supp. 2d 632, 639-40 (W.D. Tex. 2014) (striking down Texas' marriage ban); *Bourke v. Beshear*, 2014 WL 556729, at *11-12 (W.D. Ky. Feb. 12, 2014) (invalidating Kentucky's marriage ban); *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 973 (S.D. Ohio 2013) (granting permanent injunction and declaratory judgment compelling Ohio to recognize valid out-of-state marriages of same-sex couples on Ohio death certificates).

(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.* Arizona's marriage ban deprives Plaintiffs and other same-sex couples of their fundamental right to marry and to have their valid out-of-state marriages honored under state law, thereby triggering strict scrutiny.

1. Arizona's Marriage Ban Abrogates Unmarried Same-Sex Couples' Fundamental Right To Marry.

The right to marry has long been recognized as 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 Clause of the Fourteenth Amendment."); *Turner v. Safley*, 482 U.S. 78, 95-96 (1987); *Loving v. Virginia*, 388 U.S. 1, 12 (1967). Indeed, the Supreme Court has described the marital relationship as "intimate to the degree of being sacred," *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965), and thus sheltered necessarily by due process.

This fundamental right is defined by the constitutional liberty to select the partner of one's choice, and courts accordingly have 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) (noting that our federal Constitution "undoubtedly imposes constraints on the state's power to control the selection of one's spouse").[5] Further, the long line of decisions

[5] *See also Bostic*, 2014 WL 3702493, at *9 ("If courts limited the right to marry to certain couplings, they would effectively create a list of legally preferred spouses, rendering the choice of whom to marry a hollow choice indeed."); *Kitchen*, 2014 WL 2868044, at *15 (noting that "the importance of marriage is based in great measure on 'personal aspects' including the 'expression[] of emotional support and public commitment'" and that the Supreme Court's "pronouncements on the freedom to marry . . . focus on the freedom to choose one's spouse") (quoting *Turner v. Safley*, 482 U.S. 78 (1987) and other cases); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) ("The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations."); *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

recognizing the significance of—and the protections accorded to—marital relationships would be meaningless if states could simply refuse to recognize the marriages of disfavored groups, thereby depriving these spouses of their constitutional rights.

As the Supreme Court recognized in *Lawrence v. Texas*, 539 U.S. 558 (2003), and in *Windsor* (and many lower courts recently have reaffirmed), fundamental rights and liberty interests are ***not*** limited to different-sex couples. In ruling in *Windsor* that the federal government must provide marital benefits to married same-sex couples, and that married gay people 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 spouses. 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. Thus, absent sufficient and sufficiently tailored state interests (which have been notably scarce supply since *Windsor*), it is unconstitutional to "deprive some couples . . . but not other couples, of [the] rights and responsibilities [of marriage]." *Id.* at 2694.

Therefore, the unmarried Plaintiffs and other same-sex couples wishing to marry in Arizona do not seek 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 repeatedly 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. In *Loving*, for example, the Supreme Court did not describe the right asserted as a "new" right to "interracial marriage." 388 U.S. at 1. Nor did the Supreme Court describe a right to "prisoner marriage" in *Turner*, 482 U.S. 78 (1987), or a right to "deadbeat parent marriage" in *Zablocki v. Redhail*, 434 U.S. at 374. Instead, as the Tenth Circuit recently

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(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").

has emphasized, "it is impermissible to focus on the identity or class-membership of the individual exercising the right." *Kitchen*, 2014 WL 2868044, at *18. "'Simply put, fundamental rights are fundamental rights. They are not defined in terms of who is entitled to exercise them.' . . . Plaintiffs seek to enter into legally recognized marriages, with all the concomitant rights and responsibilities enshrined in [state] law. They desire not to redefine the institution but to participate in it." *Id.*[6]

Because the choice of whom to marry is the quintessential personal decision protected by the Due Process Clause, federal courts now steadily are striking down state laws that withdraw from same-sex couples the freedom to make this choice, recognizing the constitutionally unjustified harms inflicted by such laws and reaffirming that—regardless of sexual orientation—all persons are guaranteed the fundamental right to marry.[7] Today's decisions echo the California Supreme Court's observation of more than half a century ago in the first state high court ruling invalidating a race-based marriage restriction. The Court said, regardless of group membership, any person "may find himself barred by law from marrying the person of his choice and that person to him may be irreplaceable. Human beings are bereft of worth and dignity by a doctrine that would make them as interchangeable as trains." *Perez v. Sharp*, 32 Cal. 2d 711, 725, 198 P.2d 17, 25 (1948).

Karen and Nelda have chosen each other and have built a life together of mutual

[6] The argument that same-sex couples seek a "new" right rather than the same right exercised by others repeats the error the U.S. Supreme Court made in *Bowers v. Hardwick,* 478 U.S. 186 (1986), and corrected in *Lawrence v. Texas*, 539 U.S. 566 (2003). In a challenge by a gay man to Georgia's sodomy statute, the *Bowers* Court recast the right at stake from a right, shared by all adults, to consensual intimacy with the person of one's choice, to a claimed "fundamental right" of "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 noted that *Bowers'* constricted framing of the issue "fail[ed] to appreciate the extent of the liberty at stake." *Lawrence*, 539 U.S. at 567; *see also Kitchen*, 2014 WL 2868044, at *20; *Bostic*, 2014 WL 3702493, at *10.

[7] *See, e.g.*, *Bostic*, 2014 WL 3702493, at *9; *Kitchen,* 2014 WL 2868044, at *12-30; *De Leon*, 975 F. Supp. 2d at 659 (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)); *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").

commitment, worth and dignity spanning five decades. [PSUMF ¶ 2] David and Kevin have chosen each other and have created a family that now includes their two lively, adopted daughters who delight and challenge them. [PSUMF ¶ 5] Each adult to the other is precious and irreplaceable. They must be permitted to marry.

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

In addition to violating the fundamental right to marry of same-sex couples who wish to marry in their home state of Arizona, the marriage ban also violates due process by denying same-sex couples who have married out-of-state recognition of their valid marriages. There is nothing novel about the principle that couples have vested fundamental rights to have their marriages accorded legal recognition by the State. For example, in *Loving*, 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 interracial couples who had married elsewhere and then entered the state. 388 U.S. at 4. The Court held that Virginia's statutory scheme—including the penalties for having married out-of-state and its voiding of marriages lawfully celebrated 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).[8] As the Tenth Circuit recently concluded, "[i]n light of

[8] 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." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). As one federal court put it 65 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 entered into will be recognized consistently has been understood to be of fundamental importance both to the individual and to society: "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).

Windsor, we agree with the multiple district courts that have held that the fundamental right to marry necessarily includes the right to remain married." *Kitchen*, 2014 WL 2868044, at *16.

Under the laws of 19 states and the District of Columbia, the married Plaintiffs and many others like them across Arizona are validly married.[9] As *Windsor* held, denying recognition to same-sex couples who solemnly, lawfully have married each other unconstitutionally deprives them and their dependents of "equal dignity." 133 S. Ct. at 2693. It also denies them equal treatment that can be measured in dollars and cents, lost time, aggravation, and stress. As Edie Windsor did, Plaintiffs here suffer unequal tax treatment. [PSUMF ¶ 35] They also face barriers to Social Security and veterans benefits. [PSUMF ¶ 37, 38] And they are excluded from innumerable state law benefits and protections—such as a simple path to formalize a parent-child relationship via stepparent adoption—that facilitate and safeguard modern family life. [*See* PSUMF *generally*]

Like Edie Windsor, who married validly under New York law, Plaintiffs here validly married in California, Iowa, Minnesota, Seattle, New Mexico as well as New York. [PSUMF ¶¶ 8, 10, 12, 14, 17, 18, 20, 22] And now, like Section 3 of the federal Defense of Marriage Act ("DOMA")—which the Supreme Court struck down in *Windsor*—Arizona law treats all of these married plaintiffs as if their marriages never took place. For Patrick and Josefina, this has meant the cruel indignity of being denied the opportunity to apply for and receive a death certificate identifying them as the surviving spouse of their beloved husband and wife, respectively, plus ongoing

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Accordingly, interstate recognition of marriage has been a defining and essential feature of American law. The longstanding 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.").

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

ineligibility for Social Security survivor benefits that depend upon the marriage law of their domicile. For Fred and George, Arizona's refusal to honor their valid California marriage means that practical, financial and dignitary issues haunt them as they prepare for their final months together. [PSUMF ¶ 8, 9]

For all the married Plaintiffs, Arizona denies them recognition as married for ***all*** purposes under state law, just as DOMA did under federal law. And as with DOMA, the injury the Arizona ban inflicts on Plaintiffs "is a deprivation of an essential part of the liberty protected by the [Constitution's due process guarantee]." *Windsor*, 133 S. Ct. at 2692. Like DOMA, Arizona'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 one's marriage. *Id*. at 2693. Arizona's refusal to recognize Plaintiffs' out-of-state marriages, and the marriages of other same-sex couples in Arizona 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 Arizona's marriage ban is to treat same-sex relationships unequally by excluding "persons who are [or were] in a lawful same-sex marriage," like Plaintiffs, from the important protections afforded heterosexual married persons—in violation of the Due Process guarantee of the United States Constitution. *Id.* at 2695.

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

By denying 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 related fundamental liberty interests. Arizona's marriage ban burdens Plaintiffs' protected interest in autonomy over "personal decisions relating to . . . family relationships," *Lawrence*, 539 U.S. at 573, and additionally impairs Plaintiffs' ability to identify themselves and to participate fully in society as married persons, 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 David, Ken, Kelli and Kathy, and other lesbian and gay parent raising children with a same-sex spouse or life partner, from securing legal recognition of their parent-child relationships through established legal mechanisms generally available to married parents (*e.g.,* stepparent adoption, the spousal presumption of parenthood, and other marital parentage protections), thus infringing their fundamental liberty interest in "direct[ing] the upbringing and education" of their children. *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 for minor children D.B-T. and M.B-T., I.Y., and M.D—violate the core of the substantive guarantees of the Due Process Clause as recognized by the Supreme Court. *See Moore v. East Cleveland*, 431 U.S. 494, 503 (1977).

4. Arizona's Marriage Ban Cannot Withstand Any Level Of Review, Let Alone Heightened Scrutiny.

Arizona's withholding from Plaintiffs of the fundamental right to marry and to have their out-of-state marriages recognized, and burdening of Plaintiffs' other protected liberty interests, denies them many of the legal, social, and financial benefits enjoyed by different-sex married couples and their children. Because Arizona'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; *accord Bostic*, 2014 WL 3702493, at *9-10; *Kitchen*, 2014 WL 2868044, at *21. But Defendants cannot articulate ***any*** legitimate interest—let alone a compelling one—for denying same-sex couples the right to marry and to have their valid out-of-state marriages recognized in Arizona. *Accord Bostic*, 2014 WL 3702493, at *17; *Latta*, 2014 WL 1909999, at *28-29; *Geiger*, 2014 WL 2054264, at *14; *De Leon v. Perry*, 975 F. Supp. 2d 632, 653 (W.D. Tex. 2014).

As a result, Arizona's marriage ban violates Plaintiffs' due process rights for the same reasons that it violates Plaintiffs' equal protection rights (described below). *See Loving*, 388 U.S. at 12 (striking down anti-miscegenation law on both due process and equal protection grounds); *see also Bostic*, 2014 WL 3702493, at *17 (affirming grant of summary judgment in plaintiffs' favor); *Kitchen*, 2014 WL 2868044, at *32 (affirming ruling in plaintiffs' favor on cross motions for summary judgment). Indeed, far from withstanding strict, or at least heightened, scrutiny, Arizona's marriage ban cannot satisfy even rational basis review (*see infra* § B.4.), and therefore must be struck down as unconstitutional.

B. By Denying Unmarried Plaintiffs The Right To Marry And Denying Married Plaintiffs Recognition Of Their Valid Out-Of-State Marriages, Arizona'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 legally irrelevant membership in a disfavored 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.").

Gay and lesbian couples are similarly situated to heterosexual couples in every respect that is relevant to the purposes of marriage recognized by the Supreme Court:

> 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.

Griswold, 381 U.S. at 486. *See also 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). Their relationships have endured

across decades [PSUMF ¶¶ 2, 7]; sustained them through illness [PSUMF ¶¶ 7, 10, 19]; brought them the pleasure of shared leisure [Ocampo Decl., Ex. B ¶17; Ex. F, ¶2; Ex. L, ¶4], harmony of shared religious faith [Ocampo Decl., Ex. L ¶¶ 5, 9] and the challenges and satisfactions of parenthood. [PSUMF ¶¶ 12, 14, 15, 16]. These are couples whose mutual love and devotion affirm the constitutional values that have caused marriage to remain a vital institution across generations and still today.

For all legally relevant purposes, Plaintiffs are similarly situated to couples who are permitted to marry. Because, as discussed below, no constitutionally adequate state purposes justify their exclusion, Arizona's marriage ban defies the basic principles of the Equal Protection Clause. It creates a permanent "underclass" of lesbian and gay Arizonans who are denied the fundamental right of marriage available to others simply because of public disapproval of their constitutionally-protected desire and choice to form a bonded marital union with a same-sex spouse rather than a different-sex spouse. Or, at least, the ban relegates them in service of the constitutionally impermissible intention to maintain a superior legal status for heterosexual couples. Because Arizona's marriage ban consigns lesbians and gay men and their families to a stigmatized and second-class status, it cannot be squared with the basic dictates of the Equal Protection Clause.

1. The Marriage Ban Discriminates Based On Sexual Orientation.

The experience of falling in love with a person of the same sex, and decisions to date, forge a relationship, marry and build a life with that person, are expressions of sexual orientation. Arizona's marriage ban directly classifies and prescribes "distinct treatment on the basis of sexual orientation." *In re Marriage Cases*, 183 P.3d 384, 440-41 (Cal. 2008). *See also Lawrence*, 539 U.S. at 581 (O'Connor, J., concurring) ("Texas treats the same conduct differently based solely on the participants. Those harmed by this law are people who have a same-sex sexual orientation and thus are more likely to engage in behavior prohibited by [the Texas sodomy law]. The Texas statute makes homosexuals unequal in the eyes of the law by making particular conduct—and only that conduct—subject to criminal sanction."); *Christian Legal Soc.'y v. Martinez*, 130 S. Ct. 2971

(2010).

The exclusion is categorical, preventing ***all*** lesbian and gay couples from marrying consistently with their sexual orientation. Where, as here, the law'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).

2. Heightened Scrutiny Applies Because The Marriage Ban Discriminates Based On Sexual Orientation.

The Ninth Circuit has determined that "*Windsor* requires that we reexamine our prior precedents"[10] and "apply heightened scrutiny to classifications based on sexual orientation." *SmithKline Beecham Corp. v. Abbott Labs.,* 740 F.3d 471, 484, 9th Cir. 2014, *en banc rev. denied*).[11] Under heightened scrutiny, the harm inflicted by state action that discriminates based on sexual orientation must be justified and overcome by a sufficiently strong government interest, which the court assesses by carefully examining the actual purposes of the law or other state action, rather than hypothesizing conceivable justifications. *Id*. at 480-83. In this assessment, the court must "ensure that our most fundamental institutions neither send nor reinforce messages of stigma or second-class

[10] *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*.").

[11] Lower courts without controlling post-*Lawrence* precedent on the issue must apply the familiar four-element test to determine whether sexual orientation classifications warrant heightened scrutiny. *See, e.g. Windsor v. United States*, 699 F.3d 169, 181 (2d Cir. 2012), *aff'd on other grounds* 133 S. Ct. 2675 (2013). And a growing number of federal and state courts are recognizing that faithful application of those factors inevitably leads to the conclusion that such classifications indeed must be considered suspect or quasi-suspect and should be subjected to heightened scrutiny. *See, e.g.*, *Windsor*, 699 F.3d at 181-85; *Obergefell*, 962 F. Supp. 2d at 987; *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 at 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).

status." *Id*. at 483.

Although *SmithKline* concerned jury selection, one judge of the Circuit has observed,

> In the view of many, the application of heightened scrutiny [to sexual orientation classifications] precludes the survival under the federal Constitution of long-standing laws treating marriage as the conjugal union between a man and a woman . . . state officials charged with defending such laws in this court have already abdicated their task, invoking this case . . . this is not just a *Batson* decision. It is perhaps all but this court's last word on the question whether the Constitution will require States to recognize same-sex marriages as such . . . .

2014 WL 2862588, at *1 (June 24, 2014, 9th Cir. 2014) (denying en banc review) (O'Scannlain, J., dissenting). *Accord Lawrence*, 539 U.S. at 601 (Scalia, J., dissenting). Plaintiffs share this view. As explained below, no legitimate—let alone strong—government interest justifies the harms the ban inflicts on Plaintiffs, including the harms of stigmatizing messages that Plaintiffs are unworthy of inclusion, protection and celebration through the usual way society allows couples to transform the promises of their hearts into solid pledges for a lifetime—marriage.

3. The Marriage Ban Discriminates Based On Sex And With Respect To The Exercise Of A Fundamental Right And Thus Warrants Heightened Scrutiny On These Grounds As Well.

Arizona's marriage ban also should be subject to heightened scrutiny because it classifies Arizona citizens on the basis of sex. Because of these sex-based classifications, Nelda Majors, for example, is precluded from marrying Karen Bailey because Nelda is a woman and not a man; were Nelda a man, she could marry Karen. Likewise, because of the sex-based classifications, Kent Burbank is prevented from having his marriage to Vicente Talanquer recognized by the State because Kent is a man and not a woman; were Kent a woman, Arizona would recognize Kent's marriage to Vicente. 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.").[12]

The ban also discriminates based on sex by impermissibly enforcing conformity with sex stereotypes, pressing women and men to adhere to the view that women need and should marry men, and men need and should marry women, as a condition of recognizing a couple's out-of-state marriage as valid. The Supreme Court has found this type of 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 Plaintiffs in their exercise of their fundamental rights and liberty interests, the ban is subject to strict scrutiny for this reason as well. *Zablocki v. Redhail,* 434 U.S. 374, 383 (1978); *Loving v. Virginia,* 388 U.S. 1, 12 (1967); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); *Bostic*, 2014 WL 3702493, at *10; *Kitchen*, 2014 WL 2868044, at *21.

[12] Arizona'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 11 n.11.

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4. The Marriage Ban Cannot Survive Rational Basis Review, Let Alone Heightened Scrutiny.

Arizona's marriage ban is unconstitutional even under rational basis review because it irrationally targets lesbians and gay men for exclusion from the right to marry and to have valid out-of-state marriages recognized in this state. 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. Thus, even under rational basis review, courts must "insist on knowing the relation between the classification adopted and the object to be obtained." *Id.* at 632. And when the government offers an ostensibly legitimate purpose, the court must examine the challenged law's connection to that purpose to assess whether it is too "attenuated" to rationally advance the asserted purpose. *See Windsor,* 133 S. Ct. at 2694; *Romer,* 517 U.S. at 635; *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446 (1985); *see also 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 main provision of DOMA denied equal protection 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 such an 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. This is not to say that all constitutionally deficient motives are the fruit of "malicious ill will." *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 375 (2001) (Kennedy, J., concurring). Such motives can be born simply out 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).[13]

Such attitudes are discernible throughout the arguments set out in the 2008 Ballot Pamphlet urging passage of Proposition 102.[14] The arguments themselves resemble those routinely marshalled in support of laws excluding same-sex couples from marriage. *See, e.g.*, *Bostic*, 2014 WL 3702493, at *10-17; *Kitchen*, 2014 WL 2868044, at *21-30; *De Leon*, 975 F. Supp. at 653-656; *Deboer*, 2014 WL 1100794, at *35-50. They include: (a) tradition, (b) procreation and quality of parenting; and (c) majoritarian control over who may marry rather than judicial determination of couples' constitutional claims. None can justify the Arizona ban's demeaning, stigmatizing effects and myriad tangible harms for lesbian and gay couples and their families.

a. The marriage ban cannot be justified by any asserted interest in maintaining "traditional" limitations on marriage.

To survive constitutional scrutiny, the marriage ban must be justified by some legitimate state interest other than simply maintaining "traditional" restrictions on

[13] In determining whether a law has such an impermissible purpose, the Supreme Court has looked to a variety of direct and circumstantial evidence, including the law's text 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 law (*see, e.g.*, *Windsor*, 133 S. Ct. at 2693; *Arlington Heights*, 429 U.S. at 266-68), and a history of discrimination by the governmental, *see, e.g.*, *Arlington Heights*, 429 U.S. at 266-68. But with or without direct evidence of discriminatory intent, the absence of any logical connection to a legitimate purpose will support an inference of an impermissible intent to discriminate. *See Romer*, 517 U.S. at 632; *Cleburne*, 473 U.S. at 448-50.

[14] A true copy is attached as Exhibit 1 to Ocampo Decl. and also is available at http://www.azsos.gov/election/2008/Info/PubPamphlet/Sun_Sounds/english/Prop102.htm.

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 laws denying same-sex couples 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 Varnum*, 763 N.W.2d at 898; *Goodridge*, 798 N.E.2d at 961 n.23; *see also Golinski*, 824 F. Supp. 2d at 993. To uphold Arizona'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. 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. *Accord Bostic*, 2014 WL 3702493, at *54; *Deboer*, 2014 WL 1100794, at *12; *De Leon*, 975 F. Supp. 2d at 655.

b. There is no rational relationship between the marriage ban and any asserted interests related to procreation or parenting.

There is no rational connection between Arizona's marriage ban and any asserted state interests in encouraging heterosexual couples to procreate responsibly within marriage, or in encouraging the raising of children by supposedly "optimal" parents. Arizona law does not condition the right to marry on a couple's abilities or intentions for

having or raising children. Instead, like Utah and all other states, Arizona permits adults to "choose a spouse of the opposite sex regardless of the pairing's procreative capacity. The elderly, those medically unable to conceive, and those who exercise their fundamental right not to have biological children are free to marry and have their out-of-state marriages recognized." *Kitchen*, 2014 WL 2868044, at *22. *See also Lawrence*, 539 U.S. at 605 (Scalia, J., dissenting); *Bostic*, 2014 WL 3702493, at *14 ("Because same-sex couples and infertile opposite-sex couples are similarly situated, the Equal Protection Clause counsels against treating these groups differently."); *De Leon*, 975 F. Supp. 2d at 654 ("[P]rocreation is not and has never been a qualification for marriage.").[15]

In addition to the lack of justification for the differential treatment of same-sex couples and infertile different-sex couples, there is no causal link between excluding lesbian and gay couples from marriage and the procreative and parenting choices of fertile heterosexual couples. As the Tenth Circuit put it, "Regardless of whether some individuals are denied the right to choose their spouse, the same set of duties, responsibilities, and benefits set forth under Utah law apply to those naturally procreative pairings touted by [the State]. We cannot imagine a scenario under which recognizing same-sex marriages would affect the decision of a member of an opposite-sex couple to have a child, to marry or stay married to a partner, or to make personal sacrifices for a child." *Kitchen*, 2014 WL 2868044, at *27; *Bishop*, 2014 WL 3537847 at *8 ("Oklahoma has barred all same-sex couples, regardless of whether they will adopt, bear, or otherwise raise children, from the benefits of marriage while allowing all opposite-sex couples, regardless of their child-rearing decisions, to marry. Such a regime falls well short of

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[15] *See also* A.R.S. § 25-121 (identifying information to be provided by applicants for marriage license, including their understanding that sexually transmitted diseases information is available to them and that these diseases may be transmitted to unborn children, but not information about their intentions or capacities to have or raise children). Indeed, Arizona permits certain couples to marry ***only on condition that they not procreate***. *See* A.R.S. § 25-101(B) ("[F]irst cousins may marry if both are sixty-five years of age or older or if one or both first cousins are under sixty-five years of age, upon approval of any superior court judge in the state if proof has been presented to the judge that one of the cousins is unable to reproduce.").

establishing 'the most exact connection between justification and classification.'"); *Bostic*, 2014 WL 3702493, at *13-15.

Opponents of marriage for same-sex couples also often argue that excluding same-sex couples from marriage serves the purpose of promoting an ideal that children will be raised by "optimal parents," which they characterize as married, biological, different-sex and gender-differentiated parents. *See, e.g., Bostic*, 2014 WL 370249, at *16-17; *Latta*, 2014 WL 1909999, at *28; *Varnum*, 763 N.W.2d at 900. But, as the Tenth and Fourth Circuits, and numerous other federal courts, now have held authoritatively, the marriage ban has no rational connection with any asserted governmental interest in increasing the number of children raised by their biological parents, let alone distinguishing between "optimal" parents and less-than-ideal parents whose children may be at risk, or in measuring parenting quality in terms of gender stereotypes. *Kitchen*, 2014 WL 2868044, at *23-24; *Bostic*, 2014 WL 3702493, at *16-17.

First, as noted above, children being raised by different-sex couples are unaffected by whether same-sex couples can marry. *Kitchen*, 2014 WL 2868044, at *26 ("[I]t is wholly illogical to believe that state recognition of the love and commitment between same-sex couples will alter the most intimate and personal decisions of opposite-sex couples."). And children raised by same-sex couples will not come to have different-sex parents 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.

Second, broad assumptions that gender and sexual orientation determine parenting ability are improper. As the Tenth Circuit observed, "every same-sex couple, regardless of parenting style, is barred from marriage and every opposite-sex couple, irrespective of parenting style, is permitted to marry. The Supreme Court has previously rejected state attempts to classify parents with such a broad brush." *Kitchen*, 2014 WL 2868044, at *28 (citing *Stanley v. Illinois,* 405 U.S. 645, 646 (1972), which invalidated state law that made children of unwed fathers wards of the state upon death of the mother). "Just as the state

law at issue in *Stanley* 'needlessly risk[ed] running roughshod over the important interests of both parent and child,' [Utah's marriage ban] cannot be justified by the impermissibly overbroad assumption that any opposite-sex couple is preferable to any same-sex couple." *Kitchen*, 2014 WL 2868044, at *28.[16]

Moreover, as a separate matter, the overwhelming scientific consensus, based on decades of peer-reviewed scientific research, shows unequivocally that children raised by same-sex couples are just as well-adjusted as those raised by heterosexual couples. *DeBoer,* 973 F. Supp. 2d at 760-68 (finding that testimony adduced at trial overwhelmingly supported finding that there are no relevant differences between the children of same-sex couples and the children of different-sex couples). Indeed, as court after court has recognized, children are raised just as "optimally" by same-sex couples as they are by different-sex couples. *See, e.g.*, *Golinski*, 824 F. Supp. 2d at 991; *Perry*, 704 F. Supp. 2d at 980; *Howard v. Child Welfare Agency Rev. Bd.*, Nos. 1999-9881, 2004 WL 3154530 (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.[17] The Fourth Circuit held it did not need to reach the issue, yet cited as "extremely persuasive" the American

[16] Were it actually an important goal of government to prioritize the raising of children by those whose genetic material made possible each child's birth, then means to achieve it might include an end to divorce, a ban on assisted reproduction, and an end to interventions by Child Protective Services to remove children from abusive or neglectful biological parents and place them instead, when necessary, in foster care or with adoptive parents willing and able to love and nurture them—like Vicente and Kent, Kevin and David, Karen and Nelda. But, like the family law rules of other states, Arizona law neither denies heterosexual couples these options nor makes biology destiny for children.

[17] *See also De Leon*, 975 F. Supp. 2d at 653-54; *Latta*, 2014 WL 1909999, at *28; *Geiger*, 2014 WL 2054264, at *41-42. This consensus has been confirmed 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* Brief of the American Psychological Association et al. as Amici Curiae on the Merits in Support of Affirmance, *United States v.* Windsor, 133 S. Ct. 2675 (No. 12-307), 2013 WL 871958, at *14-26 (Mar. 1, 2013 (discussing this scientific consensus); Brief of the American Sociological Ass'n in Support of Respondent Kristin M. Perry and Respondent Edith Schlain *Windsor*, *Hollingsworth v. Perry*, No. 12-144, and *United States v. Windsor*, No. 12-307, 2013 WL 840004, at *6-14 (Feb. 28, 2013).

Psychological Association's amicus brief explaining, "there is no scientific evidence that parenting effectiveness is related to parental sexual orientation," and "'the same factors'—including family stability, economic resources, and the quality of parent-child relationships—are linked to children's positive development, whether they are raised by heterosexual, lesbian, or gay parents." *Bostic*, 2014 WL 3702493, at *16. The Tenth Circuit likewise noted the expert consensus that "the parenting abilities of gay men and lesbians—and the positive outcomes for their children—are *not* areas where most credible scientific researchers disagree." *Id*.[18]

Furthermore, like many heterosexual couples, lesbian and gay couples become parents in various ways, including through assisted reproduction (such as I.Y., the son of Jessica and Kathy Young, and the twin daughters of Kelli Olson and Jen Hoefle Olson); through adoption (such as M.B.-T. and D.B-T, the sons of Vicente Talanquer and Kent Burbank, and David Larance and Kevin Patterson's daughters); and out of necessity when relatives are in crisis (as when Karen Bailey and Nelda Majors welcomed Karen's great grand-nieces M.D. and Sharla Curtis into their home). When these children have parents who want to be legally married under Arizona law, the government has no lesser interest in affording them the additional security and supports enjoyed by children with married different-sex parents. *See Kitchen*, 2014 WL 2868044, at *17; *DeBoer*, 2014 WL 1100794, at *12-13; *Varnum*, 763 N.W.2d at 902; *In re Marriage Cases*, 183 P.3d at 433.

But, like the statute invalidated in *Windsor*, rather than assisting these actual children, Arizona's marriage ban serves only to "humiliate" them and other "children now being raised by same-sex couples" and "make[] it even more difficult for [them] to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Windsor*, 133 S. Ct. at 2694. "Excluding same-sex couples from civil marriage will not make children of opposite-sex

[18] The Tenth Circuit commented that the State of Utah backed away from its prior arguments about child welfare following the cross-examination of experts undertaken during the *DeBoer* trial and the resulting district court decision. *Kitchen*, 2014 WL 2868044, at *23.

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 (citation and internal quotation marks omitted).

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

The Supreme Court in *Windsor* 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," there was no legitimate purpose the government could articulate that could "overcome[] the purpose and effect to disparage and injure" same-sex couples and their families. *Windsor*, 133 S. Ct. at 2694, 2696.

Arizona voters approved the marriage ban in 2008. They did so two years after having rejected a proposed constitutional amendment that would have limited legal protections for different-sex unmarried couples as well as same-sex couples.[19] The 2008 Ballot Proposition Guide ("2008 Ballot Guide") records the arguments offered by both sides.[20] Even without the telling contrast between the rejected 2006 measure (that would have eliminated rights of heterosexuals as well as lesbian and gay couples) and the 2008 measure that passed decisively, the arguments in favor of Proposition 102 make explicit the proponents' intention to target same-sex couples and ensure that they are remain excluded from marriage in Arizona. The arguments present an array of ostensible justifications and express all too plainly the view that married same-sex couples pose alarming threats to the community, especially to children, and that society's well-being

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[19] *See Arizona Protect Marriage, Proposition 107, BALLOTPEDIA*.ORG, http://ballotpedia.org/Arizona_Protect_Marriage,_Proposition_107_(2006) (last visited Aug. 14, 2014).

[20] *See 2008 Ballot Propositions & Judicial Performance Review, AZSOS.GOV*, http://www.azsos.gov/election/2008/Info/PubPamphlet/Sun_Sounds/English/Prop102.htm (last visited Aug. 14, 2014).

depends on voters "protecting" heterosexual couples' marriages against the prospect of lesbian and gay couples marrying and being married in Arizona.

State Senator Sylvia Allen set this tone, exhorting voters that "Society has set up our laws to protect the children and to provide in the case of a spouse dying. All of that would change if same sex marriage gets its foot hold . . . same sex marriage is about forcing all within our society . . . to accept radical changes which will have far reaching consequences. . . . The loser will be the children who must endure the selfish desires of adults." [PSUMF ¶ 32] Shauna Smith similarly declared, "Same-sex marriages are detrimental to families, which are vital to any community." [PSUMF ¶ 31]. Pastor Macias added, "Altering the meaning of marriage affects all of us. We certainly do not want the public schools to teach our elementary school children that gay 'marriage' is okay." [PSUMF ¶ 32] As Representative Cecil Ash asserted, "In our culture, people cohabit and enter into various sexual relationships without government interference. While these relationships may offer a certain amount of personal fulfillment, they do not benefit our society, nor do they receive the protection of the law. That is reserved for marriage between a man and a woman." [*Id.*]

Some Proposition 102 proponents, and perhaps many voters, seemingly sought dual goals—to maintain a special status for heterosexual couples in marriage while not discriminating against lesbian and gay couples. But, such an effort yields a tiered class system that is constitutionally forbidden when its reason is simply the majority's desire for it. Even a heartfelt intention not to injure does not prevent the harms of such a system, either its denial of legal protections and benefits or its stigmatizing messages. Coy and Tanya Johnston's ballot statement illustrates how ineffectual statements of benign intentions are against the constitutionally fatal defect of this approach:

> Our agenda is not to punish, segregate, or discriminate against gay/lesbian people, but to protect the safest unit in the world, the family. . . . Just as we would protect our homes and country against attack, we support this defense for the sacred family unit. Whether a person desires to marry his daughter, **homosexual partner**, a son, **dog, tree, underage neighborhood girl or car**; **we cannot allow this**

> **diminishment of the sacred union of marriage and its symbolism by "naturalizing" unnatural marriage** . . . The natural traditional family unit is the foundation of society. Protect USA. Protect Societies. Protect the Family.

[PSUMF ¶ 32, emphasis added]

This purpose—to "protect" marriage and heterosexual couples' families by fencing out lesbian and gay Arizonans and their families—is impermissible under the Equal Protection Clause because its inescapable "practical effect" is "to impose a disadvantage, a separate status, and so a stigma upon" same-sex couples and their children 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 none), 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.

V. CONCLUSION

For the foregoing reasons, the Court should enter summary judgment in favor of Plaintiffs and declare that Arizona's exclusion of same-sex couples from marriage violates the guarantees of due process and equal protection secured by the Fourteenth Amendment to the United States Constitution.

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CERTIFICATE OF SERVICE

☒ I hereby certify that on August 13, 2014, I electronically transmitted the attached documents to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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☒ I hereby certify that on August 13, 2014, I served the attached document by first class mail on Honorable John W. Sedwick, United States District Court, Federal Building and United States Courthouse, 222 West 7th Avenue, Box 32, Anchorage, Alaska 99513-9513.

s/ S. Neilson