UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

ADA MERCEDES CONDE VIDAL and IVONNE ÁLVAREZ VÉLEZ; MARITZA LÓPEZ AVILÉS and IRIS DELIA RIVERA RIVERA; JOSÉ A. TORRUELLAS IGLESIAS and THOMAS J. ROBINSON; ZULMA OLIVERAS VEGA and YOLANDA ARROYO PIZARRO; JOHANNE VÉLEZ GARCÍA and FAVIOLA MELÉNDEZ RODRÍGUEZ; and PUERTO RICO PARA TOD@S,

Plaintiffs,

v.

ALEJANDRO J. GARCÍA PADILLA, in his official capacity as Governor of the Commonwealth of Puerto Rico; ANA RIUS ARMENDARIZ, in her official capacity as Secretary of the Health Department of the Commonwealth of Puerto Rico; WANDA LLOVET DÍAZ, in her official capacity as Director of the Commonwealth of Puerto Rico Registrar of Vital Records; and MELBA ACOSTA FEBO, in her official capacity as Director of the Treasury in Puerto Rico,

Defendants.

Civil Action No. 3:14-cv-01253-PG

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

TABLE OF AUTHORITIES (CONT'D)

Page(s)

TABLE OF AUTHORITIES (CONT'D)

Page(s)

TABLE OF AUTHORITIES (CONT'D)

Page(s)

TABLE OF AUTHORITIES (CONT'D)

Page(s)

State Cases

TABLE OF AUTHORITIES (CONT'D)

Page(s)

Statutes

Other Sources

INTRODUCTION

Today, the Commonwealth of Puerto Rico excludes certain residents from the right to marry or remain married to the person they love. Plaintiffs are five loving, committed same-sex couples and an organization that represents lesbian, gay, bisexual, transsexual and transgender ("LGBT") people and their families in Puerto Rico. Plaintiffs Maritza and Iris, Yolanda and Zulma, and LGBT members of Puerto Rico Para Tod@s have not married (hereinafter "unmarried Plaintiffs") and wish to do so in their home of Puerto Rico, but are prohibited from doing so by the Commonwealth; Plaintiffs Ada and Ivonne, Johanne and Faviola, José and Thomas, and married LGBT members of Puerto Rico Para Tod@s have legally married in other jurisdictions (hereinafter "married Plaintiffs"), but Puerto Rico does not honor their marriages as it does the out-of-state marriages of different-sex couples. All Plaintiffs suffer concrete harms, denial of marital benefits, and daily indignities because Puerto Rico refuses to allow them to marry or refuses to recognize their marriage.

Puerto Rico denies Plaintiffs these most basic freedoms, protections and recognition through Article 68 of the Civil Code of Puerto Rico, 31 L.P.R.A. § 221, and other laws that preclude Plaintiffs from marrying in Puerto Rico or achieving recognition by the Commonwealth of their marriages lawfully entered into in other jurisdictions (hereinafter the "Marriage Ban").[1] Specifically, Article 68 of the Civil Code defines marriage as "a civil contract whereby a man and a woman mutually agree to become husband and wife," and prohibits the legal recognition of

[1] As per their Amended Complaint, Plaintiffs challenge the constitutionality of Article 68 of the Civil Code of Puerto as well as any "other laws in the Commonwealth that preclude [Plaintiffs] from marrying or having their marriages lawfully entered into in other jurisdictions recognized in Puerto Rico." Am. Compl. ¶ 1. Other laws that reflect the definition of marriage adopted by the Commonwealth in Article 68 include, but are not limited to, Rule 27 of the Commonwealth's Rules of Evidence, 32 L.P.R.A. Ap. IV R. 27(A)(1) (defining spouses as "[a] man and a woman legally married to each other."), and Puerto Rico's Internal Revenue Code, 13 L.P.R.A. §§ 30041, 30241 (defining "spouse" and "married taxpayers as "husband and wife"), among others.

"[a]ny marriage between persons of the same sex or transsexuals contracted in other jurisdictions." 31 L.P.R.A. § 221.

The Commonwealth excludes LGBT people who wish to marry or to have their marriages recognized (hereinafter "Banned Couples") from the civil institution of marriage. But Banned Couples wish to marry or have their marriages recognized for the same reasons as couples permitted to marry in Puerto Rico (hereinafter "Accepted Couples"): to celebrate and publicly declare their love and commitment before their families, friends, and communities through recognized partnerships that provide unparalleled intimacy, companionship, emotional support, and security. By denying Banned Couples, including Plaintiffs, the choice of whether and whom to marry, the Commonwealth "prohibits them from participating fully in our society, which is precisely the type of segregation that the Fourteenth Amendment cannot countenance." *Bostic v. Schaefer*, No. 14-1167, 2014 U.S. App. LEXIS 14298, at *67 (4th Cir. July 28, 2014).

Since the Supreme Court's decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013), which held unconstitutional Section 3 of the Defense of Marriage Act ("DOMA"), 1 U.S.C. §7, approximately three dozen federal and state court decisions throughout the country have ruled that laws barring same-sex couples from marriage or refusing to respect their existing marriages are invalid. The Courts of Appeals for the Fourth, Seventh and Tenth Circuits, more than fifteen federal district courts in more than two dozen cases, and state courts in six states have struck down state marriage bans as unconstitutional.[2] Across the United States, courts applying the

[2] *See, e.g.*, *Baskin v. Bogan*, No. 14-2386, 2014 U.S. App. LEXIS 17294 (7th Cir. Sept. 4, 2014), *aff'g Baskin v. Bogan*, No. 14-cv-00355, 2014 U.S. Dist. LEXIS 86114 (S.D. Ind. June 25, 2014), and *Wolf v. Walker*, 986 F. Supp. 2d 982 (W.D. Wis. 2014); *Bostic v. Schaefer*, No. 14-1167, 2014 U.S. App. LEXIS 14298, *aff'g Bostic v. Rainey*, 970 F. Supp. 2d 456 (E.D. Va. 2014); *Bishop v. Smith*, No. 14-5003, 2014 U.S. App. LEXIS 13733 (10th Cir. July 18, 2014), *aff'g Bishop v. United States ex rel. Holder*, 962 F. Supp. 2d 1252 (N.D. Okla. 2014); *Kitchen v. Herbert*, 755 F.3d 1193, 2014 U.S. App. LEXIS 11935 (10th Cir. 2014), *aff'g* 961 F. Supp. 2d 1181 (D. Utah 2013); *Brenner v. Scott*, No. 14-cv-107, 2014 U.S. Dist. LEXIS 116684 (N.D. Fla. Aug. 21, 2014); *Burns v. Hickenlooper*, No. 14-cv-01817, 2014 U.S. Dist. LEXIS 100894 (D. Colo. July 23, 2014); *Love v. Beshear*, No. 13-cv-750, 2014 U.S. Dist. LEXIS 36076 (W.D. Ky. Mar. 19, 2014); *Whitewood v. Wolf*, 992 F. Supp. 2d 410 (M.D. Pa. 2014); *Geiger v.*

analysis and reasoning laid out by the Supreme Court in *Windsor* have ruled that state marriage bans deprive same-sex couples of their fundamental right to marry and equal protection of the laws. Plaintiffs in this case are in the same position as the couples whose rights have been vindicated by each of those courts. "[W]hen gender and sexual orientation are taken away, [Plaintiffs] are in all respects like the family down the street." *Baskin*, 2014 U.S. Dist. LEXIS 86114, at *45-46. "The Constitution demands that we treat them as such." *Id.* at *45.

The undisputed facts[3] of this case compel the relief Plaintiffs seek: the freedom of each to marry the unique person he or she loves, and to have their existing marriages from other jurisdictions recognized in their home—Puerto Rico.

LEGAL STANDARD

Summary judgment shall be granted when the pleadings and declarations show that there is no genuine dispute 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); *see also Rockwood v. SKF USA Inc.*, 687 F.3d 1, 9 (1st Cir. 2012); Fed. R. Civ. P. 56(a). Federal Rule of Civil Procedure 56 "allows a party to move for summary judgment at any time, even as early as the commencement of the action." Fed. R. Civ. P. 56 Advisory Committee's Note to 2009

Kitzhaber, 994 F. Supp. 2d 1128 (D. Or. 2014); *Latta v. Otter*, No. 13-cv-482, 2014 U.S. Dist. LEXIS 66417 (D. Idaho May 13, 2014); *Henry v. Himes*, No. 14-cv-129, 2014 U.S. Dist. LEXIS 51211 (S.D. Ohio Apr. 14, 2014); *DeBoer v. Snyder*, 973 F. Supp. 2d 757 (E.D. Mich. 2014); *Tanco v. Haslam*, No. 13-cv-01159, 2014 U.S. Dist. LEXIS 33463 (M.D. Tenn. Mar. 20, 2014); *De Leon v. Perry*, 975 F. Supp. 2d 632 (W.D. Tex. 2014); *Lee v. Orr*, No. 13-cv-8719, 2014 U.S. Dist. LEXIS 21620 (N.D. Ill. Feb. 21, 2014); *Bourke v. Beshear*, 996 F. Supp. 2d 542 (W.D. Ky. 2014); *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968 (S.D. Ohio Dec. 23, 2013); *Pareto v. Ruvin*, No. 14-1661-CA-01, slip op. (Fla. Dist. Ct., Miami-Dade Cnty. July 25, 2014); *Brinkman v. Long*, No. 13-CV-32572 (Colo. Dist. Ct., Cook Cnty. July 9, 2014); *Wright v. Arkansas*, No. 60CV-13-2662 (Ark. Cir. Ct., Pulaski Cnty. May 9, 2014); *A.L.F.L. v. K.L.L.*, No. 2014-CI-02421 (Tex. Dist. Ct., Bexar Cnty, Apr. 22, 2014); *Griego v. Oliver*, 316 P.3d 865 (N.M. 2013); *Darby v. Orr*, No. 12-CH-19718 (Ill. Cir. Ct., Cook Cnty. Sept. 27, 2013); *Garden State Equality v. Dow*, 79 A.3d 1036 (N.J. 2013).

[3] Pursuant to Local Civil Rule 56(b), Plaintiffs have filed a Separate Statement of Uncontested Material Facts to accompany the instant motion. Plaintiffs hereby incorporate by reference the undisputed facts outlined in their separate statement.

Amendments. Here, there are no material facts in dispute concerning the application of the Marriage Ban and the harms it inflicts on Plaintiffs, and application of the controlling law to the facts shows that summary judgment should be granted to Plaintiffs.

ARGUMENT

The Supreme Court observed in *Windsor* that when government relegates same-sex couples' relationships to a "second-tier" status, the government "demeans" and "degrades" the couples, "humiliates" their children, deprives their families of equal dignity, and causes them countless tangible harms, all in violation of "basic due process and equal protection principles." *Windsor*, 133 S. Ct. at 2694-95. Puerto Rico's Marriage Ban inflicts all of these harms on Plaintiffs and thereby violates Banned Couples' rights to due process and equal protection under the United States Constitution. The Marriage Ban deprives Plaintiffs and their children of equal dignity and autonomy in the most intimate sphere of their lives and brands them as inferior to other Puerto Rican families, denying them state and federal protections, responsibilities, and benefits, and inviting ongoing discrimination in numerous daily interactions with third parties and their own government. It also denies them the symbolic imprimatur and dignity that the label "marriage" uniquely confers. Marriage is the only term that, without further explanation, conveys the depth and steadfastness of a relationship and commands instant respect from society. There is no governmental interest served by continuing to exclude Plaintiffs from marriage. Following *Windsor*, more than three dozen court decisions all over the United States have struck down state marriage bans as unconstitutional, *see* note 1, *supra*. This Court similarly should invalidate Puerto Rico's Marriage Ban.

I. BY DENYING UNMARRIED PLAINTIFFS THE RIGHT TO MARRY AND DENYING MARRIED PLAINTIFFS RECOGNITION OF THEIR EXISTING MARRIAGES, PUERTO RICO'S MARRIAGE BAN VIOLATES THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION.

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. The right to equal protection ensures that similarly situated persons are not treated differently simply because of their membership in a class. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) ("The Equal Protection Clause . . . is essentially a direction that all persons similarly situated should be treated alike.").[4]

The Commonwealth's Marriage Ban is antithetical to basic principles of equal protection. It creates a permanent "underclass" of people singled out and denied the fundamental right to marry based simply on their constitutionally protected sexual identities. This stigmatized, second-class status cannot be squared with the basic dictates of the Equal Protection Clause.

A. The Marriage Ban discriminates on the basis of sexual orientation and must be subjected to heightened scrutiny.

Puerto Rico's Marriage Ban directly classifies and prescribes distinct treatment on the basis of sexual orientation. Sexual orientation is relational and turns on whether a person is attracted to and wishes to form relationships with persons of the same or different sex. As a matter of law, courts have held that laws targeting conduct closely associated with being gay or lesbian classify persons based on sexual orientation. *See Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2990 (2010) (prohibition on same-sex intimate conduct no different from discrimination against the status of being gay or lesbian); *Lawrence v. Texas*, 539 U.S. 558, 575 (2003) ("When homosexual conduct" is criminalized, that "in and of itself is an invitation to

[4] Gay and lesbian couples are similarly situated to heterosexual couples in every respect relevant to the purposes of marriage. *See Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) ("Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes: a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects."); *Turner v. Safley*, 482 U.S. 78, 95-96 (1987) (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 relationships . . . just like heterosexual couples." *Varnum v. Brien*, 763 N.W.2d 862, 883-84 (Iowa 2009).

subject homosexual persons to discrimination."). Falling in love with a person of the same sex, and deciding to marry and build a life with that person are expressions of sexual orientation. The Marriage Ban's exclusion is categorical, preventing *all* same-sex couples from marrying consistent with their sexual orientation, and refusing to recognize the lawful marriages of same-sex couples entered into in other jurisdictions. Where, as here, the statute's discriminatory effect is more than "merely disproportionate in impact," but rather affects everyone in a class and "does not reach anyone outside that class," a showing of discriminatory intent is not required. *See M.L.B. v. S.L.J.*, 519 U.S. 102, 126-28 (1996).

Because the Marriage Ban constitutes a categorical exclusion, preventing all lesbians and gay men from marrying consistent with their sexual orientation, heightened scrutiny should apply. *See Baskin,* 2014 U.S. App. LEXIS 17294, at *20 (classifications based on sexual orientation are "constitutionally suspect"); *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 483-84 (9th Cir. 2014) (holding that "heightened scrutiny applies to classifications based on sexual orientation"); *Windsor v. United States*, 699 F.3d 169, 185 (2d Cir. 2012) (same). In determining whether a classification should receive heightened scrutiny, the court must consider: (1) whether the class historically has been "subjected to discrimination;" (2) whether the class has a defining characteristic that "frequently bears [a] relation to ability to perform or contribute to society;" (3) whether the class exhibits "obvious, immutable, or distinguishing characteristics that define them as a discrete group;" and (4) whether the class is "a minority or politically powerless." *Windsor*, 699 F.3d at 181 (citations omitted). The first two factors are the most important. *See id.* ("Immutability and lack of political power are not strictly necessary factors to identify a suspect class.").

Prior to *Windsor*, the First Circuit declined to extend heightened scrutiny to classifications based on sexual orientation because "neither *Romer* nor *Lawrence* mandate[d] heightened scrutiny." *Cook v. Gates*, 528 F.3d 42, 61 (1st Cir. 2008); *see also Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 9 (1st Cir. 2012). But the First Circuit has never engaged in the four-factor analysis of whether heightened scrutiny should apply to sexual orientation classifications, and *Windsor* has called into question any precedent applying only rational basis review for sexual orientation classifications, including *Cook* and *Massachusetts*. *See SmithKline*, 740 F.3d at 481 ("*Windsor* requires that we reexamine our prior precedents").

The Supreme Court in *Windsor* not only struck down Section 3 of DOMA by applying a heightened level of scrutiny,[5] but also declined to reverse the Second Circuit's extension of heightened scrutiny to classifications based on sexual orientation. Post-*Windsor*, numerous courts across the country, including the Seventh and Ninth Circuits, have held that sexual orientation is a suspect or quasi-suspect class deserving heightened scrutiny. *See Baskin*, 2014 U.S. App. LEXIS 17294, at *19-20 ("And more than a reasonable basis is required because this is a case in which the challenged discrimination is . . . 'along suspect lines.'"); *SmithKline*, 740 F.3d at 483-84; *Love*, 989 F. Supp. 2d at 545 ("This Court finds that homosexual persons constitute a quasi-suspect class 'based on the weight of the factors and on analogy to the classifications recognized as suspect and quasi-suspect.'") (quoting *Windsor*, 699 F.3d at 185); *Wolf*, 986 F. Supp. 2d at 1014 (concluding "that sexual orientation discrimination is subject to heightened scrutiny"); *Whitewood*, 992 F. Supp. 2d at 430 ("To summarize, we find that all four

[5] Post-*Windsor* courts have found that *Windsor* applied heightened scrutiny because (1) the Supreme Court did not consider "conceivable" justifications for the law not asserted by the defenders of the law; (2) the Court required the government to "justify" the discrimination; (3) the Court considered the harm that the law caused the disadvantaged group; and (4) the Court did not afford the law a presumption of validity. *SmithKline*, 740 F.3d at 481-483; *see also Wolf*, 986 F. Supp. 2d at 1010 (agreeing "with the court in *SmithKline* that the Supreme Court's analysis in *Windsor* . . . had more 'bite' than a rational basis review would suggest"); *Latta*, 2014 U.S. Dist. LEXIS 66417, at *52-53.

factors weigh in favor of a finding that gay and lesbian persons compose a class that is subject to heightened scrutiny."); *Latta*, 2014 U.S. Dist. LEXIS 66417, at *52. This Court similarly should find the Marriage Ban, which classifies based on sexual orientation, triggers heightened scrutiny.

Gay and bisexual people satisfy the four-factor test. First, the First Circuit has already noted that "[a]s with the women, the poor and the mentally impaired, gays and lesbians have long been the subject of discrimination." *Massachusetts*, 682 F.3d at 11. *See also Baskin*, 2014 U.S. App. LEXIS 17294, *30 ("Because homosexuality is not a voluntary condition and homosexuals are among the most stigmatized, misunderstood, and discriminated-against minorities in the history of the world, the disparagement of their sexual orientation, implicit in the denial of marriage rights to same-sex couples, is a source of continuing pain to the homosexual community."). Second, "it is axiomatic that sexual orientation has no relevance to a person's capabilities as a citizen." *Whitewood*, 992 F. Supp. 2d at 428. *Accord Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 986 (N.D. Cal. 2012) ("[T]here is no dispute in the record or the law that sexual orientation has no relevance to a person's ability to contribute to society."). Further, sexual orientation is a "sufficiently distinguishing" characteristic. *See Windsor*, 699 F.3d at 184. *Accord Baskin*, 2014 U.S. App. LEXIS 17294, at *27 ("[T]here is little doubt that sexual orientation, the ground of the discrimination, is an immutable (and probably an innate, in the sense of in-born) characteristic rather than a choice."). Lastly, the long history of discrimination against lesbians, gay men and bisexual people (including laws such as the Marriage Ban) demonstrates that they are "not in a position to adequately protect themselves from the discriminatory wishes of the majoritarian public." *Windsor*, 699 F.3d at 185.

Because the First Circuit has never utilized the four-factor analysis to determine whether heightened scrutiny should apply to sexual orientation classifications and the decisions in *Cook*

and *Massachusetts* predate *Windsor*, this Court should address the question and hold that classifications based on sexual orientation are subject to heightened scrutiny.

B. The Marriage Ban also warrants heightened scrutiny because it discriminates on the basis of gender.

Puerto Rico's Marriage Ban also warrants heightened scrutiny because it classifies based on gender and impermissibly seeks to enforce conformity with gender-based stereotypes about the proper roles of men and women. *See Orr v. Orr*, 440 U.S. 268, 283 (1979) (finding that "[l]egislative classifications . . . on the basis of gender carry the inherent risk of reinforcing stereotypes about the 'proper place' of women" and men). Laws that classify based on gender are invalid absent an "exceedingly persuasive justification" showing they substantially further important governmental interests. *United States v. Virginia*, 518 U.S. 515, 534 (1996); *see also Massachusetts*, 682 F.3d at 9 ("Gender-based classifications invoke intermediate scrutiny and must be substantially related to achieving an important governmental objective."). The relevant inquiry under the Equal Protection Clause is whether the law treats an individual differently because of his or her gender. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 146 (1994).

The Marriage Ban discriminates facially by gender in defining and recognizing marriage. 31 L.P.R.A. § 221. As a result, Maritza is precluded from marrying the person she wishes—Iris—solely because Maritza is a woman rather than a man. *See Kitchen*, 961 F. Supp. 2d at 1206 (Utah's marriage ban "involves sex-based classifications because it prohibits a man from marrying another man, but does not prohibit that man from marrying a woman."); *see also Baehr v. Lewin*, 852 P.2d 44, 58 (Haw. 1993); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 971 (Mass. 2003) (Greaney, J., concurring); *cf. Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 996 (N.D. Cal. 2010) ("Sexual orientation discrimination can take the form of sex discrimination."). *See Baker v. Vermont*, 744 A.2d 864, 905 (Vt. 1999) (Johnson, J., concurring and dissenting).

Puerto Rico's Marriage Ban is no less invidious because it denies men as well as women the right to marry a same-sex life partner. Just as *Loving v. Virginia* 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," *Loving v. Virginia*, 388 U.S. 1, 8 (1967); *see also Powers v. Ohio*, 499 U.S. 400, 410 (1991); *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964), the Marriage Ban cannot escape heightened scrutiny with "equal application" of its gender-based classifications. *See J.E.B.*, 511 U.S. 127 (government may not strike jurors based on sex, even though such a practice, as a whole, does not favor one sex over the other).

Puerto Rico's Marriage Ban also discriminates based on gender by impermissibly enforcing conformity with gender stereotypes. The Marriage Ban prohibits recognition of any marriage between persons of the same sex or transsexuals. The bar to marriage for same-sex couples impermissibly seeks to enforce a gender-based stereotype that marriage inherently requires that a woman should marry a man, and that a man should marry a woman. Puerto Rico's current marriage laws grant spouses the same rights and obligations regardless of their gender. Thus, there is no rational foundation to require that spouses have different genders. Rather, the requirement is an irrational vestige of the outdated notion that men and women have different "proper" roles in marriage.

Similarly, by specifically targeting transgender people,[6] the Marriage Ban seeks to reinforce gender stereotypes. But "discrimination against a transgender individual because of

[6] "Transgender" is "[a]n umbrella term for people whose gender identity and/or gender expression differs from what is typically associated with the sex they were assigned at birth," which includes transsexuals. GLAAD Media Reference Guide – Transgender Issues, *available at* http://www.glaad.org/reference/transgender (Sept. 14, 2014). *Cf. Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011) ("There is . . . a congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms.").

her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender." *Glenn*, 663 F.3d at 1317. Multiple federal Courts of Appeals have so held in varied contexts, including under the Equal Protection Clause. *See, e.g., id.* at 1313-19 (finding state entity engaged in prohibited sex discrimination under the Equal Protection Clause when it terminated an employee for being transgender, and stating "discrimination on this basis is a form of sex-based discrimination that is subject to heightened scrutiny under the Equal Protection Clause"); *Smith v. City of Salem*, 378 F.3d 566, 577 (6th Cir. 2004) (holding facts alleged by transgender plaintiff "easily constitute a claim of sex discrimination grounded in the Equal Protection Clause of the Constitution"); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213, 215 (1st Cir. 2000) (holding "that a transgender plaintiff stated a claim by alleging that he 'did not receive [a] loan application because he was a man, whereas a similarly situated woman would have received [a] loan application'"); *Schwenk v. Hartford*, 204 F.3d 1187, 1202-03 (9th Cir. 2000) (concluding that a transgender plaintiff singled out for attack because of self-definition as a woman stated an actionable claim for sex discrimination under the Gender Motivated Violence Act, 42 U.S.C. § 13981).

The Supreme Court has held statutory gender 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"); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724-25 (1982); *Califano v. Webster*, 430 U.S. 313, 317 (1977). The Equal Protection Clause prohibits "differential treatment or denial of opportunity" based on a person's gender in the absence of an "exceedingly persuasive" justification. *Virginia*, 518 U.S. at 532-33 (internal quotation marks omitted).

The Commonwealth's gender discrimination triggers heightened scrutiny.

C. The Marriage Ban triggers strict scrutiny because it prohibits a class of citizens from exercising the fundamental right to marry and remain married.

Lastly, strict scrutiny is required because, regardless of whether the Marriage Ban's classification is suspect, it discriminates with respect to the exercise of the fundamental right to marry and to remain married. *See Bostic*, 2014 U.S. App. LEXIS 14298, at *46-47; *Kitchen*, 2014 U.S. App. LEXIS 11935, at *62-63; *Bishop*, 2014 U.S. App. LEXIS 13733, at *18. When a legislative classification interferes with exercising a fundamental right, it triggers strict scrutiny and must be narrowly tailored to advance a compelling governmental interest. *See Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); Erwin Chemerinsky, Constitutional Law: Principles and Policies, § 10.1. As discussed, *infra*, the Marriage Ban cannot withstand any level of scrutiny.

II. PUERTO RICO'S MARRIAGE BAN INFRINGES ON PLAINTIFFS' FUNDAMENTAL RIGHT TO MARRY AND OTHER LIBERTY INTERESTS PROTECTED BY THE DUE PROCESS CLAUSE.

The Due Process Clause of the Fourteenth Amendment provides that no "State [shall] deprive any person of life, liberty, or property, without due process of law," U.S. Const. amend. XIV, § 1, and protects individuals from arbitrary governmental intrusion into fundamental rights. *See, e.g., Washington v. Glucksberg*, 521 U.S. 702, 719-20 (1997). When laws burden the exercise of a fundamental right, the government must show that the intrusion "is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978). Courts first determine whether the right infringed is "fundamental," and if so, apply strict scrutiny to determine if the law is narrowly tailored to serve a compelling government interest. *Id.* Here, the Commonwealth's Marriage Ban deprives Plaintiffs of their fundamental right to marry and to have valid out-of-state marriages recognized, thereby triggering strict scrutiny. In any event, and as discussed *infra*, the Marriage Ban cannot survive any level of scrutiny.

A. The Marriage Ban infringes upon unmarried Plaintiffs' individual right to marry, free of unwarranted interference by the Commonwealth.

"Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred." *Griswold*, 381 U.S. at 486. "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Loving*, 388 U.S. at 12 (citation omitted); *accord Zablocki*, 434 U.S. at 383. Indeed, the Supreme Court has described the right to marry as "fundamental." *See Turner*, 482 U.S. at 95 ("The decision to marry is a fundamental right"). Deciding whether and whom to marry is exactly the kind of liberty interest about which government should have little say. *See, e.g.*, *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 564-65 (1989) ("[F]reedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process of the Fourteenth Amendment."); *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977).

In recognizing marriage as a fundamental right, courts have placed special emphasis on one's free choice of spouse. *See, e.g.*, *Hodgson v. Minnesota*, 497 U.S. 417, 435 (1990) ("the regulation of constitutionally protected decisions, such as . . . whom [to] marry, must be predicated on legitimate state concerns other than disagreement with the choice the individual has made"); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 620 (1984) (our federal Constitution "undoubtedly imposes constraints on the state's power to control the selection of one's spouse"); *see also Zablocki*, 434 U.S. at 387 (finding unconstitutional burden on right to marry where law affected individuals' "freedom of choice in an area in which we have held such freedom to be fundamental"); *Bostic*, 2014 U.S. App. LEXIS 14298, at *44-45; *Kitchen*, 2014 U.S. App. LEXIS 11935, at *38; *In re Marriage Cases*, 183 P.3d 384, 420 (Cal. 2008); *Goodridge*, 798 N.E.2d at 958. The long line of decisions recognizing the significance of—and protections

accorded to—marital relationships would be meaningless if states could unilaterally deprive group members of their constitutionally guaranteed choice with respect to a marital partner.

As the Supreme Court recently recognized in *Windsor* (and lower courts have since repeatedly reaffirmed), the fundamental right to marry is *not* limited to different-sex couples. In ruling that the federal government must provide marital benefits to married same-sex couples, and that married LGBT persons and their children deserve equal dignity and equal treatment from the federal government, the Court acknowledged that marriage is not inherently defined by the gender or sexual orientation of the individuals who constitute the couples. To the contrary, marriage enables 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. Banned Couples are no different from Accepted Couples with respect to "the inner attributes of marriage that form the core justifications for why the Constitution protects this fundamental human right." *Kitchen*, 961 F. Supp. 2d at 1200. *See also Bostic*, F. Supp. 2d at 473 ("Gay and lesbian individuals share the same capacity as heterosexual individuals to form, preserve and celebrate loving, intimate and lasting relationships. Such relationships are created through the exercise of sacred, personal choices—choices, like the choices made by every other citizen, that must be free from unwarranted government interference."). It is thus unconstitutional to "deprive some couples . . . but not other couples, of [the] rights and responsibilities [of marriage]." *Windsor*, 133 S. Ct. at 2694. "*Lawrence* and *Windsor* indicate that the choices that individuals make in the context of same-sex relationships enjoy the same constitutional protection as the choices accompanying opposite-sex relationships." *Bostic*, 2014 U.S. App. LEXIS 14298, at *46. As the choice of whom to marry is among those choices, court after court has struck down state laws barring LGBT couples from

marrying—reaffirming that all people are guaranteed the fundamental right to choose whom to marry regardless of sexual orientation or gender. *See, e.g., Bostic*, 2014 U.S. App. LEXIS 14298, at *46; *Kitchen*, 2014 U.S. App. LEXIS 11935, at *97; *Baskin*, 2014 U.S. Dist. LEXIS 86114, at *45; *Wolf*, 986 F. Supp. 2d at 1028; *Whitewood*, 992 F. Supp. 2d at 423-424; *De Leon*, 975 F. Supp. 2d at 659; *Perry*, 704 F. Supp. 2d at 991.[7] This Court should concur.

B. The Marriage Ban violates the fundamental right of married Plaintiffs to remain married in Puerto Rico.

The Marriage Ban also violates due process by denying married Plaintiffs recognition of their valid marriages. "[T]he fundamental right to marry necessarily includes the right to remain married." *Kitchen*, 2014 U.S. App. LEXIS 11935, at *47-48. *See also Latta*, 2014 U.S. Dist. LEXIS 66417, at *40; *Henry*, U.S. Dist. LEXIS 51211, at *22; *De Leon*, 975 F. Supp. 2d at 661-62; *Obergefell*, 962 F. Supp. 2d at 978. The landmark case *Loving v. Virginia* specifically addresses this issue.

In *Loving*, an interracial couple left Virginia to marry in a jurisdiction that permitted persons of different races to marry, and returned home. 388 U.S. at 2. When they challenged Virginia's ban on interracial marriages, the Supreme Court struck down not only Virginia's law prohibiting those marriages within the state, but also the statutes that denied recognition to and criminally punished such marriages entered outside the state. *Id.* at 4. Significantly, the Court held that Virginia's statutory scheme—including penalizing out-of-state marriages and voiding marriages obtained elsewhere—"deprive[d] the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment." *Id.* at 12; *see also Zablocki*,

[7] As the First Circuit has stated, "*Lawrence* recognized that, in at least some circumstances, the consideration of recent trends and practices is relevant to defining the scope of protected liberty." *Cook*, 528 F.3d at 54. Indeed, "liberty's full extent and meaning may remain yet to be discovered and affirmed." *Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623, 1636 (2014).

434 U.S. at 397 n.1 ("[T]here is a sphere of privacy or autonomy surrounding an existing marital relationship into which the State may not lightly intrude….") (Powell, J., concurring).

"When a state effectively terminates the marriage of a same-sex couple married in another jurisdiction, it intrudes into the realm of private marital, family, and intimate relations specifically protected by the Supreme Court." *Obergefell*, 962 F. Supp. 2d at 979; *see also Windsor*, 133 S. Ct. at 2694.[8] The constitutionally guaranteed right to marry would be meaningless if the Commonwealth were free to refuse recognition and effectively annul a marriage as if it had never occurred. The status of being married "is a far-reaching legal acknowledgment of the intimate relationship between two people," *Windsor*, 133 S. Ct. at 2692, a commitment of enormous import that spouses carry wherever they go throughout their married lives. Puerto Rico may not strip married Plaintiffs of "one of the vital personal rights essential to the orderly pursuit of happiness," *Loving*, 388 U.S. at 12, when they are in the Commonwealth. Like the couple in *Loving*, Banned Couples have a constitutional due process right "not to be deprived of one's already-existing legal marriage and its attendant benefits and protections" upon returning home. *Obergefell*, 962 F. Supp. 2d at 978; *cf. DeLeon v. Perry*, 975 F. Supp.2d at 662.

C. Plaintiffs seek to validate their fundamental right to marry, not a new and different right to marry someone of the same sex.

Those who oppose LGBT couples marrying try to reposition these couples as seeking a *new* right, that is too recently coined to be fundamental. *See, e.g.*, *Wolf*, 986 F. Supp. 2d at 1001.

[8] Puerto Rico's own history and laws are consistent with the fundamental importance of the marriage recognition principle in U.S. legal history and tradition. Puerto Rico has long followed the general rule that the validity of a marriage is governed by the laws of the place where it was celebrated. *See Guzmán v. Rivera González*, 2006 P.R. App. LEXIS 176 (P.R. Ct. App. Jan. 31, 2006). And the Puerto Rico Supreme Court has stated that any judgment or sentence from another jurisdiction in the United States must be honored by the Commonwealth even if it is contrary to the Commonwealth's public policy or laws, so long as jurisdiction was proper. *Rodríguez Contreras v. E.L.A.*, 183 D.P.R. 505, 520-521 (P.R. 2011). Puerto Rico has honored marriages that were valid in other jurisdictions, even if that couple could not meet Puerto Rico's own marriage requirements. *See, e.g.*, *Cintrón v. Roman*, 36 D.P.R. 484 (P.R. 1927). The Marriage Ban is a marked departure from this long-standing rule, and is constitutionally impermissible. The rule of inter-state marriage recognition, while often cast as comity rather than a constitutional principle, is an essential element of the constellation of protections accorded the institution of marriage.

But this attempted reframing improperly describes the liberty interests at stake. None of the Supreme Court's decisions involving the right to marry limit the right to a particular group. *See Bostic*, 2014 U.S. App. LEXIS 14298, at *44; *Latta*, 2014 U.S. Dist. LEXIS 66417, at *37; *Henry*, 2014 U.S. Dist. LEXIS 51211, at *25 ("The Supreme Court has consistently refused to narrow the scope of the fundamental right to marry by reframing [it] as a more limited right that is about the characteristics of the couple seeking marriage."). Indeed, "[o]ver the decades, the Supreme Court has demonstrated that the right to marry is an expansive liberty interest that may stretch to accommodate changing societal norms." *Bostic*, 2014 U.S. App. LEXIS 14298, at *43.

Like any fundamental right, the freedom to marry is defined by the attributes of the right itself, rather than the identity of the people seeking to exercise it. Legal analysis of the right would be circular, otherwise: "The Supreme Court has never analyzed whether a fundamental right to marry exists by defining the right to include only those who are not being excluded from access to that right." *Pareto*, slip op. at 14. In *Loving*, for example, the Supreme Court did not describe the right asserted as a "new" right to "interracial marriage." Nor did the Court describe a "right of prison inmates to marry" in *Turner*, 482 U.S. 78, or a "right of people owing child support to marry" in *Zablocki*, 434 U.S. 374. Plaintiffs simply seek the right to marry the person they choose, one of our most deeply rooted and cherished liberties. *See Windsor*, 133 S. Ct. at 2689 (in seeking to marry, same-sex couples seek to "occupy the same status and dignity as that of a man and woman in lawful marriage"). "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." *Bostic*, 2014 U.S. App. LEXIS 14298, at *44-45.

The argument that Plaintiffs seek a "new" right rather than the same right exercised by others echoes the flawed reasoning of the Supreme Court's overruled decision in *Bowers v.*

Hardwick, 478 U.S. 186 (1986), *overruled by Lawrence*, 539 U.S. 558. In *Bowers*, the Court recast the right at stake as a claimed "fundamental right" of "homosexuals to engage in sodomy," rather than a right, shared by all adults, to consensual intimacy with the person of one's choice. *Lawrence*, 539 U.S. at 566-67 (quoting *Bowers*, 478 U.S. at 190). In overturning *Bowers*, *Lawrence* held that the constricted framing of the issue in *Bowers* "fail[ed] to appreciate the extent of the liberty at stake." *Lawrence*, 539 U.S. at 567.

D. 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 also infringes upon a host of other related fundamental liberty interests. The Supreme Court has found that marriage is related to other protected rights such as privacy and association. *See Griswold*, 381 U.S. at 486 (referring to the "privacy surrounding the marriage relationship"); *M.L.B.*, 519 U.S. at 116 ("Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as 'of basic importance in our society' . . . sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect.") (internal citations omitted).

Puerto Rico's Marriage Ban burdens Plaintiffs' protected interest in autonomy over "personal decisions relating to . . . family relationships," *Lawrence*, 539 U.S. at 574, and additionally impairs Plaintiffs' ability to identify themselves and to participate fully in society as married couples, thus burdening their fundamental liberty interests in intimate association and self-definition. *See Griswold*, 381 U.S. at 482-83; *Windsor*, 133 S. Ct. at 2689. For example, the Marriage Ban interferes with constitutionally protected interests in family integrity and association by precluding Plaintiffs Ada and Ivonne, Maritza and Iris, and Johanne and Faviola from securing legal recognition of parent-child relationships through legal mechanisms available

to Accepted Couples (*e.g.*, stepparent adoption, joint adoption, and other marital parentage protections), thus infringing on their fundamental liberty interest in "direct[ing] the upbringing and education" of their child. *See Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925). Such infringements on bonds between children and their parents violate core substantive guarantees of the Due Process Clause as recognized by the Supreme Court. *See Moore*, 431 U.S. at 503.

E. Puerto Rico's Marriage Ban cannot withstand strict scrutiny.

In withholding from Plaintiffs the fundamental right to marry, recognition of marriages entered into outside of the Commonwealth, and other protected liberty interests, Puerto Rico denies them legal, social and financial benefits enjoyed by Accepted Couples and their children. Such significant interference with "the exercise of a fundamental right . . . cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." *Zablocki*, 434 U.S. at 388. But Defendants cannot articulate *any* legitimate interest—let alone a compelling one—for denying Plaintiffs the right to marry and have their valid marriages recognized. As a result, the Marriage Ban violates Plaintiffs' due process rights for the same reasons that it violates their equal protection rights. *See, e.g.*, *Loving*, 388 U.S. at 12 (striking down anti-miscegenation law on both equal protection and due process grounds). Indeed, as discussed below, the Marriage Ban cannot satisfy even rational basis review and therefore must be struck down as unconstitutional.[9]

III. THE MARRIAGE BAN CANNOT SURVIVE ANY LEVEL OF SCRUTINY.

Puerto Rico's Marriage Ban is unconstitutional under any level of scrutiny because it irrationally targets Plaintiffs for exclusion from the right to marry and to have their marriages

[9] In *Cook*, the First Circuit held that "*Lawrence* . . . applies a standard of review that lies between strict scrutiny and rational basis." 528 F.3d at 56. At minimum, this Court should, "balance[] the strength of the state's asserted interest[s] . . . against the degree of intrusion into the [Plaintiffs'] private . . . life caused by the statute in order to determine whether the law was unconstitutionally applied." *Id.*

entered into in other jurisdictions recognized as valid in the Commonwealth. Even if this Court declines to hold that classifications based on sexual orientation trigger heightened scrutiny or to engage in the four-factor analysis of whether heightened scrutiny should apply, this Court should still "scrutinize with care the purported bases" for Puerto Rico's Marriage Ban. *See Massachusetts*, 682 F.3d at 11 (courts must scrutinize with care the purported bases for legislation discriminating on the basis of sexual orientation). *See also Baskin*, 2014 U.S. App. LEXIS 17294, at *19 ("We hasten to add that even when the group discriminated against is not a 'suspect class,' courts examine, and sometimes reject, the rationale offered by government for the challenged discrimination."). Accordingly, the Court must at least "undertake[] a more careful assessment of the justifications [for the Marriage Ban] than the light scrutiny offered by conventional rational basis review. *Massachusetts*, 682 F.3d at 11.

Moreover, because the Marriage Ban bears all the hallmarks of discrimination, it cannot survive even rational basis review. As courts have concluded with respect to other jurisdictions' marriage bans, no rationale proffered for the Marriage Ban can withstand even the lowest level of constitutional review, as "even when the group discriminated against is not a 'suspect class,' courts examine, and sometimes reject, the rationale offered by government for the challenged discrimination." *Baskin*, 2014 U.S. App. LEXIS 17294, at *19. *See also Geiger*, 2014 U.S. Dist. LEXIS 68171, at *46; *DeBoer*, 973 F. Supp. 2d at 769; *De Leon*, 975 F. Supp. 2d at 652-53; *Bostic*, 970 F. Supp. 2d at 482; *Bourke*, 996 F. Supp. 2d 542, at 32; *Bishop*, 962 F. Supp. 2d at 1295; *Kitchen*, 961 F. Supp. 2d at 1205; *Perry*, 704 F. Supp. 2d at 997.

A. No legitimate interest justifies the Marriage Ban's primary purpose and practical effect—to disadvantage and demean Plaintiffs and their families.

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 it may also incidentally serve

a neutral governmental interest. *Windsor*, 133 S. Ct. at 2693-96. In requiring that classifications be justified by an independent and legitimate purpose, the Equal Protection Clause prohibits classifying for "the purpose of disadvantaging the group burdened by the law." *Romer v. Evans*, 517 U.S. 620, 633 (1996); *see also Cleburne*, 473 U.S. at 450; *Moreno*, 413 U.S. at 534.

The Supreme Court has sometimes described this impermissible purpose as "animus" or a "bare . . . desire to harm a politically unpopular group." *Moreno*, 413 U.S. at 534. *See also Romer*, 517 U.S. at 634; *Cleburne*, 473 U.S. at 447. But an impermissible motive does not require "malicious ill will." *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374-75 (2001) (Kennedy, J., concurring). It can also take the form of "negative attitudes," *Cleburne*, 473 U.S. at 448, "fear," *id.*, "irrational prejudice," *id.* at 450, or "some instinctive mechanism to guard against people who appear to be different in some respects from ourselves," *Garrett*, 531 U.S. at 374 (Kennedy, J., concurring).[10]

The inescapable "practical effect" of the Marriage Ban is "to impose a disadvantage, a separate status, and so a stigma upon" Banned Couples, socially and, in terms of government protections. *Windsor*, 133 S. Ct. at 2693. The Ban "diminishes the stability and predictability of basic personal relations" of LGBT people and "demeans the couple, whose moral and sexual choices the Constitution protects." *Id.* at 2694 (citing *Lawrence*, 539 U.S. 558).

The Puerto Rico Legislative Assembly's purpose in passing the current version of the Marriage Ban in 1999 was to target Banned Couples and exclude them from marriage. The Ban

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

was passed in the wake of *Baehr v. Lewin*, to prevent Puerto Rico from having to recognize marriages of same-sex couples. H.B. 1013 Rep., H.R. Jud. Comm., 13th Legislative Assembly, 2d Sess. 6-8 (P.R. 1997). This precise context led to the passage of DOMA (*Windsor*, 133 S. Ct. at 2682-83), and thus the motives for Puerto Rico's Marriage Ban are equally impermissible. The legislature enacted the Marriage Ban to prohibit recognition of LGBT people's relationships. The Puerto Rico Legislative Assembly's animus-laden motive—to fence LGBT people and their children out of marriage's protections—is impermissible under the Equal Protection Clause.[11]

B. Preservation of tradition cannot justify Puerto Rico's Marriage Ban.

To survive constitutional scrutiny, the Marriage Ban would have to be justified by some legitimate state interest beyond that of maintaining a "traditional" definition of marriage. "Tradition per se . . . cannot be a lawful ground for discrimination—regardless of the age of the tradition." *Baskin*, 2014 U.S. App. LEXIS 17294, at*54. *See also Heller v. Doe*, 509 U.S. 312, 326-27 (1993) ("Ancient lineage of a legal concept does not give it immunity from attack for lacking a rational basis."); *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."); *Whitewood*, 992 F. Supp. 2d at 431 ("Nor can past

[11] During the legislative debate of the current Marriage Ban, members of the legislature made clear that they did not accept homosexual conduct, H.R. Sess. Diary, 13th Legislative Assembly, 2d Sess. 99 (P.R. 1997) ("no aceptamos la conducta homosexual") (Rep. Jímenez Cruz); that they considered homosexuality an abomination, *id.* at 109 ("Yo creo que es abominable el homosexualismo.") (Rep. Aponte Hernández); that marriage between people of the same sex would cause Puerto Rico to deteriorate, *id.* at 138 ("Y avalando el que dos personas del mismo sexo se puedan casar yo estaría comenzando el deterioro del Puerto Rico.") (Rep. Ramos Rivera); and that allowing Banned Couples to marry would set a bad example for children, *id.* at 137 (Rep. Ramos Rivera); *id.* at 145 (Rep. Núñez González). By enacting the Marriage Ban, the legislature was avoiding turning Puerto Rico into, as one representative stated, a "homosexual paradise" that would negatively impact Puerto Rico's morals and customs. *Id.* at 132 ("evitemos . . . convertir a Puerto Rico . . . como un paraíso para los homosexuales y las lesbianas. Cuando Puerto Rico se convierta en eso . . . realmente es denigrante para un pueblo que la moral y las costumbres están muy en altas.") (Rep. Mundo Ríos). Indeed, Puerto Rico's legislature consciously discriminated against LGBT people when it enacted the Marriage Ban. *See id.* at 110 ("el discrimen, si es que es alguno, está en el Código Civil, es claro: no pueden contraer matrimonio.") (Rep. Aponte Hernández); H.B. 1013 Rep. at 16 (incorrectly stating that constitution did not prohibit discrimination based on sexual orientation).

tradition trump the bedrock constitutional guarantees of due process and equal protection."). That is because "times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress." *Lawrence*, 539 U.S. at 579.

With respect to laws prohibiting Banned Couples from marriage, "the justification of 'tradition' does not explain the classification; it merely repeats it. Simply put, a history or tradition of discrimination—no matter how entrenched—does not make the discrimination constitutional." *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 478 (Conn. 2008); *accord Goodridge*, 798 N.E.2d at 961 n.23; *Varnum*, 763 N.W.2d at 898; *see also Golinski*, 824 F. Supp. 2d at 993. Ultimately, "'preserving the traditional institution of marriage' is just a kinder way of describing the [s]tate's *moral disapproval* of same-sex couples," *Lawrence*, 539 U.S. at 601 (Scalia, J., dissenting) (emphasis in original), which is not a rational basis for perpetuating discrimination. *See Windsor*, 133 S. Ct. at 2692; *Romer*, 517 U.S. at 633; *Cleburne*, 473 U.S. at 450; *Moreno*, 413 U.S. at 534.

C. There is no rational relationship between the Marriage Ban and any asserted interest related to procreation, childrearing, or optimal parenting.

Finally, no purported governmental interest in steering procreation into optimal childrearing environments, or in "responsible procreation" sustains the Marriage Ban. There is simply no rational connection between barring LGBT couples from marriage and any asserted governmental interest in encouraging Accepted Couples to procreate responsibly within marriage, or in encouraging childrearing by supposedly "optimal" parents. *See Geiger*, 2014 U.S. Dist. LEXIS 68171, at *43; *DeBoer*, 973 F. Supp. 2d at 771-772; *De Leon*, 975 F. Supp. 2d at 653; *Bostic*, 970 F. Supp. 2d at 478; *Bishop*, 962 F. Supp. 2d at 1291; *Kitchen*, 961 F. Supp. 2d at 1212. Indeed, such an argument is "so full of holes that it cannot be taken seriously." *Baskin*, 2014 U.S. App. LEXIS 17294, at *25. It is "wholly illogical to believe that state recognition of

the love and commitment" between Banned Couples will alter the most intimate and personal decisions of Accepted Couples. *Kitchen*, 2014 U.S. App. LEXIS 11935, at *76.

In the first instance, any "responsible procreation" rationale for the Marriage Ban rests on impermissible stereotypes that "straight couples[, particularly men,] tend to be sexually irresponsible, producing unwanted children by the carload, and so must be pressured . . . to marry." *Baskin*, 2014 U.S. App. LEXIS 17294, at *42. Excluding Banned Couples from marriage has no bearing on how Accepted Couples rear the children they may bear or on encouraging procreation. *See Bishop*, 962 F. Supp. 2d at 1291; *Kitchen*, 961 F. Supp. 2d at 1211-12; *Golinski*, 824 F. Supp. 2d at 992; *Perry*, 704 F. Supp. 2d at 972. And children being raised by Accepted Couples are unaffected by whether Banned Couples can 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, there simply is no rational connection between the Marriage Ban and any asserted governmental interest in optimal parenting. *See De Leon*, 975 F. Supp. 2d at 653-54; *Bostic*, 970 F. Supp. 2d at 478; *Perry*, 704 F. Supp. 2d at 980. To the contrary, "the overwhelming weight of the scientific evidence" shows that there are no differences between the children raised by same-sex couples and those raised by different-sex couples. *DeBoer*, 973 F. Supp. 2d at 771.[12] It is beyond any serious debate that "[c]hildren raised by gay or lesbian

[12] This consensus is reflected 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, *Windsor*, 133 S. Ct. 2675 (No. 12-307), 2013 U.S. S. Ct. Briefs LEXIS 1339, at *30-48- (discussing this scientific consensus); Brief of the American Sociological Ass'n in Support of Respondent Kristin M. Perry and Respondent Edith Schlain Windsor, *Perry*, 133 S. Ct. 2652 (No. 12-144), 2013 U.S. S. Ct. Briefs LEXIS 1380, at *13-23.

parents are as likely as children raised by heterosexual parents to be healthy, successful and well-adjusted." *Perry*, 704 F. Supp. 2d at 980.

Lastly, the Marriage Ban actually harms children; it does not protect their welfare. Puerto Rico's Marriage Ban serves only to "humiliate" the "children now being raised by same-sex couples" and "make[] it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Windsor*, 133 S. Ct. at 2694; *accord Baskin*, 2014 U.S. App. LEXIS 17294, at *32-33, 67. "Excluding same-sex couples from civil marriage will not make children of opposite-sex marriages more secure, but it does prevent children of same-sex couples from enjoying the immeasurable advantages that flow from the assurance of a stable family structure in which children will be reared, educated, and socialized." *Goodridge*, 798 N.E.2d at 964 (internal quotations and citations omitted). Thus, the Marriage Ban hurts children being raised by loving Banned Couples. *See Bostic*, 970 F. Supp. 2d at 478; *Golinski*, 824 F. Supp. 2d at 992-93.

In sum, the concrete harms and stigmatic injuries to Plaintiffs, Banned Couples, and their children "of being denied the right to marry is considerable. Marriage confers respectability on a sexual relationship; to exclude a couple from marriage is thus to deny it a coveted status." *Baskin*, 2014 U.S. App. LEXIS 17294, at *30.

CONCLUSION

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

Dated: September 15, 2014

Respectfully submitted,

/s/ Omar Gonzalez-Pagan

Omar Gonzalez-Pagan*
Hayley Gorenberg*
Jael Humphrey-Skomer*
LAMBDA LEGAL DEFENSE & EDUCATION FUND, INC.
120 Wall Street, 19th Floor
New York, New York 10005-3904
T: (212) 809-8585 | F: (212) 809-0055
ogonzalez-pagan@lambdalegal.org
hgorenberg@lambdalegal.org
jhumphrey@lambdalegal.org

Gary W. Kubek*
Harriet M. Antczak*
Jing Kang*
DEBEVOISE & PLIMPTON LLP
919 Third Avenue
New York, NY 10022
T: (212) 909-6000 | F: (212) 909-6836
gwkubek@debevoise.com
hmantcza@debevoise.com
jkang@debevoise.com

Ryan M. Kusmin*
DEBEVOISE & PLIMPTON LLP
555 13th Street N.W.
Washington, DC 20004
T: (202) 383-8000 | F: (202) 383-8118
rmkusmin@debevoise.com

Celina Romany-Siaca (USDCPR 121811)
Celina Romany Law Offices
268 Munoz Rivera Avenue, Suite 1500
San Juan, PR 00918
T: (787) 754-9304 | F: (787) 754-9324
bufetecelinaromany@gmail.com

Attorneys for Plaintiffs Maritza López Avilés and Iris Delia Rivera Rivera; José A. Torruellas Iglesias and Thomas J. Robinson; Zulma Oliveras Vega and Yolanda Arroyo Pizarro; Johanne Vélez

García and Faviola Meléndez Rodríguez; and Puerto Rico Para Tod@s.

AND

/s/ Ada M. Conde Vidal
Ada M. Conde Vidal (USDCPR 206209)
Conde Attorney at Law, PSC
P.O. Box 13268
San Juan, PR 00908-3268
T: (787) 721-0401 | F: (787) 977-8072
condelawpr@gmail.com

Attorney for Plaintiffs Ada M. Conde Vidal and Ivonne Álvarez Vélez

* Admitted *pro hac vice*.

CERTIFICATE OF SERVICE

I, Omar Gonzalez-Pagan, an attorney, certify that on September 15, 2014, I served upon counsel for all parties by electronically filing the foregoing with the Clerk of the Court using the CM/ECF system.

/s/ Omar Gonzalez-Pagan